LEGISLATURE OF THE STATE OF IDAHO
Sixty-first Legislature First Regular Session - 2011

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 153

BY ENVIRONMENT, ENERGY, AND TECHNOLOGY COMMITTEE

AN ACT

RELATING TO WATER QUALITY; AMENDING SECTION 39-3601, IDAHO CODE, TO RE-
VISE PROVISIONS OF LEGISLATIVE INTENT; AMENDING SECTION 39-3602, IDAHO
CODE, TO DEFINE TERMS, TO REMOVE A DEFINITION AND TO REVISE A DEFINI-
TION; AMENDING SECTION 39-3603, IDAHO CODE, TO PROVIDE A POLICY RELAT-
ING TO TIER I, II AND III PROTECTIONS ASSOCIATED WITH WATER QUALITY, TO
PROVIDE FOR IMPLEMENTATION, TO PROVIDE FOR ANTIDEGRADATION REVIEWS AS-
SOCIATED WITH THE ISSUANCE OF CERTAIN GENERAL PERMITS, TO PROVIDE THAT
THE DEPARTMENT MAY PRESUME certain DISCHARGES ARE INSIGNIFICANT OR THAT
certain POLLUTION CONTROLS ARE the LEAST DEGRADING ALTERNATIVE IF SUP-
PORTED BY THE PERMIT RECORD, TO PROVIDE FOR THE IDENTIFICATION OF TIER
II WATERS, TO PROVIDE FOR THE DETERMINATION OF APPROPRIATE LEVELS OF
PROTECTION, TO PROVIDE THAT THE DEPARTMENT SHALL DETERMINE WHETHER CER-
TAIN ACTIVITIES OR DISCHARGES ARE INSIGNIFICANT, TO PROVIDE A GUIDELINE
AND TO PROVIDE THAT THE DEPARTMENT MAY REQUEST ADDITIONAL INFORMATION;
AMENDING SECTION 39-3623, IDAHO CODE, TO PROVIDE FOR THE APPROVAL OF
SPECIFIED RULES; AND DECLARING AN EMERGENCY.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 39-3601, Idaho Code, be, and the same is hereby
amended to read as follows:

39-3601. DECLARATION OF POLICY AND STATEMENT OF LEGISLATIVE IN-
TENT. The legislature, recognizing that surface water is one of the state's
most valuable natural resources, has approved the adoption of water quality
standards and authorized the director of the department of environmental
quality in accordance with the provisions of this chapter, to implement
these standards. In order to maintain and achieve existing and designated
beneficial uses and to conform to the expressed intent of congress to control
pollution of streams, lakes and other surface navigable waters of the United
States, the legislature declares that it is the purpose of this chapter to
enhance and preserve the quality and value of the surface water resources of
navigable waters of the United States within the state of Idaho, and to de-
define the responsibilities of public agencies in the control, and monitoring
of water pollution, and, through implementation of this chapter, enhance
the state's economic well-being. In consequence of the benefits resulting
to the public health, welfare and economy, it is hereby declared to be the
policy of the state of Idaho to protect this natural resource by monitoring
and controlling water pollution; to support and aid technical and planning
research leading to the control of water pollution, and to provide financial
and technical assistance to municipalities, soil conservation districts and
other agencies in the control of water pollution. The director, in coopera-
tion with such other agencies as may be appropriate, shall administer this
chapter. It is the intent of the legislature that the state of Idaho fully
meet the goals and requirements of the federal clean water act and that the
rules promulgated under this chapter not impose requirements beyond those of
the federal clean water act.

SECTION 2. That Section 39-3602, Idaho Code, be, and the same is hereby
amended to read as follows:

39-3602. DEFINITIONS. Whenever used or referred to in this chapter,
unless a different meaning clearly appears from the context, the following
terms shall have the following meanings:
(1) "Applicable water quality standard" means those water quality
standards identified in the rules of the department.
(2) "Attainable" beneficial uses means uses that can be achieved by the
implementation of required effluent limits for point sources and cost-effec-
tive and reasonable best management practices for nonpoint sources.
(3) "Best management practice" means practices, techniques or measures
developed, or identified, by the designated agency and identified in the
state water quality management plan which are determined to be a cost-effect-
ive and practicable means of preventing or reducing pollutants generated
from nonpoint sources to a level compatible with water quality goals.
(4) "Board" means the board of environmental quality.
(5) "Control strategies" means cost-effective actions in TMDL imple-
mentation plans to control the discharge of pollutants that can reasonably
be taken to improve the water quality within the physical, operational, eco-

(6) "Degradation" or "lower water quality" means, for purposes of an-
tidegradation review, a change in a pollutant that is adverse to designated
or existing uses, as calculated for a new point source, and based upon moni-
toring or calculated information for an existing point source increasing its
discharge. Such degradation shall be calculated or measured after appropri-
ate mixing of the discharge and receiving water body.
(7) "Department" means the department of environmental quality.
(8) "Designated agency" means the department of lands for timber har-
vest activities, for oil and gas exploration and development and for mining
activities; the soil and water conservation commission for grazing activi-
ties and for agricultural activities; the transportation department for
public road construction; the department of agriculture for aquaculture;
and the department of environmental quality for all other activities.
(9) "Designated use or designated beneficial use" means those uses as-
signed to waters as identified in the rules of the department whether or not
the uses are being attained. The department may adopt subcategories of a
use.
(10) "Director" means the director of the department of environmental
quality, or his or her designee.
(11) "Discharge" means any spilling, leaking, emitting, escaping,
leaching, or disposing of a pollutant into the waters of the state. For the
purposes of this chapter, discharge shall not include surface water runoff
from nonpoint sources or natural soil disturbing events.
"Existing use" means those surface water uses actually attained on or after November 28, 1975, whether or not they are designated uses. Existing uses may form the basis for subcategories of designated uses.

"Full protection, full support, or full maintenance of designated beneficial uses of water" means compliance with those levels of water quality criteria listed in the appropriate rules of the department, or where there is no applicable numerical criteria, compliance with the reference streams or conditions approved by the director in consultation with the appropriate basin advisory group.

"Lower water quality" means a measurable adverse change in a chemical, physical, or biological parameter of water relevant to a designated beneficial use, and which can be expressed numerically. Measurable adverse change is determined by a statistically significant difference between sample means using standard methods for analysis and statistical interpretation appropriate to the parameter. Statistical significance is defined as the ninety-five percent (95%) confidence limit when significance is not otherwise defined for the parameter in standard methods or practices.

"General permit" means an NPDES permit issued by the U.S. environmental protection agency authorizing a category of discharges under the federal clean water act or a nationwide or regional permit issued by the U.S. army corps of engineers under the federal clean water act.

"Integrated report" means the consolidated listing and reporting of the state's water quality status pursuant to the federal clean water act.

"National pollutant discharge elimination system (NPDES)" means the point source permitting program established pursuant to section 402 of the federal clean water act.

"New nonpoint source activity" means a new nonpoint source activity or a substantially modified existing nonpoint source activity on or adversely affecting an outstanding resource water which includes, but is not limited to, new silvicultural activities, new mining activities and substantial modifications to an existing mining permit or approved plan, new recreational activities and substantial modifications to existing recreational activities, new residential or commercial development that includes soil disturbing activities, new grazing activities and substantial modifications to existing grazing activities, except that reissuance of existing grazing permits, or grazing activities and practices authorized under an existing permit, is not considered a new activity. It does not include naturally occurring events such as floods, landslides, and wildfire including prescribed natural fire.

"Nonpoint source activities" includes grazing, crop production, silviculture, log storage or rafting, construction, mining, recreation, septic systems, runoff from storms and other weather related events and other activities not subject to regulation under the federal national pollutant discharge elimination system. Nonpoint source activities on waters designated as outstanding resource waters do not include issuance of water rights permits or licenses, allocation of water rights, operation of diversions, or impoundments.

"Nonpoint source runoff" means water which may carry pollutants from nonpoint source activities into the waters of the state.
"Outstanding resource water" means a high quality water, such as water of national and state parks and wildlife refuges and water of exceptional recreational or ecological significance, which has been so designated by the legislature. It constitutes an outstanding national or state resource that requires protection from point source and nonpoint source activities that may lower water quality.

"Person" means any individual, association, partnership, firm, joint stock company, joint venture, trust, estate, political subdivision, public or private corporation, state or federal governmental department, agency or instrumentality, or any legal entity, which is recognized by law as the subject of rights and duties.

"Point source" means any discernible, confined, and discrete conveyance including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are, or may be, discharged. This term does not include return flows from irrigated agriculture, discharges from dams and hydroelectric generating facilities or any source or activity considered a nonpoint source by definition.

"Pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical waste, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, silt, cellar dirt; and industrial, municipal and agricultural waste, gases entrained in water; or other materials which, when discharged or released to water in excessive quantities cause or contribute to water pollution. Provided however, biological materials shall not include live or occasional dead fish that may accidentally escape into the waters of the state from aquaculture facilities.

"Reference stream or condition" means one (1) of the following:
(a) The minimum biological, physical and chemical conditions necessary to fully support the designated beneficial uses; or
(b) A water body representing natural conditions with few impacts from human activities and which are representative of the highest level of support attainable in the basin; or
(c) A water body representing minimum conditions necessary to fully support the designated beneficial uses.

In highly mineralized areas or in the absence of such reference streams or water bodies, the director, in consultation with the basin advisory group and the technical advisers to it, may define appropriate hypothetical reference conditions or may use monitoring data specific to the site in question to determine conditions in which the beneficial uses are fully supported.

"Short-term or temporary activity" means an activity which is limited in scope and is expected to have only minimal impact on water quality as determined by the director. Short-term or temporary activities include, but are not limited to, maintenance of existing structures, limited road and trail reconstruction, soil stabilization measures, and habitat enhancement structures.

"Silviculture" means those activities associated with the regeneration, growing and harvesting of trees and timber including, but not limited to, disposal of logging slash, preparing sites for new stands of trees.
to be either planted or allowed to regenerate through natural means, road
construction and road maintenance, drainage of surface water which inhibits
tree growth or logging operations, fertilization, application of herbicides
or pesticides, all logging operations, and all forest management techniques
employed to enhance the growth of stands of trees or timber.

(257) "Soil and water conservation commission" means an agency of state
government as created in section 22-2718, Idaho Code.

(268) "Soil conservation district" means an entity of state government
as defined in section 22-2717, Idaho Code.

(249) "State" means the state of Idaho.

(2430) "State water quality management plan" means the state management
plan developed and updated by the department in accordance with sections
205, 208, and 303 of the federal clean water act.

(2431) "Subbasin assessment" means a document that describes a waters-
shed or watersheds for which a total maximum daily load is proposed, the
water quality concerns, the status and attainability of designated uses and
water quality criteria for individual water bodies, the nature and location
of pollutant sources, past and ongoing pollutant control activities, and
such other information that the director with the advice of the local waters-
shed advisory group determines is pertinent to the analysis of water quality
and the development and implementation of a total maximum daily load.

(302) "Total maximum daily load (TMDL)" means a plan for a water body
not fully supporting designated beneficial uses and includes the sum of the
individual pollutant allocations for point sources, load allocations for
nonpoint sources, and natural background levels of the pollutant impacting
the water body. Pollutant allocations established through TMDLs shall be at
a level necessary to implement the applicable water quality standards for
the identified pollutants with seasonal variations and a margin of safety to
account for uncertainty concerning the relationship between the pollutant
loading and water quality standards.

(313) " Waters or water body " means all the accumulations of surface wa-
ter, natural and artificial, public and private, or parts thereof which are
wholly or partially within, flow through or border upon this state the navi-
gable waters of the United States as defined in the federal clean water act.
For the purposes of this chapter, water bodies shall not include municipal
or industrial wastewater treatment or storage structures or private reser-
voirs, the operation of which has no effect on waters of the state.

(324) " Water pollution " is such alteration of the thermal, chemical,
biological or radioactive properties of any waters of the state, or such dis-
charge or release of any contaminant into the waters of the state as will or
is likely to create a nuisance or render such waters harmful or detrimental
or injurious to public health, safety or welfare or to domestic, commercial,
industrial, recreational, aesthetic or other legitimate uses or to live-
stock, wild animals, birds, fish or other aquatic life.

(345) " Water quality standards " are the designated uses of a water
body and water quality criteria necessary to support those uses, and an an-
tidegradation policy.

(346) "Watersheds" means the land area from which water flows into a
stream or other body of water which drains the area. For the purposes of this
chapter, the area of watersheds shall be recommended by the basin advisory
group described in section 39-3613, Idaho Code.

SECTION 3. That Section 39-3603, Idaho Code, be, and the same is hereby
amended to read as follows:

39-3603. GENERAL WATER QUALITY STANDARD AND ANTIDEGRADATION POLICY
AND IMPLEMENTATION. (1) Policy.
(a) Maintenance of existing uses for all waters -- Tier I protection.
The existing instream beneficial uses of each water body and the level
of water quality necessary to protect those uses shall be maintained and
protected.
(b) High quality waters -- Tier II protection. Where the quality of wa-
ters exceeds levels necessary to support propagation of fish, shellfish
and wildlife and recreation in and on the water, that quality shall be
maintained unless the department finds, after full satisfaction of the
intergovernmental coordination and public participation provisions
of this chapter, and the department's planning processes, along with
appropriate planning processes of other agencies, that lowering water
quality is necessary to accommodate important economic or social de-
velopment in the area in which the waters are located. In allowing such
reductions in water quality, the department shall assure water quality
adequate to protect existing uses fully.
(c) Outstanding resource waters -- Tier III protection. Where an out-
standing resource water has been designated by the legislature that wa-
ter quality shall be maintained and protected from the impacts of point
and nonpoint source activities.
(2) Implementation.
(a) General permits. For general permits issued on or after July 1,
2011, the department will conduct an antidegradation review, includ-
ing any required Tier II analysis, at the time at which general permits
are certified. For general permits that the department determines ade-
quately address antidegradation, review of individual applications
for coverage will not be required unless it is required by the general
permit. For general permits that the department determines do not ade-
quately address antidegradation, the department may conclude that
other conditions, such as the submittal of additional information or
individual certification at the time an application is submitted for
coverage under a general permit, may be necessary in the general permit
to provide reasonable assurance of compliance with the antidegradation
policy. If supported by the permit record, the department may also
presume that discharges authorized under a general permit are insignif-
icant or that the pollution controls required in the general permit are
the least degrading alternative as specified in the department's rules.
(b) Identification of Tier II waters. The department will utilize a wa-
ter body by water body approach in determining where Tier II protection
is appropriate in addition to Tier I protection. This approach shall be
based on an assessment of the chemical, physical, biological and other
information regarding the water body. The most recent federally ap-
proved integrated report and supporting data will be used to determine
the appropriate level of protection as follows:
(i) Water bodies identified in the integrated report as fully supporting assessed uses will be provided Tier II protection.

(ii) Water bodies identified in the integrated report as not assessed will be provided an appropriate level of protection on a case-by-case basis using information available at the time of a proposal for a new or reissued permit or license.

(iii) Water bodies identified in the integrated report as not fully supporting assessed uses will receive Tier I protection for the impaired aquatic life or recreational use, except as follows:

1. For aquatic life uses identified as impaired for dissolved oxygen, pH or temperature, if biological or aquatic habitat parameters show a healthy, balanced biological community is present, as described in the water body assessment guidance published by the department, then the water body shall receive Tier II protection for aquatic life.

2. For recreational uses, if water quality data show compliance with those levels of water quality criteria listed in the department's rules, then the water body shall receive Tier II protection for recreational uses.

(iv) Special resource waters listed in the department's rules shall be evaluated in the same fashion as all other waters.

(c) Tier II analysis for insignificant activity or discharge. The department shall consider the size and character of an activity or discharge or the magnitude of its effect on the receiving stream and shall determine whether it is insignificant. If an activity or discharge is determined to be insignificant, then no further Tier II analysis for other source controls, alternatives analysis or socioeconomic justification is required.

(i) The department shall determine insignificance when the proposed change in an activity or discharge, from conditions as of July 1, 2011, will not cumulatively decrease assimilative capacity by more than ten percent (10%).

(ii) The department may request additional information from the applicant in making a determination whether a proposed change in an activity or discharge is insignificant.

SECTION 4. That Section 39-3623, Idaho Code, be, and the same is hereby amended to read as follows:

39-3623. EFFECT OF RULES. Every rule promulgated within the authority conferred in sections 39-3617 through 39-3622, Idaho Code, shall be of temporary effect and shall become permanent only by enactment of statute at the first regular session following adoption of the rule. Rules not approved in the above manner shall be rejected, null, void and of no force and effect on July 1, following submission of the rules to the legislature.

(1) The rules promulgated within the authority conferred in this act and adopted by the board of health and welfare on January 31, 1990, and contained in IDAPA 16.01.2003,31 and 16.01.2003,32 and 16.01.2053,01 through 16.01.2053,07, are hereby approved by the legislature.

(2) The rules promulgated within the authority conferred in this act and adopted by the board of environmental quality on November 10, 2010, and
contained in IDAPA 58.01.02.010.71, 58.01.02.010.72, 58.01.02.051.03 and
58.01.02.052.09 are hereby approved by the legislature.

SECTION 5. An emergency existing therefor, which emergency is hereby
declared to exist, this act shall be in full force and effect on and after its
passage and approval.