

Department of Environmental Quality

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

**Water Quality Standards, IDAPA 58.01.02
Docket No. 58-0102-1802, Dated July 26, 2018**

This rulemaking has been initiated to revise recreational use criteria and aquatic life criteria for three toxics.

The Notice of Negotiated Rulemaking was published in the May 2018 issue of the Idaho Administrative Bulletin, a preliminary draft rule was made available for public review on May 8, 2018, and meetings were held on May 31 and June 28, 2018. 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/58-0102-1802.

DEQ's Response to Comments/Negotiated Rulemaking Summary
Docket No. 58-0102-1802, Dated July 26, 2018

1. Association of Idaho Cities			
C o m m e n t #	Rule Section/ Subject Matter	C o m m e n t e r	Comment Summary
1	General	1.	<p>“AIC urges the DEQ to ensure rapid bacteria testing equipment is available at each DEQ Regional Office so that DEQ staff can quickly respond to perceived or real public health risks within our communities.”</p>
			<p>DEQ uses the state lab or private laboratories to analyze samples for <i>E. coli</i> and other pollutants, and does not intend to construct and staff analytical labs within the agency. However, samples for <i>E. coli</i> and enterococci results have 6 hour holding times prior to the start of sample analysis. Sample analysis requires a 24 hour culture, and results are available from the laboratory within 30 hours from the time of collection.</p>
2	General	1.	<p>“We also are concerned about 303(d) impairment listings that are based on overly conservative interpretations of US EPA’s 2012 recommended federal criteria that were developed for beaches and subsequently recommended for all primary contact recreation waters.”</p>
			<p>While EPA’s recommendation is based on epidemiological studies conducted at beaches, the criteria are based on rates of illness associated with swimming or other similar recreational activities. While not all waters are suitable for swimming or full immersion, the Clean Water Act does have the stated goal that all waters of the US will meet water quality goals that would support swimming.</p> <p>From EPA’s 2012 304(a) recommendation: <i>Seven studies were performed at temperate beaches primarily impacted by wastewater treatment plants (WWTPs) discharging effluent from treated municipal sewage. Three of those beaches were marine water and four were fresh water. Studies also were performed at two additional beaches: a temperate beach in Surfside, South Carolina impacted by urban runoff sources, and a tropical beach in Boquerón, Puerto Rico. EPA also considered epidemiological studies from other research efforts in developing these recreation criteria.</i>¹</p>

¹ EPA (US Environmental Protection Agency). 2012. Recreational Water Quality Criteria. Washington, DC: EPA, Office of Water. Washington, DC. 820-F-12-058. 68 pp.

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3		1.	AIC supports the use of either enterococci or E. coli data to assess potential risk to public health due to bacterial contamination in waters where people swim and play, and withdraws our comments regarding whether one might provide a more accurate assessment of risk. AIC anticipates improvements in public health risk assessment tools in the future and looks forward to working with the DEQ as the technology develops to accurately and quickly detect better indicators of harmful pathogens.	Thank you for your comment.
4		1.	<p>AIC does not agree that there “appears to be no value in maintaining a distinction between primary and secondary contact [sic] recreation” simply because the current geometric mean criteria are the same. Instead, AIC urges the DEQ to recognize that the risks to public health are significantly reduced when swimming is not physically possible within certain water bodies due to either a lack of water depth or other factors. These differences in risk are reflected by the current approach in Idaho to apply a higher “single sample maximum” value to secondary contact recreation.</p> <p>The adoption of the proposed approach will cause an increase in monitoring and impairment listings of water bodies that have a low -exposure risk without a corresponding increase to public health protection. Therefore, AIC opposes the collapse of primary and secondary contact recreation use designations into a single primary contact recreation use.</p>	<p>DEQ has revised the proposed rule to maintain a distinction between Primary and Secondary contact recreation, and has revised the definitions to clarify that all activities included in SCR are also included in PCR:</p> <p><i>02. Recreation.</i></p> <p><i>a. Primary contact recreation (PCR): water quality appropriate for prolonged and intimate contact by humans or for recreational activities when the ingestion of small quantities of water is likely to occur. Such activities include, but are not restricted to, those used for swimming, water skiing, or skin diving. PCR includes all activities associated with Secondary Contact Recreation (SCR).</i></p> <p><i>b. Secondary contact recreation (SCR): water quality appropriate for recreational uses on or about the water and which are not included in the primary contact category. These activities may include fishing, boating, wading, infrequent swimming, and other activities where ingestion of raw water is not likely to occur.</i></p>

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5		1.	<p>AIC supports the adoption of a “statistical threshold value” (STV) for use; but only supports the application of the proposed STV when ample data is available to assess whether 25% of the samples collected exceed the proposed value over any 90-day period with valid samples. AIC urges the DEQ to promulgate the new criteria based on a 25% exceedance over a 90-day period based on our understanding that the EPA is no longer objecting to longer averaging periods.</p>	<p>Earlier drafts of the 2012 EPA Recommended Criteria based the STV on the 75th percentile of the expected distribution with a maximum excursion frequency of 25%. Based on review of public comments and further scientific analyses, EPA modified the STV to the 90th percentile of the water quality distribution with an excursion frequency of 10%</p> <p>The STV magnitude and frequency are linked. For example, in EPA’s final Recommended Criteria, they selected an STV magnitude that corresponded to the 90th percentile of the water quality distribution associated with the geomean criteria; it is expected that 10% of the time, <i>E. coli</i> concentrations would exceed the STV without a corresponding exceedance of the geomean. Based on Idaho data, the proposed <i>E. coli</i> STV of 410 CFU/100 L does correspond with an approximate 90% frequency of exceeding the geomean of 126 CFU/100 mL.</p> <p>Therefore, if Idaho proposed to deviate from the 2012 EPA guidance, we would need to select an STV magnitude that corresponded to the selected frequency. For an exceedance frequency of 25%, the appropriate corresponding percentile would be the 75th percentile, which would be 235 CFU/100 mL. It would not be appropriate nor defensible to select the 90th percentile of the water quality distribution but apply an exceedance frequency greater than 10%.</p> <p>Furthermore, increasing the duration component from 30 days to 90 days for the STV would also require increasing the duration component for the geomean. While DEQ acknowledges the variability inherent in monitoring ambient waters for bacteria, we do not believe that a 90 day duration is necessary or advisable for recreational criteria. Extending the duration to 90 days would further burden DEQ staff and others monitoring for compliance with the criterion.</p>

C o m m e n t #	Rule Section/ Subject Matter	C o m m e n t e r	Response
6		<p>1. AIC opposes application of the STV where only 1 sample is available for any purpose other than swimming advisories at designated beaches. Those tasked with assessing risks to public health due to bacterial contamination of swimming waters understand that the bacteria generating sources and conveyance patterns create intermittent and fragmented concentrations. AIC urges the DEQ to take the uncertainty associated with the result from a single sample into account during this rulemaking proceeding. Instead, AIC supports retention of the current rule that provides for additional sample collection prior to the DEQ making a final recreation use support determination.</p>	<p>Current NPDES permits use the STV or SSMs as threshold values for requiring a 24 hour notice of exceedance to DEQ and EPA...</p> <p>The proposed rule provides for additional sample collection prior to making a final recreation use determination, and does not require any action based on a single sample, but rather based on a 10% exceedance frequency.</p> <p>Many permittees are monitoring more frequently than weekly to determine compliance, and any action would require > 10% exceedances of the STV.</p>
7		<p>1. AIC opposes the DEQ's proposal to use the STV as the basis of water quality based effluent limits (WQBEL) and for total maximum daily load (TMDL) targets for non-continuous or episodic discharges. Non-continuous or episodic discharges can occur at any time; however, when these occur during high runoff and wet weather events we urge to [sic] Department to apply common sense and acknowledge that recreational uses do not generally occur at these times. Instead, we suggest the development of appropriate "wet weather" criteria for the protection of human and aquatic health during extreme events.</p>	<p>DEQ does not intend to develop alternate criteria for wet weather. How STVs and geomeans will be integrated into permit limits will be permit and TMDL dependent and will follow appropriate guidance such as the Idaho Pollutant Discharge Elimination System (IPDES) Effluent Limit Development Guidance (http://www.deq.idaho.gov/media/60181085/ipdes-effluent-limit-development-guidance-1217.pdf).</p>