

Revisions to Proposed Rule for Board Consideration, Docket No. 58-0102-1001

The revisions made to the proposed rule are highlighted. Only those portions of the proposed rule containing revisions are included.

010. DEFINITIONS.

For the purpose of the rules contained in IDAPA 58.01.02, "Water Quality Standards," the following definitions apply: (4-11-06)

XX. Activity. For purposes of antidegradation review, an activity that causes a discharge to a water subject to the jurisdiction of the Clean Water Act.

04. Assigned Criteria. In order to conduct an antidegradation review, it must be known what criteria are assigned to protect the water body which may be affected by the proposed activity or discharge. Assigned criteria are those associated with the designated, presumed, and any existing uses from Section 100 of these rules. Criteria associated with beneficial uses from Section 100 of these rules. ()

18. Degradation or Lower Water Quality. For purposes of antidegradation review, degradation or lower water quality means a change in concentration of a pollutant that is measurable and adverse to beneficial designated or existing uses that may be made of the water, as calculated upon appropriate mixing of the discharge and receiving water. ()

236. Discharge. When used without qualification, any spilling, leaking, emitting, escaping, leaching, or disposing of a pollutant into the waters of the state. For purposes of antidegradation review, means "discharge" as used in Section 401 of the Clean Water Act. (8-24-94)()

35. Existing Activity or Discharge. An activity or discharge that has been previously authorized or did not previously require authorization. ()

45. Highest Statutory and Regulatory Requirements for Point Sources. All applicable effluent limits required by the Clean Water Act and other permit conditions. It also includes any compliance schedules or consent orders requiring measures to achieve applicable effluent limits and other permit conditions required by the Clean Water Act. ()

49. Impairment. ()

a. For the purpose of determining the appropriate level of antidegradation protection, impairment means: ()

i. For aquatic life uses, that two or more major biological groups such as fish, macroinvertebrates, or algae have been modified by human activities significantly beyond the natural range of the reference streams or conditions approved by the Director in consultation with the appropriate basin advisory group; and ()

ii. For recreational uses, non-compliance with those levels of water quality criteria listed in Sections 200, 210, 251, and 275 (where applicable). ()

b. The Department shall utilize the current version of the "Water Body Assessment Guidance," as published by the Idaho Department of Environmental Quality, as a guide to assist in making impairment decisions. ()

59. Measurable. Refers to the practical ability to detect change in water quality taking into account limitations in analytical technique and sampling variability. Because analytical techniques change and repeated sampling and application of statistics can enable detection of progressively smaller changes, the Department will generally consider measurable changes to be those that can be determined with ninety five percent (95%) confidence based on detection limits and precisions of standard methods of analysis. Because the Department recognizes that in some cases smaller changes may be significant to human health or aquatic life protection, the Department will in those cases consider calculated changes to be measurable. ()

65. New Activity or Discharge. An activity or discharge that has not been previously authorized. Existing activities or discharges not currently permitted or licensed will be presumed to be new unless the Director determines to the contrary based on review of available evidence. An activity or discharge that has previously taken place without need for a license or permit is not a new activity or discharge when first licensed or permitted. ()

(BREAK IN CONTINUITY OF SECTIONS)

052. IMPLEMENTATION.

The antidegradation policy shall be implemented as follows: ()

01. List of Waters Protected. All waters receive Tier I protection. Waters receiving Tier II protection will be identified using a water body by water body approach during the antidegradation review. The Department will not maintain a list of Tier I or II waters. Waters given Tier III protection are designated in law. ()

02. Restoration Projects. Changes in water quality may be allowed by the Department without an antidegradation review where determined necessary to secure long-term water quality improvement through restoration projects designed to trend toward natural characteristics and associated uses to a water body where those characteristics and uses have been lost or diminished. Restoration projects shall implement best management practices. ()

03. Emergency Actions. Nothing in the antidegradation policy is intended to apply to emergency response actions taken to protect human life or property, irrespective of any temporary or permanent change in water quality. ()

043. General Permits. For general permits issued on or after July 1, 2011, the Department will conduct antidegradation review, including a Tier II analysis, at the time at which general permits are certified. For general permits that the Department determines adequately address antidegradation, review of individual applications for coverage will not be required unless it is required by the general permit. For general permits that the Department determines do not adequately address antidegradation, the Department shall ensure that antidegradation is adequately addressed. To achieve this the Department may conclude that other conditions, such as the submittal of additional information or individual certification at the time an application is submitted for coverage under a general permit, are may be necessary in the general permit to provide reasonable assurance of compliance with the antidegradation policy. If supported by the permit record, the Department may also conclude that discharges authorized under a general permit are insignificant. ()

054. Initiation of Antidegradation Review. Review of degradation potential and application of the appropriate level of protection from degradation will be triggered by an application for a new or reissued permit or license. ()

065. Identification of Tier I and Tier II Waters. The Department will utilize a water body by water body approach in determining where Tier II protection is appropriate in addition to Tier I protection. This approach shall be based on an assessment of the chemical, physical, biological, and other information regarding the water body. The most recent federally approved Integrated Report and supporting data will be used to determine the appropriate level of protection as follows: ()

a. Water bodies identified in the Integrated Report as fully supporting assessed uses will be provided Tier II protection. ()

b. Water bodies identified in the Integrated Report as not assessed will be provided an appropriate level of protection on a case-by-case basis using information available at the time of a proposal for a new or reissued permit or license. ()

c. Water bodies identified in the Integrated Report as not fully supporting an assessed use will receive Tier I protection, except as follows: ()

i. For aquatic life uses listed only for one or more of the following causes: dissolved oxygen, nutrients, pH, sediment, or temperature, if biological data show or aquatic habitat parameters show a healthy, balanced biological community is present, as described in the "Water Body Assessment Guidance" published by the Idaho Department of Environmental Quality, then the water body shall receive Tier II protection for aquatic life. If these data are insufficient to determine a healthy, balanced biological community is present, then the water body will be provided an appropriate level of protection on a case-by-case basis using information available at the time of a proposal for a new or reissued permit or license. ()

(1) Impairment, then the water body shall receive Tier I protection for aquatic life; or ()

(2) No impairment, then the water body shall receive Tier II protection for aquatic life; or ()

(3) If biological data are insufficient to determine impairment, then the water body will be provided an appropriate level of protection on a case by case basis using information available at the time of a proposal for a new or reissued permit or license. ()

ii. For recreational uses, if water quality data show impairment compliance with those levels of water quality criteria listed in Sections 200, 210, 251, and 275 (where applicable), then the water body shall receive Tier II protection for recreational uses ()

[07. Tier I Review revised and relocated so that it follows Evaluation of Effect of an Activity or Discharge on Water Quality]

086. Evaluation of Effect of an Activity or Discharge on Water Quality. The Department will evaluate the effect on water quality for each parameter of concern pollutant. The Department will determine whether an activity or discharge results in an improvement, no change, or degradation of water quality. ()

a. Effect on water quality will be based on the calculated change in concentration in the receiving water as a result of a new or reissued permit or license. With respect to a discharge, this calculation will take into account dilution using appropriate mixing of the receiving water under critical conditions coupled with the design flow of the discharge. For a reissued permit or license, the calculated change will be the difference in water quality that would result from the activity or discharge as authorized in the current permit or license and the water quality that would result from the activity or discharge as proposed in the reissued permit or license. For a new permit or license, the calculated change will be the difference between the existing receiving water quality and water quality that would result from the activity or discharge as proposed in the new permit or license. ()

i. Current Discharge Quality. For parameters of concern pollutants that are currently limited, current discharge quality shall be based on limits in the current permit or license. For parameters of concern pollutants not currently limited, current discharge quality shall be based on available discharge quality data collected within five years of the application for a permit or license or other relevant information. ()

ii. Proposed Quality for an Existing Discharge. Future discharge quality shall be based on proposed permit limits. For parameters of concern pollutants not limited in the proposed permit or license, future discharge quality will be estimated from available discharge quality data since the last permit or license was issued accounting

for any changes in production, treatment or operation. For the proposed discharge of a new ~~parameter~~ pollutant or a proposed increased discharge of a ~~parameter~~ pollutant, future discharge quality will be estimated based on information provided by the applicant or other relevant information. ()

iii. ~~New Permit Limits for an Existing Discharge. When new permit limits are proposed for the first time for a parameter of concern pollutant in an existing discharge, then for purposes of calculating the change in water quality, any statistical procedures used to derive the proposed new limits will be applied to past the current discharge quality as well, where appropriate.~~ ()

iv. ~~Proposed Quality for a New Discharge. Future discharge quality shall be based on proposed permit limits. For parameters of concern pollutants not limited in the proposed permit or license, future discharge quality will be based on information provided by the applicant or other relevant information.~~ ()

b. ~~Receiving water quality will be the quality measured, or modeled as appropriate, immediately above the discharge for flowing waters and outside any Department authorized mixing zone for lakes and reservoirs.~~ ()

c. ~~Offsets. In determining the effect of an activity or discharge on water quality of Tier II or Tier III waters, the Department may take into account reductions in pollution from other sources that are tied to the proposed activity or discharge. These offsets in pollution must be upstream of the degradation in water quality due to the proposed activity or discharge and occur before the activity or discharge is allowed to begin. The applicant seeking a permit or license for an activity or discharge based on offsets will be held responsible for assuring offsets are achieved and maintained as a condition of their permit or license.~~ ()

d. ~~Measurable change. If a calculated change is not measurable, then it will be evaluated as no change.~~ ()

07. Tier I Review. Tier I review will be performed for all new or reissued permits or licenses. Existing uses and the water quality necessary to protect the existing uses must always be maintained and protected. No degradation or lowering of water quality may be allowed that would cause or contribute to violation of water quality criteria as calculated after authorized mixing of the discharge with the receiving water. Identification of existing uses and the water quality necessary for their protection will be based on all available information, including any water quality related data and information submitted during the public comment period for the permit or license. ()

a. ~~If a receiving water does not meet assigned criteria, then the Department shall ensure that an activity or discharge authorized by a new or reissued permit or license meets criteria adopted to protect and maintain existing beneficial uses and shall ensure that the activity or discharge complies with the provisions of Section 055 of these rules. In making this determination, the Department shall rely upon the presumption that, if the numeric criteria established to protect specific uses are met, then the existing beneficial uses they were designed to protect are protected.~~ ()

b. ~~If a receiving water meets or surpasses assigned criteria, then no change to an existing activity or discharge or commencement of a new activity or discharge may be allowed that would degrade ambient water quality so that it violates criteria established to protect beneficial uses.~~ ()

098. Tier II Analysis. A Tier II analysis will only be conducted for activities or discharges, subject to a permit or a license, that cause degradation. The Department may allow significant degradation of surface water quality that is better than assigned criteria only if it is determined to be necessary to accommodate important economic or social development in the area in which the waters are located. The process and standard for this determination are set forth below. ()

a. ~~Insignificant Activity or Discharge. The Department shall consider the size and character of an activity or discharge or the magnitude of its effect on the receiving stream and may shall determine that whether it is insignificant. If an activity or discharge is determined to be insignificant, then no further Tier II analysis, as set forth in Subsections 052.098.b., 052.098.c., and 052.098.d., shall be required.~~ ()

~~i. In no case will the~~ The Department shall determine insignificance when the proposed change in an activity or discharge, from conditions as of July 1, 2011, ~~will:~~ ()

(1) Will not increase ambient concentrations by more than ten percent (10%); ~~or and~~ ()

(2) Will not cumulatively decrease assimilative capacity by more than ten percent (10%). ()

ii. The Department reserves the right to request additional information from the applicant in making a determination a proposed change in an activity or discharge is insignificant. ()

b. Other Source Controls. In allowing any degradation of high water quality, the Department must assure that there shall be achieved in the watershed the highest statutory and regulatory requirements for all new and existing point sources and cost-effective and reasonable best management practices for all nonpoint source controls. In providing such assurance, the Department may enter together into an agreement with other State of Idaho or federal agencies in accordance with Sections 67-2326 through 67-2333, Idaho Code. ()

c. Alternatives Analysis. Degradation will be deemed necessary only if there are no reasonable alternatives to discharging at the levels proposed. The applicant seeking authorization to degrade high water quality must provide an analysis of alternatives aimed at selecting the best combination of site, structural, managerial and treatment approaches that can be reasonably implemented to avoid or minimize the degradation of water quality. To identify the least degrading alternative that is reasonable, the following principles shall be followed: ()

i. Controls to avoid or minimize degradation should be considered at the earliest possible stage of project design. ()

ii. Alternatives that must be evaluated ~~include (where appropriate), but are not limited to, as appropriate, are:~~ ()

(1) Relocation or configuration of outfall or diffuser; ()

(2) Process changes/improved efficiency that reduces pollutant discharge; ()

(3) Seasonal discharge to avoid critical time periods for water quality; ()

(4) Non-discharge alternatives such as land application; and ()

(5) Offsets to the activity or discharge's effect on water quality. ()

iii. The Department retains the discretion to require the applicant to examine specific alternatives or provide additional information to conduct the analysis. ()

iv. In selecting the preferred alternative the applicant shall: ()

(1) Rank all technologically feasible treatment alternatives by their cost effectiveness at pollutant reduction; ()

(2) Consider the environmental costs and benefits across media and between pollutants; and ()

(3) Select the least degrading option or show that a more degrading alternative is ~~environmentally or economically~~ justified based on Subsections 052.08.c.iv.(1) or 052.08.c.iv.(2) above. ()

d. Socioeconomic Justification. Degradation of water quality deemed necessary must also be determined by the Department to accommodate important economic or social development. Therefore, the applicant seeking authorization to degrade water quality must at a minimum identify the important economic or social development for which lowering water quality is necessary and should use the following steps to demonstrate this:

_____ ()

i. Identify the affected community; _____ ()

ii. Describe the important social or economic development associated with the activity; _____ ()

iii. Identify the relevant social, economic and environmental health benefits and costs associated with the proposed degradation in water quality for the preferred alternative. Benefits and costs that must be analyzed include, but are not limited to: _____ ()

(1) Economic benefits to the community such as changes in employment, household incomes and tax base; _____ ()

(2) Provision of necessary services to the community; _____ ()

(3) Potential health impacts related to the proposed activity; _____ ()

(4) Impacts to direct and indirect uses associated with high quality water, e.g., fishing, recreation, and tourism; and _____ ()

(5) Retention of assimilative capacity for future activities or discharges. _____ ()

iv. Factors identified in the socioeconomic justification should be quantified whenever possible but for those factors that cannot be quantified a qualitative description of the impacts may be accepted; an _____ ()

v. If the Department determines that more information is required, then the Department may require the applicant to provide further information or seek additional sources of information. _____ ()

e. Process. _____ ()

i. Analysis. The Department in cooperation with State of Idaho designated management agencies and/or federal agencies will collect information regarding the other source controls specified in Subsection 052.098.b. The applicant for a new or reissued permit or license is responsible for providing information pertinent to determining significance/insignificance of proposed changes in water quality and completing an alternatives analysis and socioeconomic justification as appropriate and submitting them to the Department for review. _____ ()

ii. Departmental review. The Department shall review all pertinent information and, after intergovernmental coordination, public notice and input, make a determination as to whether there is assurance that the other source controls specified in Subsection 052.098.b. shall be achieved, and whether degradation of water quality is necessary to accommodate important economic or social development. _____ ()

iii. Public Involvement. The Department will satisfy the public participation provisions of Idaho's continuing planning process, and, to the extent possible, public notice and review of antidegradation will be coordinated with existing 401 certification notices for public review. _____ ()

1009. Tier III - Outstanding Resource Waters (ORWs). ORWs are designated by the legislature. Subsection 052.4009 describes the nomination, public notice and comment, public hearing, and board review process for directing the Department to develop legislation designating ORWs. Only the legislature may designate ORWs. Once designated by the legislature, the ORWs are listed in these rules. _____ ()

a. Nominations. Any person may request, in writing to the board, that a stream segment be considered for designation as an Outstanding Resource Water. To be considered for ORW designation, nominations must be received by the board by April 1 or ten (10) days after the adjournment sine die of that year's regular session of the legislature, whichever is later, for consideration during the next regular session of the legislature. All nominations shall be addressed to: _____

Idaho Board of Environmental Quality
Department of Environmental Quality
Outstanding Resource Water Nomination
1410 N. Hilton
Boise, Idaho 83706-1255

The nomination shall include the following information: _____ ()

i. The name, description and location of the stream segment: _____ ()

ii. The boundaries upstream and downstream of the stream segment: _____ ()

iii. An explanation of what makes the segment a candidate for the designation; _____ ()

iv. A description of the existing water quality and any technical data upon which the description is based as can be found in the most current basin status reports; _____ ()

v. A discussion of the types of nonpoint source activities currently being conducted that may lower water quality, together with those activities that are anticipated during the next two (2) years, as described in the most current basin status reports; and _____ ()

vi. Any additional evidence to substantiate such a designation. _____ ()

b. Public Notice and Public Comment. The board will give public notice that one (1) or more stream segments are being considered for recommendation to the legislature as outstanding resource waters. Public notice will also be given if a public hearing is being held. Public comments regarding possible designation will be accepted by the board for a period of at least forty-five (45) days. Public comments may include, but are not limited to, discussion of socioeconomic considerations; fish, wildlife or recreational values; and other beneficial uses. _____ ()

c. Public Hearing. A public hearing(s) may be held at the board's discretion on any stream segment nominated for ORW designation. Public notice will be given if a hearing is held. The decision to hold a hearing may be based on the following criteria: _____ ()

i. One (1) or more requests contain supporting documentation and valid reasons for designation; _____ ()

ii. A stream segment is generally recognized as constituting an outstanding national resource, such as waters of national and state parks, and wildlife refuges; _____ ()

iii. A stream segment is generally recognized as waters of exceptional recreational or ecological significance; _____ ()

iv. The board shall give special consideration to holding a hearing and to recommending for designation by the legislature, waters which meet criteria found in Subsections 052.4009.c.ii. and 052.4009.c.iii.; _____ ()

v. Requests for a hearing will be given due consideration by the board. Public hearings may be held at the board's discretion. _____ ()

d. Board Review. The board shall review the stream segments nominated for ORW designation and based on the hearing or other written record, determine the segments to recommend as ORWs to the legislature. The board shall submit a report for each stream segment it recommends for ORW designation. The report shall contain the information specified in Subsection 052.4009.a. and information from the hearing record or other written record concerning the impacts the designation would have on socioeconomic conditions; fish, wildlife and recreational values; and other beneficial uses. The Department shall then prepare legislation for each segment that will be recommended to the legislature as an ORW. The legislation shall provide for the listing of designated segments in these rules without the need for formal rulemaking procedures, pursuant to Sections 67-5201, et seq., Idaho Code.

()

e. Designated Waters. Those stream segments designated by the legislature as ORWs are listed in Sections 110 through 160. ()

f. Restriction of Nonpoint Source Activities on ORWs. Nonpoint source activities on ORWs shall be restricted as follows: ()

i. The water quality of ORWs shall be maintained and protected. After the legislature has designated a stream segment as an outstanding resource water, no person shall conduct a new or substantially modify an existing nonpoint source activity that can reasonably be expected to lower the water quality of that ORW, except for conducting short term or temporary nonpoint source activities which do not alter the essential character or special uses of a segment, allocation of water rights, or operation of water diversions or impoundments. Stream segments not designated as ORWs that discharge directly into an ORW shall not be subject to the same restrictions as an ORW, nor shall the ORW mixing zone be subject to the same restrictions as an ORW. A person may conduct a new or substantially modify an existing nonpoint source activity that can reasonably be expected to lower the water quality of a tributary or stream segment, which discharges directly into an ORW or an ORW mixing zone, provided that the water quality of that ORW below the mixing zone shall not be lowered. ()

ii. After the legislature has designated a stream segment as an outstanding resource water as outlined in Subsection 052.4009.e., existing nonpoint source activities may continue and shall be conducted in a manner that maintains and protects the current water quality of an ORW. The provisions of this section shall not affect short term or temporary activities that do not alter the essential character or special uses of a segment, allocation of water rights, or operations of water diversions or impoundments, provided that such activities shall be conducted in conformance with applicable laws and regulations. ()

g. Restriction of Point Source Discharges to ORWs and Their Tributaries. The water quality of ORWs shall be maintained and protected. Point source discharges that may cause degradation to ORWs may be allowed only if they are offset by reductions in other discharges per Subsection 052.086.c. ()