



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10**

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WATER
DIVISION

September 29, 2020

Paula Wilson
Idaho Department of Environmental Quality
1410 N. Hilton
Boise, Idaho 83706

RE: EPA's Comments on Idaho's Docket No. 58-0102-2001 Proposed Rule – Bacteria Recreation Criteria and Variances

Dear Ms. Wilson:

Thank you for the opportunity to provide comments to the Idaho Department of Environmental Quality on its water quality standards and implementation requirements for bacteria recreation criteria and variances (Docket No. 58-0102-2001). EPA appreciates the DEQ's efforts to address the stakeholders' concerns with the 2019 rule associated with Docket No. 58-0102-1802 through this negotiated rulemaking before formally submitting the rules to EPA for review and action under the Clean Water Act section 303(c).

EPA has reviewed the Proposed Rule and offers the following comments for your consideration. Some of these comments reiterate previous comments EPA provided to DEQ on May 15, 2020¹ and June 22, 2020,² regarding Idaho's water quality standards/implementation for bacteria and on October 4, 2018, for Idaho's earlier proposed rule to revise the recreational use criteria (Docket No. 58-0102-1802).³

Bacteria Criteria – IDAPA 58.01.02.251

Toxics Criteria Addition

IDAPA 58.01.08.251.01 states that “Waters designated for recreation must meet the Fish Only water quality criteria set forth in subsection 210.01.b.” This provision adds clarification by

¹ Letter to Michelle Dale, Water Quality Standards Coordinator, Idaho Department of Environmental Quality, from Cyndi Grafe, Water Quality Standards Coordinator, USEPA Region 10. *The EPA's Comments on Idaho's Water Quality Standards/Implementation – Bacteria, Docket No. 58-0102-2001*. May 15, 2020. pp. 4

² Letter to Paula Wilson, Rules Coordinator, Idaho Department of Environmental Quality State Office Attorney General's Office, from Cyndi Grafe, Water Quality Standards Coordinator, USEPA Region 10. *EPA's Comments on Idaho's Docket No. 58-0102-2001 Preliminary Draft Negotiated Rule (Draft No. 1) – Bacteria Recreation Criteria and Variances*. June 22, 2020. pp. 4

³ Letter to Jason Pappani, Water Quality Standards Coordinator, Idaho Department of Environmental Quality, from Cyndi Grafe, Water Quality Standards Coordinator, USEPA Region 10. *EPA's Comments on Idaho's Proposed Rule – Revision of Recreational Use Criteria and New Aquatic Life Criteria for Acrolein, Carbaryl, and Diazinon, Docket No. 58-0102-1802*. October 4, 2018. pp. 3

cross-referencing subsection 210.01.b, which states that the criteria protect human health and the Fish Only criteria apply to waters designated for primary or secondary contact recreation use. EPA supports this cross-reference to clarify the appropriate application of toxics criteria to protect human health in waters designated for recreation.

Fecal Indicators - Enterococci Criteria Addition

The 2019 rule and 2020 proposed rule added enterococci criteria at IDAPA 58.01.08.251.02.b consistent with EPA's 2012 national recommended CWA section 304(a) criteria.⁴ During the May 31, 2018 negotiated rulemaking meeting, the DEQ verbally noted the department's intent to implement the *E. coli* and enterococci criteria as independently applicable. Further, the DEQ clarified its intent at IDAPA 58.01.08.251.02 by stating that data for either of the indicator criteria would be considered sufficient for determining compliance with the bacteria criteria. The DEQ stated in the 2019 proposed rule notice that allowing use of either indicator would provide dischargers with the option to request an alternative fecal bacteria indicator for monitoring compliance with water quality standards and support a transition period from *E. coli* criteria to enterococci criteria. Based on this reasoning, EPA supports such a transition approach with two fecal indicators and the rule revision.

Geometric Mean and Statistical Threshold Value Criteria and Implementation

A. Independently Applicable

In the 2019 rule, DEQ added "or" to the proposed rule language at IDAPA 58.01.08.251.02.a.i and b.i. In the letters dated October 4, 2018 and May 15, 2020, EPA indicated our interpretation of the proposed rule language to mean that for each fecal indicator there are two components, geometric mean and statistical threshold value (STV), and that each are independently applicable. This interpretation of the rule language is consistent with EPA's criteria recommendations and EPA requests confirmation of this interpretation in DEQ's public comment summary.

B. Duration and Same Data Distribution

In its proposed rule, DEQ established a criteria duration of 45 days at IDAPA 58.01.08.251.02.a and b. Although EPA's criteria recommendations state that 30 days is considered to be an optimal duration period to capture both short-term and long-term variability of exposure conditions to protect recreational uses, EPA has since concluded that a geometric mean not to exceed 90 days, in combination with the protective criteria magnitudes, is protective of a primary contact recreation use and consistent with EPA's criteria recommendations and data analysis.⁵

EPA's criteria recommendations state that the criteria magnitude should be expressed as a geometric mean and a STV that are both part of the same distribution of water quality data. EPA interprets the 2019 rule and the proposed rule to mean that the STV and geometric mean for each 45-day period are

⁴ Recreational Water Quality Criteria. 2012. USEPA Office of Water 820-F-12-058. pp. 63. Available at: <https://www.epa.gov/sites/production/files/2015-10/documents/rwqc2012.pdf>.

⁵ Communication from EPA's Standards and Health Protection Division to the Water Quality Standards Coordinators: *Narrative Justification for Longer Duration Period for Recreational Water Quality Criteria*. (Oct. 30, 2015).

calculated from the same data distribution. EPA requests confirmation of this interpretation in DEQ's public comment summary.

Sample Size and Geometric Mean

The language regarding the Geometric Mean Criterion for *E. coli* and enterococci (IDAPA 58.01.08.251.02.a.i and b.i) states, "based on a minimum of five (5) samples taken every three (3) to eleven (11) days over a forty-five (45) day period." As discussed in EPA's previous comments, the agency does not plan to take action on the language under section 303(c) of the Clean Water Act as data sufficiency clauses/statements addressing the sample number do not meet EPA's test for what constitutes a new or revised water quality standard.⁶

Representative Samples

The language at IDAPA 58.01.08.251.02.a.i.(2) and b.ii requires that samples collected are representative of the 45-day duration. EPA plans not to take action on the language under section 303(c) of the Clean Water Act as sample representativeness does not meet EPA's test for what constitutes a new or revised water quality standard.⁷ However to clarify implementation, EPA suggests revising the language in IDAPA 58.01.08.251.02.a.i.(2) and b.ii to ensure understanding that collected samples should be representative of the waterbody and that DEQ includes all representative samples, including spikes, in STV calculations (the red text and strikeout reflects EPA's recommendations).

The Department will ensure **representative** samples **have been** collected ~~represent~~ **during** the forty-five (45) day duration.

Swimming Beaches

IDAPA 58.01.08.251.02.a.ii states that "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." EPA plans not to take action on the language under section 303(c) of the Clean Water Act because advisory values or beach action values do not meet EPA's four-part test for determining what constitutes a new or revised water quality standard.⁸

Effluent Bacteria Samples

The language at IDAPA 58.01.08.251.02.c states, "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." EPA plans not to take action on the language under section 303(c) of the Clean Water Act because permitting implementation procedures do not meet EPA's four-part test for determining what constitutes a new or revised water quality standard.⁹ However for implementation purposes, EPA recommends the following language revisions to clarify Idaho's intent (the red text reflects EPA's recommendations).

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

⁶ *What is a New or Revised Water Quality Standard under 303(c)(3)? Frequently Asked Questions*, EPA No. 820F12017 (Oct. 2012). Available at <https://www.epa.gov/sites/production/files/2014-11/documents/cwa303faq.pdf>

⁷ *Id*

⁸ *Id*

⁹ *Id*

Specific Variances – IDAPA 58.01.02.260

As stated in our previous comment letter of May 15, 2020, EPA supports DEQ’s proposal to delete the rule language at IDAPA 58.01.08.260.02 related to specific variances that EPA had disapproved on May 7, 2010. The preliminary draft rule now includes new revisions to subsection 260, including renumbering since the current subsection 260.02 is proposed for deletion. EPA does not have specific concerns with the proposed minor wording changes and renumbering structure.

However, there are parts of DEQ’s variance regulations that are not consistent with the current water quality standards variance regulations at 40 CFR 131.14. In August 2015, EPA published a final rule updating the federal water quality standards regulation which included establishing the variance requirements at 40 CFR 131.14.¹⁰ Since the most recent revisions to Idaho’s variance policy occurred in 2002 and were approved by EPA in 2006, EPA recommends DEQ consider updating the state’s variance regulations to incorporate the elements of the federal variance regulations as appropriate.¹¹ For example, DEQ’s regulations do not include: 1) the additional justification factor related to restoration, found at 40 CFR 131.14(b)(2)(i)(A)(2); 2) the requirements related to the highest attainable condition of the water body or waterbody segment applicable throughout the term of the variance; and 3) a requirement that the variance term only be as long as necessary to achieve the highest attainable condition per 40 CFR 131.14(b)(1)(iv). Regardless of whether Idaho adopts these changes to the state’s current variance policy, any water quality standards variances issued by DEQ must comply with the federal variance requirements at 40 CFR 131.14.

EPA appreciates and supports the DEQ's continuing efforts to update Idaho’s water quality standards to ensure ongoing protection to aquatic life and public health. If you have any questions or would like to discuss these comments further, please contact me at (208) 378-5771.

Sincerely,



Cyndi Grafe
Water Quality Standards Coordinator

¹⁰ USEPA. August 21, 2015. *Water Quality Standards Regulatory Revisions; Final Rule (40 CFR Part 131)*. Federal Register Vol. 80, No. 162. 51019-51050. <https://www.gpo.gov/fdsys/pkg/FR-2015-08-21/html/2015-19821.htm>.

¹¹ As an example, the State of Alaska recently incorporated 40 CFR 131.14 by reference and submitted those revisions to EPA on February 19, 2020 for review and action under the CWA. EPA approved the revisions on March 23, 2020.