

**From:** [Norm Semanko](#)  
**To:** [Paula Wilson](#)  
**Subject:** IPDES Negotiated Rulemaking - Comments on Combined Drafts 1 through 4 and Definitions - Docket No. 58-0125-1401 (June 5, 2015)  
**Date:** Friday, June 26, 2015 9:52:04 PM

---

Dear Paula,

These comments are submitted on behalf of the Idaho Water Users Association (IWUA) regarding IPDES Combined Drafts 1 through 4 and Definitions, Docket No. 58-0125-1401, dated June 5, 2015. In addition to these comments, we continue to support the specific changes suggested in our previous comments, many of which have not been made by DEQ.

**Rule 0. Legal Authority.** Idaho DEQ's NPDES rulemaking is being conducted pursuant to Idaho Code Section 39-175C, as authorized and directed by the Idaho State Legislature in 2014. The last sentence of draft rule 0 should therefore be retained. The remainder of the draft rule should be deleted. The authorities cited in these additional sentences are different and much broader in scope than those which authorize the NPDES program rulemaking. Just one example is the authority that relates to "the waters of the state", which is a much broader term than "waters of the U.S." under the Clean Water Act. "Waters and waters of the state" is defined in DEQ's Water Quality Standards as "all the accumulations of water, surface and underground, natural and artificial, public and private, or parts thereof which are wholly or partially within, which flow through or border upon the state." IDAPA 58.01.02.10.113. This is of course the same definition contained in the draft IPDES Rule (10.109). Under the Clean Water Act, NPDES permits are required for the discharge of pollutants into "waters of the U.S.", not "waters of the state", which is basically all waters. The State's NPDES program should not be more expansive than EPA's NPDES program. This was not the direction or intent of the Legislature. Specifically, Idaho Code Section 39-175B provides that DEQ may not require NPDES permits in instances where EPA would not require NPDES permits. Also, Idaho Code defines "waters or water body" as "the navigable waters of the United States as defined in the federal clean water act", not as "waters of the state". Idaho Code Sec. 39-3602(34).

**Rule 03. Incorporation by Reference.** Draft rule 3.bb.iv. provides: "The term Waters of the United States means waters of the state of Idaho." For the same reasons as discussed regarding Rule 0 above, this provision should be deleted. In addition, EPA does not define Waters of the United States this way. It is presumably beyond the authority of Idaho DEQ to define what the term Waters of the United States means. In any event, it cannot be defined so broadly.

**Rule 10.27. Definition of "Discharge of a Pollutant".** This term defines discharge as the addition of any pollutant to waters of the state, rather than waters of the United States. For the same reasons as discussed regarding Rule 0 above, the term waters of the state should be removed and replaced with waters of the United States or a

similar description, limited to jurisdiction under the Clean Water Act.

This definitional problem occurs and needs to be correct in several other places (e.g., Rule 10.59 and Rule 10.110).

**Rule 102.01. Persons Who Must Obtain a Permit.** This draft rule provides that any person who proposes to discharge a pollutant "to a surface water in Idaho" must obtain an NPDES permit. This is broader in scope than the Clean Water Act, which only requires a permit to discharge to waters of the United States. This section needs to be revised accordingly.

**Rule 102.02. Exclusions from Permit.** This draft rule provides an exemption for discharges into "waters of the state". For the reasons stated above, this phrase should be replaced with "waters of the United States" or a similar term, limiting jurisdiction to that provided by the Clean Water Act.

There are several additional references in the draft rule to "waters of the state" which similarly need to be revised.

We are not clear why DEQ has drafted a rule which would expand the scope of the NPDES program to waters over which EPA has no jurisdiction under the Clean Water Act. We encourage DEQ to fix this fundamental problem. It is unlikely that IWUA would be able to support the rule, or delegation to DEQ, if it remains so broad.

As always, thank you for the opportunity to provide comments.

Regards,

Norman M. Semanko  
Executive Director & General Counsel  
Idaho Water Users Association  
1010 W. Jefferson St., Suite 101  
Boise, ID 83702  
208-344-6690  
norm@iwua.org

