

Overview of Incorporations by Reference for the DEQ IPDES Program, Docket No. 58-0125-2301

Required by Idaho Code § 67-5223(4)

Idaho DEQ, under the direction of the Legislature in 2014 (HB406), started development of a primacy application package to implement the Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) program for the state of Idaho. DEQ undertook rulemaking in 2014 through 2015 and the Legislature approved the Rules Regulating the Idaho Pollutant Discharge Elimination System (IPDES) Program during the 2016 Legislative session. DEQ subsequently updated the IPDES rules in 2020 as part of the omnibus rulemaking and is now proposing rulemaking to further update these rules. This rulemaking includes incorporation by reference of existing federal rules and negotiation of rules that provide the state additional flexibility in implementing the NPDES federal program.

40 CFR 123.62(e) requires that all new Clean Water Act permitting programs comply with the federal regulations upon approval. For Idaho's program to receive approval of the application submitted August 31, 2016, DEQ must update those references to federal regulations to reflect the most current version, in this case, July 1, 2023. Incorporation by reference allows DEQ to keep its rules up to date with federal regulation changes and simplifies compliance for the regulated community.

EPA has updated several rules regulating the permitting of discharges, since July 1, 2020, including: regulations to revise the technology-based effluent limitations guidelines and standards (ELGs) and direct final action to extend the date for existing coal-fired power plants to submit a notice of planned participation (NOPP) for the permanent cessation of coal combustion subcategory in the 2020 Steam Electric Reconsideration Rule; postponing compliance deadlines for implementation of EPA's Phase 2 electronic reporting rule; and changes to test procedures when analyzing wastewater and other environmental samples under the NPDES program.

Reproducing the Code of Federal Regulations (CFR) in state rule is impractical and costly. Therefore, when possible, DEQ incorporates federal regulations by reference. Sections with no changes are also incorporated to ensure the state rules are consistent with federal regulations and to provide one set of rules for cities and industry to follow. Idaho entities that discharge treated wastewater to surface waters are required to comply with all applicable new and updated federal rules regardless of whether DEQ incorporates them by reference.

In addition, for DEQ to be the implementing authority for the IPDES program in the state of Idaho, the agency is required to demonstrate that the rules regulating the IPDES program meet minimum federal requirements. Note, if DEQ's IPDES program does not meet EPA's minimum requirements, EPA could impose sanctions on Idaho as outlined in the Clean Water Act ([33 USC 1342\(c\)](#)) including the delay in approving the IPDES program and once approved the withdrawal of approval of the IPDES program.

The following table summarizes the CFR sections the DEQ IPDES Program incorporates by reference. The federal regulations incorporated by reference will be updated with the July 1, 2023 CFR effective date. The July 1, 2023 CFR is a codification of federal regulations published in the Federal Register as of July 1, 2023.

Table 1: Rules incorporated by reference.

<u>40 CFR Part</u>	Title	Changes in effect July 1, 2023?	Impact on Idaho
122.2	Definition of Waters of the United States	No	—
122.21(r)	Application Requirements for Facility with Cooling Water Intake Structures	No	—
122.23	Concentrated Animal Feeding Operations	No	—
122.24	Concentrated Aquatic Animal Production Facilities	No	—
122.25	Aquaculture Projects	No	—
122.26	Storm Water Discharges	Yes	Yes
122.27	Silvicultural Activities	No	—
122.29(d)	Effect of Compliance with New Source Performance Standards	No	—
122.30 and 122.32 thru 122.37	Requirements and Guidance for Small Municipal Separate Storm Sewer Systems	Yes	Yes
122.42(e)	Additional Conditions Applicable to NPDES Permits for Concentrated Animal Feeding Operations	Yes	Yes
Appendix A to 122	NPDES Primary Industry Categories	No	—
Appendix C to 122	Criteria for Determining a Concentrated Aquatic Animal Production Facility	No	—
Appendix D to 122	NPDES Permit Application Testing Requirements	No	—
Appendix J to 122	NPDES Permit Testing Requirements for Publicly Owned Treatment Works	No	—
125.1 through 125.3	Criteria and Standards for Imposing Technology-Based Treatment Requirements under Section 301(b) and 402 of the Clean Water Act	No	—
125.10 and 125.11	Criteria for Issuance of Permits to Aquaculture Projects	No	—
125.30 through 125.32	Criteria and Standards for Determining Fundamentally Different Factors Under Sections 301(b)(1)(A) and 301(b)(2)(A) and (E) of the Clean Water Act	No	—
125.70 through 125.73	Criteria for Determining Alternative Effluent Limitations Under Section 316(a) of the Clean Water Act	No	—
125.80 through 125.89	Requirements Applicable to Cooling Water Intake Structures for New Facilities Under Section 316(b) of the Clean Water Act	No	—
125.90 through 125.99	Requirements Applicable to Cooling Water Intake Structure for Phase II Existing Facilities Under Section 316(b) of the Clean Water Act	No	—
127.11 through 127.16	Electronic Reporting of NPDES Information from NPDES-Regulated Facilities	Yes	Yes
129.1 through 129.105	Toxic Pollutant Effluent Standards and Prohibitions	No	—

40 CFR Part	Title	Changes in effect July 1, 2023?	Impact on Idaho
133.100 through 133.105	Secondary Treatment Regulation	No	–
136	Guidelines Establishing Test Procedures for the Analysis of Pollutants, including Appendices A, B, C, and D	Yes	Yes
401	General Provisions	No	–
403	General Pretreatment Regulations for Existing and New Sources of Pollution, Including Appendices D, E, and G	Yes	Yes
405 through 471	Effluent Limitations and Guidelines	Yes	Yes
503.2 through 503.48	Sewage Sludge, including Appendices A and B	Yes	Yes

These changes are discussed in more detail below. The associated Federal Register notices are denoted in parentheses as hyperlinks.

The following parts were revised and may impact on Idaho facilities:

EPA has updated the following parts of the CFR since the IPDES rules were last updated in 2020. These federal regulatory changes may impact the IPDES program process and procedures. These rulemakings include:

- NPDES Electronic Reporting Rule—Phase 2 Extension – **40 CFR Parts 122, 127, 403, and 503**
 - **(85 FR 69189, November 2, 2020)** – This rule postpones compliance deadlines for implementation of Phase 2 of the eRule. It also promulgates clarifying changes and eliminates some duplicative or outdated reporting requirements. Specific changes to the rule occur in:
 - 122.26 – Storm water discharges
 - 122.34 – Permit requirements for regulated small MS4 permits
 - 122.42 – Additional conditions applicable to specified categories of NPDES permits
 - 127.16 – Implementation of electronic reporting requirements for NPDES permittees, facilities, and entities subject to this part
 - 403.12 – Reporting requirements for POTW’s and industrial users
 - 503.18 – Reporting
 - 503.28 – Reporting
 - 503.48 – Reporting
- Clean Water Act Methods Update Rule for the Analysis of Effluent – **40 CFR Part 136**
 - **(86 FR 27226, May 19, 2021)** – This rule changes to test procedures required to be used by industries and municipalities when analyzing the chemical, physical, and biological properties of wastewater and other environmental samples for

reporting under EPA's NPDES permit program. Specific changes to the rule occur in:

- 136.3 – Identification of test procedures
- 136.6 – Method modifications and analytical requirements
- Steam Electric Reconsideration Rule – **40 CFR Part 423**
 - [**\(85 FR 64650, October 13, 2020\)**](#) – This rule provides regulation to revise the technology-based effluent limitations guidelines and standards (ELGs) for the steam electric power generating point source category applicable to flue gas desulfurization wastewater and bottom ash transport water. Specific changes to the rule occur in:
 - 423.11 – Specialized definitions
 - 423.12 – Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT)
 - 423.13 – Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT)
 - 423.16 – Pretreatment standards for existing sources (PSES)
 - 423.18 – Permit conditions
 - 423.19 – Reporting and recordkeeping requirements
- Effluent Limitation Guidelines and Standards for the Steam Electric Power Generating Point Source Category—Initial Notification Date Extension – **40 CFR Part 423**
 - [**\(88 FR 18440, March 29, 2023\)**](#) – This rule provides direct final action to extend the date for existing coal-fired power plants to submit a notice of planned participation (NOPP) for the permanent cessation of coal combustion subcategory in the 2020 Steam Electric Reconsideration Rule. Specific changes to the rule occur in:
 - 423.19 – Reporting and recordkeeping requirements

The remaining federal regulations (40 CFR) have not been changed or updated since the previous IPDES rule updates. DEQ proposes to update all federal regulations incorporated by reference with the July 1, 2023 CFR effective date, including the regulations that have not been revised since the most recent incorporation by reference. This will maintain consistency for all federal regulations listed in IDAPA 58.01.25.003.