

# IDAHO

## *Enforceable Provisions Applicable to Nonpoint Source Water Pollution*

### DISCHARGE PROHIBITIONS

#### Water Pollution Control Law

Idaho's water pollution control law includes a few provisions that may authorize enforcement against nonpoint source discharges that adversely affect water quality in outstanding resource waters and in certain impaired waters for which Total Maximum Daily Loads (TMDLs) have been developed.

- Idaho law provides that "no person shall conduct a new or substantially modify an existing nonpoint source activity that can reasonably be expected to lower the water quality of an *outstanding resource water*, except where the nonpoint source activities are temporary or short-term and do not alter the essential character of a stream segment."<sup>1</sup> Prior agency approval is required to conduct any new nonpoint source activities affecting such waters.<sup>2</sup>

- Where total maximum daily loads (TMDLs) are required -- for example, in high-priority impaired waters where there is significant risk to the designated water uses<sup>3</sup> -- the state must develop "pollution control strategies for both point sources and nonpoint sources for reducing those sources of pollution."<sup>4</sup> For "reasonably foreseeable nonpoint source activities," the agency is to develop and implement best management practices (BMPs).<sup>5</sup> For medium and low priority waters, where there are "risks" or "minimal risks" to the designated uses, nonpoint source BMPs must be adjusted to stop further impairment of water quality.<sup>6</sup>

However, BMPs may not be required for agricultural operations, except on a "voluntary basis," even in cases where TMDLs are required.<sup>7</sup> And, unless a TMDL is required to be developed and nonpoint strategies have been prescribed, there is no requirement for persons who conduct nonpoint activities to meet water quality standards other than those necessary to support the *existing* beneficial use of the water body.<sup>8</sup>

If a person fails to obtain new nonpoint source approval in those few instances where it is required (outstanding resource waters), or fails to implement BMPs and violations of water quality result, the agency may institute a civil action.<sup>9</sup> Nonpoint source activities that are conducted according to BMPs are, moreover, not subject to enforcement action, unless the discharge is causing an imminent or substantial danger to public health. Nonpoint source activities not conducted according to BMPs may be subject to compliance schedules, administrative and civil relief including injunctive relief.<sup>10</sup> The statute contains general penalty authority for environmental violations, including administrative and civil actions.<sup>11</sup> Also, where a TMDL has been developed, normal enforcement practices by other designated agencies are available under the state's water quality management plan.<sup>12</sup>

## Other Discharge Limitations

- Public nuisance is defined as anything that is "injurious to health" or "unlawfully obstructs the free passage or use...of any navigable lake, or river, stream, canal or basin..."<sup>13</sup> Idaho's Right to Farm Act and its Right to Conduct Forest Practices Act limit the circumstances under which agricultural operations and forest practices, respectively, may be deemed a nuisance,<sup>14</sup> specifically exempting agricultural operations from nuisance claims if they have been in operation for more than one year and operation is not "improper" or "negligent."<sup>15</sup> Also, local government entities are prohibited from enacting any laws that declare generally recognized agricultural practices to be a public or private nuisance.<sup>16</sup>

## Fish/Fisheries Laws

- Idaho law prohibits the placing in waters of any "...toxicants, chemicals, poisonous...or other material which may tend to destroy, kill, disable, or drive away fish..." Violation of this provision is punishable by fines and/or prison sentence.<sup>17</sup>

## OPERATIONAL REQUIREMENTS

### Forestry Requirements

- Under Idaho law, the Forest Board is required to "develop methods for controlling watershed impacts resulting from cumulative effects" of forest practices.<sup>18</sup> Under the Idaho Forestry Act ("Act"), a BMP is defined as practices that the Forest Board determines to be the "most effective and practicable means of preventing or reducing the amount of nonpoint pollution generated by forest practices,"<sup>19</sup> and the rules under the Act establish site-specific BMPs for stream segments of concern.<sup>20</sup> If under the rules, implementation of BMPs is insufficient to protect beneficial uses, the forest activity may be deemed "an imminent or substantial threat."<sup>21</sup> The Act implements this language by requiring that operators post a notice of intent to engage in forestry practices.<sup>22</sup> An operator will be required to post an operating bond where an operator has failed to apply BMPs or willfully caused degradation of water resources.<sup>23</sup> The forestry rules and practices are enforced through issuance of notice of violation and cease and repair orders. Relevant sanctions include suits for reparations, attachment of liens, bond forfeiture and injunctive relief.<sup>24</sup> Variances from these rules and practices can be obtained for approved alternatives that provide equivalent or better results.<sup>25</sup> The Right to Conduct Forest Practices Act limits the circumstances under which forest practices may be deemed a nuisance.<sup>26</sup>

### Agriculture Requirements

- Due to provisions under Idaho's Right to Farm Act (see supra nuisance section and the prohibition against enactment of a zoning ordinance that forces the closure of an agricultural operation operating in accordance with recognized practices<sup>27</sup>) and due to the general water pollution control law provision exempting agricultural operations from BMPs not adopted on a voluntary basis<sup>28</sup> (see supra general discharge prohibitions), there are relatively few general enforceable agriculture requirements under Idaho state law. Similarly, the Idaho Local Land Use Planning Act ("LLUPA")

prevents county commissioners from enacting any law that "deprives any owner of full and complete use of agricultural land..." Idaho law does establish soil conservation districts with authority to develop comprehensive plans and provides for the adoption of "appropriate soil-conserving land-use practices."<sup>29</sup> Rules require these districts to adopt BMPs and incorporate them into a five-year plan that protects water quality.<sup>30</sup> But these are not enforceable except as conditions on receipt of assistance. Similarly, rules for the agricultural water quality program provide financial assistance that may be conditional on implementation of BMPs, to the districts for the control and abatement of water pollution from agricultural lands.<sup>31</sup>

- Idaho law requires the department of health and welfare to promulgate a state nutrient management plan for surface waters.<sup>32</sup> State and local governments enforce the plans using their "police powers."<sup>33</sup>

- The state's chemigation law establishes design standards for use of irrigation systems for application of fertilizers and pesticides.<sup>34</sup> The Department of Agriculture ("DOA") can enter and inspect to determine compliance with chemigation standards.<sup>35</sup> Conducting chemigation without a license is subject to civil penalties ranging from \$1-25,000, and other chemigation-related violations are subject to fines and a misdemeanor charge.<sup>36</sup>

- Idaho law also has general pesticide registration, labelling and application requirements and prohibits "applying pesticides in a faulty, careless or negligent manner."<sup>37</sup> The Department of Agriculture ("DOA") can enter and inspect to determine compliance with general pesticide use requirements.<sup>38</sup> Any individual claiming damage from pesticide use must file a report with the DOA. Applying pesticides without a license is subject to fines and injunction, and other violations are subject to up to \$3000 in civil penalties.<sup>39</sup>

## **Development and Other Earth-Disturbing Activities**

No operating requirements are set forth apart from any that may be authorized by general land use regulation such as zoning.

- The LLUPA establishes planning goals that include ensuring that the important environmental features of the state and localities are protected and enhanced; protecting fish, wildlife and recreation resources; and avoiding undue air and water pollution.<sup>40</sup> Exemptions from uses that are otherwise prohibited under the LLUPA are provided through issuance of special use permits.<sup>41</sup> Also, the LLUPA states that county commissioners are not empowered to enact any law that "deprives any owner of full and complete use of agricultural land..."<sup>42</sup>

- Idaho regulations defining the development of comprehensive state water plan include provisions for designation of protected rivers and designation of interim protected rivers while the plan is being developed.<sup>43</sup> No enforcement provisions or sanctions specific to these regulations exist.

## Endnotes

- <sup>1</sup> I.C. 39-3618.
- <sup>2</sup> I.C. 39-3620.
- <sup>3</sup> I.C. 39-3610(1).
- <sup>4</sup> I.C. 39-3611.
- <sup>5</sup> I.C. 39-3620.
- <sup>6</sup> I.C. 39-3610(2),(3).
- <sup>7</sup> I.C. 39-3610(1).
- <sup>8</sup> I.C. 39-3604.
- <sup>9</sup> I.C. 39-3622.
- <sup>10</sup> IDAPA 16.01.02.350.01 &.02.
- <sup>11</sup> I.C. 39-108.
- <sup>12</sup> I.C. 39-3612.
- <sup>13</sup> I.C. 18-5901.
- <sup>14</sup> I.C. 22-4501, I.C. 38-1401.
- <sup>15</sup> I.C. 22-4503.
- <sup>16</sup> I.C. 22-4504.
- <sup>17</sup> I.C. 36-902.
- <sup>18</sup> I.C. 38-1305(8).
- <sup>19</sup> I.C. 38-1303(15).
- <sup>20</sup> IDAPA 20.02.01.080.01.
- <sup>21</sup> IDAPA 20.02.01.080.07.
- <sup>22</sup> I.C. 38-1306.
- <sup>23</sup> I.C. 38-1306B(1).
- <sup>24</sup> I.C. 38-1307.
- <sup>25</sup> IDAPA 20.02.01.020.01.a.
- <sup>26</sup> I.C. 38-1401.
- <sup>27</sup> I.C. 22-4501, 22-4504.
- <sup>28</sup> I.C. 39-3610.
- <sup>29</sup> I.C. 22-2716, 22-2722.
- <sup>30</sup> IDAPA 20.05.02.
- <sup>31</sup> IDAPA 16.01.14.001.
- <sup>32</sup> I.C. 39-105.
- <sup>33</sup> IDAPA 16.01.16.100.09.
- <sup>34</sup> I.C. 22-1401.
- <sup>35</sup> I.C. 22-1404.
- <sup>36</sup> I.C. 22-1408, 22-1411.
- <sup>37</sup> I.C. 22-3401, 22-3420.
- <sup>38</sup> I.C. 22-3414.
- <sup>39</sup> I.C. 22-3417, 22-3422 - 23.
- <sup>40</sup> I.C. 22-6502(d),(j), & (k).
- <sup>41</sup> I.C. 67-6512.
- <sup>42</sup> I.C. 67-6529.
- <sup>43</sup> IDAPA 37.02.01.