

Dear Senators BAIR, VICK, Stennett, and
Representatives THOMPSON, Anderst, Smith:

The Legislative Services Office, Research and Legislation, has received the enclosed rules of the Department of Environmental Quality:
IDAPA 58.01.11 - Ground Water Quality Rule - Temporary and Proposed Rule (Docket No. 58-0111-1501).

Pursuant to Section 67-454, Idaho Code, a meeting on the enclosed rules may be called by the cochairmen or by two (2) or more members of the subcommittee giving oral or written notice to Research and Legislation no later than fourteen (14) days after receipt of the rules' analysis from Legislative Services. The final date to call a meeting on the enclosed rules is no later than 06/23/2015. If a meeting is called, the subcommittee must hold the meeting within forty-two (42) days of receipt of the rules' analysis from Legislative Services. The final date to hold a meeting on the enclosed rules is 07/22/2015.

The germane joint subcommittee may request a statement of economic impact with respect to a proposed rule by notifying Research and Legislation. There is no time limit on requesting this statement, and it may be requested whether or not a meeting on the proposed rule is called or after a meeting has been held.

To notify Research and Legislation, call 334-4834, or send a written request to the address on the memorandum attached below.



Eric Milstead
Director

Legislative Services Office Idaho State Legislature

Serving Idaho's Citizen Legislature

MEMORANDUM

TO: Rules Review Subcommittee of the Senate Resources & Environment Committee and the House Environment, Energy & Technology Committee

FROM: Principal Legislative Research Analyst - Katharine Gerrity

DATE: June 04, 2015

SUBJECT: Department of Environmental Quality

IDAPA 58.01.11 - Ground Water Quality Rule - Temporary and Proposed Rule (Docket No. 58-0111-1501)

The Department of Environmental Quality submits notice of temporary and proposed rule at IDAPA 58.01.11 - Ground Water Quality Rule. According to the department, rulemaking has been initiated for consistency with the 2015 revision to Section 39-102, Idaho Code, as a result of the passage of HB 197. The department notes that the rule clarifies that degradation of ground water caused by mining activities is allowed at point of compliance as long as the mine operator uses best management practices to the maximum extent practical. HB 197 also provided that the Board of Environmental Quality was to promulgate temporary rules by June 1, 2015, to implement the provisions of the act. The department states that given that fact, there was no time in which to conduct negotiated rulemaking.

Pursuant to the provisions of Section 39-107D, Idaho Code, the department indicates that the rule regulates an activity not regulated by the federal government. The rulemaking is authorized pursuant to sections 39-105, 39-107, 39-120 and 39-126, Idaho Code.

cc: Department of Environmental Quality
Paula J. Wilson

IDAPA 58 - DEPARTMENT OF ENVIRONMENTAL QUALITY

58.01.11 - GROUND WATER QUALITY RULE

DOCKET NO. 58-0111-1501

NOTICE OF RULEMAKING - TEMPORARY AND PROPOSED RULE

EFFECTIVE DATE: The temporary rule was effective June 1, 2015.

AUTHORITY: In compliance with Idaho Code §§ 67-5221(1) and 67-5226(1), notice is hereby given that the Board of Environmental Quality has adopted a temporary rule and the Department of Environmental Quality has initiated proposed rulemaking. This action is authorized by Idaho Code §§ 39-105, 39-107, 39-120, and 39-126.

PUBLIC HEARING SCHEDULE: No hearings have been scheduled. Pursuant to Idaho Code § 67-5222(2), a public hearing will be held if requested in writing by twenty-five (25) persons, a political subdivision, or an agency. Written requests for a hearing must be received by the undersigned on or before June 19, 2015. If no such written request is received, a public hearing will not be held.

DESCRIPTIVE SUMMARY: This rulemaking has been initiated to make revisions to the Ground Water Quality Rule, IDAPA 58.01.11, for consistency with the 2015 revision to Idaho Code § 39-102 enacted under House Bill 197. House Bill 197 clarifies that degradation of ground water caused by mining activities is allowed at point of compliance as long as the mine operator uses best management practices to the maximum extent practical. This rule revises Sections 150, 301, 400, and 401.

Mining industry, conservation groups, environmental protection groups, state and federal land management agencies, and concerned citizens of the state of Idaho may be interested in commenting on this proposed rule. Language the agency proposes to add is underlined. Language the agency proposes to delete is struck out. It is these additions and deletions to which public comment should be addressed.

After consideration of public comments, DEQ intends to present the final proposal to the Board of Environmental Quality in the fall of 2015 for adoption of a pending rule. The pending rule is expected to become final and effective upon adjournment of the 2016 legislative session if adopted by the Board and approved by the Legislature.

TEMPORARY RULE JUSTIFICATION: Pursuant to Idaho Code § 67-5226(1)(b), the Governor has found that temporary adoption of the rule is necessary to meet the statutory deadline to promulgate a rule by June 1, 2015.

INCORPORATION BY REFERENCE: Pursuant to Idaho Code § 67-5229(2)(a), the following is a brief synopsis of why the incorporation by reference is necessary: Not applicable.

NEGOTIATED RULEMAKING: Negotiated rulemaking was not conducted. House Bill 197 includes an emergency clause which requires the Board of Environmental Quality to promulgate a rule with an effective date of June 1, 2015. With this deadline, there is no time to conduct negotiated rulemaking. DEQ determined that negotiated rulemaking was not feasible due to the statutory deadline and because DEQ has no discretion with respect to implementing Idaho Code provisions.

IDAHO CODE § 39-107D STATEMENT: This temporary/proposed rule does regulate an activity not regulated by the federal government. This rulemaking has been initiated as directed by the Idaho Legislature in House Bill 197.

FISCAL IMPACT STATEMENT: The following is a specific description, if applicable, of any negative fiscal impact on the state general fund greater than ten thousand dollars (\$10,000) during the fiscal year when the pending rule will become effective: Not applicable.

ASSISTANCE ON TECHNICAL QUESTIONS AND SUBMISSION OF WRITTEN COMMENTS: For assistance on questions concerning the negotiated rulemaking, contact Ed Hagan at ed.hagan@deq.idaho.gov or (208)373-0356.

Anyone may submit written comments by mail, fax or e-mail at the address below regarding this proposed rule. DEQ will consider all written comments received by the undersigned on or before July 3, 2015.

DATED this 3rd Day of June, 2015.

Paula J. Wilson,
Hearing Coordinator
Department of Environmental Quality
1410 N. Hilton / Boise, Idaho 83706-1255
(208)373-0418 / Fax No. (208)373-0481
paula.wilson@deq.idaho.gov

**THE FOLLOWING IS THE TEMPORARY RULE AND THE PROPOSED TEXT
OF DOCKET NO. 58-0111-1501
(Only those Sections being amended are shown.)**

150. IMPLEMENTATION.

This rule establishes minimum requirements to maintain and protect ground water quality. This rule applies to all activities with the potential to degrade ground water quality. (3-20-97)

01. Ground Water Quality Standards. The numerical and narrative standards in Sections 200 and 301 identify minimum levels of protection for ground water quality and shall be used as a basis for: (3-20-97)

- a. Evaluating or comparing ground water quality when developing or modifying best available methods, best management practices, or best practical methods; (3-20-97)
- b. Identifying permit conditions; (3-20-97)
- c. Establishing cleanup levels; and (3-20-97)
- d. Determining appropriate actions when ground water quality standards are exceeded. (3-20-97)

02. Aquifer Categorization. Aquifers of the state shall be categorized based on vulnerability of the ground water, existing and projected future beneficial uses of the ground water, existing water quality, and social and economic considerations. There shall be three aquifer categories, Sensitive Resource, General Resource, and Other Resource, to provide different levels of protection. The level of protection required for each category and application of standards to these categories are shown in Table I.

Table 1. Level of Protection and Application of Standards to Aquifer Categories		
Category	Level of Protection	Application of Standards
Sensitive Resource	Apply best management practices and best available methods. This category provides the highest level of ground water protection.	May apply stricter standards than in Section 200.
General Resource	Apply best management practices and best practical methods <u>to the maximum extent practical.</u>	Apply numerical and narrative standards in Section 200.
Other Resource	Apply best management practices and best practical methods <u>to the maximum extent practical.</u>	May apply less strict standards than in Section 200.

~~(7-1-98)~~(6-1-15)T

a. All aquifers where there are activities with the potential to degrade ground water quality are categorized in Section 300. Those aquifers where no activities with the potential to degrade ground water quality are occurring will remain uncategorized until such activities are commenced. If no action is taken to categorize an aquifer when an activity(ies) with the potential to degrade ground water quality is initiated, the aquifer will automatically be categorized as General Resource. (3-20-97)

b. Categorization should be considered when an activity with the potential to degrade ground water quality is proposed over an aquifer or portion of an aquifer which presently has no such activities and, based on the criteria in Section 350, the aquifer may be most appropriately categorized as Sensitive Resource or Other Resource. (3-20-97)

c. Recategorization should be considered when information on vulnerability of the ground water, existing and projected future beneficial uses of the ground water, existing quality of the ground water, and social and economic considerations, in conjunction with one or more of the criteria in Section 350, demonstrates that the aquifer or portion of an aquifer may be more appropriate in another category. (3-20-97)

03. Ground Water-Surface Water Interconnection. The beneficial uses of interconnected surface water shall be recognized when evaluating ground water quality protection. The implementation of water quality programs shall ensure that the quality of ground water that discharges to surface water does not impair the identified beneficial uses of the surface water and that surface water infiltration does not impair beneficial uses of ground water. (3-20-97)

04. Interagency Coordination. The Department will coordinate with other federal, state, and local agencies to pursue interagency agreements when necessary to ensure implementation of this rule for activities which have the potential to degrade ground water quality. (3-20-97)

(BREAK IN CONTINUITY OF SECTIONS)

301. MANAGEMENT OF ACTIVITIES WITH THE POTENTIAL TO DEGRADE AQUIFERS.

01. Sensitive Resource Category Aquifers. (3-20-97)

a. Activities with the potential to degrade Sensitive Resource aquifers shall be managed in a manner which maintains or improves existing ground water quality through the use of best management practices and best available methods except when a point of compliance is set pursuant to Section 401. ~~(3-20-97)~~(6-1-15)T

b. Numerical and narrative standards identified in Section 200 shall apply to aquifers or portions of aquifers categorized as Sensitive Resource. In addition, stricter numerical and narrative standards, for specified constituents, may be adopted pursuant to Section 350 on a case by case basis and listed in Section 300. (3-20-97)

02. General Resource Category Aquifers. (3-20-97)

a. Activities with the potential to degrade General Resource aquifers shall be managed in a manner which maintains or improves existing ground water quality through the use of best management practices and best practical methods to the maximum extent practical except when a point of compliance is set pursuant to Section 401. ~~(3-20-97)~~(6-1-15)T

b. Numerical and narrative standards identified in Section 200 shall apply to aquifers or portions of aquifers categorized as General Resource. (3-20-97)

03. Other Resource Category Aquifers. (3-20-97)

a. Activities with the potential to degrade Other Resource aquifers shall be managed in a manner

which maintains existing ground water quality, except for those identified constituents which may have a less stringent standard, through the use of best management practices and best practical methods to the maximum extent practical except when a point of compliance is set pursuant to Section 401. (3-20-97)(6-1-15)T

b. Numerical and narrative standards identified in Section 200 shall apply to aquifers or portions of aquifers categorized as Other Resource. In addition, less strict numerical and narrative standards, for specified constituents, may be adopted pursuant to Section 350 on a case by case basis and listed in Section 300. (3-20-97)

(BREAK IN CONTINUITY OF SECTIONS)

400. GROUND WATER CONTAMINATION.

01. Releases Degrading Ground Water Quality. No person shall cause or allow the release, spilling, leaking, emission, discharge, escape, leaching, or disposal of a contaminant into the environment in a manner that: (3-20-97)

a. Causes a ground water quality standard to be exceeded; (3-20-97)

b. Injures a beneficial use of ground water; or (3-20-97)

c. Is not in accordance with a permit, consent order or applicable best management practice, best available method or best practical method. (3-20-97)

02. ~~Prevention~~ Measures Taken in Response to Degradation. (3-20-97)(6-1-15)T

a. Except when a point of compliance is set pursuant to Section 401. ~~When~~ when a numerical standard is not exceeded, but degradation of ground water quality is detected and deemed significant by the Department, the Department shall take one (1) or more of the following actions: (3-20-97)(6-1-15)T

i. Require a modification of regulated activities to prevent continued degradation; (3-20-97)

ii. Coordinate with the appropriate agencies and responsible persons to develop and implement prevention measures for activities not regulated by the Department; (3-20-97)

iii. Allow limited degradation of ground water quality for the constituents identified in Subsection 200.01.a. if it can be demonstrated that: (3-30-07)

(1) Best management practices, best available methods or best practical methods, as appropriate for the aquifer category, are being applied; and (3-20-97)

(2) The degradation is justifiable based on necessary and widespread social and economic considerations; or (3-20-97)

iv. Allow degradation of ground water quality up to the standards in Subsection 200.01.b., if it can be demonstrated that: (3-20-97)

(1) Best management practices are being applied; and (3-20-97)

(2) The degradation will not adversely impact a beneficial use. (3-20-97)

b. The following criteria shall be considered when determining the significance of degradation: (3-20-97)

i. Site specific hydrogeologic conditions; (3-20-97)

- ii. Water quality, including seasonal variations; (3-20-97)
- iii. Existing and projected future beneficial uses; (3-20-97)
- iv. Related public health issues; and (3-20-97)
- v. Whether the degradation involves a primary or secondary constituent in Section 200. (3-20-97)

03. Contamination Exceeding a Ground Water Quality Standard. The discovery of any contamination exceeding a ground water standard that poses a threat to existing or projected future beneficial uses of ground water shall require appropriate actions, as determined by the Department, to prevent further contamination. These actions may consist of investigation and evaluation, or enforcement actions if necessary to stop further contamination or clean up existing contamination, as required under the Environmental Protection and Health Act, Section 39-108, Idaho Code. (3-20-97)

04. Agricultural Chemicals. Agricultural chemicals found in intermittently saturated soils within the crop root zone will not be considered ground water contaminants as long as the chemicals remain within the crop root zone, and have been applied in a manner consistent with all appropriate regulatory requirements. (3-20-97)

05. Site-Specific Ground Water Quality Levels or Points of Compliance. The Department may allow site-specific ground water quality levels, for any aquifer category, that vary from a standard(s) in Section 200 or Section 300, or may allow site-specific points of compliance, based on consideration of effects to human health and the environment, for: (7-1-09)

- a. Remediation conducted under the Department's oversight; (3-20-97)
- b. Permits issued by the Department; (3-20-97)
- c. Situations where the site background level varies from the ground water quality standard; (7-1-09)
- d. Dissolved concentrations of secondary constituents listed in Section 200 of this rule. The Department may allow the use of dissolved concentrations for secondary constituents if the requesting person demonstrates that doing so will not adversely affect human health and the environment; or (7-1-09)
- e. Other situations authorized by the Department in writing. (3-20-97)

401. MINING.

01. Request for Setting Point(s) of Compliance and Standards Applicable to Mining Activities. At the request of a mine operator, pursuant to this section, the Department shall set a point of compliance, or points of compliance, at which the mine operator ~~must~~ shall protect current and projected future beneficial uses of the ground water and meet the ground water quality standards as described in ~~Subsection 150.01~~ Section 200 or as allowed under Subsection 400.05. Degradation of ground water is allowed at a point of compliance if the mine operator implements the level of protection during mining activities appropriate for the aquifer category as specified in Table 1 of Subsection 150.02. If a request is not made, the mine operator must meet the ground water quality standards as described in Subsection 150.01 in ground water both within and beyond the mining area unless the Department establishes the point(s) of compliance consistent with Subsection 401.03. ~~Mining activities must be managed using the level of protection appropriate for the aquifer category in accordance with Subsection 150.02 and Section 301.~~ (7-1-09)(6-1-15)T

02. Application Process. (7-1-09)

a. If the mine operator requests a point of compliance, or points of compliance, the mine operator shall make written application to the Department. The application shall be accompanied by a fee of two thousand five hundred dollars (\$2,500). The application shall include the following information in sufficient detail to allow the Department to establish point(s) of compliance: (7-1-09)

- i. Name, location, and mailing address of the mining operation; (7-1-09)
- ii. Name, mailing address, and phone number of the mine operator; (7-1-09)
- iii. Land ownership status of the mining operation (federal, state, private or public); (7-1-09)
- iv. The legal structure (corporation, partnership, etc.) and residence of the mine operator; (7-1-09)
- v. The legal description, to the quarter-quarter section, of the location of the proposed mining operation; (7-1-09)
- vi. Evidence the mine operator is authorized by the Secretary of State to conduct business in the state of Idaho; (7-1-09)
- vii. A general description of the operational plans for the mining operation from construction through final reclamation. This description shall include any proposed phases for construction, operations, and reclamation and a map that identifies the location of all mining activities; (7-1-09)
- viii. A preconstruction topographic site map or aerial photos extending at least one (1) mile beyond the outer limits of the mining area, identifying and showing the location and extent of the following features: (7-1-09)
 - (1) All wells, perennial and intermittent springs, adit discharges, wetlands, surface waters and irrigation ditches; (7-1-09)
 - (2) All public and private drinking water supply source(s) within one (1) mile of the mining area; (7-1-09)
 - (3) All service roads and public roads; (7-1-09)
 - (4) All buildings and structures within one (1) mile of the mining area; (7-1-09)
 - (5) All special resource waters within one (1) mile of the mining area; and (7-1-09)
 - (6) All Clean Water Act Section 303(d) listed streams, and their listed impairments, within one (1) mile of the mining area; (7-1-09)
- ix. To the extent such information is available, a description and location of underground mine workings and adits and a description of the structural geology that may influence ground water flow and direction; (7-1-09)
- x. Information regarding the relevant factors set forth in Subsection 401.03; and (7-1-09)
- xi. A proposed point of compliance, or points of compliance. (7-1-09)
- b.** Within thirty (30) days of receipt of an application, the Department shall issue a written notice to the mine operator indicating: (7-1-09)
 - i. That the application is complete; or (7-1-09)
 - ii. That the Department is rejecting the application as incomplete. In such a case, the Department shall provide a list of deficiencies. Upon a determination that the application is incomplete, the Department shall refund one-half (1/2) of the application fee. (7-1-09)
- c.** The Department shall establish the point(s) of compliance within one hundred eighty (180) days after receipt of a complete application unless the Department determines that additional time is necessary due to unusual circumstances. (7-1-09)

03. Setting the Point(s) of Compliance. The point(s) of compliance shall be set as close as possible to the boundary of the mining area, taking into consideration the relevant factors set forth in Subsections 401.03.a. through 401.03.h., but in no event shall the point(s) of compliance be within the boundary of the mining area. The mining area boundary means the outermost perimeter of the mining area (projected in the horizontal plane) as it would exist at the completion of the mining activity. The point(s) of compliance shall be set so that, outside the mining area boundary, there is no injury to current or projected future beneficial uses of ground water and there is no violation of water quality standards applicable to any interconnected surface waters. The Department's determination regarding the point(s) of compliance shall be based on an analysis and consideration of all relevant factors including, but not limited to: (7-1-09)

a. The hydrogeological characteristics of the mining area and surrounding land, including any dilution characteristics of the aquifer and any natural attenuation supported by site-specific data; (7-1-09)

b. The concentration, volume, and physical and chemical characteristics of contaminants resulting from the mining activity, including the toxicity and persistence of the contaminants; (7-1-09)

c. The quantity, quality, and direction of flow of ground water underlying the mining area; (7-1-09)

d. The proximity and withdrawal rates of current ground water users; (7-1-09)

e. A prediction of projected future beneficial uses; (7-1-09)

f. The availability of alternative drinking water supplies; (7-1-09)

g. The existing quality of the ground water, including other sources of contamination and their cumulative impacts on the ground water; and (7-1-09)

h. Public health, safety, and welfare effects. (7-1-09)

04. Ground Water Monitoring and Reporting. The Department shall require ground water monitoring and reporting whenever the Department sets the point(s) of compliance. The Department shall not require ground water monitoring that duplicates ground water monitoring required by other state or federal agencies as long as the mine operator provides the data to the Department. (7-1-09)

a. A ground water monitoring system required under Subsection 401.04 shall be designed to: (7-1-09)

and **i.** Represent the quality of background ground water that has not been affected by the mining activity; (7-1-09)

ii. Represent the quality of ground water passing the point(s) of compliance in order to determine compliance with ground water quality standards or effectiveness of best management practices. (7-1-09)

b. When practicable, indicator monitoring wells or other devices may be required. Such indicator wells and other devices shall not be used to determine compliance with the ground water quality standards, but instead may be used to evaluate modeling results, to predict the quality of ground water at the point(s) of compliance, or to determine the effectiveness of best management practices. (7-1-09)

c. All monitoring wells shall be constructed (well depth, well screen size, well screen interval, gravel pack, etc.) and developed so that ground water samples represent the quality of ground water that is relevant to current and future beneficial uses. (7-1-09)

05. Coordination with Other State or Federal Agencies/Public Notice. Before setting the point(s) of compliance or requiring ground water monitoring, the Department shall coordinate with and seek recommendations from other state or federal agencies that have regulatory authority over the mining activities. The Department may provide public notice and an opportunity for public comment prior to setting or changing the point(s) of compliance. The Department shall issue a public notice after it sets the point(s) of compliance. (7-1-09)

06. Limitations. Section 401 addresses only those contaminants that naturally occur in the mining area ground water or in the surrounding rock or soil and are present in concentrations above the natural background level as a result of mining activities. (7-1-09)

07. Application of Provisions. The provisions set out in Section 401 apply to new mining activities or to an expansion of existing mining activities commencing after July 1, 2009. All consent orders, compliance schedules, and other agreements adopted or issued by the Department prior to July 1, 2009 pertaining to ground water protection at mine sites shall remain in full force and effect. (7-1-09)

08. Change in Point(s) of Compliance/Ground Water Monitoring. (7-1-09)

a. A change in the point(s) of compliance may be requested by the mine operator when there is a change in, or new information regarding, the mining activity or any of the factors set forth in Subsection 401.03. A change requested by the mine operator shall include an identification of the new proposed point(s) of compliance, a description of the cause for the change and any data supporting the change. The mine operator's request shall be handled as an application submitted pursuant to Subsection 401.02.a. and shall be subject to all other provisions of Section 401. (7-1-09)

b. The Department may initiate a change in the point(s) of compliance if there is a change in, or new information regarding, the mining activity or any of the factors set forth in Subsection 401.03, and the Department determines that the change is necessary to ensure there is no injury to current or projected future beneficial uses of ground water and no violation of water quality standards applicable to any interconnected surface waters. The Department shall notify the mine operator in writing of the Department's intent to change the point(s) of compliance. The Department shall make its final decision to change the point(s) of compliance within sixty (60) days of the notice to the mine operator unless the Department and the mine operator agree more time is necessary to make the decision. (7-1-09)

c. The Department may require additional or new ground water monitoring or indicator wells when the Department changes the point(s) of compliance. The Department may also require additional or different ground water monitoring or indicator wells if the Department determines, based upon a change in or new information regarding the mining activity or any of the factors listed in Subsection 401.03, that the monitoring no longer meets the requirements set forth in Subsection 401.04. The mine operator may also request a change in the monitoring. (7-1-09)