



Eric Milstead
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: August 17, 2017

SUBJECT: Department of Environmental Quality

IDAPA 58.01.02 - Water Quality Standards - Proposed Rule (Docket No. 58-0102-1702)

IDAPA 58.01.25 - Rules Regulating the Idaho Pollutant Discharge Elimination System Program - Proposed Rule (Docket No. 58-0125-1701)

1. IDAPA 58.01.02 - Water Quality Standards

The Department of Environmental Quality submits notice of proposed rule at IDAPA 58.01.02 - Water Quality Standards. According to the department, the purpose of the rulemaking is to make some administrative revisions and to streamline and reorganize a table that contains criteria for toxic substances for the protection of aquatic life and human health. The department states that, in terms of the administrative revisions, water quality standards adopted and submitted to the EPA since May 30, 2000, are not effective for Clean Water Act purposes until the EPA approves them, which is known as the Alaska Rule. The department notes that the rulemaking will add a new rule section setting out a rulemaking process which would retain the existing rule that continues to be effective for Clean Water Act purposes until the EPA approves the revisions. The department states that this will allow the regulated community to stay informed of the status of rules effective for Clean Water Act purposes. The department adds that the rulemaking will also delete obsolete language in two definitions. In terms of streamlining the table setting forth the criteria for toxic substances, the rulemaking breaks existing criteria into two tables, is for organizational purposes only and provides no substantive changes. All criteria values remain the same.

According to the department, negotiated rulemaking was not conducted due to the simple nature of the rulemaking. The department confirms that the proposed 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 Chapter 36, Title 39, Idaho Code.

Mike Nugent, Manager
Research & Legislation

Paul Headlee, Manager
Budget & Policy Analysis

April Renfro, Manager
Legislative Audits

Glenn Harris, Manager
Information Technology

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

The Department of Environmental Quality submits notice of proposed rule at IDAPA 58.01.25 - Rules Regulating the Idaho Pollutant Discharge Elimination System Program. According to the department, the purpose of the rulemaking is to ensure that Idaho's rules remain consistent with federal regulations. The department proposes changes to the current rules to provide a smoother transition for the regulated community when DEQ becomes the permitting authority. In addition to updating the effective date of the Code of Federal Regulations that is incorporated by reference, the rulemaking is also based on several other federal rulemakings. The department states that in December 2015, EPA's rule on electronic reporting became effective for NPDES permitting authorities. The proposed rulemaking includes the electronic reporting requirements found in 40 CFR Part 127. The department states that on January 9, 2017, EPA's small Municipal Separate Storm Sewer System remand rule became effective. The department notes that the changes allow for the state to select an approach for permitting these discharges and establishing the method for permittees to meet the maximum extent practicable standards established by the Clean Water Act. The department adds that changes to the federal regulations include updates to effluent limitation guidelines for steam electric generating point sources, oil and gas point sources and approved test methods for analysis of parameters in effluent discharges. The department states that the rules will also be updated to delete references to the vessel general permit. The agency indicates it will not be taking over responsibility for this element of the NPDES program, adding that no state has implemented this portion.

Negotiated rulemaking was conducted. The department confirms that the proposed 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 39-175C, Idaho Code.

cc: Department of Environmental Quality
Paula J. Wilson

Overview of Incorporations by Reference for the DEQ IPDES Program, Docket No. 58-0125-1701

Required by Idaho Code § 67-5223(4)

Idaho DEQ, under the direction of the Legislature in 2014 (HB406), started development of a primacy application package to implement the Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) program for the state of Idaho. DEQ undertook rulemaking in 2014 through 2015 and the Legislature approved the Rules Regulating the Idaho Pollutant Discharge Elimination System Program during the 2016 Legislative session. DEQ is now proposing rulemaking to update these rules. This rulemaking includes incorporation by reference of existing federal rules and negotiation of rules that provide the state additional flexibility in implementing the NPDES federal program.

40 CFR 123.62(e) requires that all new Clean Water Act permitting programs comply with the federal regulations upon approval. For Idaho's program to receive approval of the application submitted August 31, 2016, DEQ must update those references to federal regulations to reflect the most current version, in this case, July 1, 2017. Incorporation by reference allows DEQ to keep its rules up-to-date with federal regulation changes and simplifies compliance for the regulated community.

EPA has updated several rules regulating the permitting of discharges in the last 18 months. These updates include regulations requiring electronic reporting, changes to effluent limitations and guidelines for technology based effluent limits, and addressing requirements stemming from a federal court decision regarding small municipal separate storm sewer systems (MS4).

Reproducing the Code of Federal Regulations (CFR) in state rule is impractical and costly. Therefore when possible, and as supported by Idaho cities and industry, DEQ incorporates federal regulations by reference. Sections with no changes are also incorporated to ensure the state rules are consistent with federal regulations and to provide one set of rules for cities and industry to follow. Idaho cities and industry, that discharge treated wastewater to surface waters, are required to comply with all applicable new and updated federal rules regardless of whether DEQ incorporates them by reference.

In addition, for DEQ to be the implementing authority for the IPDES program in the state of Idaho, the agency is required to demonstrate that the rules regulating the IPDES program meet minimum federal requirements. Note, if DEQ's IPDES program does not meet EPA's minimum requirements, EPA could impose sanctions on Idaho as outlined in the Clean Water Act ([33 USC 1342\(c\)](#)) including the delay in approving the IPDES program and once approved the withdrawal of approval of the IPDES program.

The following table summarizes the Code of Federal Regulations (CFR) sections the DEQ IPDES Program incorporates by reference.

(The federal regulations incorporated by reference will be updated with the July 1, 2017 Code of Federal Regulations (CFR) effective date. The July 1, 2017 CFR is a codification of federal regulations published in the Federal Register as of July 1, 2017. Because this rulemaking has been initiated prior to July 1, 2017, applicable federal regulations published in the Federal Register and codified between now and July 1, 2017 may be identified as necessary for incorporation by reference before the conclusion of this rulemaking.)

40 CFR Part	Title	Changes During Past Year?	Impact on Idaho
122.21(r)	Application Requirements for Facility with Cooling Water Intake Structures	No	—
122.23	Concentrated Animal Feeding Operations	No	—
122.24	Concentrated Aquatic Animal Production Facilities	No	—
122.25	Aquaculture Projects	No	—
122.26	Storm Water Discharges	Yes	Yes
122.27	Silvicultural Activities	No	—
122.29(d)	Effect of Compliance with New Source Performance Standards	No	—
122.30 and 122.32 thru 122.37	Requirements and Guidance for Small Municipal Separate Storm Sewer Systems	Yes	Yes
122.42(e)	Additional Conditions Applicable to NPDES Permits for Concentrated Animal Feeding Operations	Yes	Yes
Appendix A to 122	NPDES Primary Industry Categories	No	—
Appendix C to 122	Criteria for Determining a Concentrated Aquatic Animal Production Facility	No	—
Appendix D to 122	NPDES Permit Application Testing Requirements	No	—
Appendix J to 122	NPDES Permit Testing Requirements for Publicly Owned Treatment Works	No	—
1251 through 125.3	Criteria and Standards for Imposing Technology-Based Treatment Requirements under Section 301(b) and 402 of the Clean Water Act	No	—
125.10 and 125.11	Criteria for Issuance of Permits to Aquaculture Projects	No	—
125.30 through 125.32	Criteria and Standards for Determining Fundamentally Different Factors Under Sections 301(b)(1)(A) and 301(b)(2)(A) and (E) of the Clean Water Act	No	—
125.70 through 125.73	Criteria for Determining Alternative Effluent Limitations Under Section 316(a) of the Clean Water Act	No	—
125.80 through 125.89	Requirements Applicable to Cooling Water Intake Structures for New Facilities Under Section 316(b) of the Clean Water Act	No	—
125.90 through 125.99	Requirements Applicable to Cooling Water Intake Structure for Phase II Existing Facilities Under Section 316(b) of the Clean Water Act	No	—

129.1 through 129.105	Toxic Pollutant Effluent Standards and Prohibitions	No	—
133.100 through 133.105	Secondary Treatment Regulation	No	—
136	Guidelines Establishing Test Procedures for the Analysis of Pollutants, including Appendices A, B, C, and D	No	—
401	General Provisions	Yes	Yes
403	General Pretreatment Regulations for Existing and New Sources of Pollution, Including Appendices D, E, and G	Yes	Yes
405 through 471	Effluent Limitations and Guidelines	Yes	No
503.2 through 503.48	Sewage Sludge, including Appendices A and B	Yes	Yes

These changes are discussed in more detail below. The associated Federal Register notices are denoted in parentheses as hyperlinks.

The following parts were revised and will have an impact on Idaho facilities:

EPA has updated several parts of the CFR since the Legislature approved the Rules Regulating the Idaho Pollutant Discharge Elimination System (IPDES) Program. These rulemakings include the Electronic Reporting Rule ([FR 64064](#)), Small MS4 General Permit Remand Rule ([FR 89320](#)), Steam Electric Generating Point Source Category ([FR 67838](#)), and Oil and Gas Extraction Point Source Category ([FR 41845](#) and [FR 88126](#)). These federal regulatory changes impact the IPDES program process and procedures as well as calculation of effluent limitations and conditions in an IPDES permit.

Process and Procedures

[FR 64064](#) and [FR 89320](#) directly impact the agency’s process and procedures for:

1. accepting and sharing information related to an IPDES permit and
2. drafting general permits regulating storm water in small municipalities.

[FR 64064](#), commonly referred to as the eReporting Rule, requires the electronic reporting and sharing of Clean Water Act NPDES program information. This action was taken to reduce the amount of time and resources permittees and regulatory authorities spend on this program as well as increase data accuracy, improve compliance reporting, and provide better protection of the nation’s waters. 40 CFR Parts 9, 122, 123, 124, 127, 403, 501, and 503 are all impacted by this regulation. This regulation became final on December 21, 2015.

A more detailed summary of the CFR changes that impact the IPDES program process and procedures is given below.

Part 122.26: Storm Water Discharges

- This section defines who is required to submit an application for an NPDES storm water permit, provides application requirements for these permits, defines deadlines for application, provides for conditional exclusion from needing to obtain a permit for activities that qualify for a no exposure waiver or certification.

- This past year EPA promulgated one rule ([FR 64064](#)) in this section that revised 122.26(b)(15)(i)(A) and (g)(1)(iii) requiring that storm water dischargers regulated under 122.26 submit signed certifications electronically in accordance with 40 CFR 127.2(b) and 40 CFR 3.
- 122.26(b)(15)(i)(C) was added requiring that by December 21, 2020, certifications filed under 122.26(b)(15)(i)(A) and (B) [also known as low erosivity waivers] be submitted electronically in compliance with 40 CFR 127.2(b) and 40 CFR 3.

Part 122.30 and 122.32 through 122.37: Requirements and Guidance for Small Municipal Separate Storm Sewer Systems

- Part 122.32 through 122.37 outline the requirements for small municipal separate storm sewer systems (MS4s).
- EPA promulgated 2 rules in this section: the eReporting Rule [FR 64064](#) and the Small MS4 General Permit Remand Rule [FR 89320](#). Section 122.34(g)(3) is impacted by the eReporting Rule and 122.33 through 122.35 are updated to reflect changes to how the permitting authority is required to write general permits affecting small MS4s within their jurisdiction.
- The Small MS4 General Permit Remand rule allows the permitting authority to select from 2 options for crafting a general permit for small MS4s.
 - One option requires the permitting authority to put into the general permit all of the required permit terms and conditions for compliance with the permit and allows the permittee to file a notice of intent for coverage showing the permittee will comply with the terms in the permit.
 - The other approach allows the permitting authority to include required permit terms and conditions applicable to eligible small MS4s and during the process of authorizing small MS4s to discharge, establish additional terms and conditions for each individual small MS4 operator. This approach places some of the burden of showing how the permittee will comply with the minimum control measures on the permittee.
 - In the first approach, because the general permit would go through significant public comment, the permittee's application for coverage would not be required to go through the public comment process. In the second approach, the permittee's application for coverage would need to go through a public comment process.

Part 122.42(e): Additional Conditions Applicable to NPDES Permits for Concentrated Animal Feeding Operations (CAFO)

- This section contains requirements regarding nutrient management plans for CAFOs. This section:
 - details the 9 minimum measures required in a nutrient management plan;
 - identifies the time period a CAFO must keep records for;
 - defines requirements for transferring manure or process wastewater to other persons;
 - lists the components required for an annual report; and
 - details what to do to change a nutrient management plan.
- EPA promulgated one rule ([FR 64064](#)) in this section that revised the annual reporting requirements for CAFO (122.42(e)(4)) directing all CAFOs submitting annual reports to comply with the eReporting rule by December 21, 2020.

Part 403: General Pretreatment Regulations for Existing and New Sources of Pollution, Including Appendices D, E, and G.

- This subchapter in the CFR prescribes effluent limitation guidelines and program requirements for municipalities operating a pretreatment program. These program requirements and effluent guidelines establish how pretreatment programs monitor and control the inflow of pollutants to their collection and treatment systems.
- EPA promulgated one rule ([FR 64064](#)) in this section requiring electronic submission of reports identified in:
 - 403.12(e)(1) semi-annual reports for categorical industrial users;
 - 403.1(h) semi-annual reports for industrial users not subject to categorical pretreatment standards; and
 - 403.12 (i) annual reports from POTWs with approved pretreatment programs.

Part 503: Sewage Sludge, including Appendices A and B.

- This section establishes standards for the final use or disposal of sewage sludge/biosolids generated during the treatment of domestic sewage in a treatment works. Standards included in this part are applicable for biosolids that are applied to the land, placed on a surface disposal site, or fired in a sewage sludge incinerator. Biosolids in Idaho are land applied, or placed in landfills. There are no sewage sludge incinerators in Idaho.
- EPA promulgated one rule ([FR 64064](#)) in this section requiring electronic submission of reports identified in:
 - 503.18 Annual report for land application of sewage sludge/biosolids;
 - 503.28 Annual report for surface disposal of sewage sludge/biosolids; and
 - 503.48 Annual report for incineration of sewage sludge/biosolids.

The following parts were revised and may impact Idaho facilities:

There were also updates to the subparts associated with DEQ's permit program that will have an impact on oil and natural gas extraction facilities operating in Idaho.

Part 405 through 471: Effluent Limitations and Guidelines (ELGs)

- This subchapter in the CFR prescribes effluent limitation guidelines for existing sources, and standards of performance for new sources. These are the technology based effluent limits used in the development of an NPDES permit.
- Three actions were taken since the IPDES rules were last updated:
 - [FR 41845](#) – Establishes pretreatment standards to prevent the discharge of pollutants in wastewater to publicly owned treatment works from onshore oil and gas extraction from shale and/or tight geologic formations by revising 435 (authority citation); adding 435.33, 435.34, and subpart H; and adding 435.33(a)(3). These revisions to 435 and subpart H are important because pollutants from these industries may:
 - disrupt the operation of the POTW;
 - accumulate in sewage sludge causing a limitation on their ability to be used beneficially; and
 - facilitate the formation of harmful disinfection by-products.

- [FR 88126](#) – Extends the deadline for compliance with [FR 41845](#) pretreatment standards for onshore oil and gas extraction facilities from August 29, 2016 to August 29, 2019.
- [FR 67838](#) – Changes to technology based effluent limitation guidelines and standards for steam electric power generating facilities. Revised 423.10; revised 423.11(b), (e), and (f); added 423.11(n) – (f); revised 423.12(b)(11) and (12); added 423.12(b)(13); revised 423.13(g) and (h); added 423.13(i) – (n); revised 423.15; added 423.16(e) – (i); revised 423.17.

The following parts were not revised.

The federal regulations (40 CFR) identified below have not been changed or updated since initially being incorporated by reference in IDAPA 58.01.25.003. DEQ proposes to update all federal regulations incorporated by reference with the July 1, 2017 CFR effective date, including the regulations that have not been revised since the initial incorporation by reference. This will maintain consistency for all federal regulations listed in IDAPA 58.01.25.003.

Part 122.21(r) Application Requirements for Facility with Cooling Water Intake Structures

- This section addresses requirements for a permit application from a facility with a cooling water intake structure.

Part 122.23 Concentrated Animal Feeding Operations

- This section addresses CAFO operations under general and individual permits.

Part 122.24 Concentrated Aquatic Animal Production Facilities

- This section addresses CAAP operations and application requirements.

Part 122.25 Aquaculture Projects

- This section addresses requirements for concentrated aquatic animal production facilities.

Part 122.27 Silvicultural Activities

- This section addresses the requirements for silvaculture activities and defines what is included as a silvacultural point source.

Part 122.29(d) Effect of Compliance with New Source Performance Standards

- This section defines new sources and new dischargers, and establishes criteria for making a new source determination. Establishes performance standards that are applicable for new sources.

Appendix A to Part 122 NPDES Primary Industry Categories

- This section provides a list of the NPDES primary industry categories.

Appendix C to Part 122 Criteria for Determining a Concentrated Aquatic Animal Production Facility

- This section establishes the criteria used in determining if a hatchery, fish farm, or other facility is a concentrated aquatic animal production facility for the purposes of permitting.

Appendix D to Part 122 NPDES Permit Application Testing Requirements

- This section provides tables for use in determining the testing required when submitting an NPDES or IPDES permit application.

Appendix J to Part 122 NPDES Permit Testing Requirements for Publicly Owned Treatment Works

- This section provides testing requirements for publicly owned treatment works.

Part 125.1 through 125.3 Criteria and Standards for Imposing Technology-Based Treatment Requirements under Section 301(b) and 402 of the Clean Water Act

- This section establishes criteria and standards for the imposition of technology-based treatment requirements in permit under Section 301(b) of the Clean Water Act, including the application of EPA promulgated effluent limitations and case by case determinations of effluent limitations under section 402(a)(1) of the Act.

Part 125.30 through 125.32 Criteria and Standards for Determining Fundamentally Different Factors Under Sections 301(b)(1)(A) and 301(b)(2)(A) and (E) of the Clean Water Act

- This section establishes the criteria and standards to be used in determining whether effluent limitations alternative to those required by promulgated EPA effluent limitations guidelines under section 301 and 304 of the Clean Water Act should be imposed on a discharger because factors relating to the discharger's facilities, equipment, processes or other factors are fundamentally different from the factors used in the development of the national limits.

Part 125.70 through 125.73 Criteria for Determining Alternative Effluent Limitations Under Section 316(a) of the Clean Water Act

- This section describes the factors, criteria and standards for the establishment of alternative thermal effluent limitations under section 316(a) of the Clean Water Act.

Part 125.80 through 125.89 Requirements Applicable to Cooling Water Intake Structures for New Facilities Under Section 316(b) of the Clean Water Act

- This section establishes requirements that apply to the locations, design, construction, and capacity of cooling water intake structures at new facilities, the purpose of which is to establish the best technology available for minimizing adverse environmental impacts associated with the use of these structures.

Part 125.90 through 125.99 Requirements Applicable to Cooling Water Intake Structure for Phase II Existing Facilities Under Section 316(b) of the Clean Water Act

- This section established the CWA section 316(b) requirements that apply to cooling water intake structures at existing facilities, including standards for minimizing adverse environmental impacts associated with the use of these structures. Establishes the

appropriate technology requirements at certain specified facilities as well as monitoring, reporting, and recordkeeping requirements.

Part 129.1 through 129.105 Toxic Pollutant Effluent Standards and Prohibitions

- This section establishes the effluent standards or prohibitions for certain toxic pollutants applicable to sources and pollutants identified in this section.

Part 133.100 through 133.105 Secondary Treatment Regulation

- This section establishes the level of effluent quality that is attainable through the application of secondary or equivalent treatment.

Part 136 Guidelines Establishing Test Procedures for the Analysis of Pollutants, including Appendices A, B, C, and D

- This section describes the test procedures that shall be used to perform the measurements indicated whenever the constituent specified is required to be measured.