

Docket 58-0125-1401 – IPDES Rules

Response to Comments on Draft 3.0 April 3, 2015 comment deadline

EPA

1. Section 300.01.j.iv, which seems to be the parallel section to §122.41(j)(4), does not cross-reference 40 CFR Subchapters N (Effluent Guidelines and Standards) or O (Sewage Sludge). Additionally, the state section uses the phrase “other test procedure have been specified in the permit” instead of “unless another method is required under 40 CFR subchapters N or O.”

DEQ has corrected this oversight by adding “unless another test method required by 40 CFR Part 401 through 471, and Part 501 through Part 503.” This modification is present in the updated rules Section 300.10.d.

2. Section 300.03 a.iii(2) refers to “an approved sludge plan” instead of “an approved land application plan,” mentioned in §122.41(l)(1)(iii). EPA is concerned that confusion may arise from references to “sludge plan” in federal regulations and “land application plan” in state regulations. Explain if additional clarification will be provide in the regulation.

DEQ has added the following language to clarify, “an approved land application or sludge disposal plan.” This modification is present in the updated rules Section 300.12.a.iii.(2).

3. Section 300.03.c. does not include the qualifying phrase, “in some cases modification or revocation and reissuance is mandatory” from section §122.41(l)(3). It is not necessary that Idaho have the language here so long as the proposed regulations have the equivalent of 40 CFR §122.61 elsewhere in the regulation.

DEQ has included/adapted the entirety of 40 CFR 122.61 within the rules Section 202.

4. Section 300.03.f. does not include references to the state provisions that are equivalent to §122.41(g) (Property rights) and 122.44(g)(Twenty-four hour reporting), which are respectively cited in §122.41(l)(6)(A) and §122.41(l)(6)(C), respectively.

DEQ has added references to Subsection 300.07 (Property Rights) and 302.09 (Twenty-Four Hour Reporting). These modifications are present in the updated rules Sections 300.12.f.iii.(1) and (3).

5. Section 300.04 does not define “bypass, “so there is no equivalent provision to §122.41(m)(1)(i) and (ii). DEQ said they intend to define bypass in the definitions section. However, EPA recommends that the definition be included with the bypass provision language or at a minimum cross reference to definition section..

DEQ has added the language, “Bypass, as defined in Section 010.XX,...” to cross reference the definition. This modification is present in the updated rules Section 300.13.a.

6. Section 300.05 does not define “upset,” so there is no equivalent provision to 122.41(n)(1) and does not include an equivalent section to 122.41(n)(4)(Burden of proof). DEQ said they intend to define upset in the definitions section. However, EPA recommends that the definition be included with the provision language or at a minimum cross reference to definition section.

DEQ has added the language, “...permittee may claim upset, as defined in Section 010.XX,...” to cross reference the definition. This modification is present in the updated rules Section 300.14.a.

7. Section 301.02 does not include the §122.43(a) references to §122.46, §122.47(a), or §122.48.

DEQ has added references to Sections 101 (Permit Duration), 305.01 (Compliance Schedules), and 304.01 (Monitoring Requirements). These modifications are present in the updated rules Section 302.02.

8. Section 301.03.iii. does not specify that any grant of a monitoring waiver must be included in a statement of basis (if there is one)—the federal equivalent section at §122.44(a)(2)(iv) includes this.

DEQ intends to issue Fact Sheets for all new, modified, and revoked and reissued permits, and will not issue Statements of Basis.

9. Section 301.04.a. does not include a reference to §122.41(a) or a state equivalent provision, the federal equivalent section at §122.44(b)(1) includes this reference.

DEQ has added reference to Sections 300.01 (Duty to Comply). This modification is present in the updated rules Section 302.04.

10. Section 301.04.b. refers to “the disposal under the Clean Water Act” rather than “sewage sludge use or disposal under the Clean Water Act” mentioned in §122.44(b)(2).

DEQ has corrected this oversight by adding “Standards for sewage sludge use or disposal....” This modification is present in the updated rules Section 302.04.b.

11. Section 301.04.c. refers to “sewage sludge use” and omits “or disposal” mentioned in §122.44(b)(2).

DEQ has corrected this oversight by adding “...sewage sludge use or disposal...” This modification is present in the updated rules Section 302.04.c.

12. Section 301.06.a.vi(1) refers to water quality “target or concentration value” rather than “criterion” mentioned in §122.44(d)(1)(vi)(A). Please explain the reason for this change.

DEQ has chosen to identify these values as targets or concentration values rather than criteria. The lead in to this subpart says that if the State does not have or has not established a water quality criterion for a specific pollutant then the State must use one or more of the following to

establish effluent limits. It is not rationale to say that the state must use a water quality criterion as one of the methods for establishing effluent limits when there is no water quality criterion. Therefore DEQ has elected to substitute more accurate terminology which gets to what the federal register is meaning, that is water quality targets from a TMDL, recommended values (if they exist) from EPA guidance documents or other similar state values, or proposed or pending numeric values (which are not yet criteria) that would be appropriate.

13. Section 304.01.e. omits the §122.47(a)(4) requirement that, “the permittee shall notify the Director in writing of its compliance or non-compliance with the interim or final requirements, or submit progress reports if paragraph (a)(3)(ii) is applicable.”

DEQ has changed the language to read, “Within fourteen (14) days following each interim and final date of compliance, the permittee shall notify the Department in writing of its compliance or noncompliance with the interim or final requirements, or submit progress reports if Subsection 305.01.d.ii is applicable.” This modification is present in the updated rules Section 305.01.e.

Idaho Conservation League:

1. Section 301.20 proposes to add language allowing the DEQ to include provisions in IPDES permits that would allow compliance with water quality based effluent limits to be achieved through pollutant trading.

Current DEQ guidance on this matter is not binding and has not been reviewed and approved by the EPA. We believe that these IPDES rules need to include significantly more details regarding how pollutant trading would operate in an the IPDES. Absent additional information about how pollutant trading might operate within an IPDES permit, it is impossible to determine if this inclusion is more, or less, stringent than the existing federal language.

There are no requirements in the federal regulations regarding pollutant trading, so DEQ’s pollutant trading language cannot be more stringent than the federal law or rules. DEQ understands the concern, but believes the additional detail requested would be better addressed in future guidance. Further, EPA still retains the ability to object to IPDES permits that they believe may not meet requirements of the Clean Water Act and other applicable federal regulations.

2. 302.09.d proposes to include unique Idaho language providing a means of utilizing injection wells as a means of disposing of municipal and industrial wastewater. This provision seems to incorporate a provision that is not found in the federal NPDES rules. Bringing such a provision into Idaho’s IPDES rules seems to run afoul DEQ’s charter to not draft rules that are less stringent than current federal rules.

DEQ has modified its language so that the applicable rules are cited to for informational purposes. DEQ’s language does not assert any means for utilizing injection wells beyond what currently exists. This language simply identifies the agencies responsible for compliance of disposal into injection wells.

Clearwater Paper

1. Section 200. Renewal of NPDES Permits, Interim and Final Limits (200.01 and 200.02). This section should specify that the exceptions to anti-backsliding authorized under § 303(d)(4) of the Clean Water Act apply to IPDES permitting actions.

DEQ has petitioned EPA for clarification on the inclusion of anti-backsliding provisions. The majority of anti-backsliding provisions are found in Section 402(o) of the Clean Water Act, which do reference 303(d)(4). 40 CFR 122.44(l) provides some language regarding anti-backsliding; however, there are some provisions found in 402(o) that are not found in 40 CFR 122.44(l). DEQ is waiting EPA's clarification before making changes to the subsection regarding anti-backsliding but believes that adding language referring to 303(d)(4) is appropriate.

2. Section 201. Modification or Revocation and Reissuance of IPDES Permits, Minor modification (200.03). Clearwater requests that IDEQ provide additional flexibility in the subsection on minor modifications. For example, making minor changes to a permit that do not result in the increase of pollutants discharged to the environment should be treated as a minor modification. We understand that EPA recently approved a minor modification rule for the state of Alaska's permit program that incorporates this additional flexibility.

DEQ has added the following language based on Alaska's approved rule, "Make a change in a permit provision that will result in neither allowing an actual or potential increase in the discharge of a pollutant or pollutants into the environment nor result in a reduction in monitoring of a permit's compliance with applicable statutes and regulations." This modification is present in the updated rules Section 201.03.i.

3. Section 300. Applicable Permit Conditions (300.01,b). This provision should clarify that continuation of an activity is authorized so long as a permittee has timely applied for renewal of a permit.

DEQ has added the following language, "If the permittee complies with the application requirements of Section 105 for an individual permit, or the notice of intent requirements of Section 130 for a general permit, and a permit is not issued prior to the expiring permit's expiration date, the expiring permit shall remain in force as stipulated in Subsection 101.02 and 101.03." This modification is present in the updated rules Section 300.02.

4. Section 302. Calculating Permit Conditions, Pollutant Credits for Intake Water (302.07). This section should make clear that pollutant credits for intake water also apply when calculating water quality-based effluent limits. Specifically providing for intake credits in setting permit limits will be of increasing importance as IDEQ and EPA likely adopt more stringent human health criteria.

The section on Pollutant Credits for Intake Waters (now 303.07) has been expanded to provide for calculating intake credits for both technology and water quality based effluent limits. Language for water quality based effluent limits is borrowed from proposed language in Washington.

5. Section 304. Compliance Schedules. Currently IDEQ water quality rules authorize compliance schedules in NPDES Permits for water quality-based effluent limits established for the first time in a permit. See IDAPA 58.01.02.400.03. We believe this provision should be referenced in Section 304 for clarity.

DEQ has added the following language, “Permits 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, under IDAPA 58.01.02.400.03.” This modification is present in the updated rules Section 305.01.f.

6. Section 310. Variances. Currently IDEQ’s water quality rules authorize water quality-based variances based on a variety of conditions. See IDAPA 58.01.260.01,b. We believe these same conditions should be referenced in Section 310 for clarity.

DEQ has added the following language, “...Variances from water quality standards under IDAPA 58.01.02.260.” This modification is present in the updated rules Section 310.01.iv.

7. Also, Clearwater requests that watershed (or even statewide) variances be authorized. Finally this Section should make clear that if IDEQ authorizes a discharger specific variance or watershed-based variance then it is not necessary to incorporate such a variance in Idaho's Water Quality Standards at IDAPA 58.01.02.

These types of variances are currently under consideration for Human Health Criteria rulemaking.

City of Post Falls

1. Upsets-300.05. Although the definition of upset will be addressed later, this comment address both the definition and the following paragraphs. To the extent allowable under the CWA, upsets should be an affirmative defense for non-compliance with a water quality based effluent limits in addition to TBELs. The same burden of proof criteria would apply; importantly including the cause being beyond the control of the permittee.

DEQ believes that upsets should be applicable to WQBELs, as well, and has removed the term, “technology-based” from the updated rules Section 300.14 in order to preclude WBELs.

2. Water Quality Standards-3001.06.c. This subsection should be expanded to prevent ambiguities. The cited 401-Certification process applies to federally issued permits and not to state issued discharge permits, although states are still responsible for ensuring neighboring water quality standards are met. This section should include the process for evaluation of such issues as well as spell out responsibilities for that evaluation process. As this is a significant issue, amended language should be available for public comment.

DEQ has petitioned EPA for clarification on this component of the federal register. It is DEQ’s belief that this subsection should be changed to reflect language in CWA 402(b)(5) instead of

401(a)(2). Changes to this section will be dependent upon clarification from EPA, but at this point no change has been made.

3. Intake Credits and Variances-300.07 and 310. DEQ indicated revisions were being developed on these sections. The City looks forward to reviewing the revised sections and providing comment. As noted in the development of the HHWQC rulemaking, the City supports including flexibility within these sections to address difficult pollutants.

Thank you for the comment.

Association of Idaho Cities

1. Sections 300 and 301: Temperature Provisions Consistent with Section 316(a) and CFR 130.7(c)(2) of the Act. Throughout the entire section, there are references to water-quality based effluent limitations based on multiple sections of the Act, which never include section 316(a), which provide special consideration of balanced aquatic populations when listing waters, developing TMDLs (40 CFR 130.7(c)(2)), or developing thermal limitations for point sources (e.g. 300.01(a)(ii); 301.03; 301.04(a); 301.06; 301.07...). These references do not include section 316(a) provisions of the Act for point sources and should be reviewed and modified as necessary to provide Clean Water Act Section 316 elements.

DEQ has added Section 310.05 (Special Procedures for Decisions on Thermal Variances – 40 CFR 124.66). This section affirms that DEQ will determine if alternative effluent limitations are justified under the Clean Water Act section 316(a) and whether cooling water intake structures will use the best available technology under section 316(b).

2. Section 300.05: Upset. The upset provisions contained in the draft are consistent with federal rules (40 CFR 122.41(n)(2)), however, only apply to four conventional pollutants (BOD, TSS, pH and 85% BOD/TSS removal rate) contained in the Act. Because many water quality based limits are contained in permits and biological processes to meet these limits are sensitive to variation in influent, temperature, and other factors out of the control of the POTW, some states have extended the upset provision to water quality based limits using the same approach as for conventional pollutants. AIC recommends the upset provisions contained in the rule apply to conventional and water quality based limitations.

Please see response to Post Falls Comment 1.

3. Section 301.03: Establishing Technology-based Permit Provisions. AIC supports the incorporation of both technology and water-quality based permit conditions to meet the goals of the Clean Water Act. Section 301.03 appears to include. All of the rule language necessary to do that; however, does not describe or address guidance on how the State of Idaho intends to establish these limitations (e.g. use EPA (1991) Technical support document for the development of water quality based toxics or develop a separate IPDES guidance). States have significant flexibility in the assumptions and conditions used to determine water quality based conditions and the use of appropriate approaches and assumptions in the development of WQBELs is of significant interest to permittees and the public.

- a. If IDEQ intends to develop WQBEL Guidance, it appears that this section 300.03 may be an appropriate portion of the rule to include that information.
 - b. IDEQ should identify that temperature impairment listing, temperature TMDL development (see 40 CFR 130.7(c)(2)), and limitations for point sources are addressed differently by the Act (e.g. Balanced Indigenous Population of aquatic life) instead of simply relying on compliance based on numeric water quality criteria as is typically done for other WQBEL parameters.
- a. *DEQ has not yet identified how it intends to establish these limitations; this will occur in the near future as the IPDES program and primacy application develop.*
 - b. *DEQ has added Section 310.05 (Special Procedures for Decisions on Thermal Variances – 40 CFR 124.66). This section affirms that DEQ will determine if alternative effluent limitations are justified under the Clean Water Act section 316(a) and whether cooling water intake structures will use the best available technology under section 316(b).*
4. Section 301.20: Authorization for Trading in permit. AIC supports the option for the State to include an explicit authorization for trading into permits. AIC believes that this is an essential element in the permitting and TMDL landscape now and in the future. The March 6, 2015 draft Lower Boise Phosphorus TMDL contains no reserve for growth for any point source with the anticipation that all future growth will come from discharges at the TMDL water quality target (70 ug/l TP) or a combined treatment plus trade approach.

Thank you for your comment.

5. Section 302.07(d): Intake Credits. AIC appreciates and supports the inclusion of intake credits in the determination of IPDES limitations, particularly for toxics. However, the proposed provision only provides credits for facilities that withdraw source waters from the same waterbody to which they discharge. In Idaho, over 90% of the domestic potable water is from groundwater sources, which might be higher or lower for specific pollutants than surface waters. Across the state, groundwater is primarily the source of waters used by public and industrial sources, and under the draft Intake Credit language, not available to be included as an intake credit.

AIC recommends that the language be modified to include all source waters, including groundwaters, so this important implementation tool is available to all IPDES permittees instead of only those few that have the same source and receiving waters.

Section 303.07(b)(iv) in draft rules 3.1 (formerly Section 302.07(e) in draft rules 3.0) already identifies that if DEQ finds that no environmental degradation will result, it may waive the requirement that credit be granted only if the intake water is withdrawn from the same body of water into which the discharge is made.

6. Section 304.01.(d)(ii): Schedules of Compliance...AIC recommends that the draft language be modified to include the use of SOCs for conventional and non-conventional (e.g. global and legacy toxics) pollutants so that this important compliance tool can be used effectively based on the type of permitting challenge that needs to be addressed.

DEQ believes the current draft rule language does not preclude the use of Schedules of Compliance to adequately address conventional and non-conventional pollutants as mentioned in your comment.

7. Section 310: Variances. AIC appreciates and supports the use of variances as an important Clean Water Act tool to address difficult water quality based permit issues, including the use of section 316(a) variances included in the Act but not EPA regulation.

AIC suggests that due to the nature of some pollutants, that variances should be allowed on a watershed (e.g. Silver Valley) or statewide basis (e.g. mercury, arsenic, PCBs...) either in this or other sections of the IPDES rules...AIC encourages the IPDES program to incorporate and implement both watershed based and bubble permitting as foundational tools to efficiently and cost effectively implement IPDES permit and achieve difficult watershed based challenges more quickly.

These types of variances are currently under consideration for Human Health Criteria rulemaking.

8. IPDES Rulemaking Schedule...AIC is concerned that a rush to authorization could lead to the loss of important opportunities associated with an efficient and effective rollout of the IPDES program. Or, to put more plainly: good is better than fast for the IPDES permittees of the state...AIC is willing to work with IDEQ, other interested stakeholders, and if necessary the Idaho Legislature, to provide IDEQ additional time to complete this very important task of developing rules, regulations, guidance, and policy necessary to implement an effective and efficient IPDES program.

Thank you for your offer.

Idaho Mining Association

1. Section 200. Renewal of NPDES Permits, Interim and Final Limits (200.01 and 200.02)
This section should make clear that the exception to anti-backsliding authorized under § 303(d)(4) also applies to IPDES permitting actions.

Please see response to Clearwater Paper Comment 1

2. Section 201. Modification or Revocation and Reissuance of IPDES Permits, Minor modification (200.03)
This section incorporates 40 CFR 122.63. IDEQ is not required, however, to adopt this section of the federal regulation to obtain an authorized program. We believe IDEQ should consider expanding this section to allow for additional flexibility in making minor modifications to permits. In particular, we recommend that a minor modification would apply to changes that do not increase the discharge of a pollutant, among other. I am enclosing a copy of Alaska's EPA accepted rule on minor NPDES modifications that we believe IDEQ should adopt in lieu of mirroring federal regulations.

Please see response to Clearwater Paper Comment 2

3. Section 300. Applicable Permit Conditions (300.01.b)

This provision should make clear that continuation of an activity is authorized so long as a permittee has timely applied for renewal of a permit.

Please see response to Clearwater Paper Comment 3

4. Section 302. Calculating Permit Conditions, Pollutant Credits for Intake Water (302.07)

This section should make clear that pollutant credits for intake water also apply when calculating water quality-based effluent limits. Also with respect to Disposal of Pollutants into Wells, into POTWs, or by Land Application (302.08) we recommend that subsections (d) and (e) of this section be deleted because they potentially expand the scope of permitting obligations under other state rules.

Please see response to Clearwater Paper Comment 4 and Idaho Conservation League Comment 2.

5. Section 304. Compliance Schedules

IDEQ water quality rules currently authorize compliance schedules in NPDES Permits for water quality-based effluent limits established for the first time in a permit. See IDAPA 58.01.02.400.03. We believe this provision should be incorporated into Section 304.

Please see response to Clearwater Paper Comment 5

6. Section 310. Variances

IDEQ water quality rules currently authorize water quality-based variances based on a variety of conditions (see IDAPA 58.01.260.01,b.) We believe these same conditions should be incorporated into Section 310. Secondly, we think IDEQ should specify in this section that watershed (or even statewide) variances may be authorized. Finally, this section should make clear that if IDEQ authorizes a discharger-specific variance or watershed-based variance then it is not necessary to incorporate such a variance in Idaho Water Quality Standards at IDAPA 58.01.02.

Please see response to Clearwater Paper Comment 6 and 7