

**Department of Environmental Quality  
Water Quality Standards, IDAPA 58.01.02  
Docket No. 58-0102-1502**

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

This rulemaking has been initiated to update copper criteria for aquatic life.

The Notice of Negotiated Rulemaking was published in the October 2015 issue of the Idaho Administrative Bulletin, and a preliminary draft rule was made available for public review. Nine negotiated rulemaking and guidance development meetings were held between October 28, 2015, and July 18, 2017. Key information was posted on the DEQ rulemaking web page and distributed to the public. Members of the public participated in the negotiated rulemaking process by attending the meetings and by submitting written comments.

All comments received during the negotiated rulemaking process were considered by DEQ when making decisions regarding development of the rule. For comments that were not incorporated into the draft rule, DEQ's response to those comments is attached. At the conclusion of the negotiated rulemaking process, DEQ formatted the final draft for publication as a proposed rule in the Idaho Administrative Bulletin. The negotiated rulemaking record, which includes the negotiated rule drafts, written public comments, documents distributed during the negotiated rulemaking process, and the negotiated rulemaking summary, is available at [www.deq.idaho.gov/58-0102-1502](http://www.deq.idaho.gov/58-0102-1502).

DEQ's Response to Comments/Negotiated Rulemaking Summary  
Docket No. 58-0102-1502

Commenter 1 – U.S. Environmental Protection Agency (EPA)	
Commenter 2 – National Marine Fisheries Service (NMFS)	
Commenter 3 – Copper Development Association	

Rule Section/ Subject Matter	C o m m e n t e r	Comment	Response
Subsection 210.01	1 2	Implementation procedures and default criteria values should be in rule (rather than guidance) and should be legally binding.	<p>Providing implementation procedures in guidance allows for flexibility and for permit writers, dischargers, and DEQ assessors and TMDL writer's to take advantage of novel approaches, such as the fixed monitoring benchmark, to develop effluent limits. Implementation procedures for the Biotic Ligand Module (BLM) are provided in separate guidance document and more generally in the IPDES effluent limit development guidance.</p> <p>By adopting the copper BLM DEQ is setting criteria for copper. DEQ does not believe there is a need for a secondary or backup copper criterion, and expects this could lead to confusion as to which criterion really applies. So called "default criteria" are intended to address the situation of insufficient data to employ the BLM. This is a minor need, one that can be avoided by collection of the necessary input data to the BLM. DEQ has set up a process in guidance that encourages the gathering of data needed to run the BLM such that whatever utility there may be at the outset will diminish as the affected public gain experience with the BLM.</p>
Subsection 210.01	1 2	Recommend using estimated input parameter data when measured data are unavailable, use of values or approach from EPA's missing parameters document. <sup>1</sup>	Use of conservative inputs for individual inputs leads to the unrealistic situation in which the resulting criteria represent no real waters. DEQ prefers use of conservative <i>criteria</i> based on actual data rather than using estimated inputs. Further, DEQ will not reference draft documents (such as the EPA missing parameters report – which is not a final document) as they are subject to revision.

<sup>1</sup> EPA (US Environmental Protection Agency). 2016. Draft Technical Support Document: Recommended Estimates for Missing Water Quality Parameters for Application in EPA's Biotic Ligand Model. Washington DC: EPA, Office of Water. EPA-820-R-15-106. Available at <https://www.epa.gov/sites/production/files/2016-02/documents/draft-tsd-recommended-blm-parameters.pdf>.

Subsection 210.03	1 2	<p>Recommend additional language in rule stating that BLM criteria will be based on <i>location</i> and <i>time</i> when copper bioavailability is greatest, and that applicable criteria for any site will be based on the lowest time-specific modeled criteria.</p> <p>Recommend :</p> <ul style="list-style-type: none"> <li>(1) Calculation of criteria or reconciling multiple instream water quality criteria (IWQC) in a manner that is protective of designated uses at all times, including under the most bioavailable or toxic conditions;</li> <li>(2) requiring a determination of when and where the most bioavailable conditions occur; and</li> <li>(3) ensuring sufficiently representative data are collected.</li> </ul>	<p>The BLM provides estimates of protective copper concentrations based on site-specific input parameters, known as Instantaneous Water Quality Criteria (IWQC). By definition, an IWQC is protective of conditions <i>at the time</i> that the data were collected. Adopting in rule a procedure that reconciles multiple variable IWQCs and applies the lowest IWQC at all times is inconsistent with the science and time-specific nature of the BLM, and could result in the nonsensical situation where Idaho would be identifying waters as impaired by copper and investing limited state resources into TMDLs for waters where toxic copper conditions are never encountered.</p> <p>DEQ continues to maintain that the applicable criteria at any given time are the associated IWQCs derived from concurrent samples of input parameters.</p>
Subsection 210.01	1	Recommend removing reference values from table.	Reference values are included for illustrative purposes and are consistent with all relevant toxics criteria, e.g. hardness dependent metals criteria. DEQ believes that Idaho WQS users are familiar with the use of reference values and understand that the footnotes direct the user to the appropriate equation or, in this case, model.
	3	Use of 1-hour averaging time for acute criterion is overprotective; the 24-hour averaging period is sufficient to be protective of aquatic life	The 1-hour averaging period for copper is consistent with the averaging period for acute criteria for other toxics.