



Jeff Youtz
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: Principal Legislative Research Analyst - Katharine Gerrity

DATE: December 2, 2013

SUBJECT: Department of Environmental Quality

IDAPA 58.01.02 - Water Quality Standards (Docket No. 58-0102-1301)

The Department of Environmental Quality submits notice of proposed rule at IDAPA 58.01.02 - Water Quality Standards. The department provided the history leading up to this rulemaking. According to the department, it initiated this rulemaking in response to EPA's disapproval of the water quality standards provision that exempts, from Tier II antidegradation review, those activities or discharges determined to be insignificant. The department states that it is also proposing to revise IDAPA 58.01.02.055 which addresses the treatment of water bodies that do not support designated beneficial uses because it needs to be updated to ensure it is consistent with changes in the Idaho Code and other sections of the water quality standards that have been adopted since the adoption of this section of the rule.

The department notes that in November 2010, antidegradation implementation procedures were adopted by the Board of Environmental Quality and submitted to the 2011 Idaho Legislature for review. The rule was approved in part and rejected in part. The department adds that the Legislature also adopted HB 153 in 2011 which revised the Idaho Code to include sections addressing the definition of degradation, the treatment of general permits, the identification of Tier II waters and insignificant discharges or activities.

The department also indicates that in April 2011, it submitted revisions to its water quality standards administrative rule and corresponding revisions to the Idaho Code to EPA for review and action. The EPA approved the revisions as submitted. In November 2011, the Board of Environmental Quality adopted a rule docket which included revisions to make the language on implementation of antidegradation procedures in Idaho's water quality standards complete and consistent with changes in state law resulting from the Legislature's passage of HB 153. However, in February 2012, Greater Yellowstone Coalition brought an action in federal court challenging EPA's approval of Idaho's definition of "degradation" of water quality and Idaho's mandatory exemption from review for de minimus levels of discharge. The Coalition argued that the de minimus exemption allows too much pollution. The Court granted a motion for remand of the de minimus issue filed by EPA and in July 2013, EPA disapproved the de minimus exemption.

The department states that the Clean Water Act provides that if the state does not adopt changes in its rule to address the disapproval within ninety days, EPA will promulgate a standard for the state. The department went on to note that adoption of this rule docket will avoid EPA promulgation.

Mike Nugent, Manager
Research & Legislation

Cathy Holland-Smith, Manager
Budget & Policy Analysis

April Renfro, Manager
Legislative Audits

Glenn Harris, Manager
Information Technology

The department also indicates that after consideration of public comments, it intends to present the final proposal to the Board of Environmental Quality at the May 2014 meeting for adoption as a pending and temporary rule. If adopted, the temporary rule will become effective on June 4, 2014. The pending rule is expected to be final upon adjournment of the 2015 legislative session if approved by the Idaho Legislature. The department adds that the Governor has found that temporary adoption of the rule is appropriate in order to comply with deadlines in federal programs and avoid federal promulgation of Idaho's water quality standards. The department also adds that it intends to submit legislation to amend Section 39-3603(2)(c), Idaho Code which needs to be amended before this rule docket can become effective.

The department states that negotiated rulemaking was conducted. The department confirms that the standards included in this proposed rule are not broader in scope, nor more stringent, than federal regulations and do not regulate an activity not regulated by the federal government. The rule appears to be authorized pursuant to Sections 39-105, 39-107 and 39-3601 et seq., Idaho Code.

cc: Department of Environmental Quality
Paula J. Wilson
Don Essig