

Dear Senators HEIDER, Brackett, Stennett, and
Representatives VANDER WOUDE, Amador, Smith:

The Legislative Services Office, Research and Legislation, has received the enclosed rules of the Department of Environmental Quality:
IDAPA 58.01.02 - Water Quality Standards - Proposed Rule (Docket No. 58-0102-2001).

Pursuant to Section 67-454, Idaho Code, a meeting on the enclosed rules may be called by the cochairmen or by two (2) or more members of the subcommittee giving oral or written notice to Research and Legislation no later than fourteen (14) days after receipt of the rules' analysis from Legislative Services. The final date to call a meeting on the enclosed rules is no later than 10/02/2020. If a meeting is called, the subcommittee must hold the meeting within forty-two (42) days of receipt of the rules' analysis from Legislative Services. The final date to hold a meeting on the enclosed rules is 10/30/2020.

The germane joint subcommittee may request a statement of economic impact with respect to a proposed rule by notifying Research and Legislation. There is no time limit on requesting this statement, and it may be requested whether or not a meeting on the proposed rule is called or after a meeting has been held.

To notify Research and Legislation, call 334-4854, or send a written request to the address on the memorandum attached below.



Eric Milstead
Director

Legislative Services Office

Idaho State Legislature

Serving Idaho's Citizen Legislature

MEMORANDUM

TO: Rules Review Subcommittee of the Senate Resources & Environment Committee and the House Environment, Energy & Technology Committee

FROM: Deputy Division Manager - Katharine Gerrity

DATE: September 16, 2020

SUBJECT: Department of Environmental Quality

IDAPA 58.01.02 - Water Quality Standards - Proposed Rule (Docket No. 58-0102-2001)

Summary and Stated Reasons for the Rule

The Department of Environmental Quality submits notice of proposed rulemaking at IDAPA 58.01.02 - Water Quality Standards. According to the department, the rulemaking was initiated to revise water quality criteria based on stakeholder comments from the 2018 rulemaking and the 2019 legislative session regarding the implementation of the bacteria criteria and to delete obsolete rule language contained in Subsection 260.02 as it is no longer needed due to disapproval of the standard by EPA. The department states that the rulemaking addresses concerns regarding implementation of bacteria criteria During the 2019 legislative review of pending rule Docket No. 58-0102-1802, at which time stakeholders raised concerns regarding the implementation of Idaho bacteria criteria as presented in the pending rule. The department notes that on March 18, 2019, the House adopted House Concurrent Resolution No. 23 to reject Subsection 251.02, adopted as a pending rule under Docket No. 58-0102-1802 and on March 19 2019, HCR23 was introduced in the Senate and referred to the Senate Health & Welfare Committee but was not reported out of committee. Therefore, the pending rule docket became final and effective on April 11, 2019. According to the department, this rulemaking seeks to revise Idaho Water Quality Standards to address the stakeholders' unresolved concerns. The department states that it conducted another series of negotiations to better understand the stakeholder concerns regarding the recommended and subsequently proposed criteria. During these negotiations, DEQ agreed to include several provisions to help clarify the intent of the criteria and implementation of the criteria. DEQ adds that it has worked closely with the stakeholder groups who initially brought up the concerns and, due to their involvement in helping draft the proposed language, believes that the proposed language addresses their concerns. Specifically, language was included to address concerns regarding implementation of the statistical threshold value, increasing the time period used in calculating geometric mean values, and including a recommendation for public swimming beaches.

The department states that the rule also deletes obsolete rule provisions, specifically Subsection 260.02 including footnotes. The department notes that Subsection 260.02, Variances from Water Quality Standards, Specific Variances, was adopted by the Board in 2000 and approved by the Idaho Legislature in 2001 (Docket No. 58-0102-0002). On May 29, 2003, DEQ submitted the final rule to EPA. On May 7, 2010, EPA disapproved the variance; therefore, Subsection 260.02 is not effective for Clean Water Act purposes and has been identified for deletion. The department further explains that water quality standards adopted and submitted to EPA since

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May 30, 2000, are not effective for federal Clean Water Act (CWA) purposes until EPA approves them (see 40 CFR 131.21). This is known as the Alaska Rule. This rulemaking will be promulgated so that the existing rule effective for CWA purposes remains in the Idaho Administrative Code until EPA approves the rule revisions. Notations explaining the effectiveness of the rule sections are also included. Upon EPA approval, the revised rule will become effective for CWA purposes and the previous rule and notations will be deleted from the Idaho Administrative Code. Information regarding the status of EPA review will be posted at deq.idaho.gov, EPA Actions on Proposed Standards.

The department also confirms that this proposed rule does not regulate an activity not regulated by the federal government, nor is it broader in scope or more stringent than federal regulations.

Negotiated Rulemaking / Fiscal Impact

The department states that negotiated rulemaking was conducted.

Statutory Authority

The rulemaking appears to be authorized pursuant to Sections 39-105, 39-107, and 39-3601 et seq., Idaho Code.

cc: Department of Environmental Quality
Paula J. Wilson

***** PLEASE NOTE *****

Per the Idaho Constitution, all administrative rules may be reviewed by the Legislature during the next legislative session. The Legislature has 3 options with this rulemaking docket: **1)** Approve the docket in its entirety; **2)** Reject the docket in its entirety; or **3)** Reject the docket in part.

IDAPA 58 – DEPARTMENT OF ENVIRONMENTAL QUALITY

58.01.02 – WATER QUALITY STANDARDS

DOCKET NO. 58-0102-2001

NOTICE OF RULEMAKING – PROPOSED RULE

AUTHORITY: In compliance with Section 67-5221(1), Idaho Code, notice is hereby given that this agency has initiated proposed rulemaking. This rulemaking action is authorized by Sections 39-105, 39-107, and 39-3601 et seq., Idaho Code.

PUBLIC HEARING SCHEDULE: Pursuant to Section 67-5222(2), Idaho Code, a public hearing will be held if requested in writing by twenty-five (25) persons, a political subdivision, or an agency. Written requests for a hearing must be received by the undersigned on or before September 18, 2020. If no such written request is received, a public hearing pursuant to Section 67-5222(2), Idaho Code, will not be held. Two public meetings were held during the negotiated rulemaking process. The public will have the opportunity to provide oral comments on the proposed rule during the meeting of the Idaho Board of Environmental Quality (Board) scheduled for November 2020. The meeting details are in the Notice of Meeting of the Idaho Board of Environmental Quality, Docket No. 58-0102-2001, published in the Idaho Administrative Bulletin on [September 2, 2020, Vol. 20-9](#), and available at deq.idaho.gov/58-0102-2001.

DESCRIPTIVE SUMMARY: This rulemaking was initiated to: (1) revise water quality criteria based on stakeholder comments from the 2018 rulemaking and the 2019 legislative session regarding the implementation of the bacteria criteria; and (2) delete obsolete rule language contained in Subsection 260.02 as it is no longer needed due to disapproval of the standard by EPA.

Address Concerns Regarding Implementation of Bacteria Criteria

During 2019 legislative review of pending rule Docket No. [58-0102-1802](#), stakeholders raised concerns regarding the implementation of Idaho bacteria criteria as presented in the pending rule. On March 18, 2019, the House adopted House Concurrent Resolution No. 23 (HCR23) to reject Subsection 251.02, adopted as a pending rule under Docket No. 58-0102-1802. On March 19 2019, HCR23 was introduced in the Senate and referred to the Senate Health & Welfare Committee. HCR23 was not reported out of committee; the pending rule docket became final and effective on April 11, 2019. This rulemaking seeks to revise Idaho Water Quality Standards to address the stakeholders' unresolved concerns.

DEQ conducted another series of negotiations to better understand the stakeholder concerns regarding the recommended and subsequently proposed criteria. During these negotiations, DEQ agreed to include several provisions to help clarify the intent of the criteria and implementation of the criteria. DEQ has worked closely with the stakeholder groups who initially brought up the concerns and, due to their involvement in helping draft the proposed language, believes that the proposed language addresses their concerns. Specifically, language was included to address concerns regarding implementation of the statistical threshold value, increasing the time period used in calculating geometric mean values, and including a recommendation for public swimming beaches.

Delete Obsolete Rule Language

DEQ proposes to delete Subsection 260.02 including footnotes. Subsection 260.02, Variances from Water Quality Standards, Specific Variances, was adopted by the Board in 2000 and approved by the Idaho Legislature in 2001 (Docket No. 58-0102-0002). On May 29, 2003, DEQ submitted the final rule to EPA. On May 7, 2010, EPA disapproved the variance; therefore, Subsection 260.02 is not effective for Clean Water Act purposes and has been identified for deletion.

Idahoans that recreate in, drink from, or fish Idaho's surface waters, and any who discharge pollutants to those same waters, may be interested in commenting on this proposed rule. The proposed rule text is in legislative format. Language the agency proposes to add is underlined. Language the agency proposes to delete is struck out. It is these additions and deletions to which public comment should be addressed.

After consideration of public comments, DEQ intends to present the final proposal to the Board in November 2020 for adoption of a pending rule. The rule is expected to be final and effective upon the conclusion of the 2021 legislative session if adopted by the Board and approved by the Legislature.

EFFECTIVE FOR CLEAN WATER ACT PURPOSES: Water quality standards adopted and submitted to EPA since May 30, 2000, are not effective for federal Clean Water Act (CWA) purposes until EPA approves them (see [40 CFR 131.21](#)). This is known as the Alaska Rule. This rulemaking will be promulgated so that the existing rule effective for CWA purposes remains in the Idaho Administrative Code until EPA approves the rule revisions. Notations explaining the effectiveness of the rule sections are also included. Upon EPA approval, the revised rule will become effective for CWA purposes and the previous rule and notations will be deleted from the Idaho Administrative Code. Information regarding the status of EPA review will be posted at deq.idaho.gov, EPA Actions on Proposed Standards.

INCORPORATION BY REFERENCE: Pursuant to Section 67-5229(2)(a), Idaho Code, the following is a brief synopsis of why the incorporation by reference is necessary: Not applicable.

NEGOTIATED RULEMAKING: On April 1, 2020, the notice of negotiated rulemaking was published in the Idaho Administrative Bulletin and posted on DEQ's website. A meeting was held on May 7, 2020. On June 8, 2020, a preliminary draft rule was posted on DEQ's website. One additional meeting was held on June 11, 2020. Stakeholders and members of the public participated by signing up for email notifications, attending the meetings, and submitting comments. Key information was posted on DEQ's website and distributed to persons who participated in the negotiated rulemaking.

All comments received during the negotiated rulemaking process were considered by DEQ when making decisions regarding the development of the rule. At the conclusion of the negotiated rulemaking process, DEQ submitted the draft rule to the Division of Financial Management to review for compliance with [Executive Order No. 2020-01, Zero-Based Regulation](#). Based on that review, DEQ has formatted the draft for publication as a proposed rule. DEQ is now seeking public comment on the proposed rule. The negotiated rulemaking record, which includes the negotiated rule drafts, documents distributed during the negotiated rulemaking process, and the negotiated rulemaking summary, is available at deq.idaho.gov/58-0102-2001.

IDAHO CODE SECTION 39-107D STATEMENT: This proposed rule does not regulate an activity not regulated by the federal government, nor is it broader in scope or more stringent than federal regulations.

FISCAL IMPACT STATEMENT: 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 when the pending rule will become effective: Not applicable.

ASSISTANCE ON TECHNICAL QUESTIONS: For assistance on questions concerning this rulemaking, contact Michelle Dale at michelle.dale@deq.idaho.gov, (208) 373-0187.

SUBMISSION OF WRITTEN COMMENTS: Anyone may submit written comments by mail, fax or email at the address below regarding this proposed rule. DEQ will consider all written comments received by the undersigned on or before October 2, 2020.

Dated this 2nd day of September, 2020.

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Hearing Coordinator
Department of Environmental Quality
1410 N. Hilton Street
Boise, Idaho 83706-1255
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THE FOLLOWING IS THE PROPOSED TEXT OF DOCKET NO. 58-0102-2001
(Only Those Sections With Amendments Are Shown.)

251. SURFACE WATER QUALITY CRITERIA FOR RECREATION USE DESIGNATIONS.

Effective for CWA purposes until the date EPA issues written notification that the revisions in Docket No. 58-0102-~~4802~~2001 have been approved.

01. E. Coli Bacteria. Waters designated for recreation are not to contain *E. coli* bacteria, used as indicators of human pathogens, in concentrations exceeding: (4-11-06)

a. Geometric Mean Criterion. Waters designated for primary or secondary contact recreation are not to contain *E. coli* bacteria in concentrations exceeding a geometric mean of one hundred twenty-six (126) *E. coli* organisms per one hundred (100) mL based on a minimum of five (5) samples taken every three (3) to seven (7) days over a thirty (30) day period. (4-11-06)

b. Use of Single Sample Values. A water sample exceeding the *E. coli* single sample maximums below indicates likely exceedance of the geometric mean criterion, but is not alone a violation of water quality standards. If a single sample exceeds the maximums set forth in Subsections 251.01.b.i., 251.01.b.ii., and 251.01.b.iii., then additional samples must be taken as specified in Subsection 251.01.c.: (4-11-06)

i. For waters designated as secondary contact recreation, a single sample maximum of five hundred seventy-six (576) *E. coli* organisms per one hundred (100) mL; or (4-11-06)

ii. For waters designated as primary contact recreation, a single sample maximum of four hundred six (406) *E. coli* organisms per one hundred (100) mL; or (4-11-06)

iii. For areas within waters designated for primary contact recreation that are additionally specified as public swimming beaches, a single sample maximum of two hundred thirty-five (235) *E. coli* organisms per one hundred (100) mL. Single sample counts above this value should be used in considering beach closures. (4-11-06)

c. Additional Sampling. When a single sample maximum, as set forth in Subsections 251.01.b.i., 251.01.b.ii., and 251.01.b.iii., is exceeded, additional samples should be taken to assess compliance with the geometric mean *E. coli* criteria in Subsection 251.01.a. Sufficient additional samples should be taken by the Department to calculate a geometric mean in accordance with Subsection 251.01.a. This provision does not require additional ambient monitoring responsibilities for dischargers. (4-11-06)

251. SURFACE WATER QUALITY CRITERIA FOR RECREATION USE DESIGNATIONS.

Not effective for CWA purposes until the date EPA issues written notification that the revisions in Docket No. 58-0102-~~4802~~2001 have been approved.

01. Toxics Criteria. Waters designated for recreation must meet the Fish Only water quality criteria set forth in Subsection 210.01.b. (4-11-19)

02. Fecal Indicators. Waters designated for recreation must meet criteria for indicator ~~organisms~~ ~~bacteria~~ of fecal contamination. Either of the following indicators ~~criterion would be considered~~ ~~is~~ sufficient for determining compliance with the fecal indicator criteria: (4-11-19)()

a. *E. Coli* Bacteria. ()

i. Waters designated for recreation are not to contain *E. coli* bacteria, used as indicators of human

pathogens, in concentrations exceeding: (4-11-06)

~~i.1) Geometric Mean Criterion. Not to contain E. coli in concentrations exceeding a~~ geometric mean of one hundred twenty-six (126) *E. coli* counts per one hundred (100) mL based on a minimum of five (5) samples taken every three (3) to ~~seven eleven (711)~~ days over a ~~thirty forty-five (3045)~~ day period; or ~~(4-11-19)()~~

~~ii.2) SA statistical Threshold Value (STV). No greater than ten percent (10%) of valid samples collected over a thirty (30) day period are to contain E. coli bacteria in concentrations exceeding an STV of four hundred and ten (410) E. coli counts per one hundred (100) mL, or in more than ten percent (10%) of samples collected over a forty-five (45) day period. The Department will ensure samples collected represent the forty-five (45) day duration.~~ ~~(4-11-19)()~~

~~ii. For public swimming beaches, a single sample value of two hundred thirty-five (235) E. coli counts per one hundred (100) mL should be used in considering beach closures.~~ ~~()~~

b. Enterococci. Waters designated for recreation are not to contain enterococci bacteria, used as indicators of human pathogens, in concentrations exceeding: (4-11-19)

i. ~~Geometric Mean Criterion. Not to contain E. coli in concentrations exceeding a~~ geometric mean of thirty-five (35) enterococci counts per one hundred (100) mL based on a minimum of five (5) samples taken every three (3) to ~~seven eleven (711)~~ days over a ~~thirty forty-five (3045)~~ day period; or ~~(4-11-19)()~~

ii. ~~SA statistical Threshold Value (STV). No greater than ten percent (10%) of valid samples collected over a thirty (30) day period are to contain enterococci bacteria in concentrations exceeding an STV of one hundred and thirty (130) enterococci counts per one hundred (100) mL, in more than ten percent (10%) of samples collected over forty-five (45) day period. The Department will ensure samples collected represent the forty-five (45) day duration.~~ ~~(4-11-19)()~~

~~c. When comparing effluent bacteria samples to the criteria, the averaging period shall be thirty (30) days or less based on a minimum of five (5) samples.~~ ~~()~~

(BREAK IN CONTINUITY OF SECTIONS)

260. VARIANCES FROM WATER QUALITY STANDARDS.

~~01. Variances.~~ Variances from meeting certain water quality standards may be granted by the Department provided they are consistent with the following requirements: ~~(8-24-94)()~~

~~a01. When granted by the Department, i~~ **Procedure.** Individual variances are to be pollutant and discharger specific, and shall be granted pursuant to the following ~~procedure~~: ~~(3-15-02)()~~

~~ia.~~ Prior to granting a variance, the Department ~~shall will~~ publish notice of the Department's tentative determination to grant a variance and ~~shall will~~ receive written comments for not less than thirty (30) days after the date the notice is published. The notice ~~shall will~~ contain a clear description of the impacts of the variance upon the receiving stream segment. The Department ~~shall will~~ also provide an opportunity for oral presentation of comments, if requested in writing within fourteen (14) days of the notice, by twenty-five (25) persons, a political subdivision, or an agency. ~~(3-15-02)()~~

~~ib.~~ The Department's final **variance** decision ~~with respect to a variance~~ may be appealed pursuant to IDAPA 58.01.23, "Rules of Administrative Procedure Before the Board of Environmental Quality." The Department ~~shall will~~ maintain and make available to the public an updated list of variances. ~~(3-15-02)()~~

~~b02.~~ **Attainability.** In order to obtain a variance from a water quality standard, the discharger must demonstrate that meeting the standard is unattainable based on one or more of the following grounds: ~~(8-24-94)()~~

- ~~ii~~a. Naturally occurring pollutant concentrations prevent the attainment of the standard; or (8-24-94)
- or
- ~~ii~~b. Natural, intermittent, or low flow conditions or water levels prevent the attainment of the standard; (4-5-00)
- ~~ii~~c. Human caused conditions or sources of pollution prevent the attainment of the standard and cannot be remedied or would cause more environmental damage to correct than to leave in place; or (8-24-94)
- ~~ii~~d. Dams, diversions or other types of hydrologic modifications preclude the attainment of the standard, and it is not feasible to restore the water body to its original condition or to operate such modification in a way that would result in attainment of the standard; or (8-24-94)
- ~~ii~~e. Physical conditions related to the natural features of the water body, unrelated to water quality, preclude attainment of the standard; or (8-24-94)
- ~~ii~~f. Controls more stringent than technology-based effluent limitations would result in substantial and widespread economic and social impact. (8-24-94)

~~e~~03. **Documentation.** The discharger must submit to the Department documentation that treatment more advanced than required by technology-based effluent limitations have been considered and that alternative effluent control strategies have been evaluated. (8-24-94)()

~~e~~04. **Effective Period.** Any variance granted by the Department will remain in effect for a period of five (5) years or the life of the permit. (8-24-94)()

~~ii~~a. Upon expiration ~~of the five (5) year time period or permit~~, the discharger must either meet the standard or ~~must~~ re-apply for the variance in accordance with these rules. (8-24-94)()

~~ii~~b. ~~In considering a re-application for a variance, the Department will require t~~The discharger to ~~must~~ demonstrate reasonable progress towards meeting the standard ~~when reapplying for a variance~~. (8-24-94)()

~~02.~~ **Specific Variances.** ~~In addition to any variances listed separately from these rules as described in Subsection 260.01.a.ii., the following variances have also been granted by the Department in accordance with Subsection 260.01:~~ (3-15-02)

~~a.~~ ~~The South Fork Coeur d'Alene River Sewer District (Page Wastewater Treatment Facility) is granted variances from meeting water quality standards in Section 250 for ammonia and chlorine, and Section 210 for cadmium, lead, and zinc, discharged to the West Page Swamp, located in T49N, R2E, S32, Boise Prime Meridian.~~ (3-30-01)

~~b.~~ ~~The variances provided in Subsection 260.02.a. are conditioned upon the discharges showing reasonable progress toward reducing their discharge of ammonia and chlorine. Reasonable progress shall be measured according to the terms of the state's certification of the discharges.~~ (3-30-01)

Note: Final rule submitted to EPA on May 29, 2003 (docket 58-0102-0002). This revision grants a variance to the South Fork Coeur d'Alene River Sewer District (Page Wastewater Treatment Facility) from meeting water quality standards for ammonia, chlorine, cadmium, lead, and zinc discharged to the West Page Swamp. On May 7, 2010, EPA disapproved the variance; therefore, Subsections 260.02.a. and b. are not effective for CWA purposes. For more information, go to <http://www.deq.idaho.gov/epa-actions-on-proposed-standards>.