

Docket 58-0125-1401 – IPDES Rules

Response to Comments on Draft 5.0

May 29, 2015 comment deadline

Idaho Farm Bureau (IFB):

1. Farm Bureau supports DEQ's fee proposal which recommends using general fund money to cover the cost of issuing and administering most general permits under the program, including aquaculture permits.

We appreciate DEQ working diligently to make the fee schedule as equitable as possible and for the transparency in which the process has taken place.

DEQ thanks the Farm Bureau for this comment and their support.

U.S. Environmental Protection Agency (EPA):

1. The EPA appreciates adjustments made to the Idaho Department of Environmental Quality's (DEQ's) earlier work on the State Water Quality Management Resource Model to account for the estimated permit universe. The IPDES Program Analysis, dated January 2015, presented at the January 23 rulemaking meeting, used incorrect permittee numbers for some permit categories as noted in the EPA's February 5 comment letter.

As described in Discussion Paper No. 5 - Fee Schedules, changes to the model assumptions resulted in an overall increase in the estimated FTEs from 26 to 28.2. However, the EPA is concerned that resources have shifted from permitting to compliance, inspection and enforcement (CIE) with the permitting FTE allocation adjusted from 11 down to 7 and the CIE FTE allocation adjusted from 8 up to 14.6. Based on the EPA's permitting experience in Idaho, 7 FTE would be inadequate to support NPDES permitting.

DEQ utilized the State Water Quality Management Resource Model provided to the state by EPA to develop the January Program Analysis using estimated numbers provided by EPA. At that time the model estimated 8.3 permit writers would be necessary. DEQ also inquired how many permit writers were currently working on writing permits for Idaho. While EPA provided a preliminary estimate of the number, DEQ was cautioned against using that number since it did not reflect the time spent on only Idaho permits, but instead was reflective of the number of permit writers working in EPA Region 10. The January Program Analysis attempted to reconcile the number of permit writers reflected from the model estimates with the number currently employed at EPA Region 10 and settled on a number halfway between the two.

Once EPA provided accurate numbers of the quantity of permits in Idaho, DEQ again used the State Water Quality Management Resource Model to develop new estimates of the time needed for permit writing. Because EPA has moved 7 facilities from individual permits to a general permit the hours associated with writing permits changed from 14,734 to 12,729 which is reflected in the model estimates changing from 8.3 to 7.1 FTEs. In EPA's comments, submitted

February 5, 2015, EPA stated that a comparison to Region 10 staffing levels is difficult for a variety of reasons. Therefore DEQ is choosing to rely on the model provided rather than attempt to correlate to EPA's current or projected staffing levels for the various components of the EPA program.

DEQ also believes that the state will be able to process permits once the program is established using the hours provided in the estimate as time needed to write the various permits. Some areas that DEQ can identify as improvements in efficiency include the ability of the state permit writers to identify and calculate mixing zones, apply the state's antidegradation policy, and issue permits faster due to the reduction in interaction necessary between federal and state agency staff. The 401 Certification process adds significant time and process to the permit writing schedule.

DEQ is attempting to forecast the overall programmatic resource needs based on the current permit universe. Due to the fact that the agency will likely not be getting delegated authority for the full program until after 2020, it seems unlikely that estimates of the current permit universe will exactly reflect what that permit universe will look like in the future. There may be efficiencies in permitting that might be employed which are not currently envisioned. DEQ is attempting to craft a programmatic resource calculation that seems reasonable both in the number of hours and FTEs needed to staff a full program and stays within reach of the authorizing legislation for seeking delegated authority. DEQ believes that the current estimate of 28 FTEs and \$2.8 million is in line with neighboring states which have a permit universe similar to Idaho's.

2. The fee rule does not provide for inflationary adjustments. The EPA recommends incorporation of provisions that would allow DEQ to institute increases based on an inflation metric to ensure permit fees keep pace with the cost of administering the program.

The State of Idaho Legislature requires fee rules to be adopted by concurrent resolution. Attempts to develop fee rules with automatic increases, such as inflationary adjustments, have never been approved by the Legislature. The proposed fee rule bases the municipal IPDES annual fee on equivalent dwelling units. The municipal IPDES annual fee will adjust based on growth and covers 48% of the IPDES program fee basis. The number of CGPs is also performance based and will fluctuate based on NOIs for CGPs. CGPs cover 33.8 percent of the IPDES program fee revenue. Overall the proposed fee rule for municipal and CGPs covers almost 82 percent of the IPDES program fee revenue and is based on factors that reflect the work load.

3. The EPA requests that a revenue estimate be provided based on the permit universe using the proposed fee schedule. It is important to demonstrate the proposed fee schedule will result in the sufficient revenue to support that program along with obligations requested from state general funds. 40 CFR § 123.22 details the requirements of the Program Description, which must address staff, cost and resources dedicated to administering the Federally required portion of the program.

DEQ provided after the May 15th rulemaking an Excel workbook that allows for the calculation of the revenue needed for the permit universe. It also shows how the proposed fee schedule will generate the necessary revenue. DEQ will be providing a more detailed description in the application for delegated authority in September of 2016 as required by 40 CFR 123.22

4. 100.05.a. - This provision does not address changes to the fee due date as a result of holidays. The EPA suggests incorporating that fees are due on October 1 or the following business day if October 1 is a weekend or state holiday. For example, 100.b.ii addresses installment due dates shifting because of "legal holidays." The EPA suggests using the term "state holiday" versus "legal holiday" because it is more specific and relates directly to DEQ's work schedule.

DEQ utilized the language regarding legal holiday that is identical to the current state drinking water rules. To maintain consistency with rules in other programs within DEQ, changing legal holiday to state holiday will not be done. DEQ will incorporate the recommendation regarding the addition of shifting the due date if Oct 1 falls on a legal holiday. Additionally in Section 050 Computation of Time DEQ specifically states that if the last day of a period falls on a Saturday, Sunday or legal holiday the period runs until the end of the next day which is neither a Saturday, Sunday or holiday.

5. 100.07 - This provision addresses the delinquency of payment that would authorize DEQ to suspend technical services, if payment is 90 days past due, and consider the permittee in noncompliance, if payment is 180 days past due. DEQ should ensure that they have the authority to terminate permits or permit coverage in cases of serious delinquency. It would be appropriate to clarify this authority in this portion of the rule or cross-reference with provisions that provide this authority.

Section 203.03 provides that noncompliance by the permittee with any condition of the permit is cause to terminate the permit. The failure to pay the fee is a violation of the permit, and therefore, provides a basis for termination of the permit.

6. The EPA remains concerned about the upset definition in DEQ's regulations. It is the EPA's understanding that DEQ intends on defining upset such that an affirmative defense can be made for violations of water quality based effluent limitations. The federal definition does not provide for the use of the upset defense for violations of water quality based effluent limitations. As such, the EPA is concerned that DEQ's definition is less stringent than the comparable federal regulation. If there were a violation of a water quality based effluent limitation as a result of an upset, the permitting authority would have the ability to exercise its enforcement discretion in determining whether to take an action for the violation(s).

DEQ appreciates EPA's concern regarding the use of upset as an affirmative defense in the case of violation of water quality based effluent limits. However, in evaluating the definition for bypass, DEQ believes that the language for the definition sets up a situation where the operator or owner of a facility should be able to claim upset as an affirmative defense regardless of the type of effluent limitation. DEQ's reasons for this are as follows:

1. EPA is concerned that DEQ's definition is less stringent than the federal regulation. DEQ argues that in fact this definition is in line with the intent of the federal regulations and also will allow the agency to be more informed about non-compliance events that may occur at facilities. According to the 24 hour monitoring requirements (40 CFR 122.41(l)(6)(ii)(B)), an operator/owner must inform the agency of "any upset which exceeds any effluent limitation in the permit". DEQ argues that if the intention of the federal regulations was that upsets would only be applied to technology based effluent limits, this portion of the federal regulations would not specifically call out "any effluent limitation". The implication here is that any effluent limitation means either water quality based or technology based effluent limitation.
2. An upset is clearly identified as an exceptional incident causing unintentional and temporary non-compliance due to factors beyond the control of the permittee. An upset therefore is not the result (and these exceptions are clearly identified in the definition) of operational error, improperly or inadequately designed facilities, lack of preventative maintenance or careless or improper operation. Essentially an upset is something that occurs outside of the control of the operator/owner which causes a temporary non-compliance with the effluent limitations. As such, the operator/owner should not be held accountable for this exceptional event that does not cause sustained or permanent non-compliance with permit limits.
3. The burden of proof for upset as an affirmative defense still lies with the operator/owner to show there was no improper or inadequate maintenance or operation of the facility, that the event was exceptional and did not cause lasting non-compliance with the effluent limitations.
4. There is precedent in other states for not specifically identifying technology based effluent limitations.

Given the reasons listed above DEQ concludes that an upset, by definition, is something that affects the process of treating wastewater and should not be constrained to only technology based effluent limits. Regardless of how the effluent limitation is calculated, the operator/owner should be afforded the right to show that an exceptional event outside their control caused a temporary, unintentional violation of the effluent limitations. The agency would also be informed about these upset events in cases where WQBELs were violated and not just when TBELs were being violated. The current language under the 24 hour reporting requirements (which EPA does not point out in this comment) could be interpreted to mean only upsets which cause violation of TBELs must be included in the report, whereas under the proposed DEQ interpretation upsets causing a violation of any effluent limit would need to be included in the 24 hour reporting.

Idaho Conservation League (ICL):

1. We have reviewed DEQ's recalculation of the number of discharge permits that the IPDES program is likely to encompass and find DEQ's new estimate to be more in line with what we believe to be the number of permits that need to be serviced. We appreciate DEQ's efforts to more accurately capture this effort.

Correctly gauging the number of permits is one of several critical components to accurately projecting needed staffing levels. Another key variable in accurately projecting needed staffing levels is the number of hours necessary to execute tasks.

Given the more accurate estimation of the number of IPDES permits, we support DEQ's increase in staff necessary to undertake the Compliance, Inspection and Enforcement (CIE) activities. The increase in the number of permits necessitates the nearly doubling of staff (from 8 FTEs to 14.6 FTEs) needed to carry out this important role.

Thank you for your comment.

2. However, we are gravely concerned that DEQ is grossly underestimating the number of hours that will be required to successfully implement permitting tasks.

In January, the DEQ underestimated the number of permits that would be part of the IPDES program. Still, even with what DEQ now admits was a significant underestimate, the DEQ estimated that it would take 11 FTEs approximately 19,800 hours to undertake permitting activities. Now, with the significant increase in the estimated number of permits that will be in the IPDES program, the DEQ estimates that this vastly increased permit load can be adequately service by only 7.1 FTEs in only 12,728 hours. This seems suspect.

DEQ agrees that the January estimate of the number of entities covered under stormwater general permits was low; however, because these are general permits, the time associated with crafting the general permit itself does not increase. There is a minimal increase in hours in the permits section due to the need to approve notices of intent for coverage under the general permit. The majority of the workload associated with increasing the number of entities covered under a general permit actually appears in the compliance, inspection, and enforcement section. Hence there is a commensurate increase in the change in hours and FTEs, from 8 to 14, needed in that section.

3. DEQ is clearly attempting to keep this program within a scale that they believe that the legislature will support. However, by artificially constraining the budget to under \$2.8 million, the DEQ is forced to artificially constrain needed staff numbers.

The January IPDES program staff and budget estimate was a total of 25.5 FTE and \$2.7 million per year. The 'new and improved' staff and budget estimate to cover the significantly larger number of permits is 28.5 FTE and \$2.8 million per year.

The pursuit of NPDES primacy has, in part, been stoked the assertion that Idaho will be able to process permits more quickly than the EPA and that Idaho will expeditiously churn out permits and work through the existing backlog. As noted in a prior DEQ analysis, the EPA is currently struggling to re-issue permits in a timely manner and there currently exists a significant 'backlog' of out-of-date permits. The DEQ analysis reports that 35% of all NPDES permits in Idaho are out of date. Per the January DEQ report, the EPA appears to have 13-14 FTE permit writers servicing Idaho's permit needs – yet this backlog continues to exist.

In prior comments to DEQ on the issue of staffing levels, we raised concern about the number of staff (11 FTEs) DEQ was proposing to devote to permitting. DEQ's reduction in the number of permitting staff to just 7.1 FTE is preposterous and casts the validity of the State's efforts to secure primacy of NPDES permitting into doubt and seems completely divorced from the reality.

DEQ is simply going to have to increase the total budget for the IPDES program and hire the proper number of staff to implement the IPDES program.

Please refer to the response to EPA's Comment 1 in this document

4. We feel compelled to point out that the proposed fee structure results in municipalities bearing the costs for a hugely disproportionate share of the IPDES program. This seems inherently unfair. Why should small towns pay their fair share yet private, for profit aquiculture operations pay nothing? Why should the municipalities as a whole pay nearly half of all of the fees charge by the program? Why should urban areas be subsidizing rural areas? And, why should the city of Boise pay nearly 10% of all of the annual fees collected in the entire state? Will 10% of the entire resources of the IPDES program be devoted to servicing the City of Boise? Of course not; so why is Boise paying 10% of all of the fees?

We believe that permittees should be charged pursuant to the amount of work that is required to service their permits and ancillary needs. DEQ's current proposal shifts costs away from those who have been vocal opponents of the State seeking privacy because of their objects to having to pay for their discharge permits. In essence, those who opposed primacy on grounds that they did not want to pay for their own permits are being rewarded by not having to pay for permits. Foisting these costs onto others creates an unfair system that will likely prove unpopular and unsustainable as time goes on and the paying part of the universe begins to feel as if they have been taken advantage of.

We urge DEQ to create a more equitable system for allocating costs to permittees.

Municipalities are not bearing a disproportionate cost of the IPDES program. Municipalities are bearing the IPDES program costs associated with municipal permits, inspection, technical assistance, enforcement, pretreatment programs, MS4 permits and biosolids. EPA's State Water Quality Management Resource Model is the mechanism used to define the current IPDES program staffing needs based on hours. The associated Fee Schedule Proposal spreadsheet takes those hours and uses state wages, etc. to derive the overall program costs. These IPDES program cost estimates are based on the approved EPA model using existing DEQ wages. There is no better approach to use to assess the IPDES program revenue needs.

The proposed fee basis of using equivalent dwelling units as a basis for deriving the IPDES municipality fee was developed with support from the Association of Idaho Cities, the Association of Idaho Public Works Professionals and individual cities. This stakeholder group worked with their municipal counterparts in identifying the mechanism to apportion costs to the cities. That apportionment of costs, with a 50% IPDES fee structure, results in \$1.74 per EDU

per year, clearly not a burden to the EDU user of the city collection and wastewater treatment systems.

The IPDES program is fortunate to be receiving state general fund support for this important program. The choice was made to use state general funds to supplement the minor general permit community. No attempt was made to distinguish or discriminate in deriving fees from facilities based on size.