

water

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Visit our webpage:

[www.idahowaterpolicygroup.org](http://www.idahowaterpolicygroup.org)

### **Upcoming Events**

**May 19 & 20:** 2010 Idaho Water Reuse Conference, "Municipal and Industrial Solutions", Boise  
Register at [www.dea.idaho.gov/2010IdahoWaterReuseConference](http://www.dea.idaho.gov/2010IdahoWaterReuseConference)

**May 20:** Treasure Valley CAMP, Location TBA, 9 a.m.  
**May 24-28:** IGWA WD 120 Mitigation Plan & SWC/BOR Objections, Boise IDWR

**May 25:** Idaho Primary  
**May 26:** Storage Subcommittee, Boise Idaho Water Center, 3 p.m.

**May 27-28:** IWRB Meeting, Boise IDWR, 8:30 a.m.

**June 2:** Antidegradation Negotiated Rulemaking, Boise IDEQ Conf. Rm D, 9 a.m. to 3 p.m.

Idaho Department of Environmental (IDEQ) opened this second Antidegradation meeting by reiterating its objective to develop a consensus-based rule that its board, the Idaho legislature and Environmental Protection Agency (EPA) can approve. However, the agency asserted its authority to make the final decisions, especially where consensus was absent and in those gray areas where state and federal regulations or the courts do not offer a clear path forward.

**Process:** Stakeholders, however, were initially more focused on the process the agency will use to determine who and what defines consensus, noting that the process could impact the regulated community's support for the rule before the board and the legislature and that the legislature will also want to understand the process used to develop the rule. Stakeholders also noted the difficulty of negotiating in good faith while a lawsuit is on-going was also raised.

IDEQ agreed to put together a structure and framework along with the major topics to present for the next meeting. It was also noted that EPA could withhold its final approval until the rule is implemented although it is unclear as to whether or not that may happen here.

**Second Draft:** The second draft incorporates public comments received through April 28th and may be viewed on IDEQ's website. The most significant change in this draft is that IDEQ struck the policy statement in Draft No. 1 and reverted to the language that is already part of existing Idaho Code. Draft rule sections 051.04 Restoration Projects, 051.05 Emergency Actions and 051.06 Implementation were also discussed.

In discussing the draft and proposed changes, the stakeholder's primary concern is that the rule provides clarity and certainty with respect to interpretation and definitive, specific processes for compliance. IDEQ sees the rule as the foundation for antidegradation policy and implementation and intends to build more detailed information into the guidance that will follow.

While IDEQ needs a rule that complies with applicable state and federal regulations and the provisions of the Clean Water Act (CWA), stakeholders want to ensure that rule does not broaden or expand IDEQ's regulatory authority and remains confined to point source activities.

Part of that discussion centered around how Idaho and the CWA define surface water bodies and who has authority over those water bodies. The rule does not directly address ground water, but could potentially have impacts if one considers, for example, the interconnectivity of surface and ground water. IDEQ was asked to clarify how the rule would impact the 401, 404 and 303d listings, IDEQ permits and Outstanding Resource Water or Special Water designations within the state.

Another discussion centered whether the terms "lowering water quality" or "anti-degradation" best describes this rule's intent. Lowering water quality may not be as easily measured, especially in assessing future impacts, while antidegradation demonstrates measurable change. Idaho Conservation League questioned whether recent court decisions will allow any lowering of water quality under an anti-degradation policy. The final language could necessitate a statutory amendment be adopted in conjunction with the rule. The Attorney General's office was asked to provide further research on the language and possible statutory change. The final rule and guidance will also be subject to an attorney general review.

With respect to the specific sections discussed at this meeting, under Section 51.04 Restoration, IDEQ is considering the development of Memorandums of Agreement with various agencies. Stakeholders asked for clarification with respect to impacts of exemptions to downstream permit holders.

EPA is questioning the need to include Section 51.05 Emergency Actions. If included, stakeholders asked the agency to address their full intent and how they would address damages.

Section 51.06 Implementation triggered much of the discussion on lowering water quality and stream designations.

**Interim Anti-degradation Procedure:** Because there are NPDES permits currently before the agency, IDEQ has worked with EPA to develop an interim anti-degradation procedure. The procedure is posted on its website for transparency, but is not intended to be a model for this rulemaking. Depending on the outcome of the rulemaking, that procedure may need to be modified.

**Next Meeting:** The next negotiated rulemaking meeting is scheduled for June 2, 2010 from 9 a.m. to 3 p.m. at IDEQ's Boise office. Teleconferencing is available at the regional offices. The meeting will address the developing an implementation plan using a water body by water body criteria or contaminant parameters. IDEQ will distribute a White Paper on the subject outlining the pros and cons associated with both and explaining their preference for using contaminant parameters. If it is available and there is time, there may also be further discussion on the definition of "lower water quality".

**Comments:** Comments received on or before May 19th will be incorporated in the draft discussed at the June 2nd meeting. Comments may be submitted at any time during this process.

Information relating to this negotiated rulemaking is available on IDEQ's website. That information contains a table IDEQ is developing to compare what is being done in other states. The website link is: [http://www.deq.state.id.us/rules/water/58\\_0102\\_1001\\_negotiated.cfm](http://www.deq.state.id.us/rules/water/58_0102_1001_negotiated.cfm)