

KINGSTON WATER DISTRICT

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Tyler Fortunati
Department of Environmental Quality
1410 N. Hilton
Boise, Idaho 83706

Mr. Fortunati,

Greetings. On behalf of the Kingston Water District, I would like to submit this correspondence as public comment on the proposed rule changes intended for the Idaho Rules for Public Drinking Water systems (Docket #58-0108-2301) published in the September 6, 2023, Idaho Administrative Bulletin.

The Kingston Water District was established in 1954. It is located in Shoshone County with 257 connections and approximately 580 residents. Although Kingston Water District is a smaller system, in 2008 the District undertook the construction of a new well facility with pH control and disinfection and a new storage reservoir (all mandated by DEQ). The project also included various other upgrades to our distribution system, including a new customer metering system. The project was approved by the Idaho Department of Environmental Quality (“DEQ”) prior to construction and all “as built” drawings were also approved after the project was completed. I am the licensed operator for our district and have been responsible for the operation, maintenance, and management of the system since 2004.

We are interested in commenting on the proposed changes to the definition of “Substantially Modified” in IDAPA 58.01.08 Section 003 (73), page 653 of the Administrative Bulletin.

The proposed revisions to the regulations describe the method DEQ would use to determine when a public drinking water system would be placed into substantially modified status and a percentage of increase (25%) that is incorporated into the decision-making process. A portion of the proposed new text states “Material

Modifications completed after July 1, 2007 are the only modifications counted towards the twenty-five percent (25%) increase”.

It would appear IDEQ intends to apply this proposed regulatory revision retroactively, in contradiction to Idaho Law. The Idaho Administrative Procedure Act, prior to 2023 Idaho House Bill 206 provided for retroactive application of a rule that was final and effective, when provided for in the rule. See former IC 67-5224(5)(a). House Bill 206 removed this language, which in turn also removed the legislative intent to allow final rules to be applied retroactively. ID LEGIS 314 (2023), 2023 Idaho Laws Ch. 314 (H.B.206).

Idaho Statute and case law provides that no law in Idaho will be applied retroactively in the absence of a clear legislative intent to that effect. IC 73-101; *Johnson v. Stoddard*, 96 Idaho 230, 234, 526, P.2d 835, 839 (1974). This principle applies equally to regulations. *Erickson v. Idaho Bd. of Licensure of Prof'l Engineers & Prof'l Land Surveyors*, 165 Idaho 644, 649, 450, P.3d 262 (2019) (quoting I.C. 54-1208 (Administrative rules cannot be “(i)nconsistent with the constitution and laws of this state”). Proposed IDAPA 58.01.08, Section 003 (73), does not provide clear legislative intent of retroactive application as required by Idaho law.

Also, the proposed text identifies “The total length of transmission and distribution mains” as one of the parameters taken into account when performing the 25% increase calculation (as indicated in the current definition of substantially modified). However, the proposed new definition includes the statement “Removal of existing system components will not be used to reduce the combine increase of (the) 25% calculation”.

This would mean, for example; that if a public water system implements changes to its distribution system that were to include abandonment of sections of distribution water mains, the length of the abandoned section would still be considered as part of the “total length of transmission and distribution water mains” for purposes of calculating the 25% increase determination. Another way to illustrate this scenario is as follows:

BEFORE CHANGES TO A WATER SYSTEM		AS A RESULT OF CHANGES TO A WATER SYSTEM		AFTER CHANGES TO A WATER SYSTEM	
50,000 Ft of TOTAL Length of water mains	MINUS	10,000 Ft of abandoned water mains	EQUALS	50,000 Ft of TOTAL Length of water mains	

The Kingston Water District understands DEQ's reasoning behind including linear footage of water mains that are new extensions of a water system, but disagrees with the inclusion of abandoned sections of water mains when performing the calculation for determining percentage of increases. Simply put, it is arbitrary and capricious to include abandoned water mains in the calculations; the abandoned water mains are no longer material to the public water system. This arbitrary and capricious proposal is compounded by DEQ's presumed attempt to apply the new rule on a retroactive basis.

To address these concerns, the Kingston Water District respectfully suggests the following solutions:

1. Remove the text "after July 1, 2007". Insert "After July 1, 2024" or some other future date after (or if) this proposed rule change is approved.
2. Remove the last sentence stating "Removal of existing components will not be used to reduce the combined increase of (the) 25% calculation."

If the proposed rule is adopted in its current form the Kingston Water District and potentially many other Idaho Water Districts will be considered a substantially modified system for actions taken in the past. This designation will have a profound and adverse effect on our community. For older water systems in Idaho, the change to substantially modified status brings enhanced and increased requirements for water system pressures, standby power sources, water reservoir storage capacity, and fire hydrant flow capacity. While these items may be legitimate concerns that may warrant consideration as a water system grows in size and population, it is unreasonable to require small water systems to bear the large financial burden of these mandated upgrades long before they are needed and their population has grown to a point where they can afford them.

In conclusion, the Kingston Water District would like to reiterate that we believe approval of this proposed rule, as it is currently stated, will have a detrimental impact on the lives of Idaho citizens in our small community and others throughout the State, while providing little to no obvious public health protection benefit.

We ask DEQ to re-evaluate whether the resulting impacts and costs of the proposed rule are justified by its anticipated benefits.

Finally, the Zero-Based Regulation requirements, established pursuant to Executive Order No. 2020-01, require the benefits of a regulatory revision be achieved, as well as reduce the overall regulatory burden, or remain neutral, as compared to the previous version of the regulation. The intent of Zero-Based Regulation is to reduce overall regulatory burden, streamline various provisions, increase clarity and ease of use, and maintain State program approval. As written, the proposed revisions addressing IDAPA 58.01.08 Section 302.03(c), page 671 of the Idaho Administrative Bulletin, do not support the Governor's specific goals for this rulemaking process.

We appreciate the opportunity to participate in the regulatory process through "Notice and Comment" method of involvement.

Sincerely,

A handwritten signature in blue ink, appearing to read "W. Jon Groth". The signature is fluid and cursive, with a large initial "W" and a stylized "G".

W. Jon Groth, Manager/Operator
Kingston Water District