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Director

# Legislative Services Office

## 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:** Deputy Division Manager - Katharine Gerrity

**DATE:** October 03, 2017

**SUBJECT:** Department of Environmental Quality

IDAPA 58.01.02 - Water Quality Standards - Proposed Rulemaking (Docket No. 58-0102-1502)

IDAPA 58.01.02 - Water Quality Standards - Proposed Rulemaking (Docket No. 58-0102-1701)

#### **1. IDAPA 58.01.02 - Water Quality Standards**

The Department of Environmental Quality submits notice of proposed rulemaking at IDAPA 58.01.02 - Water Quality Standards. According to the department, the rulemaking is being proposed to update the department's existing hardness dependent criteria by using EPA's 2007 304(a) copper criteria. The department adds that this update is a Reasonable and Prudent Alternative identified in National Oceanic and Atmospheric Administration's biological opinion on Idaho's criteria for toxic substances to support aquatic life. The department indicates that by adopting this criteria it will be able to use the most current state of the science to ensure that the criteria are more precise and are neither unnecessarily burdening dischargers nor increasing risk to aquatic life.

The department states that water quality standards adopted and submitted to EPA since May 30, 2000, are not effective for Clean Water Act purposes until EPA approves them (the Alaska rule), and that this rulemaking will be promulgated so that the existing rule, which continues to be effective, remains in the Idaho Administrative Code until EPA approves the rule revisions. The department has provided notations explaining the effectiveness of the rule sections.

Nine negotiated rulemaking meetings were held between October 2015 and July 2017. The department confirms that the rule does not regulate an activity not regulated by the federal government, nor is it broader in scope or more stringent than federal regulations. The rulemaking appears to be authorized pursuant to Sections 39-105, 39-107 and 39-3601, et seq., Idaho Code.

#### **2. IDAPA 58.01.02 - Water Quality Standards**

The Department of Environmental Quality submits notice of proposed rulemaking at IDAPA 58.01.02 - Water Quality Standards. According to the department, the rulemaking is being proposed to update the selenium

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criteria for aquatic life use by using EPA's 2016 304(a) selenium criterion based on fish tissue concentrations. The department adds that this update is a Reasonable and Prudent Alternative identified in National Oceanic and Atmospheric Administration's (NOAA) biological opinion on Idaho's criteria for toxic substances to support aquatic life. The department notes that NOAA has called for state adoption and EPA approval or EPA promulgation of the criterion by May 2018 and that in order to avoid EPA promulgating a federal standard for Idaho, this rulemaking was initiated.

The department goes on to state that in fish, selenium toxicity occurs primarily through transfer to the eggs, reducing reproductive success and survival. The department notes that current criteria derived from water column concentrations do not take into account the effects of selenium bioaccumulation in aquatic systems and are generally under-protective of aquatic life. The proposed criterion is derived from the allowable concentration of selenium in fish tissue found to be protective of aquatic life.

The department states that water quality standards adopted and submitted to EPA since May 30, 2000 are not effective for Clean Water Act purposes until EPA approves them (the Alaska rule), and that this rulemaking will be promulgated so that the existing rule, which continues to be effective, remains in the Idaho Administrative Code until EPA approves the rule revisions. The department has provided notations explaining the effectiveness of the rule sections.

According to the department, new subsections set forth site-specific selenium criteria for Upper Blackfoot River and Georgetown Creek Watersheds as well as Hoopes Spring, Sage Creek and Crow Creek near the Smoky Canyon Mine. The department indicates that the proposed rule applies to all waters of the state except the main stems of the Kootenai, Salmon and Snake Rivers within the historic range of white sturgeon, as well as subbasins flowing directly into the aforementioned rivers and those designated as critical salmonid habitat or bull trout habitat.

Three negotiated rulemaking meetings were held in 2017. The department confirms that the rule does not regulate an activity not regulated by the federal government, nor is it broader in scope or more stringent than federal regulations. The rulemaking appears to be authorized pursuant to Sections 39-105, 39-107 and 39-3601, et seq., Idaho Code.

cc: Department of Environmental Quality  
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