

Idaho Pollutant Discharge Elimination System

Public Participation in the Permitting Process



**State of Idaho
Department of Environmental Quality**

February 2016



Printed on recycled paper, DEQ, February 2016,
PID IPGF, CA 82988. Costs associated with this
publication are available from the State of Idaho
Department of Environmental Quality in accordance
with Section 60-202, Idaho Code.

1 Introduction

The Idaho Department of Environmental Quality (DEQ) is developing a set of guidance documents to help the regulated community and DEQ easily understand and follow the procedures for successful implementation of the Idaho Pollutant Discharge Elimination System (IPDES) Program. The following document presents DEQ's draft guidance for public participation in the IPDES permitting process.

Idaho Code and IPDES rules (IDAPA 58.01.25) provide minimum standards for public participation opportunities. DEQ has broad authorities, however, to supplement its communication efforts beyond the legal minimums. This guidance document summarizes the legal minimums for public notification and comment opportunity. It then describes additional tools available to the agency for supplementing the legal minimums to optimize opportunities for effective participation in the permit decision-making process.

Specifically, this guidance is intended to do the following:

1. Provide an overview of the IPDES goals and objectives for protecting water quality in Idaho
2. Describe the basic public participation process for an IPDES permit
3. Describe supplemental public participation efforts, along with the applicable situations and tools
4. Discuss additional outreach with respect to IPDES permits that may be controversial, complex, or raise significant local concerns
5. Outline other actions to modify, revoke and reissue, or terminate permits, which may also include a public participation process
6. Briefly identify the IPDES appeals process
7. Discuss the IPDES web interface and Permit Issuance Plan (PIP), which will provide the public with advance notice of permits proposed to be issued or reissued

2 IPDES Program Goals and Objectives

Water Quality Standards. At the core of DEQ's efforts to protect water quality are Idaho's water quality standards (IDAPA 58.01.02). Those rules designate uses that are to be protected in and of the waters of the state and establish standards of water quality protective of those uses (IDAPA 58.01.02.001.02). They also include provisions for applying the standards. Any permit authorizing a discharge to waters of the United States in Idaho must result in compliance with the state water quality standards regardless of whether the US Environmental Protection Agency (EPA) or DEQ is issuing the permit.

While the water quality standards establish the goals for water quality to support beneficial uses, permit actions require decisions about how the standards are applied. For example, implementing provisions of the water quality standards requires decisions about the following:

1. The extent to which water quality may be degraded from high quality natural conditions under the state antidegradation policy
2. Whether to provide for mixing of an effluent within receiving waters

3. Whether standards should be modified to reflect conditions specific to a water body

Sound permitting decisions based on a complete understanding of local conditions is an intended and expected result of Idaho obtaining authorization to administer the National Pollutant Discharge Elimination System (NPDES) permitting program.

Enhance Access. As the state’s environmental permitting authority, DEQ intends to rely on input from residents, tribes, local governments, and other stakeholders to inform its permit decisions. An important goal in DEQ’s IPDES Program is to enhance public access to permit information and processes in order to produce better permits and better compliance with permit terms and conditions.

Equal Protection. An equally important objective of the IPDES permit development and administration process is to provide equal access and protections across the state despite different geographic, cultural, and socioeconomic characteristics of affected individuals or populations. The IPDES Program strives to provide an equal voice despite differences in the ability of persons to engage agency staff and decision makers and difficulties associated with communications over distances and across cultures.

Efficiency. At the same time, the IPDES permit issuance process must be efficient in how it informs the public, and in how it collects, considers, and responds to input. An efficient permit issuance system is one that is capable of clear and open communication with interested public participants and organizations, while maintaining a schedule for timely permit development and issuance. The process also should engage the interested public in a thoughtful and effective manner so as to be accessible and informative, but not a burden. An anticipated byproduct of these efforts is a high degree of public confidence in DEQ and the permits it issues and administers.

Because DEQ will not have delegated NPDES authority on tribal lands, tribes retain the government-to-government relationship they currently have with EPA. At the same time, the IPDES public participation process extends coordination efforts and opportunities to tribal governments regarding concerns about potential IPDES permits that may impact waters flowing across tribal lands.

Overarching Programs. Many larger projects, especially those that involve new development and invoke federal permitting or funding decisions, trigger broader environmental reviews that consider the range of potential project impacts on the environment, human health, and certain species and their habitats. In these cases, impacts on water quality, and the NPDES or IPDES permits intended to address those impacts, often comprise a subset of considerations under the broader review.

Rules that integrate environmental reviews include federal laws—such as the National Environmental Policy Act (NEPA), Endangered Species Act (ESA), Resource Conservation and Recovery Act (RCRA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)—along with state rules pertaining to the hazardous waste management program under “Rules and Standards for Hazardous Waste” (IDAPA 58.01.05), underground injection control program under “Rules and Minimum Standards for the Construction and Use of Injection Wells” (IDAPA 37.03.03), and “Rules for the Control of Air Pollution in Idaho”

(IDAPA 58.01.01). These environmental regulations often include early public education and outreach and create opportunities to engage with the public on water quality matters. DEQ strives to integrate its IPDES public communication efforts into the public participation processes undertaken as part of other overarching reviews and to take full advantage of those early public communication and engagement opportunities to consider water quality and wastewater discharge permitting issues.

Feedback, Assessment, and Continuous Improvement Process. A key aspect of DEQ's public engagement efforts will be a continuous improvement process based on comments and feedback from the public on the department's efforts. DEQ will use those comments and feedback to assess the efficacy of informing and engaging the public and adapt approaches based on the public's view of what works best. The objective is a public engagement process that evolves in response to public need. DEQ will solicit and capture comments and feedback during and after key permitting efforts. Comments and feedback will be compiled, analyzed, and provided to the public in response-to-comments documents, which will also illuminate lessons learned and help improve future efforts.

Recordkeeping. DEQ will document public and agency communications and key public concerns and identify how those concerns were addressed. Documentation of public interest will be included as part of the administrative record along with agency responses, actions, decisions, and supporting information. DEQ will maintain an official record of each permitting action and make those records readily available to the public via internet posting.

Training. Training for IPDES personnel in effective permit-centered communications will be another key element supporting an effective IPDES Program. DEQ will employ in-house and external training opportunities for IPDES personnel in effective communication techniques. A basic level of communications training will be mandatory for all IPDES personnel. Supplemental training opportunities will also be offered. DEQ envisions creating training tools, such as recordings of training sessions, that can be used as a reference outside of live training sessions.

Applicability of this Plan. In general, the supplemental communication tools described in this document (section 5) will apply to the permitting process for individual and general permits but not to the approval of notices of intent (NOIs) for an individual facility to operate under a general permit. However, these tools may also be applied in instances where an NOI for an individual facility to operate under a general permit already invokes a public notice and comment process.

Early Notification of IPDES Actions. The most effective time for public outreach is early in the permitting process. Engaging others early on improves the odds of identifying and addressing issues and formulating solutions that may need to be accounted for in a permit. DEQ will be mindful of the advantages of communicating with the public and interested organizations early in the permit process.

DEQ seeks to be proactive in the IPDES permitting process. A Permit Issuance Plan (PIP) will be posted on the DEQ website and updated biannually. The PIP is a list of all permits proposed to be issued or reissued during a calendar year. The PIP will be posted on DEQ's website and e-mailed to local contacts and any interested party upon request.

3 Basic Public Process

Although DEQ may use additional communication tools, as described throughout this document, the basic process providing for public participation on an IPDES permit (either individual or general permit) is identified in IDAPA 58.01.25. This process begins once a draft permit has been prepared. Each step in the required process is described below.

Draft Permit. Notice that a draft permit is available initiates a minimum 30-day public review and comment period (IDAPA 58.01.25.109.01.a–c). This public notice is provided by a combination of mailings to the applicant, certain listed state and federal agencies, affected Indian tribes, any users identified in the permit application or a privately owned treatment works, persons who specifically request to be kept on the mailing list, and any local government having jurisdiction over the area where the facility is located. DEQ may also provide notice of opportunities on the department’s website, through mailing lists, and by periodic publication in newspapers, regional and state-funded newsletters, environmental bulletins, state law journals or similar publications, or any other method reasonably calculated to give notice of the action to persons potentially affected (IDAPA 58.01.25.109.01.d).

The permit application, draft permit, and fact sheet describing the terms of the permit will be available during the public comment period (IDAPA 58.01.25.109.01.d). DEQ may schedule a public meeting on the draft permit if there is significant public interest, an interested party requests in writing a public meeting within the first 14 days of the public comment period (IDAPA 58.01.25.109.02.b.), or for other good reason (IDAPA 58.01.25.109.01.i).

Proposed Permit. After the close of the minimum 30-day public comment period, DEQ considers information provided by the public, prepares a document summarizing the public comments received on the draft permit, and may make changes to the draft permit. After the public comment period and prior to issuing the final permit decision, DEQ will give the applicant an opportunity to provide additional information to respond to public comments. DEQ may request more information from the applicant in order to respond to public comments (IDAPA 58.01.25.109.02.h.). However, new data and information provided by any party may necessitate another public comment period if it results in substantive changes to the draft permit.

DEQ will then develop a proposed permit. EPA may take up to 90 days to provide specific grounds for objection of a proposed permit. If EPA objects to a proposed permit, any state, interstate agency, or interested person may request EPA to hold a public hearing regarding the objection. Additionally, DEQ may submit a revised permit that meets EPA’s objections. However, EPA may issue the final permit if DEQ does not submit a revised permit that meets EPA’s objections within the time periods specified in the NPDES memorandum of agreement between EPA and DEQ (40 CFR §123.44).

Final Permit. Following the close of the public comment period(s) on a draft permit, and after receipt of any comments on the proposed permit from EPA, DEQ will issue a final permit decision and fact sheet. A final permit decision means a final decision and the final permit action to issue, deny, modify, revoke and reissue, or terminate a permit (IDAPA 58.01.25.107.04.). The final permit, response to comments, revised fact sheet, and associated permit documents will be posted on the DEQ webpage.

Accommodations for Persons with Disabilities. DEQ will comply with the Americans with Disability Act (42 USC 12101–12213). A person with a disability can request and receive special accommodation to participate in the permit process.

4 Supplemental Public Processes

As part of IPDES communication efforts, DEQ is committed to exercising its authority to accomplish the objectives of more efficient and precise permits, and parity in water quality protection across the state. This section describes when DEQ will supplement its public participation efforts and the tools available for that purpose.

Additional public outreach is typically most appropriate for proposed projects that raise significant local concerns or are complex or controversial. Some circumstances that may warrant additional public outreach on permitting matters include the following:

- Large, complex projects with multiple permitted discharges
- Projects that are locally or regionally important or controversial
- Projects that raise recreational or other resource and use concerns
- Projects that are proximal to sensitive or protected resources or areas
- Projects that may involve the use of new or complex technologies

In deciding whether to supplement permit communications, the primary consideration will be the degree of interest expressed by the public, tribal organizations, nongovernmental organizations, local and regional governments, and other stakeholders. DEQ will also consider the views of the applicant and other state and federal agencies.

In all its communications, DEQ will strive to communicate factually and clearly. By planning ahead, DEQ will also strive to schedule communication processes so they do not adversely affect permit development schedules. At the same time, DEQ will attempt to schedule proposed actions and opportunities for public involvement to reasonably accommodate interested parties.

5 Supplemental Communication Tools

DEQ has several tools to supplement required permit communications. Some of these supplemental tools will always be used, while others are optional. In some cases, supplemental communications may rely on invoking a single supplemental activity such as extending review periods or holding public meetings or workshops during the draft permit comment period. In other cases, DEQ may combine a number of supplemental efforts and regulatory requirements into a project *permit plan*. Permit plans may integrate communications required by IPDES rules with supplemental communication tools into a single overall plan for engaging the public on a permit matter. Permit plans would primarily be used for large, complex, and controversial projects but may be developed for other permit projects where it would help interested parties understand the breadth and sequence of all opportunities to learn about, discuss, and comment on a permitting project.

Preliminary Draft Permit. Prior to formal public notice of a draft IPDES permit, DEQ will post the notice of a forthcoming draft permit on the DEQ website and provide a permit applicant 10 business days to review the preliminary draft permit, unless the review period is waived in part or in whole by the applicant. In some cases, DEQ may allow the applicant a longer preliminary draft review period for complex permits. While this is primarily intended for the applicant to review and discuss any errors and omissions in the preliminary draft permit with DEQ, it also gives the public an early 10-day notice of the developing draft permit.

Project Representation. IPDES permitting and compliance personnel will provide project representation to help achieve goals of early communication with affected residents and organizations, provide continuity in communications, and gather meaningful information. These actions are intended to anticipate public communication needs and design and implement effective participatory processes. Responsibilities for these project representatives include maintaining lists of persons and organizations interested in being apprised of developments; maintaining contact with interested persons and organizations through face-to-face meetings; informing persons and organizations of status and progress; fostering the flow of information to and from the department and the applicant or permittee; serving as an accessible agency point of contact; and arranging for meetings, conference calls, and other forums to enhance communications.

Pre-application Process. Any person who intends to apply for a permit or who proposes to discharge a pollutant into the waters of the United States in Idaho should contact DEQ to schedule a meeting prior to submitting an application. This pre-application process (IDAPA 58.01.25.104) takes place before a permit application is submitted, involves the voluntary participation of the permit applicant, and serves three purposes: (1) determine whether the activities or facility will require an IPDES permit and whether other suitable permitting options are available (e.g., reuse, discharge to ground water, elimination of the discharge); (2) identify the IPDES permit application requirements; and (3) identify the IPDES permit application submittal schedule. The number of pre-application meetings can range from a single event to a series depending on the situation and may include discussion of plans for, or results of, baseline monitoring efforts.

Public Meetings. IPDES rules provide DEQ with discretion to hold public meetings during the public comment period on draft permits. Public meetings can provide a more convenient means for the public to comment on a permit. They also afford an opportunity for members of the public to hear from other members and organizations. In accordance with IPDES rules (IDAPA 58.01.25.109.02.b), DEQ will hold a public meeting whenever it finds, on the basis of requests, a significant degree of public interest in a draft permit. DEQ may also hold a public meeting if it might clarify one or more issues involved in the permit decision or for other good reason in DEQ's discretion.

Supplemental Notice and Information. The IPDES rules include both prescribed and optional methods for notifying the public of the availability of draft IPDES permits (IDAPA 58.01.25.109.01.d.iii). DEQ will strive to identify and employ the most effective ways to notify interested individuals and parties of permit actions and other matters. Notification will typically consist of some combination of posting on the DEQ website, individual notification via mailings or e-mail, advertisements in local or regional publications, and press releases. In more rural settings, DEQ will consider working with local government and residents to spread the word by

whatever means is most effective for the community, such as bulletin board postings or local government announcements.

For larger or more controversial projects, DEQ will compile lists of interested individuals and parties. DEQ's experience suggests that maintaining lists of e-mail addresses for interested parties and organizations and communicating via e-mail is an effective and efficient means of keeping the public informed. DEQ will also use the internet to make information available to the public.

Tribal Government Coordination. DEQ will make reasonable efforts to inform and seek participation from federally recognized tribal governments that may be affected by a proposed activity under the IPDES Program (IDAPA 58.01.25.109.01.d.i.(3)). This coordination will be accomplished by providing notice of a forthcoming permit action. The advance notice will be provided by mail or any other method reasonably calculated to give actual notice of the action in question. In addition to procedural matters, initial coordination efforts will focus on early identification of local interests and general concerns.

Extended Public Comment Periods. While IPDES rules require a minimum 30-day public comment period on draft permits (IDAPA 58.01.25.109), DEQ may extend a comment period if a request is received in writing by the department prior to the last day of the comment period (IDAPA 58.01.25.109.02.g). DEQ will extend comment deadlines or provide supplemental public comment opportunities consistent with IDAPA 58.01.25.109 when the commenter requesting additional time demonstrates the need for such time or when there is significant public sentiment that the initial time allotted was insufficient for reasons unknown to or unforeseen by DEQ when it initially established the schedule. At the same time, DEQ will weigh the benefits of longer public comment periods against impacts of project and permit schedules.

6 Other Permit Actions: Modify, Revoke and Reissue, or Terminate

In addition to issuing IPDES permits, DEQ may take other actions to modify, revoke and reissue, or terminate permits, which may include a public participation process.

Modify or Revoke and Reissue. DEQ may modify or revoke and reissue an active permit for specific reasons identified in IDAPA 58.01.25.201.02. DEQ will follow the same public involvement procedures used for new permits when it modifies or revokes and reissues an existing permit, with the exception of minor modifications (IDAPA 58.01.25.201.03), which do not require the development of a draft permit, fact sheet, or public notification and comment. The minor modification provision is restricted to a very narrow range of truly minor changes.

When DEQ modifies a permit, interested parties will have the opportunity to review the draft and final permit modifications and request a public meeting. In a permit modification, only those conditions to be modified are reopened. All other aspects of the existing permit remain in effect for the duration of the unmodified permit (IDAPA 58.01.25.201.01.b.ii). However, when a permit is revoked and reissued, the entire permit is reopened just as if the permit had expired and was being reissued. During any revocation and reissuance proceeding, the permittee must

comply with all conditions of the existing permit until a new final permit is reissued (IDAPA 58.01.25.201.01.b.iii).

Terminate. Permits may be terminated either at the request of any interested person (including the permittee) or upon the department's own initiative. All requests for termination must be in writing and contain facts or reasons supporting the request. However, permits may only be terminated for the reasons specified in IDAPA 58.01.25.203.03 or 04. If DEQ tentatively decides to terminate a permit, it will issue a notice of intent to terminate, make it available for public comment, and give notice of an opportunity for public meetings (IDAPA 58.01.25.109).

7 Appeals

The public has access to a permit appeals process (IDAPA 58.01.25.204). Appeal of a final IPDES permit decision begins by filing a petition for review with DEQ's hearing coordinator within 28 days after DEQ serves notice of the final permit decision. Only a person who is aggrieved by the final permit decision (i.e., the permit holder or applicant and any person or entity who filed comments or who participated in the public meeting on the draft permit) may file a petition for review. Ultimately, any person aggrieved by a final department action or determination has a right to judicial review by filing a petition for review (IDAPA 58.01.25.204.26).

7.1 Citizen Action

The citizen suit provisions of Clean Water Act §505 allow citizens to commence a civil action against any person who is alleged to be in violation of an effluent standard or limitation or an order issued by EPA or a state with respect to such a standard or limitation. The citizen suit provisions allow citizens to sue a person in violation of a state-issued NPDES permit and therefore would be available with respect to a violation of IPDES permits. (See *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993 [11th Cir. 2004].)

8 Additional Ways to Stay Informed

Permit Issuance Plan. DEQ will prepare a PIP that identifies the permits the department proposes to issue during the upcoming year. The PIP will be updated annually and posted on DEQ's webpage, with notification sent via the electronic mailing list that the PIP is available for review. This process will allow the public advance notice of a permit that is proposed to be issued or reissued and the opportunity to contact DEQ to discuss the project or schedule a meeting.

IPDES Web Interface. DEQ is developing an IPDES web interface that will provide the general public with electronic access to most publically available information pertaining to permits. In this web interface, users will be able to search for, view, and download information and documents pertaining to applications, permits, facilities, compliance, inspection, and enforcement. This tool will allow the public to easily locate specific information of interest, thereby reducing the need for public records requests.