

**Department of Environmental Quality
Water Quality Standards
IDAPA 58.01.02**

Docket No. 58-0102-2001

Negotiated Rulemaking Summary
[Idaho Code § 67-5220\(3\)\(f\)](#)

This rulemaking was initiated to (1) revise water quality criteria based on stakeholder comments and concerns regarding the implementation of the bacteria criteria, and (2) delete obsolete rule language.

On April 1, 2020, the notice of negotiated rulemaking was published in the Idaho Administrative Bulletin and posted on DEQ's website. A meeting was held on May 7, 2020. On June 8, 2020, a preliminary draft rule was posted on DEQ's website. One additional meeting was held on June 11, 2020. Stakeholders and members of the public participated by signing up for email notifications, attending the meetings, and submitting comments. Key information was posted on DEQ's website and distributed to persons who participated in the negotiated rulemaking.

All comments received during the negotiated rulemaking process were considered by DEQ when making decisions regarding the development of the rule. Certain issues remain unresolved and are summarized in the attached response to comments document. At the conclusion of the negotiated rulemaking process, DEQ submitted the draft rule to the Division of Financial Management to review for compliance with [Executive Order No. 2020-01, Zero-Based Regulation](#). Based on that review, DEQ has formatted the draft for publication as a proposed rule. DEQ is now seeking public comment on the proposed rule. The negotiated rulemaking record, which includes the negotiated rule drafts, documents distributed during the negotiated rulemaking process, and the negotiated rulemaking summary, is available at deq.idaho.gov/58-0102-2001.

DEQ's Response to Comments/Negotiated Rulemaking Summary
Docket No. 58-0102-2001

1. Association of Idaho Cities (AIC)
2. Idaho Ground Water Appropriators, Inc. (IGWA)
3. U.S. EPA Region 10
4. United States Geological Service (USGS)

Cmt #	Rule Section/ Subject Matter	Commenter	Comment Summary	Response
1.	Public Swimming Beaches	1. 2.	AIC and IGWA suggest that the best path forward is for Idaho to adopt a "swimming standard" for recreation advisories and public beach closures by the Idaho health districts (i.e., utilizing a STV); and a "recreational use standard" for beneficial use support determinations that are based on a 90-day averaging period, coupled with minimum data requirements (i.e., 5 to 10 samples), so that the STV or geomean may be applied with "equal weight," while not impacting the accuracy of the Idaho beneficial use support determinations.	<p>Thank you for your comment. In many waters throughout Idaho, the primary time period for recreational use may not extend 90 days. DEQ is proposing a geometric mean based on a minimum of five (5) samples taken every three (3) to eleven (11) days over a forty-five (45) day period. DEQ has revised the proposed rule to extend the duration from 30 to 45 days. DEQ believes this better represents risk to recreational users in Idaho.</p> <p>While Idaho rule does not have a "swimming standard" for beach closures, DEQ added the following, previously deleted, language at Subsection 251.02.c: "For public swimming beaches, a single sample value of two hundred thirty-five (235) <i>E. coli</i> counts per one hundred (100) mL should be used in considering beach closures." However, this subsection will not be a water quality standard submitted to EPA for approval for Clean Water Act purposes.</p>

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2.	Minimum number of samples	1.	<p>AIC is concerned about the implementation of the post-2019 criteria to assess whether chronic, human-caused sources of bacteria or viruses necessitate the development of a Total Maximum Daily Load (TMDL) to restore public safety. AIC wishes to respectfully remind DEQ staff of the underpinning reasons why the pre-2019 criteria clarified that the “single sample maximum (SSM) is not a criteria, and exceedance of the SSM alone” was “not considered a criterion violation.” (Pre-2019 IDAPA, as cited on slide 11 in the May 7, 2020 DEQ presentation). The underlying reasons for this provision are well documented in the public record when the pre-2019 criteria were adopted, and directly relate to how the concentrations of these organisms are extremely variable at both temporal and spatial scales. This variability poses a significant challenge in the development of both the pre-2019 and post-2019 criteria, which has been resolved throughout the United States and world using a statistical model of indicator organisms for exposure risk.</p> <p>AIC does not support the adoption of statistically based criteria without a corresponding required minimum number of samples to assess whether chronic, human-caused sources of bacteria or viruses necessitate the development of a Total Maximum Daily Load (TMDL) to restore public safety.</p> <p>AIC requests that the post-2019 rule language be revised to specify that a minimum of 5 samples are required prior to applying any criterion, and to clarify that a single sample that exceeds an STV alone will not be considered a criterion violation.</p>	<p>DEQ’s proposed rule includes the following data sufficiency statements that will clarify the rule for both DEQ staff and the public. “The geometric mean of thirty-five (35) enterococci [or 126 <i>E. coli</i>] counts per one hundred (100) mL based on a minimum of five (5) samples taken every three (3) to eleven (11) days over a forty-five (45) day period;”</p> <p>DEQ’s proposed rule, IDAPA 58.01.02.251.02 extends the duration from 30 days to 45 days, to allow for the collection of additional samples to ensure they are representative of longer-term ambient conditions while taking into consideration Idaho’s recreational use season.</p> <p>Beneficial uses become designated beneficial uses through the rulemaking process and communicate a desired water quality to future perimeters and dischargers. The proposed rule does not require beneficial use determinations be made on a single sample. The rule, as proposed, includes a 10% excursion frequency component, meaning that an exceedance only occurs if more than 10% of the samples taken exceed the applicable criterion. It also provides for additional sample collection prior to making a final recreation use determination, and does not require any action based on a single sample, but rather based on the 10% excursion frequency. DEQ has proposed the following rule language to clarify, “When considering an STV exceedance, the department shall ensure that representative samples have been collected to represent the forty-five (45) day duration.”</p> <p>During discussions about averaging periods, concerns about determining permit compliance arose due to the 30-day reporting period. In response, DEQ has proposed rule language (IDAPA 58.01.02.251.02.c.) that stipulates, “When comparing effluent bacteria samples to the criteria, the averaging period shall be thirty (30) days or less based on a minimum of five (5) samples.”</p>

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3.	IDAPA 58.01.02. 251.02.c.	3.	<p>EPA's criteria recommendations are for both a geometric mean and STV (rather than just a geometric mean or just an STV) because used together these criteria indicate whether the water quality is protective of the designated use of primary contact recreation. Using the geometric mean alone may not adequately protect against spikes in bacteria loads because the geometric mean alone is not sensitive to them</p> <p>As written, IDAPA 58.01.08.251.02.c [sic] would result in using the geometric mean to supersede the STV and therefore, would not be consistently protective of the designated use. EPA recommends DEQ delete IDAPA 58.01.08.251.02.c [sic].</p>	Thank you for your comment. DEQ has removed this proposed rule language.
4.	Variances	3.	<p>EPA supports DEQ's proposal to delete the rule language at IDAPA 58.01.08.260.02 [sic] related to specific variances that EPA had disapproved on May 7, 2010. However, there are parts of DEQ's variance regulations that are not consistent with the water quality standards variance regulations at 40 CFR 131.14.</p> <p>EPA recommends DEQ consider updating the state's current variance regulations to incorporate the elements of the federal variance regulations that are not in DEQ's current variance regulations, as appropriate.</p>	DEQ will not be considering updates to the current variance regulations at this time, as it is outside of the scope of the current negotiated rulemaking.
5.	STV and Geometric Mean	3.	EPA interprets the 2019 rule and the proposed rule revisions to mean that the STV and geometric mean for each 30-day period are calculated from the same data distribution. EPA requests that DEQ confirm this interpretation.	It is correct that the STV and geometric mean are calculated from the same data distribution set; however, DEQ's new proposed rule calls for an STV and geometric mean with a 45-day distribution.

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6.	STV and Geometric Mean	3.	The DEQ added “or” to the proposed rule language at IDAPA 58.01.08.251.02.a.i [sic] and b.i. The EPA interprets the proposed rule language to mean that for each indicator there are two components, geometric mean and statistical threshold value, and that each are independently applicable. This methodology is consistent with the EPA’s criteria recommendations. The EPA requests that DEQ confirm this interpretation.	DEQ confirms EPA’s interpretation of the proposed rule language to mean that for each indicator there are two components, geometric mean and statistical threshold value, and that each are independently applicable.
7.	STV exceedance	4.	The old rule language included provisions for trigger values, wherein a bacteria sample exceeded a STV would trigger a responsibility for further monitoring by the Department. While not explicit to the present rule language, the concept of triggering accelerated monitoring has some merit, especially for popular recreation areas. If a [sic] organization such as ours detects an exceedance of a STV, does DEQ wish to be notified? If so, that expectation would be helpful to communicate, such as via web materials. Depending on scheduling, travel distance, availability, and such, we might be able to resample upon request. But if not asked, we are unlikely to re-sample, and if we don’t tell DEQ of a STV exceedance, DEQ is unlikely to ask.	Thank you for your comment. Yes, DEQ does want to be notified when an organization such as USGS detects and exceedance of an STV. In the future, DEQ will consider ways to better communicate with other agencies regarding exceedances and resampling.