



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10**

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WATER
DIVISION

February 1, 2022

Dr. Mary Anne Nelson
Water Quality Division Administrator
Idaho Department of Environmental Quality
1410 North Hilton
Boise, Idaho 83706-1255

Re: EPA's Clean Water Act Action on the December 3, 2021, Submittal of New and Revised Recreational Bacteria Criteria and Non-substantive Water Quality Standards Revisions (Idaho Docket 58-0102-2001)

Dear Dr. Nelson:

The U.S. Environmental Protection Agency has completed review of the new and revised water quality standards (WQS) at 58.01.02.251 and 58.01.02.260 of the Idaho Administrative Code, submitted to EPA by the Idaho Department of Environmental Quality (DEQ) by letter dated December 1, 2021, and transmitted on December 3, 2021. Under the Clean Water Act (CWA) section 303(c), 33 U.S.C. § 1313(c), states and authorized tribes must submit new and revised WQS to EPA for review and action, and EPA must ensure that those WQS are consistent with the CWA and EPA's implementing regulations. The details of EPA's action are outlined below and are further described in the enclosed technical support document.

EPA's action applies only to waters in the state of Idaho and does not apply to waters that are within Indian Country, as defined in 18 U.S.C. § 1151. Nothing in this action shall constitute an approval or disapproval of a WQS that applies to waters within Indian Country. EPA, or authorized Indian Tribes, as appropriate, retain the authority to establish WQS for waters within Indian Country.

I. Summary of EPA's Action

The revisions submitted to EPA for CWA review and action update the bacteria criteria to protect all waters designated for recreation at IDAPA 58.01.02.251. In addition to the bacteria criteria revisions, the submittal package includes a non-substantive clarification cross-referencing Idaho's application of toxics criteria to recreational uses at IDAPA 58.01.02.251.01 and non-substantive revisions to IDAPA 58.01.02.260.

Pursuant to EPA's authority under CWA section 303(c) and the implementing regulations at 40 CFR § 131, EPA is approving the following new and revised WQS:

- IDAPA 58.01.02.251.02, a, and b regarding fecal indicators for *E.coli* bacteria and enterococci, respectively.

- IDAPA 58.01.02.251.02.a.i(1) and IDAPA 58.01.02.251.02.a.i(2) regarding magnitude, duration and frequency for *E. coli* bacteria criteria; and IDAPA 58.01.02.251.02.b.i, and IDAPA 58.01.02.251.02.b.ii regarding magnitude, duration and frequency for enterococci criteria.

In accordance with its CWA authority and 40 CFR § 131, EPA also approves the following non-substantive revisions:

- New provision at IDAPA 58.01.02.251.01, which is a non-substantive cross-reference that reiterates language from subsection 210.01.b. The new cross reference clarifies the State's application of the toxics criteria to protect human health in waters designated for recreation and does not establish any new or revised criteria.
- Editorial changes to existing rule language at IDAPA 58.01.02.260 in response to EPA's disapproval on May 7, 2010 related to specific variances.

II. Provisions Not Subject to EPA 303(c) Review

EPA is taking no action on certain rule language provisions at IDAPA 58.01.02.251.02.a.i.(1) and IDAPA 58.01.02.251.02.b.i; IDAPA 58.01.02.251.02.a.i.(2) and IDAPA 58.01.02.251.02.b.ii; and IDAPA 58.01.02.251.02.a.ii and IDAPA 58.01.02.251.02.c, because EPA has determined they are not new or revised WQS that the agency has the authority to review and approve or disapprove pursuant to CWA section 303(c) authority, 33 U.S.C. § 1313(c)(3).

EPA supports DEQ's proposed deletion of the provision at IDAPA 58.01.02.260.02 on specific variances that EPA disapproved on May 7, 2010. The removal is not a revision to an effective WQS, and therefore EPA is taking no action on the removal because EPA has determined it is not a new or revised WQS that EPA has the authority to review and approve or disapprove pursuant to CWA section 303(c), 33 U.S.C. § 1313(c)(3).

EPA appreciates the efforts your staff have dedicated to providing new protections for Idaho waters and looks forward to continuing close collaborations with the State. If you have any questions regarding this letter, please contact me at (206) 553-8696 or Andrea Ramirez, EPA staff lead, at (206) 553-1058 or ramirezpuentes.andrea@epa.gov.

Sincerely,

Cami Grandinetti
Branch Manager

Enclosure: Technical Support Document

cc (e-copy): Jason Pappani, Surface Water Bureau Chief, DEQ

Technical Support Document

EPA's Clean Water Act Action on Idaho's New and Revised Recreational Bacteria Criteria and Non-substantive Water Quality Standards Revisions

Submitted December 3, 2021

February 1, 2022

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Technical Support Document

EPA’s Clean Water Act Action on Idaho’s New and Revised Recreational Bacteria Criteria and Non-Substantive Water Quality Standards Revisions

Submitted December 3, 2021

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I. Introduction

This Technical Support Document provides the basis for the U.S. Environmental Protection Agency's (EPA) approval action under section 303(c) of the Clean Water Act (CWA), 33 U.S.C. § 1313(c), and the federal water quality standards (WQS) regulations at 40 CFR § 131, on new and revised WQS regarding recreational bacteria criteria and non-substantive water quality standards revisions, submitted to EPA by the Idaho Department of Environmental Quality (DEQ). The new and revised water quality standards set forth in Idaho's Administrative Rules (IDAPA 58.01.02) were duly adopted pursuant to state law.

Idaho's new and revised recreational use definition and criteria were adopted on April 11, 2019 (Idaho Docket 58-0102-1802). Based on stakeholder concerns regarding some language adopted in Docket No. 58-0102-1802, DEQ initiated a second negotiated rulemaking in 2020 (Idaho Docket 58-0102-2001) to address those concerns before formally submitting the rules to EPA for review and action under CWA section 303(c). Docket No. 58-0102-2001 also includes the deletion of water quality standards provisions for variances that EPA previously disapproved and was included together with the recreational WQS submission on December 3, 2021.¹

This document is organized as follows:

- Part II – Provides background information about CWA requirements and Idaho's recreational bacteria water quality standards submittal. It also includes the scope of EPA's action.
- Part III – Describes EPA's action and the basis for the action under CWA section 303(c) and the implementing regulations at 40 CFR § 131.
- Part IV – Summarizes the rule provisions that EPA is taking no action on.

II. Background

A. Clean Water Act Requirements for Water Quality Standards

The objective of the CWA is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters with an interim goal, where attainable, to achieve water quality that provides for the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water. Under section 303(c) of the CWA, and federal implementing regulations at 40 CFR § 131.4, states (and authorized tribes²) have the primary responsibility for reviewing, establishing, and revising WQS. These standards include the designated uses of a waterbody or waterbody segment, the water quality criteria necessary to protect those designated uses, and an antidegradation policy. This statutory and regulatory framework allows states to work with local communities to adopt appropriate designated uses (as required at 40 CFR §131.10(a)) and to adopt criteria to protect those designated uses (as required at 40 CFR §131.11(a)).

¹ Letter dated December 1, 2021 from Mary Anne Nelson, Administrator Water Quality Division, Idaho Department of Environmental Quality, to Dan Opalski, Director, Office of Water, Region 10, U.S. Environmental Protection Agency, RE: Submission of revised water quality standards for approval.

² The term "authorized tribe" means a tribe eligible under CWA section 518(e) and 40 CFR 131.8 for treatment in a similar manner as a state (TAS) for the purpose of administering a water quality standards program.

States are required to hold public hearings for the purpose of reviewing applicable WQS periodically, but at least once every three years, and, as appropriate, modifying these standards (40 CFR §131.20). Each state must follow applicable legal procedures for revising or adopting such standards (40 CFR § 131.5(a)(6)), and is required to submit a certification by the state's attorney general, or other appropriate legal authority within the state, that the WQS were duly adopted pursuant to state law (40 CFR § 131.6(e)). EPA's review authority and the minimum requirements for state WQS submittals are described at 40 CFR §§ 131.5 and 131.6, respectively.

States are required by 40 CFR § 131.11(a) to adopt water quality criteria that protect their designated uses. In establishing such criteria, states should establish numeric values based on one of the following:

- CWA section 304(a) guidance;
- CWA section 304(a) guidance modified to reflect site-specific conditions; or,
- Other scientifically defensible methods (40 CFR § 131.11(b)(1)).

In addition, states should establish narrative criteria where numeric criteria cannot be determined or to supplement numeric criteria (40 CFR § 131.11(b)(2)).

Section 303(c) of the CWA requires states and authorized tribes to submit new or revised WQS to EPA for review and action. EPA reviews these changes and approves the WQS if they meet the requirements of the CWA and EPA's implementing regulations.

EPA considers four questions (described below) when evaluating whether a particular provision is a new or revised WQS. If all four questions are answered "yes," then the provision would likely constitute a new or revised WQS that EPA has the authority and duty to approve or disapprove under CWA section 303(c)(3).³

1. Is it a legally binding provision adopted or established pursuant to state or tribal law?
2. Does the provision address designated uses, water quality criteria (narrative or numeric) to protect designated uses, and/or antidegradation requirements for waters of the United States?
3. Does the provision express or establish the desired condition (e.g., uses, criteria) or instream level of protection (e.g., antidegradation requirements) for waters of the United States immediately or mandate how it will be expressed or established for such waters in the future?
4. Does the provision establish a new WQS or revise an existing WQS?

If EPA approves a state's WQS submission, such standard(s) shall thereafter be the applicable standard for CWA purposes. When EPA disapproves a state's WQS, EPA shall notify the state and specify why the WQS is not in compliance with the requirements of the CWA and federal WQS regulations, and specify any changes that are needed to meet such requirements (40 CFR § 131.21).

Finally, EPA considers non-substantive edits to existing WQS to constitute new or revised standards that EPA has the authority to approve or disapprove under CWA section 303(c)(3). While such edits and

³ See *What is a New or Revised Water Quality Standard under 303(c)(3) Frequently Asked Questions*, U.S. Environmental Protection Agency, EPA Pub. No. 820F12017 (Oct. 2012). Hereafter referred to as 303(c) FAQs. Available at <https://www.epa.gov/sites/production/files/2014-11/documents/cwa303faq.pdf>

changes do not substantively change the meaning or intent of the existing WQS, EPA believes it is reasonable to treat such edits and changes in this manner to ensure public transparency as to which provisions are applicable for CWA purposes. EPA notes that the scope of its review and action on non-substantive edits or editorial changes extend only to the non-substantive edits or changes themselves. EPA does not re-open or reconsider the underlying WQS that are the subject of the non-substantive edits or editorial changes.

B. Overview of Idaho's submittal

DEQ's December 3, 2021 (Docket 58-0102-2001) submittal to EPA included new and revised bacteria criteria to protect recreation at IDAPA 58.01.02.251. The submittal also includes the deletion of IDAPA 58.01.02.260.02 which refers to previously disapproved specific variances, including footnotes, text of WQS that are not new or revised, various non-substantive changes to WQS, such as formatting and renumbering of provisions, and additional language and provisions that are not WQS.

Revisions to the recreational bacteria criteria were included in pending rule docket 58-0102-1802. During the 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. DEQ subsequently initiated the rulemaking, Docket No. 58-0102-2001, to consider revisions to bacteria criteria language at Section 251.

The Idaho Board of Environmental Quality (Board) adopted the pending rule (Idaho Docket 58-0102-2001) on November 19, 2020. The temporary rule took effect on July 1, 2021. The proposed rule was published on September 2, 2021 and was followed by a formal 30-day comment period.

DEQ maintains an online record of the current submittal rulemaking, including an overview of the rule docket, the various drafts of the rule, comments received, presentations given, and additional information. The online record can be accessed at: <https://www.deq.idaho.gov/public-information/laws-guidance-and-orders/rulemaking/water-quality-docket-no-58-0102-2001/>

DEQ's December 3, 2021, submittal package (Idaho Docket 58-0102-2001) includes:

- 1) A cover letter, briefly describing the rulemaking, its justification, and the contents of the package supporting the rule, dated December 1, 2021.
- 2) Notice of negotiated rulemaking, dated April 1, 2020.
- 3) Notice of rulemaking with the proposed rule, dated September 2, 2020.
- 4) Negotiated rulemaking summary and DEQ's response to public comments.
- 5) Notice of rulemaking announcing adoption of pending rule by the Board, dated December 2, 2020.
- 6) Notice of omnibus rulemaking (July 21, 2021) announcing adoption of temporary rule on July 1, 2021. Idaho Docket No. 58-0000-2100.
- 7) Comprehensive tracked changes of Rule Revisions to IDAPA 58.01.02.251 prepared for submittal to EPA.
- 8) Idaho's Attorney General's Certification stating that the rules were duly adopted pursuant to state law, dated December 3, 2021.

C. Overview of EPA Criteria Recommendations

EPA issued its current ambient water quality criteria recommendations for recreational waters in 2012.⁴ The criteria are designed to protect the public from exposure to harmful levels of pathogens while participating in water-contact activities in all water bodies designated for such recreational uses.

EPA issued these recommendations consistent with the CWA. Amendments to the CWA by the Beaches Environmental Assessment and Coastal Health (BEACH) Act of 2000 directed EPA to conduct studies associated with pathogens and human health, and to publish new or revised criteria recommendations for pathogens and pathogen indicators based on those studies. Prior to 2012, EPA had last issued recreational water quality criteria recommendations in 1986.

The 2012 Recreational Water Quality Criteria recommendations relied on the latest research and science, including studies that show a link between illness and fecal contamination in recreational waters. The criteria are based on the use of two bacterial indicators of fecal contamination, *E. coli* and Enterococci. The revised criteria are designed to protect primary contact recreation, including swimming, bathing, surfing, water skiing, tubing, water play by children, and similar water contact activities where a high degree of bodily contact with the water, immersion and ingestion are likely.

EPA's water quality criteria recommendations are intended as guidance for states and authorized tribes in establishing new or revised water quality standards. As discussed below in the section titled "EPA's Action on New and Revised Water Quality Standards," Idaho's revisions at IDAPA 58.01.02.251 addressing the bacteria criteria to protect recreation in fresh waters are consistent with EPA's 2012 Recreational Water Quality Criteria recommendations.

D. Scope of EPA's Action

The revisions submitted to EPA for CWA review and action update the bacteria criteria at IDAPA 58.01.02.251 to protect all waters designated for recreation.⁵ In addition to the bacteria criteria revisions, Idaho has included a non-substantive clarification cross-referencing the state's application of toxics criteria to recreational uses at IDAPA 58.01.02.251.01.

Idaho also submitted revisions to variances from WQS at IDAPA 58.01.02.260 that include non-substantive reformatting, wording changes, and the deletion of Subsection 260.02 which was disapproved by EPA on May 7, 2010.⁶

EPA is only acting on the new or revised WQS adopted into regulation by DEQ and identified in DEQ's December 3, 2021 submittal. EPA is taking no action on the existing sections of the Idaho Administrative Code which were not part of DEQ's December 3, 2021 new or revised WQS submittal,

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

⁵ Designated for primary contact recreation and/or secondary contact recreation. For more information see <https://adminrules.idaho.gov/rules/current/58/580102.pdf>

⁶ EPA Disapproval of a Variance to Water Quality Standards for Ammonia, Chlorine, Cadmium, Lead and Zinc from the Page Wastewater Treatment Plant to the West Page Swamp – Docket No. 58-0102-0002. Available at <https://www2.deq.idaho.gov/admin/LEIA/api/document/download/14663>

but that are referenced in the new IDAPA 58.01.02. In such cases, EPA’s action on the new or revised WQS does not extend to the existing content of the referenced Idaho Administrative Code sections.

As noted above in Section II.A., the non-substantive changes to previously approved WQS are to ensure public transparency as to which provisions are applicable for purposes of the CWA in accordance with 40 CFR § 131.21(c). The scope of EPA’s action regarding such provisions extends only as far as the actual non-substantive changes themselves. EPA’s action on the non-substantive changes does not constitute an action on the underlying previously approved WQS because they are not new or revised.

Additionally, Idaho submitted some provisions and revisions that do not constitute new or revised WQS that EPA has the authority to review and act on under CWA section 303(c) and 40 CFR § 131. These non-WQS provisions are discussed in the section titled “Provisions that EPA is Taking No Action On.”

Today’s action applies only to waters within the jurisdiction of the state of Idaho and does not apply to waters that are within Indian Country, as defined in 18 U.S.C. § 1151. Nothing in this decision document shall constitute an approval or disapproval of a WQS that applies to waters within Indian Country. EPA, or authorized Indian Tribes, as appropriate, retain the authority to establish water quality standards for waters within Indian Country.

III. EPA’s Action on New and Revised Water Quality Standards

The following section summarizes EPA’s action and rationale for each provision. Please refer to Docket 58-0102-2001⁷ for a complete text of the new and revised WQS. The underlined portion of the text indicates the new or revised language that is the subject of EPA’s action.

A. Action on Non-substantive Revisions

1. Toxics Criteria

EPA Action

In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR § 131, EPA approves the new provision at IDAPA 58.01.02.251.01.

251. SURFACE WATER QUALITY CRITERIA FOR RECREATION USE DESIGNATIONS.

01. Toxics Criteria. Waters designated for recreation must meet the Fish Only water quality criteria set forth in Subsection 210.01.b.

EPA Rationale

This new provision adds a cross-reference to subsection 210.01.b, which states that the criteria for toxic substances to protect human health, specifically the Fish Only criteria, apply to waters designated for primary or secondary contact recreation use. EPA approves this non-substantive cross-reference that reiterates language from subsection 210.01.b. The new cross reference clarifies the State’s application of the toxics criteria to protect human health in waters designated for recreation and does not establish any new or revised criteria.

⁷ Water Quality: Docket No. 58-0102-2001. Available at: <https://www.deq.idaho.gov/public-information/laws-guidance-and-orders/rulemaking/water-quality-docket-no-58-0102-2001/>

2. Editorial Changes to Subsection 260

EPA Action

Pursuant to section 303(c) of the CWA and 40 CFR Part 131, EPA approves the non-substantive editorial changes at IDAPA 58.01.02.260.

EPA Rationale

In response to EPA’s disapproval on May 7, 2010 related to specific variances, DEQ deleted the rule language at IDAPA 58.01.02.260.02 and reformatted, renumbered, and made minor editorial changes to subsection 260. EPA’s approval of these non-substantive editorial changes, including wording changes, reformatting, and renumbering of the existing effective WQS within this section is to ensure public transparency. The scope of EPA’s action in approving such changes extends only as far as the actual changes themselves. The non-substantive editorial changes to these provisions do not alter the underlying provisions that EPA previously approved and EPA is not acting on the previously approved provisions.

B. Action on New and Revised Bacteria Criteria

The substantive changes to criteria listed in IDAPA 58.01.02.251 are summarized below in Table 1. Table 1 also includes a comparison of Idaho’s revised criteria and EPA’s 2012 Recreational Water Quality Criteria recommendations.

Table 1: Comparison of Idaho’s Revised Criteria at IDAPA 58.01.02.251 with EPA’s 2012 Recreational Water Quality Criteria Recommendations

Criteria Component	EPA’s 2012 Recommendations	Idaho’s Revisions
Indicator	Enterococci <u>or</u> <i>E. coli</i>	Enterococci <u>and</u> <i>E. coli</i>
Magnitude (CFU or MPN/100 mL)	Recommendation 1 – Illness Rate of 36/1,000 Enterococci: GM = 35; STV = 130 <i>E. coli</i> : GM = 126; STV = 410	Adopted EPA’s Recommendation 1: Illness Rate of 36/1,000 Enterococci: GM = 35; STV = 130 Illness Rate of 36/1,000 <i>E. coli</i> : GM = 126; STV = 410
	Recommendation 2 – Illness Rate of 32/1,000 Enterococci: GM = 30; STV = 110 <i>E. coli</i> : GM = 100; STV = 320	
Duration and Frequency – GM	Not to be exceeded in any 30-day interval	Idaho uses a 45-day interval which is consistent with the 2015 EPA Policy Memo. ⁸

⁸ 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. 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.

Duration and Frequency – STV	Not to be exceeded more than 10% of the time in the same 30-day interval assessed for the GM	Not to be exceeded more than 10% of the time in the same 45-day interval, which is consistent with the 2015 EPA Policy Memo. ⁷
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GM = Geometric Mean; STV = Statistical Threshold Value;
 CFU = Coliform Forming Units; MPN = Most Probable Number

1. Indicator

EPA Action

In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR § 131, EPA approves the underlined new and revised provisions at IDAPA 58.01.02.251.02, a, and b regarding fecal indicators.

251. SURFACE WATER QUALITY CRITERIA FOR RECREATION USE DESIGNATIONS.

02. Fecal Indicators. Waters designated for recreation must meet criteria for indicator bacteria of fecal contamination. Either of the following indicators is sufficient for determining compliance with the fecal indicator criteria:

IDAPA 58.01.02.251.02.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:

IDAPA 58.01.02.251.02.b – Enterococci. Waters designated for recreation are not to contain Enterococci bacteria, used as indicators of human pathogens, in concentrations exceeding:

EPA Rationale

Idaho added Enterococci as an indicator of bacterial contamination in fresh water, which is consistent with EPA’s 2012 Recreational Water Quality Criteria recommendations regarding use of either *E. coli* or Enterococci as indicators of bacterial contamination in fresh water.⁹ DEQ clarified its intent at IDAPA 58.01.02.251.02 by stating that data for “*either*” of the indicator bacteria would be considered sufficient for determining compliance with the bacteria criteria. DEQ stated that allowing use of either indicator would provide dischargers with the option to request an alternative fecal bacteria indicator for monitoring compliance with WQS and support a transition period from *E. coli* criteria to Enterococci criteria.¹⁰ Based on this reasoning, EPA approves such a transition approach using two fecal indicators since DEQ confirmed these indicators were independently applicable.¹¹

DEQ adopted IDAPA 58.01.02.251.02.a in 2006 and made a non-substantive renumbering change in 2019.¹² EPA’s approval of this non-substantive editorial change to a previously approved WQS is to ensure public transparency as to which provisions are effective for purposes of the CWA. The scope of EPA’s action in approving such provisions extends only as far as the actual changes themselves. EPA’s

⁹ 2012 RWQC

¹⁰ DEQ. 2019. *Water Quality: Docket No. 58-0102-1802*. Available at: <https://www.deq.idaho.gov/public-information/laws-guidance-and-orders/rulemaking/water-quality-docket-no-58-0102-1802/>

¹¹ Comment No. 6. DEQ’s Response to Comments/Negotiated Rulemaking Summary. *Docket No. 58-0102-2001*.

¹² The existing language is not underlined other than the added section number 02, a and b, and romanette i, to indicate it’s not new or revised.

action here does not constitute an action on the underlying previously approved WQS.¹³

2. Magnitude

EPA Action

In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR § 131, EPA approves the underlined new and revised provisions at IDAPA 58.01.02.251.02.a.i(1), IDAPA 58.01.02.251.02.a.i(2), IDAPA 58.01.02.251.02.b.i, and IDAPA 58.01.02.251.02.b.ii regarding magnitude (see underlined text below).

IDAPA 58.01.02.251.02.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:

(1) 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 eleven (11) days over a forty-five (45) day period; or

(2) A statistical threshold value (STV) of four hundred and ten (410) *E. coli* counts per one hundred (100) mL 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.

IDAPA 58.01.02.251.02.b. – Enterococci. Waters designated for recreation are not to contain Enterococci bacteria, used as indicators of human pathogens, in concentrations exceeding:

i. 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 eleven (11) days over a forty-five (45) day period; or

ii. 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.

EPA Rationale

Idaho adopted two different sets of criteria for *E. coli* and Enterococci. For *E. coli*, Idaho adopted a geometric mean (GM) of 126 counts¹⁴ per 100 mL, and a statistical threshold value (STV) of 410 counts¹⁴ per 100 mL. For Enterococci, Idaho adopted a GM of 35 counts¹⁴ per 100 mL, and a STV of 130 counts¹⁴ per 100 mL. All of these criteria are consistent with EPA's recommendations for *E. coli* and Enterococci at an illness rate of 36/1,000 primary contact recreators. EPA recommends adoption of both a GM and a STV at an estimated illness rate of either 36/1,000 primary contact recreators or

¹³ 303(c) FAQs

¹⁴ For both indicators, enterococci and *E. coli*, and the corresponding criteria comprising geometric means and statistical threshold values for each indicator, EPA interprets Idaho's term "counts" as a unit of measure that allows the application of either the membrane filtration or MPN method, consistent with the 2012 Recreational Water Quality Criteria recommendations. The footnote "a" to Table 1 for the 2012 RWQC states, "EPA recommends using EPA Method 1600 (U.S. EPA, 2002a) to measure culturable enterococci, or another equivalent method that measures culturable enterococci and using EPA Method 1603 (U.S. EPA, 2002b) to measure culturable *E. coli*, or any other equivalent method that measures culturable *E. coli*."

32/1,000 primary contact recreators. EPA's criteria recommendations at both estimated illness rates (and therefore Idaho's selected magnitude associated with the illness rate of 36/1,000) are protective of the designated use of primary contact recreation in fresh waters.

As confirmed in the public summary,¹⁵ DEQ added "or" to the rule language at IDAPA 58.01.02.251.02.a.i(1) and b.i to clarify that for each fecal indicator there are two components, geometric mean and statistical threshold value, and that each are independently applicable. For purposes of determining compliance with the criteria, it is EPA's understanding that both criteria components, the STV and GM, will apply.

EPA approves the magnitude portion of these criteria based on their protection of the designated use and consistency with EPA recommendations.

3. Duration and Frequency

EPA Action

In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR § 131, EPA approves the underlined new and revised provisions at IDAPA 58.01.02.251.02.a.i(1), IDAPA 58.01.02.251.02.a.i(2), IDAPA 58.01.02.251.02.b.i, and IDAPA 58.01.02.251.02.b.ii regarding duration and frequency (see underlined below).

IDAPA 58.01.02.251.02.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:

(1) 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 eleven (11) days over a forty-five (45) day period; or

(2) A statistical threshold value (STV) of four hundred and ten (410) *E. coli* counts per one hundred (100) mL 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.

IDAPA 58.01.02.251.02.b. – Enterococci. Waters designated for recreation are not to contain Enterococci bacteria, used as indicators of human pathogens, in concentrations exceeding:

i. 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 eleven (11) days over a forty-five (45) day period; or

ii. 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.

¹⁵ DEQ Response to Comments, Proposed Rule Docket No. 58-0102-2001, comment no. 3. Available at: <https://www2.deq.idaho.gov/admin/LEIA/api/document/download/12135>

EPA Rationale

DEQ established a criteria duration of 45 days at IDAPA 58.01.02.251.02.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.¹⁶

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. DEQ clarified in the response to comments that when calculating the geometric mean within the averaging period, that the 10 percent exceedance value must be calculated using the same subset of data. DEQ further confirmed that it interprets the STV and geometric mean for each 45-day period to be calculated from the same data distribution.¹⁷

4. Summary

As shown in Table 1 and discussed above, EPA has determined that each component of Idaho's revised bacteria criteria (indicator organisms, magnitude, duration, and frequency) is consistent with EPA's 2012 Recreational Water Quality Criteria recommendations and/or the 2015 EPA Policy Memo (*Narrative Justification for Longer Duration Period for Recreational Water Quality Criteria paper from EPA's Standards and Health Protection Division, October 2015*). Therefore, Idaho's revised criteria are protective of primary contact recreation in fresh waters for the reasons discussed in EPA's criteria development document.¹⁸ EPA addresses the remaining rule revisions in the section below titled, "Provisions that EPA is Not Taking Action On."

IV. Provisions that EPA is Taking No Action On

1. IDAPA 58.01.02.251.02.a.i(1) *E. coli* and IDAPA 58.01.02.251.02.b.i Enterococci – "based on a minimum of five (5) samples taken every three (3) to eleven (11) days"

These clauses within the provisions are related to data sufficiency for assessing compliance with the recreational criteria. They do not express the desired condition or level of instream protection for waters of the U.S. Therefore, EPA is taking no action on the data sufficiency language because EPA has determined they are not new or revised WQS that EPA has the authority to review and approve or disapprove pursuant to CWA section 303(c), 33 U.S.C. § 1313(c)(3).¹⁹

2. IDAPA 58.01.02.251.02.a.i(2) *E. coli* and IDAPA 58.01.02.251.02.b.ii Enterococci – "The Department will ensure samples collected represent the forty-five (45) day duration."

EPA is taking no action on the above language regarding sample representativeness because EPA has determined that it does not express the desired condition or level of instream protection for

¹⁶ 2015 EPA Policy Memo

¹⁷ DEQ Response to Comments, Proposed Rule Docket No. 58-0102-2001. Available at: <https://www2.deq.idaho.gov/admin/LEIA/api/document/download/12135>

¹⁸ 2012 RWQC

¹⁹ 303(c) FAQs

waters of the U.S., and therefore, it is not a new or revised WQS that EPA has the authority to review and approve or disapprove pursuant to CWA section 303(c), 33 U.S.C. § 1313(c)(3).²⁰

3. IDAPA 58.01.02.251.02.a.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.

EPA is taking no action on this beach action value (BAV) provision. As noted in the 2012 Recreational Water Quality Criteria recommendations²¹, “EPA suggests that states use a BAV as a conservative, precautionary tool for making beach notification decisions. The BAV is not a component of EPA’s recommended criteria...” Additionally, the construct of the Idaho provision, that the beach action value “...*should be used in considering* beach closures” (emphasis added) further identifies that the provision constitutes a consideration rather than a mandate for the desired condition of waters of the U.S. Therefore, EPA has determined the BAV is not a new or revised WQS that EPA has the authority to review and approve or disapprove pursuant to CWA section 303(c), 33 U.S.C. § 1313(c)(3).^{22, 23}

4. IDAPA 58.01.02.251.02.c – For comparing permit effluent bacteria samples to the criteria, the averaging period shall be thirty (30) days or less based on a minimum of five (5) samples.

This provision relates to effluent bacteria samples which are used for compliance and enforcement actions associated with the Idaho Pollutant Discharge Elimination System (IPDES) permit program. This provision identifies an averaging period for samples collected from permit effluent, and as such does not express the desired condition or level of instream protection for waters of the U.S. Therefore, EPA is taking no action on this provision because EPA has determined it is not a new or revised WQS that EPA has the authority to review and approve or disapprove pursuant to CWA section 303(c), 33 U.S.C. § 1313(c)(3).²⁴

5. IDAPA 58.01.02.260.02 – Specific variances

As stated in EPA’s comment letter, dated May 15, 2020,²⁵ EPA supports DEQ’s proposal to delete the rule language at IDAPA 58.01.02.260.02 related to specific variances that EPA disapproved on May 7, 2010. Because these provisions were never approved by EPA as WQS, their removal provides clarity as to what is in effect for CWA purposes and comports with the remedy for the disapproval. The removal is not a revision to an effective WQS, and therefore EPA is taking no action on the removal because EPA has determined it is not a new or revised WQS that EPA has the authority to review and approve or disapprove pursuant to CWA section 303(c), 33 U.S.C. §

²⁰ *Id*

²¹ 2012 RWQC

²² *Id*

²³ Letter dated September 29, 2020 from Cyndi Grafe, EPA Water Quality Standards Coordinator, to Paula Wilson, Idaho Department of Environmental Quality. Re: EPA’s Comments on Idaho’s Docket 58-0102-2001 Proposed Rule – Bacteria Recreation Criteria and Variances.

²⁴ *Id*

²⁵ Letter dated May 15, 2020 from Cyndi Grafe, EPA Water Quality Standards Coordinator, to Michelle Dale, Idaho Department of Environmental Quality. RE: The EPA's Comments on Idaho's Water Quality Standards/Implementation – Bacteria, Docket No. 58-0102-2001.

1313(c)(3). No substantive changes have been made to the provision.

In August 2015, EPA published a final rule updating the federal water quality standards regulation which included establishing requirements for variances at 40 CFR 131.14.²⁶ 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.²⁷ EPA notes that any water quality standards variances issued by DEQ must comply with the federal variance requirements at 40 CFR 131.14.

²⁶ 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>.

²⁷ 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.