

**Department of Environmental Quality
Water Quality Standards, 58.01.02
Docket No. 58-0102-1501**

**Negotiated Rulemaking Summary
Idaho Code § 67-5220(3)(f)**

The purpose of this rulemaking is to add language to the Idaho Water Quality Standards that is consistent with the federal regulations for designating and revising uses assigned to waterbodies, providing basis for guidance on the use designation/revision process.

Key information considered by DEQ was provided by the public during the negotiated rulemaking process. Members of the public participated in the negotiated rulemaking process by attending the meetings and by submitting written comments. All comments received during the negotiated rulemaking process were considered by DEQ when making decisions that resulted in drafting the rule.

The negotiated rule drafts contain revisions made based on meeting discussions and review of written comments received. At the conclusion of the negotiated rulemaking process, DEQ formatted the final rule draft for publication as a proposed rule in the Idaho Administrative Bulletin. The negotiated rulemaking record, which includes the negotiated rule drafts, written public comments, and documents distributed during the negotiated rulemaking process, is available at www.deq.idaho.gov/58-0102-1501.

DEQ elected not to make certain rule revisions that were suggested in written comments received. Responses to those comments are provided below.

EPA suggested DEQ add language to the rule which included language on highest attainable use. Specifically they suggested DEQ add a new subsection to include the following language: "When adopting a new or revised designated use based on a required uses attainability analysis, the Department shall also adopt the highest attainable use." At the time of the negotiated rulemaking, the rule language EPA proposed related to the definition of highest attainable use and the suggested addition of rule language related to highest attainable use in the use attainability analysis (UAA) process was still proposed federal language. DEQ provided comments on the proposed federal rule. DEQ believes the federal highest attainable use provisions as proposed, are unclear, inconsistent with the CWA and do not reflect the way many states, including Idaho, view aquatic life uses. Since the federal rule has not been finalized, DEQ does not at this time know if EPA has modified the rule in response to comments. Therefore, at this time DEQ does not believe this language should be incorporated.

At Subsection 102.01(a)(iv), EPA suggested that DEQ add additional language stating that if economic factors were used in determining that appropriate beneficial uses were applied to a water body, then a UAA shall be performed. The language in Subsection 102.01(a)(iv) is a reiteration of Idaho Code § 39-3604, and it would take a legislative action to change the language in the code. In addition, DEQ felt this additional language was unnecessary since language proposed by DEQ at Subsection 102.02(a)(vi) already indicates that removing a use because of economic impacts would be part of a UAA. .

Idaho Conservation League (ICL) requested additional language to be added stating that existing uses are protected in private and man-made waters. The water quality standards already contain a number of provisions that make it clear that existing uses must be protected including, but not limited to, Subsections 050.02.b, 051.01, 052.07 and 080.01.b. DEQ does not believe it is necessary to reiterate the statement in this rulemaking

ICL requested that DEQ define substantial and widespread social and economic impact and provide a framework for evaluating this in Subsection 102.02(a)(vi). This language is a direct reflection of 40 CFR 131.10(g)(6). EPA has dedicated significant resource to defining substantial and widespread social and economic impact and produced policy and guidance addressing this. More information may be located at <http://water.epa.gov/scitech/swguidance/standards/economics/>.

ICL suggested that language at Subsection 102.02(d) was a restatement of the definition of UAA and was unnecessary. While the language is redundant, it is critical to the understanding and meaning of the section. Therefore DEQ retained the language.

ICL suggested that the current proposed language at Subsection 102.02(e)(i) gives the impression that a UAA is not required when DEQ designates uses which include any aquatic life or recreational uses. This is correct; DEQ does not intend to do UAAs when designating waterbodies for the first time for aquatic life or recreational uses. DEQ does intend to do UAAs when designating a waterbody for a use that requires lower water quality criteria than previous designated uses required.

ICL suggested an additional section be added to include language stating that all UAAs will be reviewed every three years. DEQ did not add this language because it will only be revisiting UAAs that have removed aquatic life or recreation uses, which is what is required under the Clean Water Act (CWA) regulations. UAAs which leave in place some aquatic life or recreation use will not be reviewed every three years.

Idaho Water Users Association (IWUA) suggested DEQ add rule language requiring written permission from the owners/operators of man-made waterways for discharge. This language is not within DEQ's purview.

IWUA suggested the term "nonpoint source control" in Subsection 102.01(a)(vii) is problematic. DEQ did not change this language as it is directly from 40 CFR 131.10(d). This term does not require nonpoint source controls, but instead only indicates when uses are deemed attainable.

IWUA suggested the terms "waste," "waste transport," "waste assimilation," and "water body" should be defined. This language is directly from 40 CFR 131.10(a). DEQ did not further define these terms.

IWUA suggested DEQ clarify who incurs the cost of a UAA. Generally, while each situation is unique, DEQ intends the cost of a UAA be incurred by the party seeking the use change.

IWUA suggested that the use of the term "water conservation requirements" in Subsection 102.02(a)(ii) was problematic. DEQ did not revise this language as it is directly from 40 CFR 131.10(g)(s). This language does not establish or require the implementation of any water conservation requirements.

IWUA suggested that the use of the term "more stringent" in Subsection 102.02(a)(vi) was problematic. This language is directly from 40 CFR 131.10(g)(6). When controls are required that are indeed more stringent than those defined in sections 301(b) and 306 of the CWA and result in substantial and widespread social and economic harm, then the waterbody and uses qualify for a UAA.