NOTICE OF PROPOSED RULEMAKING

TITLE 18. ENVIRONMENTAL QUALITY

CHAPTER 11. DEPARTMENT OF ENVIRONMENTAL QUALITY

WATER QUALITY STANDARDS

PREAMBLE

1. Permission to proceed with this proposed rulemaking was granted under A.R.S. § 41-1039 by the governor on:

August 24, 2022, &

February 5, 2024

2. Article, Part, or Section Affected (as applicable) **Rulemaking Action**

R18-11-406 Amend

3. Citations to the agency's statutory rulemaking authority to include the authorizing statute (general) and the implementing statute (specific):

Authorizing statute: A.R.S. §§ 49-221, and 49-223.

Implementing statute: A.R.S. §§ 49-221, and 49-223.

4. Citations to all related notices published in the *Register* that pertain to the current record of the proposed rule:

Notice of Rulemaking Docket Opening: 30 A.A.R. 2137, Issue Date: June 28, 2024, Issue Number: 26, File Number: R24-115.

5. The agency's contact person who can answer questions about the rulemaking:

Name: Jon Rezabek

Title: Legal Specialist

Division: Water Quality

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1110 W. Washington Ave.
Phoenix, AZ 85007

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6. An agency's justification and reason why a rule should be made, amended, repealed or renumbered, to include an explanation about the rulemaking:

General Explanation of the Collective Rulemaking: The Arizona Department of Environmental Quality (ADEQ) is required under A.R.S. § 49-223(A) to open a rulemaking docket for the adoption of federal drinking water maximum contaminant levels (MCLs) as state aquifer water quality standards (AWQSs) within one year of the Environmental Protection Agency's (EPA's) establishment

of new or adjusted MCLs. MCLs for Arsenic, Bromate, Chlorite, Haloacetic Acids, Microbiological Contaminants, Total Trihalomethanes and Uranium are either unestablished as AWQSs or are established but currently have a misaligned value as the standard. MCLs for the seven (7) pollutants can be viewed at 40 *Code of Federal Regulations* (C.F.R.) 141.60 *et seq.* A.R.S. § 49-223(A) requires ADEQ to move forward with the adoption of MCLs as AWQSs through the rulemaking process unless substantial opposition to the adoption is received from stakeholders. Upon receipt of substantial opposition, ADEQ may adopt for that pollutant the verbatim MCL as an AWQS, but only upon a finding that the MCL is appropriate for adoption in Arizona as an AWQS. In making this finding, ADEQ must consider whether the assumptions used by the EPA in developing and implementing the MCLs are appropriate for establishing an Arizona state AWQSs. The listed assumptions for consideration are technology, cost, sampling and analytical methodologies and public health risk reduction. If ADEQ determines the MCL is inappropriate as an AWQS, the Department may establish an alternative AWQS for the pollutant with an MCL. The alternative AWQS must be:

(1) Based on the protection of human health and shall rely on technical protocols appropriate for the development of AWQSs, and

(2) Based on credible medical and toxicological evidence that has been subjected to peer review.

Subject Matter of this NPRM: This *Notice of Proposed Rulemaking* (NPRM) proposes an alternate AWQS for Microbiological Contaminants from the MCL for Microbiological Contaminants. The original MCL for Microbiological Contaminants was established through Final Rule by the Environmental Protection Agency (EPA), published in the *Federal Register* at 78 *Federal Register* 10270.

Standard Work Development: In approaching and preparing for the execution of the requirements in A.R.S. § 49-223, ADEQ developed a guidance document or "standard work" as the language of the statute leaves a number of determinations to the discretion of the Department. An example of this is whether an MCL is "appropriate" as an AWQS or relying on "technical protocols" appropriate for the development of an alternative AWQS. These statutorily-based and reasoned procedures were developed and released to the public for comment in the summer of 2023. They can be viewed at the following webpage: https://www.azdeq.gov/rulemaking/awqs-update/resources.

Substantial Opposition: ADEQ has received substantial opposition from stakeholders on the proposal to adopt the Microbiological Contaminants MCL as an AWQS. "Substantial opposition" is defined in A.R.S. § 49-223(A) as "information submitted to the director that explains with reasonable specificity why the [MCL] is not appropriate as an [AWQS]." Its functionality in the procedure laid out in A.R.S. § 49-223 is explained above in *General Explanation of the Collective Rulemaking*. The submitted opposition includes current permittees voicing concerns about the high numbers of false positive samples of Total Coliform that would have tested negative had Fecal Coliform or *E.coli* been the indicator parameter used in the standard instead. Details of the hardships encountered by the regulated community include hundreds of hours of labor in verification or repeat sampling. This, along with shipping and laboratory testing costs, amount to tens of thousands of dollars in unnecessary spending. With this series of AWQS rulemakings, ADEQ proposes to establish or align AWQSs for Arsenic, Bromate, Chlorite, Haloacetic Acids, Total

Trihalomethanes and Uranium verbatim with the MCL. However, given the substantial opposition received on the Microbiological Contaminants MCL, ADEQ was prompted to follow the procedure in A.R.S. § 49-223(A) for determining whether the Microbiological Contaminants MCL is appropriate as an Arizona state AWQS. ADEQ used its newly developed "standard work" as explained above in executing this requirement. The conclusion is that the MCL is inappropriate (*See* "'Inappropriate' Determination for the Microbiological Contaminants MCL (A.R.S. § 49-223(A))" for detail below). Thereafter, ADEQ followed the procedure for establishing an alternative AWQS for Microbiological Contaminants, pursuant to A.R.S. § 49-223(B), also using the newly developed "standard work". The conclusion is that an alternative AWQS should be established, which is proposed via this NPRM (*See* "Alternative AWQS Development and Setting for Microbiological Contaminants (A.R.S. § 49-223(B))" for detail below).

What is the MCL for Microbiological Contaminants? The MCL for Microbiological Contaminants is not numerical, but can be described as a narrative sampling procedure. The standard can be found at 40 C.F.R. 141.63(c). The essential part of the MCL is that a system must sample for Total Coliform and *E.coli* routinely. Upon a positive result of Total Coliform, the system must sample for *E.coli*. A positive result from the *E.coli* repeat sample (following a positive Total Coliform routine sample) constitutes a violation of the standard. Furthermore, upon a positive result of a routine *E.coli* sample, the system must repeat the sample for *E.coli*. A positive result from the *E.coli* repeat sample (following a positive *E.coli* routine sample) constitutes a violation of the standard. Additionally, a system violates the standard when:

(1) it fails to take a repeat sample following an *E.coli*-positive routine sample, or

(2) it fails to test for *E.coli* when any repeat sample tests positive for Total Coliform.

What is the current AWQS for Microbiological Contaminants?

The current AWQS for Microbiological Contaminants is similarly not numerical and can be described as a narrative sampling procedure. The standard can be found at A.A.C. R18-11-406(F). The essential part of the current AWQS is that a facility must sample for Total Coliform routinely. Upon a positive Total Coliform routine sample, a Total Coliform repeat sample shall be taken within two weeks of the time the sample results are reported. A positive Total Coliform repeat sample following a positive Total Coliform routine sample constitutes a violation of the standard.

Associated Rulemakings ADEQ proposes a total of five (5) NPRMs in the collective AWQS Update rulemaking. Three (3) of the five (5) NPRMs propose to establish or align the AWQSs with the MCLs in *Arizona Administrative Code*, (A.A.C.) Title 18, Chapter 11, Article 4 for pollutants Arsenic, Bromate, Chlorite, Haloacetic Acids, Total Trihalomethanes and Uranium. This NPRM's scope is limited to Microbiological Contaminants and proposes an alternative AWQS to the corresponding MCL under the procedure described in A.R.S. § 49-223 and above. A second NPRM's scope includes Arsenic. A third NPRM's scope includes Uranium. A fourth NPRM's scope includes the four (4) disinfection byproducts, which are Bromate, Chlorite, Haloacetic Acids and Total Trihalomethanes. A fifth and final NPRM includes in its scope a proposed new section and some amendments to A.A.C., Title 18, Chapter 9, Articles 1 and 2. With the fifth NPRM, ADEQ proposes a rule detailing implementation of new or adjusted

AWQSs into existing Individual Aquifer Protection Program permits (APPs), along with adjacent amendments to existing rule to make way for this purpose.

What are Aquifer Water Quality Standards and what is their purpose? Aquifer Water Quality Standards or "AWQSs" are protective groundwater standards that were put in place and designated by the Arizona Legislature to preserve Arizona's aquifer quality for drinking water-protected use (*See* A.R.S. § 49-224(B)).

How are Aquifer Water Quality Standards Used? The AWQSs are used in ADEQ's Aquifer Protection Program (APP), remediation projects under the Water Quality Assurance Revolving Fund (WQARF), the Voluntary Remediation Program (VRP), and elsewhere.

"Inappropriate" Determination for the Microbiological Contaminants MCL (A.R.S. § 49-223(A)) ADEQ developed a "standard work" procedure for conducting an "appropriateness" determination pursuant to A.R.S. § 49-223(A). The "standard work" can be reviewed on ADEQ's website at https://www.azdeq.gov/rulemaking/awqs-update/resources. ADEQ's review of EPA's assumptions on technology, costs, sampling and analytical methodologies and public health risk reduction resulted in significant concern for the costs, analytical methods and public health risk reduction assumptions in particular. ADEQ found that the narrative MCL at 40 C.F.R. 141.63(c) is simply inappropriate as is for verbatim adoption as an AWQS and applicability upon the facilities regulated by the APP program, such as Wastewater Treatment Plants, Mines and Industrial facilities. One of the main reasons is that the MCL is designed for Public Water Systems, not APP type facilities. Specifically, this is because the Microbiological Contaminants MCL requires routine sampling of both Total Coliform and *E.coli* parameters. Thereafter, upon a positive result of either Total Coliform or E.coli, a repeat sample is required for both parameters. Violation occurs when a positive result is obtained from an *E. coli* repeat sample that occurs after a total coliform-positive routine sample. Violation also occurs when a positive result is obtained from a Total Coliform repeat sample that occurs after an *E. coli*-positive routine sample. ADEQ has found that the Total Coliform parameter is a very general indicator of coliforms in a sampling well, many of which occur naturally and are not indicative of a threat to human health. In particular, Total Coliform is too broad of an indicator parameter to signal fecal coliform health concerns. On the contrary, ADEQ has found that Fecal Coliform and *E.coli* is a more exacting indicator or surrogate of fecal coliforms, which are dangerous to human health. Additionally, when a permittee samples for Total Coliform and receives a positive result, more often than not, the result is what is known as a "false positive", signaling non-health threatening coliforms in a sample. ADEQ notes that false positives have led to a number of permittees having to perform accelerated or more frequent monitoring intervals pursuant to the permits unnecessarily, which have associated costs.

Alternative AWQS Development and Proposal for Microbiological Contaminants (A.R.S. § 49-223(B)) After determining that the MCL for Microbiological Contaminants is inappropriate as an AWQS, ADEQ followed the "standard work" procedure for alternative AWQS development and establishment. ADEQ is proposing an appropriate alternative Microbiological Contaminants AWQS based upon the presence or absence of either Fecal Coliform or *E.coli* in a 100-milliliter sample (depending on the requirement of the permit). Upon a positive result of a routine Fecal Coliform sample, a repeat sample of either Fecal Coliform or

E.coli with a positive result constitutes a violation of the aquifer water quality standard for microbiological contaminants. Upon a positive result of a routine *E.coli* sample, a repeat sample of *E.coli* with a positive result constitutes a violation of the aquifer water quality standard for microbiological contaminants. Through research and consultation, ADEQ determined that *E. coli* is a better indicator of fecal contamination than total or fecal coliforms and that total coliform positive samples are known to result in a "false positive". A "false positive" in a Total Coliform context is when a sample result is positive, but the cause of the positive result indicates a type of total coliform that does not originate in fecal contamination, is not dangerous to human health and occurs naturally. A common "false positive" is when a positive Total Coliform sample is actually indicating rust in a well. Additionally, ADEQ considered the language of 40 C.F.R. 141.63(c), the state of existing Individual APP and Reclaimed Water permits, the Department's mission to protect human health and the environment, as well as costs to permittees, analytical methodologies and public health risk reduction. Ultimately, ADEQ determined that shifting away from Total Coliform as an indicator parameter for an alternative Microbiological Contaminants AWQS and moving towards Fecal Coliform and *E.coli is appropriate*. Specifically, Fecal Coliform and *E.coli* are more exacting at indicating a threat to human health. The decision to configure the AWQS proposal to allow permittees to utilize Fecal Coliform or *E.coli* was due to the fact that protecting human health is not diminished under any of the possible orientations and existing permittees are sampling for both parameters already in some cases. Allowing permittees to keep those sampling traditions and optimize a sampling orientation from a cost effective perspective are all factors that led to ADEQ's proposal.

Who are the stakeholders to this rulemaking? The stakeholders for this rulemaking include permittees of the APP, remediation projects under the Water Quality Assurance Revolving Fund (WQARF), the Voluntary Remediation Program (VRP), private well owners, community water systems and the constituents they serve, as well as all Arizonans who benefit from the state's aquifers being protected for drinking water use.

What has been the stakeholder process thus far for this rulemaking? ADEQ has conducted a number of general and specific stakeholder meetings, as well as tribal listening sessions, concerning this rulemaking. The dates of those events are as follows: 9/29/22, 6/8/23, 9/11//23, 12/12/23, 12/13/23, 4/29/24, 8/8/24 and others. A repository of stakeholder materials can be found published on ADEQ's website here: https://www.azdeq.gov/rulemaking/awqs-update/resources.

7. A reference to any study relevant to the rule that the agency reviewed and proposes either to rely on or not to rely on in its evaluation of or justification for the rule, where the public may obtain or review each study, all data underlying each study, and any analysis of each study and other supporting material:

State-Based AWQS Report – Microbiological Contaminants Aquifer Water Quality Standards Technical Support:

Summary: This report provides information to the Department for the purpose of "standard work" guidance in determining an appropriate alternative AWQS for microbiological contaminants per A.R.S. § 49-223(B).

Study Resource: Provided recommendations on the establishment of an alternative AWQS to the Microbiological Contaminants MCL based on credible medical and toxicological evidence that has been subjected to peer review, as well as

technical protocols appropriate in the development of an AWQS.

Public Review: The public may review this study or may obtain copies from the Department by request. Requests can be submitted to the Department by email at awqs@azdeq.gov or by mail to Arizona Department of Environmental Quality, 1110 W. Washington Ave. Phoenix, AZ 85007.

Reference: LaPat-Polasko, L., Hoagland-Stamatovski, B., and Brenton, H. (2023). State-Based AWQS Report – Microbiological Contaminants Aquifer Water Quality Standards Technical Support. Matrix New World Engineering, Land Surveying and Landscape Architecture, PC.

MCL Assumptions Report – Microbiological Standards Aquifer Water Quality Standards Technical Support:

Summary: This report provides a review of the EPA assumptions used to establish the MCL for Microbiological Contaminants at 78 *Federal Register* 10270. The assumptions reviewed are listed in A.R.S. § 49-223(A) and include technologies, costs, sampling and analytical methodologies and public health risk reduction.

Study Resource: Provided review of the EPA assumptions used to establish the MCL for Microbiological Contaminants at 78 *Federal Register* 10270 in order to inform ADEQ further on the subject matter and its applicability in the AWQS setting.

Public Review: The public may review this study or may obtain copies from the Department by request. Requests can be submitted to the Department by email at awqs@azdeq.gov or by mail to Arizona Department of Environmental Quality, 1110 W. Washington Ave. Phoenix, AZ 85007.

Reference: LaPat-Polasko, L., Hoagland-Stamatovski, B., and Brenton, H. (2023). MCL Assumptions Report – Microbiological Contaminants Aquifer Water Quality Standards Technical Support. Matrix New World Engineering, Land Surveying and Landscape Architecture, PC.

Draft Economic Impact Statement for Microbiological Contaminants Proposed AWQS:

Summary: This report provides the Department a draft economic impact statement on the proposed Microbiological Contaminants AWQS modeled after the requirements of A.R.S. § 41-1055.

Study Resource: This report informs ADEQ on the economic impact of the subject matter of the rulemaking.

Public Review: The public may review this study or may obtain copies from the Department by request. Requests can be submitted to the Department by email at awqs@azdeq.gov or by mail to Arizona Department of Environmental Quality, 1110 W. Washington Ave. Phoenix, AZ 85007.

Reference: McClure Consulting LLC with The Natelson Dale Group, Inc. (2024). Draft Economic Impact Statement for Microbiological Contaminants Proposed AWQS. McClure Consulting LLC with The Natelson Dale Group, Inc.

8. A showing of good cause why the rulemaking is necessary to promote a statewide interest if the rulemaking will diminish a previous grant of authority of a political subdivision of this state:

Not applicable

9. The preliminary summary of the economic, small business, and consumer impact:

Opening a rulemaking docket and pursuing the adoption of new or adjusted MCLs as AWQSs is a mandate the Arizona State Legislature has enshrined in statute for ADEQ to execute (*see* A.R.S. § 49-223). An identification of the proposed rulemaking can be found in Heading No. 6 above. The proposed AWQS for Microbiological Contaminants does not propose a numeric change in water quality standards, but instead proposes to implement more efficient/effective monitoring protocols. The primary cost impact of the proposed AWQS would be a reduction in permittee sampling costs due to the reduced incidence of false-positive test results. The APP has around 500 individual permittees; however, only a fraction of them monitor for microbiological contaminants as some APP permittees simply do not process sewage, nor discharge treated wastewater (I.E. - mines & industrial facilities).

In addition to creating cost savings for permittees, the proposed AWQS would potentially generate economic benefits in terms of a reduction in cases of illness and death associated with microbiological contamination. In particular, the improved sampling protocols are expected to allow for quicker identification of incidents of contamination, allowing for more timely implementation of corrective measures. The higher incidence of false-positive test results under the existing protocols – and the associated need for retesting – can result in delays in identifying actual cases of contamination, potentially resulting in disease outbreaks that could otherwise be contained sooner (*See* Matrix and McClure Reports referenced in Heading No. 7 above).

Under the proposed AWQS for Microbiological Contaminants, costs for routine and repeat sampling are expected to decrease in comparison to the costs of complying with the current AWQS. These potential cost savings are attributable to the expectation that the routine sampling and repeat sampling requirements under the new AWQS would result in fewer "false positive" samples, thereby reducing the need for follow-up sampling and unwarranted corrective actions for facilities falsely deemed to be non-compliant. Statewide, the cost savings to permittees are estimated to range from $882,000 to $1.7 million annually (in 2023 dollars) (*See* McClure Report referenced in Heading No. 7 above).

Based on available time series data from the Arizona Department of Health Services (ADHS) and the Federal Center for Disease Control and Prevention (CDC), it is estimated that regulation of microbiological contamination results in 80 fewer cases of illness and 0.3 fewer deaths per year (statewide) (*See* Matrix Reports referenced in Heading No. 7 above). In monetary terms, these prevented illnesses and deaths represent annual statewide benefits of $3.5 million per year (in 2023 dollars) (*See* McClure Report referenced in Heading No. 7 above).

In Arizona, all aquifers in the state are protected for drinking water use (*See* A.R.S. § 49-224(B)). Reducing microbiological contaminant contribution to the aquifers of the state will help to mitigate the health risks listed above which directly correlates to economic hardships in treating disease related to microbiological contaminant exposure (*See* Matrix and McClure Reports referenced in Heading No. 7 above). Millions of Arizonans stand to benefit as a result of the adjustment of the Microbiological Contaminant AWQS (*See* Matrix and McClure Reports referenced in Heading No. 7 above). Two examples include a projected health risk reduction and treatment cost savings for private well owners and cost savings associated with public drinking water systems and their clientele due to a reduction of microbiological contaminants in the groundwater source that would otherwise need to be treated at the public drinking water facility (*See* Matrix and McClure Reports referenced in Heading No. 7 above).

ADEQ projects that stakeholders subject to the VRP and WQARF programs will see little to no impact from the scope of this AWQS rulemaking.

10. The agency's contact person who can answer questions about the economic, small business and consumer impact statement:

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Title: Legal Specialist

Division: Water Quality

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Fax: (602) 771-2366

Email: awqs@azdeq.gov

Website: https://www.azdeq.gov/awqs-update-active-rulemaking

11. The time, place, and nature of the proceedings to make, amend, repeal, or renumber the rule, or if no proceeding is scheduled, where, when, and how persons may request an oral proceeding on the proposed rule:

The public comment period for this rulemaking will take place between November 15th, 2024 and December 16th, 2024. The public comment period will close on December 16th, 2024. Please submit comments on the rule in this *Notice of Proposed Rulemaking* (NPRM) at any time during the public comment period via the AWQS comment portal found at https://www.azdeq.gov/awqs-update-active-rulemaking. Comments may also be submitted via email at awqs@azdeq.gov or via mail at the following physical address:

ADEQ
Attn: Ophelia Begay
Cube 6190C
Groundwater Section
Water Quality Division
1110 W. Washington St.
Phoenix, AZ 85007

ADEQ will be holding a public hearing for the purpose of taking oral comments on the record. All interested parties may attend. The public hearing will be held virtually. The access information is below:

Date: December 16th, 2024

Time: TBD Time

Location: GoToWebinar hosted by Arizona Department of Environmental Quality at:

https://attendee.gotowebinar.com/register/473262133213561692

You may also call in and listen to the meeting using your phone, but please note that phone-only access does NOT provide the option for the participant to speak.

PHONE: (562) 247-8422

Access Code: 705-628-496

Listen only; no ability to comment

Nature: Public hearing on the proposed rules.

ADEQ will take reasonable measures to provide access to department services to individuals with limited ability to speak, write or understand English and to those with disabilities. Requests for language translation, ASL interpretation, CART captioning services or disability accommodations must be made at least 48 hours in advance by contacting the Title VI Nondiscrimination Coordinator, Leonard Drago, at 602-771-2288 or Drago.Leonard@azdeq.gov. For a TTY or other device, Telecommunications Relay Services are available by calling 711.

12. All agencies shall list other matters prescribed by statute applicable to the specific agency or to any specific rule or class of rules. Additionally, an agency subject to Council review under A.R.S. §§ 41-1052 and 41-1055 shall respond to the following questions:

There are no other matters prescribed by statute applicable specifically to ADEQ or this specific rulemaking.

a. Whether the rule requires a permit, whether a general permit is used and if not, the reasons why a general permit is not used:

This rulemaking does not create a requirement for a permit.

b. Whether a federal law is applicable to the subject of the rule, whether the rule is more stringent than federal law and if so, citation to the statutory authority to exceed the requirements of federal law:

Federal law is not applicable to the subject matter of the rule.

c. Whether a person submitted an analysis to the agency that compares the rule's impact of the competitiveness of business in this state to the impact on business in other states:

N/A

13. A list of any incorporated by reference material as specified in A.R.S. § 41-1028 and its location in the rules:

N/A.

14. The full text of the rules follows:

Rule text begins on the next page.

TITLE 18. DEPARTMENT OF ENVIRONMENTAL QUALITY

CHAPTER 11. DEPARTMENT OF ENVIRONMENTAL QUALITY

WATER QUALITY STANDARDS

ARTICLE 4. AQUIFER WATER QUALITY STANDARDS

Section

R18-11-406. Numeric Aquifer Water Quality Standards: Drinking Water Protected Use

ARTICLE 4. AQUIFER WATER QUALITY STANDARDS

Section

R18-11-406. Numeric Aquifer Water Quality Standards: Drinking Water Protected Use

A. No Change

B. No Change

C. No Change

D. No Change

E. No Change

F. Aquifer water quality standard for microbiological contaminants. The aquifer water quality standard for microbiological contaminants is based upon the presence or absence of ~~total coliforms~~ either Fecal Coliform or *E.coli* in a 100-milliliter sample, depending on the requirement in the permit. ~~If a sample is total coliform-positive, a 100-milliliter repeat sample shall be taken within two weeks of the time the sample results are reported. Any total coliform-positive repeat sample following a total coliform-positive sample constitutes a violation of the aquifer water quality standard for microbiological contaminants.~~

1. If a routine sample of Fecal Coliform is positive, a 100-milliliter repeat sample of either Fecal Coliform or *E.coli* shall be taken within five (5) days of becoming aware of the exceedance. A Fecal Coliform or *E.coli*-positive repeat sample following a Fecal Coliform-positive routine sample constitutes a violation of the aquifer water quality standard for microbiological contaminants.
2. If a routine sample of *E.coli* is positive, a 100-milliliter repeat sample of *E.coli* shall be taken within five (5) days of becoming aware of the exceedance. An *E.coli*-positive repeat sample following a *E.coli*-positive routine sample constitutes a violation of the aquifer water quality standard for microbiological contaminants.

G. No Change