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Idaho State Legislature

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MEMORANDUM

TO: Rules Review Subcommittee of the Senate Resources & Environment Committee and the House Environment, Energy & Technology Committee

FROM: Principal Legislative Research Analyst - Katharine Gerrity

DATE: September 02, 2015

SUBJECT: Department of Environmental Quality

IDAPA 58.01.04 - Rules for Administration of Wastewater Treatment Facility Grants - Proposed Rule (Docket No. 58-0104-1501)

IDAPA 58.01.12 - Rules for Administration of Water Pollution Control Loans - Proposed Rule (Docket No. 58-0112-1501)

IDAPA 58.01.25 - Rules Regulating the Idaho Pollutant Discharge Elimination System Program - Proposed Rule - New Chapter and Fee Rule (Docket No. 58-0125-1401)

1. IDAPA 58.01.04 - Rules for Administration of Wastewater Treatment Facility Grants

The Department of Environmental Quality submits notice of proposed rule at IDAPA 58.01.04 - Rules for Administration of Wastewater Treatment Facility Grants. According to the department, the rulemaking has been initiated to comply with 2014 revisions to the Clean Water Act that require planning documents that are used for State Revolving Fund projects to assess the cost and effectiveness, to the maximum extent practicable, of efficient water use, reuse, recapture and conservation.

The department notes that negotiated rulemaking was conducted. The department also confirms that the proposed rule does not regulate an activity not regulated by the federal government and is not broader in scope or more stringent than federal regulations. The rulemaking appears to be authorized pursuant to Chapters 1 and 36, Title 39, Idaho Code.

2. IDAPA 58.01.12 - Rules for Administration of Water Pollution Control Loans

The Department of Environmental Quality submits notice of proposed rulemaking at IDAPA 58.01.12 - Rules for Administration of Water Pollution Control Loans. According to the department, the rulemaking has been initiated to comply with 2014 revisions to the Clean Water Act relating to requirements associated with the State Revolving Fund loan effort. The department states that the amendment requires that Idaho consider population trends and unemployment data, in addition to the existing criteria of median household income, when determining which borrowers will qualify for disadvantaged loan terms

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The department notes that negotiated rulemaking was conducted. The department also confirms that the proposed rule does not regulate an activity not regulated by the federal government and is not broader in scope or more stringent than federal regulations. The rulemaking appears to be authorized pursuant to Chapters 1 and 36, Title 39, Idaho Code.

3. IDAPA 58.01.25 - Rules Regulating the Idaho Pollutant Discharge Elimination System Program

The Department of Environmental Quality submits notice of proposed rulemaking at IDAPA 58.01.25 - Rules Regulating the Idaho Pollutant Discharge Elimination System Program. According to the department, the rulemaking has been initiated to implement Section 39-175C, Idaho Code, as enacted during the 2005 legislative session and amended during the 2014 legislative session, which directed the department to seek approval of a National Pollutant Discharge Elimination System (NPDES) program. The department states that in order to gain approval of a program, it must have rules in place that meet the requirements of the Clean Water Act and federal regulations. The department goes on to state that the rules establish procedures for submitting permit applications, writing and issuing Idaho Pollutant Discharge Elimination System (IPDES) permits, filing appeals, fee structures, developing general permits and other required components of an NPDES program.

The department indicates that negotiations took place with certain elements of the program including the permit application process, the appeals process, the fee structure and compliance enforcement with IPDES permits. Eight meetings were held between December 2014 and July 2015. The department goes on to state that, with respect to required NPDES program components, federal regulations have been incorporated by reference into the proposed rules. The department notes that such incorporation by reference benefits the agency and simplifies the overall rule chapter by incorporating those sections of the federal regulations that must be adhered to in the course of developing an IPDES program. The department notes that this reduces the overall cost of the rule and will allow the agency to adhere to the legally mandated deadline of submitting a complete application to the EPA by September 2016.

This is a fee rule. The department notes that Section 39-175C, Idaho Code, provides for the collection of reasonable fees for processing and implementing an NPDES permit program. The department goes on to state that fees shall not be assessed or collected until the state obtains an approved program consistent with the requirements of Idaho law. Members will find the proposed fees reflected in Section 110 of the rule.

The department also confirms that the proposed rule does not regulate an activity not regulated by the federal government and is not broader in scope or more stringent than federal regulations. The rulemaking appears to be authorized pursuant to Sections 39-101 et seq., and 39-175 A-C, Idaho Code.

cc: Department of Environmental Quality
Paula J. Wilson

PROPOSED RULE COST/BENEFIT ANALYSIS

Section 67-5223(3), Idaho Code, requires the preparation of an economic impact statement for all proposed rules imposing or increasing fees or charges. This cost/benefit analysis, which must be filed with the proposed rule, must include the reasonably estimated costs to the agency to implement the rule and the reasonably estimated costs to be borne by citizens, or the private sector, or both.

Department or Agency: Department of Environmental Quality

Agency Contact: Barry Burnell Phone: 373-0194_____

Date: September 22, 2014

IDAPA, Chapter and Title Number, and Chapter Name:

IDAPA, 58.01.25, Idaho Pollutant Discharge Elimination System

Fee Rule Status: X Proposed ___ Temporary

Rulemaking Docket Number: 58-0125-2501

STATEMENT OF ECONOMIC IMPACT:

HOW PROGRAM COSTS WERE DETERMINED

Managing permits for Idaho's estimated 2046 NPDES-permitted facilities would require the equivalent of about 29 full time DEQ employees dedicated to the program, at a total cost of \$3,034,000 per year. These costs were updated from estimated program costs determined using a national model (spreadsheet) developed by EPA and states with NPDES primacy to estimate the cost of managing a state permit program (IPDES Discussion Paper #5: <http://www.deq.idaho.gov/laws-rules-etc/deq-rulemakings/docket-no-58-0125-1401/58-0125-1401-ipdes-discussion-paper5.pdf>). Original costs identified in Decision Analysis Report #3 were estimated in 2005 so DEQ updated the projected costs consistent with current numbers of permitted facilities and updated estimates of time required to complete permit and inspection activities.

In broad terms, an NPDES permit program includes the following activities and costs:

- Writing and issuing permits
- Conducting annual inspections
- Managing the required data
- Maintaining compliance assurance/enforcement
- Administering the program

Basic assumptions and criteria for each category of permittee are identified in the IPDES Program Analysis (<http://www.deq.idaho.gov/laws-rules-etc/deq-rulemakings/docket-no-58-0125-1401>) to illustrate how the model determined costs. In December 2014, revisions were made in the cost estimates to reflect the following changes in expected permitting practices as EPA currently operates:

- A biosolids general permits for six regions of Idaho was added, as EPA is currently in this process.

- Municipal storm water permitting was modified to be individual permits rather than general permits.
- Minor municipal permits were adjusted to be all individual permits rather than some general permits. The general permit concept for municipal facilities has proven unworkable for EPA.
- The single general permit for aquaculture that was contemplated has been replaced with three general permits.
- The permit inventory was reviewed and changed based on updated information provided by EPA in February 2015.

KEY ASSUMPTIONS

Biosolids permitting and management is not a required element of a state primacy program. Biosolids are the treated solids from wastewater treatment processing that is land applied to crops or disposed of in landfills. The lack of having the biosolids program would offset some of the advantages of having primacy. DEQ would still have to manage state regulations in this area, and EPA would administer their own regulations, creating some confusion for permittees.

It should also be noted that the costs for confined animal feeding operations (CAFO) only include permitting costs shown for DEQ but not the compliance and inspection costs that would continue to be funded by the Department of Agriculture, as is currently being done.

FUNDING OPTIONS

NPDES primacy has been discussed in the past, but never pursued because permit holders could not agree on a fee based funding structure.

CRITERIA FOR FUNDING NPDES PRIMACY

At an October 2001 meeting, a report prepared by CH2MHILL following an investigation of other states' fee structures was reviewed and discussed. (The report is available in the appendix of NPDES Decision Analysis Report 2.) While none of the states researched seemed to have just the right fee mix for Idaho, it was apparent that any funding approach suitable for Idaho needs to meet the following general criteria:

- The system should be simple, with little administrative burden on permit holders or the agency.
- Fees should be annual and constant.
- Individual permit fees should not be greater than the cost of issuing and managing the permit.
- Funding for the program should be spread between permit fees, state funds, and federal funds, if possible.

The proposed fee structure would use three cost categories that group similar sources:

- Municipal
- Industrial
- Storm water

Originally, it was hoped that the program could be funded by one-third fees, one-third federal funds, and one-third state general funds. However, after discussions with EPA, it was apparent that the only funds available from EPA that could be used would be an existing grant that funds a portion of other DEQ activities, including

surface water programs, wastewater land application permitting, wastewater plan reviews, NPDES certifications, and about fifty NPDES inspections. The latter two activities would be covered by the primacy program but would only amount to approximately two FTEs.

Funding the IPDES program will be dependent on a combination of state general fund appropriations and fee collections. This draft rule proposes a fee schedule that was negotiated during the rulemaking process and was developed to collect approximately half of the dollars necessary to implement the program. Fees are phased in over time in compliance with I.C. §39-175.

BENEFITS OF AN IDAHO NPDES PROGRAM

It is difficult to make a cost comparison between a state run NPDES program and a federally run NPDES program. Some of the benefits of a state run program are difficult to measure because they do not have an easily identifiable “cash value,” but they include the following:

- Idaho state employees, who have familiarity and understanding of Idaho specific issues, will oversee the Idaho program.
- Permittees will have only one set of rules and regulations and one agency with which to interact, resulting in less confusion for permittees and less overlap of responsibilities for regulatory agencies.
- The state would have a fully functioning program to protect Idaho natural resources and human health.
- The state will have the ability to interpret and apply Idaho water quality standards to determine when permit limits are necessary and what alternate or innovative approaches are appropriate.
- The state will coordinate water programs—such as the total maximum daily load program (TMDL) and the state loan and grant programs—with the permitting program, providing a more comprehensive approach to water quality protection.
- The state will focus on upfront compliance assistance before enforcement.
- The state will not have to consult with Federal Services on compliance with the endangered species act.
- The state will coordinate all of the available tools, including using other sections of the Idaho water quality standards, such as variances and use attainability analyses, to develop commonsense solutions during the permitting process.
- The state will use innovative, cost-effective solutions to water quality issues, such as those issues involving temperature, nutrients, and mercury.
- The state will have the ability to pool state and private funding for research when opportunities arise to work together on desirable program changes or standards development.

All of these issues need to be considered together.