

Overview of Incorporations by Reference for the DEQ IPDES Program, Docket No. 58-0000-2000F

IDAPA 58.01.25, Rules Regulating the Idaho Pollutant Discharge Elimination System Program

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 Program during the 2016 Legislative session. DEQ is now proposing rulemaking to 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, 2020. 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 in the last 36 months, including regulations for testing procedures approved for analysis and sampling, best available technology economically achievable ("BAT") effluent limitations and pretreatment standards for existing sources ("PSES"), technology-based pretreatment standards to reduce discharges of mercury from dental offices into municipal sewage treatment plants, and final rule defining the scope of waters federally regulated under the Clean Water Act.

Reproducing the Code of Federal Regulations (CFR) in state rule is impractical and costly. Therefore when possible, and as supported by Idaho stakeholders, 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 Code of Federal Regulations (CFR) sections the DEQ IPDES Program incorporates by reference. The federal regulations incorporated by reference will be updated with the July 1, 2020 Code of Federal Regulations (CFR) effective date. The July 1, 2020 CFR is a codification of federal regulations published in the Federal Register as of July 1, 2020.

Table 1: Rules incorporated by reference

40 CFR Part	Title	Changes in effect July 1, 2020?	Impact on Idaho
122.2	Definition of Waters of the United States	Yes	Yes
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	No	—
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	No	—
122.42(e)	Additional Conditions Applicable to NPDES Permits for Concentrated Animal Feeding Operations	No	—
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	No	—
129.1 through 129.105	Toxic Pollutant Effluent Standards and Prohibitions	No	—
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	No	—
405 through 471	Effluent Limitations and Guidelines	Yes	Yes
503.2 through 503.48	Sewage Sludge, including Appendices A and B	No	—

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 several parts of the CFR since the Rules Regulating the Idaho Pollutant Discharge Elimination System (IPDES) rules were last updated in 2017. These federal regulatory changes may impact the IPDES program process and procedures. These rulemakings include the:

- **Effluent Limitations Guidelines and Standards for the Dental Category – 40 CFR Part 405 through 471**
 - [\(82 FR 27154, June 14, 2017\)](#) – This final rule controls mercury discharges to POTWs by establishing a performance standard for amalgam process wastewater based on the use of amalgam separator technology. The rule also requires dental dischargers to adopt two BMPs, one which prohibits the discharge of waste (“or scrap”), and the other which prohibits the use of line cleaners that may lead to the dissolution of solid mercury when cleaning chair-side traps and vacuum lines. Specific changes to the rule occur in:
 - 441.10 – Applicability
 - 441.20 – General definitions
 - 441.30 – Pretreatment standards for existing sources (PSES)
 - 441.40 – Pretreatment standards for new sources (PSNS)
 - 441.50 – Reporting and recordkeeping requirements
- **Clean Water Act Methods Update Rule for the Analysis of Effluent – 40 CFR Part 136**
 - [\(82 FR 40836, August 28, 2017\)](#) – This final rule modifies the testing procedures approved for analysis and sampling under the Clean Water Act. The changes fall into the following categories:

- New and revised EPA methods (including published by voluntary consensus standard bodies, such as ASTM International and the Standard Methods Committee);
 - Updated versions of currently approved methods;
 - Methods reviewed under the alternate test procedures (ATP) program;
 - Clarifications to the procedures for EPA approval of nationwide and limited use ATPs; and
 - Amendments to the procedure for determination of the method detection limit to address laboratory contamination and intra-laboratory variability.
- Specific changes to the rule occur in:
 - 136.1 – Applicability
 - 136.2 – Definitions
 - 136.3 – Identification of test procedures
 - 136.4 – Application for and approval of alternate test procedures for nationwide use
 - 136.5 – Approval of alternate test procedures for limited use
 - 136.6 – Method modifications and analytical requirements
 - Appendix B to Part 136—Definition and Procedure for the Determination of the Method Detection Limit
- Postponement of Certain Compliance Dates for the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category – **40 CFR Part 405 through 471**
 - ([82 FR 43494, September 18, 2017](#)) – This rule postpones the associated compliance dates in the November 3, 2015 Rule. In particular, EPA is postponing the earliest compliance dates for the new, more stringent, BAT effluent limitations and PSES for flue gas desulfurization (FGD) wastewater and bottom ash transport water in the 2015 Rule for a period of two years. However, EPA this does not revise the new, more stringent BAT effluent limitations and pretreatment standards in the 2015 Rule for fly ash transport water, flue gas mercury control wastewater, and gasification wastewater, or any of the other requirements in the 2015 Rule. Specific changes to the rule occur in:
 - 423.11 – Specialized definitions
 - 423.13 – Pretreatment standards for existing sources (PSES)
 - 423.16 – Pretreatment standards for new sources (PSNS)
- The Navigable Waters Protection Rule: Definition of “Waters of the United – **40 CFR Part 122**
 - ([85 FR 22250, April 21, 2020](#)) – This final rule defines the scope of waters federally regulated under the Clean Water Act. The Navigable Waters Protection Rule is the second step in a comprehensive, two-step process intended to review and revise the definition of “Waters of the United States.” Specific changes to the rule occur in:
 - 122.2 - Definitions

The remaining federal regulations (40 CFR) have not been changed or updated since the previous IPDES negotiate rulemaking. DEQ proposes to update all federal regulations incorporated by reference with the July 1, 2020 CFR effective date, including the regulations that have not been revised since the initial incorporation by reference. This will maintain consistency for all federal regulations listed in IDAPA 58.01.25.003.