Docket 58-0125-1401 – IPDES Rules

Response to Comments on Draft 6.0 and Combined Drafts 1 through 4 and Definitions

June 26, 2015 comment deadline

U.S. Environmental Protection Agency (EPA):

1. **Comments Discussion Paper 6.0** – We have no comments on the discussion paper at this time.

Thank you for the response.

2. **Comments on Draft Rules (204, 205, 206)** – The EPA will complete our review and provide comments on these sections of the rule prior to the end of the comment period for the complete rules ending on July 24.

Thank you for the response.

Idaho Water Users Association (IWUA):

1. **Rule 0. Legal Authority**.
    a. 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.

DEQ agrees that the specific authority to adopt the IPDES rules is set forth in Idaho Code section 39-175C. The authority to enforce the rules once adopted is contained in the Environmental Protection and Health Act, including without limitation, Idaho Code section 39-108(5)(a)(ii) that authorizes civil penalties for violations associated with the IPDES rules. DEQ will change the legal authority section to make this more clear.

    b. 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).

DEQ has removed the definition and use of the term "waters of the state" from the draft IPDES rules. DEQ has replaced this term with "Waters of the United States" throughout the draft rules and has incorporated by reference, this definition from 40 CFR 122.2 into Section 003 (Incorporation by Reference) of the draft IPDES rules. We believe this revision appropriately identifies the waters subject to IPDES regulation and is consistent with federal regulations.

2. **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.

DEQ now uses the term "waters of the United States" throughout the draft IPDES rules and has incorporated this definition by reference in Section 003 (see comment response to IWUA comment #1b).

3. **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).

DEQ now uses the term "waters of the United States" throughout the draft IPDES rules and has incorporated this definition by reference in Section 003 (see comment response to IWUA comment #1b).

4. **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.

DEQ now uses the term "waters of the United States" throughout the draft IPDES rules and has incorporated this definition by reference in Section 003 (see comment response to IWUA comment #1b).

5. **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.

DEQ now uses the term "waters of the United States" throughout the draft IPDES rules and has incorporated this definition by reference in Section 003 (see comment response to IWUA comment #1b).

Idaho Conservation League (ICL):

1. **Appeal Process.** We support the utilization of a record review process. This sort of appeal process encourages interested parties to participate fully in the permitting process and results in an efficient, manageable appeal timeline.

Thank you for the response.

2. **Hearing Authority.** We support amending the EPHA so as to provide that DEQ Board Members must comply with the CWA conflict of interest requirements. Taking this path would result in the Board being able to best able to carry out both their existing duties and hear CWA (and CAA) appeals.

   With regard to the option of having the DEQ Director hear CWA appeals, we would note that the current Director would not be able to hear such appeals at this time. This limitation is likely not limited to the current Director – future Directors are also likely to have this conflict.

   ICL appreciates the opportunity to review IPDES Rules Draft 1-4 and Definitions

Thank you for the response.

3. **Waters of the State.** Within Section 3 it is noted that "The term Waters of the United States means waters of the state of Idaho." Is this "waters of the state of Idaho" referenced above the same as "waters of the State" as defined in 58.01.02.010.113?

DEQ now uses the term "waters of the United States" throughout the draft IPDES rules and has incorporated this definition by reference in Section 003 (see comment response to IWUA comment #1b).

4. **305.01.f.** We oppose this proposed modification. Compliance schedules may only be lawfully incorporated into an NPDES (or an IPDES) permit when the effluent limits necessitating facility upgrades are new requirements or limits. This proposed modification to the language would allow compliance schedules to be incorporated into permits in a manner that would affect compliance with effluent limits that have been in prior permits. We believe that this would be considered 'back siding.'

The rule in Section 305.01.f allows compliance schedules to be developed in accordance with Idaho Water Quality Standards, IDAPA 58.01.02.400.

Association of Idaho Cities (AIC):

1. **Waters of the State versus Waters of the U.S.** Throughout combined drafts 1-4, the draft rule uses Waters of the State (WOS) and Waters of the United States (WOTUS) interchangeably. The definition of WOS (#109 in definitions section) includes groundwaters, private waters, and other waters (e.g. upland canals with no tributary connection to WOTUS) that are outside of Clean Water Act jurisdiction based on the final rule released by EPA on May 27, 2015 but not yet published in the Federal Register. Because Waters of the State are defined more broadly than Waters of the United States, and only Waters of the United States are subject to Clean Water Act permitting under the National Pollutant Discharge Elimination System permits program or in the future under an EPA approved Idaho Pollutant Discharge Elimination System permit program, the rule needs to clarify that only Waters of the United States are subject to permitting and that some of the Waters of the State are not subject to permitting. The following is a list, including but not limited to, the sections of Drafts 1-4 that appear to require modification:

   i. Legal Authority (page 3).
      Second "waters of the state" in this section should be WOTUS.
   ii. Incorporation by Reference: 3.bb.iv (page 5).
      Replace "…the term waters of the state of Idaho" with "WOTUS."
   iii. Definitions: 10.09: Best Management Practices (page 7).
      While the application of BMPs to WOS in sentence one appears to be appropriate, the application of BMPs in sentence two of this section only applies to WOTUS.
   iv. Definitions: 10.23: Direct Discharge (page 8).
      The proposed direct discharge definition all WOS and should only apply to WOTUS. Replace WOS with WOTUS.
   v. Definitions: 10.27.b.: Discharge of pollutant (page 8).
      Replace WOS with WOTUS.
   vi. Definitions: 10.89: Silvacultural Point Source (page 14).
      Review use of WOS, appears that it should be WOTUS.
   vii. Definitions: 10.100: Toxic Pollutant (page 15).
      Replace WOS with WOTUS.
   viii. Definitions: new 10.110: Waters of the U.S. page (page 16).
      Add WOTUS to definitions (new 110, renumber current 110-114 to 111-115).
   ix. Definitions: existing 10.110: Water Pollution (page 16).
      Replace WOS with WOTUS for both occurrences.
   x. Definitions: existing 10.112: Water Transfer (page 16).

Replace WOS with WOTUS

xi. Exclusion from Permits: 102.02 (page 20).
Replace WOS with WOTUS.

xii. Exclusion from Permits: 102.02.a.ii.(3) (page 20).
Check to see if WOS should be replaced by WOTUS.

xiii. Exclusion from Permits: 102.02.b (page 20).
Replace WOS with WOTUS.

xiv. Pre-application Process: 104 (page 21).
Replace WOS with WOTUS.

xv. Application for an Individual Permit:
105.11.b.(9)(viii) page 34; 105.11.b.(9)(viii)(1) page 34; 105.11.d(7)(ii) page 36; 105.11.d(7)(iii) page 36 ; and 105.11.f (page 36). Replace WOS with WOTUS.

xvi. Permit Application Requirements for Municipal Separate Storm Sewer Discharges:
105.18, 105.18.b.iii(2) twice (page 56); 105.18.b.iv(2)(a) twice (page 57). Replace WOS with WOTUS.

xvii. General Permit Administration: 130.05.c.vii(1) page 73; and 130.05.c.vii(3) page 73. Replace WOS with WOTUS.

xviii. Calculating Permit Provisions: Intake Credits 303.07.a.i (page 94).
Replace WOS with WOTUS.

xix. Calculating Permit Provisions: Disposal of Pollutants into wells, POTWs or Land Application: 303.09.a twice (page 96), 303.09.a.i (page 96), 303.09.a.ii twice (page 96). Replace WOS with WOTUS.

DEQ now uses the term "waters of the United States" throughout the draft IPDES rules and has incorporated this definition by reference in Section 003 (see comment response to IWUA comment #1b).

2. **Stormwater Definition.** The proposed definition of *Storm Water* is: "*Runoff, snow melt…*" The federal definition of Storm Water is "*Storm water runoff, snow melt…*"

   The proposed definition appears to be a more broad definition of stormwater because it is not limited to storm water runoff. The federal definition is consistent with the definition of all existing MS4 permits issued in the state of Idaho.

   AIC recommends that the proposed IPDES program use the federal definition of stormwater see 40 C.F.R. 122.26(b)(13).

DEQ has changed the definition for "storm water" (now in Section 010.93) to, "Storm water runoff, snow melt…" consistent with 40 CFR 122.26(b)(13).

3. **Municipal Separate Storm Sewer System (MS4) Definition.** The proposed rule does not contain a definition of Municipal Separate Storm Sewer System (MS4). The Code of Federal Regulations defines large, medium, and small MS4 at sections 40 C.F.R. 126.b(4), 40 C.F.R. 126.b(7), and 122.32 respectively.

AIC suggests that the 40 C.F.R. 126 definitions of large and medium MS4 and the 40 C.F.R. 132 definition of small MS4 be added to the definitions section of the proposed rule.

DEQ has incorporated by reference all of 40 CFR 122.26(b) and 122.32 into the IPDES rules, which includes the definitions for large, medium, and small MS4s.

4. **Waters of the United States Definition.** The proposed rule does not contain a definition of "Waters of the United States."

   AIC suggests the draft rule include the federal definition of "Waters of the United States" found at 40 C.F.R. 122.2.

DEQ now uses the term "waters of the United States" throughout the draft IPDES rules and has incorporated this definition by reference in Section 003 (see comment response to IWUA comment #1b).

5. **Incorporation of NPDES Rules by Reference.** AIC understands the three options proposed in the discussion paper and supports the Idaho Department of Environmental Quality (IDEQ) proposed use of the hybrid approach of adoption by reference of federal rules for reasons of cost effectiveness and development some rules to incorporate important aspects of the rules that are Idaho specific or which are not currently included in existing federal rules.

Thank you for the response.

6. **Section 100.01: Rights.** The second sentence of this section is a confusing restatement of the key elements contained in the first sentence and implies that additional permits and agreements are necessary. The second sentence adds nothing substantively, that is not already addressed in the first sentence.

   AIC recommends that the second sentence be stricken.

The second sentence is similar to that of 40 CFR 122.5(b) and (c) and as stated in our response to comments for draft rules 2.0, "DEQ has provided this final sentence in Subsection 100.01 as a courtesy to the regulated community to inform them that while their discharge requires an IPDES permit, there may be other approvals or authorizations that are necessary that DEQ is not aware of or responsible for." Further, DEQ has been including this language in our 401 certifications, and it is DEQ's intent that nothing in the language requires approval from a private owner to discharge. Instead, it alerts the discharger that it is the discharger's responsibility to get an approval if one is needed.

7. **Section 102.01: Obligation to Obtain an IPDES Permit.** The draft rule indicates that a permit is required for a discharge to "surface waters of the state." The definition of waters of the state is broader than and includes waters that are not subject to NPDES permit obligations (e.g. groundwaters).

We believe that IDEQ's obligation and intention is to issue IPDES permits to Waters of the United States. AIC suggests that the draft rule section 102.01 be modified to read:

"Any person who discharges or proposes to discharge a pollutant to a water of the United States, …".

DEQ now uses the term "waters of the United States" throughout the draft IPDES rules and has incorporated this definition by reference in Section 003 (see comment response to IWUA comment #1b).

8. **CWA Section 316 (a & b).** AIC appreciates and supports the inclusion of CWA Section 316(a) thermal variances and CWA Section 316(b) cooling water intake provisions in the proposed rules… AIC recommends that the draft rule include or that IDEQ reviews the draft rule for:

    a. Include: Definition of "Balanced Indigenous Population" identical to the federal definition at 40 C.F.R. § 125.71(c) in the IPDES and state water quality standards definitions sections. The definition currently is adopted by reference in the proposed rule, but would require specific knowledge of the existence of Section 316 of the Act that the existing Idaho standards do not address and therefore are not transparent to many NPDES permittees, non-governmental organizations, and the public.

DEQ has incorporated all of 40 CFR 125.70 – 73 (Subpart H) into Section 003 (Incorporation by Reference), which includes the definition of "Balanced Indigenous Population."

    b. Include 316(a) questions/information per EPA recommendations in permit applications (e.g. is the applicant seeking or has the applicant been granted and is reapplying for a CWA Section 316(a) or (b) variance).

DEQ will consider including these questions/information in permit applications.

    c. Include additional permit and fact sheet requirements for Section 316(a) as identified by EPA.

DEQ has incorporated all of 40 CFR 125.70 – 73 (Subpart H) into Section 003 (Incorporation by Reference), as well as adapted 40 CFR 124.57, 124.66, and other pertinent CFR regulations into the draft IPDES rules, which address the requirements for 316(a) variances.

    d. Review of the state water quality standards, the Integrated Report thermal listing process, procedures, and guidance, and the thermal TMDL development processes and guidance to include the appropriate CWA 316(a) and 40 C.F.R. 130.7(c)(2) elements, conditions, and processes.

DEQ will consider these resources in when addressing the Clean Water Act section 316(a).

e. Review section 302.03 to determine if a new section at 302.03.d is necessary to authorize thermal variances consistent with CWA Section 316.

DEQ has incorporated by reference and adapted into the draft IPDES rules, the federal regulations addressing requirements for 316(a) variances (see response to AIC comment #8c).

f. Review section 302.04.e to determine if it needs to be modified to include 316(a) as well as 316(b) as another effluent limitation or standard.

DEQ has incorporated by reference and adapted into the draft IPDES rules, the federal regulations addressing requirements for 316(a) variances (see response to AIC comment #8c).

g. Review section 303.10 to determine if new sections are necessary for the calculation of limits for facilities with section 316(a) thermal variances and/or cooling water intake structures (316(b)).

We could not locate a section 303.10 in the draft IPDES rules.

h. Review section 310.02 to determine if language identical to section 310.01.e is necessary in this section.

The language is very similar between these two sections. However, Section 310.01 applies to non-POTWs, whereas Section 310.02 applies to POTWs.

i. Review section 310.05.a to determine if the last "and" in this section should be "or". The language appears to authorize thermal variances only for cooling water intake structures and not thermal variances for other permittees without cooling water intakes.

This requested change has been made in the rule.

9. Upset. AIC appreciates the proposed upset definition and provisions contained in the draft rule and believes that they are consistent with the Act, prior EPA actions, and federal rules… AIC strongly supports the IPDES rules providing an upset defense for both technology and water quality based limitations.

Thank you for the response.

10. **Water Quality-Based Requirements and Guidance.** AIC supports the incorporation of both technology and water-quality based permit conditions to meet the goals of the Clean Water Act. Draft sections of the rule include all of the rule language necessary to do that; however, do not describe or address guidance on how the State of Idaho intends to establish these limitations (e.g. EPA Technical Support Document or State Technical Support Document for the development of water quality based toxics). EPA provides States significant flexibility in the policy choices for 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.

Because IDEQ has indicated it will develop state level guidance for development of WQBELs, AIC would encourage IDEQ to include references to state guidance in the appropriate sections of the rule (e.g. 302.04, 302.06, 302.07, new 302.08…).

Although DEQ intends to develop the appropriate guidance, such guidance and other documents cannot be cited in the draft IPDES rules at this time because they do not exist.

11. **Authorization for Trading.** AIC appreciates and strongly supports the authorization for water quality trading included in the draft rule at 302.20. AIC believes that this is an essential element in the permitting and TMDL landscape now and in the future as demonstrated by the recent June 5, 2015 draft Lower Boise Phosphorus TMDL. The draft TMDL contains no reserve for growth for any point sources with the anticipation that all future growth will come from discharges at the TMDL water quality target (100 ug/l TP) or a combined treatment plus trade approach.

Thank you for the response.

12. **Intake Credits.** AIC appreciates and supports the inclusion of intake credits in the determination of IPDES limitations contained in the draft rule at 303.07. AIC believes that intake credits will be particularly useful for toxics. However, the proposed provision only provides credits for facilities that withdraw source waters from the same waterbody that they discharge to. In Idaho, groundwater provides 95% of the drinking water, which might be higher or lower for specific pollutants than surface waters due to natural or geologic conditions. Across the state, groundwater is the primary source of potable water used by public and industrial sources, and under the draft Intake Credit language, should also be available as an intake credit.

    AIC recommends that the language be modified to include all sources of potable 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.

In order to be eligible for intake credits, the source of water must be the same as the receiving water. Section 303.07.a.iv of the IPDES rules includes ground water sources which "…may be considered to be from the same body of water if the Department determines that the pollutant would have reached the vicinity of the outfall point in the receiving water within a reasonable period had it not been removed by the permittee."

13. **Schedules of Compliance.** AIC appreciates and supports the inclusion of revised language at 305.01.f to the Schedules of Compliance (SOCs) approach for IPDES permits… AIC appreciates and supports the draft language modification to include the use of SOCs for conventional and non-conventional (e.g. global and legacy toxics) pollutants (e.g. removal of the new pollutant only use of SOCs) proposed at the June 12, 2015 meeting. SOCs are an important compliance tool that can be used effectively in the long or short term based on the type of permitting challenge that needs to be addressed.

Thank you for the response.

14. **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 for thermal discharges from point sources included in the Act.

    AIC supports, due to the nature of some pollutants, variances granted on a watershed (e.g. Silver Valley) or statewide basis (e.g. mercury, arsenic, PCBs…) and encourages IDEQ to include approaches other than permit by permit for application in the IPDES rules and state water quality standards programs where appropriate.

Thank you for the response.

15. **Section 5: IPDES Fees.** AIC supports the proposed joint state, federal, and fee based funding method for implementation of the IPDES program. AIC is particularly supportive of the 60% state funding level, primarily as an economic development tool for all Idaho municipalities, and particularly for small and medium sized cities.

Thank you for the response.

16. **Section 6: Permit Appeal Options.** During the June 12, 2015 IPDES meeting, IDEQ presented two basic questions to the negotiated rulemaking group:

    - What Type of IPDES Appeal Process Should be Used: Record or Adjudicatory?
    - What Individual or Body Should Hear the Appeal?

    AIC appreciated the options, advantages, disadvantages, and IDEQ preference expressed in Draft Paper #6 and the presentation on June 12.

    Concerning the type of appeal process, AIC supports the IDEQ preference of a record based appeal for the reasons IDEQ identified in the Draft Paper and presentation.

    Concerning the individual or body hearing the appeal, AIC supports the creation of a new IPDES Appeals Board composed of three members, similar to EPA's Environmental Appeals Board. The IPDES Appeals Board should be composed of individuals who have expertise in surface water and IPDES matters, but do not have conflicts of interest (e.g. derive income from sources with IPDES discharges), and that are appointed by the IDEQ Board.

DEQ has modified the rule so that the appeals are heard by Hearing Officers appointed by the Director from a pool of Hearing Officers approved by the Board. Hearing Officers pool should be individuals with expertise or experience in IPDES related issues, and no Hearing Officer can be appointed that has a conflict of interest as defined in the Clean Water Act and federal regulations. DEQ believes this is the best way to ensure meeting the conflict of interest requirements and ensure a qualified, independent person hears appeals.

17. **Important IPDES Implementation Opportunities Not Contained in the Current Proposed Rules.**

    a. Watershed Based and Bubble Permitting:

    Watershed-based NPDES permitting is a process that emphasizes addressing all stressors within a hydrologically-defined drainage basin, rather than addressing individual pollutant sources on a discharge-by-discharge basis. Watershed-based permitting can encompass a variety of activities ranging from synchronizing permits within a basin to developing water quality-based effluent limits using a multiple discharger modeling analysis. The type of permitting activity will vary depending on the unique characteristics of the watershed and the sources of pollution impacting it. The ultimate goal of this effort is to develop and issue NPDES permits that better protect and maintain or restore biological function within entire watersheds. In 2007, EPA published guidance for watershed based permitting12 and EPA has conducted watershed based permitting in Idaho (eleven concurrent NPDES permits issued to municipal wastewater and industrial discharges in the lower Boise watershed in 1999).

    Bubble Permitting is also a tool available to the IPDES program that provides innovative and cost effective strategies to comply with nutrient or other pollutants and have been used in the Tualatin watershed for both the wastewater and stormwater discharge permits issued to Clean Water Services and has been discussed as a tool to implement the Spokane Nutrient TMDL. Bubble permitting also may accelerate environmental compliance by providing additional incentives for over compliance and is frequently associated with trading.

    Watershed based and Bubble Permitting are two tools that IDEQ should use to address difficult nutrient or toxic pollutant water quality challenges (e.g. Watershed based TMDLs) across the state in a more effective and cost efficient manner.

    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 permits and achieve watershed based challenges more quickly and cost effectively.

Thank you for the response.

18. **18. IPDES Rulemaking Schedule.** AIC recognizes that the IPDES rulemaking schedule is very aggressive. AIC remains supportive of the IPDES authorization process; however, important issues that provide flexibility, cost effectiveness, and accelerated compliance with environmental goals (e.g. IPDES Technical Support Document for Toxics Control; IPDES Thermal Variance Technical Support Document; Watershed and Bubble Permit Policy/Guidance…) are important elements to include at the inception of the program.

    AIC is concerned that if there is a rush to authorization, with the promise of changes during implementation, that ten or twenty years down the road the potential efficiencies and opportunities of efficient and cost effective rollout of the IPDES program will have

been forgone. Or put more plainly, a thoughtful and robust IPDES rulemaking and guidance development process is better than fast IPDES rulemaking for the IPDES permittees, non-governmental organizations, public, and state of Idaho.

AIC recognizes the IDPES schedule was developed in response to a statutory deadline and the enormous amount of work that needs to be done to pull together the rules, regulations, policies and guidance to run an effective and efficient IPDES program.

AIC would be willing to work with IDEQ, other interested stakeholders, and if necessary the Legislature, to provide additional time to complete this very important task of developing IPDES rules, regulations, guidance, and policy necessary to implement an effective, efficient, and successful IPDES program.

Thank you for the response.

Idaho Farm Bureau Federation:

1. IFBF supports a record review appeal process rather than an adjudicatory process. Our members also support using a hearing officer that is selected by the Director of DEQ from a list of pre-approved individuals who have professional expertise and experience. It does not make sense to set up a separate board, nor does it make sense to disband the current DEQ board.

DEQ has modified the rule so that the appeals are heard by Hearing Officers appointed by the Director from a pool of Hearing Officers approved by the Board. Hearing Officers pool should be individuals with expertise or experience in IPDES related issues, and no Hearing Officer can be appointed that has a conflict of interest as defined in the Clean Water Act and federal regulations. DEQ believes this is the best way to ensure meeting the conflict of interest requirements and ensure a qualified, independent person hears appeals.

2. Our next comment on this latest draft relates to a definition in the incorporation by reference section located at the bottom of page 5 of Combined Drafts 1 through 4 and definitions.

   Specifically, the draft rule proposes to include "vi. The term Waters of the United States means waters of the State of Idaho." This language, while seemingly innocuous, is very troubling and will lead to disastrous unintended consequences.

   …Therefore, we suggest a much less sweeping statement for the IPDES rules. Regardless of the outcome of the EPA rules, it is not appropriate, nor do we want ALL Idaho waters to be considered Waters of the U.S.

   A more appropriate definition would be "The term Waters of the United States means those waters within the State of Idaho that are clearly under the jurisdiction of EPA as authorized by the Clean Water Act."

An even more specific definition would be "The term Waters of the United States means navigable waters within Idaho." If you chose to do so, you could actually list the waters that are currently covered under the NPDES program.

DEQ now uses the term "waters of the United States" throughout the draft IPDES rules and has incorporated this definition by reference in Section 003 (see comment response to IWUA comment #1b).

3. Finally, there are several other proposed definitions that now give us great concern. These are located primarily on page 8 of the Combined Drafts 1 through 4 and definitions. These include "Direct Discharge", "Discharge of a Pollutant" and "Effluent Limitation". There may be other similar definitions that we have overlooked as well.

   Each of these definitions has been proposed to include "waters of the state". This again is very troubling since the NPDES program does not currently include ALL the waters of the State of Idaho; it only includes the Waters of the United States as defined in the Clean Water Act, which are "navigable" waters. These definitions appear to expand the IPDES program far beyond the current NPDES program which is not what the Legislature intended when they authorized DEQ to seek primacy from EPA.

   Further complicating the issue, the rules currently include on page 16 the definition "Waters and Waters of the State. 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." This clearly includes waters that are not and never have been contemplated to be under the jurisdiction of the EPA. Therefore, it makes no sense to keep referring to waters of the state since that definition includes far more waters than what applies to the IPDES program.

   It would be preferable and far clearer to simply define "Waters of the United States" as we have suggested above and then retain the definitions on page 8 as they existed prior to the proposed wording changes so they continue to refer to Waters of the United States. This will avoid any possible inference that the IPDES program applies to additional waters in Idaho that were not previously covered under the NPDES program.

   We respectfully request that you change these, and any other similar definitions. We believe that the State Legislature would have grave reservations about approving the rules as proposed since it provides for an expansion of the program over waters not intended to be covered.

DEQ now uses the term "waters of the United States" throughout the draft IPDES rules and has incorporated this definition by reference in Section 003 (see comment response to IWUA comment #1b).

Idaho Association of Commerce and Industry (IACI):

1. Important concepts that IACI believes needs to be incorporated into the administrative appeal rule include:

- The appeal process should be based on a record review. We believe this process needs to give the applicant the opportunity to provide information in response to new issues or topics that are raised during the public comment period.

- The appeal should be heard by a hearing officer selected by the DEQ Director from a list of qualified hearing officers approved by the DEQ Board. An appeal of the hearing officer's decision should go to Idaho State District Court.

DEQ has modified the rule so that the appeals are heard by Hearing Officers appointed by the Director from a pool of Hearing Officers approved by the Board. Hearing Officers pool should be individuals with expertise or experience in IPDES related issues, and no Hearing Officer can be appointed that has a conflict of interest as defined in the Clean Water Act and federal regulations. DEQ believes this is the best way to ensure meeting the conflict of interest requirements and ensure a qualified, independent person hears appeals. In addition, DEQ has added a provision allowing the permit applicant an opportunity to provide additional information in response to public comments received.

2. IACI recommends the following language for Section 204.

01. Petition for Review of a Permit Decision. ….

a. Any person who is aggrieved by the final permit decision may file a petition for review as provided in this section. A person aggrieved includes the permit holder or applicant, and any person or entity who filed comments or who participated in the public hearing on the draft permit or any person ~~or entity with legal standing to challenge the final permit decision~~.

b. [no change]

c. In addition to meeting the requirements in Subsection 204.06, a petition for review must:

i. ~~Identify the permit condition or other specific aspect of the permit decision that is being challenged~~ Be confined to the issues raised during the public comment process or to changes made to the permit by the Department after the close of the public comment period;

ii. ~~Set forth the legal and factual basis for the petitioner's contentions~~ Identify the permit condition or other specific aspect of the permit decision that is being challenged;

iii. Set forth the relief sought;

iv. Set forth the basis for asserting that the petitioner is an aggrieved person…… (leave this section as written by DEQ)

05. Petition to Intervene. Any person who participated in the public comment process and who has a direct and substantial interest in the outcome of the Petition for Review may file a Petition to Intervene.

07. Augmenting the Administrative Record. Consideration of the Petition for Review by the Hearing Authority…….The Hearing Authority may allow the record to be augmented if the requesting party shows that the additional information is material, is relevant to the issues raised in the appeal and that: (leave this section as written by DEQ)

a. ~~There were good reasons for failure to present information during the permitting proceeding; or~~ The Department relied on records outside the Administrative Record in making its decision; or

b. ~~There were alleged irregularities in the permitting proceeding and the party wishes to introduce evidence of the alleged irregularities.~~ The augmentation is needed to explain technical terms or complex subject matter; or

c. ~~A statement regarding whether the party desires an opportunity for oral argument.~~ The augmentation is necessary to determine whether the Department considered all relevant factors; or

d. The permit applicant needs to address a new issue raised during the public comment period or to a change made in the permit by the Department after the public comment period closes.

e. There were alleged irregularities in the permitting proceeding or alleged showing of bad faith by the Department, and the party wishes to introduce evidence of the alleged irregularities or bad faith. (This section "e" is new but replaces DEQ's section "b" with additional language.)

DEQ has made the following changes: (1)limited persons who can file a petition to the permit applicant or those who participated in the comment process;and (2)limited the issues to those raised in comments or related to changes made in the permit after the close of the public comment period. DEQ did not limit the persons who can intervene to those who participated in the public comment process as such persons can already file petitions to initiate an appeal and DEQ believes others who have a direct and substantial interest in the outcome of the appeal should be allowed to participate. DEQ also did not modify the record augmentation provisions for a number of reasons. First, DEQ has included a provision allowing a permit applicant to respond to comments received before the final permit decision is issued. In this way, the permit applicant should not have to augment the record to respond to comments. Second, DEQ believes the record should not be augmented unless there was a reason for the information not being submitted during the public comment process. This will help ensure that persons are

encouraged to provide information to DEQ during the permitting process so that DEQ makes the most informed permit decision. Third, some of the reasons for augmentation would allow new information, not provided to DEQ when it was making its permit decision, simply by showing that the information relates to whether DEQ considered relevant facts. This broadly worded exception, without the requirement that the person show the information could not have been submitted during the comment process, does not appear consistent with the concept of a record review.

Idaho Mining Association (IMA):

1. We believe these goals can best be met by having administrative appeals heard by a hearing officer appointed by the DEQ Director. The Director would choose from a list of qualified hearing officers that has been approved by the Board of Environmental Quality. This would assure a more impartial decision than might be otherwise made if the Director were to make the decision and would also address the conflict of interest issues contained in the Clean Water Act and its regulations.

DEQ has modified the rule so that the appeals are heard by Hearing Officers appointed by the Director from a pool of Hearing Officers approved by the Board. Hearing Officers pool should be individuals with expertise or experience in IPDES related issues, and no Hearing Officer can be appointed that has a conflict of interest as defined in the Clean Water Act and federal regulations. DEQ believes this is the best way to ensure meeting the conflict of interest requirements and ensure a qualified, independent person hears appeals.

2. DEQ has also solicited comments concerning whether the appeals process should be an adjudicatory process or a record review process. We support a record review process to assure that interested parties provide all relevant information during the permit process.

Thank you for the response.

3. We also support a very limited ability to augment the certified administrative record with information that is material to the permit decision. This should only be allowed when there are good reasons the information was not presented during the permit proceeding. Those reasons would include a need for additional evidence because of new issues raised during public comments, addressing permit terms and conditions added by DEQ after public comment and a need to explain technical terms or complex matters.

Please see response to comments by IACI.

4. In addition, we favor an appeals process similar to that used in Montana. Only an applicant can appeal a final permit decision within the agency but a third party can initiate any appeal of that decision in district court. A third party appeal should be a record review only where the court would apply a judicial review standard that examines whether a decision was arbitrary and capricious or an abuse of discretion. This would assure an efficient permitting system and eliminate the ability of opponents of a permit decision to add months, perhaps years, to the time it takes to make a decision final.

DEQ believes an appeal process should allow permit applicants and those who participated in the comment process an equal right for an administrative appeal.

Idaho National Laboratory (INL):

1. **Section 1.02, Scope.** The scope of the rules is to "…*establish procedures and requirements for the issuance and maintenance of permits for facilities required by Idaho Code and the Clean Water Act to have requested and received authorization to discharge pollutants to a surface water of the state.*" It appears to be the intent of the rule to regulate surface water only, therefore, a definition for "surface waters of the state" in Section 10, Definitions, is recommended.

DEQ now uses the term "waters of the United States" throughout the draft IPDES rules and has incorporated this definition by reference in Section 003 (see comment response to IWUA comment #1b).

2. **Sections 3.03.bb.vi and 10.109.** Section 3.03bb.vi states "*The term Waters of the United States means waters of the state of Idaho." Section 10.109 states: "Waters and Waters of the State. 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.*" The definition of Waters and Waters of the State is significantly more restrictive (e.g., regulating groundwater) then the Environmental Protection Agency (EPA) definition of Waters of the United States. Idaho Code 39-3601, Declaration of Polociy and Statement of Legislative Intent states: "*It is the intent of the legislature that the state of Idaho fully meet the goals and requirements of the federal clean water act and that the rules promulgated under this chapter not impose requirements beyond those of the federal clean water act.*" INL suggests deleting the definition and used of the term "Waters of the State" and replacing it with the new definitions for "surface waters of the state" that is equivalent to the EPA definition of Waters of the United States.

DEQ now uses the term "waters of the United States" throughout the draft IPDES rules and has incorporated this definition by reference in Section 003 (see comment response to IWUA comment #1b).

3. Sections 102.01, 102.02, etc. The terms "surface water and "waters of the state are used interchangeably throughout the proposed rule. For consistency and clarity, INL suggests using the term "surface waters of the state," through the proposed rule.

DEQ now uses the term "waters of the United States" throughout the draft IPDES rules and has incorporated this definition by reference in Section 003 (see comment response to IWUA comment #1b).