

MINUTES

HOUSE ENVIRONMENT, ENERGY, & TECHNOLOGY COMMITTEE

DATE: Tuesday, February 02, 2016
TIME: 1:30 P.M.
PLACE: Room EW41
MEMBERS: Chairman Thompson, Vice Chairman Anderst, Representatives Raybould, Hartgen (Hartgen), Vander Woude, Nielsen, Anderson, Mendive, Trujillo, Beyeler, Chaney, Nate, Scott, Smith, Rusche, Jordan, Rubel
ABSENT/ EXCUSED: None
GUESTS: Barry Burnell, IDEQ; Doug Conde, IDEQ; Steve Rector, Nez Perce; Justin Hayes, ICL; Lana Weber, ICL; Kassandra Townsend, ICL; Paula Wilson, DEQ; Jess Byrne, DEQ; Rialin Flores, CVI; Marcia Jedry, IAU; John Tippets, DEQ; Jim Werntz, US EPA

Chairman Thompson called the meeting to order at 1:30 p.m. He explained that we would be reviewing **Docket No. 58-0102-1201** first, and reviewing **Docket No. 58-0125-1401** second.

DOCKET NO. 58-0102-1201: **Barry Burnell**, Water Quality Division Administrator for the IDEQ, presented **Docket No. 58-0102-1201**, Human Health Criteria for Toxic Pollutants, to the committee. He began by giving some rule history of the Human Health Criteria (HHC) for Toxic Pollutants in Idaho regarding fish consumption. EPA disapproved the Idaho DEQ Human Health Toxics Criteria in 2012, based on a fish consumption rate of 17.5 grams of fish per day. DEQ found the existing data to be limited in scope for Idaho residents, old data, and it is of questionable quality. DEQ performed a survey development and implementation, which culminated in a fish consumption survey implemented April 2014 to April 2015. Data analysis was performed August 2015, and the proposed rule was completed for board review in December 2015.

The survey tested the general population and Idaho resident anglers. It was a phone survey that met all targeted demographics. EPA engaged with the five tribes in Idaho to do tribal member surveys. Face to face interviews were done with the Nez Perce and Shoshone-Bannock Tribes. Heritage surveys were done with Kootenai, Coeur d'Alene, Shoshone-Paiute, Nez Perce, and Shoshone-Bannock Tribes.

The Dietary Recall survey data was evaluated by the National Cancer Institute (NCI), which is the gold standard for measuring data. Its method enabled consumers to be surveyed twice. It used a deterministic approach, which means a value is selected and run once. On the survey, the Survey/Population columns showing All Idaho and Idaho Angler includes all fish, including deep water marine fish and fresh water fish. The Nez Perce and Shoshone-Bannock fish consumption columns are based on Group 2 collection of fish, which includes anadromous fish such as salmon and steelhead, fresh water fish, and market fish. It does not include deep water marine fish. This most closely meets EPA requirements. The number for the Nez Perce, 66.5 grams, is the number used to derive DEQ criteria. There is not a direct comparison between all Idaho and tribal consumption because the all-Idaho number includes deep water marine fish.

DEQ had nine policy meetings. Several groups participated in the rule-making process: the Association of Idaho Cities, industries, federal agencies, tribal members, environmental groups, and representatives from Washington and Alaska who see Human Health Criteria for toxic pollutant issues on their horizon. The survey found that 89% of the Idaho population are considered fish consumers.

Regarding the Idaho rule-making risk of carcinogens, EPA guidance allows states to choose from a range of 10^{-5} to 10^{-6} for the incremental increase in cancer risk used in calculating criteria for the general population. Higher consumers should be protected at 10^{-4} or lower. DEQ chose to use an incremental increase in cancer risk level of 10^{-5} based on all the data. The general population is generally at a lower risk level, but the risk can never be made the same for everyone.

DEQ identified 105 toxic substances. Due to EPA changes in the understanding of toxicity there are 209 revised or new criteria; for example, copper was added based on drinking water quality. Due to this, approximately 30% of EPA's recommendations have become less stringent. DEQ has until the end of this year to complete and submit a rule. This pending rule is the state's response. EPA must promulgate a rule for Idaho if DEQ fails to take action.

Looking at the changes to the rule itself, the chart showing the Table of Human Health Criteria lists compounds and risk factors for water and fish consumption. The column between B and C is labeled "Carcinogen?" If that pollutant is marked with a yes, it means that formula is used to derive human health criteria. These inputs on cancer potency factors and incremental factors are based on intake over a 70-year period.

Chairman Thompson turned the gavel over to **Rep. Raybould**.

Mr. Burnell answered questions from the committee, saying the Idaho Association of Commerce & Industry states it will take 90 years for a single extra cancer case to occur in Idaho due to exposure to a chemical in surface water. However, Mr. Burnell stated DEQ data is based on a 70-year exposure to drinking surface water and eating fish, so he was not familiar with that calculation.

Mr. Burnell stated the rule the DEQ has developed is fully compliant with EPA rules. The key finding that caused the 2006 disapproval goes away because DEQ had its own surveys done. One of EPA's goals is to have a specific standard for all of the Pacific Northwest. EPA could disapprove this rule, but DEQ is in a strong position because all the research was based on compliance with the guidelines given by EPA. If the tribal fish consumption rates went up, then it would be the obligation of DEQ to address standards again.

Rep. Raybould turned the gavel over to **Chairman Thompson**.

Mr. Burnell answered further questions, saying the 66.5 number was chosen to follow the EPA guideline stating that the rate should be in the 90th percentile of the total population and the average of the targeted subpopulation. DEQ chose the 95th percentile for the total population and the mean rather than the average for the targeted subgroup, which yields a more conservative number than EPA recommendations. Mr. Burnell believes these are numbers EPA can approve. It is fully compliant with EPA national recommended health requirement standards; however, if they are disapproved, Idahoans should be prepared to defend them and appeal the numbers. DEQ is confident these numbers will fit the national criteria.

The cost of the study included \$300,000 spent on the fish consumption survey, \$75,000 on data analysis, and personnel costs for five or six staff members. The farm-raised fish of Hagerman Valley are a component of the survey. DEQ studied levels of mercury, arsenic, and selenium in fish; results of that study led to a state-wide Fish Consumption Advisory for bass as well as the Health and Welfare's Idaho Fish Consumption Advisory which lists levels of mercury.

Justin Hayes, Program Director of the Idaho Conservation League (ICL), spoke **in opposition** to the rule. He participated throughout the study and does not disagree with the science, but with the outcome of the study. The policy proposed is protective of 95% of the non-tribal or white population, but only protective of the mean for the tribal population. It is a policy question.

MOTION: **Rep. Rusche** made a motion to approve **Docket No. 58-0102-1201**. He supports this rule so Idaho can maintain primacy; otherwise Idaho will lose control to EPA.

Mr. Burnell answered further questions about concerns with EPA. There is some risk of court action, but DEQ can modify the rule as needed. After the rule is submitted to EPA, if they disapprove the rule, they must give directions on how to correct it. The rule was created using good science which is defensible.

VOTE ON THE MOTION: After further discussion, **Chairman Thompson** called for a vote. **Rep. Jordan** requested a roll call vote on **Docket No. 58-0102-1201**. **Motion carried by a vote of 15 AYE and 2 NAY. Voting in favor of the motion: Reps. Anderst, Raybould, Hartgen, Vander Woude, Nielsen, Anderson, Mendive, Trujillo, Beyeler, Chaney, Nate, Scott, Smith, Rusche, and Chairman Thompson. Voting in opposition to the motion: Reps. Rubel and Jordan.**

DOCKET NO. 58-0125-1401: **Mr. Burnell**, Water Quality Division Administrator for the DEQ, presented **Docket No. 58-0125-1401**, regulation of the Idaho Pollutant Discharge Elimination System (IPDES), to the committee. This rulemaking was initiated in response to the 2014 Legislative Session and the passage of House Bill 406. This rulemaking was a direct outgrowth of the need to have appropriate regulations in Idaho administrative code to oversee the implementation of an Idaho Pollutant Discharge Elimination System (IPDES) permitting, compliance, and enforcement program. If this rule is not adopted, then DEQ will not meet the September 2016 National Pollutant Discharge Elimination System (NPDES) application deadline. Participation in the rulemaking was strong; representatives from the cities, industry, EPA, tribes, and environmental groups participated.

There will be a cost to the regulated community associated with the IPDES program. The proposed rule outlines a fee schedule that was negotiated with the stakeholders, the Division of Financial Management (DFM), and the governor's office. Currently the overall estimate for implementing the program is roughly \$3 million annually. It is in the existing budget, so there will be no fiscal impact. The negotiations with DFM and the governor's office have developed an approach by which, with legislative approval, \$2 million would come from the General Fund and the remainder made up by fees paid by the municipalities, individual industrial dischargers, and construction and industrial storm water permittees. The fee schedule is equitable, sustainable, and matches resource needs. This rule includes a fee and as such will require a concurrent resolution to be passed.

This proposed rule regulates an activity currently regulated by the federal government. During the negotiated rulemaking process, DEQ was cognizant of the stringency clause in Idaho Code and the resulting rule meets but does not go beyond the federal law and regulations that control state program requirements. This rule incorporates by reference several sections of the Code of Federal Regulations (40 CFR 123). Citations are available online.

The addition of this rule chapter is fundamental in implementing the IPDES program and incorporates federally required components. In deliberations with the rulemaking committee DEQ decided to follow a hybrid approach of incorporating several sections of the federal regulations by reference, but re-writing a majority of those regulations that pertain to the permitting process, such as applying for a permit, agency review and issuance of permits, and permit appeals. The CFRs incorporated by reference are dated July 1, 2015.

Section 100 through 103 describe who has to obtain a permit, what rights are ensured by the permit, the permit term, continuation of permits, what activities are excluded from needing a permit, and when DEQ will not issue a permit (prohibitions). The proposed rule distributes the fee burden over three categories of dischargers where DEQ will be expending the most time and resources. The final estimated budget is just over \$3 million, and DEQ has support from DFM and the governor's office and with legislative approval to build up over two additional budget cycles a General Fund appropriation in the amount of \$2 million.

The next sections of the rule deal with the procedures and criteria for applying for a permit, renewing a permit, modifying a permit, revoking and reissuing, transferring, or terminating a permit. Sections 204 through 206 describe the appeals process for IPDES permits. The next section outlines compliance schedules. Sections 370 and 380 briefly describe the pretreatment and biosolids (sewage sludge) components of the IPDES program.

Mr. Burnell answered questions from the committee. The reverse order of creating the rules and then the bill was due to the deadline of September 21, 2016, set by EPA. The NPDS program is intended to be administered by the state. Idaho does not have primacy in the NPDS program. EPA developed the criteria used nationwide. Idaho is 30 years late getting into the game. There is a minimum standard the state must achieve for primacy. Currently there are two bills introduced in the Senate to meet these standards. About 1,200 pages from the federal CFR are being adopted by reference, which saves Idaho \$60,000 per year. Currently DEQ does not have primacy. DEQ is developing this rule to obtain primacy. As far as cost is concerned, Idaho's costs are comparable to neighboring states.

Justin Hayes, Program Director of the Idaho Conservation League, spoke **in support** of the rule. Almost all states already have primacy for this rule, so Idaho is playing catch-up. Because Idaho's program cannot be either more or less stringent than the federal program, Idaho ends up with a program that is identical to the federal program. At this time Idaho has a backlog of permits with the EPA. ICL supports this rule.

Justin Hayes answered questions from the committee. If ICL prevailed in a Clean Water Act litigation against a discharger who is in violation, the costs would be recouped not from the state but from the discharger in violation. The ICL program is the same as the federal program.

MOTION: **Rep. Rusche** made a motion to approve **Docket No. 58-0125-1401. Motion carried by voice vote. Rep. Scott and Rep. Nate** requested to be recorded as voting **NAY**.

ADJOURN: There being no further business to come before the committee, the meeting was adjourned at 3:40 p.m.

Representative Thompson
Chair

Diana Seba
Secretary