

IPDES Negotiated Rulemaking

Response to Comments

Docket 58-0125-1401, Feb 6th Comment Deadline

This document provides a summary of comments received regarding items presented in the January 23rd rulemaking meeting.

Discussion Paper 1 – Incorporation by Reference

DEQ Update to Discussion Paper 1: DEQ is proposing not to incorporate by reference, Subpart G (40 CFR 125.56 - 40 CFR 125.68 Criteria for Modifying Secondary Treatment Requirements).

Rationale: Subpart G is not applicable to Idaho because 40 CFR 125.9(a) States that this subpart of the CFR pertains to, "...discharge into ocean waters or saline estuaries."

Commenter: Idaho Mining Association (IMA)

Comment 1: IMA generally supports the "hybrid" approach recommended by IDEQ.

DEQ Response 1: Thank you for the comment.

Comment 2: Since IDEQ has not yet identified those Idaho specific rules that IDEQ will propose, it is difficult to provide any definitive comments to those federal rules which will be incorporated by reference absent an evaluation of the IPDES rule.

DEQ Response 2: The specific list of federal rules being proposed for incorporation by reference is available in the IPDES Discussion Paper #1, which is posted on the DEQ website at: <http://www.deq.idaho.gov/58-0125-1401>.

Comment 3: Is IDEQ going to develop an Idaho specific rule to authorize issuance of general stormwater permits similar to 40 CFR 122.28? If so, IMA would be interested in reviewing this rule. IMA would be concerned if IDEQ intends to issue all stormwater permits as individual permits and not a general permit.

DEQ Response 3: DEQ intends to develop Idaho specific rules for general stormwater permits through the negotiated rulemaking process.

Comment 4: First there is currently some confusion as to which stormwater permit (construction or MSGP) is required for initial exploration and development type work at a new mine site. IMA believes it should be only subject to one stormwater permit throughout the life of a mine. IMA expects IDEQ to administer the IPDES program to allow such a result.

Comment 5: When IDEQ assumes responsibility to administer the IPDES program, IMA will expect the agency to ensure that inactive mines that are fully reclaimed are no longer subject to the permitting program.

DEQ Response 4 and 5: DEQ will strive to develop and implement permitting rules which are as stringent as federal regulations, but not more stringent or broader in scope.

Commenter: Idaho Association of Commerce and Industry (IACI)

Comment 1: IACI supports the "hybrid" approach recommended by the Department in the Incorporate Pertinent NPDES Rules by Reference document... As stated in earlier forums, IACI supports the Department providing as much flexibility as possible in implementing the IPDES program consistent with federal and state law... At this time, IACI has no specific comments on the NPDES rules that the Department proposes to incorporate by reference.

DEQ Response 1: Thank you for the comment.

Comment 2: Our membership needs to understand the Idaho specific rules that the Department will propose. There are a number of EPA permits (stormwater and CAFO as examples) that IACI believes need revision. It would be helpful for the Department to explain its plans to create such permits and associated rules.

DEQ Response 2: DEQ will develop Idaho-specific permitting rules during the upcoming negotiated rulemaking meetings. The specific list of federal rules being proposed for incorporation by reference are available in the IPDES Discussion Paper #1, which is posted on the DEQ website at: <http://www.deq.idaho.gov/58-0125-1401>.

Commenter: Environmental Protection Agency (EPA)

Comment 1: The EPA supports DEQ's approach to incorporate by reference to the degree possible for the reasons DEQ cited including cost effectiveness and ensuring regulations meeting federal regulatory requirements.

DEQ Response 1: Thank you for the comment.

Commenter: Idaho Conservation League (ICL)

Comment 1: A key aspect of understanding the program will be providing a single set of rules for people to consult. To this end, we believe that reprinting all of the necessary NPDES rules into the Idaho rules is the best way to proceed... We believe that the best possible path forward if for Idaho to adopt whatever federal language it needs to and to craft whatever unique Idaho language it needs to and then to print the entire text of this State and Federal amalgam into Idaho's IDAPA Rules so that it can be read as a single document.

DEQ Response 1: As presented during the January 23, 2015 negotiated rulemaking meeting, DEQ believes that due to printing costs and potential transcription errors, incorporating by reference, the specific list of NPDES rules presented in the IPDES Discussion Paper #1, will be more accurate and cost effective for Idaho.

Program Analysis

Commenter: Environmental Protection Agency (EPA)

Comment 1: The EPA suggests the Idaho Department of Environmental Quality re-evaluate the model to incorporate the permittees covered under the EA's general storm water permits, the Construction General Permit (CGP) and the Multi-Sector General Permit (MSGP). CGP and

MSGP permittee data are currently not in the EPA's Integrated Compliance Information System (ICIS) database. Rather, ICIS only contains storm water data for those facilities that were inspected. // The EPA queried these databases to capture active sites and estimate the number of permittees covered. This search revealed permittees covered under the CGP are 1,200, the MSGP are 280 and 165 permittees have Certification for No Exposure. The estimated total number of storm water discharges regulated under the CGP and MGP are 1,645 versus DEQ's model estimate of 301 permittees.

DEQ Response 1: DEQ appreciates EPA providing updated estimates of the number of permittees covered under the CGP and MSGP. These updated values will be used in place of the original EPA-provided number of 301 to re-evaluate the resources needed to fully implement the program.

Comment 2: Page 16, Table 9 cont., Non-permitted facilities. The default value in the model assumed complaint investigations for non-permitted would be three times the number of permitted facilities. In EPA experience, applying this multiplier to general permits overestimates the number of non-permittee facility complaint investigations.

DEQ Response 2: This update to the model has been made.

Comment 3: The EPA suggests the following changes to better align with EPA's current experience and practices for NPDES permitting, inspections, compliance, and enforcement in Idaho.

1. Page 14, Table 8, Minor Facilities DMRs are submitted monthly not quarterly as assumed in the report.

DEQ Response 3: This update has been made to the model.

Comment 4: Page 17, Table 9 cont., Violation Response, Administrative Orders and Penalty, General permittees, Storm water. The EPA reviewed records of formal enforcement actions, such as administrative order and penalties, and found that the model underestimates the percentage of facilities affected as compare to EPA's experience in Idaho. The EPA's R10 experience in Idaho shows 50% of minors and 20% of general permittees with follow up response result in administrative orders and/or penalties.

DEQ Response 4: This update has been made to the model.

Comment 5: Page 11, the document states the EPA currently employs 13 to 14 permit writing staff; however, staff work on permitting activities in R10 states (Alaska, Washington, and Oregon) in addition to their work on Idaho permits. This summary neglects to include staff dedicated to NPDES inspections, compliance and enforcement. The EPA estimates 8 to 9 FTE work on inspections, compliance, and enforcement in Idaho alone. Overall, the EPA believes that comparison to R10 staffing levels is difficult for a variety of reason including R10 utilizing the EPA headquarters and contractor assistance for some activities, and unquantified contributions by subject experts throughout the EPA.

DEQ Response 5: While not addressed on page 11 of the program analysis, DEQ did include staff dedicated to NPDES inspections, compliance and enforcement; DEQ presented this during the Jan 23rd rule making presentation. Page 19 of the program analysis provides a rough estimate of current EPA resources at work in this area using the information provided by EPA during the development of the report. As a result, EPA's estimate of 8 to 9 FTEs in the area of inspections,

compliance, and enforcement aligns with the report's projected workload of 14,254 hours or 8 FTE's needed in the compliance, inspection, and enforcement component of Idaho's NPDES program.

Commenter: Idaho Conservation League (ICL)

Comment 1: We are concerned that DEQ's analysis of staffing needs significantly underestimates the number of staff that will be required to implement and administer the IPDES program.

DEQ seems to have undertaken a thoughtful analysis of the various necessary components necessary to run the IPDES program: Administration, Permitting and Compliance. Utilizing this analysis to come to an accurate estimation of staffing needs hinges on correctly gauging the number of IPDES permits that will be issued and the amount of work required to service each permit.

We are concerned that the DEQ has significantly underestimated the number of *current* NPDES permits that have been issued in Idaho. As a result, DEQ has significantly underestimated the number of DEQ staff that will be required to maintain and service these current permit.

DEQ Response 1: DEQ acknowledges that the original data provided and used in the model estimate was not accurate (see response to EPA Comment 1). The model has been updated and addresses more up to date information regarding the overall number of applicants covered under the various storm water general permits.

Comment 2: Also of concern is the fact that the DEQ estimates do not factor in any growth in the number of permit applications.

The pursuit of NPDES primacy has, in part, been stoked by the supposed need to ensure that businesses that want to locate in Idaho need to have access to prompt permitting. This argument is predicated on the belief that new businesses are going to come to Idaho and apply for IPDES permits. DEQ, however, assumes in its analysis that the number of permits will stay the same and that no new industries will apply for IPDES. This inconsistency needs to be corrected and the number of permits that Idaho services needs to be projected as growing through time – and staffing need to be increased to reflect this.

DEQ Response 2: DEQ acknowledges the concern shown regarding future staffing and permitting in Idaho. The program analysis developed for and commented on here was done to determine the starting point for discussions regarding fees. While it is quite probable that there will be growth in the permitting realm, a robust and fair fee structure should account for growth in this program by supporting additional full time equivalents to cover workload as new permittees come to Idaho.

Comment 3: In addition to new industries locating into Idaho, there is likely to be new permits sought by industry already in Idaho. For instance, there is currently very little participation in the CAFO General NPDES Permit. However, within the last several years there have been a number of cases of CAFOs being penalized by the ISDA for illegal discharges to waterways. It seems likely that the DEQ will be obligated to require that some subset of the CAFOs in Idaho

apply for and operate pursuant to an IPDES permit in the future. These considerations need to be accounted for in estimations of future staffing levels.

Also related to servicing the CAFOs in Idaho, even though no CAFOs currently have NPDES permits, the DEQ will have to conduct a significant amount of compliance and related review and investigations. This need is not reflected in the current analysis because the fact that there are zero CAFO NPDES permits in Idaho means that the calculations to estimate the work needed to inspect them returns a zero figure. There are hundreds of CAFO in Idaho and DEQ will be responsible for reviewing operations and insuring compliance – even if they are just ensuring their ‘zero-discharge’ no IPDES required status. This is going to require a lot of staff time and this oversight needs to be corrected and staff time needs to be budgeted to service this important industry.

DEQ Response 3: DEQ has updated the model estimates based on more current information and believes that EPA’s estimate (see EPA Comment 5) is accurate. At this time, DEQ believes that the overall number of FTEs proposed for the full program will be sufficient, but there may be a different allocation of personnel between the permitting and CIE components.

Comment 4: As noted in the DEQ analysis, the EPA is currently struggling to re-issue permits in a timely manner and there currently exists a significant ‘backlog’ of out-of-date permits. The DEQ analysis reports that 35% of all NPDES permits in Idaho are out of date.

Per the DEQ report, the EPA appears to have 13-14 FTE permit writers servicing Idaho’s permit needs – yet this backlog continues to exist. So it seems logical to conclude that 13-14 permit writers are not sufficient to addressing the existing pool of Idaho permits, and there is absolutely no opportunity for them to also somehow address new industries moving to Idaho.

In its analysis, DEQ concludes that it will need 11 permit writers. This estimate seems divorced from the reality that we can observe by looking at EPA’s current staff needs.

DEQ Response 4: EPA and DEQ have discussed the current backlog as well as the presumption in the program analysis that all 13-14 permits writers work on Idaho permits (See EPA comment 5). EPA’s current staff in permitting does not work solely on Idaho permitting although EPA did not provide a specific listing of the number of FTEs allocated to work on Idaho permitting needs. While it is useful as a rough gauge of determining if the model estimations are reflective of the current reality, it is not always possible to make a straight across comparison between EPA’s current program, which is divided into separate offices (NPDES Permits Unit and NPDES Compliance Unit), to Idaho’s proposed program build out.

DEQ acknowledges the concern expressed here that there will be a reduced ability of the state to keep up on permitting needs. To address this issue, DEQ intends to develop a permitting process that is more streamlined than EPA’s current process which will reduce the amount of time spent on administrative tasks and allow permit writers more time to deal with the actual development of permits.

Comment 5: On the topic of whether or not permit writers should be centralized in the State office or decentralized out to the regions and whether permit writers should be specialized for certain types of dischargers or act as generalists... We believe that the permit writers should be

specialized. This is likely to result in them being more efficient and writing more consistent permits. We also believe that the overall program will be stronger and better managed if the program is centrally located in the State office. We believe that this will allow individual staff to benefit from being co-located with other personnel working on similar issues, have better access to support and technical and legal assistance.

DEQ Response 5: Thank you for the comment.

Comment 6: We are concerned that DEQ has underestimated the number of hours that are required to undertake certain types of activities. For instance, the DEQ estimates that it will take 16 hours to conduct a Complaint Investigation at a Major Facility with an individual. We do not believe that this is an accurate estimate of the time required. Similarly, DEQ estimates that other sorts of facilities will be investigated in 16 hours. And, similarly, we do not think this is realistic.

DEQ Response 6: DEQ has updated the model based on more recent and accurate information provided by EPA.

Comment 7: As we look through the entire list of compliance related activities, all of them seem to significantly underestimate the time required to do the complete activity.

No where is this underestimating more apparent than the section of the analysis related to Violation Response Civil and Criminal Referral. While DEQ seems to have better estimates of the ‘effort required’ for activities listed here, the DEQ estimates very, very small ‘number of facilities affected.’ So, while DEQ estimates that it will take 1,000 hrs of staff time to address a civil referral – it also estimates that only 0.001 facilities per year will require this effort. As a result, the analysis estimates that only 1 (one) hour per year will need to be staffed for this activity.

Indeed, if you add up *all* of the hours needed for civil and criminal referral for *all* of the permits issued in the entire state, the DEQ analysis reports that DEQ will only need to staff this for 3 (three) hours per year. This makes no sense. DEQ is creating an IPDES program that has no capacity (or only 3 hrs per year of capacity) to undertake civil or criminal referrals. This is a huge oversight.

DEQ Response 7: Please refer to EPA Comment 4 where EPA provides a more realistic and accurate percentage of complaint investigation and violation response. DEQ has updated the model to reflect this new information. Additionally, DEQ program analysis recommended using 3 FTEs in the Enforcement component as well as hiring a deputy attorney general (not included in the model) to help with enforcement.

Draft Rule Language – Confidential Business Information

Commenter: Environmental Protection Agency (EPA)

Comment 1: Part 01. Confidentiality Claim, references Section 9-337 of the Idaho Code, which is a compilation of definitions. The proposed language uses the term “submitter” which is not included among the definitions in Idaho Code 9-337. The EPA suggests a definition for or clarification with regard to the term “submitter” and whom may make claims of confidentiality. NPDES regulation 40 CFR 122.22 details signatory requirements and is applicable to state programs. The regulations identify person of authority who must sign NPDES permit-related documentation such as applications and discharge monitoring reports. DEQ should consider whether the “submitter” of confidential information must be a duly authorized representative for the permittee.

DEQ Response 1: The Clean Water Act, section 402(b)(2)(B), requires that states wishing to obtain approval of a state NPDES program must have authority to inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of the Clean Water Act. Section 308 authorizes EPA to gather information from persons other than just those that have authority to sign applications or other permit-related documents. The information submitted from such persons may include confidential information. Therefore, DEQ believes it can not limit the persons who can claim information is confidential to only those identified under 40 CFR 122.22.

Comment 2: Part 20. Trade Secret Claims, reference Section 9-342A of the Idaho Code, but at this time, this Section does not reference the Clean Water Act (CWA). The EPA understands the statute will be amended to incorporate CWA and NPDES requirements. This Section implies that claims of confidentiality apply only to “trade secrets” whereas the NPDES regulations at 40CFR122.7 do not specifically limit “confidential business information” to “trade secrets”. The EPOA recommends removing “as a trade secret” from the proposed rule language.

DEQ Response 2: Idaho Code section 9-342A does not apply only to trade secrets. Section 9-342A(1) provides that the documents listed, which include those documents required to be available to the public for state primacy over delegated or authorized federal programs, must be available to the public even if the record is otherwise exempt under the Idaho public records law. Idaho public records law provides exemptions from public disclosure for many categories of records beyond just trade secrets. Therefore, DEQ disagrees with EPA’s interpretation of Idaho Code Section 9-342A. However, DEQ has modified the confidentiality language to make it clear that a claim of confidentiality, including but not limited to a claim as to information claimed confidential as a trade secret, shall be denied with respect to IPDES permits and the other information required to be publically accessible.

Comment 3: Section 9-342(A)(7) states, “*the court may award reasonable costs and attorney’s fees to the if it finds the claim of confidentiality or the decision of the director of the department of environmental quality to provide records was frivolously pursued.*” 40 CFR 123.30 requires that a State “*provide an opportunity for judicial review in State Court of the final approval or denial of permits....that is sufficient to provide for, encourage, and assist public participation in the permitting process.*” It is possible that this section of the Idaho Code may infringe upon a person’s ability to comment upon a permit, etc.

DEQ Response 3: DEQ believes it is very unlikely that the discretionary authority of a court to award costs and attorney fees to a prevailing party in an appeal regarding whether a document is a trade secret exempt from disclosure when the court finds the claim or the Department’s decision was “frivolously pursued,” will discourage or infringe on a person’s ability to comment

on a permit.

Comment 4: Part 30. Denial, comports with the requirements of 40 CF 122,7(b) and (c) which are applicable to state programs. Subpart c. captures some information that cannot be deemed as confidential, but does not fully capture the requirements of 40CFR 122.21. The EPA suggest that subsection c. refer to 40 CFR 122.21, which is applicable to state programs, or regulations DEQ develops pertaining to application requirements.

DEQ Response 4: DEQ agrees and has added in a reference to DEQ's section 105 that addresses permit applications.

Comment 5: Subsection d. references 40 CFR 2.302 for the definition of effluent data. the EPA suggests DEQ consider incorporation of the regulation by reprinting the relatively short definition in the IPDES rule to eliminate the need to cross-reference to the federal regulation.

DEQ Response 5:The definition of effluent data in 40 CFR 2.302 is 8 paragraphs long. DEQ does not at this time believe it would be beneficial to include the definition in this section of the Rules.

Commenter: Idaho Conservation League (ICL)

Comment 1: Additional language needs to be added which clarifies that all documents, plans, schedules, monitoring data, reports etc. that are submitted to the agency pursuant to a requirement included in an IPDES permit will be made available to the public and any claim of confidentiality for such materials shall be denied.

This language is required because the currently proposed language fails to provide that materials submitted to the department, as a term of compliance with a discharge permit, are publicly available documents.

DEQ Response 1: Requests for information submitted to the agency will be handled under the public records law, and will be available for public review unless exempt from disclosure. While it is impossible at this point to know all the documents that might be required to be submitted under the conditions of a permit, DEQ believes it is unlikely that such information would be subject to an exemption from disclosure. Moreover, if the information required to be submitted fits into the broad category of "effluent data" it must be available to the public notwithstanding any claim the information is exempt from disclosure.
