

IDAPA 58 – DEPARTMENT OF ENVIRONMENTAL QUALITY

58.01.02 – WATER QUALITY STANDARDS

DOCKET NO. 58-0102-1701

NOTICE OF NEGOTIATED RULEMAKING

AUTHORITY: In compliance with Section 67-5220, Idaho Code, and IDAPA 58.01.23, Rules of Administrative Procedure Before the Board of Environmental Quality, Sections 810 through 815, notice is hereby given that this agency intends to promulgate a rule and desires public participation before publishing a proposed rule. This rulemaking action is authorized by Sections 39-105, 39-107, and 39-3601 et seq., Idaho Code.

METHOD OF PARTICIPATION: Those interested in participating in the negotiated rulemaking process are encouraged to attend the meeting at one of the following locations. The public may participate by telephone and web conferencing at any of the meeting locations or with individual connections. Individuals interested in participating by telephone and web conferencing should contact the undersigned by the date provided in the table below. For those who cannot participate by attending the meeting, information for submitting written comments is provided at the end of this notice.

MEETING SCHEDULE: The negotiated rulemaking meetings will be held as follows. Additional meetings will be scheduled if necessary.

ORIGINATING LOCATION – LIVE MEETING DEQ State Office Conference Center 1410 N. Hilton, Boise, Idaho Thursday, April 27th, 2017 - 9:00 am to 12:30 pm (MDT)	
TELEPHONE AND WEB CONFERENCE LOCATIONS	
DEQ Lewiston Regional Office 1118 F Street Lewiston, Idaho	DEQ Pocatello Regional Office 444 Hospital Way #300 Pocatello, Idaho

Contact the undersigned by *April 20, 2017* to make arrangements for participation by telephone and web conferencing

The meeting locations will be accessible to persons with disabilities, and language translators will be made available upon request. Requests for these accommodations must be made no later than five (5) days prior to the meeting date. For arrangements, contact the undersigned.

PRELIMINARY DRAFT RULE: By April 5, 2017, the preliminary draft rule can be obtained at www.deq.idaho.gov/58-0102-1701 or by contacting Paula Wilson at paula.wilson@deq.idaho.gov, (208) 373-0418.

DESCRIPTIVE SUMMARY: This negotiated rulemaking has been initiated to update the selenium criteria for aquatic life use. This proposed update is identified as a Reasonable and Prudent Alternative (RPA) in the National Oceanic and Atmospheric Administration’s (NOAA) biological opinion (BiOp) on Idaho’s criteria for toxic substances to support aquatic life. This BiOp concluded that the current selenium criterion was likely to adversely affect endangered species and would result in adverse modification of critical habitat. The NOAA recommendation is to use EPA’s 2016 304(a) selenium criterion based on fish-tissue concentrations. NOAA has called for state adoption and EPA approval or EPA promulgation of this criterion by May 2018. In order to avoid EPA promulgating a federal selenium standard for Idaho, DEQ proposes to undertake a negotiated rulemaking for a revised selenium aquatic life criterion in Idaho’s water quality standards. DEQ’s 2014 triennial review identified revision of the aquatic life criteria for selenium as a medium priority.

Although selenium may cause acute toxicity at high concentrations, the most detrimental effect on aquatic organisms is due to its bioaccumulative properties. Aquatic organisms exposed to selenium accumulate it primarily through their diets and not directly through water. In fish, selenium toxicity occurs primarily through transfer to the eggs, reducing reproductive success and survival. 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 fish-tissue concentration, in conjunction with site-specific bioaccumulation factors, can be used to determine the allowable concentration of selenium in ambient water. Aquatic communities are expected to be protected by this chronic criterion from any potential acute effects of selenium. By adopting the fish-tissue derived criterion, DEQ will ensure that its criterion neither unnecessarily burdens dischargers nor increases risk to aquatic life.

A site specific criterion (SSC) petition was filed with DEQ by J. R. Simplot Company for Sage and Crow Creeks. Due to EPA's 2016 304(a) recommended selenium criterion, a revision of this SSC petition is expected later this year.

The text of the rule will be drafted by DEQ in conjunction with a negotiating committee made up of persons having an interest in the development of this rule. In short, this rule will replace the existing water column based criteria for selenium with a four part criterion. The recommended elements are: (1) a fish egg-ovary element; (2) a fish whole-body and/or muscle element; (3) a water column element (one value for lentic and one value for lotic aquatic systems); and (4) a water column intermittent element to account for potential chronic effects from short-term exposures (one value for lentic and one value for lotic aquatic systems). Site specific criteria for Sage and Crow Creeks in southeast Idaho will also be considered for development.

Idahoans that recreate in, drink from, or fish Idaho's surface waters and all who discharge pollutants to those same waters may be interested in participating in this rulemaking.

Upon conclusion of negotiations, DEQ intends to publish a proposed rule for public comment in the summer of 2017 and then present the final proposal to the Idaho Board of Environmental Quality (Board) in the fall of 2017 for adoption of a pending rule. If adopted by the Board, the rule will be reviewed by the 2018 Idaho Legislature.

EFFECTIVE FOR CLEAN WATER ACT PURPOSES: Water quality standards adopted and submitted to EPA since May 30, 2000 are not effective for federal Clean Water Act (CWA) purposes until EPA approves them (see **40 CFR 131.21**). This is known as the Alaska Rule. This rulemaking will be promulgated so that the existing rule, which continues to be effective for CWA purposes, remains in the Idaho Administrative Code until EPA approves the rule revisions. Notations explaining the effectiveness of the rule sections are also included. Upon EPA approval of the rule revisions, the old rule sections and notations will be deleted from the Idaho Administrative Code. Information regarding the status of EPA review will be posted at <http://www.deq.idaho.gov/epa-actions-on-proposed-standards>.

ASSISTANCE ON TECHNICAL QUESTIONS AND SUBMISSION OF WRITTEN COMMENTS: For assistance on questions concerning this rulemaking, contact Stephanie Jenkins at stephanie.jenkins@deq.idaho.gov or (208) 373-0407.

For those who cannot participate by attending the scheduled meeting, written comments may be submitted by mail, fax or email at the address below. Written comments on the preliminary draft rule must be received by May 5, 2017. For information regarding submission of written comments on subsequent drafts of the negotiated rule, to receive copies of submitted written comments, and to receive the most recent version of the draft negotiated rule, contact the undersigned.

Dated this 5th day of April, 2017.

Paula J. Wilson, Hearing Coordinator
Department of Environmental Quality
1410 N. Hilton Street
Boise, Idaho 83706-1255

Phone: (208) 373-0418
Fax: (208) 373-0481
E-mail: paula.wilson@deq.idaho.gov