Docket 58-0125-1401 – IPDES Rules

Response to Comments on Complete Draft IPDES Rules

July 24, 2015 comment deadline

Clear Springs Foods, Inc.:

1. Clear Springs Foods appreciates recent IDEQ efforts to distinguish differing authorities that need be applied to various types of sludge. We are encouraged that IDEA does not intend to manage aquaculture settling basin "sludge" differently than EPA currently regulates the same waste material under our current NPDES permits. Yet, draft IPDES Rules version 2 attempts to expand regulatory authority and impose more stringent requirements than EPA by applying Clean Water Act sewage sludge (defined as sludge generated during the treatment of domestic sewage in a treatment works) requirements under 40 CFR Part 503 of the Clean Water Act to non-municipal (including aquaculture by proposed definition) sludge management (IPDES Section 380, page 111-113). We are unaware of any authority within the Clean Water Act that enables a state to apply Part 503 requirements to anything other than domestic sewage. Part 503.1 clearly establishes the purpose for Part 503 standards which are authorized to be applied to just "domestic sewage" generated in a "treatment works." And while draft IPDES Rules version 2 proposes to exclude 503.1 such exclusion does not change or authorize regulation of other types of sludge under Part 503. Clear Springs Foods does not believe the elements of Part 503 are severable. IDEQ cannot pick various parts of the Clean Water Act to apply regulation or standards out of context. The simplest resolution, and it is **Clear Springs Foods recommendation, is that IDEQ exclude the material collected in aquaculture settling basins from the definition of sludge.**

DEQ has returned the draft IPDES rules to regulating sewage sludge as identified in the CFR (including 40 CFR 503). This includes:

- *Removing Section 380.05 from the draft IPDES rules,*
- *Removing the definition for "Stabilized Sludge" and its use in the draft IPDES rules,*
- *Reverting the definitions for "Sludge," "Sludge Use or Disposal," and "Standards for Sludge Use or Disposal" to "Sewage Sludge," "Sewage Sludge Use or Disposal Practice" "Standards for Sewage Sludge Use or Disposal," as defined in 40 CFR 122.2, and*
- *Replacing references to "sludge" with "sewage sludge," as identified in the CFR.*

2. …Idaho fish farm sludge and/or biosolids have been successfully regulated under current EPA NPDES permitting authorities and under the Idaho Waste Management Guidelines for Aquaculture Operations. There appears no scientific or public health justification to expand regulatory authority or expand management requirements beyond those identified in the current Idaho aquaculture NPDES permit. **Clear Springs Foods recommends IDEQ exclude the material collected in aquaculture settling basins from the definition of sludge and opposes the application of Part 503 requirements to aquaculture wastes**.

See the response to Clear Springs Foods comment #1.

3. The current EPA NPDES permits (Section I. Permit Coverage. F.2) for aquaculture facilities allows for a temporary inactivation of discharge authorization. Such temporary inactivation has been a useful tool during times of significant fish farm remodeling or transfer of ownership when a fish farm is not discharging pollutants. In this circumstance the permittee notifies EPA and IDEQ in writing that a facility will be temporarily shut-down for some extended period of time. Specific requirements for inactivation authorization to discharge are identified in the permit. **Clear Springs Foods recommends such temporary permit inactivation be provided for in the IPDES program rules.**

DEQ intends to address temporary inactivation during guidance development and/or the permitting process.

4. Complete draft IPDES Rule version 2, Page 10, Major Facility definition 50. Definition 50(b) defines a Major Facility to include a non-municipal facility that equals or exceeds the point accumulation obtained in the NPDES Non-Municipal Permit Rating Work Sheet. It is not clear what is intended. EPA identifies a point accumulation of 80 as the break-point. Is that the break-point IDEQ intends to follow? **Clear Springs Foods recommends better definition be provided.**

The definition of "Major Facility" has been changed to, "…equals or exceeds the eighty (80) point accumulation ~~obtained~~ as described in the Score Summary ~~in~~ of the NPDES Non-Municipal Permit Rating Work Sheet (June 27, 1990)…"

5. Page 15, definition (88) of Stabilized Sludge. It is not clear what stabilized sludge is. Since sludge's are not all the same what is stabilized for one type of sludge may be inconsequential for other sludge types. Aquaculture facility sludge, from full flow or off-line settling ponds or basins, would be composed of water, fish fecal matter, and waste feed. In contrast, domestic sewage sludge could contain any number of additional pollutants including human pathogens. Aquaculture facility sludge is typically about 12% solids and may be directly applied to land or first dried in a drying bed prior to land application. **Clear Springs Foods suggests the definition for stabilized sludge be deleted and that any issues about non-municipal sludge be addressed in guidance document. Idaho has already provided suitable guidance on aquaculture sludge in the "Idaho Waste Management Guidelines for Aquaculture Operations."**

See the response to Clear Springs Foods comment #1.

City of Twin Falls:

1. …Table 13 on page 11 of the discussion paper (Discussion Paper #5, Fee Schedules, presented on May 15, 2015) shows the final breakdown of what the fee schedule will be for the IPDES program. A concern the City has is that if the general state funds and federal funds diminish over time, the burden of the IPDES program would be funded by

only three categories, and the other categories will have no apparent financial requirement to operate under the IPDES program.

DEQ strives to develop and propose a fee structure to the Idaho Legislature that is equitable and sustainable. The final fee structure will be based on IPDES program budget requirements, and discussions with the Idaho Division of Financial Management and the Governor's Office. Further, as discussed in the May 15, 2015 negotiated rulemaking meeting and presented below, the number of hours spent in each discharger category is dominated by municipal, industrial, and storm water permits. These three categories account for 80% of the overall hours spent in permitting, compliance, and enforcement.

Activity	Hours	% of Permitting & CIE
Municipal Permits	14020	36%
Industrial Permits	3724	10%
Aquaculture GPs	266	1%
Aquaculture NOIs	1784	5%
Storm water GPs	1585	4%
Storm water NOIs	11503	30%
Other GPs	354	1%
Other NOIs	805	2%
Emergency, training, & non-permitted Facilities	4710	12%

As programmatic resources change over time (due to any number of economic factors), the agency would pursue changes to the fee structure and appropriations from the state general fund as appropriate.

2. …DEQ choose to present draft fees based on the 50% scenario. However, the current state and federal fund burden only covers approximately 30% of the program as identified in Table 4 on page 4 of the discussion paper. It may be more suitable for DEQ to show how the state would fund the IPDES program under the current scenario of approximately 30% in order to provide a more conservative estimation.

DEQ appreciates the city's concern regarding providing a conservative estimate of the fee structure necessary to support the program if the state general fund and federal dollars only cover 30% of the program's resource needs. However, there is considerable support within the state for a higher amount to be appropriated from the state's general fund, and DEQ attempted to provide the stakeholder committee with the most reasonable estimate of the amount that would be supported by the state.

3. …But, using these (state general) funds for general permit writing and compliance, inspection, and enforcement (CIE) would not be appropriate in the City's view, since general permit costs could be recovered through either an application fee and/or annual fee for those permitted under these general permits. Any excess general and federal funds

could be distributed over the whole IPDES program equitably. Excluding a particular permitted group over another. The general permittees should pay an application fee and/or annual fee suitable to the level of effort associated with all aspects of managing general permittees.

DEQ appreciates the city's comment regarding the overall application of fees. As part of the fee schedule negotiations, various ways of distributing the overall fee burden amongst all permitted entities were discussed. The outcome of these negotiations is what was presented to the rulemaking committee for comment. The majority of comments received were in support of this fee structure.

4. The City recognizes that individual permits could potentially require more time and effort in the preparation of general permits. Yet, it is unclear how DEQ will assess CIE activity expenses equitability for each permittee under the IPDES program. DEQ shows that CIE will require more than 50% of the FTEs to operate the IPDES program on page 3, but only three permitted categories will pay for the fee burden costs not covered by the state and federal funds. It should be considered that all permitted categories covered under either a general or individual permit could take a substantial amount of time and effort in the CIE portion of the IPDES program, and having only three categories cover the cost of all permitted categories would not be equitable.

See the response to the City of Twin Falls comment #1.

5. As noted by the City in the May 15, 2015 meeting, under the general stormwater permit, the City is required to file a notice of intent (NOI) along with the general contractor seeking coverage for projects. This double filing could lead to inaccurate general stormwater permit numbers and could potentially be a "double dipping" situation.

Under the draft IPDES rules, the coverage that the city would obtain under a Municipal Separate Storm Sewer System (MS4) permit addresses discharges from the City's storm sewer system needed to collect, treat, and discharge storm water incident to property within the City's jurisdiction. This is a different permit than a construction general permit (CGP). Under a CGP, only the operator(s) would be required to submit a notice of intent (NOI) to obtain coverage. Therefore, the city would only need to submit an NOI if it is also acting as an operator for a project (e.g. participating in construction activities).

6. DEQ is proposing using and equivalent dwelling unit (EDU) to calculate the municipal discharge fee burden under the IPDES program. The City would suggest that the IPDES municipal discharge fee be based on the current water tap connections reported to DEQ's Water Quality Division every year for potable water connections. This number would more accurately represent the users of municipal systems and provide a consistent number of users.

DEQ appreciates the comment regarding the calculation of equivalent dwelling units. While there are many ways in which to calculate this value, DEQ chose to use the population within a given municipality and the average number of people per household as the method for calculating this value. This was the method used to calculate how much each municipality would

need to submit in order for the overall municipal component of the fees collected to equal the amount needed. DEQ did not have available the number of potable water connections for all the different municipalities and sewer districts, nor was there consistent reporting in the current EPA NPDES permits and fact sheets on the number of wastewater connections. Without that information at hand when developing the fee schedule, the agency chose a method of calculation that distributes the fees as fairly as possible among the users of NPDES permitted facilities across the state.

DEQ believes it is the municipalities' choice as to how to recover the fees from the various users associated with the wastewater treatment facility. The municipality or sewer district may choose to distribute the fee among those with a potable water connection. The municipality or sewer district may choose any other alternative deemed appropriate.

Idaho Water Users Association (IWUA):

1. **Rule 0. Legal Authority**. IWUA supports the changes made to draft Rule 0 and the other draft rules that previously contained the phrase "waters of the state" or similar terminology. As explained in IWUA's June 26, 2015 comments on Combined Drafts 1 through 4 and Definitions (June 5, 2015), the definition of "waters of the state" is too broad to be applied to the NPDES program.

Thank you for the comment.

2. **Rule 10.73. Receiving Waters**. In addition to the changes that have already been made to this definition, it should make clear that receiving waters are: "Those waters of the United States to which there is a discharge of pollutants". Waters that are not "waters of the United States" are not jurisdictional under the Clean Water Act and should not be included in the definition of "receiving waters" to which pollutants are discharged pursuant to the NPDES permit program.

The definition of "Receiving Waters" has been changed to, "Those waters <u>of the United States</u>…"

3. **Rule 100.01. Rights.** IWUA continues to support the language contained in draft Rule 100.01 and appreciates the Department's recognition of the authorities and protections referenced in this rule. In addition, consideration should be given to expressly requiring that these "necessary approvals, authorizations, or permits" be obtained and submitted to the Department before any permit to discharge is processed or issued. It should not be a condition that is left to be complied with only after discharges have already been commenced. Accordingly, IWUA suggests that this requirement be included in the completeness criteria of Rule 106.01, as described below.

The issuance of an IPDES permit described in Subsection 100.01, "…does not excuse the permit holder from the obligation to obtain any other necessary approvals, authorizations, or permits." However, it is beyond DEQ's authority to determine what additional approvals, authorizations, or permits a discharger may need to obtain, beyond those specifically required in the NPDES/IPDES rules.

4. **Rule 101.01. Permit Term.** The draft rule provides that a permit may be issued for a period of less than 5 years. It is unclear why the Department would issue a Pesticide General Permit (PGP) for less than 5 years. Given the regulatory burden involved with a shorter duration general permit, IWUA suggests that the PGP be issued for a period of 5 years and that this be clearly expressed in the rule.

This language was adapted from 40 CFR 122.46(a). DEQ does not intend to issue IPDES permits for less than five years, unless doing so would benefit DEQ and the permittee (e.g. aligning reuse and IPDES permit cycles).

5. **Rule 102.02. Exclusions from Permit**. Idaho Code Section 39-175B provides a statutory exclusion for "activities and sources not required to have permits by the United States environmental protection agency". This exclusion should be included in the rule.

The following language has been added as 102.04 (formerly Section 102.02), "The Department will not require IPDES permits for facilities or activities not required to have permits under the Clean Water Act and federal Clean Water Act regulations."

6. **Rule 106.01. Completeness Criteria**. Any "necessary approvals, authorizations, or permits" recognized under Rule 100.01 should be required as part of a complete permit application under Rule 106.01, prior to processing or issuance of a permit.

See the response to the IWUA comment #3.

7. **Rule 109.02. Public Comment**. IWUA appreciates the Department eliminating the requirement that permit conditions be considered to "comply with the provisions of applicable federal laws". However, the draft rule still contemplates that such conditions may be necessary to comply with provisions of the Clean Water Act. The rule should set forth what specific legal authority, if any, exists for the Department to consider and incorporate conditions that the federal fisheries agencies believe are "necessary to avoid substantial impairment of fish, shellfish, or wildlife resources". In particular, the rule should cite the specific Clean Water Act provision or section of the Code of Federal Regulations which requires the Department to protect against such "substantial impairment" as part of the NPDES permit program. If no such authority exists, this rule should be eliminated.

IPDES permits must ensure compliance with Idaho Water Quality Standards (WQS). WQS include aquatic life and wildlife habitat beneficial uses (IDAPA 58.01.02.100) and numeric and narrative criteria to protect the uses. The narrative criteria are set to avoid an impairment of designated uses (IDAPA 58.01.02.200) and the WQS prohibit discharges that will injure designated or existing uses (IDAPA 58.01.02.080.01.b). A permit that results in substantial impairment of fish, shellfish or wildlife resources may be determined by DEQ to result in impairment of the aquatic life or wildlife habitat uses protected under state WQS. Under these circumstances, conditions would have to be included in the permit to avoid a violation of WQS (IPDES draft rules Section 103.04). Further, IPDES draft rules Section 109.02.d is adapted from 40 CFR 124.59(b), which is required for NPDES program authorization under 40 CFR 123.25.

8. **Rule 110.02. Fee Schedule**. IWUA supports the proposed fee schedule for "other general permits", including the Pesticide General Permit.

Thank you for the comment.

9. **Rule 130.05. Administration**. Draft Rule 130.05.c provides: "The Department may terminate, revoke, or deny coverage under a general permit, and require the discharger or applicant to apply for and obtain an individual IPDES permit. Any interested person may petition the Department to take action under this subsection." The Department should provide notice and an opportunity for the affected discharger or applicant to be heard before such a determination is made. As currently drafted, notice is provided under Rule 130.06 only after the decision to require an individual permit has already been made. This basic lack of due process should be corrected.

The Department agrees that an applicant for coverage under a general permit should have a right to challenge the Department's decision to terminate, revoke or deny coverage under a general permit and require an application for an individual permit. Therefore, the Department has revised sections 130.06 and 204.27 to provide for a right to appeal.

10. **Rule 204.01. Petition for Review of a Permit Decision.** The process for review set forth in this rule should also be extended to the Department's decision to terminate or revoke coverage under a general permit and require an individual permit. Alternatively, some other review mechanism should be provided. In all cases, an opportunity for judicial review of such a decision must be provided.

As noted above (see the response to IWUA comment #9), the Department agrees that a right to appeal should be afforded, and has modified the rule accordingly.

Idaho Mining Association (IMA):

1. The Idaho Mining Association has reviewed the material presented at the July 10 IPDES rulemaking meeting. During that meeting DEQ proposed language for the regulation of non-municipal sludge. IMA believes this proposed language is inconsistent with the provisions of 39-175B, Idaho Code…EPA does not regulate non-municipal sludge in its NPDES program and, therefore, such regulation by DEQ would be contrary to the specific direction of the legislature. We recommend DEQ withdraw all parts of the proposed rule that attempt to regulate non-municipal sludge.

    a. The simplest way to address this issue would be to revise the definition of "sludge" in the proposed rule at Section 010.85 to mirror the federal definition of "sewage sludge" at 40 CFR 122.2, which only regulates municipal sludge.

See the response to Clear Springs Foods comment #1.

b. Proposed Section 380.05 should also be deleted. We are not suggesting that DEQ's current regulation of non-municipal sludge needs to be changed, just that non-municipal sludge should not be part of the IDPES program.

See the response to Clear Springs Foods comment #1.

Idaho Association of Commerce and Industry (IACI):

1. …We do ask the Department to reconsider the IACI comments on criteria for augmenting the administrative record. IACI's earlier suggested conditions for supplementing the administrative record are well-established judicially created exceptions to record review under the federal Administrative Procedures Act (APA). [IACI's prior comment letter is attached.] They are relatively narrow exceptions. NPDES Permits often involved complex and technical evaluations which often require additional explanation to an appointed hearing officer who may or may not understand all of the technical nuances. Until a Permit is appealed and the contested issues are crystalized, it is difficult for a permittee to predict and explain all technical and legal issues that may be raised in an appeal. Often a judge (or a hearing officer) benefits from providing additional explanatory materials. That is the reason for the federal APA record review exceptions, and that is why IACI recommended these changes in Section 204.07 of the proposed rule. IACI does not object to also leaving the Department's current exceptions in Section 204.07.

The federal regulations that provide for a right to appeal EPA permit decisions to the Environmental Appeals Board do not allow an opportunity for augmentation of the administrative record. Therefore, DEQ is offering a right to augment the record not allowed under the currently applicable federal administrative appeal procedure. The augmentation provisions included in the rule are essentially identical to the provisions for augmentation in the Idaho Administrative Procedures Act (APA), Section 67-5276, Idaho Code. In addition, there does not appear to be any explicit provision in the federal APA that allows for augmentation. Therefore, the Department does not agree that additional opportunities for augmentation should be included in the rule because: (1) the Department added to section 109.02.h as an opportunity for the applicant to add additional information to the record to respond to issues and comments raised during the public comment period; (2) the Department has already included a right to further augment the record that is not available under the current federal NPDES administrative appeal provisions; (3)the augmentation provisions mirror the right to augment the record allowed under the Idaho APA; and (4) the Department is concerned that additional exceptions may defeat the intent of the rule, supported by the negotiated rulemaking committee, to restrict the appeal to a record review.

2. Also, in Section 204.01(a) in the appeals process, we suggest deleting the word "includes" as it suggests other parties may also appeal a permit.

Section 204.01(a) of the IPDES Draft Rules Version 2 was changed to, "A person aggrieved is limited to…"

3. Finally, we believe that a party should have some type of standing to prosecute an appeal in addition to attending a public hearing or submitting a comment letter. We request that the Department consider revising the language in Section 204.01(a) accordingly.

DEQ does not agree that additional restrictions should be included that further limit the persons who can appeal a final permit decision. Allowing any person, who participated in the permitting process, a right to appeal mirrors EPA's appeal provisions. In addition, there are both standing and APA requirements should a person appeal the final administrative appeal decision to district court. A person who seeks to continue an appeal to district court will have to meet judicially established standing requirements. In addition, under Section 67-5279, Idaho Code, an agency action shall be affirmed unless substantial rights of the appellant have been prejudiced by the agency action. In sum, the Department believes it has included appropriate limitations on the persons who can file appeals of IPDES permit decisions and at this time does not agree to further limitations.

4. During the July 10 meeting, the Department put forth specific language for the regulation of non-municipal sludge. Since regulation of non-municipal sludge is not regulated by the current NPDES Permit program, we request that the Department confine the proposed IPDES Rule to only municipal sludge. Therefore IACI requests that the Department withdraw all references to non-municipal sludge in the proposed rule, including Section 380.05.

See the response to Clear Springs Foods comment #1.

Idaho Conservation League (ICL):

1. Section 500 - Enforcement
   It is our understanding that the EPA will not approve IPDES related rules that are less stringent than federal rules. With this in mind, we note that the DEQ rules (and statutes) related to CWA/IPDES enforcement and penalties are much less stringent than the federal version. For instance, Idaho statutes referenced in the IPDES rules provides that penalties for IPDES civil violations are a maximum of $10,000 per violation. The federal rules provide for these violations are $37,500 per violation. There are numerous other differences regarding penalties – max. penalty per day, per violation, for continuing violations, civil vs. criminal, etc. We believe that these differences make the Idaho rules less stringent than the federal rules. The Idaho rules and statutes need to be changed to mirror the federal provisions.

The enforcement authorities that states must have to operate an EPA approved program are set forth in 40 CFR 123.27, including the minimum penalty authorities. DEQ's enforcement authorities as set forth in Idaho Code sections 39-108(5)(a)(ii) and 39-117(3) meet the minimum requirements of 40 CFR 123.27.

2. Section 500 – Enforcement
   There does not appear to be a section of these rules that provides for citizen enforcement of IPDES violations. Similarly, this matter is not dealt with in any of the Idaho statutes that re referenced in the IPDES rules. We believe that the State must include a means of

citizen enforcement that mirrors the language found in the federal statute and in the CFR. Failure to do so means that the IPDES rules are less stringent than the federal version. If DEQ does not agree, please provide us with a response that explains DEQ's reasoning.

There is no requirement for states to include a citizen suit provision in state law in order to gain approval of a state NPDES permit program. The citizen suit provisions of the Clean Water Act section 505 allow citizens to commence a civil action against any person who is alleged to be in violation of an effluent standard or limitation or an order issued by EPA or a state with respect to such a standard or limitation. The citizen suit provisions allow citizens to sue a person in violation of a state issued NPDES permit, and therefore, would be available with respect to a violation of IPDES permits. See, e.g., Parker v. Scrap Metal Processors, Inc., 386 F.3d 993 (11th Cir. 2004).

3. Section 010.52 – Definition of Maximum Daily Flow
   Should this definition be modified so as to provide that this term refers to the maximum treated throughput of a facility rather than just the maximum amount of flow that can be received by the facility?

The definition of "Maximum Daily Flow" has been changed to, "The largest volume of flow to be ~~received~~ discharged…"

4. Section 010.76 – Definition of Secondary Industry Category
   We recommend that DEQ not utilize the abbreviation SIC in this definition. SIC typically stands for Standard Industry Classification. Using it to as an abbreviation for Secondary Industry Category could cause confusion.

The abbreviation SIC has been removed from the definition of Secondary Industry Category. Additionally, Section 105.18.b.ii. has been corrected so that the abbreviation SIC corresponds with Standard Industrial Classification.

5. Section 107.04 – Final Permit
   It is not clear to us why there is specific language in this section referring to comments from EPA. Is this stating that EPA comments will be treated differently then public comments or that the EPA comments will be received on a different timeline than public comments?

As provided in 40 CFR 123.44, the Memorandum of Agreement between DEQ and EPA shall provide a period of time (up to 90 days from receipt of proposed permits) to which the EPA may make general comments upon, objections to, or recommendations with respect to proposed IPDES permits (or in the case of general permits, EPA shall have 90 days from the date of receipt of the proposed general permit). 40 CFR 123.44 also identifies that if the state does not resubmit a permit revised to meet EPA's objection, EPA may issue the permit.

6. Section 108.02 Fact Sheet
   At a prior rulemaking meeting DEQ staff had committed to developing and circulating factsheets for all draft IPDES permits. This is contradicted by the text in this section. Pursuant to this text, minor facilities and activities would not have factsheets developed.

We believe that the public needs to have access to a factsheet to review and provide comment on draft IPDES permits for minor facilities. This is especially true with regard to the large number minor WWTPs in Idaho. We would appreciate it if DEQ would add language providing that factsheets will be developed for minor faculties too.

Section 108.02 identifies the minimum requirements for developing fact sheets. DEQ does intend to develop fact sheets for all individual IPDES permits, which will likely be further described in guidance.

7. Section 110.02 Fee Schedule
   We believe that it is inappropriate to charge municipalities fees associated with IPDES permit and to give private, for profit, companies general IPDES permits for free and with no annual fees. This is an example of Idaho taxpayers being forced to foot the bill for the private profit of companies. We ask that DEQ please adjust this fee schedule so as to ensure that all facilities that utilize IPDES permit pay their fair share.

See the response to the City of Twin Falls comment #3.

8. Section 204.01 – Petition for Review of a Permit Decision
   This section reads: "Appeal from a final IPDES …" We wonder if it should read "Appeal ~~from~~ of a final IPDES …"

Section 204.01 has been changed to, "Appeal ~~from~~ of a final IPDES…"

Idaho Dairymen's Association (IDA) submitted by Sawtooth Law Offices, PLLC:

1. **ISDA Jurisdiction.** The Idaho State Department of Agriculture (ISDA) administers nutrient management plans and other aspects of Idaho dairy operations related to water quality. The draft IPDES Rules do not mention ISDA or its jurisdiction over these matters, and contain no provision to ensure that there is no conflict between ISDA's jurisdiction and authority over Idaho dairy operations and the Idaho Department of Environmental Quality's (IDEQ) authority under the draft rules and its administration of an IPDES program. We assume there is no intent to affect or displace ISDA's statutory jurisdiction over dairy operations. Please consider whether a provision disclaiming any intent to affect ISDA jurisdiction over dairy operations is appropriate. While we do not propose language on this issue at this time, we reserve the prerogative to do so as and when appropriate.

DEQ neither intends nor believes the draft IPDES rules affect or displace ISDA's statutory jurisdiction over dairy operations that do not discharge effluent into waters of the United States.

2. **Inconsistencies in terminology.** The following highlighted provisions and suggested changes address basic inconsistencies in terminology used to identify who/what is subject to the IPDES permitting requirements.

   001. TITLE AND SCOPE

106. Scope. These rules establish the 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~~ obtain authorization to discharge pollutants to waters of the United States. These permits shall be referred to in these rules as "IPDES permits" or "permits."

010. DEFINITIONS

37. Facility or Activity. Any IPDES point source or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the IPDES program.

a. Present rather than past tense should be used in section "106. Scope." "Obtain" is consistent with section "102. Obligation to Obtain an IPDES Permit."

Section 001.02 (Scope) has been changed to, "...Clean Water Act to ~~have requested and received~~ obtain authorization…"

b. This definition of "facility or activity" in section 010.37. is unavailing. What "facilities" other than point sources are subject to regulation under the IPDES program?

This definition is adapted from 40 CFR 122.2, and limits the facilities or activities referred, only to those subject to IPDES permits and regulations. The definition in 40 CFR 122.2 is: "Facility or activity means any NPDES "point source" or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the NPDES program."

c. Are "facilities" required to obtain IPDES permits, as indicated above, or are "persons" required to do so, as indicated below:

Section 001.02 has been changed to, "These rules establish the procedures and requirements for the issuance and maintenance of permits for facilities or activities for which a person is required by Idaho Code and the Clean Water Act to ~~have requested and received~~ obtain authorization to discharge pollutants to waters of the United States."

102. OBLIGATION TO OBTAIN AN IPDES PERMIT

01. Persons Who Must Obtain a Permit. Any person who discharges or proposes to discharge a pollutant from any point source into waters of the United States, or who owns or operates a sludge-only facility whose sludge use or disposal practice is regulated by 40 CFR Part 503 or this chapter, and who does not have an IPDES or NPDES permit in effect, shall submit a complete IPDES permit application to the Department, unless the discharge or proposed discharge:

02. Exclusions from Permit. A person shall not discharge pollutants from any point source into waters of the United States without first obtaining an IPDES permit from the Department or coverage under an IPDES general permit, unless the discharge is

excluded from IPDES permit requirements or the discharge is authorized by an IPDES or NPDES permit that continues in effect. ~~Point source d~~Discharges excluded from IPDES permit requirements, but that may be regulated by other state or federal regulations include: …

e. Any introduction of pollutants from non-point source agricultural and silvicultural activities, …

The suggested change to subsection 01., adding "from any point source into" conforms to the highlighted language in subsection 02.

d. Since the list of exclusions includes non-point sources, the introductory sentence to the list should be modified as indicated above. This is consistent with the terminology used in 40 CFR §122.3.

Section 102.01 has been changed to, "…discharge a pollutant from any point source into waters of the United States…" Section 102.04 (formerly 102.02) has been changed to, "…continues in effect. The Department will not require IPDES permits for facilities or activities not required to have permits under the Clean Water Act and federal Clean Water Act regulations. ~~Point source d~~Discharges excluded…"

3. Rule 102.02.(e) Permit Exclusions- Omission. The following correction should be made to section 102.02(e):

   e. Any introduction of pollutants from non-point source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands; however, this exclusion does not apply to discharges from concentrated animal feeding operations (CAFO) as defined in 40 CFR § 122.23, …

   This is how the exclusion is stated in the corresponding federal rule in 40 CFS 122.3(e) (see enclosed). The highlighted reference that is currently excluded from the draft IPDES Rule is important, because 40 CFR 122.23(e) exempts from NPDES permitting discharges from CAFO land application caused by agricultural storm water when "manure, litter or process wastewater is applied in accordance with site specific nutrient management practices." As currently drafted without the federal rule reference, section 102.02(e) would require all CAFO discharges to obtain IPDES permits. This is impermissibly more stringent than the corresponding federal rule. (see I.C. §39-3601). Although the IPDES Rules generally incorporate 40 C.F.R.§ 122.23 by reference, it is important to include this federal rule language for purposes of clarity in the future interpretation and administration of these rules.

Section 102.04.e (formerly 102.02.e) has been changed to, "…(CAFO) as defined in 40 CFR 122.23…"

City of Meridian:

1. Rule 100.01 EFFECT OF PERMIT – PURPOSE, states, in part: "…The issuance of, or coverage under, an IPDES permit does not constitute authorization of the permitted

activities by any other state or federal agency or private person or entity, and does not excuse the permit holder from the obligation to obtain any other necessary approvals, authorizations, or permits."

…The draft language contained in the second sentence of Rule 100.01 creates confusion, particularly where discharges are made to natural streams, creeks, rivers or other natural water bodies…The language also appears to be redundant…Idaho State law already affords the proper protections of irrigation and drainage under Title 42, Idaho Code.

…The proposed language suggests that there may be additional obligations imposed by DEQ prior to permit issuance, for dischargers to seek approval from additional parties. More restrictive requirements and delays under State IPDES permitting could result in injury to dischargers…

For these reasons, the language seems to be more restrictive than the current Federal CFR mandates and the EPA NPDES permitting process for waste water dischargers.

As stated in our response to comments for draft rules 2.0 and 6.0, 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.

Idaho Aquaculture Associate, Inc. (IAA):

1. **Aquaculture settling basin residue (aquaculture solids, fish manure) should not be included in the IPDES definition of sludge. The IPDES definition of sludge does not conform to EPA's definition of sludge.**

   …In 40 CFR 503 and on their web site EPA consistently refers to "sewage sludge" which is defined as: "any solid, semi-solid, or liquid residue removed during the treatment of municipal waste water or domestic sewage. Sewage sludge includes, but is not limited to solids removed during primary, secondary or advanced waste water treatment, scum septage, portable toilet pumpings, type III marine sanitation device pumpings (33 CFR part 159), and sewage sludge products. Sewage sludge does not include grit or screenings, or ash generated during the incineration of sewage sludge" IDEQ references 40 CFR 503 (EPA's rule on sludge) throughout the draft rules, but has deleted "sewage" wherever "sewage sludge" was previously used. In addition, IDEQ has changed EPA's definition of sludge by adding "aquaculture settling basin residue". These changes go beyond the Idaho legislature's intent of the IPDES negotiated rulemaking which directs IDEQ to not develop rules more stringent than the federal rule.

   …Section 380.05 states: "Non-Municipal Sludge Management. (a.) Sludge accumulated from non-municipal facilities and operations can be reused or dispose if in conformance

with…" Although the draft rules reference 40 CFR 503, which only pertains to sewage sludge, IDEQ makes a change by adding the non-municipal exemption (because sewage sludge, by definition, comes from POTWs). Once again this change goes beyond the Idaho legislature's intent with IPDES negotiated rulemaking to not develop rules more stringent than the federal rule.

Aquaculture settling basin residue is not the same as sewage sludge and should not be defined as such. For example, Tables 1 & 2 show that levels of metal pollutants in aquaculture settling basin residue do not come close to the EPA ceiling concentrations in sewage sludge and are typically well below ranges reported in sewage sludge (see Tables 1, 2, and 3 in the actual comment letter)…

The Idaho Aquaculture Association recommends that IDEQ:

(a) re-insert "sewage" throughout the draft IPDES rule version 2 (July 10, 2016) where previously deleted as part of "sewage sludge";

See the response to Clear Springs Foods comment #1.

(b) Remove "aquaculture settling basin residue" from the definition of sludge (definition # 86, on page 14); and

See the response to Clear Springs Foods comment #1.

(c) Add a section that the handling and disposal of aquaculture settling basin residue is referenced by the Idaho Waste Management Guidelines for Aquaculture Operations (IDEQ) and by NPDES BMP requirements (III. Best Management Practices Plan. A. Purpose), the latter stating "Through implementation of the best management practices (BMP) plan, the permittee must prevent or minimize the generation and discharge of wastes and pollutants from the facility to the waters of the United States and ensure disposal or land application of wastes in such a way to minimize negative environmental impact and comply with the relevant Idaho solid waste disposal regulations." Best management practices, as part of EPA's NPDES aquaculture discharge permit, already are under EPA's authority and compliance requirements.

See the response to Clear Springs Foods comment #1.

2. **IDEQ must notify the new permittee in writing when an automatic transfer of authority to discharge has been granted, or if not granted, what delinquencies must be corrected to receive discharge authority.**

…During inspections, the permittee is required to produce this letter as proof that it has the authority to discharge…Section 202.02 (page 77, Automatic Transfers) of the complete draft version states the method to initiate a transfer of authority to discharge, but it does not require the permitting authority to issue a letter of confirmation, nor does it require the permitting authority to issue a letter stating the transfer of authority was denied for reasons other than modifications to the permit.

…transfer requests are common and a policy is needed to assure permittees that they are operating legally under the permit.

IAA recommends that Section 202 be modified:

(a) To add language requiring IDEQ to send the new operator (permittee) a letter by the effective date stated in the transfer document confirming authorization to discharge has been transferred, and

DEQ will take this comment and the recommendation to send the new operator a letter confirming that authorization to discharge has been transferred, into consideration during the development of guidance. Currently, the draft IPDES rules state that if DEQ does not notify the existing permittee and the proposed permittee, the transfer is effective on the date specified in the agreement.

(b) If the transfer of authority has not been granted, to send the permittee a letter within 2 weeks of receipt of the transfer request stating delinquencies that must be corrected before a transfer of authority can be granted.

See the response to Idaho Aquaculture Associate comment #2a.

U.S. Environmental Protection Agency (EPA):

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.

Section 003.02.h incorporates the following federal regulations by reference, including 40 CFR 122.35: "40 CFR 122.30 and 40 CFR 122.32 through 40 CFR 122.37, revised as of July 1, 2015 (Requirements and Guidance for Small Municipal Separate Storm Sewer Systems);"

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 38.01.25.003.02(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 federal definitions were to change at some point in the future, there is the potential that the regulations will be inconsistent.

DEQ acknowledges that the referenced definitions are included in sections of the CFR that have been incorporated by reference; however, DEQ is including them in the draft IPDES rules for the convenience and benefit of the users.

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.

The definition of "effluent" has been changed to, "Any discharge of treated or untreated ~~solution containing~~ pollutants into waters of the United States."

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 that 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 bases for these wording changes and clarify the scope of this definition.

See the response to Clear Springs Foods comment #1.

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, as court could decide to mitigate a penalty.

DEQ believes that an affirmative defense and enforcement actions for noncompliance with permit effluent limitations due to an upset, should pertain to both technology (TBEL) and water-quality based (WQBEL) limitations. This is consistent with some NPDES-authorized states specifically define the term upset to include (or at least not preclude) noncompliance with WQBELs and TBELs (e.g. Minnesota and Wisconsin).

For example, the Wisconsin administrative code, NR 205.03(41), defines upset as:

"Upset means an exceptional incident in which there is unintentional and temporary <u>noncompliance with permit effluent limitations</u> [emphasis added] because of factors beyond the reasonable control of the permittee…"

Similarly, the Minnesota administrative code, 7001.1090.L, defines upset as:

"In the event of temporary noncompliance by the permittee with an applicable effluent limitation [emphasis added] resulting from an upset at the permittee's facility due to factors beyond the control of the permittee…"

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 Norwest 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 purposes of mineral or oil exploration or development."

Section 102.04.a (formerly 102.02.a) has been changed to reflect this recommended language.

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).

40 CFR 122.21(b) has been added as Section 102.02 (Operator's Duty to Obtain a Permit). 40 CFR 122.21(c)(2) has been added as Section 102.03 (Permits Under the Clean Water Act Section 405(f). DEQ believes that 40 CFR 122.21(c)(2)(i) is already addressed in Section 105.17. 40 CFR 122.21(c)(2)(ii) has been added to Section 102.01, and 40 CFR 122.21(c)(2)(ii)(A) – (E) have been added as Section 105.17.o. 40 CFR 122.21(c)(2)(iii) has been added as Section 102.03. 40 CFR 122.21(c)(2)(iv), which addresses a new facility's time to apply, has been added as Section 105.03.c.

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 make 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.

Section 102.04.c (previously 102.02.c) has been changed to, "Sewage, industrial wastes, or other pollutants discharged into publicly owned treatment works (POTWs) by an indirect

discharger who has received a will-serve letter authorizing the discharge to the POTW. Plans or agreements to switch to this method of disposal in the future do not relieve dischargers of the obligation to have and comply with permits until all discharges of pollutants to waters of the United States are eliminated. This exclusion does not apply to the introduction of pollutants to privately owned treatment works or to other discharges through pipes, sewers, or other conveyances owned by a state, municipality, or other party not leading to treatment works;"

9. IDAPA 58.01.25.103. This section appears to mirror 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).

40 CFR 122.4(b) applies to 401 certifications, and DEQ does not envision conducting 401 certifications for any permits the Department issues. This federal regulation could apply to permits issued by EPA for facilities within tribal reservations. However, it is our understanding that DEQ does not conduct 401 certifications for permits within tribal reservations. Recent examples include the cities of Plummer and Kamiah. Finally, it is DEQ's understanding that this requirement would still apply to permits issued by EPA, regardless of whether the regulation is included in the draft IPDES rules.

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."

Section 105.08.d.ii has been changed to, "…unless specified otherwise at 40 CFR Part 136. For a composite sample, only one analysis of the composite aliquots is required;"

11. IDAPA 58.01.25.105.09(j). This section requires that 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.

Section 105.09.j has been changed to, "~~Certification that a~~ A nutrient management plan that has been completed…"

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.

Section 105.11.b has been changed to, "The Department may waive any requirement of this subsection if the Department has access to substantially identical information.~~,~~ The Department may also waive any requirement of this subsection ~~or~~ if that information is not of material concern for a specific permit, if approved by the EPA Regional Administrator. The waiver request to the Regional Administrator must include the Department's justification for the waiver.

A Regional Administrator's disapproval of a Department's proposed waiver does not constitute final agency action, but does provide notice to the state and permit applicant(s) that EPA may object to any state-issued permit issued in the absence of the required information."

13. IDAPA 58.01.25.105.11(c)(viii)(4). It appears 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 ",".

Section 105.11.c.viii(4) has been changed to, "…the discharge~~. If~~, if the transport…"

14. IDAPA 58.01.25.105.12(c). This section applies to POTWs and "other designated discharges." The comparable federal regulation at 40 CFR § 122.21(j)(5) only applies to POTWs.

This section addresses IPDES application requirements for privately owned treatment works that process domestic sewage, consistent with implementation of current NPDES regulations. For example, there are privately owned municipal treatment facilities owned by the developer until the subdivision becomes populated to an extent that allows the Home Owners Association to take over ownership. Until that point these facilities are privately owned treatment works, but ultimately they become publicly owned treatment works. Currently, these treatment works initially discharge their processed effluent to the subsurface or discharge to a land application site under a Recycled Water (Reuse) Permit, but then may seek an NPDES permit.

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."

Section 106.04 and 106.04.a were adapted from 40 CFR 124.3(c), which states, "After the application is completed, the Regional Administrator may request additional information from an applicant but only when necessary to clarify, modify, or supplement previously submitted material. Requests for such additional information will not render an application incomplete."

16. IDAPA 58.01.25.109.01(e)(vi). This section requires that 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 the IDAPA 58.01.25.109.01(e)(vi).

Section 109.01.e.vii has been added as, "<u>The sludge use and disposal practice(s) and the location of each sludge treatment works treating domestic sewage and use or disposal sites known at the time of permit application;</u>"

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.

Section 201.03.i was adapted directly from Alaska's pollutant discharge elimination rules (18 AAC 83.145(a)(6)), which were recently approved by EPA Region 10. An increase in a pollutant can be measured as an increase in a pollutant's concentration or mass in the effluent.

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 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.

Section 300.15 (Penalties and Fines) states, "Permits must include penalty and fine requirements pursuant to Section 500 (Enforcement)." Section 500 (Enforcement) identifies the specific penalty provisions, including the state IPDES equivalents to 40 CFR 122.41(j)(5) and (k)(2).

19. IDAPA 58.01.25.301.02. This section sets forth specific permit conditions that apply to POTWs and privately owned by 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 the regulations to privately owned treatment works.

This is consistent with the response to EPA comment #14, but applies to permit conditions.

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?

Section 303.02.b.ii, including the phrase, "…~~establish alternatives to reasonable measures of actual production~~," has been deleted.

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."

Section 303.02.b.iii(1) has been added as, "Its actual production, as indicated in Subsections 303.02.b and 303.02.b.i is substantially below maximum production capability…" Section 303.02.b.iii(2) has been added as, "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.

Thank you for the comment.

23. IDAPA 58.01.25.310.01(e). This section sets forth the timing for variance request under the 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 (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.

Section 310.01.e has been changed to mirror 40 CFR 122.21(m)(6).

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 comment.