

IDAPA 58 - DEPARTMENT OF ENVIRONMENTAL QUALITY

58.01.02 - WATER QUALITY STANDARDS

DOCKET NO. 58-0102-1301

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 meeting locations will be connected by telephone and web conferencing. 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 meeting will be held as follows. Additional meetings may be scheduled if necessary. For information regarding individual participation by telephone and web conferencing or scheduling of additional meetings, contact the undersigned. Individual requests to participate by telephone and web conferencing must be made by August 22, 2013.

Wednesday, August 28, 2013, 9 a.m. to 12:30 p.m. Mountain Daylight Time		
Department of Environmental Quality, Conference Rooms A & B 1410 N. Hilton, Boise, Idaho	Department of Environmental Quality 444 Hospital Way #300 Pocatello, Idaho	Department of Environmental Quality, 2110 Ironwood Parkway, Coeur d'Alene, Idaho

PRELIMINARY DRAFT: By August 14, 2013, a preliminary draft of the rule can be obtained at www.deq.idaho.gov/58-0102-1301 or by contacting Paula Wilson at paula.wilson@deq.idaho.gov, (208)373-0418.

DESCRIPTIVE SUMMARY: DEQ is initiating this rulemaking docket in response to U.S. Environmental Protection Agency (EPA) disapproval of the water quality standards provision that exempts, from Tier II antidegradation review, those activities or discharges determined to be insignificant (*de minimus* exemption). This provision is set out in IDAPA 58.01.02.052.08.a.

DEQ is also proposing to revise IDAPA 58.01.02.055, which addresses the treatment of water bodies that do not support designated beneficial uses. This section 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 Section 055. Subsection 055.04, which was adopted in 1997, contains antidegradation provisions which have since been superseded by the antidegradation policy and implementation provisions contained in Section 39-3603, Idaho Code, and IDAPA 58.01.02.051 and 052, which were adopted by the Idaho Board of Environmental Quality (Board) in 2010 and approved by the Idaho Legislature in 2011 (Docket No. 58-0102-1001).

In November 2010, antidegradation implementation procedures were adopted by the Idaho Board of Environmental Quality (Board) and then submitted to the 2011 Idaho Legislature for review (Docket No. 58-0102-1001). Under House Concurrent Resolution 16 (HCR16), the Idaho Legislature rejected certain portions of the rule and approved the remainder of the rule. The 2011 Idaho Legislature also adopted House Bill 153 (HB153) 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 (codified at Sections 39-3601, 39-3602, 39-3603, and 39-3623, Idaho Code). The new sections added to Idaho law by HB153 correspond to the portions of the rule rejected by HCR16.

In April 2011, DEQ submitted revisions to its water quality standards administrative rule (Docket No. 58-0102-1001) and corresponding revisions to the Idaho Code to EPA for review and action. In August 2011, EPA approved the revisions as submitted.

In November 2011, the Board adopted Docket No. 58-0102-1103, 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 brought about by the 2011 Legislature's passage of HB153.

On February 14, 2012, Greater Yellowstone Coalition (GYC) brought an action in the U.S. District Court for the District of Idaho (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 *de minimus* exemption provides for an automatic exemption from Tier II antidegradation review if the additional pollution from a new activity would consume only 10% or less of the "assimilative capacity" of a water body. GYC argued that the *de minimus* exemption allows too much pollution. On April 24, 2013, the Court granted EPA's motion for remand of the *de minimus* issue and gave EPA 90 days to either 1) take a new action on the *de minimus* provision; or 2) inform the Court that it has determined not to take a new action, and to file a cross-motion for summary judgment and brief in support of that motion regarding the *de minimus* provision. The Court will retain jurisdiction to ensure a timely remand process and to allow the parties to challenge any new EPA decision in this case.

On July 23, 2013, EPA disapproved the *de minimus* exemption. The Clean Water Act provides that if the state does not adopt changes in its rule to address the disapproval within 90 days, EPA shall promulgate a standard for the state. Pursuant to this section of the Clean Water Act, EPA may be required to promptly prepare a proposed rule for the state of Idaho. Adoption of this rule docket will avoid EPA promulgation.

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. 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 Idaho Administrative Bulletin and present the final proposal to the Board of Environmental Quality in May 2014 for adoption of a pending and temporary rule. If adopted by the Board, the temporary rule will become effective on June 4, 2014 and the pending rule will be reviewed by the 2015 Idaho Legislature. Pursuant to Section 67-5226(1)(c), Idaho Code, the Governor has found that temporary adoption of the rule is appropriate in order to comply with deadlines in federal programs and, therefore, avoid federal promulgation of Idaho's water quality standards.

Before this rule docket can become effective, it will be necessary to revise Section 39-3603(2)(c), Idaho Code.

ASSISTANCE ON TECHNICAL QUESTIONS AND SUBMISSION OF WRITTEN COMMENTS: For assistance on questions concerning this rulemaking, contact Don Essig at don.essig@deq.idaho.gov, (208)373-0119.

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 September 6, 2013. 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 15th day of July, 2013.

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