



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10**

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OFFICE OF
WATER AND WATERSHEDS

July 24, 2015

Ms. Paula Wilson, Administrative Rules Coordinator
Idaho Department of Environmental Quality
1410 North Hilton
Boise, Idaho 83706

(sent to: paula.wilson@deq.idaho.gov)

Re: EPA Comments on Documents Presented at the July 10, 2015 IPDES Rulemaking Meeting

Dear Ms. Wilson:

The U.S Environmental Protection Agency (EPA) submits the following comments on the draft rule language presented during the above-mentioned negotiated rulemaking meeting for the Idaho Pollutant Discharge Elimination System (IPDES) Program. The negotiated rulemaking meeting covered the complete draft IPDES rules. The EPA reviewed the draft rule language as compared to the federal National Pollutant Discharge Elimination System (NPDES) regulations that are applicable to state NPDES programs under 40 CFR Part 123.

1. IDAPA 58.01.25.003.02(h). This section incorporates by reference the requirements for small municipal separate storm sewer systems (MS4s) found at 40 CFR §§ 122.30 and 122.32-122.37. It appears, however, that the Idaho Department of Environmental Quality (IDEQ) has not incorporated by reference or included in the IPDES rules a regulation that is equivalent to 40 CFR § 123.35.
2. IDAPA 58.01.25.010.01, .05, .17, and .18. The definitions of “animal feeding operation” and “concentrated animal feeding operation” are found in 40 CFR § 122.23(b). 40 CFR § 122.23 has been incorporated by reference in its entirety through IDAPA 58.01.25.003.02(b). Similarly, the definition of “aquaculture project” is found in 40 CFR § 122.25 and the definition of “concentrated aquatic animal production facility” is found in 40 CFR § 122.24. 40 CFR § 122.25 and 40 CFR § 122.24 have also been incorporated by reference in their entirety through IDAPA 58.01.25.003.02(c) and (d). As such, the definitions have already been incorporated by reference and do not need to be included in the definition section of the IPDES rules. Moreover, if either the state or the federal definitions were to change at some point in the future, there is the potential that the regulations will be inconsistent.
3. IDAPA 58.01.25.010.29. This section contains the definition of “effluent.” It defines “effluent” to include a discharge of a type of “solution.” Please provide clarification on the purpose of this part of the definition.
4. IDAPA 58.01.25.010.87. This section contains the definition of “sludge.” It appears that this definition is similar to the definition of “sewage sludge” set forth in 40 CFR § 122.2 except that 40

CFR § 122.2 states "...treatment of municipal wastewater or domestic sewage" whereas the IPDES definition states "...treatment of wastewater." This appears to make the definition broader than what was intended in the federal regulations. In addition, the IPDES definition includes "aquaculture settling basin residue" which, again, appears to make the definition broader than what is intended by the federal regulation. Last, throughout the IPDES regulations, the term "sewage sludge" has been changed to "sludge." Please explain the basis for these wording changes and clarify the scope of this definition.

5. IDAPA 58.01.25.010.101. This section contains the definition of "upset." As EPA has previously stated, by applying the affirmative defense of an upset to all effluent limitations, including water quality based effluent limitations, IDEQ's definition is less stringent and not in compliance with the federal regulations found at 40 CFR § 122.41(n). A permittee can only claim the affirmative defense of an upset for technology-based effluent limitations under 40 CFR § 122.41(n). If there is an upset at a facility that also causes a violation of water quality-based effluent limitations, there is no upset affirmative defense provided by the rule, however, IDEQ is not precluded from using enforcement discretion with regard to these violations on a case-by-case basis. Moreover, if the water quality-based effluent limitations violations were part of a third-party lawsuit, a court could decide to mitigate a penalty.
6. IDAPA 58.01.25.102.02(a). This section contains a part of the federal regulations (40 CFR § 122.3(a) which has been invalidated. *See Northwest Environmental Advocates, et al. v. EPA*, 537 F.3d 1006 (9th Cir. 2008). Although the EPA has not revised its regulations to reflect the court decision, the following language should be considered to replace IPDES 58.01.25.102.02(a) to ensure consistency with that decision:

Any discharge of sewage from vessels and any effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of (1) a vessel of the Armed Forces within the meaning of section 312 of the CWA and (2) a recreational vessel within the meaning of section 502(25) of the CWA. None of these exclusions apply to rubbish, trash, garbage, or other such materials discharged overboard; nor to other discharges when the vessel is operating in a capacity other than as a means of transportation such as when used as an energy or mining facility, a storage facility, or when secured to a storage facility, or when secured to the bed of the waters of the United States for the purpose of mineral or oil exploration or development.
7. IDAPA 58.01.25.102. This section sets forth the requirements concerning the obligation to obtain an IPDES permit. The comparable federal regulation is found at 40 CFR § 122.21. It appears that regulations comparable to 40 CFR §§ 122.21(b) and (c)(2) are missing which the state is required to have pursuant to 40 CFR § 123.25(a)(4).
8. IDAPA 58.01.25.102.02(c). This section mirrors 40 CFR § 122.3(c) except it does not include the following language, "Plans or agreements to switch to this method of disposal in the future...." This language should be incorporated into this section. It makes it clear that any person discharging pollutants to water of the U.S. who enter into a plan or agreement that will switch the

discharge to an indirect discharger into a POTW still remains obligated to have a NPDES permit until the discharge is eliminated.

9. IDAPA 58.01.25.103. This section mirrors 40 CFR § 122.4 which is required to be included in state NPDES regulations pursuant to 40 CFR § 123.25(a)(1). It appears that all of the provisions of 40 CFR 122.4 have been included in this section except 40 CFR § 122.4(b) which the state is required to have pursuant to 40 CFR § 123.25(a)(1).
10. IDAPA 58.01.25.105.08. This section appears to be missing the following language that is contained in 40 CFR § 122.21(h)(4)(i): “For a composite sample, only one analysis of the composite of aliquots is required.”
11. IDAPA 58.01.25.105.09(j). This section requires that a new or existing CAFOs submit a certification that a nutrient management plan (NMP) has been completed. The comparable federal regulation, however, requires that the facility submit the NMP as part of the NPDES permit application. *See* 40 CFR § 122.21(i)(1)(x). Since portions of the NMP may be identified as permit requirements, it is important for the facilities to submit the NMP to IDEQ for review.
12. IDAPA 58.01.25.105.11. This section is not consistent with the waiver requirements set forth in 40 CFR § 122.21(j) which contains language indicating that waiver requests must be submitted to the EPA Regional Administrator.
13. IDAPA 58.01.25.105.11(c)(viii)(4). It appears that there is a typo in this provision that makes the provision less stringent than the comparable federal regulation. Specifically, this section states that “For effluent sent to another facility for treatment prior to discharge...and phone number of the organization transporting the discharge. If the transport is provided by a party other than the applicant....” 40 CFR § 122.21(j)(1)(viii)(D)(3) states that “For effluent sent to another facility for treatment prior to discharge...and phone number of the organization transporting the **discharge, if** the transport....” The “.” should be replaced with a “,”.
14. IDAPA 58.01.25.105.12(c). This section applies to POTWs and “other designated dischargers.” The comparable federal regulation at 40 CFR § 122.21(j)(5) only applies to POTWs.
15. IDAPA 58.01.25.106.04(a). This section provides that requests for additional information will not render an application incomplete. The language appears to be inconsistent with 40 CFR § 122.21(e), which provides that “an application is complete when the Director receives an application form and any supplemental information which are completed to his or her satisfaction.”
16. IDAPA 58.01.25.109.01(e)(vi). This section requires that a public notice include a description of the location of each discharge point. The comparable federal regulation is found at 40 CFR § 124.10(d)(1)(vii). The federal regulation contains notice requirements for “sludge-only facilities” that include a description of the sludge practices and the location of each sludge treatment work treating sewage, etc. It appears that these notice requirements are missing from IDAPA 58.01.25.109.01(e)(vi).

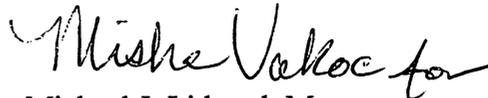
17. IDAPA 58.01.25.201.03(i). Although IDEQ does not have to include a regulation that is comparable to the federal regulation at 40 CFR § 122.63, IDEQ's current regulation appears to be less stringent than the federal regulation. In particular, IDAPA 58.01.25.201.03(i) allows IDEQ to make a minor modification "that will result in neither allowing an actual or potential increase in the discharge of a pollutant or pollutants into the environment nor result in a reduction in monitoring of a permit's compliance with applicable statutes and regulations." This could result in allowing for a change in, for example, an effluent limit that, in IDEQ's view, does not result in an increase in pollutants but, in another interested party's view, does result in an increase in pollutants. Such changes should be considered major modifications that are issued for public comment/notice.
18. IDAPA 58.01.25.300.10 and .11. Both of these sections are missing the provisions that are equivalent to 40 CFR §§ 122.41(j)(5) and (k)(2). It appears that IDAPA 58.01.25.300.15 is meant to ensure that permit contain the standard provisions that are set out in these sections. Please clarify whether IDEQ will have standard conditions that include 40 CFR §§ 122.41(j)(5) and (k)(2) set forth in a permit writers manual or template for permit writers.
19. IDAPA 58.01.25.301.02. This section sets forth specific permit conditions that apply to POTWs and privately owned treatment works. The comparable federal regulations found at 40 CFR § 122.42(b) only applies to POTWs. Please explain why IDEQ has expanded the scope of these regulations to privately owned treatment works.
20. IDAPA 58.01.25.303.02(b)(ii). This section states that "The Department may establish alternatives to reasonable measures of actual production." The federal regulations found at 40 CFR § 122.45(b)(2)(ii)(A)(1) do not contain a comparable provision. What is the intent of this additional provision?
21. IDAPA 58.01.25.303.02(b)(ii)(2). It appears that there is some language missing from this section. 40 CFR § 122.45(b)(2)(ii)(A)(2) states that a state may establish a condition if the applicant demonstrates "that its actual production ... is substantially below maximum production capability and that there is a reasonable potential for an increase above actual production during the duration of the permit."
22. IDAPA 58.01.25.303.07. This provision includes additional language concerning intake credits. The EPA needs further time to review these regulations and may comment upon this regulation at the next opportunity for review.
23. IDAPA 58.01.25.310.01(e). This section sets forth the timing for variance requests under Clean Water Act § 316(a). It states that "A variance ... must be filed by the close of the public comment period ... and with a timely application for a permit...except that...." This language is different than 40 CFR § 122.21(m)(6) which states that "a variance ... must be filed with a timely application for a permit...except that if thermal effluent limitations are established ... or are based on water quality standards the request for a variance may be filed by the close of the public comment period." In other words, if a permittee is requesting a variance, the permittee must file the request with the permit application unless (1) thermal effluent limitations are established pursuant to Clean Water Act § 402(a)(1) or (2) are based on water quality standards. If one of the

exceptions applies, then the permittee has until the close of the public comment period to make the variance request. The current IDAPA regulation combines these two time periods.

24. IDAPA 58.01.25.380. The EPA may have comments on this regulation and the sludge management program, in general, once it has reviewed the program description and Attorney General's statement which is required to be submitted under 40 CFR §§ 501.12 and 501.13.

Thank you for the opportunity to comment on the draft rule language. The EPA will reserve further review of and comments upon the complete rule during the public comment period. Please contact me at (206) 553-1755 or by email at lidgard.michael@epa.gov if you have any questions about this letter or related matters, or you may contact Karen Burgess, of my staff, at (206) 553-1644 or burgess.karen@epa.gov.

Sincerely,



Michael J. Lidgard, Manager
NPDES Permits Unit

cc: Mary Anne Nelson, IPDES Program Manager (*sent to: mary.anne.nelson@deq.idaho.gov*)