

<p><b>Docket Number:</b> <u>58-0102-1501</u>  <b>Effective Date:</b> <u>2016 Sine die</u>  <b>Rules Title:</b> <u>Water Quality Standards</u>  <b>Agency Contact and Phone:</b> <u>Barry Burnell, 373-0194</u></p>	<p style="text-align: center;"><b>Public Notice</b></p> <p><b>Hearings:</b> [ ]Yes [X] No  <b>Locations and Dates:</b> N/A  <b>Written Comment Deadline:</b> 9/4/15</p>
<p><b>Descriptive Summary of Rule as Initially proposed:</b> The purpose of this rulemaking is to add language to the Idaho Water Quality Standards that is consistent with the federal regulations for designating and revising uses assigned to waterbodies, providing basis for guidance on the use designation/revision process.</p> <p>A Use Attainability Analysis (UAA) is required in order to revise or remove a designated beneficial use that is not an existing use on a waterbody. According to federal Clean Water Act regulation (40 CFR 131.10), a designated use may be changed or removed if it is demonstrated that attaining the designated use is not feasible. The federal regulations describe six reasons for justifying infeasibility of use attainment, as well as limitations on removal of a currently designated use.</p> <p>Not all waterbody beneficial use designations necessarily reflect the most appropriate use and may benefit from a UAA. Idaho has had mixed success in developing UAAs and changing use designations. Currently DEQ does not have language in its Water Quality Standards pertaining to the UAA process, and consequently, DEQ has no basis for a policy or guidance document on when a UAA is appropriate or how to perform a UAA. UAA involves considerable data collection, analysis, and resources to meet the high demonstrable threshold required to revise use designations. Without guidance on when a UAA is required and the requirements of a successful UAA, a UAA is difficult and risky.</p> <p>In 2014 the state of Idaho Office of Performance Evaluations (OPE) submitted Evaluation Report 14-03 to the Joint Legislative Oversight Committee. The Report recommended that DEQ complete its UAA guidance document. In the DEQ response to Report 14-03, DEQ committed to completing the UAA guidance after a basis for UAA guidance was established in the Water Quality Standards. This rulemaking is intended to develop sufficient language regarding the UAA process such that the OPE recommended guidance may be completed.</p> <p>DEQ recommends that the Board adopt the rule, as presented in the final proposal, as a pending rule with the final effective date coinciding with the adjournment <i>sine die</i> of the Second Regular Session of the Sixty-third Idaho Legislature. The rule is subject to review by the Legislature before becoming final and effective.</p>	<p><b>Negotiated Rule Making:</b> [ X ] Yes [ ] No  The text of the proposed rule has been drafted based on discussions held and concerns raised during negotiations conducted pursuant to Idaho Code § 67-5220 and IDAPA 58.01.23.810-815. The Notice of Negotiated Rulemaking was published in the April 2015 Idaho Administrative Bulletin, Vol. 15-4, and a preliminary draft rule was made available for public review. Meetings were held on April 7 and May 19, 2015. Members of the public participated in this negotiated rulemaking process by attending the meetings and by submitting written comments. A record of the negotiated rule drafts, written comments, documents distributed during the negotiated rulemaking process, and the negotiated rulemaking summary is available at <a href="http://www.deq.idaho.gov/58-0102-1501">www.deq.idaho.gov/58-0102-1501</a>.</p> <p><b>Costs to the Agency:</b> DEQ will incur minimal costs during the initial rulemaking above current staffing levels. However, as the UAA process is implemented, DEQ may incur moderate staff resources to guide stakeholders through the process in reviewing and submitting UAAs.</p> <p><b>Costs to the Regulated Community:</b> The costs will be dependent upon the waterbody and data requirements. However, where a use change is warranted, it is expected that long term benefits would outweigh near term costs. Therefore, DEQ anticipates that the majority of the regulated community will positively perceive the development of rules pertaining to UAAs as a means to address the appropriate use designations on waterbodies of concern.</p> <p><b>Relevant Statutes:</b> Sections 39-105, 39-107, and 39-3601 <i>et seq.</i>, Idaho Code</p> <p><b>Idaho Code § 39-107D Statement:</b> The standards included in this rule are not broader in scope, nor more stringent, than federal regulations and do not regulate an activity not regulated by the federal government.  <b>Fiscal Impact Statement:</b> The following is a specific description, if applicable, of any negative fiscal impact on the state general fund greater than ten thousand dollars (\$10,000) during the fiscal year: Not applicable.</p>

Temporary Rule       Necessary to protect public health, safety or welfare  
 Compliance with deadlines in amendments to governing law or federal programs  
 Conferring a benefit

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**See attached Response to Comments.**

Section	Section Title	Summary of Rule Changes Based on Public Comment
010.	Definitions.	This section has not been changed.
102.	Designation and Revision of Beneficial Uses.	This section has not been changed.

DEQ's Response to Comments  
Docket No. 58-0201-1501

Commenter 1 – EPA Region 10 (EPA)

Commenter 2 – Idaho Conservation League (ICL)

Commenter 3 – Idaho Association of Commerce and Industry (IACI)

Rule Section	C o m m e n t e r	Comment	Response
010	1	<p>EPA reiterates its comments made in its April 21 and June 18, 2015 letters. EPA recommends DEQ include a definition of highest attainable use (HUA) in its rule. EPA's final rule defines HUA at 40 CFR 131.3(m): "Highest attainable use is the modified aquatic life, wildlife, or recreation use that is both closest to the uses specified in section 101(a)(2) of the Act and attainable, based on the evaluation of the factor(s) in § 131.10(g) that preclude(s) attainment of the use and any other information or analyses that were used to evaluate attainability. There is no required highest attainable use where the State demonstrates the relevant use specified in section 101(a)(2) of the Act and sub-categories of such a use are not attainable." This definition was revised based on commenters' concerns that the proposed definition of HUA used terminology that would make it difficult for states and authorized tribes to adopt an HUA that would not be challenged by stakeholders. The final HUA definition includes specific terms to ensure that the resulting HUA is clear to states, authorized tribes, stakeholders and the public.</p> <p>Consistent with the federal water quality standards regulatory revisions at 40 CFR 131.3(m), EPA provides the following definition and recommends that DEQ include this definition in its final rule:</p> <p><i>Highest attainable use - the modified aquatic life, wildlife or recreation use that is both closest to the uses specified in 101(a)(2) of the Act and attainable, based on the evaluation of the factor(s) in 40 CFR 131.10(g) that preclude(s) attainment of the use and any other information or analyses that were used to evaluate attainability.</i></p>	<p>The final EPA rule became effective late in Idaho's rulemaking process. DEQ is unable to add the suggested rule language on highest attainable use (HAU) without knowing how to determine HAU and what criteria will protect the HAU. This will take time and cannot be accommodated in this rulemaking and will be considered in our next triennial review.</p>
101	1	<p>EPA understands that DEQ has decided not to revise Sections 101.01, 101.02 and 101.0 in this rulemaking because DEQ determined that additional time is needed to develop rule language to address manmade waterways consistent with the CWA and the regulatory requirements. As DEQ has acknowledged, the man-made waterways and private waters provisions are inconsistent with the CWA and the regulatory requirements. EPA expects states to apply CWA section 101(a)(2) "national goal" uses of fishable/swimmable to all waters of the U.S., including man-made waterways and private waters that are waters of the U.S. unless a Use Attainability Analysis (UAA) is completed to determine if those uses are not feasible and an alternate use would be appropriate. EPA remains optimistic that DEQ will develop a path forward to address EPA's concerns with the manmade waterways provision and will develop rule language in a reasonable timeframe.</p> <p>As EPA stated in its June 18<sup>th</sup> comment letter until Idaho adopts rule language consistent with EPA's federal rule regarding private waters, the federal rule remains in place (referred to in the federal rule as "excluded" waters 40 CFR 131.33(c)).</p>	<p>Thank you for your comment.</p>

102.02(a)(iv)	1	In its April 21 and June 18, 2015 comment letters, EPA suggested DEQ include a statement that clearly states a UAA will be required if it is determined that a CWA Section 101(a)(2) beneficial use is not appropriate based on economic factors. This interpretation would be consistent with the Clean Water Act and its implementing regulations. DEQ did not include this clarifying language in its revised rule. Regardless of whether DEQ adds this clarification, EPA expects that DEQ will still complete a UAA pursuant to 40 CFR 131.10(j).	When removing a beneficial use due to economic considerations DEQ intends to utilize the UAA process.
102.02(d)(i)		The proposed rule includes language that now makes it clear that a UAA must be conducted whenever DEQ designates beneficial uses that do not include uses specified by CWA 101(a)(2), similar to EPA's language in 40 CFR 131.10(j). These revisions provide the necessary and appropriate clarification.	Thank you for your comment.
<u>102.02(d)(ii)</u>	1	The proposed rule language clarifies that wildlife uses are included in 101(a)(2) in addition to aquatic life and recreation uses. As with 102.02(d)(i) above, the revised rule also includes language that makes it clear a UAA must be conducted whenever DEQ acts to remove a designated beneficial use that is specified by CWA 101(a)(2), similar to EPA's language in 40 CFR 131.10(j). These revisions provide the necessary and appropriate clarification.	Thank you for your comment.
<u>102.02(e)(i)</u>	1	DEQ has included language that now makes it clear that a UAA is not required whenever DEQ designates beneficial uses that are specified by CWA 101(a)(2) similar to EPA's language in 40 CFR 131.10(k). These revisions provide the necessary and appropriate clarification.	Thank you for your comment.
<u>102.02(e)(ii)</u>	1	As with 102.02 (e)(ii) above, DEQ has added language that makes is clear that a UAA is not required whenever DEQ removes beneficial uses that do not include those uses specified by CWA 101(a)(2). These revisions provide the necessary and appropriate clarification.	Thank you for your comment.
	1	<p>EPA reiterates the comment in its June 18, 2015 letter and recommends DEQ add a new provision at 102.02(f). The federal water quality standards regulatory revisions makes clear that once a state or authorized tribe has rebutted the presumption of attainability by demonstrating through a required UAA that a use specified in section 101(a)(2) of the Act is not attainable, it must adopt the highest attainable use (HAU). The preamble to the proposed rule also provides several examples of how states and authorized tribes can articulate the HAU. These examples include using an existing designated use framework, adopting a new statewide sub-category of a use, or adopting a new sub-category of a use that uniquely recognizes the limiting condition for a specific water body (e.g., aquatic life limited by naturally high levels of copper). Some commenters expressed concern with the difficulty of articulating a specific HAU because doing so may require additional analyses. Where this may be the case, an alternative method of articulating the HAU can be for a state or authorized tribe to designate for a water body a new or already established, broadly defined HAU (e.g., limited aquatic life use) and the criteria associated with the best pollutant/parameter levels attainable based on the information or analysis the state or authorized tribe used to evaluate attainability of the designated use. This is reasonable because the state or authorized tribe is essentially articulating that the HAU reflects whatever use is attained when the most protective, attainable criteria are achieved. Where a state or authorized tribe does not already have a statewide use in their regulation that is protective of the HAU, the state or authorized tribe will need to find an approach that meets the requirements of the CWA and §131.10(g). States and authorized tribes are not limited by the examples described in this section and can choose a different approach that aligns with their specific needs, as long as their preferred approach is protective of the HAU and is consistent with the CWA and §131.10.</p> <p>EPA recommends DEQ include clarifying language consistent with this requirement and add 102.02(f) and the following language:</p> <p><b><u>102.02(f):</u> <i>When adopting a new or revised designated use based on a required use attainability analysis the Department shall also adopt the highest attainable use (as defined in 010.,cr)</i></b></p>	DEQ appreciates the added clarity and flexibility EPA has provided with regard to highest attainable use (HAU). However, DEQ needs to better understand how to implement HAU and have the opportunity to discuss this with its stakeholders before adopting language such as EPA suggests. See also response above regarding adding a definition of HAU.

102.02(d)	2	A significant portion of this subsection is merely a restatement of the definition of "Use Attainability Analysis." Since this term is already defined in the definitions section, including it here seems un-necessary.	Thank you for your comment.
102.02(e)i	2	The current proposed language gives the impression that a UAA is not required whenever the department designates uses that include any aquatic life and recreational uses. This is not correct. A UAA is required whenever the DEQ issues designated uses that require less stringent criteria than previously required. Please amend this subsection accordingly.	Section 102.02.d.ii requires a UAA whenever DEQ designates subcategories of 101(a)(2) uses that require less stringent criteria. However, when an undesignated waterbody is designated for an aquatic life or recreational use the first time a UAA is not necessary. A presumed use protection is not a use designation.
	2	<p>Additional subsection needed</p> <p>An important component of the Clean Water Act provisions that allow a state to remove the fishable and swimmable uses is the requirement that this decision be periodically reviewed. Indeed, the Clean Water Act specifically directs that this decision shall be revisited every three years. See 40 CFR Part 131.20 (a), below: Any water body segment with water quality standards that do not include the uses specified in section 101(a)(2) of the Act shall be re-examined every three years to determine if any new information has become available. If such new information indicates that the uses specified in section 101(a)(2) of the Act are attainable, the State shall revise its standards accordingly. Procedures States establish for identifying and reviewing water bodies for review should be incorporated into their Continuing Planning Process. Pursuant to this, Idaho needs to include additional language into this proposed rule. We ask that DEQ include the language provided below:</p> <p>102.03.f</p> <p>i. If a use attainability analysis has been conducted and designated uses have been removed or downgraded to uses that require less stringent criteria, the Department shall review the conclusions of the UAA at least every three years to determine if more protective uses have returned to the waterbody.</p> <p>ii. If a use attainability analysis has been conducted and designated uses have been removed or downgraded to uses that require less stringent criteria, the Department shall revise this designation in the event that more protective existing uses are later observed in the waterbody.</p>	<p>40 CFR Part 131.20 (a) speaks to triennial review of WQS..</p> <p>Per federal regulations, DEQ intends to review UAA's every three years only in cases where the uses do not include 101(a)(2) uses (i.e. fishable and swimmable). DEQ does not intend to review UAAs where aquatic life was changed from one subcategory to another.</p>
102.02.d	3	IACI has a comment on one part of the proposed rule that was also a part of the rulemaking on changes to the water quality criteria to protect human health: attainment and maintenance of downstream waters. As IACI commented during the rulemaking on human health criteria, the language on "downstream waters" (see IDAPA 58.01.02.102.01.v) should be deleted. This proposed language adds new terms ("attainment" and "maintenance") that are not defined in the Idaho rules. It is not clear how "attainment and maintenance" of downstream waters, especially those of downstream states, would be considered in the UAA process. Furthermore, the downstream water provision is not a specific requirement for conducting a UAA pursuant to 40 CFR 131.10(g). Therefore, IACI recommends you delete the language in proposed IDAPA 58.01.02.102.01.v.	The UAA language is adopted from 40 CFR 131.10(b). The attainment and maintenance of downstream waters is a critical component of water quality standards including beneficial use designation and water quality criteria.