

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 153

BY ENVIRONMENT, ENERGY, AND TECHNOLOGY COMMITTEE

AN ACT

1 RELATING TO WATER QUALITY; AMENDING SECTION 39-3601, IDAHO CODE, TO RE-  
2 VISE PROVISIONS OF LEGISLATIVE INTENT; AMENDING SECTION 39-3602, IDAHO  
3 CODE, TO DEFINE TERMS, TO REMOVE A DEFINITION AND TO REVISE A DEFINI-  
4 TION; AMENDING SECTION 39-3603, IDAHO CODE, TO PROVIDE A POLICY RELAT-  
5 ING TO TIER I, II AND III PROTECTIONS ASSOCIATED WITH WATER QUALITY, TO  
6 PROVIDE FOR IMPLEMENTATION, TO PROVIDE FOR ANTIDegradation REVIEWS AS-  
7 SOCIATED WITH THE ISSUANCE OF CERTAIN GENERAL PERMITS, TO PROVIDE THAT  
8 THE DEPARTMENT MAY PRESUME CERTAIN DISCHARGES ARE INSIGNIFICANT OR THAT  
9 CERTAIN POLLUTION CONTROLS ARE THE LEAST DEGRADING ALTERNATIVE IF SUP-  
10 PORTED BY THE PERMIT RECORD, TO PROVIDE FOR THE IDENTIFICATION OF TIER  
11 II WATERS, TO PROVIDE FOR THE DETERMINATION OF APPROPRIATE LEVELS OF  
12 PROTECTION, TO PROVIDE THAT THE DEPARTMENT SHALL DETERMINE WHETHER CER-  
13 TAIN ACTIVITIES OR DISCHARGES ARE INSIGNIFICANT, TO PROVIDE A GUIDELINE  
14 AND TO PROVIDE THAT THE DEPARTMENT MAY REQUEST ADDITIONAL INFORMATION;  
15 AMENDING SECTION 39-3623, IDAHO CODE, TO PROVIDE FOR THE APPROVAL OF  
16 SPECIFIED RULES; AND DECLARING AN EMERGENCY.  
17

18 Be It Enacted by the Legislature of the State of Idaho:

19 SECTION 1. That Section 39-3601, Idaho Code, be, and the same is hereby  
20 amended to read as follows:

21 39-3601. DECLARATION OF POLICY AND STATEMENT OF LEGISLATIVE IN-  
22 TENT. The legislature, recognizing that surface water is one of the state's  
23 most valuable natural resources, has approved the adoption of water quality  
24 standards and authorized the director of the department of environmental  
25 quality in accordance with the provisions of this chapter, to implement  
26 these standards. In order to maintain and achieve existing and designated  
27 beneficial uses and to conform to the expressed intent of congress to control  
28 pollution of ~~streams, lakes and other surface~~ navigable waters of the United  
29 States, the legislature declares that it is the purpose of this chapter to  
30 enhance and preserve the quality and value of the ~~surface water resources of~~  
31 navigable waters of the United States within the state of Idaho, and to de-  
32 fine the responsibilities of public agencies in the control, and monitoring  
33 of water pollution, and, through implementation of this chapter, enhance  
34 the state's economic well-being. In consequence of the benefits resulting  
35 to the public health, welfare and economy, it is hereby declared to be the  
36 policy of the state of Idaho to protect this natural resource by monitoring  
37 and controlling water pollution; to support and aid technical and planning  
38 research leading to the control of water pollution, and to provide financial  
39 and technical assistance to municipalities, soil conservation districts and  
40 other agencies in the control of water pollution. The director, in coopera-  
41 tion with such other agencies as may be appropriate, shall administer this  
42 chapter. It is the intent of the legislature that the state of Idaho fully

1 meet the goals and requirements of the federal clean water act and that the  
 2 rules promulgated under this chapter not impose requirements beyond those of  
 3 the federal clean water act.

4 SECTION 2. That Section 39-3602, Idaho Code, be, and the same is hereby  
 5 amended to read as follows:

6 39-3602. DEFINITIONS. Whenever used or referred to in this chapter,  
 7 unless a different meaning clearly appears from the context, the following  
 8 terms shall have the following meanings:

9 (1) "Applicable water quality standard" means those water quality  
 10 standards identified in the rules of the department.

11 (2) "Attainable" beneficial uses means uses that can be achieved by the  
 12 implementation of required effluent limits for point sources and cost-ef-  
 13 fective and reasonable best management practices for nonpoint sources.

14 (3) "Best management practice" means practices, techniques or measures  
 15 developed, or identified, by the designated agency and identified in the  
 16 state water quality management plan which are determined to be a cost-effec-  
 17 tive and practicable means of preventing or reducing pollutants generated  
 18 from nonpoint sources to a level compatible with water quality goals.

19 (4) "Board" means the board of environmental quality.

20 (5) "Control strategies" means cost-effective actions in TMDL imple-  
 21 mentation plans to control the discharge of pollutants that can reasonably  
 22 be taken to improve the water quality within the physical, operational, eco-  
 23 nomic and other constraints that affect individual enterprises and communi-  
 24 ties.

25 (6) "Degradation" or "lower water quality" means, for purposes of an-  
 26 tidegradation review, a change in a pollutant that is adverse to designated  
 27 or existing uses, as calculated for a new point source, and based upon moni-  
 28 toring or calculated information for an existing point source increasing its  
 29 discharge. Such degradation shall be calculated or measured after appropri-  
 30 ate mixing of the discharge and receiving water body.

31 (7) "Department" means the department of environmental quality.

32 (78) "Designated agency" means the department of lands for timber har-  
 33 vest activities, for oil and gas exploration and development and for mining  
 34 activities; the soil and water conservation commission for grazing activ-  
 35 ities and for agricultural activities; the transportation department for  
 36 public road construction; the department of agriculture for aquaculture;  
 37 and the department of environmental quality for all other activities.

38 (89) "Designated use or designated beneficial use" means those uses as-  
 39 signed to waters as identified in the rules of the department whether or not  
 40 the uses are being attained. The department may adopt subcategories of a  
 41 use.

42 (910) "Director" means the director of the department of environmental  
 43 quality, or his or her designee.

44 (101) "Discharge" means any spilling, leaking, emitting, escaping,  
 45 leaching, or disposing of a pollutant into the waters of the state. For the  
 46 purposes of this chapter, discharge shall not include surface water runoff  
 47 from nonpoint sources or natural soil disturbing events.

1 (112) "Existing use" means those surface water uses actually attained  
2 on or after November 28, 1975, whether or not they are designated uses. Ex-  
3 isting uses may form the basis for subcategories of designated uses.

4 (123) "Full protection, full support, or full maintenance of designated  
5 beneficial uses of water" means compliance with those levels of water qual-  
6 ity criteria listed in the appropriate rules of the department, or where  
7 there is no applicable numerical criteria, compliance with the reference  
8 streams or conditions approved by the director in consultation with the ap-  
9 propriate basin advisory group.

10 ~~(13) "Lower water quality" means a measurable adverse change in a chem-~~  
11 ~~ical, physical, or biological parameter of water relevant to a designated~~  
12 ~~beneficial use, and which can be expressed numerically. Measurable adverse~~  
13 ~~change is determined by a statistically significant difference between sam-~~  
14 ~~ple means using standard methods for analysis and statistical interpreta-~~  
15 ~~tion appropriate to the parameter. Statistical significance is defined as~~  
16 ~~the ninety-five percent (95%) confidence limit when significance is not oth-~~  
17 ~~erwise defined for the parameter in standard methods or practices.~~

18 (14) "General permit" means an NPDES permit issued by the U.S. environ-  
19 mental protection agency authorizing a category of discharges under the fed-  
20 eral clean water act or a nationwide or regional permit issued by the U.S.  
21 army corps of engineers under the federal clean water act.

22 (15) "Integrated report" means the consolidated listing and reporting  
23 of the state's water quality status pursuant to the federal clean water act.

24 (146) "National pollutant discharge elimination system (NPDES)" means  
25 the point source permitting program established pursuant to section 402 of  
26 the federal clean water act.

27 (157) "New nonpoint source activity" means a new nonpoint source ac-  
28 tivity or a substantially modified existing nonpoint source activity on or  
29 adversely affecting an outstanding resource water which includes, but is  
30 not limited to, new silvicultural activities, new mining activities and  
31 substantial modifications to an existing mining permit or approved plan, new  
32 recreational activities and substantial modifications to existing recre-  
33 ational activities, new residential or commercial development that includes  
34 soil disturbing activities, new grazing activities and substantial modifi-  
35 cations to existing grazing activities, except that reissuance of existing  
36 grazing permits, or grazing activities and practices authorized under an  
37 existing permit, is not considered a new activity. It does not include nat-  
38 urally occurring events such as floods, landslides, and wildfire including  
39 prescribed natural fire.

40 (168) "Nonpoint source activities" includes grazing, crop production,  
41 silviculture, log storage or rafting, construction, mining, recreation,  
42 septic systems, runoff from storms and other weather related events and  
43 other activities not subject to regulation under the federal national pol-  
44 lutant discharge elimination system. Nonpoint source activities on waters  
45 designated as outstanding resource waters do not include issuance of water  
46 rights permits or licenses, allocation of water rights, operation of diver-  
47 sions, or impoundments.

48 (179) "Nonpoint source runoff" means water which may carry pollutants  
49 from nonpoint source activities into the waters of the state.

1           (1820) "Outstanding resource water" means a high quality water, such  
2 as water of national and state parks and wildlife refuges and water of  
3 exceptional recreational or ecological significance, which has been so des-  
4 ignated by the legislature. It constitutes an outstanding national or state  
5 resource that requires protection from point source and nonpoint source ac-  
6 tivities that may lower water quality.

7           (1921) "Person" means any individual, association, partnership, firm,  
8 joint stock company, joint venture, trust, estate, political subdivision,  
9 public or private corporation, state or federal governmental department,  
10 agency or instrumentality, or any legal entity, which is recognized by law as  
11 the subject of rights and duties.

12           (202) "Point source" means any discernible, confined, and discrete  
13 conveyance including, but not limited to, any pipe, ditch, channel, tunnel,  
14 conduit, well, discrete fissure, container, rolling stock, concentrated  
15 animal feeding operation, or vessel or other floating craft, from which  
16 pollutants are, or may be, discharged. This term does not include return  
17 flows from irrigated agriculture, discharges from dams and hydroelectric  
18 generating facilities or any source or activity considered a nonpoint source  
19 by definition.

20           (213) "Pollutant" means dredged spoil, solid waste, incinerator  
21 residue, sewage, garbage, sewage sludge, munitions, chemical waste, bi-  
22 ological materials, radioactive materials, heat, wrecked or discarded  
23 equipment, rock, sand, silt, cellar dirt; and industrial, municipal and  
24 agricultural waste, gases entrained in water; or other materials which, when  
25 discharged or released to water in excessive quantities cause or contribute  
26 to water pollution. Provided however, biological materials shall not in-  
27 clude live or occasional dead fish that may accidentally escape into the  
28 waters of the state from aquaculture facilities.

29           (224) "Reference stream or condition" means one (1) of the following:

30           (a) The minimum biological, physical and chemical conditions necessary  
31 to fully support the designated beneficial uses; or

32           (b) A water body representing natural conditions with few impacts from  
33 human activities and which are representative of the highest level of  
34 support attainable in the basin; or

35           (c) A water body representing minimum conditions necessary to fully  
36 support the designated beneficial uses.

37 In highly mineralized areas or in the absence of such reference streams or  
38 water bodies, the director, in consultation with the basin advisory group  
39 and the technical advisers to it, may define appropriate hypothetical refer-  
40 ence conditions or may use monitoring data specific to the site in question  
41 to determine conditions in which the beneficial uses are fully supported.

42           (235) "Short-term or temporary activity" means an activity which is  
43 limited in scope and is expected to have only minimal impact on water quality  
44 as determined by the director. Short-term or temporary activities include,  
45 but are not limited to, maintenance of existing structures, limited road and  
46 trail reconstruction, soil stabilization measures, and habitat enhancement  
47 structures.

48           (246) "Silviculture" means those activities associated with the regen-  
49 eration, growing and harvesting of trees and timber including, but not lim-  
50 ited to, disposal of logging slash, preparing sites for new stands of trees

1 to be either planted or allowed to regenerate through natural means, road  
2 construction and road maintenance, drainage of surface water which inhibits  
3 tree growth or logging operations, fertilization, application of herbicides  
4 or pesticides, all logging operations, and all forest management techniques  
5 employed to enhance the growth of stands of trees or timber.

6 (257) "Soil and water conservation commission" means an agency of state  
7 government as created in section 22-2718, Idaho Code.

8 (268) "Soil conservation district" means an entity of state government  
9 as defined in section 22-2717, Idaho Code.

10 (279) "State" means the state of Idaho.

11 (2830) "State water quality management plan" means the state management  
12 plan developed and updated by the department in accordance with sections  
13 205, 208, and 303 of the federal clean water act.

14 (2931) "Subbasin assessment" means a document that describes a water-  
15 shed or watersheds for which a total maximum daily load is proposed, the  
16 water quality concerns, the status and attainability of designated uses and  
17 water quality criteria for individual water bodies, the nature and location  
18 of pollutant sources, past and ongoing pollutant control activities, and  
19 such other information that the director with the advice of the local water-  
20 shed advisory group determines is pertinent to the analysis of water quality  
21 and the development and implementation of a total maximum daily load.

22 (302) "Total maximum daily load (TMDL)" means a plan for a water body  
23 not fully supporting designated beneficial uses and includes the sum of the  
24 individual wasteload allocations for point sources, load allocations for  
25 nonpoint sources, and natural background levels of the pollutant impacting  
26 the water body. Pollutant allocations established through TMDLs shall be at  
27 a level necessary to implement the applicable water quality standards for  
28 the identified pollutants with seasonal variations and a margin of safety to  
29 account for uncertainty concerning the relationship between the pollutant  
30 loading and water quality standards.

31 (313) "~~Waters or water body" means all the accumulations of surface wa-~~  
32 ~~ter, natural and artificial, public and private, or parts thereof which are~~  
33 ~~wholly or partially within, flow through or border upon this state the navi-~~  
34 ~~gable waters of the United States as defined in the federal clean water act.~~

35 For the purposes of this chapter, water bodies shall not include municipal  
36 or industrial wastewater treatment or storage structures or private reser-  
37 voirs, the operation of which has no effect on waters ~~of the state.~~

38 (324) "Water pollution" is such alteration of the thermal, chemical,  
39 biological or radioactive properties of any waters of the state, or such dis-  
40 charge or release of any contaminant into the waters of the state as will or  
41 is likely to create a nuisance or render such waters harmful or detrimental  
42 or injurious to public health, safety or welfare or to domestic, commercial,  
43 industrial, recreational, aesthetic or other legitimate uses or to live-  
44 stock, wild animals, birds, fish or other aquatic life.

45 (335) "Water quality standards" are the designated uses of a water  
46 body and water quality criteria necessary to support those uses, and an an-  
47 tidegradation policy.

48 (346) "Watersheds" means the land area from which water flows into a  
49 stream or other body of water which drains the area. For the purposes of this

1 chapter, the area of watersheds shall be recommended by the basin advisory  
2 group described in section 39-3613, Idaho Code.

3 SECTION 3. That Section 39-3603, Idaho Code, be, and the same is hereby  
4 amended to read as follows:

5 39-3603. ~~GENERAL WATER QUALITY STANDARD AND ANTIDEGRADATION POLICY~~  
6 ~~AND IMPLEMENTATION.~~ (1) Policy.

7 (a) Maintenance of existing uses for all waters -- Tier I protection.  
8 The existing instream beneficial uses of each water body and the level  
9 of water quality necessary to protect those uses shall be maintained and  
10 protected.

11 (b) High quality waters -- Tier II protection. Where the quality of wa-  
12 ters exceeds levels necessary to support propagation of fish, shellfish  
13 and wildlife and recreation in and on the water, that quality shall be  
14 maintained unless the department finds, after full satisfaction of the  
15 intergovernmental coordination and public participation provisions  
16 of this chapter, and the department's planning processes, along with  
17 appropriate planning processes of other agencies, that lowering water  
18 quality is necessary to accommodate important economic or social de-  
19 velopment in the area in which the waters are located. In allowing such  
20 reductions in water quality, the department shall assure water quality  
21 adequate to protect existing uses fully.

22 (c) Outstanding resource waters -- Tier III protection. Where an out-  
23 standing resource water has been designated by the legislature that wa-  
24 ter quality shall be maintained and protected from the impacts of point  
25 and nonpoint source activities.

26 (2) Implementation.

27 (a) General permits. For general permits issued on or after July 1,  
28 2011, the department will conduct an antidegradation review, includ-  
29 ing any required Tier II analysis, at the time at which general permits  
30 are certified. For general permits that the department determines ad-  
31 equately address antidegradation, review of individual applications  
32 for coverage will not be required unless it is required by the general  
33 permit. For general permits that the department determines do not ad-  
34 equately address antidegradation, the department may conclude that  
35 other conditions, such as the submittal of additional information or  
36 individual certification at the time an application is submitted for  
37 coverage under a general permit, may be necessary in the general permit  
38 to provide reasonable assurance of compliance with the antidegradation  
39 policy. If supported by the permit record, the department may also  
40 presume that discharges authorized under a general permit are insignif-  
41 icant or that the pollution controls required in the general permit are  
42 the least degrading alternative as specified in the department's rules.

43 (b) Identification of Tier II waters. The department will utilize a wa-  
44 ter body by water body approach in determining where Tier II protection  
45 is appropriate in addition to Tier I protection. This approach shall be  
46 based on an assessment of the chemical, physical, biological and other  
47 information regarding the water body. The most recent federally ap-  
48 proved integrated report and supporting data will be used to determine  
49 the appropriate level of protection as follows:

1 (i) Water bodies identified in the integrated report as fully  
 2 supporting assessed uses will be provided Tier II protection.

3 (ii) Water bodies identified in the integrated report as not as-  
 4 essed will be provided an appropriate level of protection on a  
 5 case-by-case basis using information available at the time of a  
 6 proposal for a new or reissued permit or license.

7 (iii) Water bodies identified in the integrated report as not  
 8 fully supporting assessed uses will receive Tier I protection for  
 9 the impaired aquatic life or recreational use, except as follows:

10 1. For aquatic life uses identified as impaired for dis-  
 11 solved oxygen, pH or temperature, if biological or aquatic  
 12 habitat parameters show a healthy, balanced biological com-  
 13 munity is present, as described in the water body assessment  
 14 guidance published by the department, then the water body  
 15 shall receive Tier II protection for aquatic life.

16 2. For recreational uses, if water quality data show com-  
 17 pliance with those levels of water quality criteria listed  
 18 in the department's rules, then the water body shall receive  
 19 Tier II protection for recreational uses.

20 (iv) Special resource waters listed in the department's rules  
 21 shall be evaluated in the same fashion as all other waters.

22 (c) Tier II analysis for insignificant activity or discharge. The  
 23 department shall consider the size and character of an activity or dis-  
 24 charge or the magnitude of its effect on the receiving stream and shall  
 25 determine whether it is insignificant. If an activity or discharge is  
 26 determined to be insignificant, then no further Tier II analysis for  
 27 other source controls, alternatives analysis or socioeconomic justifi-  
 28 cation is required.

29 (i) The department shall determine insignificance when the pro-  
 30 posed change in an activity or discharge, from conditions as of  
 31 July 1, 2011, will not cumulatively decrease assimilative capac-  
 32 ity by more than ten percent (10%).

33 (ii) The department may request additional information from the  
 34 applicant in making a determination whether a proposed change in  
 35 an activity or discharge is insignificant.

36 SECTION 4. That Section 39-3623, Idaho Code, be, and the same is hereby  
 37 amended to read as follows:

38 39-3623. EFFECT OF RULES. Every rule promulgated within the authority  
 39 conferred in sections 39-3617 through 39-3622, Idaho Code, shall be of tem-  
 40 porary effect and shall become permanent only by enactment of statute at the  
 41 first regular session following adoption of the rule. Rules not approved in  
 42 the above manner shall be rejected, null, void and of no force and effect on  
 43 July 1, following submission of the rules to the legislature.

44 (1) The rules promulgated within the authority conferred in this act  
 45 and adopted by the board of health and welfare on January 31, 1990, and con-  
 46 tained in IDAPA 16.01.2003,31 and 16.01.2003,32 and 16.01.2053,01 through  
 47 16.01.2053,07, are hereby approved by the legislature.

48 (2) The rules promulgated within the authority conferred in this act  
 49 and adopted by the board of environmental quality on November 10, 2010, and

1 contained in IDAPA 58.01.02.010.71, 58.01.02.010.72, 58.01.02.051.03 and  
2 58.01.02.052.09 are hereby approved by the legislature.

3 SECTION 5. An emergency existing therefor, which emergency is hereby  
4 declared to exist, this act shall be in full force and effect on and after its  
5 passage and approval.