

ENVIRONMENT ENERGY & TECHNOLOGY COMMITTEE

ADMINISTRATIVE RULES REVIEW

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2010 Legislative Session

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58.01.20 - RULES FOR ADMINISTRATION OF DRINKING WATER LOAN PROGRAM

DOCKET NO. 58-0120-0901 (FEE RULE)

NOTICE OF RULEMAKING - ADOPTION OF TEMPORARY RULE

EFFECTIVE DATE: The temporary rule is effective December 2, 2009.

AUTHORITY: In compliance with Sections 67-5221(1) and 67-5226(1), Idaho Code, notice is hereby given that the Board of Environmental Quality has adopted a temporary rule and the Department of Environmental Quality (DEQ) has initiated proposed rulemaking. This action is authorized by Chapters 1 and 76, Title 39, Idaho Code.

PUBLIC HEARING SCHEDULE: No hearings have been scheduled. Pursuant to Section 67-5222(2), Idaho Code, a public hearing will be held if requested in writing by twenty-five (25) persons, a political subdivision, or an agency. Written requests for a hearing must be received by the undersigned on or before December 16, 2009. If no such written request is received, a public hearing will not be held.

DESCRIPTIVE SUMMARY: Currently, State General Fund monies support facility planning efforts. The recent strain on the State's General Fund resources is driving an effort to find alternative funding sources. If the Drinking Water Loan Program were to collect loan fees, those loan fees could be used as a substitute for State General Fund monies in supporting Idaho communities' infrastructure planning efforts. With the expected reduction of State General Fund support for drinking water facility planning efforts, the establishment of an alternate funding source will continue support for Idaho drinking water systems to prepare for infrastructure construction.

The purpose of this rulemaking is to revise the Rules for Administration of Drinking Water Loan Program to allow DEQ to collect a fee in the form of a percentage of each loan. The fees collected will be used to provide funds for supporting planning efforts and for loan program administration. The actual interest rate charged on Drinking Water State Revolving Fund (DWSRF) loans will be reduced by the amount of the fee charged so that there is no cost to the communities using the DWSRF loans. The fee revenues can then be used to fund planning grants (as currently allowed for in the Rules for Administration of Planning Grants for Public Drinking Water Facilities, IDAPA 58.01.22). The proposed revisions are consistent with the loan fee structure set out in Section 032 of the Rules for Administration of Water Pollution Control Loans, IDAPA 58.01.12.

Cities, counties, districts and associations that own and operate public drinking water systems may be interested in commenting on this proposed rule. The proposed rule text is in legislative format. Language the agency proposes to add is underlined. It is this addition to which public comment should be addressed.

After consideration of public comments, DEQ intends to present the final proposal to the Board of Environmental Quality in the spring of 2010 for adoption as a pending rule. The pending rule is expected to be final and effective upon the adjournment of the 2011 legislative session if adopted by the Board and approved by the Legislature.

NEGOTIATED RULEMAKING: Adoption of this rule would reclassify a portion of the interest due on loans to a loan fee with no monetary effect on loan recipients. Due to the nature of this rulemaking, DEQ did not conduct negotiations.

SECTION 39-107D, IDAHO CODE, STATEMENT: This 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.

TEMPORARY RULE JUSTIFICATION: Pursuant to Sections 67-5226(1)(a) and (c), Idaho Code, the Governor has found that temporary adoption of the rule is necessary for protection of public health and to confer a benefit. Adoption of this temporary rule would confer a benefit to the citizens of the state of Idaho in that a reserve fund would become available to supplement planning efforts. In addition, the Governor has found that the fee imposed in this rule meets the criteria set out in Section 67-5226(2), Idaho Code.

FEE SUMMARY: Unless this fee is implemented in FY 2010, DEQ will lose the capacity to assist drinking water systems' facility planning efforts and may have to curtail administrative oversight of the loan program due to shrinking administrative funds. Imposition of the fee is authorized by Sections 39-119 and 39-3627(4), Idaho Code.

FISCAL IMPACT STATEMENT: The following is a specific description, if applicable, of any negative fiscal impact on the state general fund greater than ten thousand dollars (\$10,000) during the fiscal year: not applicable.

ASSISTANCE ON TECHNICAL QUESTIONS AND SUBMISSION OF WRITTEN COMMENTS: For assistance on questions concerning this rulemaking, contact Tim Wendland at (208) 373-0439 or tim.wendland@deq.idaho.gov.

Anyone may submit written comments by mail, fax or e-mail at the address below regarding this proposed rule. DEQ will consider all written comments received by the undersigned on or before December 30, 2009.

DATED this 12th day of November, 2009.

Paula J. Wilson
Hearing Coordinator
Department of Environmental Quality
1410 N. Hilton
Boise, Idaho 83706-1255
(208) 373-0418
Fax No. (208)373-0481
paula.wilson@deq.idaho.gov

THE FOLLOWING IS THE TEXT OF THE TEMPORARY RULE

010. DEFINITIONS.

For the purpose of the rules contained in this chapter, the following definitions apply: (3-23-98)

01. Applicant. Any qualifying entity making application for Drinking Water loan funds. (5-3-03)

02. Board. The Idaho Board of Environmental Quality. (4-2-08)

03. Categorical Exclusion (CE). Category of actions which do not individually or cumulatively have a significant effect on the human environment and for which, therefore, neither an environmental information document nor an environmental impact statement is required. (4-2-08)

04. Close or Closing. The date on which the borrower issues and physically delivers to the Department the bond or note evidencing the loan to the borrower, specifically determining the principal, interest and fee amounts that shall be repaid and the schedule for payment. (12-2-09)T

045. Community Water System. A public drinking water system that: (5-3-03)

a. Serves at least fifteen (15) service connections used by year round residents of the area served by the system; or (3-23-98)

b. Regularly serves at least twenty-five (25) year-round residents. (3-23-98)

056. Construction. The building, erection, acquisition, alteration, reconstruction, improvement, or extension of public drinking water system facilities, including preliminary planning to determine the economic and engineering feasibility of public drinking water system facilities, the engineering, architectural, legal, fiscal, and economic investigations, reports and studies, surveys, designs, plans, working drawings, specifications, procedures, other action necessary in the construction of public water system facilities, the inspection and supervision of the construction, and start-up of the associated facilities. (5-3-03)

067. Contaminant. Any physical, chemical, biological, or radiological substance or matter in water. (5-3-03)

078. Department. The Idaho Department of Environmental Quality. (3-23-98)

089. Director. The Director of the Idaho Department of Environmental Quality or the Director's designee. (4-2-08)

0910. Disadvantaged Community. The service area of a public water system that meets affordability criteria established by the Department of Environmental Quality after public review and comment. (3-23-98)

- 101. Disadvantaged Loans.** Loans made to a disadvantaged community. (3-23-98)
- 112. Distribution System.** Any combination of pipes, tanks, pumps, and other equipment which delivers water from the source(s) and/or treatment facility(ies) to the consumer. (5-3-03)
- 123. Eligible Costs.** Costs which are necessary for planning, designing, and/or constructing public water system facilities. To be eligible, costs must also be reasonable and not ineligible costs. The determination of eligible costs shall be made by the Department pursuant to Section 041. (5-3-03)
- 134. Eligible Systems.** Public and private community water systems and nonprofit noncommunity water systems. (3-23-98)
- 145. Engineering Report.** A report prepared to address a specific portion of the system or facility for which modifications are being designed. These reports address specific purpose and scope, design requirements, and evaluate feasible treatment, storage, or distribution alternatives for the public drinking water system to identify the cost effective and environmentally sound alternative. Engineering reports are generally project specific as opposed to an overall system-wide plan such as a master plan or a facility plan. An engineering report shall be prepared by or under the supervision of an Idaho licensed professional engineer and shall bear the imprint of the engineer's seal. Guidance on how to prepare an engineering report may be found in the Handbook. (4-2-08)
- 156. Environmental Impact Statement (EIS).** A document prepared by the applicant when the Department determines that the proposed drinking water construction project will significantly affect the environment. The major purpose of the EIS will be to describe fully the significant impacts of the project and how these impacts can be either avoided or mitigated. The Environmental Review Procedures contained in Chapter 5 of the Handbook may be used as guidance when preparing an EIS. (4-2-08)
- 167. Environmental Information Document (EID).** Any written environmental assessment prepared by an applicant or consultant describing the environmental impacts of a proposed drinking water construction project. This document will be of sufficient scope to enable the responsible official to assess the environmental impacts of the proposed project and ultimately determine if an environmental impact statement (EIS) is warranted. (4-2-08)
- 178. Facility Plan.** A plan that describes the overall system, including sources of water, treatment processes and facilities, pumping stations and distribution piping, finished water storage, and waste disposal. It is a comprehensive planning document for the existing infrastructure and includes the plan for the future of the system/facility, including upgrades and additions. The plan also includes a systematic evaluation of feasible alternatives considering demographic, topographic, hydrologic and institutional characteristics of a project area to demonstrate that the selected alternative is cost effective and environmentally sound. A facility plan is sometimes referred to as a master plan or facilities planning study and is an overall system-wide plan as opposed to a project specific plan. A facility plan shall be prepared by or under the supervision of an Idaho licensed professional engineer and shall bear the imprint of the engineer's

seal. Guidance on how to prepare a facility plan may be found in the Handbook. (4-2-08)

189. Financial Management System. Uniform method of recording, summarizing, and analyzing financial information about the public water system facility. (3-23-98)

190. Finding Of No Significant Impact (FONSI). A document prepared by the Department briefly presenting the reasons why an action, not otherwise excluded, will not have a significant effect on the human environment and for which an environmental impact statement (EIS) will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it. (4-2-08)

201. Handbook. “Drinking Water Loan Handbook of Procedures.” (5-3-03)

212. Ineligible Costs. Costs which are described in Subsection 041.05. (5-3-03)

223. Managerial Capability. The capabilities of the qualified entity to support the proper financial management and technical operation of the system. (5-3-03)

234. Maximum Contaminant Level (MCL). The maximum permissible level of a contaminant in water which is delivered to any user of a public water system. (5-3-03)

245. Noncommunity Water System. A public water system that is not a community water system. (3-23-98)

256. Nonprofit Noncommunity Water System. A public water system that is not a community water system and is governed by Section 501 of the U. S. Internal Revenue Code and includes but is not limited to: state agencies, municipalities, and nonprofit organizations such as churches and schools. (3-23-98)

267. Nontransient Noncommunity Water System. A public water system that is not a community water system and that regularly serves at least 25 (twenty-five) of the same persons over six (6) months per year. (3-23-98)

278. O & M Manual. Operation and Maintenance Manual is a guidance and training manual outlining the optimum operation and maintenance of the public water system facility or its components. (3-23-98)

289. Person. An individual, corporation, company, association, partnership, state agency, municipality, or federal agency (and includes officers, employees, and agents of any corporation, company, association, state agency, municipality, or federal agency). (3-23-98)

2930. Plan of Operation. A schedule of specific actions and completion dates for construction, start-up, and operation of the public water system facility. (5-3-03)

301. Priority List. A list of proposed drinking water projects rated by severity of risk to public health, the necessity to ensure compliance with IDAPA 58.01.08, “Idaho Rules for Public Drinking Water Systems,” and the Safe Drinking Water Act (42 U.S.C. Section 300f et seq.), population affected, and need on a household basis for protection of Idaho's public drinking water.

(5-3-03)

342. Public Drinking Water System/Public Water System/Water System. A system for the provision to the public of water for human consumption through pipes or, after August 5, 1998, other constructed conveyances, if such system has at least fifteen (15) service connections, regardless of the number of water sources or configuration of the distribution system, or regularly serves an average of at least twenty-five (25) individuals daily at least sixty (60) days out of the year. Such term includes: any collection, treatment, storage, and distribution facilities under the control of the operator of such system and used primarily in connection with such system; and any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system. Such term does not include any “special irrigation district.” A public water system is either a “community water system” or a “noncommunity water system.” (4-2-08)

323. Qualifying Entity. Any county, city, special service district, nonprofit or investor-owned corporation, or other governmental entity, or a combination thereof, which owns or operates a public water system or irrigation system and which establishes and maintains a dedicated loan repayment source. (4-2-08)

334. Rehabilitation. The repair or replacement of segments of drinking water facilities. (5-3-03)

345. Reserve Capacity. That portion of the system in the planned facilities to handle future drinking water demand. (5-3-03)

356. State. The state of Idaho. (3-23-98)

367. Supplier or Provider of Water. Any person who owns and/or operates a public water system. (3-23-98)

378. Suspension. An action by the Director to suspend a loan contract prior to project completion for a specified cause. Suspended contracts may be reinstated. (3-23-98)

389. Technical Capability. The ability of the public drinking water system to comply with existing and expected drinking water rules. (5-3-03)

3940. Termination. An action by the Director to permanently terminate a loan contract prior to project completion for a specific cause. Terminated contracts shall not be reinstated. (3-23-98)

401. Unreasonable Risks to Health (URTH). Refers to a level of contamination that presents an “unreasonable risk to health” and is determined on a contaminant by contaminant basis by the U.S. Environmental Protection Agency. (5-3-03)

442. User Charge System. A system of rates and service charges applicable to specific types of users, including any legal enforcement mechanism as may be required, which provides sufficient reserves and/or revenues for debt retirement, operation and maintenance, and replacement of the public water system. (4-2-08)

423. Water System Protection Ordinance. An ordinance adopted pursuant to Chapter 32, Title 42, Idaho Code, or other applicable law which requires new connections to be properly designed and constructed, which prohibits cross-connections with non-potable water sources (and in all ways protects the water system from injection of contaminants), and which provides for fees for service from users or classes of users. (3-23-98)

434. Water Treatment Plant. That portion of the public drinking water system whose primary purpose is to remove contaminants. (5-3-03)

(BREAK IN CONTINUITY OF SECTIONS)

032. LOAN FEE.

01. Loan Fee. The Department may elect to impose a loan fee when necessary to offset the costs of administering the loan program, to provide planning assistance, or to otherwise facilitate the operation of the Drinking Water State Revolving Fund (DWSRF) effort. The Department may impose a loan fee on loans scheduled to close after December 2, 2009. The loan fee shall not exceed one percent (1%) of the unpaid balance of the loan at the time each loan payment is due. (12-2-09)T

02. Determination of Loan Fee. The Department shall determine the amount of the loan fee on a yearly basis and shall charge the same loan fee on all loans closed during any one fiscal year. The amount of the loan fee shall be included in the Intended Use Plan, as described by Section 1452 of the Safe Drinking Water Act (42 U.S.C. Section 300j-12). In determining the amount of the loan fee, the Department shall consider: (12-2-09)T

a. The Department's anticipated costs of administering the loan program for the upcoming fiscal year, including salaries and overhead; (12-2-09)T

b. Any Department costs related to providing technical assistance for the loan program for the upcoming fiscal year; (12-2-09)T

c. The amount of money generated from loan fees in previous fiscal years available for use in the upcoming fiscal year; and (12-2-09)T

d. The anticipated demand for planning assistance to supplement regular appropriations and other related needs to support the DWSRF loan program. (12-2-09)T

03. Effect on Loan Interest Rate. The loan interest rate, as described in Subsection 050.05, will be reduced by the corresponding percentage of the loan fee. (12-2-09)T

04. Payment of Loan Fee. The loan fee shall be due and payable concurrently with scheduled loan principal and interest repayments over the repayment period. (12-2-09)T

~~0323.~~ -- 039. (RESERVED).

(BREAK IN CONTINUITY OF SECTIONS)

050. LOAN OFFER AND ACCEPTANCE.

01. Loan Offer. Loan offers shall be delivered to successful applicants by representatives of the Department or by registered mail. (3-23-98)

02. Acceptance of Loan Offer. Applicants have sixty (60) days in which to officially accept the loan offer on prescribed forms furnished by the Department. The sixty (60) day acceptance period commences from the date indicated on the loan offer notice. If the applicant does not accept the loan offer within the sixty (60) day period, the loan funds may be offered to the next project on the priority list. (3-23-98)

03. Acceptance Executed as a Contract Agreement. Upon signature by the Director or the Director's designee and upon signature by the authorized representative of the qualifying entity, the loan offer shall become a contract. Upon accepting a loan offer, a qualifying entity becomes a loan recipient. The disbursement of funds, pursuant to a loan contract, is subject to a finding by the Director that the loan recipient has complied with all loan contract conditions and has prudently managed the project. The Director may, as a condition of disbursement, require that a loan recipient vigorously pursue any claims it has against third parties who shall be paid in whole or in part, directly or indirectly, with loan funds. No third party shall acquire any rights against the state or its employees from a loan contract. (4-2-08)

04. Estimate of Reasonable Cost. All loan contracts shall include the eligible costs of the project. Some eligible costs may be estimated and disbursements may be increased or decreased as provided in Section 060. (5-3-03)

05. Terms of Loan Offers. The loan offer shall contain such terms as are prescribed by the Department including, but not limited to: (3-23-98)

a. Terms consistent with these rules, the project step to be funded under the loan offer, and Chapter 76, Title 39, Idaho Code; (5-3-03)

b. Special clauses as determined necessary by the Department for the successful investigation, design, construction, and management of the project; (3-23-98)

c. Terms consistent with applicable state and federal laws pertaining to engineering reports or facility plans, design, and construction (including the Public Works Contractors License Act (Idaho Code Sections 54-1901 through 54-1924)); the Public Contracts Bond Act (Idaho Code Sections 54-1925 through 54-1930); and the Safe Drinking Water Act (42 U.S.C. Section 300f et seq.) requirements for projects funded with loan moneys of federal origin; (4-2-08)

d. Requirement for the prime engineering firm(s), retained for engineering services,

to carry professional liability insurance to protect the public from negligent acts of the engineer and errors of omission of a professional nature. The total aggregate of the professional liability of the engineer insurance shall be one hundred thousand dollars (\$100,000) or twice the amount of the fee of the engineer, whichever is greater. Professional liability insurance must cover all such services rendered for all project phases which are state funded; (4-2-08)

e. The project shall be bid, contracted, and constructed according to the current edition of Idaho Standards for Public Works Construction and the Idaho Rules for Public Drinking Water Systems (IDAPA 58.01.08) unless the qualifying entity has approved and adopted acceptable public works construction standards approved by the Department; (5-3-03)

f. The loan interest rate for loans made during the state fiscal year beginning July 1 shall be established by the Director. The interest rate shall be a fixed rate in effect for the life of the loan. The rate may equal but shall not exceed the current market rate; (5-3-03)

g. The loan fee pursuant to Section 032; (12-2-09)T

gh. All loans, except disadvantaged loans, must be fully amortized within a period not to exceed twenty (20) years after project completion. Disadvantaged loans must be fully amortized within a period not to exceed thirty (30) years. The borrower may elect for either a schedule of semi-annual repayments or annual repayments at the time the loan is finalized; and (3-23-98)

hi. Repayment default shall occur when a scheduled loan repayment is thirty (30) days past due. If default occurs, the Department may invoke appropriate loan contract provisions and/or bond covenants. (5-3-03)