



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10

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OFFICE OF THE REGIONAL
ADMINISTRATOR

SEP 30 2016

John Tippetts, Director
Idaho Department of Environmental Quality
1410 N. Hilton
Boise, ID 83706

Dear Mr. Tippetts:

On August 31, 2016, the U.S. Environmental Protection Agency received the Idaho Pollutant Discharge Elimination System program submission. As I trust you are aware, since early in 2014, the EPA has worked closely with the Idaho Department of Environmental Quality as they developed the IPDES program, including regulations, the program description, and other documents required to be submitted pursuant to 40 CFR 123.21 for program approval by the EPA. We appreciate thoughtful engagement by IDEQ senior leadership and the significant effort put forth by IDEQ staff, in coordination with stakeholders, to develop the elements for a successful program.

As required by 40 CFR 123.21(b)(1), the EPA has completed review of IDEQ's IPDES program submission and has found the submission to be complete. Although all of the documents required under 40 CFR 123.21 were submitted, upon initial review, we have identified one issue that must be addressed prior to program approval and a number of other matters. While not at this point definitively identified as barriers to program approval, these matters will require more discussion between the EPA and IDEQ for clarification and/or issue resolution. These concerns are set forth in the attachment to this letter. This is not a comprehensive list, as we have not completed a thorough review of the IPDES program submission, but we wanted to share these initial concerns as early as possible. We will provide IDEQ with a letter setting forth further issues or comments to ensure that any issues we may have with the program submission can be resolved in a timely manner.

The Clean Water Act provides for a 90-day statutory review period from the receipt date of the State's program submission; however, this review period may be extended upon mutual agreement between the two agencies [40 CFR 123.21(d)]. We anticipate extending the statutory review period, in light of IDEQ's expressed desire to gain program approval in July 2018. The EPA recommends that IDEQ provide us with changes to the IPDES program documents and any final versions of the legislative bills by May 1, 2017. This will allow us to complete the public participation process required under 40 CFR 123.61 and allow us to act on IDEQ's program submission.

Thank you for your commitment to developing a strong IPDES program. The EPA looks forward to working with you to ensure the program's long-term success. If you have any further questions, please contact me, or Dan Opalski of my staff, Director of the EPA Region 10 Office of Water and Watersheds, at opalski.dan@epa.gov or (206) 553-1855.

Sincerely,

A handwritten signature in blue ink, appearing to read "Dennis J. McLerran".

Dennis J. McLerran
Regional Administrator

Attachment

cc: Mr. Barry Burnell, Water Quality Division Administrator, IDEQ

Ms. Mary Anne Nelson, IPDES Program Manager, IDEQ

Mr. Joel Beauvais, Deputy Assistant Administrator, Office of Water

Ms. Cynthia Giles, Assistant Administrator, Office of Enforcement and Compliance Assurance

Ms. Lisa A. Castañon, Acting Regional Counsel, Office of Regional Counsel, Region 10

Attachment: Initial Issues Identified with IPDES Program Submission

1. **Criminal Intent Standard.** The Clean Water Act (CWA) criminal intent standard for negligent violations is simple negligence. As described in the submitted Attorney General's Statement, the State of Idaho's criminal intent standard for negligent violations is gross negligence. 40 CFR 123.27(b)(2) requires states to have criminal intent standards that may not be greater than the standards which apply to the EPA. Since the CWA and federal courts have defined the CWA's negligence standard as ordinary or simple negligence, an approvable State NPDES program must have a criminal negligence standard that does not require a greater burden of proof than this intent standard. A gross negligence standard does not meet this requirement. As such, Idaho will need to adequately address this criminal negligence standard issue in order for EPA to approve the IPDES program.
2. **Statute of Limitations (SOL).** Under federal law, the statute of limitations for both CWA civil and criminal enforcement actions is five years. In Idaho, the statute of limitations is two years for civil enforcement actions and one year for criminal enforcement actions. The EPA is discussing internally whether the difference between the federal SOL and Idaho's SOL raises any concerns. We will keep IDEQ staff apprised of our final analysis.
3. **Notice of Compliance Letter.** In Appendix H of the Program Description, the Enforcement Response Guide (ERG) describes a notice of compliance letter that IDEQ intends to send to permittees who were found to be non-compliant with an IPDES permit but who IDEQ now finds have come into compliance with the IPDES permit. In describing the notice of compliance letter, the ERG states "[IDEQ] will not take further action regarding those specific events." The EPA is concerned that this amounts to a programmatic, no action assurance policy that could eliminate penalty-only cases and limit cases involving intermittent violations. While IDEQ can take case-by-case enforcement discretion in determining whether to take a formal enforcement action, it should not make such commitments in writing to permittees.
4. **Concerns Regarding IDEQ's Criminal Enforcement Program.** IDEQ does not intend to have staff assigned to IPDES criminal investigations and the pursuit of criminal enforcement actions. The EPA knows criminal actions require time, knowledge and skills to pursue and dedicated staff are crucial for a successful NPDES program. IDEQ should explain and clarify how it will enforce each instance of criminal violations of state environmental statutes, considering current state law limitations and the absence of any designated environmental criminal investigators or prosecutors. Additionally, there should be no policy that limits the direct interaction between the EPA Criminal Investigation Division (EPA CID) EPA CID and IDEQ field agents. IDEQ should consult with EPA CID if there is a suspected violation of an environmental criminal statute prior to deciding whether criminal or civil proceedings will be pursued by the State or referred to EPA CID. The EPA requests further clarification in the Enforcement Procedures Manual regarding these concerns.
5. **Concentrated Animal Feeding Operation (CAFO) Program.** There are inconsistencies and ambiguities in several of the program documents regarding the respective roles of IDEQ and Idaho State Department of Agriculture (ISDA) with respect to CAFO permits. For example, in section 4.2 of the Memorandum of Understanding (MOU) between the two agencies, ISDA is described as being responsible for evaluating whether an IPDES permit would be needed for discharges into a water of the United States. In addition, the MOU between the two agencies should be modified to more fully cover the transfer of information to IDEQ related to all ISDA activities that relate to administration of the NPDES program, such as inspections of unpermitted CAFOs. There should also be an explanation in the Attorney General's Statement that details how IDEQ would obtain the

requisite information to determine whether a discharge requires NPDES permit coverage. Specifically, the EPA request clarification about whether IDEQ has authority similar to that available under section 308 of the CWA. Additionally, the Attorney General's Statement should provide an interpretation of the authority cited in the MOU between ISDA and IDEQ [Idaho Code 39-175C (5)], which is described in Section 2 as allowing IDEQ to enter into an agreement with other agencies to administer the program. IDEQ will be the only authorized NPDES agency in Idaho and, based on its statutory authority, should be the sole authority for administering the IPDES program, this includes identifying unpermitted discharges, making compliance determinations related to both permitted and unpermitted CAFOs, and taking timely and appropriate enforcement action.

6. Memorandum of Agreement between EPA and IDEQ (MOA). Under the legislation directing IDEQ to seek NPDES authorization, IDEQ is required to submit the MOA to the Legislature for approval before the agencies sign the MOA. In the July IPDES stakeholder meeting, IDEQ noted that they will introduce the MOA during the 2017 legislative session and will seek legislative approval during the 2018 legislative session. The purpose of this approach is to allow any potential stakeholder involvement to occur during the 2017 session. It is possible that the Legislature may change some terms of the MOA during either the 2017 or 2018 legislative sessions; these changes may affect program approval. As such, if there are changes to the MOA, IDEQ must provide the EPA with the revised MOA.
7. Vessel Discharges. At this time, IDEQ has all the necessary authorities to regulate vessel discharges; however, the EPA understands that IDEQ does not want to regulate vessel discharges and that IDEQ intends on introducing legislation during the 2018 legislative session that would remove IDEQ's authority to regulate vessel discharges.¹ IDEQ should keep the EPA informed about outcome of legislation so that the EPA can determine whether changes will affect the IPDES program submission.
8. Changes to NPDES Regulations. The EPA has proposed changes to federal NPDES regulations related to small Municipal Separate Stormwater Systems (MS4) permits and other NPDES regulatory updates.² Depending on the timing of the regulatory changes, the EPA may require IDEQ to change the IPDES regulations to be consistent with the federal regulations.

References:

Idaho Pollutant Discharge Elimination System: Program Application
<http://www.deq.idaho.gov/water-quality/ipdes/program-application/> (September 20, 2016)

Federal NPDES Regulations 40 CFR Part 123 - State Program Requirements
<http://www.ecfr.gov/cgi-bin/text-idx?SID=0a23fa5340faa52601026e17f2f5ba81&mc=true&node=pt40.24.123&rgn=div5#se40.24.123_161> (September 20, 2016)

¹ IPDES Program Description, September 2016, p. 16. <<http://www.deq.idaho.gov/media/60179028/ipdes-application-program-description.pdf>> (September 25, 2016) "DEQ will introduce legislation in 2018 that excludes discharges from vessels from the IPDES program. EPA will continue to operate and issue the vessel general permit(s) under their authority in Idaho."

² Stormwater Rules and Notices, Proposed MS4 General Permit Remand Rule, <<https://www.epa.gov/npdes/stormwater-rules-and-notices#proposed>> (September 25, 2016)
NPDES Application and Program Updates, <<https://www.epa.gov/npdes/npdes-application-and-program-updates>> (September 25, 2016)