Negotiated Rule Draft No. 3
Docket No. 58-0102-1001, Antidegradation Implementation Procedures
Dated May 25, 2010
Yellow shaded text indicates revisions made based on discussion held on May 12, 2010 and review of written comments received.

[Note: The following is largely proposed new rule language; pieces of language from the current rule are shaded in gray. Blue highlight denotes rule cross-references or placeholder text.]

051. ANTIDEGRADATION POLICY ~~AND IMPLEMENTATION~~.

01. Maintenance of Existing Uses for All Waters (Tier ~~1~~I Protection). The existing in stream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected. (7-1-93)

02. High Quality Waters (Tier ~~2~~II Protection). Where the quality of the waters exceeds levels necessary to support propagation of fish, shellfish and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the Department finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the Department's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the Department shall assure water quality adequate to protect existing uses fully. Further, the Department shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and cost-effective and reasonable best management practices for nonpoint source control. 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. (7-1-93)

03. Outstanding Resource Waters (Tier ~~3~~III Protection). Where high quality waters designated by the legislature constitute an outstanding national resource, such as waters of national and state parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected from the impacts of point and nonpoint source activities.

04. Thermal Discharges. In those cases where potential water quality impairment associated with a thermal discharge is involved, antidegradation shall be implemented consistent with Section 316 of the Clean Water Act.

0~~4~~5.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 ~~return~~ trend toward natural characteristics and associated uses to a water body where those characteristics and uses have been lost or diminished.

0~~5~~6.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.

~~**06. Implementation.**~~ **052. IMPLEMENTATION.** The antidegradation policy shall be implemented as follows.

~~a.~~01. **List of waters protected.** Because all waters receive Tier I protection and Tier II protection is parameter specific, the Department will not maintain a list of Tier I or II waters. Waters given SRW protection are designated in rule, ~~or~~ and waters given Tier III protection are designated in ~~rule~~ law.

~~b.~~02. **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 ~~for a discharge~~.

~~c.~~03. **Parameter by Parameter Approach.** To assess the actual effect on water quality of a discharge, the Department will evaluate each parameter in the discharge individually.

~~d.~~04. **Evaluation of effect of discharge on water quality.** For existing discharges this evaluation will consider all parameters for which there are permit limits or at least three years of discharge monitoring data. For new or increased discharges all parameters reasonably expected to be present in the discharge will be evaluated.

~~i.~~a. **Effect on water quality** is based on the calculated change in concentration as a result of the new or reissued permit or license after full mixing of the discharge and receiving stream under critical conditions. For reissued permits or licenses, the calculated change will be based upon a comparison of water quality for each parameter resulting from the discharge as currently permitted to the water quality for each parameter resulting from the discharge authorized by the reissued permit or license. For new permits, the calculated change will be based upon a comparison of water quality for each parameter resulting from the discharge authorized by the new permit to the existing receiving water quality. The Department will evaluate whether there is degradation on a parameter by parameter basis. This evaluation may show the effect to be an improvement, no change, or degradation.

~~ii.~~b. **Discharge quality.**

~~1.~~i. Current discharge quality shall be based on design flow and limits in the current permit or license, or the design flow and measured discharge quality during the most recent three years for parameters not currently limited. No evaluation will be made of parameters for which there are not monitoring data.

~~2.~~ii. Future discharge quality shall be based on design flow and proposed limits. For parameters not limited in the proposed permit or license, future discharge quality will be projected from concentrations measured in the discharge since the last permit or license was issued accounting for any changes in production, treatment or operation.

~~3.~~iii. If discharge limits are proposed for the first time for a parameter already present in an existing discharge, then for purposes of calculating the effect on water quality any statistical procedures used to derive the new limits will be applied to measured discharge quality as well.

~~iii.~~c. **Receiving stream quality** will be the quality measured immediately above the discharge.

~~iv.~~d. **Offsets.** Except for Tier I review, in determining the effect of a discharge on water quality, the Department may take into account reductions in pollution from other sources that are tied to the proposed discharge. These offsets in pollution must be upstream, result in documented improvement in water quality immediately above the point of discharge, and occur before the new or increased discharge is allowed to begin. The discharger seeking a new or increased discharge based on offsets will be held responsible

for assuring offsets are achieved and maintained as a condition of their permit or license to discharge.

~~v.~~**e.** **Measurable change.** If the calculated change is not measurable it will be evaluated as no change.

~~e.~~**05. Tier I Review.** Existing uses and the water quality necessary to protect the existing uses must always be maintained and protected, thus no degradation of water quality may be allowed that would cause or contribute to violation of water quality criteria.

~~i.~~**a.** **If a receiving waterbody does not meet assigned criteria**, the Department shall ensure that the discharge authorized by a new or reissued license or permit meets criteria adopted to protect and maintain beneficial uses and shall ensure that the discharge complies with the provisions of **section 055** of these rules.

~~ii.~~**b.** **If a receiving waterbody meets or surpasses assigned criteria**, no change in existing discharge or no new discharge may be allowed that would degrade ambient water quality below criteria established to protect beneficial uses.

~~f.~~**06. Tier II Analysis.** Water quality that is better than criteria may be degraded only if it is determined by the Department that allowing degradation is necessary to accommodate important economic and social development in the area in which the waters are located. The process and standard for this determination ~~is~~ are set forth below.

~~i.~~**a.** **Public Involvement**. The Department must satisfy the intergovernmental coordination and public participation provisions of the Department's continuing planning process in making this determination**.**

~~ii.~~**b.** **Other controls.** In allowing any degradation of 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 nonpoint source controls (Subsections 350.03 and 054.07 list best management practices for certain nonpoint source activities. Best management practices for activities not specified are, in accordance with Section 350, determined on a case-by-case basis). 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.

~~iii.~~**c.** **Insignificant Discharge.** The Department may consider the size and character of a discharge or the magnitude of its effect on the receiving stream and determine that it is insignificant and therefore does not warrant an alternatives analysis or socio-economic justification.

~~1.~~i. In no case will the Department determine insignificance when:

~~a.~~(1) The discharge will change ambient concentrations by X% or more cumulatively from conditions as of ?date?;

~~b.~~(2) The discharge is industrial or a major municipal discharge; or

~~c.~~(3) The effluent contains bioaccumulative toxins.

~~2.~~ii. Any determination of insignificance will be subject to public involvement and assurance other controls are in place as described above.

~~iv.~~**d.** **Alternatives analysis.** Degradation may be deemed necessary only if there are no feasible alternatives to discharging at the levels proposed. The applicant seeking authorization to degrade water quality, or the permitting authority for a general permit, must provide an analysis of alternatives aimed at selecting the best combination of site, structural, managerial and treatment approaches that can be feasibly implemented to prevent or minimize the degradation of water quality. In identifying the least degrading alternative that is feasible, the following principles shall be followed:

~~1.~~i. Controls to minimize degradation should be considered at the earliest possible stage of project design.

~~2.~~ii. Alternatives that must be evaluated include, but are not limited to:

~~a.~~(1) Relocation of outfall;

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

~~c.~~(3) Seasonal discharge to avoid critical time periods for water quality; and

~~d.~~(4) Non-discharge alternatives such as land application.

~~3.~~iii. The Department retains the discretion to require the applicant to examine specific alternatives or provide additional information to conduct the analysis.

~~4.~~iv. In selecting the preferred alternative the applicant shall:

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

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

~~c.~~(3) Select the least degrading option that is feasible or show that a more degrading alternative is socially and economically justified.

~~v.~~**e. Socio-economic 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, or the department for a general permit, 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:

~~1.~~i. Identify the affected community;

~~2.~~ii. Describe the important social or economic development associated with the project;

~~3.~~iii. Identify the relevant social, economic and environmental health benefits and costs associated with the proposed degradation in water quality for the preferred alternative and the least degrading alternative if it is not preferred. Benefits and costs that must be analyzed include, but are not limited to:

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

~~b.~~(2) Provision of necessary services to the community;

~~c.~~(3) Health benefits associated with minimizing pollution,;

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

~~e.~~(5) Retention of assimilative capacity for future discharges.

~~4.~~iv. Factors identified in the socio-economic justification should be quantified whenever possible but for those factors that cannot be quantified a qualitative description of the impacts may be accepted; and

~~5.~~v. If the department determines that more information is required, the department may require the applicant to provide further information or seek additional sources of information.

~~vi.~~**f. Process.**

~~1.~~i. **Analysis.** The applicant for a new or reissued permit to discharge must identify and submit to the Department a description of the highest statutory and regulatory requirements for new and existing point sources and cost-effective and reasonable best management practices for nonpoint source control. The applicant is also responsible for completing an alternatives analysis and socio-economic justification and submitting them to the Department for review.

~~2.~~ii. **Departmental review.** The Department shall review each Tier II analysis and, after intergovernmental coordination, public notice and input, make a determination as to whether the required point and nonpoint source control shall be achieved, and

whether degradation of water quality is necessary to accommodate important economic or social development.

~~3.~~iii. **Coordination of Public Notice.** To the extent possible public notice and review of antidegradation will be coordinated with existing notices for public review.

[Note: from here on the language is largely existing language from sections 056 and 055 and subsections of 400 and 350 they refer to. Changes are indicated by strikeout and underline]

~~g.~~**07. Tier III – Outstanding Resource Waters (ORW).** ORWs are designated by the legislature. Subsection 052.07 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.

~~i.~~**a. Nominations ~~for outstanding resource water designation~~**. 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:

~~1.~~i. The name, description and location of the stream segment;

~~2.~~ii. The boundaries upstream and downstream of the stream segment;

~~3.~~iii. An explanation of what makes the segment a candidate for the designation;

~~4.~~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;

~~5.~~v. A discussion of the types of nonpoint source activities currently being conducted that may ~~lower~~ degrade 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

~~6.~~vi. Any additional evidence to substantiate such a designation.

~~ii.~~**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 socio-economic considerations; fish, wildlife or recreational values; and other beneficial uses.

~~iii.~~**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:

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

~~2.~~ii. A stream segment is generally recognized as constituting an outstanding national resource, such as waters of national and state parks, and wildlife refuges;

~~3.~~iii. A stream segment is generally recognized as waters of exceptional recreational or ecological significance;

~~4.~~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 subsection **052.07.c.ii. and 052.07.c.iii.**;

~~5.~~v. Requests for a hearing will be given due consideration by the board. Public hearings may be held at the board's discretion.

~~iv.~~**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 **052.07.a.** and information from the hearing record or other written record concerning the impacts the designation would have on socio-economic 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 regulations without the need for formal rule-making procedures, pursuant to sections 67-5200, et seq., Idaho code.

~~v.~~**e. Designated waters**. Those stream segments designated by the legislature as ORWs are listed in sections 110 through 160.

~~vi.~~**f. Restriction of nonpoint source activities on ~~outstanding resource waters~~ ORWs**. Nonpoint source activities on ORWs shall be restricted as follows:

~~1.~~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.

~~2.~~ii. After the legislature has designated a stream segment as an outstanding resource water as outlined in subsection **052.07.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.

~~vii.~~**g. Restriction of point source discharges to ORWs and their tributaries.** New or increased point source discharges to ORWs may be allowed only if they are offset by reductions in other discharges per subsection **052.04.d**.

~~h.~~**08. Special Resource Waters (SRW).**

~~i.~~**a. Designations**. Waters of the state may be designated as ~~special resource waters~~ SRWs. Designation as a ~~special resource water~~ SRW recognizes at least one (1) of the following characteristics:

~~1.~~i. The water is of outstanding high quality, exceeding both criteria for primary contact recreation and cold water aquatic life;

~~2.~~ii. The water is of unique ecological significance;

~~3.~~iii. The water possesses outstanding recreational or aesthetic qualities;

~~4.~~iv. Intensive protection of the quality of the water is in paramount interest of the people of Idaho;

~~5.~~v. The water is a part of the national wild and scenic river system, is within a state or national park or wildlife refuge and is of prime or major importance to that park or refuge; or

~~6.~~vi. Intensive protection of the quality of the water is necessary to maintain an existing, but jeopardized beneficial use.

~~ii.~~**b. Designated waters**. Those waters of the state ~~determined to be special resource waters~~ designated as SRWs are listed in sections 110 through 160**.**

~~iii.~~**c. Restrictions of point source discharges to ~~special resource waters~~ SRWs and their tributaries.** Point source discharges to ~~special resource waters~~ SRWs and their tributaries shall be restricted as follows:

~~1.~~i. No new point source can discharge pollutants, and no existing point source can increase its discharge of pollutants above the design capacity of its existing wastewater treatment facility, to any water designated as a ~~special resource water~~ SRW or to a tributary of, or to the upstream segment of a ~~special resource water~~ SRW: if pollutants significant to the designated beneficial uses can or will ~~result in a reduction of the~~ degrade ambient water quality of the receiving SRW ~~special resource water as measured immediately below the applicable mixing zone~~.

~~2.~~ii. Except that new point sources can discharge, and existing point sources can increase its discharge above the design capacity of its existing wastewater treatment facility, resulting in increases in water temperatures and fluoride concentrations up to levels needed to protect designated beneficial uses in the Boise river between the bridge at Broadway avenue and river mile 50 (through Veteran's State Park).

Proposed New Definitions:

Assigned Criteria. In order to conduct an antidegradation review it must be known what criteria are assigned to protect the waterbody which would receive the proposed discharge. Assigned criteria are those associated with the designated, presumed, and any existing uses from section 100 of these rules.

Bioaccumulative Toxin. For purposes of this Chapter, bioaccumulative toxin means a chemical harmful to aquatic life or human health whose bioconcentration factor exceeds 300.

Degradation or Lower Water Quality. For purposes on antidegradation review, degradation or lower water quality means a change in water quality that is measurable and adverse to beneficial uses that may be made of the water, as calculated upon full mixing of the discharge and receiving water under critical conditions.

Existing discharge. Refers to a legal discharge of pollutants that is occurring, whether permitted or not, and all its constituent parameters.

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 following changes are established as practically un-measurable:

1. A change in temperature of less than 0.3°C
2. A change in dissolved oxygen of less than 0.2 ppm
3. A change in total phosphorus of less than 2 µg/l
4. For other parameters, the change that cannot be detected with 95% confidence using standard methods of analysis.

New Discharge. A discharge which has not occurred before. A new limit added to an existing permit for a pollutant already present in the discharge, or new regulation of an existing discharge, does not constitute a new discharge.

Permit or license. Means a permit or license for a Department regulated activity that may result in a discharge to surface water; or a federally issued permit or license for an activity that is subject to certification by the state under Section 401 of the Clean Water Act, including, for example, NPDES permits, dredge and fill permits, and FERC licenses.

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[Note: The following are excerpts of existing rule language showing ~~deletions~~ and additions.]

010. DEFINITIONS.
For the purpose of the rules contained in IDAPA 58.01.02, "Water Quality Standards," the following definitions apply

~~**49. Lower Water Quality**. A measurable and adverse anthropogenic change in a chemical, physical, or biological parameter of water relevant to a beneficial use, and which can be expressed numerically. Measurable change may be determined by a statistically significant difference using standard methods for analysis and statistical interpretation appropriate to the parameter. Statistical significance is defined as the ninety-five percent (95%) confidence limit when significance is not otherwise defined for the parameter in standard methods or practices.~~
~~(3-30-07)~~

64. Outstanding Resource Water (ORW). A high quality water, such as water of national and state parks and wildlife refuges and water of exceptional recreational or ecological significance, which has been designated by the legislature and subsequently listed in this chapter. ORW constitutes an outstanding national or state resource that requires protection from point and nonpoint source activities that may ~~lower~~ degrade water quality. (3-20-97)

…. Break in sequence

~~**051. ANTIDEGRADATION POLICY.**~~

~~**01. Maintenance of Existing Uses for All Waters**. The existing in-stream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected. (7-1-93)~~

~~**02. High Quality Waters**. Where the quality of the waters exceeds levels necessary to support propagation of fish, shellfish and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the Department finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the Department's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the Department shall assure water quality adequate to protect existing uses fully. Further, the Department shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and cost-effective and reasonable best management practices for nonpoint source control. 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. (7-1-93)~~

~~**03. Outstanding Resource Waters.** Where high quality waters constitute an outstanding national resource, such as waters of national and state parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected from the impacts of point and nonpoint source activities. (7-1-93)~~

052~~2~~3. PUBLIC PARTICIPATION.
In providing general coordination of water quality programs within each basin, in carrying out the duties of the Basin Advisory Groups as assigned, and in carrying out the provisions of Sections 39-3601, et seq., Idaho Code, the Director and the Basin Advisory Groups shall employ all means of public involvement deemed necessary, including the public involvement required under Section 67-2340 through Section 67-2347, Idaho Code, Section 051 of this rule or required in Chapter 52, Title 67, Idaho Code, and shall cooperate fully with the public involvement or planning processes of other appropriate public agencies. (3-20-97)

0534. BENEFICIAL USE SUPPORT STATUS.

In determining whether a water body fully supports designated and existing beneficial uses, the Department shall determine whether all of the applicable water quality standards are being achieved, including any criteria developed pursuant to these rules, and whether a healthy, balanced biological community is present. The Department shall utilize biological and aquatic habitat parameters listed below and in the current version of the "Water Body Assessment Guidance," as published by the Idaho Department of Environmental Quality, as a guide to assist in the assessment of beneficial use status. Revisions to this guidance will be made after notice and an opportunity for public comment. These parameters are not to be considered or treated as individual water quality criteria or otherwise interpreted or applied as water quality standards. The Department shall employ a weight of evidence approach in evaluating a combination of water quality data types (including, but not limited to, aquatic habitat and biological parameters), when such a combination of data are available, in making its final use support determination. (3-30-07)

01. Aquatic Habitat Parameters. These parameters may include, but are not limited to, stream width, stream depth, stream shade, measurements of sediment impacts, bank stability, water flows, and other physical characteristics of the stream that affect habitat for fish, macroinvertebrates or other aquatic life.(3-30-07)

02. Biological Parameters. These parameters may include, but are not limited to, evaluation of aquatic macroinvertebrates including Ephemeroptera, Plecoptera and Trichoptera (EPT), Hilsenhoff Biotic Index, measures of functional feeding groups, and the variety and number of fish or other aquatic life to determine biological community diversity and functionality. (3-20-97)

03. Use of Data Regarding pH, Turbidity, Dissolved Oxygen, and Temperature. In making use support determinations, the Department may give less weight to departures from criteria in Section 250 for pH, turbidity, dissolved oxygen, and temperature that are infrequent, brief, and small if aquatic habitat and biological data indicate to the assessor that aquatic life beneficial uses are otherwise supported. Unless otherwise determined by the Department, "infrequent" means less than ten percent (10%) of valid, applicable, representative measurements when continuous data are available; "brief" means two (2) hours or less; and "small" means conditions that avoid acute effects. Subsection **0534.03** only applies to use of this data for determination of beneficial use support status. Subsection **0534.03** does not apply to or affect the application of criteria for any other regulatory purpose including, but not limited to, determining whether a particular discharge or activity violates water quality standards. (3-30-07)

04. Natural Conditions. There is no impairment of beneficial uses or violation of water quality standards where natural background conditions exceed any applicable water quality criteria as determined by the Department, and such natural background conditions shall not, alone, be the basis for placing a water body on the list of water quality limited water bodies described in Section **0545**. (3-15-02)

05. Rigor, Quality and Relevance of Data. In making any use support determination, the Department shall consider the scientific rigor associated with the collection of samples or data (e.g., the scientific methods used to collect samples or data); the quality of measurements and/or analysis of the samples (e.g., methodology, instrumentation, accuracy, precision, and limits of detection where applicable); and the relevance of the data (e.g., the relationship to a water quality standard, beneficial use or cause of impairment, and how representative the samples or data are of the water body in question). (3-30-07)

0545. WATER QUALITY LIMITED WATERS AND TMDLS.

01. After Determining That Water Body Does Not Support Use. After determining that a water body does not fully support designated or existing beneficial uses in accordance with Section **0534**, the Department, in consultation with the applicable basin and watershed advisory groups, shall evaluate whether the application of required pollution controls to sources of pollution affecting the impaired water body would restore the water body to full support status. This evaluation may include the following: (3-20-97)

a. Identification of significant sources of pollution affecting the water body by past and present activities; (3-20-97)

b. Determination of whether the application of required or cost-effective interim pollution control strategies to the identified sources of pollution would restore the water body to full support status within a reasonable period of time; (3-20-97)

c. Consultation with appropriate basin and watershed advisory groups, designated agencies and landowners to determine the feasibility of, and assurance that required or cost-effective interim pollution control strategies can be effectively applied to the sources of pollution to achieve full support status within a reasonable period of time; (3-20-97)

d. If pollution control strategies are applied as set forth in this Section, the Department shall subsequently monitor the water body to determine whether application of such pollution controls were successful in restoring the water body to full support status. (3-20-97)

02. Water Bodies Not Fully Supporting Beneficial Uses. After following the process identified in Subsection **054<u>5</u>.01**, water bodies not fully supporting designated or existing beneficial uses and not meeting applicable water quality standards despite the application of required pollution controls shall be identified by the Department as water quality limited water bodies, and shall require the development of TMDLs or other equivalent processes, as described under Section 303(d)(1) of the Clean Water Act. A list of water quality limited water bodies shall be published periodically by the Department in accordance with Section 303(d) of the Clean Water Act and be subject to public review prior to submission to EPA for approval. Informational TMDLs may be developed for water bodies fully supporting beneficial uses as described under Section 303(d)(3) of the Clean Water Act, however, they will not be subject to the provisions of this Section.(3-20-97)

03. Priority of TMDL Development. The priority of TMDL development for water quality limited water bodies identified in Subsection **054<u>5</u>.02** shall be determined by the Director in consultation with the Basin Advisory Groups as described in Sections 39-3601, et seq., Idaho Code, depending upon the severity of pollution and the uses of the water body, including those of unique ecological significance. Water bodies identified as a high priority through this process will be the first to be targeted for development of a TMDL or equivalent process. (3-20-97)

04. High Priority Provisions. Until a TMDL or equivalent process is completed for a high priority water quality limited water body, new or increased discharge of pollutants which have caused the water quality limited listing may be allowed if interim changes, such as pollutant trading, or some other approach for the pollutant(s) of concern are implemented and the total load remains constant or decreases within the watershed. Interim changes shall maximize the use of cost effective measures to cap or decrease controllable human-caused discharges from point and nonpoint sources. Once the TMDL or equivalent process is completed, any new or increased discharge of causative pollutants will be allowed only if consistent with the approved TMDL. Nothing in this section shall be interpreted as requiring best management practices for agricultural operations which are not adopted on a voluntary basis. (3-20-97)

05. Medium and Low Priority Provisions. Until TMDLs or equivalent processes are developed for water quality limited water bodies identified as medium or low priority, the Department shall require interim changes in permitted discharges from point sources and best management practices for nonpoint sources deemed necessary to prohibit further impairment of the designated or existing beneficial uses. Nothing in this section shall be interpreted as requiring best management practices for agricultural operations which are not adopted on a voluntary basis. (3-20-97)

a. In determining the necessity for interim changes to existing activities and limitations upon proposed activities, the Department, in consultation with basin and watershed advisory groups, shall evaluate the water quality impacts caused by past regulated and unregulated activities in the affected watershed. (3-20-97)

b. Consideration of interim changes shall maximize the use of cost-effective and timely measures to ensure no further impairment of designated or existing uses. (3-20-97)

06. Pollutant Trading. Development of TMDLs or equivalent processes or interim changes under these

rules may include pollutant trading with the goal of restoring water quality limited water bodies to compliance with water quality standards. (3-20-97)

07. Idaho Agriculture Pollution Abatement Plan. Use of best management practices by agricultural activities is strongly encouraged in high, medium and low priority watersheds. The Idaho Agriculture Pollution Abatement Plan is the source for best management practices for the control of nonpoint sources of pollution for agriculture. (3-20-97)

~~**055. OUTSTANDING RESOURCE WATERS (ORW).**~~

~~**01. Nominations for Outstanding Resource Water Designation**. 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: (3-23-98)~~

~~**a.** The name, description and location of the stream segment; (7-1-93)~~

~~**b.** The boundaries upstream and downstream of the stream segment; (7-1-93)~~

~~**c.** An explanation of what makes the segment a candidate for the designation; (7-1-93)~~

~~**d.** 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; (7-1-93)~~

~~**e.** 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 (7-1-93)~~

~~**f.** Any additional evidence to substantiate such a designation. (7-1-93)~~

~~**02. 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 socio-economic considerations; fish, wildlife or recreational values; and other beneficial uses. (7-1-93)~~

~~**03. 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: (7-1-93)~~

~~**a.** One (1) or more requests contain supporting documentation and valid reasons for designation; (7-1-93)~~

~~**b.** A stream segment is generally recognized as constituting an outstanding national resource, such as waters of national and state parks, and wildlife refuges; (7-1-93)~~

c. A stream segment is generally recognized as waters of exceptional recreational or ecological significance; (7-1-93)

d. The Board shall give special consideration to holding a hearing and to recommending for designation by the legislature, waters which meet criteria found in Subsection 055.03.b. and 055.03.c.;(3-20-97)

e. Requests for a hearing will be given due consideration by the Board. Public hearings may be held at the Board's discretion. (7-1-93)

04. 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 055.01 and information from the hearing record or other written record concerning the impacts the designation would have on socio-economic 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 regulations without the need for formal rule-making procedures, pursuant to Sections 67-5200, et seq., Idaho Code.
(3-20-97)

05. Designated Waters. Those stream segments designated by the legislature as ORWs are listed in Sections 110 through 160. (7-1-93)

06. Restriction of Nonpoint Source Activities on Outstanding Resource Waters. Nonpoint source activities on ORWs shall be restricted as specified in Subsection 350.04. (7-1-93)

056. SPECIAL RESOURCE WATERS.

01. Designations. Waters of the state may be designated as special resource waters. Designation as a special resource water recognizes at least one (1) of the following characteristics: (7-1-93)

a. The water is of outstanding high quality, exceeding both criteria for primary contact recreation and cold water aquatic life; (4-5-00)

b. The water is of unique ecological significance; (7-1-93)

c. The water possesses outstanding recreational or aesthetic qualities; (7-1-93)

d. Intensive protection of the quality of the water is in paramount interest of the people of Idaho; (7-1-93)

e. The water is a part of the National Wild and Scenic River System, is within a State or National Park or wildlife refuge and is of prime or major importance to that park or refuge; or (4-5-00)

f. Intensive protection of the quality of the water is necessary to maintain an existing, but jeopardized beneficial use. (4-5-00)

02. Designated Waters. Those waters of the state determined to be special resource waters are listed in Sections 110 through 160. (4-5-00)

03. Restrictions of Point Source Discharges to Special Resource Waters and Their Tributaries. Point source discharges to special resource waters and their tributaries shall be restricted as specified in Subsection 400.01.b. (7-1-93)

057~~6~~. -- 059. (RESERVED).

…. Break in sequence

350. RULES GOVERNING NONPOINT SOURCE ACTIVITIES.

01. Implementation Policy. (7-1-93)

a. Nonpoint sources are the result of activities essential to the economic and social welfare of the state. The a real extent of most nonpoint source activities prevents the practical application of conventional wastewater treatment technologies. Nonpoint source pollution management, including best management practices, is a process for protecting the designated beneficial uses and ambient water quality. Best management practices should be designed, implemented and maintained to provide full protection or maintenance of beneficial uses. Violations of water quality standards which occur in spite of implementation of best management practices will not be subject to enforcement action. However, if subsequent water quality monitoring and surveillance by the Department, based on the criteria listed in Sections 200, 250, 251, 252, 253, and 254, indicate water quality standards are not met due to nonpoint source impacts, even with the use of current best management practices, the practices will be evaluated and modified as necessary by the appropriate agencies in accordance with the provisions of the Administrative Procedure Act. If necessary, injunctive or other judicial relief may be initiated against the operator of a nonpoint source activity in accordance with the Director's authorities provided in Section 39108, Idaho Code. In certain cases, revision of the water quality standards may be appropriate. (4-5-00)

b. As provided in Subsections 350.01.a. and 350.02.a. for nonpoint source activities, failure to meet general or specific water quality criteria, or failure to fully protect a beneficial use, shall not be considered a violation of the water quality standards for the purpose of enforcement. Instead, water quality monitoring and surveillance of nonpoint source activities will be used to evaluate the effectiveness of best management practices in protecting beneficial uses as stated in Subsections 350.01.a. and 350.02.b. (12-31-91)

02. Limitation to Nonpoint Source Restrictions. Nonpoint source activities will be subject to the following: (7-1-93)

a. Except as provided in Subsections 350.02.b. and 350.02.c., so long as a nonpoint source activity is being conducted in accordance with applicable rules, regulations and best management practices as referenced in Subsection 350.03, or in the absence of referenced applicable best management practices, conducted in a manner that demonstrates a knowledgeable and reasonable effort to minimize resulting adverse water quality impacts, the activity will not be subject to conditions or legal actions based on Subsections 400.01.b. or 080.01. In all cases, if it is determined by the Director that imminent and substantial danger to the public health or environment is occurring, or may occur as a result of a nonpoint source by itself or in combination with other point or nonpoint source activities, then the Director may seek immediate injunctive relief to stop or prevent that danger as provided in Section 39-108, Idaho Code. (7-1-93)

b. If the Director determines through water quality monitoring and surveillance that water quality criteria are not being met, or that beneficial uses are being impaired as a result of a nonpoint source activity by itself or in combination with other point and nonpoint source activities then: (3-3-87)

i. For an activity occurring in a manner not in accordance with approved best management practices, or in a manner which does not demonstrate a knowledgeable and reasonable effort to minimize resulting adverse water quality impacts, the Director may with appropriate inter-Departmental coordination. (3-3-87)

(1) Prepare a compliance schedule as provided in Section 39-116, Idaho Code; and/or (2-2-83)

(2) Institute administrative or civil proceedings including injunctive relief under Section 39-108, Idaho Code. (3-3-87)

ii. For activities conducted in compliance with approved best management practices, or conducted in a manner which demonstrates knowledgeable and reasonable effort to minimize resulting adverse water quality impacts, the Director may, with appropriate inter-Departmental coordination. (3-3-87)

(1) For those activities with approved best management practices as listed in Subsection 350.03 formally request that the responsible agency conduct a timely evaluation and modification of the practices to insure full protection of beneficial uses. (12-31-91)

(2) For all other nonpoint source activities which do not have approved best management practices as listed in Subsection 350.03, develop and recommend to the operator control measures necessary to fully protect the beneficial uses. Such control measures may be implemented on a voluntary basis, or where necessary, through appropriate administrative or civil proceedings. (12-31-91)

(3) If, in a reasonable and timely manner the approved best management practices are not evaluated or modified by the responsible agency, or if the appropriate control measures are not implemented by the operator, then the Director may seek injunctive relief to prevent or stop imminent and substantial danger to the public health or environment as provided in Section 39-108, Idaho Code. (3-3-87)

c. The Director may review for compliance project plans for proposed nonpoint source activities, based on whether or not the proposed activity will fully maintain or protect beneficial uses as listed in Sections 200, 250, 251, 252, and 253. In the absence of relevant criteria in those Sections, the review for compliance will be based on whether or not the proposed activity: (4-5-00)

i. Will comply with approved or specialized best management practices; and (3-3-87)

ii. Provides a monitoring plan which, when implemented, will provide information to the Director adequate to determine the effectiveness of the approved or specialized best management practices in protecting the beneficial uses of water; and (3-3-87)

iii. Provides a process for modifying the approved or site-specific best management practices in order to protect beneficial uses of water. (3-3-87)

d. For projects determined not to comply with those requirements, the plan may be revised and resubmitted for additional review by the Department. Any person aggrieved by a final determination of the Director may, within thirty (30) days, file a written request for a hearing before the Board in accordance with the Idaho Administrative Procedures Act. In all cases, implementation of projects detailed in a plan shall be conducted in a manner which will not result in imminent and substantial danger to the public health or environment. (3-3-87)

03. Approved Best Management Practices. The following are approved best management practices for the purpose of Subsection 350.02: (12-31-91)

a. "Rules Pertaining to the Idaho Forest Practices Act." IDAPA 20.02.01, as adopted by Board of Land Commissioners; (12-31-91)

b. Idaho Department of Environmental Quality Rules, IDAPA 58.01.06, "Solid Waste Management Rules"; (7-1-93)

c. Idaho Department of Environmental Quality Rules, IDAPA 58.01.03, "Individual/Subsurface Sewage Disposal Rules"; (7-1-93)

d. "Stream Channel Alteration Rules," IDAPA 37.03.07, as adopted by the Board of Water Resources; (7-1-93)

e. For the Spokane Valley Rathdrum Prairie Aquifer, "Rathdrum Prairie Sewage Disposal

Regulations," as adopted by the Panhandle District Health Department Board of Health and approved by the Idaho Board of Environmental Quality; (7-1-93)

f. "Rules Governing Exploration and Surface Mining in Idaho," IDAPA 20.03.02, as adopted by the Board of Land Commissioners; and (7-1-93)

g. "Dredge and Placer Mining Operations in Idaho," IDAPA 20.03.01, as adopted by the Board of Land Commissioners. (7-1-93)

h. "Rules Governing Dairy Waste," IDAPA 02.04.14, as adopted by the Department of Agriculture. (3-20-97)

~~**04. Restriction of Nonpoint Source Activities on Outstanding Resource Waters**. (12-31-91)~~

~~**a.** 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. (12-31-91)~~

~~**b.** After the legislature has designated a stream segment as an outstanding resource water as outlined in Subsection 055.05, 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. (3-20-97)~~

351. -- 399. (RESERVED).

…. Break in sequence

400. RULES GOVERNING POINT SOURCE DISCHARGES.

01. Implementation Policy. (7-1-93)

a. As provided for in Subsection 080.01, and Sections 200, 210, 250, 251, 252, 253, 275, and 400 for point source discharges, failure to meet general or specific water quality criteria is a violation of the water quality standards (4-5-00)

~~**b.** Except as noted in Section 400, no new point source can discharge pollutants, and no existing point source can increase its discharge of pollutants above the design capacity of its existing wastewater treatment facility, to any water designated as a special resource water or to a tributary of, or to the upstream segment of a special resource water: if pollutants significant to the designated beneficial uses can or will result in a reduction of the ambient water quality of the receiving special resource water as measured immediately below the applicable mixing zone. (8-24-94)~~

c. No unauthorized discharge from a point source shall occur to waters of the state. (4-11-06)

02. Limitations to Point Source Restrictions. (7-1-93)

a. So long as a point source discharge or wastewater treatment facility is regulated by the terms and conditions of an authorization pursuant to Subsection 080.02, a Board order, decree or compliance schedule, or a valid NPDES permit issued by the EPA, the discharge or facility will not be subject to additional restrictions or conditions based on Subsections 080.01, or **~~400.01.b.~~052.08.c.i.** and Sections 200, 210, 250, 251, 252, and 253. (4-11-06)

~~**b.** The restrictions set forth in Subsection 400.01.b. are modified as follows: New point sources can discharge, and existing point sources can increase its discharge above the design capacity of its existing wastewater treatment facility, resulting in increases in water temperatures and fluoride concentrations up to levels needed to protect designated beneficial uses in the Boise River between the bridge at Broadway Avenue and River Mile 50 (through Veteran's State Park). (4-5-00)~~

03. Compliance Schedules for Water Quality-Based Effluent Limitations. Discharge permits for point sources may incorporate compliance schedules which allow a discharger to phase in, over time, compliance with water quality-based effluent limitations when new limitations are in the permit for the first time. (3-15-02)

04. Wetlands Used for Wastewater Treatment. (8-24-94)

a. Waters contained within wetlands intentionally created from non-wetland sites for the purpose of wastewater or stormwater treatment, and operated in compliance with NPDES permit conditions, shall not be subject to the application of general water quality-based or site-specific criteria and standards. (8-24-94)

b. Waters contained within wetlands intentionally created from non-wetland sites for the purpose of treatment of nonpoint sources of pollution, and operated in compliance with best management practices, shall not be subject to the application of general water quality-based or site specific criteria and standards.(8-24-94)

c. Discharges from treatment systems described in Sections 400.04.a. and 400.04.b. to waters of the state are subject to all applicable rules and requirements governing such discharges. (8-24-94)

05. Flow Tiered NPDES Permit Limitations. Discharge permits for point sources discharging to waters exhibiting unidirectional flow may incorporate tiered limitations for conventional and toxic constituents at the discretion of the department. (8-24-94)

401. POINT SOURCE WASTEWATER TREATMENT REQUIREMENTS.
Unless more stringent limitations are necessary to meet the applicable requirements of Sections 200 through 300, or unless specific exemptions are made pursuant to Subsection 080.02, wastewaters discharged into surface waters of the state must have the following characteristics: (4-11-06)

01. Temperature. The wastewater must not affect the receiving water outside the mixing zone so that: (7-1-93)

a. The temperature of the receiving water or of downstream waters will interfere with designated beneficial uses. (7-1-93)

b. Daily and seasonal temperature cycles characteristic of the water body are not maintained. (7-1-93)

c. If the water is designated for warm water aquatic life, the induced variation is more than plus two (+2) degrees C. (3-15-02)

d. If the water is designated for cold water aquatic life, seasonal cold water aquatic life, or salmonid spawning, the induced variation is more than plus one (+1) degree C. (3-15-02)

e. If temperature criteria for the designated aquatic life use are exceeded in the receiving waters

upstream of the discharge due to natural background conditions, then Subsections 401.01.c. and 401.01.d. do not apply and instead wastewater must not raise the receiving water temperatures by more than three tenths (0.3) degrees C. (4-11-06)

02. Turbidity. The wastewater must not increase the turbidity of the receiving water outside the mixing zone by: (7-1-93)

a. More than five (5) NTU (Nephelometric Turbidity Units) over background turbidity, when background turbidity is fifty (50) NTU or less; or (7-1-93)

b. More than ten percent (10%) increase in turbidity when background turbidity is more than fifty (50) NTU, not to exceed a maximum increase of twenty-five (25) NTU. (7-1-93)

03. Total Chlorine Residual. The wastewater must not affect the receiving water outside the mixing zone so that its total chlorine residual concentration exceeds eleven one-thousandths (0.011) mg/l.