

Docket 58-0125-1401 – IPDES Rules

Response to Comments on Draft 4.0 and Definitions May 1, 2015 comment deadline

Idaho Mosquito and Vector Control Association (IMVCA):

1. IMVCA supports the decision of Idaho Dept. of Environmental Quality to adopt by reference the federal rules of the National Pollution Discharge Elimination System (NPDES).

Thank you for your comment.

2. In reference to Draft Rule 4 Section 130 General Permit, IMVCA urges IDEQ to adopt the rules of the Pesticide General Permit (PGP) as amended October 31, 2011
 - a. Section 2.2 Mosquitoes and Other Flying Insect Pest Control.
 - b. Section 3-Section 6 as outlined in the NPDES PGP.

DEQ is currently developing rules to guide the issuance of general permits, the provisions or criteria that have to be met to issue a general permit, the components that go into a general permit, how a person should apply for coverage, and what the agency will do when an individual permit is required rather than coverage under a general permit. Although these draft rules will not directly address specific permits, we appreciate your feedback on these issues. If you are interested in reviewing a copy of the pesticide general permit you can find it online at <http://water.epa.gov/polwaste/npdes/pesticides/EPAs-Pesticide-General-Permit.cfm>.

Sorrento Lactalis:

1. Definitions: The definition for bypass doesn't allow room for bypasses made in compliance with a land reuse permit. I don't think that was EPA's intent, and that is how we have treated it with our current NPDES permit. I would suggest clarifying it to be "Bypass means the intentional diversion of waste streams from any portion of a treatment facility into waters of the State."

DEQ believes the current definition, along with the rules in Section 300.13, Bypass Terms and Conditions (which mirror 40 CFR 122.41(m)(2)(i)–(m)(4)(i)(C)) are adequate to address reuse concerns.

2. Mass Limitations: There is no allowance for DEQ to permit the elimination of a mass limits when a discharge increases in flow (due to plant expansion) but concentration limits are complied with except for than the variance process. This limits expansion of Idaho businesses in the future. EPA has eliminated our mass limit for phosphorus in our next NPDES, so if they can do it, the State should have allowances to do the same. We requested this in our application for renewal, but I don't think it involved having to file a

variance. Could you check into this (how the EPA can do it) and make the same allowances for the State of Idaho?

EPA has allowed the use of concentration limits in place of mass, on a case-by-case basis, when concentration limits are protective of WQBELs and TBELs. EPA has done this under 40 CFR 122.45(f)(1)(ii), which states, “When applicable standards and limitations are expressed in terms of other units of measurement; or...” DEQ has included this language in IPDES draft rules 303.06.a.ii., which will provide similar discretion in evaluating appropriate mass or other effluent limits.

U.S. Environmental Protection Agency (EPA):

1. Page 3, 130.01.c - delete the word "and" at the end of that section.

DEQ has deleted the “and” to exactly match the CRF language.

2. Page 6, 130.03 - The citation to 40 CFR §124.52(b) and (c) is incorrect. First, IDEQ is not required to take on this section of the regulations. While the language in the IPDES regulation mirrors the language in 40 CFR § 124.52(b) and (c), that regulation governs the situation where EPA is designating a discharge as a point source discharge that requires a NPDES permit. The language may not be appropriate for a situation where the Idaho Department of Environmental Quality (DEQ) is moving a facility from a general permit to an individual permit. Instead, the EPA recommends that DEQ look at 40 CFR §122.28(b)(3)(ii). that section is applicable to a situation where EPA, as the permitting authority, is moving a facility from a general permit to an individual permit and may be more appropriate for what DEQ wants to accomplish through this regulation.

DEQ has changed the language in Section 130.03.a. to mirror 40 CFR 122.28(b)(3)(ii) and removed the language from 40 CFR 124.52(b).

3. Page 7. 370 - The State needs to have the procedures in place described in 40 CFR §403.10(f)(2) and the legal authority to implement them. The state would also need to ensure that any existing state authorities do not exclude or inhibit its abilities to conduct the activities of 40 CFR §403.8(f)(2), which is needed in the absence of an approved publicly owned treatment work (POTW), 40 CFR §403.10(f)(1) and (2). It is difficult for the EPA to review the Pretreatment regulations without having the entire program in hand to review. As such, the EPA is providing notice that it may have additional comments on the Pretreatment program at a later date.

DEQ understands the need to ensure the necessary legal authority is in place for the pretreatment program. In addition to the incorporation by reference of the federal pretreatment program regulations, DEQ is analyzing whether additional statutory authority is necessary. DEQ will address the questions of legal authority in the IPDES Program Description, Attorney General’s statement, and MOA, as applicable.

4. Page 8, 380 - Similar to the Pretreatment comment, above, it is difficult for the EPA to review the Sewage Sludge regulations without having the entire program in hand to review. As such, the EPA is providing notice that it may have additional comments on the Sewage Sludge program at a later date.

See response to comment #3.

5. Regarding, the state's question, "Does the State need to be able to enforce a city ordinance or a city pretreatment permit?" At this point, the EPA believes the DEQ must have the authority to enforce city ordinances with an NPDES permit and offers the followed bases:

- 40 CFR §403.5(c) requires local limits...
- EPA's 1986 State Program Guidance [the first sentence in the pretreatment legal authority section at p. 3-24 to 25] states, "States seeking pretreatment program approval must have authority to impose pretreatment standards on all industrial users of publicly owned treatment works (POTWs). Pretreatment standards include the general and specific prohibited discharges listed in 40 CFR §403.5, local limits developed by POTWs, and federally promulgated categorical pretreatment standards found in 40 CFR Subchapter N."
- 40 CFR §403.5(d) states, "Where specific prohibitions or limits on pollutants or pollutant parameters are developed by a POTW in accordance with paragraph (c), such limits shall be deemed Pretreatment Standards for the purpose of section 307(d) of the Act."
- CWA Section 309(a)(3) requires the Administrator to bring an enforcement order or civil action upon finding that a person is in violation of CWA Section 307. CWA Section 309(c)(1)(A) imposes criminal penalties for violations of "any requirement imposed in a pretreatment program approved under section [402(b)(8)]."
- CWA Section 402(b)(9) requires, as a condition of NPDES program approval, that states "insure that any industrial user of any publicly owned treatment works will comply with section [307]."
- 40 CFR §403.10(f)(1)(iv) requires state programs to have the authority to seek penalties "for noncompliance with Pretreatment Standards by Industrial Users as set forth in sec. 403.8(f)(1)(vi)."
- 40 CFR §403.8(f)(1)(vi)(B) requires authority to seek remedies "for noncompliance with any Pretreatment Standard and Requirement."

See response to comment #3.

Comments on Proposed Definitions for IDAPA 58.01.02.25.

6. Some of these definitions do not appear appropriate or necessary for the NPDES program, e.g., Dynamic Model, Man-Made Waterways, Project Plans, Release, Equivalent Dwelling Unit, Facility Plan, Facility and Design Standards, Material

Modification, Responsible Persons in Charge, etc. DEQ may want to consider deleting them.

To avoid confusion, the EPA recommends, where similar terms are used as in EPA regulations that the definitions match or be consistent with 40 CFR § 122.2 and/or the U.S. EPA NPDES Permit Writers' Manual.

DEQ will further evaluate the definitions and the inclusion/exclusion of these and other definitions as we refine this section of the draft rules. We plan to present revised draft definitions for the June 12 negotiated rulemaking meeting.

- 7. Notice of Intent to Obtain IPDES Coverage under a General Permit.** Instead of listing specific general permits, the EPA recommends that DEQ delete the list of general permits from the regulation. It is possible that DEQ will expand the universe of general permits based on similar characteristics, etc. In addition, the list of general permits does not include the Groundwater Remediation Facilities General Permit or the Small Suction Dredge General Permit.

DEQ has changed the definition to, "...shall submit a Notice of Intent to obtain coverage for surface water discharges under any ~~of the following~~ general permit classifications, including, but not limited to..." Ground water remediation and suction dredge general permits have also been added to the list.

- 8. Notice of Intent to Terminate.** Add the following italicized section to the sentence: "A construction general permit holder is obligated to submit a Notice of Intent to terminate upon completion of construction activities *and final stabilization has been achieved.*"

DEQ has changed the definition to, "...A construction general permit holder is obligated to submit a Notice of Intent to terminate upon completion of construction activities and in the case of stormwater control, final stabilization has been achieved."

- 9. Owner or operator.** Change this definition to be consistent with 40 CFR § 122.2: "... means the owner *or operator* of any 'facility or activity' subject to regulation under the NPDES program." DEQ's current draft definition excludes an entity that "operates" the facility or activity and is unacceptable as written.

DEQ has changed the definition to, "...entity that is an owner or operator of any "facility or activity" subject to regulation..."

- 10. Toxic pollutant.** Last sentence, change "Toxic substances..." to "Toxic *pollutants*..."

DEQ has changed the definition as requested.

- 11. Best management practices ("BMPs").** Change this definition to be consistent with 40 CFR §122.2: "...means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of "waters of the United States." BMPs also include treatment requirements, operating procedures,

and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage." DEQ's current draft definition states that BMPs are developed/identified by the "designated agency;" however, under the NPDES regulations, BMPs may be developed/identified by the owner/operator or their representative, not a designated agency.

DEQ has changed the definition to mirror 40 CFR 122.2.

12. **Compliance Schedule or Schedule of Compliance.** Change this definition to be consistent with 40 CFR §122.2: "...means a schedule of remedial measures included in a "permit" [or enforcement order], including an enforceable sequence of interim requirements (for example, actions, operations, or milestone events) leading to compliance with the CWA and regulations."

DEQ has changed the definition to mirror 40 CFR 122.2 (and cites IDAPA 58.01.25 in place of "regulations").

13. **Discharge.** Change this definition to be consistent with 40 CFR §122.2: "when used without qualification means the discharge of a pollutant."

DEQ has changed the definition to mirror the definition of "Discharge of a Pollutant" from 40 CFR 122.2.

14. **Technology-Based Effluent Limitation.** Change this definition to be consistent with the U.S. EPA NPDES Permit Writers' Manual Glossary of Terms: "A permit limit for a pollutant that is based on the capability of a treatment method to reduce the pollutant to a certain concentration."

DEQ intends to maintain the current definition, which is consistent with IDAPA 58.01.02 (Water Quality Standards), with the exception that DEQ will make the following change, "Treatment requirements under ~~Section 301(b)~~ of the Clean Water Act that represent the minimum level of control that must be imposed in a permit Issued under Section 402 of the Clean Water Act."

15. **Wasteload Allocation (WLA).** Change this definition to be consistent with the U.S. EPA NPDES Permit Writers' Manual Glossary of Terms: "The proportion of a receiving water's *total maximum daily load* that is allocated to one of its existing or future point sources of pollution."

DEQ intends to maintain the current definition, which was taken directly from the glossary of the 2010 EPA Permit Writers' Manual. It is also the same definition used in Idaho Water Quality Standards, IDAPA 58.01.02.

16. **Water Quality-Based Effluent Limitation.** Change this definition to be consistent with the U.S. EPA NPDES Permit Writers' Manual Glossary of Terms: "A value determined by selecting the most stringent of the effluent limits calculated using all applicable water quality criteria (e.g., aquatic life, human health, and wildlife) for a specific point source to a specific receiving water for a given pollutant."

DEQ has changed the definition to mirror the 2010 EPA Permit Writers' Manual.

17. **Effluent.** Effluent can also be "untreated" under NPDES.

DEQ has changed the definition to, "Any treated or untreated solution containing pollutants ~~wastewater discharged from a treatment facility.~~"

18. **Mixing Zone.** Change this definition to be consistent with the U.S. EPA NPDES Permit Writers' Manual Glossary of Terms: "An area where an effluent discharge undergoes initial dilution and is extended to cover the secondary mixing in the ambient water body. A mixing zone is an allocated impact zone where water quality criteria can be exceeded as long as acutely toxic conditions are prevented."

DEQ intends to maintain the current definition, which mirrors IDAPA 58.01.02, and is directly tied to the Mixing Zone Policy in Idaho's Water Quality Standards (IDAPA 58.01.02.060) that was recently approved by EPA.

19. **Primary Treatment.** Change this definition to be consistent with the U.S. EPA NPDES Permit Writers' Manual Glossary of Terms: "The practice of removing some portion of the suspended solids and organic matter in a wastewater through sedimentation. Common usage of this term also includes preliminary treatment to remove wastewater constituents that may cause maintenance or operational problems in the system (i.e., grit removal, screening for rags and debris, oil and grease removal, etc.)"

DEQ intends to maintain the current definition, which is consistent with IDAPA 58.01.16 (Wastewater Rules).

20. **Secondary Treatment.** Change this definition to be consistent with the U.S. EPA NPDES Permit Writers' Manual Glossary of Terms: "Technology-based requirements for direct discharging municipal sewage treatment facilities. Standard is based on a combination of physical and biological processes typical for the treatment of pollutants in municipal sewage. Standards are expressed as a minimum level of effluent quality in terms of: BOD5, suspended solids (SS), and pH (except as provided for special considerations and treatment equivalent to secondary treatment)."

DEQ has changed the definition to mirror the 2010 EPA Permit Writers' Manual.

21. **Person.** Change this definition to be consistent with 40 CFR §122.2.: "...means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof."

DEQ intends to maintain the current definition, which includes, "individual, association, partnership, corporation, municipality, State or Federal agency," but will add "...or an agent or employee thereof..."

22. **Privately owned treatment works.** Change this definition to be consistent with 40 CFR §122.2.: "...means any device or system which is (a) used to treat wastes from any facility whose operator is not the operator of the treatment works and (b) not a `POTW.'"

DEQ has changed the definition to, "Any device or system used to treat wastes, which is not a 'POTW.'"

23. **Septage.** Change this definition to be consistent with 40 CFR § 122.2.: "...means the liquid and solid material pumped from a septic tank, cesspool, or similar domestic sewage treatment system, or a holding tank when the system is cleaned or maintained."

DEQ has changed the definition to mirror 40 CFR 122.2.

24. **Upset.** Change this definition to be consistent with required regulatory language at 40 CFR §122.41(n): "...means an exceptional incident in which there is unintentional and temporary non-compliance with *technology based* permit effluent limitations because of factors beyond the reasonable control of the permittee...."

DEQ believes that upset provisions in IPDES rules should pertain to both technology (TBEL) and water-quality based (WQBEL) limitations. Some NPDES-authorized states specifically limit upsets to non-compliance of TBELs (e.g. Alaska, Utah, and Montana). Alternatively, some states do not specifically define upsets in their administrative codes (e.g. Oregon and Washington). Moreover, some states specifically define the term upset to include (or at least not preclude) noncompliance with WQBELs and TBELs (e.g. Minnesota and Wisconsin).

For example, the Wisconsin administrative code, NR 205.03(41), defines upset as:

"Upset means an exceptional incident in which there is unintentional and temporary noncompliance with permit effluent limitations [emphasis added] because of factors beyond the reasonable control of the permittee..."

Similarly, the Minnesota administrative code, 7001.1090.L, defines upset as:

"In the event of temporary noncompliance by the permittee with an applicable effluent limitation [emphasis added] resulting from an upset at the permittee's facility due to factors beyond the control of the permittee..."

Idaho Water Users Association (IWUA):

3. Subsection 130.01.b.ii(5) provides that general permits may be issued if the point sources: "In the opinion of the Department, are more appropriately controlled under a general permit than under individual permits". Under what criteria is such a determination made?

Specific conditions corresponding to the list of conditions provided throughout 130.01 and subsequently-developed guidance will help DEQ determine, on a case-by-case basis, when one

or more category or subcategory of sludge use or disposal practices or facilities are more appropriately controlled under a general permit than individual permits.

4. Subsection 130.02.a provides that: “General permits may be issued, modified, revoked and reissued, or terminated in accordance with Section 106, 107, 108, 109, 201, 203, or 310.”. There are several problems with this subsection.
 - a) First, this language seems inconsistent with Subsection 130.02.b.v (discussed below) which provides that coverage may be terminated or revoked under Subsection 130.02.c, without reference to the sections mentioned under Subsection 130.02.a.

Subsection 130.02.a refers to the general permits that DEQ may draft and issue. Conversely, Subsection 130.02.b.v. and 130.02.c refers to actions associated with permitted coverage under those general permits.

- b) Of particular concern is the applicability of Section 109 to general permits. IWUA provided detailed comments on proposed Section 109 in its February 17, 2015 comments on Negotiated Rule Draft No. 2.0. As spelled out in detail in those comments, which are incorporated in full by reference here, the Endangered Species Act consultation provisions in proposed Section 109 run counter to state law and are inconsistent the State Legislature’s direction to the Department regarding the State’s pursuit of primacy from EPA. Changing the word “consult” to “confer” in Subsection 109.02.e, as proposed in Draft No. 2.1, does little to address this concern. Section 109 is still a major concern to IWUA, as is application of the section to general permits pursuant to Subsection 130.02.a.

DEQ will continue to further evaluate and discuss Subsection 109.02.e with EPA, and refine this language as appropriate.

- c) Also requiring clarification is the fact that many of the provisions of Sections 106 through 109 refer to applications. How can these provisions apply to general permits, which require a notice of intent (or, in some cases, not even a notice of intent), rather than an application? At a minimum, there needs to be clarity between the process for seeking coverage under individual permits (applications) and general permits (notices of intent).

DEQ will further evaluate these and other sections as we continue to refine the draft rules. DEQ will work to ensure that there is clear delineation between requirements for individual and general permits in the final draft rule, which we plan to present for the June 12 negotiated rulemaking meeting.

5. Subsection 130.02.b.v states that: “Coverage under a general permit may be terminated or revoked in accordance with Subsection 130.02.c.”. However, Subsection 130.02.e is the subsection that actually provides that: “When an individual IPDES permit is issued to an owner or operator otherwise subject to a general permit, the applicability of the general

permit to the individual IPDES permitted is automatically terminated on the effective date of the individual permit.”

In Subsection 130.02.b.v, DEQ will reference to Subsection 130.02.c, d, and e. These subsections identify the conditions under which DEQ may require a discharger authorized under a general permit (or the discharger may request) to apply for and obtain an individual permit.

6. Subsection 130.02.c provides that: “The Department may require any discharger authorized by a general permit to apply for and obtain an individual IPDES permit. Any interested person may petition the Department to take action under this Subsection.” While an illustrative, non-exclusive list of examples is provided, and there is a process for parties to petition for the issuance of individual permits, there are no criteria in this subsection upon which the Department may make such a determination, nor is there any provision to notify the discharger of the petition or to allow the discharger to respond. This leaves the Department with largely unfettered discretion to require costly and burdensome individual permits, at the request of any petitioner, without due process being afforded to the discharger.

Subsection 130.02.c outlines the conditions under which DEQ may require a discharger authorized under a general permit to apply for and obtain an individual permit. Whereas, Subsection 130.03.a identifies the process that DEQ and the permittee must follow to obtain an individual permit.

- a. Additionally, consideration should be given to placing the burden on the petitioner to demonstrate that the existing general permit coverage is insufficient. Even if that burden is met, consideration should be given to revising the general permit, rather than requiring individual permits.

Also, if EPA has not required individual permits for such general permit activities, DEQ should not do so, particularly when the individual permits would be more stringent than the general permit, which would seem to be prohibited by the stringency provisions of Idaho law.

The Section of the IDPES rules mirrors the CFR, which helps ensure that DEQ does not draft rules which are more stringent or broader in scope than federal regulations. Subsection 130.02.c allows an interested person to petition DEQ to require a discharger, authorized by a general permit, to apply for and obtain an individual permit. However, DEQ must follow the rules presented throughout Subsection 130.02.c to determine if such action is warranted.

7. Subsection 130.03.a requires that written notification be given when the Department decides to require an individual permit. The permit holder is then given 60 days to apply for a permit. Consideration should be given to notifying the discharger in writing before the Department makes a decision, along with an opportunity for the discharger to be heard. The rule does not seem to provide for such due process.

DEQ has changed the language in Section 130.03.a. to mirror 40 CFR 122.28(b)(3)(ii), which now states, “The Department may require any owner or operator authorized by a general permit

to apply for an individual IPDES permit as provided in Subsection 130.02.c, only if the owner or operator has been notified in writing that a permit application is required. This notice shall include a brief statement of the reasons for this decision, an application form, a statement setting a time for the owner or operator to file the application, and a statement that on the effective date of the individual IPDES permit the general permit as it applies to the individual permittee shall automatically terminate. The Department may grant additional time upon request of the applicant.”

Idaho Conservation League (ICL):

1. Section 500, titled “Enforcement,” proposes to incorporate certain provisions of Idaho Code 39, Chapter 1 regarding civil and criminal enforcement and penalties. We are concerned that these Idaho specific provisions are not consistent with the provisions in the federal code and regulations. For instance, the Idaho specific provisions appear to enact a two-year statute of limitations on enforcement for Clean Water Act violations. The Idaho code references also limit both civil and criminal penalties no more than \$10,000 per day, per violations. In regard to both of those instances, we believe that the State cannot craft IPDES rules that are less stringent than the federal rules – as such, the State cannot incorporate these less stringent Idaho code references into the IPDES rules.

40 CFR 123.27 sets forth the enforcement authorities states must have in place in order to gain NPDES program approval. The authority of the state to recover civil and criminal penalties as set forth in Idaho Code sections 39-108(5)(a)(ii) and 39-117(3) meet the minimum requirements in 40 CFR 123.27. In addition, to DEQ’s knowledge, there is no requirement for a specific statute of limitations for civil or criminal enforcement in order to gain NPDES program approval.

2. Section 500 also lacks any reference to citizen enforcement. Similarly, Idaho Code 39, Chapter 1 does not contain parallel citizen suit enforcement provisions. As you know, the Clean Water Act provides the opportunity for affected citizens to actively play a role in the enforcement of the provisions of the Clean Water Act, including compliance with NPDES permit conditions and effluent limits. DEQ needs to ensure that citizen suit enforcement provisions found in the federal regulations are replicated in the Idaho rules.

There is no requirement for states to include a citizen suit provision in state law in order to gain approval of a state NPDES permit program. The citizen suit provisions in the CWA, section 505, allow citizens to initiate an action against any person who is in violation of a state issued NPDES permit. Therefore, citizens will continue to have an opportunity for citizen suit enforcement after the IPDES program is approved.