

Decision Analysis Report 3

National Pollutant Discharge Elimination System Program Review

Department of Environmental Quality

December 2005



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NPDES Primacy for Idaho: Background and History

The National Pollutant Discharge Elimination System (NPDES) program requires that facilities that discharge water from point sources into “waters of the United States” obtain permits. NPDES permits contain limits on what can be discharged, along with other provisions to ensure that the discharge does not harm water quality or the public’s health.

The U.S. Environmental Protection Agency (EPA) currently retains "primacy" for the NPDES program in Idaho, meaning that the EPA is responsible for permitting and enforcing all NPDES permits in the state. The Department of Environmental Quality (DEQ) is responsible for certifying that EPA permitted facilities meet Idaho water quality standards.

Previous Idaho Primacy Evaluations: Decision Analysis Reports 1 and 2

Since 2000, DEQ and stakeholders have been involved in a dialog to determine whether Idaho should seek state primacy for the NPDES permitting program. DEQ formed a steering committee in June 2000 to evaluate (with stakeholders) whether DEQ should take charge of the NPDES permit program.

Two reports document the progress of primacy evaluation to date:

- *Decision Analysis Report 1*¹ (dated January 26, 2001)
- *Decision Analysis Report 2*² (dated December 2002)

Summaries of these reports, which can be found in Appendices A and B of this report or at the Web sites listed at the bottom of the page, are as follows:

Decision Analysis Report 1

The initial phase of the process focused on determining the scope and estimated cost of a potential Idaho NPDES program; determining the requirements under the Clean Water Act (CWA) to obtain such a program; and identifying advantages, disadvantages, and uncertainties related to an Idaho program. The conclusion was that state NPDES primacy was conceptually attractive; however, a more detailed analysis of costs and benefits needed to be developed prior to making a recommendation to proceed.

Decision Analysis Report 2

Decision Analysis Report 2 addressed specific steering committee needs related to understanding the potential costs and benefits of a state-run NPDES permitting program. Issues discussed in the report included the following:

- State capacity to run the NPDES Program
- Endangered Species Act (ESA) consultation
- Potential flexibility and innovative state NPDES program approaches
- Program costs and funding
- Annotated outline for storm water guidance
- Water Quality Based Effluent Limits (WQBEL) guidance

¹ DEQ 2001. Decision Analysis Report 1: National Pollutant Discharge Elimination System Program Review. Department of Environmental Quality, Boise, Idaho. http://www.deq.idaho.gov/water/prog_issues/waste_water/npdes_primacy_report1.pdf

² DEQ 2002. Decision Analysis Report 2: National Pollutant Discharge Elimination System Program Review. Department of Environmental Quality, Boise, Idaho. http://www.deq.idaho.gov/water/prog_issues/waste_water/npdes_primacy_report2.pdf

2005: Decision Analysis Report 3

In the 2005 Legislative Session, House Bill 176 authorized DEQ to explore, by further evaluating the costs and benefits to the state, whether the state should operate an NPDES program. This report therefore updates information for review by the legislature and the citizens of Idaho.

In this report, *Decision Analysis Report 2* has been revised and updated to reflect current permitting practices and the current list of NPDES permittees within the state. Resource costs, scope of programs included, and the number and nature of permits have been reviewed and updated. Additionally, ESA consultation procedures have been reviewed in the context of recent court cases. Updated funding options are also briefly addressed.

Development of all guidance, rules, and program components are targeted for submittal to the legislature only after a decision is made to prepare the primacy application by the legislature. Final delegation of an NPDES program to Idaho cannot be made until the approval of all rules and budgets by the legislature and approval by the EPA.

Resolution of Concerns from Previous Evaluations

Stakeholder groups expressed concerns during previous evaluations, as recorded in *Decision Analysis Report 2*. These concerns were addressed during the 2005 NPDES primacy evaluation process, as described in the following.

Costs and Funding

This revised report updates costs for running the NPDES program. Although the funding sections presented in this report represent a range of options, a final funding structure that is adequate, equitable, and affordable needs to be defined.

DEQ will provide stakeholders with an opportunity for participation through the negotiated rulemaking process prior to establishing any fees for the NPDES Program.

Capacity

Many stakeholders have expressed the opinion that for DEQ to undertake the NPDES program there must be an adequate number of capable DEQ staff.

Demonstration of state capacity to run the NPDES Program has been ongoing over the last few years and will take several more years to fully complete. EPA provides funding to DEQ to: (1) attend training on NPDES permit writing, (2) perform NPDES inspections at selected facilities, (3) assist EPA with writing permits, and (4) focus staff in program areas, such as biosolids and storm water.

Flexibility

Where possible and while ensuring the protection of Idaho's water quality resources, the state will apply flexible or innovative approaches when implementing NPDES. Rules and guidance with flexible approaches will be drafted as the program is implemented.

Some guidance with these flexible approaches has already been developed and can be reviewed in NPDES Decision Analysis Report 2, located in Appendix B and at the following Web page:

http://www.deq.idaho.gov/water/prog_issues/waste_water/npdes_primacy_report2.pdf.

Endangered Species Act (ESA) Consultation

EPA is usually required to consult with the U.S. Fish and Wildlife Service (FWS) and the National Oceanic & Atmospheric Administration (NOAA) Fisheries Service on the state's primacy application, prior to the state receiving authorization. Once the state has primacy for the NPDES Program, it will not be obligated to consult with these agencies on the issuance of state permits, but both FWS and NOAA will still have the opportunity to make comments through the normal public review process.

Arizona Court Case May Affect Idaho

A court proceeding in Arizona may eventually affect Idaho: recently, the 9th Circuit Court of Appeals (the circuit Idaho is in) vacated EPA's approval of Arizona's NPDES Program (*Defenders of Wildlife et al v. EPA*, August 22, 2005). The court found EPA's claim—that they were required to consult with the FWS and NOAA prior to authorizing primacy but that any effects on listed species was outside EPA's program approval criteria—illogical. The court concluded that the ESA requires federal agencies to protect listed species even when their own statutes, in this case the Clean Water Act, do not address such protection.

EPA and FWS requested a rehearing before the entire 9th Circuit, arguing that because EPA has no discretion in granting primacy if a state meets the nine prerequisite conditions in the Clean Water Act, it is not required to consult with FWS and NOAA.

A decision has not yet been made on the appeal, and Arizona continues to issue NPDES permits.

The Arizona case may result in Idaho's water quality standards being evaluated by FWS and NOAA to determine if there is a *take* (a reduction in numbers, due to killing or other causes) of endangered species because of the state implementing the NPDES program using these standards. If this is the case, there may be a question as to whether EPA would issue NPDES primacy to Idaho, because the state water quality standards do not meet EPA's current recommended criteria for arsenic or the low end hardness cap for calculating hardness dependent toxic pollutant concentrations. Other portions of the state water quality standards may also be questioned under an ESA review.

What effect the Arizona case will have on a request for primacy by Idaho remains uncertain. See the supporting documents in Appendix C for a summary of the Arizona case.

Alaska Also Pursuing Primacy

It should be noted that the state of Alaska is currently in the process of pursuing NPDES primacy. For further information on Alaska's pursuit of NPDES primacy, which includes Alaska's analysis of the Arizona case, see the following Web site:

<http://www.dec.state.ak.us/water/npdes/npdes.htm>

Benefits of an Idaho NPDES Program

It is difficult to make a cost comparison between a state run NPDES program and a federally run NPDES program. Some of the benefits of a state run program are difficult to measure because they do not have an easily identifiable “cash value,” but they include the following:

- Idaho elected officials, who have familiarity and understanding of Idaho specific issues, will oversee the Idaho program.
- Permittees will have only one set of rules and regulations and one agency with which to interact, resulting in less confusion for permittees and less overlap of responsibilities for regulatory agencies.
- The state would have a fully functioning and adequate program to protect Idaho natural resources and human health.
- The state will have the ability to interpret and apply Idaho water quality standards to determine when permit limits are necessary and what alternate or innovative approaches are appropriate.
- The state will coordinate water programs—such as the total maximum daily load program (TMDL) and the state loan and grant programs—with the permitting program, providing a more comprehensive approach to water quality protection.
- The state will focus on upfront compliance assistance before enforcement.
- The state will use a streamlined ESA process with no permit-by-permit consultation.
- The state will coordinate all of the available tools, including using other sections of the Idaho water quality standards, such as *variances* and *use attainability analyses*, to develop commonsense solutions during the permitting process.
- The state will use innovative, cost-effective solutions to water quality issues, such as those issues involving temperature, nutrients, cadmium, and mercury.
- The state will have the ability to pool state and private funding for research when opportunities arise to work together on desirable program changes or standards development.

All of these issues need to be considered together.

Two examples show ways that a state program may benefit a permit holder:

Example No. 1: Reasonable Potential to Exceed

A hypothetical discharger into a river that contains an endangered species has applied for an NPDES permit. The process of filling out the permit application form is likely to be very similar under either the DEQ or EPA process, but a draft EPA permit might include limits for metals that are not deemed necessary in the DEQ draft permit—a result of the differences in the permitting procedures used by EPA and DEQ to calculate the *reasonable potential to exceed* (RPTE).

Both processes are protective of ambient water quality, but the EPA process has a higher margin of safety. Under the EPA procedures, the permittee would be required to either institute controls or demonstrate that treatment is not necessary:

- If the applicant chooses the control option, the metals limits would result in a capital cost for a lime precipitation process of \$1.50/gallon/day over 20 years. (Operation and maintenance costs are not considered in this example.)
- If the applicant chooses to demonstrate that controls are not necessary, the applicant must develop either a site-specific criteria or a water effects ratio to show that the treatment is not necessary to

protect the beneficial uses. This requirement results in additional consulting costs of \$150,000 – 250,000, and it may also require legal fees to make sure that administrative challenge rights are retained.

Similar processes and issues apply to other common pollutants, like ammonia.

Example No. 2: Consultation

The issuance of the federal (e.g. EPA) NPDES permit, when discharging into waters with threatened or endangered species, is subject to consultation with FWS and NOAA, and a biological opinion will likely be required. Preparation of a biological opinion by an applicant's consultant would cost approximately \$20,000, assuming that the permit as drafted was found to be protective and that there are no additional costs to implement reasonable and prudent alternatives.

State issued permits would not be subject to individual permit consultation requirements, saving the applicant the \$20,000 cost in conducting a biological opinion.

Recommendation from Steering Committee and Other Interested Stakeholders on NPDES Primacy

As shown in the following, there is support for NPDES primacy.

Recommendation of the NPDES Steering Committee

In December 2002, the NPDES Steering Committee members (see the appendix of *Decision Analysis Report 2* for a list names) supported state pursuit of NPDES primacy, provided that concerns regarding program costs and funding, capacity, flexibility, and specific concerns regarding program guidance are first resolved.

To elicit current opinions on the state's pursuit of primacy, a survey will be sent out to stakeholders. Results from this survey will be reported as soon as they have been received and summarized.

Statement from the Steering Committee Related to Endangered Species Act Consultation

The following statement was issued by the committee upon the presentation of the December 2002 report:

“The steering committee recognizes that the decision by the Environmental Protection Agency (EPA) to delegate NPDES primacy to the state of Idaho will require programmatic consultation with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (Services) [a part of NOAA]. We support working with the Services to assure that all parties fully understand the program and have input as it is developed to assure the consultation process is as routine and predictable as possible. Therefore, the state of Idaho, in conjunction with EPA, the Services, and any other federal agency as appropriate, should obtain any required consultation approvals prior to the EPA approving state primacy. The purpose is to ensure that the regulated community has full knowledge of consultation impacts. The state and many of the Steering Committee members submitted comments supporting the national MOA [Memorandum of Agreement] regarding consultation on CWA issues. We are opposed to consultation taking place in a manner, which goes beyond the authority of the federal agencies under the CWA and the ESA, or the provisions contained in the national MOA.”

Program Cost Estimates and Funding Options

Updated program cost estimates and an analysis of funding options for Idaho assumption of the NPDES program are presented in the following.

Program Costs

Managing permits for Idaho's estimated 904 NPDES-permitted facilities would require the equivalent of about 23 full time DEQ employees dedicated to the program, at a total cost of \$2,125,000 per year (Table 1).

How Program Costs Were Determined

Program costs were determined using a national model (spreadsheet) developed together by EPA and states with NPDES primacy to estimate the cost of managing an adequate state permit program

In broad terms, an NPDES permit program includes the following activities and costs:

- Writing and issuing permits
- Conducting annual inspections
- Managing the required data
- Maintaining compliance assurance/enforcement
- Administering the program

Basic assumptions and criteria for each category of permittee are unchanged and are listed in Decision Analysis Report 2 to illustrate how the model determined costs.

In December 2005, revisions were made in the cost estimates to reflect the following changes in expected permitting practices as EPA currently operates:

- Added biosolids general permits for six regions of Idaho, as EPA is currently in this process.
- Modified municipal storm water permitting to be individual permits rather than general permits.
- Adjusted minor municipal permits to be all individual permits rather than some general permits. The general permit concept for municipal facilities has proven unworkable for EPA.
- Reviewed staff salaries and overhead costs but did not change the average cost per FTE. However, future cost increases in this area are inevitable over time, so a mechanism should be built-in to account for increased costs.
- The single general permit for aquaculture that was contemplated has been replaced with one individual permit and two general permits.
- The permit inventory was reviewed but not changed. Although there have been some changes in permittees, the net effect is mostly unchanged. (It should be noted that the inventory has some legacy issues and therefore should only be used as an estimate.)

Key Assumptions

Biosolids permitting and management is not a required element of a state primacy program. Biosolids are the treated solids from wastewater treatment processing that is land applied to crops or disposed of in landfills.

If the biosolids component were not assumed, one fewer FTE and \$113,000 less funding would be required. However, the lack of having the biosolids program would offset some of the advantages of having primacy. DEQ would still have to manage state regulations in this area, and EPA would administer their own regulations, creating some confusion for permittees.

It should also be noted that the costs for confined animal feeding operations (CAFO) only include permitting costs shown for DEQ but not the compliance and enforcement costs that would continue to be funded by the Department of Agriculture, as is currently being done.

Table 1. Anticipated DEQ NPDES program staff and funding requirements.

| Categories | No. of Facilities | FTEs ^a | Total Cost |
|---|-------------------|-----------------------|--------------------|
| Municipal Majors 10+ mgd ^b | 5 | 1.14 | \$104,793 |
| Municipal Majors 5-10 mgd | 6 | 1.12 | \$103,049 |
| Municipal Majors 2-5 mgd | 11 | 1.28 | \$117,213 |
| Municipal Majors 1-2 mgd | 5 | 0.47 | \$42,911 |
| Municipal Minors > 500 hookups | 40 | 2.44 | \$223,844 |
| Municipal Minors < 500 hookups | 71 | 4.24 | \$389,745 |
| Total Municipal | | | \$981,555 |
| Industrial Majors (80+) | 10 | 1.09 | \$100,173 |
| Industrial Minors Medium (30-79) | 7 | 0.33 | \$30,707 |
| Industrial Minors Small (0-29) | 64 | 2.45 | \$225,368 |
| Total Industrial | | | \$356,247 |
| Aquaculture Majors | 25 | 1.06 | \$97,119 |
| Aquaculture Minors | 69 | 1.25 | \$114,377 |
| Total Aquaculture | | | \$211,495 |
| Storm Water Medium and Large MS4 ^c | 1 | 0.11 | \$10,468 |
| Storm Water Small MS4 (general) | 8 | 1.11 | \$102,411 |
| Storm Water Construction (general) | 400 | 2.75 | \$252,435 |
| Storm Water Industrial (general) | 180 | 1.66 | \$152,912 |
| Storm Water General Education/Outreach Coordination | 1 | 0.39 | \$36,155 |
| Total Storm Water | | | \$554,382 |
| CAFO ^d (DEQ portion) | 1 | 0.22 | \$20,412 |
| Total CAFO (DEQ portion) | | | \$20,412 |
| Total | 904 | 23.12 | \$2,124,091 |
| Administration | | FTEs (included above) | |
| Data Management | | 1.7 | |
| Rule/Guidance Development | | 1.8 | |
| Program Management | | 2.0 | |
| Total | | 5.5 | |

^a FTE = Full time equivalent employees

^b mgd = Million gallons per day

^c MS4 = Municipal Separate Storm Sewer System

^d CAFO = Confined Animal Feeding Operation

If the storm water costs are apportioned to the municipal and industrial categories, the breakdown of costs by category are as shown in Figure 1. As can be seen, municipal systems account for about 50% of the cost.

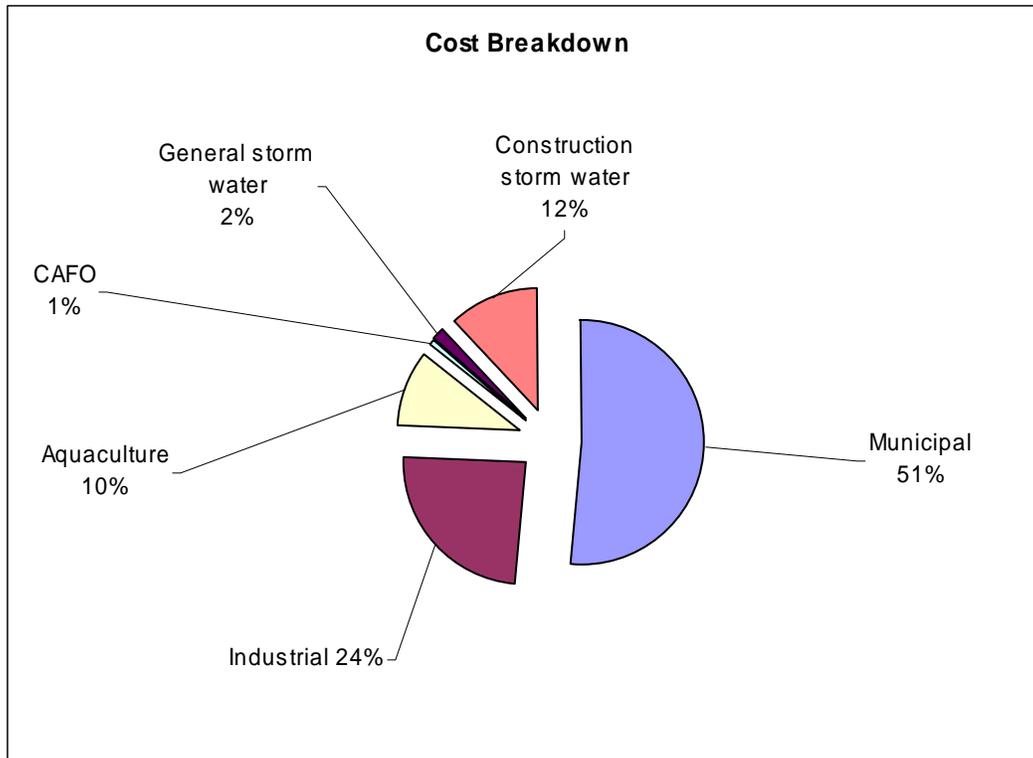


Figure 1. Cost breakdown by category of system.

Funding Options

NPDES primacy has been discussed in the past, but never pursued because permit holders felt the costs and benefits associated with the program were not proportionate. The benefits that permit holders perceived were not great enough to offset fees necessary to fund the program. There was also reluctance at the legislative level to use general funds to pay for the program.

Criteria for Funding NPDES Primacy

At an October 2001 meeting, a report prepared by CH2M HILL following an investigation of other states' fee structures was reviewed and discussed. (The report is available in the appendix of NPDES *Decision Analysis Report 2*.) While none of the states researched seemed to have just the right fee mix for Idaho, it was apparent that any funding approach suitable for Idaho needs to meet the following general criteria:

- The system should be simple, with little administrative burden on permit holders or the agency.
- Fees should be annual and constant.
- Individual permit fees should not be greater than the cost of issuing and managing the permit.
- Funding for the program should be spread between permit fees, state funds, and federal funds, if possible.

Three Draft Fee Structures

Based on these four criteria, three draft fee structures are presented, including scenarios where facilities pay one-third of the cost, sixty percent of the cost, and all of the cost.

The structures use five cost categories that group similar sources:

- Municipal
- Industrial
- Aquaculture
- Storm water
- CAFO

Each of the cost categories are further broken down into subcategories, and all the fees shown are annual fees. Estimated costs for categories and subcategories were calculated using the spreadsheet discussed in *How Program Costs Were Determined*, page 9.

Although the funding sections presented in this report represent a range of options, a final funding structure that is adequate, equitable, and affordable needs to be approved by the legislature.

Originally, it was hoped that the program could be funded by one-third fees, one-third federal funds, and one-third state general funds. However, after discussions with EPA, it was apparent that the only funds available from EPA that could be used would be an existing grant that funds a portion of other DEQ activities, including surface water programs, wastewater land application permitting, wastewater plan reviews, NPDES certifications, and about fifty NPDES inspections. The latter two activities would be covered by the primacy program but would only amount to approximately one FTE.

Realistically, funding will be necessary from some combination of permittee fees and state general funds. Table 2 illustrates three examples of fee structures; there are, doubtless, many other structures that could be used.

The amount shown in each cell for each fee option is the total fees for that category.

For example, in the line for Municipal Majors of size ten million gallons per day and larger (10+ mgd), there are a total of five facilities in Idaho, with a total cost for all facilities in this category of \$104,793. Using the 33% option would give a total category fee of \$34,582, or a fee per facility in this category of \$6916.

In mathematical terms, the fee is determined as follows:

$$\text{Fee per Facility} = \text{Total Cost} * 0.33 / \text{Number of Facilities} = \$104,793 * 0.33 / 5 = \$6916.$$

Table 2. Fee options for 33%, 60%, and 100% fee structures.

| Categories | No. of Facilities | Total Cost | Total Category 33% Fees | Total Category 60% Fees | Total Category 100% Fees |
|---|-------------------|--------------------|-------------------------|-------------------------|--------------------------|
| Municipal Majors 10+ mgd ^a | 5 | \$104,793 | \$34,582 | \$62,876 | \$104,793 |
| Municipal Majors 5-10 mgd | 6 | \$103,049 | \$34,006 | \$61,829 | \$103,049 |
| Municipal Majors 2-5 mgd | 11 | \$117,213 | \$38,680 | \$70,328 | \$117,213 |
| Municipal Majors 1-2 mgd | 5 | \$42,911 | \$14,161 | \$25,747 | \$42,911 |
| Municipal Minors > 500 hookups | 40 | \$223,844 | \$73,869 | \$134,306 | \$223,844 |
| Municipal Minors < 500 hookups | 71 | \$389,745 | \$128,616 | \$233,847 | \$389,745 |
| Total Municipal | | \$981,555 | \$323,913 | \$588,933 | \$981,555 |
| Industrial Majors (80+) | 10 | \$100,173 | \$33,057 | \$60,104 | \$100,173 |
| Industrial Minors Medium (30-79) | 7 | \$30,707 | \$10,133 | \$18,424 | \$30,707 |
| Industrial Minors Small (0-29) | 64 | \$225,368 | \$74,371 | \$135,221 | \$225,368 |
| Total Industrial | | \$356,247 | \$117,562 | \$213,748 | \$356,247 |
| Aquaculture Majors | 25 | \$97,119 | \$32,049 | \$58,271 | \$97,119 |
| Aquaculture Minors | 69 | \$114,377 | \$37,744 | \$68,626 | \$114,377 |
| Total Aquaculture | | \$211,495 | \$69,793 | \$126,897 | \$211,495 |
| Storm Water Medium and Large MS4 ^b | 1 | \$10,468 | \$3,454 | \$6,281 | \$10,468 |
| Storm Water Small MS4 (general) | 8 | \$102,411 | \$33,796 | \$61,447 | \$102,411 |
| Storm Water Construction (general) | 400 | \$252,435 | \$83,304 | \$151,461 | \$252,435 |
| Storm Water Industrial (general) | 180 | \$152,912 | \$50,461 | \$91,747 | \$152,912 |
| Storm Water General Education/Outreach Coordination | 1 | \$36,155 | \$11,931 | \$21,693 | \$36,155 |
| Total Storm Water | | \$554,382 | \$182,946 | \$332,629 | \$554,382 |
| CAFO ^c (DEQ portion) | 1 | \$20,412 | \$6,736 | \$12,247 | \$20,412 |
| Total CAFO (DEQ portion) | | \$20,412 | \$6,736 | \$12,247 | \$20,412 |
| Total | 904 | \$2,124,091 | \$700,950 | \$1,274,455 | \$2,124,091 |
| Other Funding Required | | | \$1,423,141 | \$849,636 | \$0 |

a mgd = million gallons per day

b MS4 = Municipal Separate Storm Sewer System

c CAFO = Confined Animal Feeding Operation

Apportionment of the costs among the cost categories, including other funding sources (general and federal funds) for each of the three fee structures are illustrated in Figures 2-4.

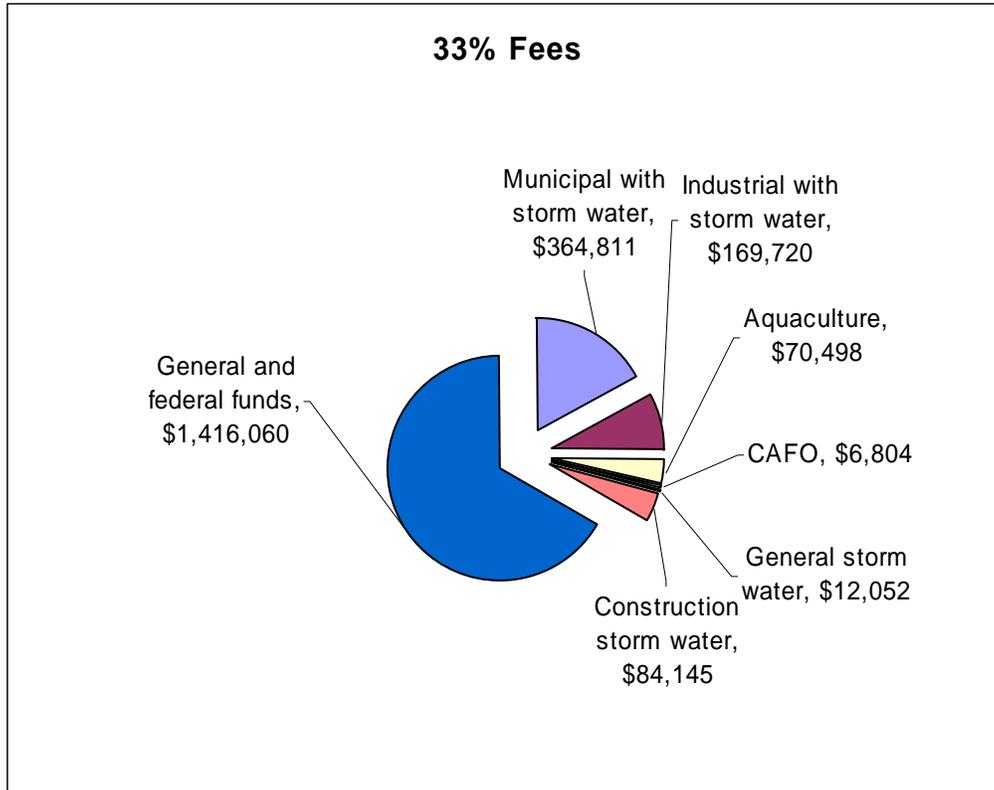


Figure 2. Apportionment of costs for 33% fee structure.

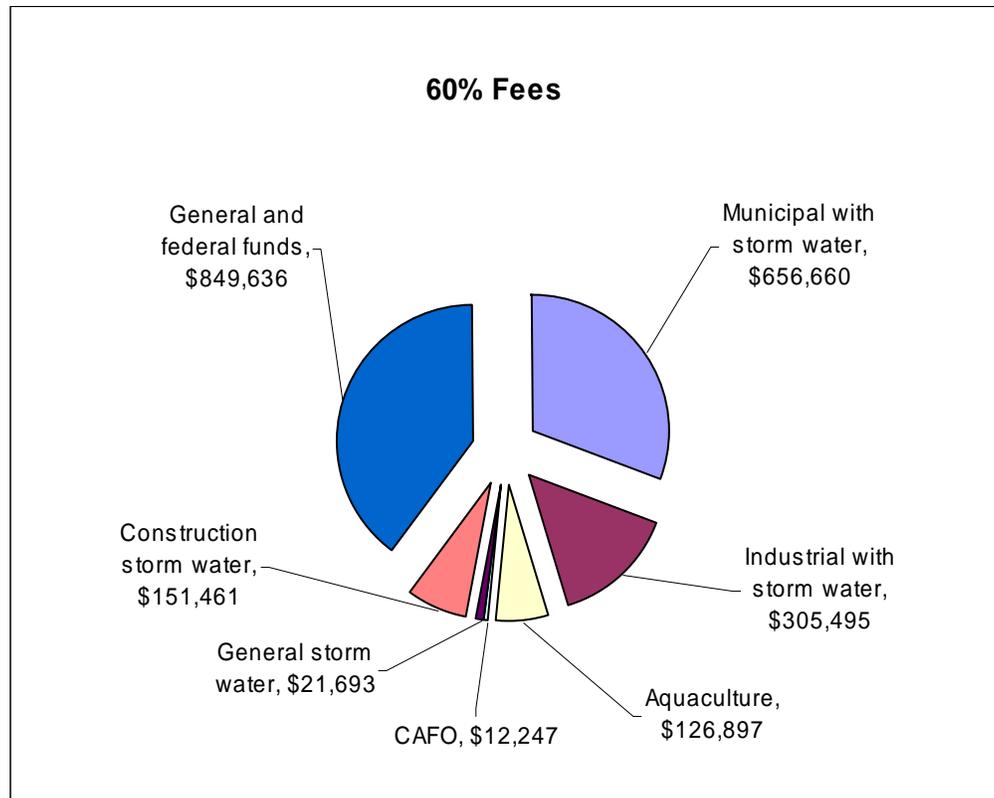


Figure 3. Apportionment of costs for 60% fee structure.

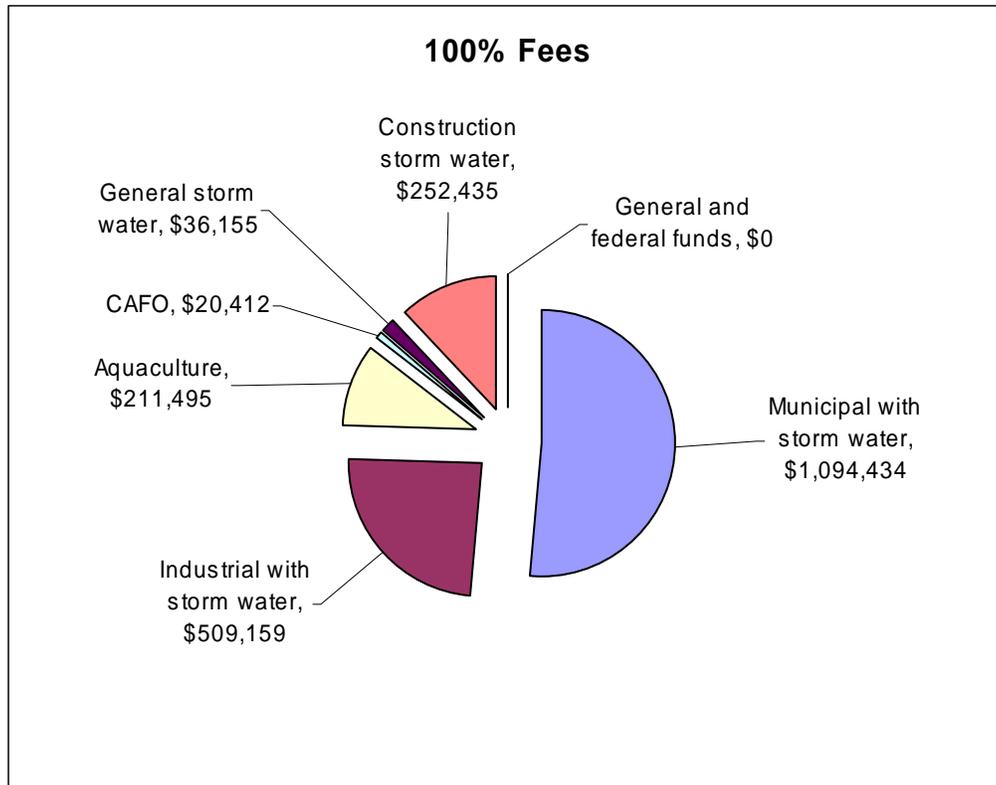


Figure 4. Apportionment of costs for 100% fee structure.

Schedule for Program Implementation

DEQ has prepared the revised report for review by the legislature during the 2006 session. Guidance, rules, and program components may be developed over the next year and are targeted for submittal to the 2007 legislature, if the legislature decides to move forward. A decision regarding the final delegation of an NPDES program to Idaho cannot be made until the approval of all rules and budgets by the legislature.

Table 3. Schedule for program implementation.

| | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|--|------|------|------|------|------|------|------|------|------|------|------|------|------|
| Background Study (6/00-11/00) | •••• | | | | | | | | | | | | |
| Steering Committee Recommendation (7/00-12/00) | •••• | | | | | | | | | | | | |
| Legislative Approval for Resources for Phase 4 (1/01-4/01) | | •••• | | | | | | | | | | | |
| Develop Implementation Package (4/01 – 12/02) | | •••• | •••• | | | | | | | | | | |
| Decision Analysis Report 2 (12/02) | | | •••• | | | | | | | | | | |
| 2005 Decision Analysis Report (1/06) | | | | | | •••• | | | | | | | |
| Develop Rules and Guidance and Application Package | | | | | | | •••• | •••• | •••• | | | | |
| Present Rules/Statutes to Legislature | | | | | | | | •••• | •••• | | | | |
| Phase in Program | | | | | | | | | •••• | •••• | •••• | •••• | •••• |

Acronyms and Abbreviations

| | |
|----------|--|
| AML | Average monthly limits |
| CAFO | Confined animal feeding operation |
| CWA | Clean Water Act |
| DEQ | State of Idaho, Department of Environmental Quality |
| EPA | U.S. Environmental Protection Agency |
| ESA | Endangered Species Act |
| MDL | Maximum daily limit |
| MOA | Memorandum of agreement |
| NPDES | National Pollutant Discharge Elimination System |
| RPTE | Reasonable potential to exceed |
| Services | Refers to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service/National Aeronautics and Oceanic Administration, together |
| WQBEL | Water quality based effluent limit |
| WWPT | Wastewater treatment plant |

Appendix A—Decision Analysis Report 1

Appendix B—Decision Analysis Report 2

**Appendix C—Supporting Documents: Defenders of
Wildlife et al v. EPA (9th Cir. Ct. Appeals, Aug. 22, 2005)**

Department of Law
9/7/05

Defenders of Wildlife et al v. EPA (9th Cir. Ct. Appeals, Aug. 22, 2005)

This recent decision vacated EPA's approval of Arizona's NPDES program, because the Ninth Circuit concluded EPA's analysis under the Endangered Species Act (ESA) was flawed. The decision is long, and the following summary is simply an effort to introduce the work group to the decision rather than to analyze any aspect of it in detail.

Background & Procedural History.

When EPA considers a state's application to assume the NPDES program, it typically consults with the service agencies (Fish & Wildlife Service for terrestrial species and National Marine Fisheries Service for marine species) under ESA § 7(a)(2) to ensure that its approval decision doesn't harm endangered species. (Note that earlier program approval decisions were not subject to ESA consultation, but recent ones have been. *See* fn. 3 to the decision.) If EPA concludes that its decision "may effect" listed species, then it initiates formal consultation. *See generally* 50 CFR Part 402. In a formal consultation, the service agency (in this case FWS) issues a Biological Opinion that EPA then considers in making its decision.

In the case of Arizona, EPA's Region 9 initiated formal consultation with FWS. FWS field staff expressed concern that because future state permit decisions would not be subject to ESA consultation, harm to listed species may result from such permits. When EPA responded that such effects were outside the scope of its program approval criteria, the agencies elevated the issue to their respective headquarters.

The ultimate Biological Opinion from the FWS sided with EPA's position that the effects of future state permits on listed species was not a valid grounds to disapprove the program. EPA relied on the Biological Opinion and approved Arizona's program. The environmental groups then appealed the program approval to the 9th Circuit Court of Appeals (the same federal circuit that Alaska is in).

Decision.

A two-member majority of the three-judge panel agreed with the environmental petitioners. Their central conclusion is that EPA's position in the case was internally inconsistent: it couldn't logically decide that it had to consult with FWS under the ESA, but could not consider effects on listed species when it made its program approval decision. As the Court put it: "EPA decided that it had to consult but had no authority to do anything concerning the matter about which it had to consult."

After rejecting EPA's decision as illogical, the Court went on to consider the argument that since CWA § 402(b) lists the criteria for state program approval, it means that impacts on listed species from future state permits is not a valid basis for program disapproval. The Court concluded, in effect, that ESA § 7(a)(2) required federal agencies to protect listed species even when their own statutes were silent on that point. In so holding, the Court recognized that two other circuit courts had reached the opposite

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conclusion in contexts similar to this program approval decision. A split between circuits is one grounds on which the U.S. Supreme Court can decide to review a circuit court decision, if EPA were to request such a review of this decision.

After considering and rejecting several other bases for affirming the EPA approval decision, the Court turned to the question of what remedy to grant to the petitioners. The Court considered letting Arizona continue to run the program while the agencies completed the ESA consultation process, but ultimately chose to vacate the state program.

The one-judge dissent is short and simple: since the CWA § 402(b) requires that EPA approve a state program that satisfies the nine statutory criteria, EPA did not have the discretion to disapprove it based on ESA-based concerns.

The implications of this decision for Alaska's efforts to gain NPDES primacy remain to be seen. EPA has 45 days from the date of the decision to either seek re-hearing from the same panel or seek re-hearing from a larger, 11-judge "en banc" panel of the Court. EPA can also petition the U.S. Supreme Court to review the case, although such review is discretionary and rarely granted.