Department of Environmental Quality
Water Quality Standards, 58.01.25
Docket No. 58-0125-1401

Negotiated Rulemaking Summary
Idaho Code § 67-5220(3)(f)

This rulemaking has been initiated to implement Idaho Code § 39-175C, which directed DEQ to seek approval of a National Pollutant Discharge Elimination System (NPDES) program. These rules will be promulgated under a new DEQ rule chapter, "Rules Regulating the Idaho Pollutant Discharge Elimination System Program," IDAPA 58.01.25.

DEQ considered key information provided by the public during the Idaho Pollutant Discharge Elimination System (IPDES) negotiated rulemaking process. Members of the public participated in eight negotiated rulemaking meetings between December 2, 2014 and July 10, 2015, and submitted written comments. The negotiated rule draft revisions were based on all meeting discussions and written comments submitted to DEQ during the negotiated rulemaking process.

At the conclusion of the negotiated rulemaking process, DEQ formatted the draft rule for publication as a proposed rule in the Idaho Administrative Bulletin. The negotiated rulemaking record, which includes the negotiated rule drafts, written public comments received, and documents distributed during the negotiated rulemaking process, is available at www.deq.idaho.gov/58-0125-1401.

Written comments were accepted on the draft rules after each negotiated rulemaking meeting. These comments were addressed at subsequent meetings and changes to the draft language were made in consideration of the comments received. However, some issues remain unresolved. In general these issues fall into the following categories:

1. Definition of the "waters of the United States or waters of the U.S."
2. Fee schedule that is equitable, sustainable, and matches resource needs
3. Permit rights, effect of a permit, and completeness criteria
4. Renewal of IPDES permits
5. Watershed and statewide variances
6. Compliance with federal laws
7. Enforcement stringency requirements
8. State legal authority and procedures
9. Augmenting the administrative record
10. Standing to appeal permit decisions
11. Definition of "upset"
12. Incorporation by reference
13. Other issues

1. Issue – Definition of "waters of the United States or waters of the U.S.":

DEQ Action:

On August 11, 2015, DEQ posted the "Complete Draft IPDES Rules – version 3" on its webpage. Subsequently, DEQ made only grammar and formatting corrections to the draft rules, with one notable exception. Because the IPDES rules submitted to the U.S. Environmental Protection Agency (EPA) as part of the NPDES primacy application must be consistent with the Clean Water Act, code of federal regulations (CFR), and the new federal Clean Water Rule which modifies the definition of waters of the U.S. and becomes effective on August 28, 2015 (if the new rule is not stayed or otherwise overturned), DEQ changed the definition of "waters of the United States or waters of the U.S." in Subsection 003.aa of the IPDES rules, as follows:

aa. ~~The term "Waters of the United States or waters of the U.S." as defined in 40 CFR 122.2, revised as of July 1, 2015.~~ The term "Waters of the United States or waters of the U.S." as defined in 40 CFR

122.2, revised as of August 28, 2015 by 80 federal register 37054-37127 (June 29, 2015), unless said revision is stayed, overturned or invalidated by a court of law or withdrawn by EPA, in which case the Department incorporates by reference the term "Waters of the United States or waters of the U.S." as defined in 40 CFR 122.2, revised as of July 1, 2015.

2. Issue – Fee schedule that is equitable, sustainable, and matches resources needs:

Comments:

The City of Twin Falls (Twin Falls), the Idaho Conservation League (ICL), and the EPA raised questions about the fairness, equity, and sustainability of the proposed IPDES fee schedule. DEQ received comments that it is inappropriate to charge municipalities fees to cover most of the costs associated with IPDES permits and to give private, for profit, companies free coverage under general IPDES permits with no annual fees. This was cited as an example of Idaho taxpayers being forced to foot the bill for the private profit of companies, and DEQ was asked to adjust the fee schedule to ensure all facilities that utilize IPDES permits pay their fair share. They felt this was inherently unfair and questioned why small towns should pay their fair share while private, for profit, aquaculture operations pay nothing; why municipalities as a whole should pay nearly half of all of the fees charged by the program; why urban areas appear to be subsidizing rural areas and; why the City of Boise should pay nearly 10% of all of the annual fees collected in the entire state?

ICL further stated that permittees should be charged pursuant to the amount of work that is required to service their permits and ancillary needs. ICL believes DEQ's current proposal shifts costs away from those who have been vocal opponents of the state seeking primacy because of their objections to having to pay for their discharge permits. In essence, those who opposed primacy on grounds that they did not want to pay for their own permits are being rewarded by not having to pay for permits, creating an unfair system that will likely prove unpopular and unsustainable as time goes on and the paying part of the universe begins to feel as if they have been taken advantage. Using state general funds for general permit writing and compliance, inspection, and enforcement (CIE) would not be appropriate, since general permit costs could be recovered through an application fee and/or annual fee for those general permits. 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 permits and any excess general and federal funds could be distributed over the whole IPDES program equitably.

DEQ's current estimates are based on the state general fund and federal funds supporting 50% of the IPDES Program. Twin Falls and ICL expressed concern that if the state general funds and federal funds diminish over time, the burden of the IPDES Program would be funded by only three categories, and the other categories would have no apparent financial requirement to operate under the IPDES program. It was further suggested that it may be more suitable for DEQ to show how the state would fund the IPDES program under a scenario of approximately 30% in order to provide a more conservative estimate.

Similarly, it was recognized that individual permits could potentially require more time and effort than preparation of general permits. Yet, although CIE activities will require more than 50% of the FTEs to operate the IPDES program, only three permitted categories will pay for the fee burden costs not covered by the state and federal funds. All permitted categories covered under either a general or individual permit could take a substantial amount of time and effort in CIE, and having only three categories cover the cost of all permitted categories would not be equitable.

EPA also commented that the fee rule does not provide for inflationary adjustments, and therefore recommended incorporating provisions that would allow DEQ to institute increases based on an inflationary metric to ensure permit fees keep pace with the cost of administering the program.

Finally, EPA and ICL were concerned that DEQ underestimated the number of hours required to successfully implement permitting tasks, by shifting resources from permitting (FTE allocation adjusted from 11 down to 7) to CIE (FTE allocation adjusted from 8 up to 14.6). Both commenters suggested that DEQ's estimates of 7.1 FTEs would be inadequate to support the permitting load. ICL further asserted that DEQ is clearly attempting to keep the IPDES program within a scale that the legislature will support and that the pursuit of NPDES primacy has, in part, been stoked by the assertion that Idaho will be able to process permits more quickly

than the EPA and that Idaho will expeditiously churn out permits and work through the existing backlog. However, EPA is currently struggling to re-issue permits in a timely manner and there currently exists a significant 'backlog' of out-of-date permits.

DEQ Response*:*

DEQ strived to develop and propose a fee structure to the Idaho Legislature that is equitable and sustainable. The final fee structure was based on IPDES program budget requirements, and discussions with the negotiated rulemaking committee, 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, inspection, and enforcement. 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.

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 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 was presented to the rulemaking committee for comment, and the majority of comments received were in support of this fee structure. The proposed fee, which uses equivalent dwelling units (EDUs) as a basis for deriving the IPDES municipality fee was developed with support from the Association of Idaho Cities (AIC), the Association of Idaho Public Works Professionals, and individual cities. This stakeholder group worked with their municipal counterparts in identifying the mechanism to apportion costs to the cities. That apportionment of costs, with a 50% IPDES fee structure, results in $1.74 per EDU per year, clearly not a burden to the EDU user of the city collection and wastewater treatment systems. The IPDES program is fortunate to be receiving state general fund support for this important program, and the choice was made to use state general funds to supplement the minor general permit community. No attempt was made to distinguish or discriminate in deriving fees from facilities based on size.

As such, municipalities are not bearing a disproportionate cost of the IPDES program. Rather, they are bearing the IPDES program costs associated with municipal permits, inspection, technical assistance, enforcement, pretreatment programs, MS4 permits and biosolids. EPAs State Water Quality Management Resource Model is the mechanism used to define the current IPDES program staffing needs based on hours. The proposed fee schedule used hours, state wages, etc. to derive the overall program costs; there is no better approach to use to assess the IPDES program revenue needs.

DEQ also appreciates concerns regarding 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.

Further, DEQ believes that the state will be able to write and process the various permits once the program is established using the hours provided in the estimate. Some areas that DEQ can identify as improvements in efficiency include the ability of the state permit writers to identify and calculate mixing zones, apply the state's antidegradation policy, issue permits faster due to the reduction in interaction necessary between federal and state agency staff, and the absence of the 401 Certification process, which adds significant

time and process to the permit writing schedule. Additionally, the majority of the workload associated with increasing the number of entities covered under a general permit actually appears in the CIE section. Hence there is a commensurate increase in the change in hours and FTEs, from 8 to 14, needed in that section.

In response to a fee structure that includes inflationary metrics, the State of Idaho Legislature requires fee rules to be adopted by concurrent resolution. Attempts to develop fee rules with automatic increases, such as inflationary adjustments, have never been approved by the Legislature. The proposed fee rule bases the municipal IPDES annual fee on EDUs. The municipal IPDES annual fee will adjust based on growth and covers approximately 48% of the IPDES program fee basis. The number of Construction General Permits (CGPs) is also performance based and will fluctuate based on Notice of Intents for CGPs. CGPs cover 33.8 percent of the IPDES program fee revenue. Overall the proposed fee rule for municipal and CGPs covers almost 82 percent of the IPDES program fee revenue and is based on factors that reflect the work load.

Finally, DEQ is attempting to forecast the overall programmatic resource needs based on the current permit universe. Due to the fact that the agency will likely not be getting delegated authority for the full program until after 2020, it seems unlikely that estimates of the current permit universe will exactly reflect what that permit universe will look like in the future. There may be efficiencies in permitting that might be employed which are not currently envisioned. DEQ is attempting to craft a programmatic resource calculation that seems reasonable both in the number of hours and FTEs needed to staff a full program and stays within reach of the authorizing legislation for seeking delegated authority. DEQ believes that the current estimate of 29 FTEs and $3.03 million is in line with neighboring states which have a permit universe similar to Idaho's.

3. Issue – Permit rights, effect of a permit, and completeness criteria:

Comments:

The Idaho Water Users Association (IWUA) supported, while the Association of Idaho Cities (AIC) and the City of Meridian opposed the second sentence of the draft rule language in Subsection 100.01 (Rights), which states, "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."

IWUA recommended that consideration should be expressly given to requiring that these "necessary approvals, authorizations, or permits" be obtained and submitted to DEQ before any permit to discharge is processed or issued. They further suggested that this requirement be included in the rule language of Subsection 106.01 (Completeness Criteria).

Those in opposition asserted that the draft language creates confusion, particularly where discharges are made to natural streams, creeks, rivers or other natural water bodies, and that the language appears redundant with Idaho state law, which already affords protections of irrigation and drainage under Title 42, Idaho Code. Further, they stated that the proposed language suggests DEQ may impose additional obligations for dischargers to seek approval from additional parties prior to permit issuance. They further argued that these more restrictive requirements and delays under state IPDES permitting could result in injury to dischargers, and are more restrictive than the current CFR and the EPA NPDES permitting process.

DEQ Response*:*

DEQ considered the balance and merit of the supporting and opposing recommendations, but left the language of Subsection 100.01 (Rights) intact.

DEQ believes that the issuance of an IPDES permit 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.

DEQ provided the language in this subsection as a courtesy to the regulated community, informing them that while their discharge requires an IPDES permit, there may be other necessary approvals or authorizations for

which DEQ is not aware of or responsible. 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.

4. Issue – Renewal of IPDES Permits:

Comments:

Clearwater Paper commented that Subsections 200.01 (Interim Effluent Limits) and 200.02 (Final Effluent Limits) should specify that the exceptions to anti-backsliding authorized under Section 303(d)(4) of the Clean Water Act apply to IPDES permitting actions.

DEQ Response:

The majority of anti-backsliding provisions are found in the Clean Water Act section 402(o), which reference 303(d)(4). Subsections 200.01 and 200.02 of the IPDES rules, which mirror 40 CFR 122.44(l), provide language regarding anti-backsliding; however, some provisions found in 402(o) are not found in 40 CFR 122.44(l). As such, DEQ is considering how best to ensure the application of the Clean Water Act section 402(o) anti-backsliding provisions in the IPDES permitting process.

5. Issue – Watershed and statewide variances:

Comments:

Clearwater Paper and the Idaho Mining Association requested that watershed (or even statewide) variances be authorized in the draft IPDES rules Section 310 (Variances) and should make clear that if IDEQ authorizes a discharger-specific variance or watershed-based variance then it is not necessary to incorporate such a variance in Idaho's Water Quality Standards at IDAPA 58.01.02.

DEQ Response:

DEQ is considering watershed or state-wide variances as part of the Human Health Criteria rulemaking. The variance provisions in the IPDES rule allow variances from Water Quality Standards as provided in the Water Quality Standards, IDAPA 58.01.02.260. This section of the Water Quality Standards allows for variances without the need for a rulemaking.

6. Issue – Compliance with federal laws:

Comments:

The IWUA supported DEQ eliminating the requirement that permit conditions be considered to "comply with the provisions of applicable federal laws". However, they asserted that the Subsection 109.02 (Public Comment) of the IPDES draft rule still contemplates that such conditions may be necessary to comply with provisions of the Clean Water Act, and that the IPDES rules should set forth what specific legal authority, if any, exists for DEQ 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, they recommend that the rule should cite the specific Clean Water Act provision or section of the CFR which require DEQ to protect against such "substantial impairment" as part of the NPDES permit program. If no such authority exists, this rule should be eliminated.

DEQ Response:

IPDES permits must ensure compliance with Idaho Water Quality Standards. Water Quality Standards 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 Water Quality Standards 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 Water

Quality Standards. Under these circumstances, conditions would have to be included in the permit to avoid a violation of Water Quality Standards (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.

7. Issue – Enforcement stringency requirements:

Comments:

ICL emphasized that the EPA will not approve IPDES rules that are less stringent than federal rules and they noted that the draft IPDES rules and statutes related to enforcement and penalties are much less stringent than the federal version. For instance, Idaho statutes referenced in the draft IPDES rules provide that penalties for IPDES civil violations are a maximum of $10,000 per violation, whereas the federal rules provide for these violations are $37,500 per violation. Numerous other differences were cited regarding penalties (e.g. maximum penalty per day, per violation, for continuing violations, civil vs. criminal, etc.).

Similarly, ICL indicated that the draft IPDES rules do not provide for citizen enforcement of IPDES violations, and citizen enforcement is not dealt with in any of the Idaho statutes referenced in the draft IPDES rules. As a result, they asserted that DEQ must include enforcement language in the draft IPDES rules that mirrors the federal rules. Failure to do so would mean that the IPDES rules are less stringent than the federal rules.

DEQ Response:

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

8. Issue – State legal authority and procedures:

Comments:

EPA asserted that the state needs to have pretreatment procedures in place described in 40 CFR 403.10(f)(2) and the legal authority to implement them. The state would also need to ensure that any existing state authorities do not exclude or inhibit its abilities to conduct the activities of 40 CFR 403.8(f)(2), which is needed in the absence of an approved publicly owned treatment work (POTW), 40 CFR 403.10(f)(l) and (2), as well as have the authority to enforce city ordinances with an IPDES permit. They provided similar questions regarding DEQ's legal authority to implement the sewage sludge program. As a result, EPA indicated that it is difficult to review the pretreatment or sewage sludge regulations without having the entire program in hand to review.

DEQ Response:

DEQ understands the need to ensure the necessary legal authority is in place for the pretreatment and sewage sludge programs. In addition to the incorporation by reference of the federal pretreatment and sewage sludge program regulations, DEQ has determined that additional statutory authority is necessary. DEQ intends to pursue the necessary statutory changes and will further address them in the IPDES Program Description, Attorney General's statement, and MOA, as applicable.

9. Issue – Augmenting the administrative record:

Comments:

The Idaho Association of Commerce and Industry (IACI) suggested conditions for supplementing the administrative record based on judicially-created relatively narrow exceptions to record review under the federal Administrative Procedures Act (APA). That is, they asserted NPDES permits often involve complex and technical evaluations which 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, which is the reason for the federal APA record review exceptions and for the recommended the changes in Subsection 204.07 (Augmenting the Administrative Record) of the draft IPDES rules.

DEQ Response*:*

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 and the provisions for augmentation for judicial review under the Clean Water Act section 509(c). Therefore, the Department does not agree that additional opportunities for augmentation should be included in the rule because: (1) DEQ 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) DEQ 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 the Clean Water Act judicial appeal provisions; and (4) DEQ 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.

10. Issue – Standing to appeal permit decisions:

Comments:

IACI remarked 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 and they requested that DEQ consider revising the language in Subsection 204.01(a), accordingly.

DEQ Response:

DEQ considered the recommendation, but does not agree that additional restrictions should be included to 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 Idaho 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, DEQ 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.

11. Issue – Definition of "upset":

Comments:

EPA commented that by applying the affirmative defense of an "upset" to all effluent limitations, including water quality based effluent limitations (WQBELs), DEQ's definition is less stringent and not in compliance with the federal regulations found at 40 CFR 122.41(n); under the CFR a permittee can only claim the affirmative defense of an upset for technology-based effluent limitations (TBELs). They further remarked, however, that DEQ is not precluded from using enforcement discretion with regard to these violations on a case-by-case basis. Moreover, if the WQBEL violations were part of a third-party lawsuit, a court could decide to mitigate a penalty.

DEQ Response:

DEQ appreciates EPA's concern regarding the use of upset as an affirmative defense in the case of violation of WQBELs. However, in evaluating the definition for bypass, DEQ believes the definition should set up a situation where the operator or owner of a facility may claim upset as an affirmative defense, regardless of the type of effluent limitation. DEQ's reasons for this are as follows:

EPA is concerned that DEQ's definition is less stringent than the federal regulation. DEQ argues that IPDES definition is in line with the intent of the CFR and will allow the agency to be more informed about non-compliance events that may occur at facilities. According to the 24-hour monitoring requirements (40 CFR 122.41(l)(6)(ii)(B)), an operator/owner must inform the agency of "any upset which exceeds any effluent limitation [emphasis added] in the permit". DEQ argues that if the intention of the federal regulations was that upsets would only be applied to TBELs, this portion of the CFR would not specifically call out "any effluent limitation." The implication here is that any effluent limitation means either WQBELs or TBELs.

An upset is clearly identified as an exceptional incident causing unintentional and temporary non-compliance due to factors beyond the control of the permittee. An upset, therefore, is not the result (and these exceptions are clearly identified in the definition) of operational error, improperly or inadequately designed facilities, lack of preventative maintenance, or careless or improper operation. Essentially, an upset occurs outside of the control of the operator/owner which causes a temporary non-compliance with the effluent limitations. As such, the operator/owner should not be held accountable for this exceptional event that does not cause sustained or permanent non-compliance with permit limits.

The burden of proof for upset as an affirmative defense still lies with the operator/owner to show there was no improper or inadequate maintenance or operation of the facility, that the event was exceptional, and did not cause lasting non-compliance with the effluent limitations.

There is precedent in other states for not specifically tying an upset to TBELs. This is consistent with some NPDES-authorized states that 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 noncompliance with permit effluent limitations [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…"

Given the reasons listed above DEQ concludes that an upset, by definition, is something that affects the process of treating wastewater and should not be constrained to only TBELs. Regardless of how the effluent limitation is calculated, the operator/owner should be afforded the right to show that an exceptional event outside their control caused a temporary, unintentional violation of the effluent limitations. DEQ would also be informed about these upset events in cases where WQBELs were violated and not just when TBELs were violated, because under the proposed DEQ interpretation, upsets causing a violation of any effluent limit would need to be included in the 24-hour reporting.

12. Issue – Incorporation by reference:

Comments:

ICL noted that a key aspect of understanding the IPDES program will be providing a single set of rules for people to consult. To this end, they recommended that DEQ adopt or recraft all of the necessary federal NPDES language into the IPDES rules and print the entire text of the state and federal amalgam into Idaho's IDAPA Rules so that it can be read as a single document.

DEQ Response:

As presented during the January 23, 2015 negotiated rulemaking meeting, DEQ believes that due to

printing costs and potential transcription errors, incorporating by reference specific federal NPDES regulations into the IPDES rules will be more accurate and cost effective for all IPDES users and Idaho citizens.

13. Issue – Other issues

The table below provides specific written comments submitted by negotiated rulemaking participants and DEQ's responses, which do not necessarily fit into the previous categories:

Proposed Rule Section	Commenter/ Comment	Response
Not in rules	**Clear Springs Foods, Inc.** 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.*
110.02	**City of Twin Falls** 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.*

Proposed Rule Section	Commenter/ Comment	Response
101.01	**Idaho Water Users Association (IWUA)** 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).*
108.02	**Idaho Conservation League** 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.*
202.02	**Idaho Aquaculture Association** 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	*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.*

Proposed Rule Section	Commenter/ Comment	Response
	been transferred, and (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.	
103	**US Environmental Protection Agency** 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.*
105.12.c	**US Environmental Protection Agency** 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.*
301.02	**US Environmental Protection Agency**	*This is consistent with the response to the EPA*

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	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.	*comment above, but applies to permit conditions.*
196.04.a	**US Environmental Protection Agency** 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."*
201.03.i	**US Environmental Protection Agency** 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.*