



IDAHO CONSERVATION LEAGUE

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You've got questions about ICL's position on Idaho's efforts to gain primacy of Clean Water Act permitting. . .

. . . We've got answers.

Has the Idaho Conservation League filed a legal challenge to Idaho's operation of the permitting program related to pollution discharges from facilities?

Yes. Pursuant to the Clean Water Act, we have filed a "Petition for Review" with the 9th Circuit Court of Appeals. We are asking the court to review the Environmental Protection Agency's (EPA) decision granting approval of the "Application by the State of Idaho to Administer the National Pollutant Discharge Elimination System and Electronic Reporting."

In the past, hasn't ICL generally supported Idaho having 'primacy' over the National Pollutant Discharge Elimination System (NPDES) program?

Yes, and we still do. The Clean Water Act is crafted in such a way that states can be in charge of pollution discharge permitting program in their state. Most states run their own programs. In Idaho, since passage of the Clean Water Act in 1972, the EPA has administered the discharge permitting program. Idaho has been one of only a handful of states that did not have primacy, and it's timely that Idaho seek to administer the permitting program within our state.

Is there an advantage if Idaho administered this program?

Yes. The EPA has not had the resources necessary to keep up with the permitting needs of Idaho and there is a significant backlog of permit applications awaiting action. As a result, many facilities in Idaho are operating under permits that have expired. These out-of-date permits do not reflect current environmental conditions and are not necessarily as protective as new, modern permits would be. Also, the EPA permitting backlog means that it can be very difficult for a new facility that wants to open in Idaho to receive a discharge permit. The wait can be many years.

If Idaho takes over the permitting program, it is likely that Idaho will be in a better position to address this backlog and expedite the processing of permit applications.

So, if there are advantages, why is ICL challenging Idaho's effort?

We want the program to be done right. Most of the Idaho program appears to be consistent with Clean Water Act direction. Nevertheless, we have concerns about a few very specific parts

of Idaho's program and we want the EPA (and Idaho) to correct these few shortcomings before those parts of the program are transferred to Idaho's administration.

Idaho has been working on getting primacy for a long time now, why are you raising these issues now?

We have participated in Idaho's primacy effort ever since it started several years ago. We have testified at the Legislature, attended numerous public meetings and rulemakings, submitted numerous comments on the draft iterations of Idaho's program plan framework, rules and guidance and we have commented in various EPA processes related to their review of the Idaho proposal. We are not jumping in late to disrupt this effort. While Idaho addressed some of our comments — there several issues that were not adequately resolved. We don't take going to court lightly and our legal challenge comes only after many unsuccessful efforts to resolve our concerns via other means.

What are the issues that you are asking the Court to review?

The main issues we are seeking review of are: (1) EPA's failure to ensure minimum criminal *mens rea* requirements in the Idaho NPDES Program (the state standard doesn't meet minimum federal requirements); (2) EPA's failure to articulate a rational basis for its approval of a two year statute of limitations in the Idaho Program (the federal standard is five years); (3) EPA's improper reliance on a 1984 regulation that was superseded by a 1987 amendment to the Clean Water Act; and (4) EPA's approval of the Idaho concentrated animal feeding operation (CAFO) program administered by the State Department of Agriculture (ISDA) without formally approving ISDA to run the NPDES program (the Clean Water Act requires states to seek approval for different agencies to administer specific programs, such as CAFOs).

Are you seeking to overturn Idaho primacy while these issues are addressed?

No. We are asking the court to require Idaho to correct the problems set forth above. We are not challenging the bulk of the new Idaho program. It is possible that the court may remand the entire program to EPA to correct these errors, but the few problems we have identified can be fixed, and ICL remains committed to the goal of having Idaho administer a healthy NPDES program fully consistent with the direction of the Clean Water Act.

What happens now?

Now that ICL has filed our petition, the EPA is crafting its response. It is likely that this will take a while for this matter to be heard by the court and for the court to issue a final ruling. In the meantime, ICL is open to discussing how to resolve these matters outside of court.

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