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Re: Idaho Dairymen's Association Comments re. Negotiated Rule Making for Idaho Pollutant Discharge Elimination System Program: Docket No. 58-0125-1401, Completed Draft IPDES Rules - Version 2, Dated July 10, 2015.

Dear Mrs. Wilson,

These comments are submitted on behalf of the Idaho Dairymen's Association (IDA) Regarding the above referenced negotiated rule making. The IDA represents the fourth largest dairy producer in the country, which works to develop and sustain the Idaho dairy industry, while protecting and promoting the health and welfare of the public as well as the environment. Dairy farmers have a long heritage as responsible stewards of the land, air, water and the animals in their care. This appreciation for the environment has helped propel the industry's long-term success and establish unprecedented, industry-wide collaborations on sustainability.

1. **ISDA Jurisdiction.** The Idaho State Department of Agriculture (ISDA) administers nutrient management plans and other aspects of Idaho dairy operations related to water quality. The draft IPDES Rules do not mention ISDA or its jurisdiction over these matters, and contain no provision to ensure that there is no conflict between ISDA's jurisdiction and authority over Idaho dairy operations and the Idaho Department of Environmental Quality's (IDEQ) authority under the draft rules and its administration of an IPDES program. We assume there is no intent to affect or displace ISDA's statutory jurisdiction over dairy operations. Please consider whether a provision disclaiming any intent to affect ISDA jurisdiction over dairy operations is appropriate. While we do not propose language on this issue at this time, we reserve the prerogative to do so as and when appropriate.

2. **Inconsistencies in terminology.** The following highlighted provisions and suggested changes address basic inconsistencies in terminology used to identify who/what is subject to the IPDES permitting requirements.

001. TITLE AND SCOPE

106. Scope. These rules establish the procedures and requirements for the issuance and maintenance of permits for facilities required by Idaho Code and the Clean Water Act to ~~have requested and received~~ obtain authorization to discharge pollutants to a surface waters of the state United States. These permits shall be referred to in these rules as “IPDES permits” or “permits.”

010. DEFINITIONS

37. Facility or Activity. Any IPDES point source or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the IPDES program.

Present rather than past tense should be used in section “106. Scope.” “Obtain” is consistent with section “102. Obligation to Obtain an IPDES Permit.”

The definition of “facility or activity” in section 010.37. is unavailing. What “facilities” other than point sources are subject to regulation under the IPDES program?

Are “facilities” required to obtain IPDES permits, as indicated above, or are “persons” required to do so, as indicated below:

102. OBLIGATION TO OBTAIN AN IPDES PERMIT

01. Persons Who Must Obtain a Permit. Any person who discharges or proposes to discharge a pollutant from any point source into waters of the United States, or who owns or operates a sludge-only facility whose sludge use or disposal practice is regulated by 40 CFR Part 503 or this chapter, and who does not have an IPDES or NPDES permit in effect, shall submit a complete IPDES permit application to the Department, unless the discharge or proposed discharge:

02. Exclusions from Permit. A person shall not discharge pollutants from any point source into waters of the United States without first obtaining an IPDES permit from the Department or coverage under an IPDES general permit, unless the discharge is excluded from IPDES permit requirements or the discharge is authorized by an IPDES or NPDES permit that continues in effect. Point source discharges excluded from IPDES permit requirements, but that may be regulated

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by other state or federal regulations include: . . .

e. Any introduction of pollutants from **non-point source** agricultural and silvicultural activities, . . .

The suggested change to subsection 01., adding “from any point source into” conforms to the highlighted language in subsection 02.

Since the list of exclusions includes non-point sources, the introductory sentence to the list should be modified as indicated above. This is consistent with the terminology used in 40 CFR §122.3.

3. **Rule 102.02.(e) Permit Exclusions- Omission.** The following correction should be made to section 102.02(e):

e. Any introduction of pollutants from non-point source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands; however, this exclusion does not apply to discharges from concentrated animal feeding operations (CAFO) **as defined in 40 CFR § 122.23**, . . .

This is how the exclusion is stated in the corresponding federal rule in 40 CFS 122.3(e) (see enclosed). The highlighted reference that is currently excluded from the draft IPDES Rule is important, because 40 CFR 122.23(e) exempts from NPDES permitting discharges from CAFO land application caused by agricultural storm water when “manure, litter or process wastewater, is applied in accordance with site specific nutrient management practices.” As currently drafted without the federal rule reference, section 102.02(e) would require **all** CAFO discharges to obtain IPDES permits. This is impermissibly more stringent than the corresponding federal rule. (*see* I.C. §39-3601). Although the IPDES Rules generally incorporate 40 C.F.R. § 122.23 by reference, it is important to include this federal rule language for purposes of clarity in the future interpretation and administration of the rules.

Respectfully submitted,



Daniel V. Steenson

enclosure

40 CFR 122.3

This document is current through the July 22, 2015, with the exception of Title 40 which appears at 80 FR 41566, July 15, 2015 issue of the Federal Register

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY > SUBCHAPTER D -- WATER PROGRAMS > PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM > SUBPART A -- DEFINITIONS AND GENERAL PROGRAM REQUIREMENTS

§ 122.3 Exclusions.

The following discharges do not require NPDES permits:

(a) Any discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of a vessel. This exclusion does not apply to rubbish, trash, garbage, or other such materials discharged overboard; nor to other discharges when the vessel is operating in a capacity other than as a means of transportation such as when used as an energy or mining facility, a storage facility or a seafood processing facility, or when secured to a storage facility or a seafood processing facility, or when secured to the bed of the ocean, contiguous zone or waters of the United States for the purpose of mineral or oil exploration or development.

(b) Discharges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA.

(c) The introduction of sewage, industrial wastes or other pollutants into publicly owned treatment works by indirect dischargers. Plans or agreements to switch to this method of disposal in the future do not relieve dischargers of the obligation to have and comply with permits until all discharges of pollutants to waters of the United States are eliminated. (See also § 122.47(b)). This exclusion does not apply to the introduction of pollutants to privately owned treatment works or to other discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other party not leading to treatment works.

(d) Any discharge in compliance with the instructions of an On-Scene Coordinator pursuant to 40 CFR part 300 (The National Oil and Hazardous Substances Pollution Contingency Plan) or 33 CFR 153.10(e) (Pollution by Oil and Hazardous Substances).

(e) Any introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from concentrated animal feeding operations as defined in § 122.23, discharges from concentrated aquatic animal production facilities as defined in § 122.24, discharges to aquaculture projects as defined in § 122.25, and discharges from silvicultural point sources as defined in § 122.27.

(f) Return flows from irrigated agriculture.

(g) Discharges into a privately owned treatment works, except as the Director may otherwise require under § 122.44(m).

(h)[Reserved]

(i)Discharges from a water transfer. Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred.

Statutory Authority

The Clean Water Act, 33 U.S.C. 1251 et seq.

History

[48 FR 14153, Apr. 1, 1983, as amended at 54 FR 254, 258, Jan. 4, 1989; 71 FR 68483, 68492, Nov. 27, 2006, as corrected at 71 FR 69622, Dec. 1, 2006; 73 FR 33697, 33708, June 13, 2008; 78 FR 38591, 38594, June 27, 2013]

Annotations

Notes

[EFFECTIVE DATE NOTE:

78 FR 38591, 38594, June 27, 2013, removed and reserved paragraph (h), effective June 27, 2013.]

Case Notes

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING SECTION --

American Petroleum Inst. v Costle (1981, ED La) 17 Env't Rep Cas 1334, 12 ELR 20951

LexisNexis® Notes

Case Notes Applicable to Entire Part

Administrative Law : Judicial Review : Standards of Review : Abuse of Discretion

Administrative Law : Judicial Review : Standards of Review : Arbitrary & Capricious Review

Environmental Law : Litigation & Administrative Proceedings : Judicial Review

Environmental Law : Litigation & Administrative Proceedings : Jurisdiction & Procedure

Environmental Law : Water Quality : General Overview

Environmental Law : Water Quality : Clean Water Act : General Overview

Environmental Law : Water Quality : Clean Water Act : Coverage & Definitions : Discharges

Environmental Law : Water Quality : Clean Water Act : Coverage & Definitions : Point Sources

Environmental Law : Water Quality : Clean Water Act : Discharge Permits : General Overview

Environmental Law : Water Quality : Clean Water Act : Discharge Permits : Dredged or Fill Material

: General Overview