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Idaho Conservation League

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Paula Wilson
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Submitted via email: paula.wilson@deq.idaho.gov

Re: Idaho Conservation League Comments re Idaho Pollutant Discharge Elimination System Program: Docket No. 58-0125-1401 - Negotiated Rulemaking. Public Comment period #1

Dear Ms. Wilson;

Since 1973, the Idaho Conservation League (ICL) has been Idaho's voice for clean water, clean air and wilderness—values that are the foundation for Idaho's extraordinary quality of life. The Idaho Conservation League works to protect these values through public education, outreach, advocacy and policy development. As Idaho's largest state-based conservation organization, we represent over 25,000 supporters, many of whom have a deep personal interest in protecting Idaho's water quality, fisheries and the health of Idaho residents. The issuance of NPDES permits is critical to protecting and restoring water quality in Idaho. Idaho's effort to obtain primacy over discharge permits issued within its borders has the potential to significantly affect water quality in Idaho.

DEQ has asked for public comment on three separate issues: 1) proposed language regarding confidentiality, 2) how to incorporate pertinent NPDES rules, and 3) DEQ's analysis of the staff/resources needed to implement an IPDES program.

Proposed language regarding confidentiality

Additional language needs to be added which clarifies that all documents, plans, schedules, monitoring data, reports etc. that are submitted to the agency pursuant to a requirement included in an IPDES permit will be made available to the public and any claim of confidentiality for such materials shall be denied.

This language is required because the currently proposed language fails to provide that

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materials submitted to the department, as a term of compliance with a discharge permit, are publicly available documents.

How to Incorporate Pertinent NPDES Rules and Requirements

If Idaho successfully obtains primacy over CWA discharge permit issuance in Idaho, it will be very important that DEQ take all of the steps that will be necessary for Idahoans to fully understand the intricacy and complexities of the new IPDES program. Failure for the regulated community, agencies, citizens and other interested parties to understand the IPDES program will greatly reduce its effectiveness and hamper transitioning to state control.

A key aspect of understanding the program will be providing a single set of rules for people to consult. To this end, we believe that reprinting *all* of the necessary NPDES rules into the Idaho rules is the best way to proceed.

Merely incorporating the necessary federal rules by reference, while sufficient from a legal perspective, is not sufficient from the perspective of ensuring that Idahoans are provided with the needed materials, in an accessible format, to allow them to understand and comply with the rules for this new program. Trying to switch back and forth between IDAPA and the CFR will be confusing. Idaho is best served by having a single set of rules to reference.

We all expect that Idaho will adopt or copy verbatim only certain aspects of the existing federal rules. And, concurrent to this, Idaho will draft unique Idaho language to replicate the intent and requirements of some portions of the federal rules. This unique Idaho language (if approved by the EPA) will 'replace' existing federal language that is currently in the CFR. It will be very confusing if an Idaho reader had to go find the germane CFR, read a line or two, get the IDAPA Rules, read a line or two, then go back to the CFR read a paragraph – go back to the IDAPA, insert single IDAPA sentence into the CFR paragraph *while mentally deleting the existing federal sentence with the unique Idaho sentence* – and then complete the CFR paragraph. This will be very, very confusing.

We believe that the best possible path forward is for Idaho to adopt whatever federal language it needs to and to craft whatever unique Idaho language it needs to and then to print the entire text of this State and Federal amalgam into Idaho's IDAPA Rules so that it can be read as a single document.

DEQ's Analysis of the Staff/Resources Needed to Implement an IPDES Program

We are concerned that DEQ's analysis of staffing needs significantly underestimates the number of staff that will be required to implement and administer the IPDES program.

DEQ seems to have undertaken a thoughtful analysis of the various necessary

components necessary to run the IPDES program: Administration, Permitting and Compliance. Utilizing this analysis to come to an accurate estimation of staffing needs hinges on correctly gauging the number of IPDES permits that will be issued and the amount of work required to service each permit.

We are concerned that the DEQ has significantly underestimated the number of *current* NPDES permits that have been issued in Idaho. As a result, DEQ has significantly underestimated the number of DEQ staff that will be required to maintain and service these current permit.

For instance, DEQ reports that there are 278 construction stormwater NPDES permits in Idaho. DEQ has, in part, utilized this estimate to calculate the number of DEQ staff that will be needed to administer, permit, inspect and ensure compliance of the IPDES program. However, our review of the federal database reports that there are currently 1201 active stormwater construction permits in Idaho. This is significantly more than DEQ has reported. And, this greater number of current NPDES permits will require significantly more staff to oversee.

Similarly, it appears that DEQ has underestimated the number of industrial stormwater permittees. DEQ reports there are 7. Our review of the federal database reports 278. Again, this larger number will require significantly more staff to oversee.

Also of concern is the fact that the DEQ estimates do not factor in any growth in the number of permit applications.

The pursuit of NPDES primacy has, in part, been stoked by the supposed need to ensure that businesses that want to locate in Idaho need to have access to prompt permitting. This argument is predicated on the belief that new businesses are going to come to Idaho and apply for IPDES permits. DEQ, however, assumes in its analysis that the number of permits will stay the same and that no new industries will apply for IPDES. This inconsistency needs to be corrected and the number of permits that Idaho services needs to be projected as growing through time – and staffing need to be increased to reflect this.

In addition to new industries locating into Idaho, there is likely to be new permits sought by industry already in Idaho. For instance, there is currently very little participation in the CAFO General NPDES Permit. However, within the last several years there have been a number of cases of CAFOs being penalized by the ISDA for illegal discharges to waterways. It seems likely that the DEQ will be obligated to require that some subset of the CAFOs in Idaho apply for and operate pursuant to an IPDES permit in the future. These considerations need to be accounted for in estimations of future staffing levels.

Also related to servicing the CAFOs in Idaho, even though no CAFOs currently have NPDES permits, the DEQ will have to conduct a significant amount of compliance and related review and investigations. This need is not reflected in the current analysis because the fact that there are zero CAFO NPDES permits in Idaho means that the

calculations to estimate the work needed to inspect them returns a zero figure. There are hundreds of CAFO in Idaho and DEQ will be responsible for reviewing operations and insuring compliance – even if they are just ensuring their ‘zero-discharge’ no IPDES required status. This is going to require a lot of staff time and this oversight needs to be corrected and staff time needs to be budgeted to service this important industry.

As noted in the DEQ analysis, the EPA is currently struggling to re-issue permits in a timely manner and there currently exists a significant ‘backlog’ of out-of-date permits. The DEQ analysis reports that 35% of all NPDES permits in Idaho are out of date.

Per the DEQ report, the EPA appears to have 13-14 FTE permit writers servicing Idaho’s permit needs – yet this backlog continues to exist. So it seems logical to conclude that 13-14 permit writers are not sufficient to addressing the existing pool of Idaho permits, and there is absolutely no opportunity for them to also somehow address new industries moving to Idaho.

In its analysis, DEQ concludes that it will need 11 permit writers. This estimate seems divorced from the reality that we can observe by looking at EPA’s current staff needs.

Centralized vs. Decentralized. Specialized vs. Generalists.

On the topic of whether or not permit writers should be centralized in the State office or decentralized out to the regions and whether permit writers should be specialized for certain types of dischargers or act as generalists... We believe that the permit writers should be specialized. This is likely to result in them being more efficient and writing more consistent permits. We also believe that the overall program will be stronger and better managed if the program is centrally located in the State office. We believe that this will allow individual staff to benefit from being co-located with other personnel working on similar issues, have better access to support and technical and legal assistance.

Compliance staffing

We are concerned that DEQ has underestimated the number of hours that are required to undertake certain types of activities. For instance, the DEQ estimates that it will take 16 hours to conduct a Complaint Investigation at a Major Facility with an individual. We do not believe that this is an accurate estimate of the time required. Similarly, DEQ estimates that other sorts of facilities will be investigated in 16 hours. And, similarly, we do not think this is realistic.

As noted above, the CAFO compliance inspections show up as requiring 0 (zero) FTEs. Aside from this error, it is also worth noting that the time that is estimate to do a CAFO routine compliance inspection (if one were done) is reported as being 2 hrs. This is not realistic. For an inspector to familiarize themselves with the facility records, travel to the facility, inspect the facility, return to the office, write up their report, etc. will take significantly more than 2 hours.

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Also, it is worth noting that many agencies direct that compliance inspections in remote locations be conducted in teams of two. This consideration would impact the number of FTE's required to conduct inspections and should be accounted for.

As we look through the entire list of compliance related activities, all of them seem to significantly underestimate the time required to do the complete activity.

No where is this underestimating more apparent than the section of the analysis related to Violation Response Civil and Criminal Referral. While DEQ seems to have better estimates of the 'effort required' for activities listed here, the DEQ estimates very, very small 'number of facilities affected.' So, while DEQ estimates that it will take 1,000 hrs of staff time to address a civil referral – it also estimates that only 0.001 facilities per year will require this effort. As a result, the analysis estimates that only 1 (one) hour per year will need to be staffed for this activity.

Indeed, if you add up *all* of the hours needed for civil and criminal referral for *all* of the permits issued in the entire state, the DEQ analysis reports that DEQ will only need to staff this for 3 (three) hours per year. This makes no sense. DEQ is creating an IPDES program that has no capacity (or only 3 hrs per year of capacity) to undertake civil or criminal referrals. This is a huge oversight.

Please contact me if you have any questions at 208-345-6933 x 24
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Sincerely,



Justin Hayes
Program Director