

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 406

BY ENVIRONMENT, ENERGY, AND TECHNOLOGY COMMITTEE

AN ACT

1 RELATING TO ENVIRONMENTAL QUALITY; AMENDING SECTION 39-108, IDAHO CODE, TO
2 REVISE AND TO PROVIDE CIVIL PENALTY PROVISIONS, TO REQUIRE COMPLIANCE
3 WITH CERTAIN PUBLIC PARTICIPATION REQUIREMENTS IN ADMINISTRATIVE AND
4 CIVIL ENFORCEMENT PROCEEDINGS, TO PROVIDE A CORRECT CODE REFERENCE AND
5 TO MAKE TECHNICAL CORRECTIONS; AMENDING SECTION 39-117, IDAHO CODE, TO
6 PROVIDE FOR SPECIFIED CRIMINAL VIOLATIONS AND PENALTIES, TO CORRECT OB-
7 SOLETE TERMINOLOGY AND TO MAKE TECHNICAL CORRECTIONS; AMENDING SECTION
8 39-175A, IDAHO CODE, TO REVISE LEGISLATIVE FINDINGS AND PURPOSES; AND
9 AMENDING SECTION 39-175C, IDAHO CODE, TO REMOVE PROVISIONS RELATING TO
10 THE EXPLORATION OF POTENTIAL OPERATION OF A STATE NATIONAL POLLUTANT
11 DISCHARGE ELIMINATION SYSTEM (NPDES) PROGRAM, TO REMOVE PROVISIONS
12 RELATING TO A REPORT TO THE LEGISLATURE, TO AUTHORIZE THE DEPARTMENT OF
13 ENVIRONMENTAL QUALITY TO PURSUE APPROVAL OF AN NPDES PROGRAM, TO PRO-
14 VIDE THAT THE STATE SHALL SUBMIT AN APPLICATION TO THE ENVIRONMENTAL
15 PROTECTION AGENCY BY A SPECIFIED DATE, TO PROVIDE FOR RULEMAKING ASSO-
16 CIATED WITH FEES, TO REMOVE PROVISIONS RELATING TO CERTAIN MEMORANDUMS
17 OF AGREEMENT, TO PROVIDE THAT THE DIRECTOR, AS APPROPRIATE, SHALL ES-
18 TABLISH AGREEMENTS WITH CERTAIN OTHER STATE AGENCIES TO ADMINISTER THE
19 NPDES PROGRAM AND TO PROVIDE A CORRECT CODE REFERENCE.
20

21 Be It Enacted by the Legislature of the State of Idaho:

22 SECTION 1. That Section 39-108, Idaho Code, be, and the same is hereby
23 amended to read as follows:

24 39-108. INVESTIGATION -- INSPECTION -- RIGHT OF ENTRY -- VIOLATION --
25 ENFORCEMENT -- PENALTY -- INJUNCTIONS. (1) The director shall cause investi-
26 gations to be made upon receipt of information concerning an alleged viola-
27 tion of this act or of any rule, permit or order promulgated thereunder, and
28 may cause to be made such other investigations as the director shall deem ad-
29 visable.

30 (2) For the purpose of enforcing any provision of this chapter or any
31 rule authorized in this chapter, the director or the director's designee
32 shall have the authority to:

33 (a) Conduct a program of continuing surveillance and of regular or
34 periodic inspection of actual or potential environmental hazards, air
35 contamination sources, water pollution sources, and of solid waste dis-
36 posal sites;

37 (b) Enter at all reasonable times upon any private or public property,
38 upon presentation of appropriate credentials, for the purpose of in-
39 specting or investigating to ascertain possible violations of this act
40 or of rules, permits or orders adopted and promulgated by the director
41 or the board;

1 (c) All inspections and investigations conducted under the authority
2 of this chapter shall be performed in conformity with the prohibitions
3 against unreasonable searches and seizures contained in the fourth
4 amendment to the constitution of the United States and section 17, ar-
5 ticle I, of the constitution of the state of Idaho. The state shall
6 not, under the authority granted by this chapter, conduct warrantless
7 searches of private property in the absence of either consent from the
8 property owner or occupier or exigent circumstances such as a public
9 health or environmental emergency;

10 (d) Any district court in and for the county in which the subject prop-
11 erty is located is authorized to issue a search warrant to the director
12 upon a showing of (i) probable cause to suspect a violation, or (ii) the
13 existence of a reasonable program of inspection. Any search warrant is-
14 sued under the authority of this chapter shall be limited in scope to
15 the specific purposes for which it is issued and shall state with speci-
16 ficity the manner and the scope of the search authorized.

17 (3) Whenever the director determines that any person is in violation of
18 any provision of this act or any rule, permit or order issued or promulgated
19 pursuant to this act, the director may commence either of the following:

20 (a) Administrative Enforcement Action.

21 (i) Notice. The director may commence an administrative enforce-
22 ment action by issuing a written notice of violation. The notice
23 of violation shall identify the alleged violation with speci-
24 ficity, shall specify each provision of the act, rule, regulation,
25 permit or order which has been violated, and shall state the amount
26 of civil penalty claimed for each violation. The notice of viola-
27 tion shall inform the person to whom it is directed of an opportu-
28 nity to confer with the director or the director's designee in a
29 compliance conference concerning the alleged violation. A writ-
30 ten response may be required within fifteen (15) days of receipt of
31 the notice of violation by the person to whom it is directed.

32 (ii) Scheduling compliance conference. If a recipient of a no-
33 tice of violation contacts the department within fifteen (15) days
34 of the receipt of the notice, the recipient shall be entitled to a
35 compliance conference. The conference shall be held within twenty
36 (20) days of the date of receipt of the notice, unless a later date
37 is agreed upon between the parties. If a compliance conference is
38 not requested, the director may proceed with a civil enforcement
39 action as provided in paragraph (b) of this subsection.

40 (iii) Compliance conference. The compliance conference shall
41 provide an opportunity for the recipient of a notice of violation
42 to explain the circumstances of the alleged violation and, where
43 appropriate, to present a proposal for remedying damage caused by
44 the alleged violation and assuring future compliance.

45 (iv) Consent order. If the recipient and the director agree on a
46 plan to remedy damage caused by the alleged violation and to assure
47 future compliance, they may enter into a consent order formalizing
48 their agreement. The consent order may include a provision pro-
49 viding for payment of any agreed civil penalty.

1 (v) Effect of consent order. A consent order shall be effective immediately upon signing by both parties and shall preclude
2 any civil enforcement action for the same alleged violation. If
3 a party does not comply with the terms of the consent order, the
4 director may seek and obtain, in any appropriate district court,
5 specific performance of the consent order and such other relief as
6 authorized in this chapter.
7

8 (vi) Failure to reach consent order. If the parties cannot reach
9 agreement on a consent order within sixty (60) days after the
10 receipt of the notice of violation or if the recipient does not
11 request a compliance conference as per paragraph (a) (ii) of this
12 subsection, the director may commence and prosecute a civil en-
13 forcement action in district court, in accordance with ~~subsection~~
14 paragraph (b) of this subsection.

15 (b) Civil enforcement action. The director may initiate a civil en-
16 forcement action through the attorney general as provided in section
17 39-109, Idaho Code. Civil enforcement actions shall be commenced and
18 prosecuted in the district court in and for the county in which the al-
19 leged violation occurred, and may be brought against any person who is
20 alleged to have violated any provision of this act or any rule, permit
21 or order which has become effective pursuant to this act. Such action
22 may be brought to compel compliance with any provision of this act or
23 with any rule, permit or order promulgated hereunder and for any relief
24 or remedies authorized in this act. The director shall not be required
25 to initiate or prosecute an administrative action before initiating a
26 civil enforcement action.

27 (4) No civil or administrative proceeding may be brought to recover for
28 a violation of any provision of this chapter or a violation of any rule, per-
29 mit or order issued or promulgated pursuant to this chapter, more than two
30 (2) years after the director had knowledge or ought reasonably to have had
31 knowledge of the violation.

32 (5) Monetary penalties.

33 (a) Any person determined in a civil enforcement action to have vio-
34 lated any provision of this act or any rule, permit or order promulgated
35 pursuant to this act shall be liable for a civil penalty not to exceed
36 the following amounts:

37 (i) For any violation of any provision of this act, rule, permit
38 or order related to air quality: ten thousand dollars (\$10,000)
39 for each separate air violation and day of continuing air viola-
40 tion, whichever is greater;

41 (ii) For any violation of any provision of this act, rule, permit
42 or order related to the Idaho national pollutant elimination sys-
43 tem program: ten thousand dollars (\$10,000) per violation or five
44 thousand dollars (\$5,000) for each day of a continuing violation,
45 whichever is greater; or

46 (iii) For any violation of any provision of this act, rule, per-
47 mit or order related to any other regulatory program authorized
48 by this act: ten thousand dollars (\$10,000) per violation or one
49 thousand dollars (\$1,000) for each day of a continuing violation,

1 whichever is greater ~~or ten thousand dollars (\$10,000) for each~~
 2 ~~separate air violation and day of continuing air violation.~~

3 The method of recovery of said penalty shall be by a civil enforcement
 4 action in the district court in and for the county where the violation
 5 occurred. All civil penalties collected under this act shall be paid
 6 into the general fund of the state. Parties to an administrative en-
 7 forcement action may agree to a civil penalty as provided in this sub-
 8 section.

9 (b) The imposition or computation of monetary penalties may take into
 10 account the seriousness of the violation, good faith efforts to com-
 11 ply with the law, and an enforceable commitment by the person against
 12 whom the penalty is directed to implement a supplemental environmental
 13 project. For purposes of this section, "supplemental environmental
 14 project" means a project which the person is not otherwise required
 15 to perform and which prevents pollution, reduces the amount of pol-
 16 lutants reaching the environment, contributes to public awareness of
 17 environmental matters, or enhances the quality of the environment. In
 18 evaluating a particular supplemental environmental project proposal,
 19 preference may be given to those projects with an environmental benefit
 20 ~~which that~~ relate to the violation or the objectives of the underlying
 21 statute ~~which that~~ was violated or ~~which that~~ enhances the quality of
 22 the environment in the general geographic location where the violation
 23 occurred.

24 (6) In addition to such civil penalties, any person who has been deter-
 25 mined to have violated the provisions of this act or the rules, permits or
 26 orders promulgated thereunder, shall be liable for any expense incurred by
 27 the state in enforcing the act, or in enforcing or terminating any nuisance,
 28 source of environmental degradation, cause of sickness, or health hazard.

29 (7) No action taken pursuant to the provisions of this act or of any
 30 other environmental protection law shall relieve any person from any civil
 31 action and damages that may exist for injury or damage resulting from any vi-
 32 olation of this act or of the rules, permits and orders promulgated thereun-
 33 der.

34 (8) In addition to, and notwithstanding other provisions of this act,
 35 in circumstances of emergency creating conditions of imminent and substan-
 36 tial danger to the public health or environment, the prosecuting attorney or
 37 the attorney general may institute a civil action for an immediate injunc-
 38 tion to halt any discharge, emission or other activity in violation of pro-
 39 visions of this act or rules, permits and orders promulgated thereunder. In
 40 such action the court may issue an ex parte restraining order.

41 (9) In any administrative or civil enforcement proceeding for viola-
 42 tion of any Idaho NPDES program rule, permit, requirement or order, the de-
 43 partment shall comply with the public participation requirements set forth
 44 in 40 CFR 123.27(d)(2).

45 SECTION 2. That Section 39-117, Idaho Code, be, and the same is hereby
 46 amended to read as follows:

47 39-117. CRIMINAL VIOLATION -- PENALTY. (1) Any person who ~~wilfully~~
 48 willfully or negligently violates any of the provisions of the non-air
 49 quality public health or environmental protection laws or the terms of any

1 lawful notice, order, permit, standard, rule or regulation issued pursuant
 2 thereto, shall be guilty of a misdemeanor and upon conviction thereof shall
 3 be punished by a fine of not more than ten thousand dollars (\$10,000) for each
 4 separate violation or one thousand dollars (\$1,000) per day for continuing
 5 violations, whichever is greater.

6 (2) Any person who knowingly violates any of the provisions of the air
 7 quality public health or environmental protection laws or the terms of any
 8 lawful notice, order, permit, standard or rule issued pursuant thereto shall
 9 be guilty of a misdemeanor and upon conviction thereof, shall be punished by
 10 a fine of not more than ten thousand dollars (\$10,000) per day per violation.
 11 In addition, any person who knowingly releases into the ambient air any haz-
 12 ardous air pollutant listed pursuant to section 112 of the federal clean air
 13 act, 42 USC U.S.C. 7412, or any extremely hazardous substance listed pur-
 14 suant to 42 USC U.S.C. 11002(a)(2) that is not listed under section 112, and
 15 who knows at the time that he thereby places another person in imminent dan-
 16 ger of death or serious bodily injury shall, upon conviction, be punished
 17 by a fine of not more than two hundred fifty thousand dollars (\$250,000) per
 18 day, or by imprisonment of not more than fifteen (15) years or both such fine
 19 and imprisonment. Any person committing such violation ~~which~~ that is an or-
 20 ganization, shall, upon conviction under this subsection, be subject to a
 21 fine of not more than one million dollars (\$1,000,000) for each violation.
 22 For any air pollutant for which the environmental protection agency or the
 23 board of ~~health and welfare~~ environmental quality has set an emissions stan-
 24 dard or for any source for which a permit has been issued under title V of the
 25 clean air act amendments of 1990, a release of such pollutant in accordance
 26 with that standard or permit shall not constitute a violation of the provi-
 27 sions of this subsection.

28 (3) Any person who willfully or negligently violates any Idaho national
 29 pollutant discharge elimination system (NPDES) standard or limitation, per-
 30 mit condition or filing requirement shall be guilty of a misdemeanor and upon
 31 conviction thereof shall be punished by a fine of not more than ten thousand
 32 dollars (\$10,000) per violation or for each day of a continuing violation.
 33 Any person who knowingly makes any false statement, representation or certi-
 34 fication in any Idaho NPDES form, in any notice or report required by an NPDES
 35 permit, or who knowingly renders inaccurate any monitoring device or method
 36 required to be maintained shall be guilty of a misdemeanor and upon convic-
 37 tion thereof shall be punished by a fine of not more than five thousand dol-
 38 lars (\$5,000) per violation or for each day of a continuing violation.

39 SECTION 3. That Section 39-175A, Idaho Code, be, and the same is hereby
 40 amended to read as follows:

41 39-175A. LEGISLATIVE FINDINGS AND PURPOSES. (1) The legislature
 42 finds:

43 (a) That navigable waters within the state are one of the state's most
 44 valuable natural resources;

45 (b) That it is in the public interest to promote effective and efficient
 46 regulation of the discharge of pollutants into navigable waters, and ~~to~~
 47 ~~explore whether~~ that the state should control such permitting decisions
 48 as authorized under the federal clean water act;

1 (c) That the clean water act allows a state to develop and implement,
 2 with approval from the United States environmental protection agency,
 3 a national pollutant discharge elimination system (NPDES) program to be
 4 administered by the state;

5 (d) That the clean water act, as amended, and regulations adopted pur-
 6 suant thereto, ~~establish~~ establishes complex and detailed provisions
 7 for regulation of those who discharge pollutants into navigable waters;

8 (e) That a state program to implement permitting decisions as autho-
 9 rized in the clean water act, and regulations adopted pursuant thereto,
 10 may enable the state to issue flexible permits consistent with the
 11 clean water act and avoid the existence of duplicative, overlapping or
 12 conflicting state and federal regulatory ~~systems~~ and enforcement pro-
 13 cesses;

14 (f) That a state program must be run with a minimum of federal inter-
 15 ference in permitting, inspection and enforcement activities and that
 16 all state permitting actions under the approved state program are to be
 17 state actions and are not subject to consultation under the endangered
 18 species act or analysis under the provisions of the national environ-
 19 mental policy act. There should be no conditions of approval of the
 20 state program ~~which~~ that have the effect of undermining or circumvent-
 21 ing ~~this~~ these principles;

22 (g) That the decision to accept delegation of authority from the envi-
 23 ronmental protection agency to operate an NPDES program has significant
 24 public policy implications that should be made by the legislature.

25 (2) Therefore, it is the intent of the legislature to establish re-
 26 quirements that must be satisfied prior to legislative approval of a permit-
 27 ting program that complies with the clean water act and ~~which~~ incorporates
 28 flexible permitting procedures and rules to be promulgated by the board.

29 SECTION 4. That Section 39-175C, Idaho Code, be, and the same is hereby
 30 amended to read as follows:

31 39-175C. APPROVAL OF STATE NPDES PROGRAM. (1) The department is au-
 32 thorized to ~~explore whether the state should operate~~ pursue approval of an
 33 NPDES program by evaluating the costs and benefits to the state, of such a
 34 program, consistent with the requirements of this section. The department
 35 shall ~~prepare a report to the legislature as to its findings by December 31,~~
 36 2005 submit a complete application consistent with the requirements of the
 37 clean water act and 40 CFR 123 to the environmental protection agency to ob-
 38 tain approval for a state NPDES program by September 1, 2016.

39 (2) The board is authorized to proceed with negotiated rulemaking and
 40 all other actions that may eventually be necessary to obtain approval of a
 41 state NPDES program by the United States environmental protection agency
 42 including rules authorizing the collection of reasonable fees for pro-
 43 cessing and implementing an NPDES permit program. Such fees shall not be
 44 assessed or collected until the state obtains an approved NPDES program con-
 45 sistent with the requirements of this section.

46 (3) ~~The director shall not execute a memorandum of agreement with the~~
 47 ~~United States environmental protection agency to obtain NPDES program ap-~~
 48 ~~proval as specified under section 402 of the clean water act and 40 CFR 123~~

1 ~~until completion of any required consultation and issuance of any final bio-~~
2 ~~logical opinion or biological assessment under the endangered species act.~~

3 ~~(4)~~ Any memorandum of agreement executed by the director to obtain ap-
4 proval to operate a state NPDES program shall not be binding on the state of
5 Idaho unless authorized by enactment of a statute. Any memorandum of agree-
6 ment not authorized in the above manner shall be of no force and effect.

7 ~~(5)~~ Implementation of a state NPDES program shall not occur prior to
8 statutory enactment of implementing legislation and authorization of a mem-
9 orandum of agreement as specified in subsection ~~(43)~~ of this section.

10 (5) The director, as appropriate, shall establish agreements with
11 other state agencies with expertise to administer the NPDES program.

12 (6) No provision of this chapter shall be interpreted as to supersede,
13 abrogate, injure or create rights to divert or store water and apply water to
14 beneficial uses established under section 3, article XV, of the constitution
15 of the state of Idaho, and title 42, Idaho Code.

16 (7) Nothing in this section is intended to supersede any existing
17 agreements between federal, state or local agencies regarding authority
18 over inspections, enforcement or other obligations under the clean water
19 act.