

**U.S. EPA Region 10**  
**Response to Comments and Testimony**  
**Idaho NPDES Program Application**

May 2018

U.S. EPA Region 10  
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## Executive Summary

On August 31, 2016, the Governor of the State of Idaho submitted a National Pollutant Discharge Elimination System (NPDES) program application to the United States Environmental Protection Agency (EPA) Region 10 Administrator pursuant to Section 402(b) of the Clean Water Act (CWA or “Act”), 33 U.S.C. § 1342(b). In the submission, the State of Idaho requested approval for the Idaho Department of Environmental Quality (IDEQ) to administer the Idaho Pollutant Discharge Elimination System (IPDES) program which would regulate discharges of pollutants into waters of the United States under its jurisdiction. The State's program submission included an implementation plan to transfer from the EPA to IDEQ the administration of specific program components in four phases over a four-year period beginning July 1, 2018, or upon program approval, whichever is later. For this reason, the EPA considered IDEQ's application to be for a partial and phased program in accordance with Section 402(n)(4) of the CWA, 33 U.S.C. § 1342(n)(4). IDEQ submitted an updated application on August 1, 2017.

On August 11, 2017, the EPA opened a 60-day public comment period that ended on October 10, 2017. In addition, the EPA held public hearings during the week of September 11, 2017, to accept comments on the IPDES program application (to be referred to as the “IPDES program application” or the “application”). This *Response to Comments and Testimony* compiles all comments and testimony submitted to the EPA during the public comment period and provides the EPA's response to those comments.

A total of 18 comment letters and testimony were submitted during the comment period. Of those 18, 10 commenters expressed support for the transfer of NPDES authority to IDEQ. One commenter expressed a general concern about IDEQ's ability to adequately run a program that sufficiently protects the environment. The remaining 7 commenters provided specific comments about the IPDES program application or IPDES program. Section II, Comments and Responses, provides a response to all comments received.

Refer to Appendix A. Federal Register Notice – Public Comment Period and Public Hearings for the Appendix B. Hearing Transcript for a transcript of the hearings. Appendix C. Compilation of All Comment Received includes a copy of each of the documents that the EPA received from commenters listed in Table 1 in response to the FR notice. Refer to EPA's webpage for access to the IPDES Application and other documents, [https://www.epa.gov/npdes-permits/idaho-  
npdes-program-authorization](https://www.epa.gov/npdes-permits/idaho-npdes-program-authorization).

In January 2018, following the EPA's public comment period for the IPDES program application, IDEQ discovered unintentional omissions due to typographical and cross-reference errors that resulted in inconsistencies relating to administrative provisions and incorporation by reference of federal regulations in the IPDES regulations. See Attorney General's Statement at p. 51 & 81 dated August 29, 2016 indicating that the state had requisite authority. The State initiated temporary rulemaking on April 9, 2018 to correct the inconsistencies. The temporary rules became effective on May 17, 2018 following adoption by the Idaho Board of Environmental Quality. Given the circumstances, the EPA did not consider the State's temporary rules to

materially change the submission. The EPA considers the rules to be in full effect for the purpose of this approval but understands that the effectiveness of the rules will sunset at the end of the 2019 session if they are not approved by the Legislature. See 40 CFR § 123.23(a). As required by Idaho law, IDEQ must proceed with formal rulemaking and obtain legislative approval during the 2019 session in order for the rules to become final rules. IDEQ has already initiated final rulemaking.

## I. IPDES Program Background

As required under Section 402(b) of the CWA, [33 U.S.C. § 1342\(b\)](#), and [40 CFR § 123.22](#), the IPDES program description specifies how IDEQ will administer the NPDES program. IDEQ will issue IPDES permits under its jurisdiction; conduct compliance and enforcement activities; gather and maintain NPDES records and report to the EPA; and oversee the regulated activities of all IPDES-permitted facilities. The EPA will retain the authority to issue NPDES permits for facilities located on tribal lands and/or discharging to tribal waters. The scope of IDEQ permitting authority includes individual and general permits for discharges to waters of the United States from facilities or activities, including industrial (*e.g.*, commercial, mining, oil and gas, and silviculture discharges; animal feeding operations; and aquatic animal production facilities) and municipal wastewater treatment facilities (*e.g.*, publicly and privately owned treatment works); discharges to waters of the United States from federal facilities; storm water discharges, including municipal storm sewer systems (combined and separate); construction and industrial storm water general permits; and individual permits for storm water discharges; sewage sludge (biosolids) under [40 CFR Part 503](#); and the pretreatment program under [40 CFR Part 403](#). IDEQ's program will not include permitting of discharges incidental to the normal operation of a non-military, non-recreational vessel operating in a capacity as a means of transportation; the EPA will continue to issue permits under Section 402 of the CWA, 33 U.S.C. § 1342, to regulate such discharges from non-military, non-recreational vessels and all ballast water discharges.

IDEQ will assume permitting and compliance authority for the NPDES program in four phases. The EPA will retain full permitting and compliance authority over facilities until that authority is transferred to IDEQ in accordance with the following schedule:

- Phase I—Individual Municipal Permits and Pretreatment on July 1, 2018, the date of program authorization
- Phase II—Individual Industrial Permits, one year after program authorization (anticipated July 1, 2019).
- Phase III—General Permits (Aquaculture, Pesticide, CAFO, Suction Dredge, Remediation), two years after program authorization (anticipated July 1, 2020).
- Phase IV—Federal Facilities, General and Individual Stormwater Permits and Biosolids, three years after program authorization (anticipated July 1, 2021).

## II. Public Process

The EPA initiated the notice of availability; request for comment; and notice of public hearings on August 11, 2017 (82 FR 37583). In addition, on the following dates and times, the EPA Region 10 held five information meetings, each followed by a public hearing. The presentations and handouts from the meetings are available at the EPA’s webpage, <https://www.epa.gov/npdes-permits/presentations-and-handouts-september-2017-public-meetings-idaho-npdes-program>.

Public Hearing Dates and Locations:

- September 11, 2017 at Central Public Library in Idaho Falls.
- September 12, 2017 at Twin Falls Public Library.
- September 13, 2017 at Boise Public Library.
- September 14, 2017 at Lewiston Community Center.
- September 15, 2017 at Coeur d'Alene Public Library.

## II. Comments Received

Table 1. lists each of the individual parties that provided comments during the public comment period or at the public hearings.

**Table 1. List of Commenters**

<b>Commenter ID Number</b>	<b>First Name</b>	<b>Last Name</b>	<b>Date Received</b>	<b>Organization/Affiliation</b>	<b>Written Comment or Testimony (Hearing, Location)</b>
1	Jim	Eberhard	8/18/2017	Citizen	Written
2	Stu	Bryant	8/18/2017	WWTP Op City of Kamiah	Written
3	Gordon	Petrie	8/21/2017	Mayor, Emmett	Written
4	Eric	Shannon	8/22/2017	Nampa Hway District No. 1	Written
5	Malisa	Maynard	8/25/2017	Permittee	Written
6	Ava	Issacson	9/20/2017	Stakeholder, Organization	Written
7	Jason	Brown	10/3/2017	Permittee	Written
8	Justin	Hayes	10/5/2017	Stakeholder, Organization	Written
9	Darin	Taylor	10/9/2017	Permittee	Written
10	Justin	Hayes	10/10/2017	Stakeholder, Organization	Written
11	Sharon	Bosley	10/10/2017	Stakeholder, Organization	Written

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<b>Commenter ID Number</b>	<b>First Name</b>	<b>Last Name</b>	<b>Date Received</b>	<b>Organization/Affiliation</b>	<b>Written Comment or Testimony (Hearing, Location)</b>
12	Heather	Tafoyah	10/10/2017	Permittee	Written
13	George	Moody	10/10/2017	Tribe	Written
14	John	Claassen	9/14/2017	Citizen	Hearing, Lewiston, written comments
15	Scott	McClury	9/12/2017	Citizen	Hearing, Twin Falls, testimony
16	Jason	Brown	9/12/2017	Permittee	Hearing, Twin Falls, testimony
17	Jane	Whitmeyer	9/13/2017	Citizen	Hearing, Boise, testimony
18	Clayton	Steel	9/14/2017	Permittee	Hearing, Lewiston, testimony

## Commenter 1

Sirs, Please, do not let Idaho take control of this! If this happens, we will be drinking cow urine shortly. The power that the ranchers and miners have in this state is not to be underestimated. Idaho passed the "Ag Gag" law. It was done at the request of the agricultural PACS. There was no way the law would go uncontested by ACLU and other groups, sure enough, the courts ruled it unconstitutional. As you are aware of, the water in Idaho goes back to the environment of the world, it does not remain here. Giving the state the power to regulate water pollution will end up polluting everyone's water. The law suits that follow will be long, and very expensive. Our state and national tax dollars can be put to much better use. Please for the sake of our environment, and our tax dollars do not let this happen.

## EPA Response

The CWA and the EPA's implementing regulations have safeguards in place to ensure that approved state programs meet minimum federal requirements. The EPA's decision on whether to approve the IPDES program is based on the program requirements set forth in Section 402 of the CWA, 33 U.S.C. § 1342, and 40 CFR Part 123. States may seek authority to administer the NPDES program by submitting a complete application to the EPA. Once the EPA determines that the application is complete and that the state has developed a program consistent with Section 402 of the CWA, 33 U.S.C. § 1342, and 40 CFR Part 123, the EPA must approve the program and authorize the state to administer the NPDES program.

To ensure the integrity of state programs, the EPA retains oversight authority over state NPDES programs, including under Section 402(d) of the CWA, 33 U.S.C. § 1342(d), and retains enforcement authority. The EPA regularly reviews state NPDES programs to ensure authorized states are consistent with the Clean Water Act and relevant regulations and functioning within their full authority. The EPA's oversight activities include review of draft NPDES permits prepared by the State as well as assessments of states' NPDES programs through the Permit Quality Review (PQR) and State Review Framework (SRF) processes. The EPA provided a

presentation detailing the oversight work that it conducts with authorized states at the August 23, 2016, IPDES stakeholder meeting. Please refer to IDEQ's webpage to view the presentation, <http://www.deq.idaho.gov/media/60178998/ipdes-epa-oversight-role-presentation-0816.pdf>.

In addition, Section 402(c) of the CWA, 33 U.S.C. § 1342(c), and 40 CFR Part 123 give the EPA the authority to withdraw programs that fail to meet all of the NPDES program requirements. In addition, third parties can petition the EPA to seek program withdrawal.

## Commenter 4

The following are comments to the U.S. Environmental Protection Agency (EPA) regarding the proposed transfer of federal Clean Water Act permitting and enforcement to the State of Idaho, and specifically that of Municipal Separate Storm Sewer Systems (MS4).

1. **Special Use Districts:** Permitting and enforcement agencies must recognize the unique status of special use districts, such as highway districts. Unlike state, county or city governments, special use districts do not have ordinance or law enforcement authority, nor broad jurisdictional authority. Highway districts, for example, do not have jurisdiction beyond their rights-of-way; Past permits have failed to recognize this, trying to pass on regulatory functions to the permittee, which are beyond the permittee's authority or ability to perform.
2. **Drainage:** Permitting and enforcement agencies must recognize that highway districts, similar to a private property owner, have no power to regulate or require the alternation of historic and otherwise legal drainage onto their rights-of-way.
3. **Irrigation Discharges:** Past and proposed MS4 permits say irrigation (including landscape irrigation) discharges are allowed. There is confusion, however, about whether "allowed" means they are permitted or exempt; this needs clarification to say exempt. Irrigation flows, which do not originate on highway rights-of-way, typically cross those rights-of-way to discharge into Waters of the U.S. If "permitted", then they must be catalogued and monitored in the permittee's MS4 inventory; "exempt" means they do not.
4. **Storm Runoff into Irrigation:** Past permits have defined "discharge" as flows collected in catch basins, pipes or ditches; it does not mean sheet flow. EPA staff have historically held that storm sheet flow into Irrigation facilities (catch basins, pipes and ditches which would not exist but for the irrigation) do not qualify as storm discharge. This needs to be clarified in future permits, and similarly interpreted by future state regulators.
5. **Pollutants of Concern:** Permittees should not be required to test for and eliminate "pollutants of concern" which originate outside their jurisdiction. Examples listed in the draft MS4 permit are chlorpyrifos and malathion (agricultural insecticides) and E. coli (a sewage bacteria). These come from farms, dairies, septic tanks, etc., not highway rights-of-way. This should be a public health agency responsibility, not a highway district.

6. Waiver: A permit should be waived when the outfalls are so few that no real public benefit is achievable by regulating them. There is a huge and costly bureaucratic overhead effort to a MS4 permit program, whether the permittee has 10 or 10,000 outfalls. It is poor stewardship to spend tax dollars on this effort without any real public benefit.

The EPA allows for such a waiver where (1) the MS4 serves a population of 1,000 or less, (2) the MS4 is not interconnected with adjacent jurisdictions, and (3) the MS4 does not impair water quality. In Idaho, the Nampa Highway District No. 1 MS4 system has nine outfalls, and serves a population of 156. The District submitted a draft waiver request, which was endorsed by EPA staff. State of Idaho staff disagreed, however, on the premise that all highway drainage impairs water quality, an interpretation that rules out a waiver under any circumstance. The EPA will not approve a waiver independent of the State, because it is in the process of transferring administration and enforcement of the MS4 permitting program to the State.

## EPA Response

The comments provided are not directly related to the NPDES application. Instead, the comments address issues regarding permit requirements in MS4 permits. The commenter has provided the EPA and IDEQ with these comments in a different process involving the EPA's development of the draft Idaho MS4 General Permit. The commenter will have another opportunity to comment upon the draft Idaho MS4 General Permit during the permit public comment period which is a separate action.

## Commenter 6

Dear Idaho Department of Environmental Quality,

Idaho Rivers United would like to provide comments on the Idaho NPDES Program Authorization process.

Idaho Rivers United (IRU) is a 501(c)3 nonprofit environmental advocacy organization with 3,500 members throughout Idaho and beyond. Our members generally are river-loving rafters, kayakers, anglers and environmentally-attuned citizens. The mission of IRU is "to protect and restore the rivers of Idaho." IRU, its members, and supporters expect protection of rivers for their ecological, scenic and recreational values. The restoration of wild salmon and steelhead species has been IRU's highest organizational priority for the past 20 years. We have also worked to prevent unneeded new dams, decommission dams that outlived their useful lives, cease water pollution, designate new wild and scenic rivers and defend existing wild and scenic rivers.

The Clean Water Act is a necessary and invaluable piece of legislation that requires diligent supervision and rigorous standards. *If IDEQ operates Idaho's NPDES process, we expect that the Clean Water Act's Integrity and intentions will continue to be upheld to fullest extent possible. Idaho's rivers are a resource that cannot be degraded for short-sided economic gains, or irresponsible operations.*

Idaho Rivers United recognizes the necessity of the Clean Water Act to protect Idahoans from degradative actions of industry, or the like. Therefore, it is of paramount importance that the IDEQ continues to put environmental health and safety first in their pursuit of managing Idaho's NPDES Program.

Thank you for your time in reading these comments.

Sincerely,

Idaho Rivers United

## EPA Response

Refer to the EPA's response to commenter 1. The CWA and NPDES regulations allow for the EPA's continued oversight of the NPDES program.

## Commenter 8

The Idaho Conservation League (ICL) submitted two comment letters during the comment period. The EPA has provided a response to each of the comments below.

### ***Comment 1:***

The Idaho NPDES program does not comply with the requirements of 40 CFR §§ 123.27(a)(3) and 123.27(b)(1). 40 CFR §§ 123.27(a)(3)(ii) requires that state programs authorize criminal penalties "in at least the amount of \$10,000 a day per violation," while the Idaho laws cited in the Attorney General's Statement allow for maximum fines of \$10,000 per day. The Idaho penalty provisions also fail the minimum standards set out in 40 CFR §§ 123.27(b)(1) because the Idaho penalties are not assessable up to the maximum amount set out in § 123.27(a)(3) for each day of violation.

### ***EPA Response:***

State NPDES programs are required to have the ability to assess fines in the amount of \$10,000 a day for any willful or negligent violation of any NPDES permit condition or filing requirement. 40 CFR § 123.27(a)(3)(ii). These programs also must be able to recover \$5,000 fines from anyone who knowingly makes any false statement, representation or certification in any NPDES form, notice or report. Id. at 123.27(a)(3)(iii). In addition, 40 CFR § 123.27(b)(1) provides that the maximum civil penalty or criminal fine set forth in § 123.27(a)(3) "shall be *assessable* for each instance of violation, and if the violation is continuous, shall be *assessable up to the maximum amount* for each day of violation." Emphasis added.

Contrary to the commenters' assertions, the regulations at 40 CFR §123.27(a)(3) do not require that a state impose a minimum civil or criminal fine for each violation. Instead, EPA's regulations require that states must have *the ability* to assess fines in the minimum amounts set out in the regulations. Importantly, the regulations at 40 CFR § 123.27(a) require that states administering a program shall have "available" the following remedies, including the authority to "assess" and "recover" such penalties and fines. In addition, 40 CFR § 123.27(b)(1) indicates

that the penalties set forth in § 123.27(a)(3) must be “assessable” for each violation and “assessable up to” the regulatory amount for continuous violations. To the extent that the commenter is asserting that EPA’s regulations set a minimum penalty to be imposed, such a reading would mean that states are required to impose a minimum that is higher than the federal criminal penalties required by CWA section 309(c) (e.g., \$2,500). This result is inconsistent with EPA’s stated approach to the final regulation to “afford a greater degree of flexibility on the amounts recoverable.” 45 Fed. Reg. 33290, 33381 (May 19, 1980) (emphasis added). The D.C. Circuit upheld EPA’s penalty regulation at 40 C.F.R. § 123.27 even though it does not require states to “exert enforcement authority virtually identical with the federal level, including the same levels of minimum and maximum fines” because EPA’s approach represents a reasonable balance of uniformity and state autonomy. *Natural Resources Defense Council, Inc. v. U.S. EPA*, 859 F2d 156, 180-181 (DC Cir. 1988). The Court explained that, “[c]riminal penalties, even more than civil penalties are traditionally under the control of the individual states. It is more reasonable to assume that the Administrator would have far broader discretion to respect state autonomy in the criminal sector than in the civil area and that Congress did not intend to divest the Administrator of this authority by its silence.” *Id.* at 180 (discussing note added by the Water Quality Act of 1987 that provides that states need not have civil penalties in the same monetary amount as the civil penalties described in Clean Water Action section 309(d)).

In the case of Idaho, IDEQ has the minimum penalties and fines outlined in 123.27(a)(3) “available” and thus, has satisfied both 123.27(a)(3) and (b)(1). Idaho’s statute at 39-117 provides that:

Any person who willfully or negligently violates any Idaho national pollutant discharge elimination system (NPDES) standard or limitation, permit condition or filing requirement ... shall be punished by a fine of not more than \$10,000 per violation or for each day of a continuing violation. Any person who knowingly makes any false statement representation or certification in any Idaho NPDES form, in any notice or report required by an NPDES permit, or who knowingly renders inaccurate any monitoring device or method regulation thereof shall be punished by a fine of not more than five thousand (\$5,000) per violation or for each day of continuing violation.

This statute provides IDEQ with the authority to impose penalties and fines of \$10,000 and \$5,000 fine for each violation, depending on the class of crime. See Attorney General Statement at 60-61. Therefore, Idaho has met the requirements of 40 CFR § 123.27(a)(3) and (b)(1).

Contrary to the commenters’ assertion and consistent with 40 CFR §123.27(a)(3), Idaho does have the authority to assess fines for each day of violation. Section 39-108(5)(ii) of the Idaho Code provides that civil penalties for violations of the state NPDES program could be subject to “ten thousand dollars (\$10,000) per violation or five thousand dollars (\$5,000) for *each day* of a continuing violation, whichever is greater.” Emphasis added. Similarly, the statutory provision applicable to criminal fines, quoted above, provides the state with the authority to assess fines in the amount of \$10, 000 for each day of a continuing violation for willful or negligent

violations of NPDES standards, limitations, permit conditions or filing requirements, and in the amount of up to \$5,000 for each day of a continuing violation for knowingly making false statements, representations or certification in any Idaho NPDES form, in any notice or report required by an NPDES permit, or who knowingly renders inaccurate any monitoring device or method regulation. Therefore, the EPA has concluded that the State of Idaho has the required civil and criminal penalty authority for the IPDES program.

***Comment 2:***

The EPA regulations require that the state standard for burden of proof or mental state for violations of state NPDES program requirements not be stricter than the standard the EPA must comply with for NPDES violations under the Clean Water Act. § 123.27(b)(2). The mens rea standard for criminal NPDES violations is simple negligence. CWA § 309(c); *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), cert. denied, 528 U.S. 1102 (2000). But the Idaho Code cited in the Idaho Attorney General’s report requires “criminal negligence.” EPA’s September 30, 2016 and November 30, 2016, letters to Idaho DEQ spelled out this deficiency, but Idaho has not corrected it. The Attorney General’s reference to the Note in 40 CFR §§ 123.27(a)(3)(ii) to justify the heightened standard is misplaced because the note refers to remedies, not the mental state required to establish a criminal violation. The Note following 40 CFR § 123.27(b)(2) specifically addresses the standard of proof for mental state of a violator, and clarifies that the mental state required to prove civil violations may not be greater than the degree of knowledge required under the Clean Water Act. By referring to civil violations specifically, as opposed to violations generally, the Note clarifies that the (b)(2) requirement prohibiting stricter state mental state requirements applies to civil and criminal violations separately. The Idaho program does not meet this requirement because the “criminal negligence” requirement for criminal violations under § 123.27(a)(3)(ii) is a stricter standard than the “simple negligence” standard under CWA § 309(c). The rationale EPA set out in the November 30, 2016 letter to DEQ explaining why Idaho’s criminal provisions are substandard is correct.

***EPA Response***

The EPA acknowledges that its September 30, 2016, and November 30, 2016, letters raised issues involving Idaho’s criminal negligence standard. In its November 30, 2016 letter, the EPA stated that 40 CFR §§ 123.27(b)(2) and (a)(3)(ii) address two different issues; the required “intent” standard for establishing a violation and “remedies.” On July 13, 2017, IDEQ responded to the EPA’s November 30, 2016 letter. While the EPA did not agree with all of the reasons stated in IDEQ’s response, the EPA concluded, upon further consideration, that (1) its regulations are ambiguous regarding the exact negligence standard States must have to obtain NPDES program authorization given the reference to “paragraph (a)(3)” in 40 CFR § 123.27(b)(2), and (2) the regulations should be interpreted to give both of these provisions meaning. For these reasons, the EPA agrees with IDEQ’s conclusion that Idaho’s gross negligence standard meets applicable requirements in 40 CFR § 123.27 without any further changes.

40 CFR § 123.27(b)(2) provides that the “...degree of knowledge or intent required under State law for establishing *violations under paragraph (a)(3)* of this section, shall be no greater than the...degree of knowledge or intent EPA must provide when it brings an action under the appropriate Act” (emphasis added). 40 CFR § 123.27(a)(3) provides that the state must be able to seek criminal penalties for any person who “negligently violates” certain requirements. That section includes a note stating that “[s]tates which provide the criminal remedies *based on* ‘criminal negligence,’ ‘gross negligence’ or strict liability *satisfy the requirement of paragraph (a)(3)(ii) of this section*” (emphasis added).

The EPA interprets “degree of knowledge or intent” in 40 CFR § 123.27(b)(2) to refer to the *generic* degree of criminal intent required to establish a violation under the CWA (*e.g.* negligence), whereas 40 CFR § 123.27(a)(3)(ii) controls as far as defining the exact negligence violation a state must be able to abate and the required penalties for those violations. Specifically, 40 CFR § 123.27(a)(3)(ii) requires states to recover against any person who “negligently” violates specified requirements. The note for this provision recognizes that States can provide penalties “*based on...gross negligence...to satisfy the requirement in (a)(3)(ii)*” (emphasis added). Therefore, a State satisfies both 40 CFR §§ 123.27(a)(3)(ii) and (b)(2) if they (1) have the authority to bring an enforcement action when it can establish that a person “negligently violates” the specified requirements of the CWA and (2) can assess criminal penalties of at least \$10,000 to abate such violations. This interpretation ensures that the regulatory language discussing the criminal intent standard and criminal penalties are aligned.

In addition to the rule language, the regulatory history associated with the current language in 40 CFR § 123.27 supports interpreting section 123.27(b)(2) as referring to the generic intent standard and section 123.27(a)(3) as referring to the requirement to abate violations. For example, the current regulatory language in 40 CFR § 123.27(b)(2) removed the reference to CWA Section 309 in the prior regulation and was made more general to address state programs under different statutes that involved different civil and criminal enforcement authority requirements. *See* 44 Fed. Reg. 32854, 32925 (June 7, 1979), 45 Fed. Reg. 33290, 33381-82, 33462 (May 19, 1980). These statutes had different criminal intent standards (*e.g.* negligence, knowing or willful) and the relevant statute-specific intent standards were referenced and discussed in the regulatory provisions in (a)(3) governing criminal remedies. 45 Fed. Reg. at 33462. In addition to making the language in (b)(2) more general, the EPA also added the relevant note now located in 40 CFR § 123.27(a)(3)(ii) to the CWA-specific discussions. *Id.*

The EPA’s interpretation is also reasonable given that 40 CFR § 123.27 was promulgated to implement CWA Section 402(b)(7), which requires that the Administrator “shall” approve a State’s program *unless* he determines that the State lacks adequate authority to “abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.” 33 U.S.C. § 1342(b)(7). This provision only requires that the State have the authority to “abate” violations of a permit or permit program. It does not address or mandate that States provide the same negligence standard as the federal program.

Similarly, Clean Water Act Section 309(c)(1), 33 U.S.C. § 1319(c)(1), deals with federal enforcement and does not address or mandate the negligence standard that states must have as part of an authorized NPDES program. The EPA acknowledges that there are decisions from three U.S. Courts of Appeals holding that CWA Section 309(c)(1) requires a showing of ordinary negligence. *See U.S. v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999) ("We conclude from the plain language of 33 U.S.C. § 1319(c)(1)(A) that Congress intended that a person who acts with ordinary negligence in violating 33 U.S.C. § 1321(b)(3) may be subject to criminal penalties."); *US. v. Ortiz*, 427 F.3d 1278, 1282 (10th Cir. 2005) ("Under the statute's plain language, an individual violates the CWA by failing to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance ..."); *U.S v. Pruett*, 681 F.3d 233, 242 (5th Cir. 2012) ("Section 1319(c)(1)(A) refers explicitly to `negligent' violations of the CWA. Negligence is not an ambiguous term, and is understood to mean `[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation. [Citations omitted]."). These decisions do not address what negligence standard States must have to obtain NPDES program authorization under CWA Section 402(b)(7), 33 U.S.C. § 1342(b)(7), and its implementing regulations at 40 CFR § 123.27, and therefore do not require states to have an ordinary negligence standard to obtain CWA Section 402 permitting authorization.

For these reasons, the EPA concludes that the State of Idaho's criminal negligence standard of gross negligence meets the requirements of CWA Section 402(b)(7), 33 U.S.C. § 1342(b)(7), and 40 CFR § 123.27 because the State has the authority to assess criminal penalties for violating applicable standards or limitations, NPDES permit conditions, and filing requirements, as required under 40 CFR § 123.27(a)(3)(ii), based upon establishing that a person "negligently violates" those requirements. EPA notes that after approval it retains the authority to take an enforcement action for CWA criminal violations consistent with section 309(c) of the Act.

***Comment 3:***

The 1984 EPA criminal regulations found at 40 CFR §§ 123.27(a)(3) and (b) are out of date, and not consistent with either current case law or the 1987 amendment to section 309(c) of the CWA. EPA is arbitrary and capricious and violates section 706(2)(A), 5 U.S.C. § 706(2)(A), in relying on outdated regulations to review and approve the Idaho state program.

***EPA Response:***

The regulations found at 40 CFR Part 123 are the current regulations that are in effect with regard to NPDES program authorization. These regulations are long-standing and govern EPA's approval of state NPDES programs. The EPA's review of a state's NPDES program submission involves a determination of whether a state's NPDES program submission is complete and whether the state has adequate authority, both criminal and civil, to administer a NPDES program. 40 CFR §§ 123.21 and 123.61. The EPA has determined that Idaho has the necessary authority described in 40 CFR §§ 123.27(a)(3) and (b). See response to Comment 2, Commenter 8 and Attorney General's Statement at p. 59-61.

EPA notes the commenter can petition the EPA to change these regulations if the commenter believes the regulations are out of date.

***Comment 4:***

The EPA is also arbitrary and capricious and is otherwise acting contrary to law in approving Idaho's program where the statute of limitations for civil and criminal violations in Idaho is two years and the federal standard is five. The EPA regulations require that the state standards for enforcement "shall be no greater than the burden of proof or degree of knowledge or intent EPA must provide when it brings an action under the appropriate Act." 40 CFR §§ 123.27(b)(2).

***EPA Response:***

Clean Water Act Section 402(b)(7) requires that the Administrator "shall" approve a State's program *unless* he determines that the State lacks adequate authority to "abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement." 33 U.S.C. § 1342(b)(7). The statute does not require States to have the same statute of limitations as the federal standard. The implementing regulation at 40 CFR § 123.27(b)(2) states that "[t]he *burden of proof and degree of knowledge or intent* required under State law for establishing violations...shall be no greater than the *burden of proof or degree of knowledge or intent* EPA must provide when it brings an action..." 40 CFR § 123.27(b)(2) (emphasis added). Neither this provision nor any other NPDES state program regulation requires a state to have the authority to provide the same statute of limitations for civil or criminal violations as the federal program. The statute of limitations for civil or criminal violations is not relevant to establish (1) burden of proof or (2) degree of knowledge or intent as discussed in 40 CFR § 123.27(b)(2) and the commenter has not explained how, in its view, this regulation even relates to statute of limitations.

***Comment 5:***

The State of Idaho has proposed to allow the Idaho State Department of Agriculture take the lead on CAFO enforcement even though it will not be part of the authorized program. It is not clear from the documents provided by the state that ISDA will enforce the law as rigorously as DEQ or that DEQ will devote resources necessary to ensure compliance of CAFOs in Idaho. Also, state law prohibits ISDA from sharing nutrient plans with other agencies unless those plans are part of an NPDES permit application. This will make it very difficult, if not impossible, for DEQ to inspect, or obtain relevant documents from, CAFOs that discharge without permits.

***EPA Response:***

The Idaho program application provides that IDEQ will be the approved agency for the entire IPDES program. As such, IDEQ will function as the agency with the responsibility for administering and enforcing the NPDES program as it applies to concentrated animal feeding operations (CAFOs). Based on the program description and the Attorney General Statement as well as IDEQ's statutory and regulatory authority, the EPA concludes that IDEQ has the adequate authority to issue permits for CAFO-related discharges as required by the CWA. In addition, the state has the authorities in place to identify and regulate unpermitted discharges.

IDEQ has incorporated by reference 40 CFR §§ 122.23 and 122.42(e), which are the key NPDES regulations applicable to CAFOs. In addition, the state has included requirements reflecting those set forth in 40 CFR §§ 122.21(i), 122.28(b)(2)(ii) and (vii), 122.62(a)(17), 122.63(h), as well as incorporated 40 CFR Part 412 by reference. Thus, the state has the necessary regulatory authorities in place to issue NPDES permits for CAFOs that are consistent with the federal NPDES requirements.

As further detailed in the response to comment 1, from commenter 10 below, IDEQ has broad authority, pursuant to Idaho Code 39-105 and 39-108, to address water pollution issues in the state; that authority includes enforcement against unpermitted discharges. The Attorney General Statement states that Idaho Code 39-108(1) & (2) “includes broad powers to conduct a program of surveillance, entry, and regular or periodic inspection, as well as to enter at all reasonable times upon any private or public property...for the purpose of inspecting or investigation to ascertain possible violations of DEQ rules, permits, requirements or orders.” Attorney General’s Statement at p. 73. Moreover, pursuant to nearly identical provisions in the Beef Environmental Control Act, the Dairy Environmental Control Act and the Poultry Environmental Act, IDEQ has the authority “to administer and enforce an Idaho NPDES program for [...] feeding operations, including without limitation, the authority to issue permits, access records, conduct inspections and take enforcement action. The provisions of this chapter do not alter the requirements, liabilities and authorities with respect to or established by an Idaho NPDES program.” See e.g., Beef Cattle Environmental Control Act at 22-4903(2).

Based on the authorities described above, EPA understands that IDEQ has the requisite authority in place to obtain information about permitted and unpermitted facilities and regulate them in accordance with the NPDES program, and to exercise enforcement authority with respect to unpermitted discharges from animal operations required by the CWA.

According to the state’s application materials, ISDA will serve in a supporting role in IDEQ’s regulation of CAFOs. However, ISDA has not been described as taking a lead role for the administration or the enforcement for the state’s NPDES program for CAFOs in any of the state’s documents supporting its application. The program description states, “DEQ will use ISDA’s experience and knowledge in reviewing and approving nutrient management plans and inspecting both permitted and unpermitted CAFO facilities. ... DEQ will have the responsibility and authority to pursue enforcement actions regarding violation of permits and for unauthorized or illegal discharges from CAFOs.” Program Description at p. 67. Additionally, after acknowledging that the program authorities of the two agencies are “overlapping”, the Attorney General Statement describes this overlap as being addressed by the state legislature, which “has expressly recognized that nothing in the ISDA authorities ‘shall affect the authority of the department of environmental quality to administer, enforce an Idaho program for...[CAFOs – either beef cattle feeding operations or dairy farms], including without limitation, the authority to issue permits, access records, conduct inspections and take enforcement actions...” See Attorney General’s Statement at p. 8.

Regarding the review of Nutrient Management Plans (NMPs) and IDEQ's inspection authority for unpermitted CAFOs, the Attorney General's Statement, interpreting Idaho Code 39-108, 37-606A, and 22-4909A, states that:

NMPs and the compliance information for unpermitted facilities are required by Idaho Code §37-606A(dairies) and §22-4909A (beef CAFO) to be maintained by the facility on site. IDEQ has the authority to inspect unpermitted facilities per Idaho Code 39-108 and may request during the course of such inspection to review the NMP and the NMP compliance information.

Attorney General's Statement at p. 4. Thus, the state Attorney General has certified that IDEQ does in fact have the authority to inspect CAFOs, review relevant information, including NMPs and make a determination whether an unpermitted facility does in fact need NPDES permit coverage. Furthermore, the Memorandum of Understanding (MOU) between ISDA and IDEQ which was submitted as part of the state's submission indicates that IDEQ has the authority to conduct inspections and other activities necessary to address unpermitted discharges. Section 4.2 of the MOU states, "[i]t is IDEQ's sole authority to determine if an unpermitted discharge needs to be permitted." This language in the MOA is consistent with the broad authority that is provided to DEQ in each of the sector specific statutes, the Beef Environmental Control Act, the Dairy Environmental Control Act and the Poultry Environmental Act, to identify unpermitted discharges and to exercise NPDES permitting and enforcement authority, as needed.

***Comment 6:***

Notice of Compliance Letter. The proposed Idaho program will allow all violators to avoid - compliance by simply coming into compliance once they receive a notice from DEQ. This takes away all incentive to comply before a violator is caught. This get-of-jail-free card eviscerates the Idaho enforcement program, and therefore violates section 402(b)(7) of the CWA, 33 U.S.C. § 1342(b)(7).

***EPA Response:***

Please note that the term the commenter references is now known as a "Notice of No Further Action" letter in the current NPDES program application. Clean Water Act Section 402(b)(7) requires the Administrator "shall" approve a State's program *unless* he determines that the State lacks adequate authority to "abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement." 33 U.S.C. § 1342(b)(7). The regulations at 40 CFR §§ 123.26 and 123.27 implement this statutory requirement by providing the requirements for state compliance programs and enforcement authority. These regulations outline the requirement enforcement authorities must have for NPDES permitting authorization. States have considerable enforcement discretion regarding how to employ their enforcement resources. Idaho's potential use of a "Notice of No Further Action" letter is solely within its discretion and is not prohibited by the EPA's NPDES regulations.

The EPA's 1990 Enforcement Management System document, which establishes the framework for state NPDES enforcement and compliance programs, states that "an administering agency should establish criteria for reviewing violations to determine which violations require priority review by a professional to determine whether the violation should be subject to a formal or informal enforcement response." 1990 EMS at 4. Later on the EMS outlines that,

There are three possible levels of response to all violations. For any violation, the administering agency must review the violation and determine the appropriate response. For some violations, the response may be no action necessary at this time. The Informal enforcement response can be an inspection, phone call, a violation letter, or a Federal Notice of Violation to the permittee with a copy to the administering State agency. The violation letter can be limited to a notification of the violation or to requiring certain steps to be taken within specific time frames.

1990 EMS at 65.

Idaho's program documents submitted in support of its application for program authorization describes an approach to compliance and enforcement that is consistent with the regulatory requirements and applicable EPA guidance and policy. The Attorney General's Statement certifies that the state has all of the legal authorities in place to meet the compliance evaluation and enforcement requirements in 40 CFR § 123.27. Attorney General's Statement at p. 80. These authorities, the Attorney General asserts, also suffice to meet the requirements of CWA Section 402(b)(7), 33 U.S.C. § 1342(b)(7).

The state has described the use of inspection reports as a mechanism for documenting inspections or investigations conducted at permitted or unpermitted facilities and would include documentation of any noncompliance and needed corrective actions. Program Description at p. 80. In addition, "[w]here a compliance evaluation warrants a formal enforcement action, regional office staff will consult CIE [Compliance Inspection and Enforcement] state office staff (compliance officers) to determine the appropriate enforcement action." *Id.*

The state's Enforcement Response Guide (ERG) (Appendix I of the Program Description) sets out criteria for determining the level of enforcement response and indicates that the state plans to employ formal enforcement action. ERG at 1-7. The state identifies a wide range of enforcement mechanisms, including compliance assistance, noncompliance letters, administrative actions, civil remedies, and criminal remedies. The decision whether and when to use these approaches is within the state's discretion.

The state's Enforcement Procedures Manual (Appendix H of the Program Description) sets out the circumstances in which "Notice of No Further Action" letters would be used; when the state has issued a noncompliance letter and has determined that the facility has satisfactorily remedied the violations cited in the noncompliance letter. Enforcement Procedures Manual at 30.

Furthermore, issuing “Notice of No Further Action” letters does not preclude the state or the EPA from taking further enforcement action regarding those specific noncompliance events up to the statute of limitations. ERG at 1-6.

***Comment 7:***

Memorandum of Agreement. A state program application must contain a Memorandum of Agreement (MOA) “executed by the State director and the Regional Administrator,” which “shall become effective when approved by the Administrator.” 40 CFR §§ 123.21(a), 123.24(a). The MOA that the State submitted as part of the program application has been executed by neither the State director nor the Regional Administrator. In fact, as described in EPA’s Completeness Determination letter dated September 30, 2016, Idaho legislation requires IDEQ to submit the MOA to the state Legislature for approval before signing it, and this has not yet occurred and is not scheduled until 2018. Thus EPA does not have before it, and at the time of this public comment period, the public does not have access to, an MOA that has been signed by IDEQ or has the authority to sign, and therefore which may take effect when and if the Administrator approves it. EPA may not approve the program until it has received from IDEQ, as part of its program application, a signed MOA that can go into effect upon Administrator approval, and that has been subject to the required notice and comment procedures required as part of the program approval process.

***EPA Response:***

The EPA’s regulations provide that “[a]ny State that seeks to administer a program under this part shall submit a Memorandum of Agreement. The Memorandum of Agreement shall be executed by the State Director and the Regional Administrator and shall become effective when approved by the Administrator.” 40 CFR § 123.24(a). The regulations do not specify exactly when the MOA is to be executed.

In this instance, the EPA issued a letter in September 2016 that deemed Idaho’s application complete. The letter acknowledged that IDEQ was required by law to submit the Memorandum of Agreement (MOA) to the Legislature for approval before the agencies sign the MOA to allow for potential stakeholder involvement. The EPA’s completeness letter also indicated that if the Legislature changed the MOA, that could affect program approval.

40 CFR § 123.61(a) requires the EPA to publish notice of the State’s NPDES program application in the Federal Register and state newspapers. The MOA is part of the State’s NPDES program application. The EPA’s August 2017 Federal Register Notice explained that the EPA was requesting comments on the State’s program application, that included the MOA and indicated that if the Regional Administrator approved the program, the EPA will notify the State and sign the proposed MOA. Therefore, the version of the MOA that is published for public notice and comment is the final unsigned MOA. On March 1, 2018, the Idaho Legislature approved the MOA without making any changes to it. Therefore, the version that was available for public comment has not been changed.

Commenter 10:

***Comment 1:***

The IPDES program lacks the necessary prohibition of unpermitted discharges, and enforcement authority to address them. EPA regulations at 40 CFR § 123.1(g)(1) require that “the State program must prohibit all point source discharges of pollutants, all discharges into aquaculture projects, and all disposal of sewage sludge which results in any pollutant from such sludge entering into any waters of the United States within the State's jurisdiction except as authorized by a permit in effect under the State program or under section 402 of CWA.” CWA § 402(b)(7) and 40 CFR § 123.27 require state enforcement authority for violations of state program requirements. Idaho’s IPDES statutory and regulatory authority require dischargers to submit IPDES permit applications, IDAPA 58.01.25.102, and to comply with any IPDES permit, IDAPA 58.01.25.500, and also authorize IDEQ enforcement actions for violations of state program requirements, including violations of a permit or failure to apply for a permit. But they do not appear to prohibit or authorize any enforcement authority for discharges that are not authorized by a permit. The only remedy under State law for such discharges appears to be limited to addressing the failure to submit a permit application.

***EPA Response:***

IDAPA 58.01.25.102.01 states that “[a]ny 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 sewage sludge use or disposal practice is regulated by 40 CFR Part 503 or these rules, and who does not have an IPDES or NPDES permit in effect, shall submit a complete IPDES permit application to the Department....” *Id.* IDAPA 58.01.25.102.05 further states that “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.” *Id.* Therefore, if an individual/facility is unpermitted and discharges to surface waters, the individual/facility would be in violation of this regulation and IDEQ could take an enforcement action for the unpermitted discharges.

Moreover, under Idaho Code 39-105 and 39-108, IDEQ has broad authority to address water pollution issues in the state which includes enforcement against unpermitted discharges. As set forth in the Attorney General’s Statement, “...Idaho Code section 39-108(1) provides the Director with broad authority to investigate alleged violations by unpermitted sources.... These grants of authority – both individually and collectively – establish clear and robust authority for IPDES to identify unpermitted discharges, require and issue permits to control them, and pursue necessary enforcement actions....” *See* Attorney General’s Statement at p. 53-54; *see also* Attorney General’s Statement at p. 73. Given the statutory and regulatory provisions cited above, the EPA concludes that IDEQ has the authority required under 40 CFR § 123.1(g)(1) to pursue enforcement actions against individuals/facilities who are discharging without a permit.

***Comment 2:***

The IPDES program appears to lack program elements required by 40 CFR § 403.10. Section 403.10(a) provides that “no State NPDES program shall be approved . . . unless it is determined to meet the requirements of paragraph (f) of this section,” i.e. 40 CFR § 403.10(f). At IDAPA 58.01.25.003.02.x, the IPDES program explicitly incorporates by reference all portions of 40 CFR § 403 except § 403.4, § 403.10, § 403.19 and § 403.20. This leaves out the required § 403.10(f).

***EPA Response:***

In April 2017, IDEQ initiated negotiated rulemaking to revise the IPDES rules to address certain CWA requirements. IDEQ Docket No. 58-0125-1701. The negotiated rule drafts included the addition of 40 CFR § 403.10 in the list of federal regulations to be incorporated by reference in IDAPA 58.01.25.003. Upon conclusion of the negotiated rulemaking, IDEQ formatted the final negotiated rule draft for publication as a proposed rule in the August 2017 Idaho Administrative Bulletin. The proposed rule was adopted by the Idaho Board of Environmental Quality and submitted to the Idaho Legislature for approval in January 2018. While the rule was pending with the Legislature, IDEQ discovered the reference to 40 CFR § 403.10 had been omitted due to a transcription error. As a result, IDEQ went through Idaho’s emergency rulemaking process to correct this deficiency. On May 17, 2018, the Idaho Board of Environmental Quality approved the rule and the temporary rule is in full effect as certified by the state Attorney General. See 40 CFR § 123.23(a).

***Comment 3:***

The IPDES program lacks required criteria to evaluate whether certain small municipal stormwater discharges might result in exceedances of water quality standards. EPA regulations at 40 CFR § 123.35(b)(1)(i) require state NPDES permitting authorities to “develop criteria to evaluate whether a storm water discharge results in or has the potential to result in exceedances of water quality standards, including impairment of designated uses, or other significant water quality impacts, including habitat and biological impacts.” The AG Statement states that this requirement is satisfied at IDAPA 58.01.25.102.04. The latter provision, however, merely provides for DEQ to determine whether a discharge “results in or has the potential to result in exceedances of water quality standards or other significant water quality impacts.” The State has not specified criteria to evaluate whether this threshold is met, as required by the EPA regulation.

***EPA Response:***

40 CFR § 123.35(b)(1)(i) does not require the state to have criteria in regulation for designating additional small municipal separate storm sewer (MS4) discharges. Instead, the criteria can be developed in a guidance document. IDAPA 58.01.25.102.04 states that “DEQ shall designate a small MS4 ... as a regulated MS4 ... if [IDEQ] determines that ... the storm water discharge results in or has the potential to result in exceedance of water quality standards or other significant water quality impacts; or the storm water discharge contributes to the pollutant loadings of a physically interconnected [MS4] ...” *Id.* IDEQ has developed a guidance document

which sets forth the criteria to determine whether a small MS4 should be designated. These criteria include:

- Whether the MS4 is a significant contributor of pollutants to waters of the U.S.;
- Whether the MS4 is physically interconnected to another MS4 that is already regulated;
- Whether the MS4 serves a densely populated area or an area of high growth potential;
- Whether the MS4 discharges to sensitive waters (*e.g.*, waters containing threatened or endangered species and their habitat); and,
- Whether the MS4 discharges are being effectively addressed by other water quality programs.

Idaho Pollutant Discharge Elimination System, Designation Criteria and Selection Process for Small Municipal Separate Storm Sewer Systems, IDEQ, Feb. 2016 (MS4 Designation Document). IDEQ's MS4 Designation Document contains an explanation regarding each of these criteria. For example, IDEQ will consider a small MS4 to be a significant contributor of pollutants if the MS4 discharges contribute to a violation of water quality standards. See MS4 Designation Document at p. 2.

IDEQ's guidance document was submitted as part of the state's NPDES program application and was available during the public comment process. The EPA has determined that IDEQ has the authority to designate additional small MS4s as regulated MS4s and that IDEQ has identified the criteria that it will use to make such a designation through the MS4 Designation Document.

***Comment 4:***

The IPDES program lacks authority to implement 40 CFR § 122.21(c)(2). The State program must have this authority (or something more stringent), as required by 40 CFR § 122.25(a)(4). While there are similar or overlapping provisions in IDAPA 58.01.25.105, it is not clear that they are the same as, or more stringent than, those at 40 CFR § 122.21(c)(2).

***EPA Response:***

This comment lacks specificity. It is unclear what exact requirement the commenter believes may be missing from IDEQ's regulations. IDAPA 58.01.25.102 and 58.01.25.105.17 contain provisions that are the same as 40 CFR § 122.21(c)(2). Specifically:

- 40 CFR § 122.21(c)(2)(i) requires a Treatment Works Treating Domestic Sewage (TWTDS) with a currently effective permit to submit a permit application at the time of its next permit renewal application. IDAPA 58.01.25.102.17 contains this same requirement.
- 40 CFR § 122.21(c)(2)(ii) requires any other TWTDS to submit the specified information within 1 year after publication of a standard applicable to its sewage sludge. IDAPA 58.01.25.102.01 contains a requirement that other TWTDS submit the required

information 1 year after publication of a standard applicable to its sewage sludge. The required information is set forth in IDAPA 58.01.25.105.17.o.

- 40 CFR § 122.21(c)(2)(iii) states that the Director may require permit applications from any TWTDS if the Director determines that a permit is necessary to protect public health and the environment. IDAPA 58.01.25.102.03 contains this same requirement.
- 40 CFR § 122.21(c)(2)(iv) states that any TWTDS that commences operations after promulgation of an applicable standard for sewage sludge use and disposal must submit an application to the Director at least 180 days prior to the date proposed for commencing operations. IDAPA 58.01.25.105.03.c contains this same requirement.

The EPA concludes that IDEQ's regulations contain the same requirements as 40 CFR § 122.21(c)(2).

***Comment 5:***

EPA regulations require the Attorney General's Statement to set forth the State's authority to carry out the required elements of a state NPDES program. The Attorney General's Statement fails to set forth adequately the State's authority regarding each of the required elements listed above.

***EPA Response:***

This comment lacks specificity. It is unclear which portion of the Attorney General's Statement the commenter believes fails to adequately set forth the State's required authorities. The Attorney General's Statement contains a table of all the State's authorities needed to obtain program authorization.

**Commenter 11**

A plan to move the administration of Pollution Discharge Elimination systems from the Environmental Protection Agency to the Idaho Department of Environmental Quality is seeking approval. The following comments are being submitted in response to the State of Idaho's Pollution Discharge Elimination (IPDES) program application.

DEQ submitted a primary application that adheres to the Clean Water Act (CWA) and 40 CFR 123 to EPA to address water pollution by regulating point source discharge pollutants. Section 402 of the CWA contains language regarding the NPDES. Additionally, 40 CFR part 130 Water Quality Planning and Management mentions NPDES Issues at 130.12. The following statement is found in 130.12, "Where a State has assumed responsibility for the administration of the permit program under section 402, it shall assure consistency in the Water Quality Management Plan."

To implement this program IDEQ will require approximately 29 positions located in DEQ's state and regional offices and an annual budget of 3 million dollars. Permittees will gain access to permit writers and other staff with local experience and knowledge allowing the streamlining of issuing permits. If the EPA approves the IPDES program, IDEQ will administer this program,

subject to continuing EPA oversight and enforcement authority, in place of the NPDES program now administered by the EPA.

If the application is approved, will the EPA oversight activities ensure that IDEQ has sufficient personnel to perform all necessary activities so that the IPDES program is in full compliance with all applicable CWA laws and regulations? During the public hearing in Coeur d'Alene it was indicated two additional staff will be added to help with permitting in the Northern Region of IOEQ. Will that be sufficient staffing to administer all IPDES permits for the Northern Region?

Thank you for your consideration of Kootenai Environmental's comments regarding this subject. Kootenai Environmental Alliance, Sharon Bosley, Executive Director

## EPA Response

40 CFR § 123.22 requires that a state demonstrate they have adequate resources to operate their program. IDEQ's workload analysis is included in Appendix C., IPDES Program Analysis, of the IPDES Program Description (available at <http://www.deq.idaho.gov/media/60180493/ipdes-program-description-0717.pdf>). The EPA reviewed IDEQ's proposed funding and staffing levels in the context of the scope and scale of the IPDES program and concluded that the resource levels are comparable to other approved state programs.

IDEQ's IPDES organization structure indicates that all permit writers will be stationed in the Boise HQ office. Regional offices will provide compliance, inspection and enforcement (CIE) functions. IDEQ has indicated that two additional staff along with existing inspection staff in Northern Idaho will allow them to meet their CIE needs. As IDEQ begins to implement the IPDES program, the EPA expects IDEQ may need to change and adapt the IPDES program to address new and/or emerging programmatic issues and concerns.

Refer to EPA response to commenter 1 regarding the EPA's oversight authority.

## Commenter 14

To: EPA, From: John Claassen

In submitting these briefs on air pollution, I am stating that IDEQ doesn't operate with sufficient integrity to produce clear air or water.

(The commenter submitted his August 2015 comments to IDEQ on Clearwater Paper's Permit Application and 3 additional documents regarding his concerns about air pollution. Refer to Appendix C for the letters submitted with this comment.)

## EPA Response

Refer to EPA's response to commenter 1 regarding the EPA's NPDES oversight role.

## Commenter 15

Comment from public testimony. Comment primarily related to CAFO and groundwater pollution concern. Refer to Appendix C, Speaker, Scott McClure. His final statement, "I guess going back to bottom line, I certainly do not oppose and would encourage the transfer, but I think we have some work to do because that aquifer is something we don't want to lose. Thank you."

## EPA Response

The EPA reviewed this comment and determined that it was not related to the IPDES application. Refer to EPA's response to commenter 1 regarding the EPA's oversight authority.

## Commenters 2, 3, 5, 7, 9, 12, 13, 16, 17, and 18

These commenters expressed their support in favor of the delegation of NPDES authority to the State of Idaho.

*Commenter 2* - I strongly urge the EPA to grant approval to the State of Idaho's application for primacy over the NPDES program. The Idaho Dept. of Environmental Quality has distinguished themselves as overseers of environmental matters and enjoys the greatest buy-in from stake holders I have ever witnessed. Indeed, they are efficient and get results, but do so in partnership with those they serve. It creates a unique opportunity to be successful. There is some excellent leadership, tremendous dedication, and supreme effort for this to be able work out this way. I highly commend them. I see this as an opportunity to not only reduce the burden upon the already taxed public servants USEPA, but a win for the people of Idaho. Idahoans who have a working relationship (as I do) with IDEQ understand the synergy and enthusiasm which can result from dealing with folks who are so (relatively speaking) local and accessible. I cannot complain about my dealings with the USEPA either, but it is no secret that IDEQ folks tend to be easier to reach and quicker to respond. Such is the nature of federal vs state level. This is a logical move. It helps everyone. And I would also urge Tribal authorities to consider joining this as well, although I understand they have no obligation to.

*Commenter 3* - Without question, the most efficient government is the one closest to the people it governs. Accordingly, it is without hesitation that the City of Emmett, Idaho, fully supports approving IDEQ to be the administrator of the Idaho Pollutant Discharge Elimination System program. Standards are standards. There is nothing in our experience with Idaho DEQ that would suggest its personnel would not fully and fairly enforce federal standards with regard to the discharge of pollutants into our streams and rivers. The real benefit to us, of course, should IDEQ be named the administrator is the simple face of having someone 30 miles away to talk to who can make a decision rather than someone 300 miles away. Emails and telephones have their use, but oftentimes a face-to-face experience is the only real solution; flying to Seattle is not always an option for this small town.

*Commenter 5* - Clearwater Paper Corporation (Clearwater) owns and operates a pulp, and paperboard facility in Lewiston, Idaho and is currently subject to NPDES Permit No. 100001163

issued by EPA Region 10 and therefore has an interest in the NPDES program in Idaho. Clearwater submits these comments in response to the subject Federal Register notice. Clearwater supports EPA approval of the state of Idaho's application for IPDES program approval as set forth in Governor Otter's letter to EPA dated August 31, 2016. We believe the state of Idaho has clearly demonstrated that it has the resources and legal authority to issue and enforce NPDES permits consistent with the Clean Water Act and Implementing federal regulations and guidance.

It is important to note, that the state of Idaho, through the Idaho Department of Environmental Quality (IDEQ), went through a very robust and open process over the past few years in promulgating IPDES Rules, quantifying necessary resources to support the program, developing guidance, and drafting a Memorandum of Understanding (MOU) with EPA setting forth a four-phase approach for Idaho to assume authority over the NPOES permit program in Idaho. Anybody interested in the NPDES program in Idaho, including environmental groups, regulated entities, federally recognized tribes, other federal, state and local agencies and the general public were invited to participate in development of Idaho's IPDES program. Many of these groups and entities actively participated in and helped shape the program that is currently being considered by EPA. As you know EPA Region 10, and at times, EPA headquarters, also actively participated in development of Idaho's IPDES program. Moreover, the Idaho Legislature passed specific legislation to ensure that Idaho could implement a state NPDES program consistent with the requirements of the Clean Water Act. The Idaho Legislature appropriated resources to IDEQ ensure that the agency has the capacity to implement the IPDES program (combined with user fees that will be paid by permittees to fund the program). Thus the Idaho IPDES program has been developed through a very public and transparent process.

In terms of substance, it is clear that Idaho's application and the Idaho IPDES program meets the requirements of Section 402(b) of the Clean Water Act and EPA Implementing rules at 40 CFR Part. For example, IDEQ has adopted all of the Rules (literally verbatim) set forth in 40 CFR Section 123.25 to ensure that permits are issued consistent with current EPA Rules and procedures. Idaho clearly has the legal authority to enforce IPDES permits consistent with federal requirements as specified at 40 CFR Section 123.27. "The Idaho Environmental Protection and Health Act" (EPIA) at Title 39, Chapter 1, Idaho Code which specifies the required civil and criminal penalties. The EPA enforcement provisions and processes clearly meet the requirements of the Clean Water Act and EPA implementing rules at 40 CFR Section 123.27 governing enforcement authorities. The state's program has the required compliance evaluation program, public participation processes and appropriate judicial oversight of the program to ensure that the state of Idaho's program will meet all federal requirements. Finally, the state of Idaho undertook a very robust analysis of the resources that would be required to support the program and the funding to support the required resources (user fees combined with general fund monies).

We strongly urge EPA to approve Idaho's IPOES program in a timely matter to ensure that Idaho can assume permitting and compliance authority for the NPOES program in accordance with

the phased approach specified in the MOU. Thank you for the consideration of these comments.

*Commenter 7* –The City of Twin Falls (City) has again reviewed the documents associated with the State of Idaho's (State) application for primacy to regulate point source discharge to the water of the United States in the State. Upon further review and attending the public information and comments session on September 12, 2017. The City of Twin Falls supports the State's decision to take on the authority to regulate discharges from point sources in the State.

It is our understanding that during the implementation of the Idaho Pollutant Discharge Elimination System (IPDES) program, the State will be relying on federal contributions, state general funds. and funds from the regulated community to support the program. Through our review and attendance of the public meeting, it is still our belief that the financial support to operate this program can come from State general funds, but should also be distributed among all of the discharger covered under any permit. Whether this permit is for an individual permit or general permit. It is also, our understanding that once the State has fully implemented the program by 2021, the State will again evaluate the funding sources and distribute financial burden equitably. which the City supports.

Again, the City is supportive of the State taking over regulatory authority of point source discharges in the State. If you have any questions or concerns, please contact me at (208) 735-7272 or [jbrown@tfid.org](mailto:jbrown@tfid.org)

*Commenter 9* –Thank you for the opportunity to submit comments regarding the above-referenced Application. The City of Middleton supports the State of Idaho's application to assume the role of writing, administering and enforcing water quality discharge permits within Idaho. The City of Middleton as a discharger will uphold the rules and law with Idaho Department of Environmental Quality (IDEQ) as we have with US EPA.

As a permitted discharger, the City of Middleton now collaborates extensively with both US EPA and IDEQ, and sees many benefits, and no detriments, when IDEQ, under US EPA's direction, assumes regulatory authority for administering the Clean Water Act permitting program in Idaho. Middleton residents favor the change as another step toward improved surface-water quality in Idaho.

*Commenter 12* –The City of Nampa (City) would like to express their support for the Idaho Department of Environmental Quality's (IDEQ's) application to administer the Idaho Pollutant Discharge Elimination System (IPDES) Program. It is the City's belief that a state-operated permitting program provides greater overall benefit to the participants and, ultimately, the environment. A local and engaged regulatory agency will be key as the City looks to implement innovative, integrated watershed management opportunities to best meet its community goals. The IPDES program will allow intimate collaboration between the City and local IDEQ staff to promote a streamlined permit development process that helps achieve the goals of the Clean Water Act

The City has had the opportunity to work closely with IDEQ staff recently through the development of the Lower Boise River Total Phosphorus Total Maximum Daily Load and 401 Certification for the City's National Pollutant Discharge Elimination System permit. The City appreciates IDEQ's efforts on these critical issues and looks forward to more successful interactions with IDEQ through the NPDES program.

Should you have any questions please do not hesitate to contact me at (208) 468-4493, or via email at runyann@cityofnampa.us. Nate W. Runyan, P., Deputy Public Works Director

*Commenter 13* –The Nez Perce Tribe (Tribe) appreciates the U.S. Environmental Protection Agency (EPA) consulting with the Tribe on Idaho's National Pollutant Discharge Elimination System (NPDES) program submission under the Clean Water Act.

The Tribe has worked closely with EPA over the decades as EPA has administered the Clean Water Act's NPDES program in Idaho and in Indian Country. If Idaho Department of Environmental Quality's application is approved, EPA will continue to administer the NPDES program in Indian Country. As a result, the Tribe will continue to work with EPA on a government-to-government basis as EPA administers the NPDES program on the Nez Perce Reservation and the Tribe will continue to work with EPA as EPA implements its oversight, compliance monitoring, and enforcement roles for the NPDES permits Idaho issues.

The Tribe appreciates that the proposed transfer contemplates a phased transition, and that EPA is committed to being involved in each step of the proposed transfer and to carefully overseeing the proposed transition as it would with any new program.

The Tribe's Water Resources Division will continue to be the point of contact for Clean Water Act and NPDES permitting issues; please contact Ken Clark 208-841-7368, ext. 3903 or [kenc@nezgercc.org](mailto:kenc@nezgercc.org) if you have any questions.

*Commenter 16* – Hearing Testimony - Jason Brown Environmental Engineer from the City of Twin Falls. I came here tonight just to express our support for the state taking over the authority to continue to regulate and oversee discharges into the waters of the United States. So, the city of Twin Falls does support the state implementing and taking care of this program, we believe that it provides us with a better connection with our local regulators people that understand more local issues here, but also, the ability to work with people at state level, as well. That is all I need to say.

*Commenter 17* – Hearing Testimony - Jane Whitmeyer. I am here as a citizen and also as someone who has been very involved in this rulemaking over the last, you know, three years. I would like to say “thank you” to the DEQ and all the other individuals who worked to get this process where it is today. We think it is a good, I think it is a good process and the folks I would work with do also. And we are happy that its moving forward and hoping all the dates are met as we move forward. So, thank you and all the work that you guys put into it. And hopefully we will get the good results that we all believe this process provided.

*Commenter 18* – Hearing Testimony - My name is Clayton Steel. I am the Environmental Manager for Clearwater Paper and Clearwater Paper is supportive of EPA approving the state of Idaho's NPDES program application. Thank you for the opportunity to provide comments.

### EPA Response

Comments noted. In response to comments made by Commenters 2, 3, 5, 7, 9, 12, 13, 16, 17, 18, the EPA thanks you for your interest in Idaho's NPDES Program.

## Appendix A. Federal Register Notice – Public Comment Period and Public Hearings

The FR Notice is available at <https://www.federalregister.gov/documents/2017/08/11/2017-16822/public-notice-of-state-of-idaho-national-pollutant-discharge-elimination-system-npdes-program>

### ENVIRONMENTAL PROTECTION AGENCY

[FRL–9965–41–Region 10]

### Public Notice of State of Idaho National Pollutant Discharge Elimination System (NPDES) Program Submission for EPA Approval

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of availability; request for comment; notice of public hearing.

**SUMMARY:** The United States Environmental Protection Agency (EPA) is requesting comments on and will hold public hearings for the State of Idaho's National Pollutant Discharge Elimination System (NPDES) program application (to be referred to as the "IPDES program application" or the "application"). The Governor of the State of Idaho submitted the application to the EPA Region 10 Administrator pursuant to section 402 of the Clean Water Act (CWA or 'the Act'). With this submission, the Idaho Department of Environmental Quality (IDEQ) seeks approval to administer the Idaho Pollutant Discharge Elimination System (IPDES) program regulating discharges of pollutants into waters of the United States under its jurisdiction. The State's request includes an implementation plan to transfer from the EPA to IDEQ the administration of specific program components in four phases over a four-year period beginning July 1, 2018, or upon program approval, whichever is later. If the EPA approves the IPDES program, IDEQ will administer this program, subject to continuing EPA oversight and enforcement authority, in place of the NPDES program now administered by the EPA. The EPA will retain permitting authority over all facilities that are located within a tribal reservation and/or facilities that discharge to tribal waters. Today, the EPA is requesting comments on the State's application and providing notice of public hearings that will be held at locations throughout the state. At the close of the public comment period, the EPA will review all the public comments received and will either approve or disapprove the State's request for program approval. If approved, the NPDES program authority will begin to transfer from the EPA to IDEQ on or after July 1, 2018, with the final program phase being transferred to IDEQ on or after July 1, 2021.

**DATES:** Comments must be received on or before October 10, 2017.

**ADDRESSES:** Location of Informational Meetings and Public Hearings: EPA Region 10 will hold five information meetings, with each followed by a public hearing on the following dates and times. Please check the Web site at <https://www.epa.gov/npdes-permits/idaho-npdes-program-authorization> prior to the scheduled dates for any updates to this information.

**Table I-1—Locations for Informational and Public Meetings**

Informational meeting and public hearing city/location/address/phone number	Date and time
<p><i>Idaho Falls</i></p> <p>Central Public Library, 457 W Broadway St., Idaho Falls, ID 83402, (208) 612-8460</p>	<p><i>September 11, 2017:</i> Duration: 4:00 p.m. until no later than 8:00 p.m. (MT). <i>Information meeting</i> at 4:00 p.m. until 5:30 p.m. <i>Hearing</i> will begin promptly at 6:00 p.m., until testimony is complete.</p>
<p><i>Twin Falls</i></p> <p>Twin Falls Public Library, 201 Fourth Avenue East, Twin Falls, ID 83301, (208) 733-2964</p>	<p><i>September 12, 2017:</i> Duration: 4:00 p.m. until no later than 8:00 p.m. (MT). <i>Information meeting</i> at 4:00 p.m. until 5:30 p.m. <i>Hearing</i> will begin promptly at 6:00 p.m., until testimony is complete.</p>
<p><i>Boise</i></p> <p>Boise Public Library, 715 S Capitol Blvd., Boise, ID 83702, (208) 972-8200</p>	<p><i>September 13, 2017:</i> Duration: 4:00 p.m. until no later than 8:00 p.m. (MT). <i>Information meeting</i> at 4:00 p.m. until 5:30 p.m. <i>Hearing</i> will begin promptly at 6:00 p.m., until testimony is complete.</p>
<p><i>Lewiston</i></p> <p>Lewiston Community Center, 1424 Main St., Lewiston, ID 83501, (208) 746-2313</p>	<p><i>September 14, 2017:</i> Duration: 4:00 p.m. until no later than 8:00 p.m. (PT). <i>Information meeting</i> at 4:00 p.m. until 5:30 p.m. <i>Hearing</i> will begin promptly at 6:00 p.m., until testimony is complete.</p>
<p><i>Coeur d'Alene</i></p> <p>Coeur d'Alene Public Library, 702 E Front Ave., Coeur d'Alene, ID 83814, (208) 769-2315</p>	<p><i>September 15, 2017:</i> Duration: 2:00 p.m. until no later than 6:00 p.m. (PT). <i>Information meeting</i> at 2:00 p.m. until 3:30 p.m. <i>Hearing</i> will begin promptly at 4:00 p.m., until testimony is complete.</p>

Providing Comments. The EPA will consider comments on the IPDES program application before making a final decision. You may submit comments by any of the following methods:

By Email: Send comments by email to [IdahoNPDEScomments@epa.gov](mailto:IdahoNPDEScomments@epa.gov),

By Mail/Hand Delivery/Courier: Deliver comment to U.S. EPA, Attn: Idaho NPDES Comments, Office of Water and Watersheds, Mail Stop OWW-191, 1200 Sixth Ave., Suite 900, Seattle, WA 98101-3140.

Viewing and/or Obtaining Copies of Documents. A copy of the application and related documents may be viewed or downloaded, at no cost, from the EPA Web site at <https://www.epa.gov/npdes-permits/idaho-npdes-program-authorization>. Copies of documents are also available for viewing or copying at the EPA Region 10 Library, 1200 Sixth Avenue, Suite 900 M/S OMP-0102, Seattle, WA 98101 and at the EPA Idaho Operations Office, 950 W Bannock, Suite 900, Boise, ID 83702 or call 208-378-5746. The R10 library is open Monday through Friday, excluding federal holidays, 9:00 a.m.-12:00 p.m., and 1:00 p.m.-4:00 p.m. For information about the cost of obtaining a copy or other information refer to EPA's Web page at <https://www.epa.gov/libraries/region-10-library-services> or call (206) 553-1289.

IDEQ will provide copies of the application available for viewing at their Boise office and on their Web site. The application, related documents and program development documents can be viewed or downloaded, at no cost, from the IDEQ Web site <http://www.deq.idaho.gov/water-quality/ipdes/program-application/>. The IDEQ contact is Mary Anne Nelson, IPDES Program Manager; [mary.anne.nelson@deq.idaho.gov](mailto:mary.anne.nelson@deq.idaho.gov); (208) 373-0291.

FOR FURTHER INFORMATION CONTACT: Visit <https://www.epa.gov/npdes-permits/idaho-npdes-program-authorization> or contact Karen Burgess, NPDES Permits Unit, EPA Region 10; (206) 553-1644; [burgess.karen@epa.gov](mailto:burgess.karen@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**General Information**

**A. Does this action apply to me?**

Entities potentially affected by this action are: The EPA; territorial, and tribal programs; and the regulated community and citizens within the state of Idaho. This table is not intended to be exhaustive; rather, it provides a guide for readers regarding entities that this action is likely to regulate.

***Table I-2—Entities Potentially Affected by This Proposed Approval***

Category	Examples of potentially affected entities
State, Territorial, and Indian Tribal Governments	States, Territories, and Indian Tribes that provide certification under section 401 of the CWA; States, Territories, and Indian Tribes that own or operate treatment works.
Municipalities	POTWs required to apply for or seek coverage under an NPDES individual or general permit and to perform routine monitoring as a condition of an NPDES permit.
Industry	Facilities required to apply for or seek coverage under an NPDES individual or general permit and to perform routine monitoring as a condition of an NPDES permit.
NPDES Stakeholders	Any party that may review and provide comments on NPDES permits.
Citizens of the state of Idaho	Any party that may review and provide comments on NPDES permits.

If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under FOR FURTHER INFORMATION CONTACT.

**B. What action is the EPA taking?**

The State of Idaho submitted a complete description of their IPDES program and associated documents to the EPA. In accordance with CWA section 402(b), [33 U.S.C. 1342\(b\)](#), and NPDES regulations at [40 CFR Part 123](#), the EPA shall approve a submitted program unless adequate authority does not exist as required by the CWA.

**C. What is the EPA's authority for taking this action?**

CWA section 402 established the NPDES permitting program and gives the EPA authority to approve state NPDES programs. [33 U.S.C. 1342\(b\)](#).



approval. The EPA will not make a final decision on IPDES program approval until after: (1) Considering all public comments provided during the public comment period and from the public hearings, and preparing a responsiveness summary and (2) completion of government to government tribal consultations, as requested, with federally recognized tribes in Idaho.

**Informational Meetings:**

Informational meetings will include a technical overview of both the federal and state programs and provide an opportunity for question and answer. IDEQ will participate with EPA during these meetings. Questions and answers following the informational meeting will not be entered into the official record. Comments for the official record must be made in accordance with the public hearings procedures and/or submitted as written comments before the end of the comment period.

**Public Hearing Procedures.**

The public hearings will be conducted in accordance with [40 CFR 124.12](#) and will provide interested parties with the opportunity to give written and/or oral testimony into the official record. The following procedures will be used at the public hearings. (1) The Presiding Officer shall conduct the hearing in a manner which will allow all interested persons wishing to make oral statements an opportunity to do so; however, the Presiding Officer may inform attendees of any time limitations during the opening statement of the hearing. (2) Any person may submit written statements or documents for the hearing record. (3) The transcript taken at the hearing, together with copies of all submitted statements and documents, shall become a part of the record submitted to the Regional Administrator. (4) The hearing record shall be left open until the deadline for receipt of comments specified at the beginning of this Notice to allow any person time to submit additional written statements or to present views or evidence tending to rebut testimony presented at the public hearing. (5) Hearing statements may be oral or written. Written copies of oral statements are urged for accuracy of the record and for use of the Hearing Panel and other interested persons. Persons wishing to make oral testimony supporting their written comments are encouraged to give a summary of their points rather than reading lengthy written comments verbatim into the record. All comments received by the EPA in accordance with the instructions for 'Providing Comments' by the ending date of the comment period and/or presented at the public hearing, will be considered by the EPA before final IPDES program approval.

IPDES Program Application Summary: By letter dated, and received by the EPA on August 31, 2016, the Governor of Idaho submitted the IPDES program application for program approval. The application consisted of five main components required under [40 CFR 123.21](#): (1) A letter from the governor requesting approval of the state's application, (2) a program description that describes how the state will issue IPDES permits, ensure compliance with permit conditions, conduct enforcement, as well as fund and manage the program including programmatic information and data, (3) a statement from the Attorney General's office certifying that the state's laws and regulations provide sufficient authority to the state to implement the discharge, pretreatment, and biosolids components of the NPDES program, (4) a Memorandum of Agreement (MOA) between the state and EPA which establishes, in part, timeframes for a phased approach for the state to assume authority, (5) copies of all applicable statutes and regulations including those that govern the state administrative procedures, which the state adopted to ensure the necessary authority for implementing the IPDES program, including Idaho House Bill 406 directing IDEQ to pursue permitting authority. IDEQ submitted their Continuing Planning Process (CPP) as required under [40 CFR 130.5](#) for program approval. Appendices to the Program Description include other IPDES program documents including guidance, forms and templates that IDEQ will use to implement their program.

The EPA deemed the application complete on September 30, 2016, in a letter that also identified initial issues to be addressed before program approval. In accordance with [40 CFR 123.21\(d\)](#), IDEQ requested to extend the statutory review period for the application until June 30, 2018. The EPA and IDEQ will use the period of time until program approval to address issues, complete the public process, develop the IPDES Start Printed Page 37586 program and build capacity for both permitting and enforcement functions.

*IPDES Program Summary:*

As required under section 402(b) of the CWA, [33 U.S.C. 1342\(b\)](#), and [40 CFR 123.22](#), the IPDES program description specifies how IDEQ will administer the NPDES program. IDEQ will issue IPDES permits under their jurisdiction; conduct compliance and enforcement activities; gather and maintain NPDES records and report to the EPA; and oversee the regulated activities of all IPDES-permitted facilities. The EPA will retain the authority to issue NPDES permits for facilities located on tribal lands and/or discharging to tribal waters. The scope of IDEQ permitting authority includes individual and general permits for discharges to waters of the United States from facilities or activities, including industrial (*e.g.*, commercial, mining, oil and gas, and silviculture discharges; animal feeding operations; and aquatic animal production facilities) and municipal wastewater treatment facilities (*e.g.*, publicly and privately owned treatment works); discharges to waters of the United States from federal facilities; storm water discharges, including municipal storm sewer systems (combined and separate); construction and industrial storm water general permits; and individual permits for storm water discharges; sewage sludge (biosolids) under [40 CFR Part 503](#) and the pretreatment program under [40 CFR Part 403](#). IDEQ's program will not include permitting of discharges incidental to the normal operation of a non-military, non-recreational vessel operating in a capacity as a means of transportation; the EPA will continue to issue permits under CWA section 402 to regulate such discharges from non-military, non-recreational vessels greater than 79 feet in length and all ballast water discharges.

IDEQ will assume permitting and compliance authority for the NPDES program in four phases. The EPA will retain full permitting and compliance authority over facilities until that authority is transferred to IDEQ in accordance with the following schedule:

Phase I—Individual Municipal Permits and Pretreatment upon gaining program authority (anticipated July 1, 2018).

Phase II—Individual Industrial Permits, one year after program authorization (anticipated July 1, 2019).

Phase III—General Permits (Aquaculture, Pesticide, CAFO, Suction Dredge, Remediation), two years after program authorization (anticipated July 1, 2020).

Phase IV—Federal Facilities, General and Individual Stormwater Permits and Biosolids, three years after program authorization (anticipated July 1, 2021).

**Idaho NPDES Program Application**  
Response to Comments and Testimony

Authority: This action is taken under the authority of section 402 of the Clean Water Act as amended, [33 U.S.C. 1342](#). I hereby provide public notice of the application by the State of Idaho for approval to administer the State NPDES program, in accordance with [40 CFR 123.61](#).

Dated: July 17, 2017.

Daniel D. Opalski,  
Acting Deputy Regional Administrator, EPA, Region 10.

[FR Doc. [2017-16822](#) Filed 8-10-17; 8:45 am]  
BILLING CODE 6560-50-P

## Appendix B. Hearing Transcript

The hearing transcript is available from the EPA's Idaho NPDES Program Authorization webpage (<https://www.epa.gov/npdes-permits/idaho-npdes-program-authorization>).

[Transcript of Testimony from 2017 Public Hearings on Idaho NPDES Program Application \(PDF\)](#)(8 pp, 601 K)

### Public Hearing Dates and Locations:

- September 11, 2017 at Central Public Library in Idaho Falls.
- September 12, 2017 at Twin Falls Public Library.
- September 13, 2017 at Boise Public Library.
- September 14, 2017 at Lewiston Community Center.
- September 15, 2017 at Coeur d'Alene Public Library.

## Appendix C. Compilation of All Comment Received

The compilation of comments received is available from the EPA's Idaho NPDES Program Authorization webpage (<https://www.epa.gov/npdes-permits/idaho-npdes-program-authorization>).

[Comments Received During 2017 Public Comment Period on Idaho NPDES Program Application \(PDF\)](#)(35 pp, 5 MB)

Comments accepted August 11 - October 10, 2017. Personal information has been redacted from the posted comments.