

**From:** [Norm Semanko](#)  
**To:** [Paula Wilson](#)  
**Subject:** Docket No. 58-0125-1401 - Rules Regulating the Idaho Pollutant Discharge Elimination System Program - Comments on Proposed Rule  
**Date:** Friday, October 02, 2015 4:41:58 PM

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Dear Paula,

These comments are submitted on behalf of the Idaho Water Users Association (IWUA) regarding the above-referenced Proposed Rule (Docket No. 58-0125-1401). IWUA participated in the negotiated rulemaking meetings -- providing written comments throughout -- and appreciates the substantial progress that was made during that process. IWUA now submits the following comments on the Proposed Rule. Reference is made below to the specific provisions of the Proposed Rule, as published.

**Rule 03. Incorporation by Reference.** Proposed Rule 3.02.aa incorporates the term "waters of the U.S." as defined in the Code of Federal Regulations. Of course, "waters of the U.S." is a federal agency interpretation of the term "navigable waters" as defined in the federal Clean Water Act ("the term 'navigable waters' means the waters of the United States. . ."). The federal agency interpretation is necessarily limited by the statutory definition. Accordingly, the rule should incorporate the term "navigable waters" as defined in the federal Clean Water Act, or otherwise refer to the federal Clean Water Act, not just the Code of Federal Regulations.

**Rule 100.01. Rights.** IWUA supports the language contained in Proposed Rule 100.01 and appreciates the Department's recognition of the authorities and protections referenced in this rule. In addition, IWUA supports language requiring that such approvals 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. Department approval of a permit does not grant or serve in place of any other required permission. This should be made clear.

**Rule 102.04. 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". Proposed Rule 102.04 provides: "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." IWUA is concerned that the exclusion provided for in the Proposed Rule may not be as broad as that provided for in Idaho Code. An EPA interpretation that a permit is not required may or may not be contained in a federal regulation, at least initially. In such cases, EPA is still not requiring a permit. Under the Idaho statute, if EPA doesn't require a discharge permit, the Department cannot require one. The Proposed Rule should be modified to include clarifying language. One possibility would be to add a new subsection 102.04.i to the list of exclusions as follows: "Any activity or source that is not required to obtain an NPDES permit by the United States environmental protection agency".

**Rule 105. Application for an Individual IPDES Permit.** The IPDES permit application should identify: any water conveyance facilities (e.g., canals, ditches, drains, pipes, etc), not owned or operated by the applicant, that the applicant proposes to utilize as part of the proposed discharge; the owner and operator of such facilities; whether the owner and operator of the facilities have been notified; and whether the necessary approvals, authorizations or permits have been obtained from the owner and operator to utilize the facilities.

**Rule 109.02. Public Comment.** Proposed Rule 109.02.d authorizes the Department to include conditions in the permit that the federal fisheries agencies believe are "necessary to avoid substantial impairment of fish, shellfish, or wildlife resources", if the Department determines such conditions are "necessary to comply with the provisions of the Clean Water Act". IWUA is unaware of any provision in the Clean Water Act or federal regulations requiring such "substantial impairment" conditions to be included in a point source discharge permit. If such a provision exists, it should be identified in the rule. If not, this provision should be eliminated from the rule as being more stringent or broader in scope than the Clean Water Act.

**Rule 110.02. Fee Schedule.** IWUA supports the proposed fee schedule for "Other General Permits",

including any pesticide general permit.

Rule 130.06. Case-by-Case Requirements for Individual Permits. Proposed Rule 130.06 authorizes the Department to require anyone who has been covered by a general permit to now obtain an individual permit. This decision can be made by the Department without any prior notice or opportunity to be heard. Recognizing the hardship that could be caused in this narrow category of cases, the Proposed Rule should be revised to provide notice and an opportunity to be heard before a decision is made by the Department. The Proposed Rule appropriately provides an opportunity to appeal the Department's decision as provided in Proposed Rule 204 (Appeals Process). However, this is no replacement for the right to be heard by the Department in the first instance, before the decision is made, in this specific, narrow category of cases.

IWUA appreciates the opportunity to provide these comments and looks forward to continuing to work with the Department, the Idaho State Legislature, and other interested parties toward the completion of this important rulemaking.

Respectfully submitted,

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