

Yellow shaded text indicates revisions made based on discussion held on May 19, 2015 and review of written comments received.

The comment period for this negotiated rulemaking has concluded. The comment period on the proposed rule will commence upon publication of the proposed rule in the August 5, 2015 issue of the Idaho Administrative Bulletin.

010. DEFINITIONS.

For the purpose of the rules contained in IDAPA 58.01.02, "Water Quality Standards," the following definitions apply:

XX. Use Attainability Analysis. A structured scientific assessment of the factors affecting the attainment of the use which may include physical, chemical, biological, and economic factors as described in Subsection 102.02.a.

(Break in Continuity of Sections)

101. NONDESIGNATED SURFACE WATERS.

[Revisions proposed to be made to Section 101 have been removed. Section 101 will not be included in the publication of the proposed rule and will remain as currently codified.]

01. Undesignated Surface Waters. Surface waters not designated in Sections 110 through 160, ~~and that are not man-made waterways or private waters,~~ shall be designated according to Section ~~102~~ 39-3604, Idaho Code, taking into consideration the use of the surface water and such physical, geological, chemical, and biological measures as may affect the surface water. Prior to designation, ~~such~~ undesignated waters shall be protected for beneficial uses, which include all recreational use in and on the water and the protection and propagation of fish, shellfish, and wildlife, wherever attainable. (3-23-98)

a. Because the Department presumes most waters in the state will support cold water aquatic life and primary or secondary contact recreation beneficial uses, the Department will apply cold water aquatic life and primary or secondary contact recreation criteria to undesignated waters unless Sections 101.01.b and 101.01.c. are followed. (4-5-00)

b. During the review of any new or existing activity on an undesignated water, the Department may examine all relevant data or may require the gathering of relevant data on beneficial uses; pending determination in Section 101.01.c. existing activities will be allowed to continue. (3-23-98)

c. If, after review and public notice of relevant data, it is determined that beneficial uses in addition to or other than cold water aquatic life and primary or secondary contact recreation are appropriate, then the Department will: (4-5-00)

i. Complete the review and compliance determination of the activity in context with the new information on beneficial uses, and (3-23-98)

ii. Initiate rulemaking necessary to designate the undesignated water, including providing all necessary data and information to support the proposed designation. (3-23-98)

02. Man-Made Waterways. Unless designated in Sections 110 through 160, man-made waterways are to be protected for the use for which they were developed. Man-made waterways do not have presumed use protections as described in Subsection 101.01. (7-1-93)

03. Private Waters. Unless designated in Sections 110 through 160, lakes, ponds, pools, streams and springs outside public lands but located wholly and entirely upon a person's land are not protected specifically or generally for any beneficial use. Private waters do not have presumed use protections as described in Subsection 101.01. (7-1-93)

102. DESIGNATION AND REVISION OF BENEFICIAL USES

When designating or revising beneficial uses for a water body, the Department shall consult with the basin advisory group and the watershed advisory group with the responsibilities for the water body described in Chapter 36, Title 39, Idaho Code. After consultation, the Director shall identify the designated beneficial uses of each water body in these rules pursuant to the rulemaking and public participation provisions of Chapter 52, Title 67, Idaho Code.

01. Designation of Beneficial Uses. Beneficial uses shall be designated in accordance with Section 39-3604, Idaho Code, taking into consideration the uses set forth in Section 100, and such physical, geological, chemical, and biological measures as may affect the surface water. Beneficial uses are designated according to water body unit unless designated otherwise. Use designations are made for each water body or segment whether or not they are being attained or are fully supported at the time of designation.

a. In designating beneficial uses, which a water body can reasonably be expected to attain, the Department shall consider:

i. Existing uses of the water body;

ii. The physical, geological, hydrological, atmospheric, chemical and biological measures that affect the water body;

iii. The beneficial use attainability measures identified in Section 39-3607, Idaho Code;

iv. The economic impact of the designation and the economic costs required to fully support the beneficial uses;

v. The attainment and maintenance of the water quality standards of downstream waters, including the waters of downstream states;

vi. Adopting subcategories of a beneficial use and set the appropriate criteria to reflect varying needs of such subcategories of beneficial uses, for instance, to differentiate between cold water and warm water fisheries;

vii. At a minimum, that beneficial uses are deemed attainable if they can be achieved by the imposition of effluent limits required under sections 301(b) and 306 of the federal Clean Water Act and cost-effective and reasonable best management practices for nonpoint source control; and

viii. Designating seasonal beneficial uses as an alternative to reclassifying a water body or segment thereof to uses requiring less stringent water quality criteria. If seasonal beneficial uses are adopted, water quality criteria may be adjusted to reflect the timing of the beneficial use, e.g., salmonid spawning. However, seasonal beneficial uses and their criteria shall not preclude the attainment and maintenance of a more protective beneficial use at other times.

b. In no case shall waste transport or waste assimilation be a designated beneficial use for a water body.

02. Revision of Beneficial Uses.

a. Designated beneficial uses shall be reviewed and revised when such physical, geological, hydrological, atmospheric, chemical or biological measures indicate the need to do so. Designated beneficial uses may be revised or removed if the designated beneficial use is not an existing use (as defined in Section 010), and it is demonstrated that attaining the designated beneficial use is not feasible due to one of the following factors:

i. Naturally occurring pollutant concentrations prevent the attainment of the use;

ii. Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges without violating state water conservation requirements to enable uses to be met;

iii. Human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place;

iv. Dams, diversions or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate such modification in a way that would result in the attainment of the use;

v. Physical conditions related to the natural features of the water body, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and the like, unrelated to water quality, preclude attainment of aquatic life protection uses; or

vi. Controls more stringent than those required by sections 301(b) and 306 of the federal Clean Water Act would result in substantial and widespread economic and social impact.

b. Designated beneficial uses may not be removed if:

i. They are existing uses (as defined in Section 010) unless a use requiring more stringent criteria is added; or

ii. Such uses can be attained by implementing effluent limits required under sections 301(b) and 306 of the federal Clean Water Act and by implementing cost-effective and reasonable best management practices for nonpoint source control.

c. Where existing water quality standards specify designated uses less than those which are presently being attained, the Department shall revise its standards to reflect the uses actually being attained.

d. A use attainability analysis is a structured scientific assessment of the factors affecting the attainment of the use which may include physical, chemical, biological, and economic factors as described in Subsection 102.02.a. A use attainability analysis must be conducted whenever:

i. The Department designates uses for a water body that do not include the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water; or

ii. The Department acts to remove a designated use which provides for protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water; to remove a subcategory of such uses; or to designate subcategories of such uses which require less stringent criteria than previously applicable.

e. A use attainability analysis is not required under this rule whenever:

i. The Department designates beneficial uses which include protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water; or

ii. The Department removes a beneficial use that does not include the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.