Case No. 18-72684

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IDAHO CONSERVATION LEAGUE,

Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, and
ANDREW WHEELER, Acting Director of the U.S. EPA,

Respondents.

Petition for Review
Under the Clean Water Act

PETITIONER ICL'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State

Statutes

Regulations

Other Authorities

GLOSSARY

APA	Administrative Procedures Act
CWA	Clean Water Act
EPA	United States Environmental Protection Agency
FTE	Full-time equivalent employee
ICL	Idaho Conservation League
IDEQ	Idaho Department of Environmental Quality
IPDES	Idaho Pollutant Discharge Elimination System
ISDA	Idaho State Department of Agriculture
NPDES	National Pollutant Discharge Elimination System
RTC	Response to Comments

RULE 26.1 DISCLOSURE STATEMENT

Petitioner Idaho Conservation League (ICL) is an Idaho non-profit corporation which is recognized by the IRS as a Section 501(c)(3) public charity. It has no public shares and no corporate parent or affiliate with public shares.

INTRODUCTION

The Idaho Conservation League (ICL) brings this petition for review of the U.S. Environmental Protection Agency's (EPA) approval of the Idaho Pollutant Discharge Elimination System (IPDES) program because the program fails to meet requirements of the Clean Water Act (CWA) in three separate ways.

The backbone of the CWA is the National Pollutant Discharge Elimination System (NPDES), which provides the framework for issuing permits to limit pollution discharges to our nation's waters. *See* 33 U.S.C. § 1342. If a state submits a proper application, the CWA allows EPA to authorize that state to run the NPDES program in that state. EPA cannot approve a state NPDES program unless the program meets the requirements in CWA Section 402(b) and 40 C.F.R. Part 123 that ensure state NPDES programs are adequate and will not undermine the CWA.

In June 2018, EPA approved the State of Idaho's NPDES program, which authorizes the Idaho Department of Environmental Quality (IDEQ) to take over NPDES permitting in Idaho despite three significant deficiencies of the IPDES program. EPA erred by approving the IPDES program with a criminal *mens rea* standard that is impermissibly more difficult to meet than the federal standard, and with a short statute of limitations that will impermissibly undermine the IPDES enforcement program. EPA also illegally authorized IDEQ to run the IPDES

program even though IDEQ will rely on a different agency, the Idaho State Department of Agriculture (ISDA), to be the main regulatory agency for concentrated animal feeding operations (CAFOs).

In the years leading to its approval, EPA recognized these problems and notified IDEQ it needed to make changes to its IPDES proposal, but IDEQ refused to make the changes. EPA backed down and approved the IPDES program with these flaws in place.

The Court should declare that EPA violated the CWA and Administrative Procedure Act (APA) in approving the IPDES program with these three flaws, and remand without vacatur for EPA to correct the errors set out here within two years of date of the order. Remand without vacatur is warranted because state legislative amendments will be required to conform with the minimum requirements of the CWA, and ICL is targeting its challenges to these three errors in EPA's approval of the IPDES program to improve the program and meet CWA requirements.

STATEMENT OF JURISDICTION

ICL petitions under 33 U.S.C. § 1369(b)(1)(D) for review of EPA's approval of the IPDES program. The CWA requires filing a petition within 120 days of EPA's approval of a state NPDES program. *Id.* § 1369(b)(1). EPA approved the IPDES program under 33 U.S.C. § 1342(b) on June 5, 2018, and published the

approval on June 14, 2018. *See* 83 Fed. Reg. 27,769 (June 14, 2018). ICL timely filed its petition with this Court on October 1, 2018.

With this brief, ICL files the declarations of Jonathan D. Oppenheimer and Matthew Nykiel, who are ICL staff and members. *See Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1527–30 (9th Cir. 1997) (petitioners entitled to submit affidavits to establish standing). The declarations show ICL has organizational and representational standing to bring this action because ICL and its members suffer injuries in fact which are fairly traceable to EPA's approval of the IPDES program, and a favorable decision will redress these injuries. *See Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 984–86 (9th Cir. 1994) (standing to pursue statewide CWA issue where conservation group member declarations showed injury to their personal use and enjoyment of some waters within state); *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 183 (2000) ("environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity"); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982) (organizational standing where challenged activity interferes with plaintiff's mission and drains its resources).

STATEMENT OF THE ISSUES

1. Was EPA's approval of the IPDES program arbitrary and capricious, an abuse of discretion, and/or not in accordance with the CWA because:

A. The IPDES program requires "criminal negligence" to prove a misdemeanor CWA violation when the CWA requires only "simple negligence"?

B. The IPDES program's short two-year statute of limitation for IPDES violations impermissibly constrains IDEQ's NPDES enforcement authority so that it does not meet CWA requirements?

C. EPA effectively authorized a different agency—ISDA—to administer the CAFO component of the program without following the CWA process and requirements under Section 402(n)(3) for doing so?

2. If ICL prevails on any of the three issues above, should the Court remand the IPDES approval to EPA to correct the discrete problems addressed in this petition without vacating approval of the larger program?

PERTINENT STATUTES AND REGULATIONS

The pertinent statutes at issue are set forth in the Addendum.

STATEMENT OF THE CASE

A. The Clean Water Act and Authorized States

In 1972, Congress passed the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and attain "water quality which provides for the protection and propagation of fish, shellfish and wildlife and provides for recreation." 33 U.S.C. § 1251(a). Central to carrying out these goals is the NPDES permit program.

All point source discharges of pollutants to waters of the United States must be authorized. 33 U.S.C. § 1311(a). The CWA defines "point source" broadly to include discernable, confined and discrete conveyances of pollutants, such as factories and sewage pipes, and also to include concentrated animal feeding operations (CAFOs). 33 U.S.C. § 1362(14). Many feedlots and dairies in Idaho are CAFOs and are therefore subject to regulation under the CWA.

NPDES permits impose technology-based and water quality-based effluent limitations, requiring permit holders to limit their pollution discharges. *See* 33 U.S.C. §§ 1311, 1312. NPDES permit holders are also required to monitor and report their pollution discharges. 40 C.F.R. § 122.41(j) & (l).

When a person violates 33 U.S.C. § 1301(a) by discharging pollutants without an NPDES permit or without complying the terms of an NPDES permit, the CWA authorizes civil and criminal enforcement. 33 U.S.C. § 1319.

Enforcement serves as an important deterrent to violations of the CWA. *See Friends of the Earth*, 528 U.S. at 185.

By default, EPA runs the NPDES program; however, states can apply to run their own programs. 33 U.S.C. § 1342(b). The CWA allows EPA to authorize a state to administer its own NPDES program if the state can demonstrate that its program meets the minimum federal standards. CWA Section 402(b), and implementing regulations at 40 C.F.R. Part 123, spell out the process and set out the minimum requirements for EPA to approve a state NPDES program.

Most states were authorized within the first years after the CWA was enacted in 1972.[1] On June 14, 2018, Idaho became the 47th state to be authorized to run its own NPDES program. 83 Fed. Reg. 27,769, 27,770 (June 14, 2018).

B. Background on Idaho NDPES Administration

Idaho's 46-year delay in seeking approval to implement the NPDES program reflects its long-standing resistance to meeting federal CWA mandates, as reflected in numerous court rulings. *See, e.g., Idaho Conservation League v. Browner*, 968 F. Supp. 546 (W.D. Wash. 1997) (ordering EPA to adopt more protective water quality standards when Idaho did not do so); *Idaho Sportsmen's Coal. v. Browner*, 951 F. Supp. 962 (W.D. Wash. 1996) (ordering EPA to adopt

[1] The "Authority" button on this EPA webpage shows the year in which each of the 47 states was authorized to administer the CWA: https://www.epa.gov/npdes/npdes-state-program-information .

CWA "total maximum daily load" schedule when Idaho failed to). Even when the Idaho legislature finally approved seeking authorization to run the IPDES program, it nonetheless mandated that Idaho's program cannot exceed the absolute minimum requirements of the CWA. *See* Idaho Code Ann. § 39-175B.

Idaho has also long promoted the dairy and cattle industries despite their adverse environmental impacts—including unconstitutional restriction of free speech in adopting the 2014 Idaho "Ag-gag" law recently invalidated by this Court. *See Animal Legal Def. Fund v. Wasden,* 878 F.3d 1184 (9th Cir. 2018). Particularly relevant here, Idaho legislation has long shielded CAFOs from environmental enforcement and even public disclosure of their "nutrient management plans" (*i.e.,* waste disposal plans), and other aspects of their environmental compliance. *See, e.g.,* "Beef Cattle Environmental Control Act," Idaho Code Ann. §§ 22-4901 *et seq*.; "Dairy Environmental Control Act," Idaho Code Ann. §§ 37-601 *et seq.*

Those Acts vest the director of ISDA with authority to regulate dairy and cattle CAFOs in Idaho, and direct that IDEQ enter into an agreement with ISDA that "recognizes its expertise" and allows IDEQ to delegate to ISDA the authority to administer CWA permits in Idaho for beef CAFO operations. Idaho Code Ann. § 22-4903(3); Idaho Code Ann. § 37-603(4). ISDA also is given authority to approve new CAFO designs and construction, and to conduct inspections. Idaho

Code Ann. §§ 22-4905 & 22-4907; Idaho Code Ann. § 37-605. ISDA must initially review and approve CAFO nutrient management plans, but then ISDA returns those plans to the CAFOs, to avoid public disclosure. Idaho Code Ann. § 22-4906; *Idaho Conservation League v. Idaho Cattle Ass'n*, 143 Idaho 366, 146 P.3d 366 (Idaho 2006) (addressing Idaho legislation allowing CAFOs to shield nutrient management plans from public disclosure).

Moreover, Idaho law defines CAFO nutrient management plans, along with "all information generated by the [CAFO] as a result of such plan," to be "trade secrets," *see* Idaho Code Ann. § 22-4909A, Idaho Code Ann. § 37-606A(2), and thus protects them as well as ISDA's CAFO inspection reports from public disclosure through the Idaho Public Records Act, *see* Idaho Code Ann. §§ 74-107(17) & 74-114.

This secrecy over Idaho CAFOs and their waste disposal practices has spurred many concerns about the true impacts that CAFOs are having on Idaho water quality, particularly in the Snake River. *See* Oppenheimer Decl., ¶¶ 28–33.

C. Idaho's Application to Administer the NPDES Program.

On August 29, 2016, Idaho formally applied to EPA for NPDES authorization. *See* ER 63-64. The Administrative Record shows an iterative process, starting before Idaho's formal application and continuing over the next two years, in which Idaho submitted proposals to EPA and EPA recommended

changes necessary for the IPDES program to meet the minimum requirements of the CWA. *See*, *e.g.*, ER 7-11, 36-38, 40-52, 77-87. While Idaho made many changes recommended by EPA, it ignored others.

By at least July 2016, EPA also raised concerns that Idaho's *mens rea* standard for criminal negligence and its two-year statute of limitations were inadequate. A July 20, 2016 IDEQ e-mail admits that EPA notified it that Idaho's gross negligence standard was stricter than the federal simple negligence standard. ER 51-52. That e-mail also states EPA "expressed a concern about Idaho's ability to pursue enforcement actions" given Idaho's two-year statute of limitations, because "EPA's experience is that building an enforcement case takes much longer." *Id*. EPA continued to raise these concerns in correspondence with IDEQ over the next two years. *See*, *e.g.*, ER 54-61, 71, 73, 77-87.

On February 5, 2015, EPA wrote IDEQ raising concerns about granting IDEQ NPDES permitting authority in light of Idaho law giving ISDA authority over CAFO permitting and enforcement. ER 40. EPA said, "[t]he language of the Dairy Act raises concerns as it appears that the Idaho State Department of Agriculture (ISDA) would administer NPDES permits for the dairy industry in some undefined way." ER 40. EPA had already raised similar concerns earlier. *See* ER 7-13 (5/29/14 DEQ email to EPA stating, "We asked for your review of the Dairy Environmental Control Act, and whether this Act will cause Idaho

difficulties when we seek authorization for the NPDES program."). EPA continued to raise this concern throughout the IPDES approval process. *See* ER 71 (9/30/16 EPA letter to IDEQ stating, "There are several inconsistencies and ambiguities in several of the program documents regarding the respective roles of IDEQ and [ISDA] with respect to CAFO permits."); ER 077 (3/10/17 EPA letter to IDEQ stating, "This section describes ISDA as determining whether CAFOs who have discharged need IPDES permit coverage. ISDA, however, does not have IDPES authority; thus, this determination is beyond the scope of ISDA's authority.").

D. ICL's Comments.

EPA published notice of its draft approval of the IPDES program on August 1, 2017, and invited public comments. 82 Fed. Reg. 37,583 (Aug. 1, 2017). ICL submitted timely public comments on October 5, 2017 and October 10, 2017. *See* ER 259-264. Among other concerns, ICL raised many of the same issues EPA had raised—namely, that the IPDES *mens rea* standard for negligent CWA violations was too strict, the statute of limitations for enforcing criminal CWA violations was too short, and that ISDA—not IDEQ—would really run the CAFO program. *Id.* EPA responded to comments in May 2018. *See* ER 265-271.

Despite its prior concerns, and ICL's comments pointing out the deficiencies remaining with the IPDES program, EPA approved the IPDES program in June 2018. *See* 83 Fed. Reg. 27,769, 27,770 (Jun. 14, 2018). ICL now seeks judicial

reversal of that approval, and remand for EPA to cure the three defects in its IPDES program approval, for reasons explained in detail below.

SUMMARY OF ARGUMENT

EPA unlawfully approved the IPDES program in violation of the CWA because of three legal deficiencies.

First, the criminal enforcement authority for IPDES violations did not meet minimum federal standards. Section 309(c) of the CWA, 33 U.S.C. § 1319(c), as interpreted by this Court in *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000), authorizes criminal penalties in the case of simple negligence, whereas the Idaho Code, as interpreted by the Idaho Attorney General's office, requires "criminal negligence." EPA's regulations require that state criminal intent standards be no stricter than federal standards. 40 C.F.R. § 123.27(b)(2). EPA approved Idaho's NPDES program even though its criminal enforcement provisions impermissibly contain the stricter *mens rea* standard. In approving the IPDES program, EPA also relied on an outdated regulation that was superseded by the 1987 amendments to the CWA. The superseded regulation, 40 C.F.R. § 123.27(a)(3)(ii), sets out the wrong *mens rea* standard to guide EPA in its approval of the IPDES program.

Second, EPA approved the IPDES program despite a unlawfully-short two-year statute of limitations for enforcement actions. The federal statute of

limitations is five years. IDEQ's NPDES program application states that it will only inspect most facilities every two to five years, and that it will take up to two years from discovery of a violation to enforcement. This means that by the time IDEQ inspects most facilities, much less actually initiates a penalty action, the statute of limitations would already have run on any violations during most or all of the time since the prior inspection. CWA § 402(b) requires state programs to have adequate enforcement authority to abate violations. The implementing regulations at 40 C.F.R. § 123.27 require state programs to have authority to assess penalties in specified minimum amounts *for each day or incident of violation*. Idaho's short statute of limitations hamstrings its own NPDES program so that it cannot meet either of these criteria.

Third, EPA authorized IDEQ to run the NPDES Permit program knowing that ISDA, and not IDEQ, would be regulating CAFOs for surface water discharges. CWA section 402(n)(3) specifically requires EPA approval of other state agencies to run parts of an NPDES program, but EPA did not do that here. Rather, EPA acted contrary to law in approving IDEQ to regulate CAFOs knowing that ISDA would be handling that work.

For these reasons, EPA violated the CWA and the Court should remand the approval of the IDPES program to EPA without vacatur to correct the deficiencies in the program within two years.

STANDARD OF REVIEW

Although the CWA provides for petitions for review of an EPA decision approving a state NPDES program, it provides no standards for judicial review. 33 U.S.C. § 1369(b)(1). This Court thus reviews EPA's approval of the IPDES program under Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, which provides that the Court should "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See Akiak Native Cmty. v. EPA*, 625 F.3d 1162, 1165 (9th Cir. 2010); *Am. Mining Cong. v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992). This requires that there be a rational basis in the record justifying the decision. *See Tablada v. Thomas*, 533 F.3d 800, 805 (9th Cir. 2008) ("[w]e conduct this review based solely on the administrative record and determine whether the agency has articulated a rational basis for its decision"). *See also Gill v. U.S. Dept. of Justice*, 913 F.3d 1179, 1187 (9th Cir. 2019); *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 840-41 (9th Cir. 2003).

ARGUMENT

I. EPA IMPROPERLY APPROVED THE IDAHO CRIMINAL *MENS REA* STANDARD.

EPA made at least two significant errors in approving the criminal provisions of the IPDES program. First, EPA's approval does not comply with its own regulations. Second, it relied on outdated regulations that do not comply with the current amended criminal provisions of the CWA.

A. The Idaho *Mens Rea* Standard Does Not Comply with 40 C.F.R. § 123.27(b)(2).

EPA did not follow its own regulations in approving the criminal provisions of the IPDES program. EPA regulations at 40 C.F.R. § 123.27(b)(2) require that the state standard for burden of proof or mental state for violations of state program requirements not be greater than the standard the EPA must comply with for NPDES violations under the Clean Water Act. The regulation states:

> The burden of proof and 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 burden of proof or degree of knowledge or intent EPA must provide when it brings an action under the appropriate Act.

40 C.F.R. § 123.27(b)(2).

The degree of knowledge, or *mens rea* standard, for criminal CWA violations is simple negligence. 33 U.S.C. § 1319(c); *Hanousek*, 176 F.3d at 1120–21. The Idaho AG's report, ER 65-66, explains that "[c]riminal negligence has

been interpreted by the Idaho courts to mean gross negligence or something more than simple or ordinary negligence." ER 66. *See also* ER 73. The Idaho standard is therefore not consistent with the minimum federal standard as interpreted by this Court.

In its Response to Comments (RTC), EPA now claims that § 123.27(b) refers to a "generic degree of criminal intent" and does not require any specific *mens rea*. ER 267. EPA's response misses the point. The plain language of § 123.27(b) states that whatever the degree of knowledge or intent is, it cannot be greater than what EPA must prove, and EPA's burden is to show only simple negligence. *See Hanousek*, 176 F.3d at 1120–21. Idaho's standard is far stricter in requiring criminal intent, and thus violates CWA requirements for state authorization.

1. The Administrative Record Supports ICL's Interpretation of the *Mens Rea* Standard.

The administrative record supporting EPA's decision to approve the IPDES program shows that EPA consistently maintained that Idaho's criminal negligence standard did not meet the minimum requirements for program approval. *See*, *e.g.,* ER 51-62, 71-74. In its September 30, 2016 letter to IDEQ, EPA states:

> The Clean Water Act (CWA) criminal intent standard for negligence is simple negligence. As described in the submitted Attorney General's Statement, the State of Idaho's criminal intent standard for negligent violations is gross negligence. 40 CFR 123.27(b)(2) requires states to have criminal intent standards that

> may not be greater than the standards which apply to the EPA. Since the CWA and federal courts have defined the CWA's negligence standard as ordinary or simply negligence, an approvable State NPDES program must have a criminal negligence standard that does not require a greater burden of proof than this intent standard. . . .

ER 73.

EPA's follow-up November 30, 2016 letter to DEQ reiterated this shortcoming of the Idaho criminal code: "The EPA has concluded that Idaho must revise the statutory language for the criminal intent standard in order for the EPA to approve the IPDES program." ER 75. On June 13, 2017, DEQ responded to EPA's arguments, ER 88-92, but there is nothing in the record other than the May 2018 RTC to show that EPA considered those arguments. In the RTC, EPA states it concluded, upon further consideration, that (1) its regulations are ambiguous and (2) it must read the entire regulation to give meaning to each section, essentially adopting the IDEQ's June 13, 2017 interpretation of EPA's regulation. ER 2656-268.

"Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016). "[T]he agency must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Id.* (citations omitted). *See also Oregon Natural Desert Association v. Rose*, 921 F.3d 1185, 1190 (9th Cir. 2019). Other than the post-hoc rationalization in the RTC,

EPA offers no explanation for its full reversal of its prior legal interpretation of its regulations, and nothing in the record supports a reasoned determination that EPA's prior long-standing interpretation was wrong.

EPA's post-hoc rationalization in the RTC notwithstanding, the EPA regulations do not allow for a *mens rea* standard that is greater than the standard EPA must comply with. The IPDES program does not comply with 40 C.F.R. § 123.27(b)(2) because the Idaho criminal negligence requirement for criminal violations is a greater standard than the "simple negligence" standard under the CWA, 33 U.S.C. § 1319(c). EPA's September 30, 2016 and November 30, 2016 letters to IDEQ, ER 71-76, spelled out this deficiency, but Idaho never corrected it, and the rationale EPA set out in those letters is still correct.

2. EPA's Interpretation of 40 C.F.R. § 123.27 Is Not Entitled to *Auer* Deference.

Prior to 2017, EPA consistently took the position that the Idaho *mens rea* standard did not meet minimum federal requirements. *See*, *e.g.,* ER 54-63, 71-76. In its May 2018 RTC, however, EPA flipped on those earlier interpretations of 40 C.F.R. § 123.27, adopting the position taken by the State in its June 13, 2017 letter to EPA. ER 88-92, 265-268.

An agency is generally entitled to deference in the interpretation of its own regulations. *Auer v. Robbins*, 519 U.S. 452 (1997).[2] The Supreme Court, however, has interpreted *Auer* to limit deference in cases where the "agency's interpretation is plainly erroneous or inconsistent with the regulation." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (quotation omitted). And deference "is likewise unwarranted when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Id.*

This Court has also limited *Auer* deference. "[W]e defer to the agency's interpretation of its ambiguous regulation unless an alternative reading is *compelled* by the regulation's plain language or by other indications of the agency's intent at the time of the regulation's promulgation." *Marsh v. J. Alexander's LLC*, 905 F.3d 610, 623 (9th Cir. 2018) (en banc) (emphasis in original). EPA's novel re-interpretation of a long-standing regulation is only entitled to the "measure of deference proportional to the 'thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.'" *Voss v. Comm. of Internal Revenue*, 796 F.3d 1051, 1066 (9th Cir. 2015) (quoting

[2] The breadth of *Auer* deference is currently before the U.S. Supreme Court in *Kisor v. Wilkie*, Case No. 16-1929, Docket No. 18-15.

Christopher, 132 S.Ct. at 2168–69). *See also Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) ("Interpretations such as those . . . in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference.")

EPA is not entitled to deference in this case because the plain language of 40 C.F.R. § 123.27(b)(2) contradicts its novel reinterpretation of that regulation. The current version of 40 C.F.R. § 123.27 has been in effect since 1989, and there is no record of EPA's new re-interpretation ever having been used before. Deference is also unwarranted here because EPA did not create a record explaining the reversal of its long-held legal interpretation of 40 C.F.R. § 123.27. Other than the post-hoc explanation in the RTC, there is no rational basis in the record to support EPA's reversal. *See Tablada*, 533 F.3d at 805.

Finally, as noted in more detail below, EPA's new read of 40 C.F.R. § 123.27(a)(3) is at odds with the current version of 33 U.S.C. § 1319(c). Any ambiguity in 40 C.F.R. §§ 123.27(a)(3) and (b)(2) of which EPA now complains arises only because EPA's regulations are outdated and do not comply with the CWA, as explained below.

B. EPA Relied on Outdated Regulations that Were Superseded by the 1987 Amendments to the CWA.

EPA relied heavily on 40 C.F.R. § 123.27(a)(3)(ii) and the note following that section to approve the Idaho criminal standards portion of the IPDES program.

This provision of EPA's CWA regulations states in relevant part: "Criminal fines shall be recoverable against any person who willfully or negligently violates any applicable standards or limitations; any NPDES permit condition; or any NPDES filing requirement." 40 C.F.R. § 123.27(a)(3)(ii). The note following that sections states: "States 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." *Id.* Relying on this note, EPA approved Idaho's simple negligence standard. EPA erred in relying on 40 C.F.R. § 123.27(a)(3)(ii) and the note because this outdated regulation was never amended to comply with the 1987 Amendments to the CWA.

1. Congress Amended Section 309(c) in 1987.

In 1987, Congress amended the CWA to, among other things, change the *mens rea* standards for criminal violations under CWA Section 309(c), 33 U.S.C. § 1319(c). *See* P.L. 100-4 (1987). Prior to 1987, section 309(c)(1) provided criminal penalties for those who "willfully or negligently" violated enumerated sections of the CWA.[3] The phrase "willfully or negligently" is the key term used

[3] *See* 33 U.S.C. § 1319(c)(1) (1982) ("Any person who *willfully or negligently* violates section 1311, 1312, 1316, 1317 or 1318 of this title, or any permit condition or limitation implementing any of such section in a permit issued under section 1342 of this title by the Administrator or by a State or in a permit issued under section 1344 of this title by a State, shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed

by EPA in 40 C.F.R. § 123.27(a)(3)(ii) when it promulgated that regulation in 1983. *See* 48 Fed. Reg. 14,178 (Apr. 1, 1983).

The 1987 CWA Amendments introduced new *mens rea* standards and tougher penalties for criminal violations of the CWA. In 1987, Congress split criminal liability into the current subsections (1) (negligent) and (2) (knowing). *See* 33 U.S.C. § 1319(c)(1), (2). Negligent violations of the CWA are now prosecuted under Section 309(c)(1), and knowing violations are dealt with under Section 309(c)(2). This Court ruled in *Hanousek*, 176 F.3d at 1120–21, that the negligence standard in 33 U.S.C. § 1319(c)(1) is simple negligence.[4]

EPA amended portions of its 40 C.F.R. Part 123 regulations in 1989 to comport with the 1987 amendments to the CWA, but the agency did not update the criminal section of the state authorization regulations found in 40 C.F.R. § 123.27. *See* 54 Fed. Reg. 246 (Jan. 4, 1989). The preamble to the updated regulations references the changes to CWA Section 309(c), 54 Fed. Reg. at 251, but the 1989 updates made only one small change to the regulations to correct what appeared to be a typographical error, and it made no changes to address the new *mens rea*

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after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation or by imprisonment for not more than two years, or by both.") (emphasis added).

[4] Three other circuits have followed *Hanousek. See United States v. Maury*, 695 F.3d 227 (3rd Cir. 2012); *United States v. Pruett et al*, 681 F.3d. 232 (5th Cir. 2012); *United States v. Ortiz*, 427 F.3d 1278 (10th Cir. 2005).

standards in the statute. The Federal Register notice simply stated: "Section 123.27 second note, is amended by revising the reference to '(a)(3)(iii)(B)' to read '(a)(3)(ii).'" 54 Fed. Reg. at 258.

EPA had the opportunity with that rulemaking to fix the problem but failed to do so. EPA has not updated that regulation since 1989, the regulation is inconsistent with CWA, and EPA therefore cannot rely on it to approve Idaho's inadequate *mens rea* standard.

2. 40 C.F.R. 123.27(a)(3) Makes Sense Only in the Context of the Pre-1987 Amendments.

The current version of 40 C.F.R. § 123.27(a)(3)(ii) does not track the changes Congress made to the CWA in 1987. It states in relevant part: "Criminal fines shall be recoverable against any person who willfully or negligently violates any applicable standards or limitations; any NPDES permit conditions; or any NPDES filing requirement . . ." 40 C.F.R. § 123.27(a)(3)(ii). This tracks the language of the pre-1987 section 309(c)(1) of the CWA. It fits as an interpretation of the pre-1987 Act but makes no sense under the current statutory structure.

EPA states in its RTC that its regulation is "ambiguous." ER 266. It is not ambiguous; it is wrong. The current version of the CWA sets out separate *mens rea* standards for "any person who negligently violates . . .," and one who "knowingly violates . . . ." 33 U.S.C. § 1319(c)(1) and (2). Unlike the pre-1987 version, the current Section 309(c) has two separate penalty schemes for the two different

levels of *mens rea*. *Id.* With the 1987 amendments, Congress abandoned the old "willfully or negligently" language, but EPA failed to update its regulations to reflect that change in the CWA.

The explanatory note following 40 C.F.R. § 123.27(a)(3)(ii) further complicates the problem. The note reads: "States 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." 40 C.F.R. § 123.27(a)(3)(ii). The note, like the regulation, is also inconsistent with Section 309(c) of the CWA. The pre-1987 version of Section 309(c)(1) used the now antiquated term "willfully or negligently"; whereas the current Section 309(c)(1) uses the term "negligent," leaving "knowing violations" to a separate statutory treatment.

By EPA's current reading of the note, a state in the Ninth Circuit with a criminal negligence or gross negligence standard for criminal violations would not run afoul of the requirements of 40 C.F.R. § 123.27(b)(2). The note does not obviate the need to comply with the minimum federal requirements of 40 C.F.R. § 123.27(b)(2). And that was EPA's consistent interpretation of the regulation until EPA issued the RTC in 2018.

The EPA regulations at issue in this case have been out of sync with the statutory requirements of the CWA for 32 years, and EPA has never attempted to

fix the problem. EPA was therefore arbitrary and capricious and violated the APA, 5 U.S.C. § 706(2)(A), in relying on outdated regulations to review and approve the Idaho state program.

II. THE TWO-YEAR STATUTE OF LIMITATION FOR IPDES ENFORCEMENT ACTIONS IS TOO SHORT TO SATISFY CWA REQUIREMENTS.

EPA's approval of the IPDES program was also arbitrary and capricious or otherwise contrary to law because the two-year statute of limitations for IPDES enforcement actions is too short for the program to meet the CWA's enforcement requirements.

A. The CWA Requires State NPDES Programs to Have Adequate Enforcement Authority to Abate NPDES Violations, and to Assess Penalties for Each Instance or Day of Violation.

As a prerequisite to EPA approval of a state NPDES program, the CWA requires that the state program meet each of the nine criteria set out in CWA Section 402(b), one of which is that a state program must have "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). *See also Akiak Native Comm.*, 625 F.3d at 1166. This requirement deals not with discretionary policy questions of what IDEQ must *do* in implementing the NPDES program in Idaho, but rather the objective question of

the minimum legal *authority* IDEQ must have in order for EPA to approve the state program.

In addition, EPA regulations require that a state program have the authority to recover specified minimum monetary penalties for various categories of violations, and that those penalties "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." 40 C.F.R. § 123.27(b)(1) (emphases added).

B. Idaho's Two-Year Statute Deprives IDEQ of Adequate Authority to Abate NPDES Violations or to Assess Penalties for Each Instance or Day of Violation.

Idaho's statute of limitations governing IDEQ's enforcement authority makes it impossible to obtain penalties for each instance or each day of IPDES violations, as required by 40 C.F.R. § 123.27(b)(1). The statute of limitations for IPDES enforcement actions is set out in Idaho Code Ann. § 39-108(4), which provides:

> No civil or administrative proceeding may be brought to recover for a violation of any provision of this chapter or a violation of any rule, permit or order issued or promulgated pursuant to this chapter more than two (2) years after the director had knowledge or ought reasonably to have had knowledge of the violation.

IDEQ can discover violations either through self-reporting (discharge monitoring reports) or through inspection, each of which is a critical component of the enforcement program. *See* ER 234; ER 105-111; 33 U.S.C. § 1342(b)(2)(B); 40

C.F.R. § 123.26(b), (e)(5). IDEQ describes its inspection program in Appendix G of its Program Description, setting out inspection frequencies for various categories of facilities in Table 1. ER 147. Inspection frequencies range from a maximum of one inspection every two years (for 37 "major" facilities), to once every five years (for 102 "nonmajor" facilities), with even lower frequencies for specific discharger categories.[5] *Id.* Based on these inspection frequencies, if IDEQ discovers an NPDES violation during one of these inspections, the violation may already be as much as two years old for major facilities and five years old for minor facilities. Thus, for nonmajor facilities, Idaho's statute of limitation already would have run for any violations occurring in the first three of the five preceding years, leaving IDEQ without authority to penalize the discharger for instances or days of violation during 60% of the time elapsed since the prior inspection.

But this understates the problem because IDEQ could not bring an enforcement action on the day of the inspection; it takes time to initiate an enforcement action. Appendix H of the IPDES Program Description spells out the various steps that IDEQ will take from inspection to initiation of a penalty action—

[5] For example, for more than 1,000 storm water facilities, the frequency is given as "10% per year" which translates to an average of one inspection in ten years for each facility, and for 162 "small suction dredge" facilities the inspection frequency is given as "5% of permittees" or once every 20 years. *Id.* For simplicity this discussion will focus on "major" and "nonmajor" facilities, though the same arguments would be even more extreme for facilities with even less frequent inspection schedules.

including preparation of an inspection report, a series of informal and formal letters and notices to the discharger, and opportunities or the discharger to respond and to negotiate with IDEQ—and specifies a timeline of 730 days (two years) for the entire process. ER 222. To be sure, IDEQ provides in a footnote to the Table that timelines may be shorter, and generally recognizes the two-year time limit and emphasizes the importance of meeting it. *Id. See also* ER 116–117. But despite these bare assurances, the fact remains that it takes *some* significant amount of time to proceed from inspection to enforcement. If it takes that entire 730-day timeline, then the statute of limitations will have run on *all* of the violations discovered via inspection (or, for that matter, for any violations no matter how IDEQ discovers them). If it takes half of that time (one year), then the statute of limitations would have run on any violations occurring during *half* of the two-year period since the prior inspection for major facilities (the first of the two prior years), and *80%* of the five-year period for nonmajor facilities (the first four years of the prior five).

This was not a problem for EPA when it ran Idaho's NPDES program and is not a problem for many other states because they have longer limitation periods that allow enough time to perform inspections and prepare enforcement actions. EPA's statute of limitations for NPDES enforcement actions is five years. 28 U.S.C. § 2462. The most recent state before Idaho to obtain NPDES program

approval from EPA, Alaska, allows six years for such actions. Alaska Stat. § 9.10.120. The prior state to obtain EPA approval was Arizona, with no limitation period. Ariz. Rev. Stat. § 12-510. The one before that, Maine, provides a six-year limitation period. Me. Rev. Stat. tit. 14 § 752. Two other states in EPA Region 10 with Idaho, Washington and Oregon, have no limitation period. Wash. Rev. Code § 4.16.160, Or. Rev. Stat. § 12.250. Idaho's drastically shorter two-year limitation period does not allow enough time to perform inspections and initiate enforcement actions, as demonstrated by the inspection timelines and enforcement procedures that Idaho itself laid out in EPA's record for this decision.

For these reasons, IDEQ does not have adequate authority to abate violations of the IDPES program, rendering EPA's approval of IPDES arbitrary and capricious and not in accordance with the CWA and its regulations. *See* 33 U.S.C. § 1342(b)(7). *See also* 40 C.F.R. § 123.27(b)(1).

C. Idaho's Two-Year Limitation Period Runs from the Time IDEQ Could Have Discovered a Violation.

Idaho's statute of limitation runs not from the date of violation, but from the date that Idaho "had knowledge or ought reasonably to have had knowledge of the violation." Idaho Code Ann. § 39-108(4). This language explicitly starts the limitation period running not upon *actual* IDEQ discovery of a violation, but rather when IDEQ "ought reasonably to have had knowledge" of it. This language further

underscores that Idaho's two-year statute of limitations is unreasonably short in violation of CWA minimum requirements for a state NPDES program.

While no Idaho judicial decisions interpret this provision, there are opinions interpreting similar state law standards. Idaho's statute of limitations for an action in fraud begins at the time of discovery of the fraud by the aggrieved party. Idaho Code Ann. § 5-218(4). Under Idaho case law, "actual knowledge of the fraud will be inferred if the allegedly aggrieved party could have discovered it by the exercise of due diligence." *Nancy Lee Mines v. Harrison*, 95 Idaho 546, 547, P.2d 828, 829 (Idaho 1973); *Gerlach v. Schultz,* 72 Idaho 507, 514, 244 P.2d 1095, 1099 (Idaho 1952); *Mason v. Tucker and Assoc.*, 125 Idaho 429, 435, 871 P.2d 846, 852 (Id. App. 1994). This standard for constructive knowledge is comparable to the statutory standard for commencing the limitation period for IPDES enforcement actions, which starts when IDEQ has actual knowledge "or ought reasonably to have had knowledge." Idaho Code Ann. § 39-108(4).

In fact, Idaho courts use nearly that precise formulation in other cases addressing the statute of limitations for fraud claims.[6] *See McCorkle v. Northwestern Mut. Life Ins.*, 141 Idaho 550, 554, 112 P.3d 838, 842 (Id. App.

[6] In any case, the limitation period for IPDES violations explicitly begins at latest when IDEQ has actual knowledge, and this line of Idaho cases establishes that constructive knowledge will suffice even without the "ought reasonably to have had knowledge" prong.

2005) ("The statute does not begin to run until the plaintiff knew or reasonably should have known of the facts constituting the fraud."). In interpreting this standard, the Idaho Supreme Court endorsed the reasoning of the Washington Supreme Court, quoting it as follows:

> We hold that this action was barred by the three year statute of limitations, whether appellants had actual knowledge of the various transactions or not, for the reason that the facts were open and appeared upon the records of the corporation, subject to inspection by stockholders. If the stockholders failed to examine the corporate records, they must have been negligent and careless of their own interests. *The means of knowledge were open to them, and means of knowledge are equivalent to actual knowledge.*

Nancy Lee Mines, 511 P.2d at 829 (emphasis added), *citing Davis v. Harrison,* 25 Wash.2d 1, 167 P.2d 1015, 1024 (1946).

An IPDES violator defending an IPDES enforcement action could credibly argue that, under Idaho law, the two-year limitation period begins to run once a violation has occurred and knowledge of it would have been available to IDEQ if only it chose to look. IDEQ could not unilaterally extend the statutory limitation period simply by its choice not to inspect facilities for two to five years or longer, and there is no rational basis in the record for EPA to have concluded otherwise.

D. EPA Recognized this Problem and Notified IDEQ of It, Yet Approved the Program With No Rational Basis to Overlook it.

Idaho's two-year statute of limitations was among the initial concerns that EPA identified with Idaho's application. EPA pointed out Idaho's statute of

limitations contrasted with the federal five-year period. ER 073. EPA later detailed its concerns to IDEQ with numerous questions. ER 095–096. There is no detailed response by IDEQ in the record, other than bare assertions that IDEQ developed its enforcement process "to ensure the statute of limitations . . . is met," and the State's "streamlined process allows DEQ to operate successfully within the statute of limitations." ER 116–17.

Also absent from the record is any EPA re-evaluation of the issue in view of IDEQ responses or other information, or any rationale for approving the program despite the short limitation period. ICL commented during the public comment period that EPA "is 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." ER 260. In response, EPA merely pointed out that the CWA "does not require States to have the same statute of limitations as the federal standard." ER 269. But neither there nor elsewhere in the record does EPA provide any explanation or justification for withdrawing its stated concerns about the short statute of limitations, or for affirmatively concluding that the IPDES enforcement authority meets the CWA requirements regardless of it.

Based on the record before EPA and its decision documents, Idaho's two-year statute of limitations is too short to satisfy the requirements for approval of

the IPDES program. As explained above, the short statute of limitation will rule out enforcement of many violations discovered during inspections, and thus runs counter to the CWA statutory requirement that a state agency have "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).

And it will make it impossible for IDEQ to assess "the maximum civil penalty or criminal fine . . . for each instance of violation and, if the violation is continuous, . . . up to the maximum amount for each day of violation," as required by 40 C.F.R. § 123.27(b)(1), because the bulk of the instances or days of violations discovered during inspections will fall outside of the statute of limitations, given the structure of the IPDES program as described in the record.

While *how* the state chooses to exercise enforcement authority under an NPDES is not subject to EPA review, the CWA prohibits EPA from approving an NPDES program where the state lacks adequate enforcement authority altogether. With a two-year statute of limitation, the IPDES program impermissibly limits IDEQ's enforcement authority to an extent prohibited by the CWA. For these reasons, EPA's approval of the IPDES program has no rational basis in the record and thus is arbitrary and capricious, and is contrary to the CWA and its regulations, and should be remanded by this Court.

III. EPA IMPROPERLY AUTHORIZED IDEQ TO REGULATE CAFOs UNDER THE CWA, KNOWING THAT ISDA WOULD BE IN CHARGE.

EPA does not authorize a state as a whole to run its own NPDES program; it authorizes an agency within the state. *See* 40 C.F.R. § 123.22(b). Here, EPA authorized IDEQ to run the IPDES program. 83 Fed. Reg. 27,769, 27,770 (Jun. 14, 2018); ER 269 ("The Idaho program application provides that IDEQ will be the approved agency for the entire IPDES program.").

But the record is clear that ISDA—not IDEQ—will regulate CAFOs in Idaho and that EPA knew this when it approved the IPDES program. The CWA allows states to apply for and EPA to approve other agencies within a state to run discrete parts of an NPDES program. 33 U.S.C. § 1342(n)(3). But ISDA never applied to run the CAFO program, and EPA never authorized ISDA to do so. EPA's approval of IPDES, thus, allows ISDA to evade the EPA-approval process, which is required by the CWA and is necessary to ensure ISDA's program is adequate. The Court should, therefore, remand EPA's approval of IPDES.

A. The Record Shows that EPA was Aware that ISDA Would Run the CAFO Program.

The record shows that EPA was aware that ISDA would be undertaking the bulk of the work of regulating surface water discharges from CAFOs, even though ISDA never applied for authorization to run that program. *See*, *e.g.*, ER 7–11 (May

29, 2014 email from IDEQ to EPA), ER 40–43 (Feb. 5, 2015 letter from EPA to IDEQ).

As explained above, both the Idaho "Beef Cattle Environmental Control Act," Idaho Code Ann. §§ 22-4901 *et seq*., and the Idaho "Dairy Environmental Control Act," Idaho Code Ann. §§ 37-601 *et seq.*, expressly vest authority in ISDA—not IDEQ—to conduct all aspects of permitting and enforcement over Idaho CAFOs. This includes directing IDEQ to enter into an agreement with ISDA for CWA permitting and enforcement of CAFOs. Idaho Code Ann. § 22-4903(3); Idaho Code Ann. § 37-603(4).

The CWA regulations require the state to provide EPA a "description of the State agency staff who will carry out the State program." 40 C.F.R. § 123.22(b)(1). But no IDEQ staff are assigned to CAFO regulation in Idaho, according to the record. For example, in Table 9 of the 2015 Program Description, IDEQ reported *zero* full-time equivalent employees (FTEs) devoted to CAFO inspections, complaint investigation, and administrative orders. ER 28–30. Similarly, in Appendix G to the 2017 Revised Program Description, at Table 1, IDEQ reports zero permitted CAFOs in Idaho and shows a dash for the "Total Facilities to be Inspected in a Given Year." *See* ER 147. In IDEQ's July 2016 "[IPDES] Compliance Monitoring Strategy," the agency writes:

> ISDA routinely conducts inspections every year of all CAFOS to ensure compliance with state law. DEQ will use ISDA's

> experience and history of with the agriculture industry when evaluating the potential for a CAFO to discharge to waters of the United States. *Data gathered from IPDES inspections performed by ISDA* . . . will be transferred to DEQ . . .

ER 143 (emphasis added).

In other words, ISDA will perform IPDES inspections of feedlots and dairies in Idaho, and IDEQ has no plans to staff or run the CAFO program other than to "coordinate" with ISDA. The record, thus, shows ISDA is regulating CAFOs in Idaho, not IDEQ, and EPA knew this when it approved the IPDES program.

B. Even Though IDEQ May Have Authority Over CAFOs, EPA Was Still Wrong to Approve IPDES.

In order for a state to be authorized to run a CWA program, it must show that it has the authority and the resources to run that program. *See* 40 C.F.R. §§ 123.21, 123.22, 123.23. Here, IDEQ nominally has the authority, but not the resources. In its RTC, EPA states "the EPA concludes that IDEQ has the adequate authority to issue permits for CAFO-related discharges as required by the CWA." ER 269. Whatever authority IDEQ may have, EPA authorized the IPDES program knowing that IDEQ devoted no resources to critical functions for CAFOs and that ISDA will, in fact, run most of the program. ISDA will not issue NPDES permits, but it will conduct routine inspections, manage nutrient management plans, initiate enforcement actions, and interface with the regulated entities.

In the course of seeking authorization, the Idaho legislature passed bills clarifying that the state-law authorities granted to ISDA would not limit IDEQ's authority to enforce the CWA. *See* ER 270. But saying that IDEQ is not blocked from enforcing is not the same as saying it will run the program, and the record shows that IDEQ will have little to no involvement in the CAFO program. *See*, *e.g.*, ER 147; ER 28–31.

In the end, EPA apparently set aside its concerns, and approved the IPDES program, understanding that ISDA would be doing the day-to-day work of regulating CAFOs. In the RTC, EPA never addressed the question of whether IDEQ has staff and funds to administer the CAFO program in Idaho. EPA described ISDA as playing a "supporting role," ER 270, when that is false and misleading—ISDA's role in CAFO management is not "supporting," it is the leading role. In approving IDEQ to run a program that is actually handled by ISDA, with IDEQ having no staff or resources to regulate and enforce the IPDES program regarding CAFO discharges, EPA again acted arbitrarily and capriciously and in violation of the CWA, requiring reversal.

C. IDEQ's Ability to Enforce Against CAFOs in Idaho Does Not Obviate the Need to Authorize ISDA under Section 402(n)(3).

If a state wishes to have a part of the NPDES program assigned to another agency within the state, it must seek authorization under CWA section 402(n)(3),

33 U.S.C. § 1342(n)(3).[7] But Idaho and EPA did not comply with that process here with respect to ISDA's administration of CAFO discharges. EPA acknowledges in its RTC that the ISDA and IDEQ authorities are "overlapping," ER 270, and argues that because IDEQ will remain in the lead, the Idaho CAFO program is properly authorized. This argument effectively writes Section 402(n)(3) out of the CWA.

EPA relied on ISDA's involvement in the CAFO regulation to approve IDEQ's application for the IPDES program, but EPA did not comply with its regulations in the process. EPA's regulations require states seeking authorization to describe "the organization and structure of the State agency *or agencies* which will have responsibility for administering the program." 40 C.F.R. § 123.22(b) (emphasis added). And the regulations require each agency, if more than one, to have "statewide jurisdiction over the class of activities." *Id.*, 40 C.F.R. § 123.21(g)(1).

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[7] 33 U.S.C. § 1342(n)(3) provides:

> The Administrator may approve a partial permit program covering administration of a major category of discharges under this subsection if - (A) such program represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the State; and (B) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b) of this section.

Nothing in the record shows that Idaho described ISDA as running any part of the IPDES program, nor did Idaho provide that ISDA has CWA jurisdiction over the CAFOs it will be inspecting. The record makes clear that ISDA is running most of the CAFO program in Idaho, but it never applied for such authority under section 402(n)(3). EPA acted without authority in authorizing IDEQ to run a program that the record describes as being run by another unauthorized state agency.

IV. REMAND WITHOUT VACATUR IS THE APPROPRIATE REMEDY.

While the Court should rule in favor of ICL and hold that EPA violated the CWA and the APA in approving the IPDES program, it need not reverse and set aside the entire IDPES program approval. Instead, the Court should remand without vacatur because it will allow Idaho time to make the legislative fixes that will be required to comply with the CWA and to seek approval by EPA. The *mens rea* standard found at Idaho Code Ann. § 39-117, and the statute of limitations found at Idaho Code Ann. § 39-108(4), will both require legislative amendments to come into compliance with minimum federal standards under the CWA. The State will also require time to formally apply to EPA for authorization of ISDA to regulate CAFOs under the CWA, or to transfer that responsibility to IDEQ.

The three components of the IDPES program that ICL challenges here are important parts of the larger IPDES program, most of which ICL does not object

to. While EPA was wrong to approve the IPDES program with these noted defects, vacatur of the entire IPDES program would not serve the interests of the people of Idaho, ICL, its members or the environment. Remand without vacatur and a two-year time frame to fix the errors would allow the State to retain control of CWA permitting and enforcement in Idaho and still have a reasonable time frame in which to correct program's shortcomings.

This Court has held that, "[o]rdinarily, when a regulation is not promulgated in compliance with the APA, the regulation is invalid. However, when equity demands, the regulation can be left in place while the agency follows the necessary procedures." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (citations omitted). A court can remand without vacatur where "'there is at least a serious possibility that the [agency] will be able to substantiate its decision' given an opportunity to do so, and when vacating would be 'disruptive.'" *Hawaii Longline Ass'n v. Nat'l Marine Fisheries Serv.*, 288 F. Supp. 2d 7, 12 (D.D.C. 2003) (citing *Radio-Television News Directors Ass'n v. FCC*, 184 F.3d 972, 888 (D.C. Cir. 1999)) (alteration in original).

Here, remand with a two-year window in which to seek two focused state legislative changes to the *mens rea* and statute of limitations requirements for IPDES violations would be reasonable. Also, if the State wishes for ISDA to take over regulation of CAFOs in Idaho under the CWA, two years should afford

enough time to prepare and submit a CWA section 402(n)(3) application to EPA, and to make whatever structural and regulatory changes would be needed to comply with the terms of the EPA authorization.

CONCLUSION

For the foregoing reasons, the Court should rule that EPA violated the CWA and APA in the three ways identified above when it approved the IPDES program, and remand without vacatur for EPA to remedy those errors within two years.

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Respectfully submitted,

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STATEMENT OF RELATED CASES

Petitioner is not aware of any related cases within the meaning of Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

9th Cir. Case Number: 18-72684

Pursuant to Red. R. App. P. 32(a)(7)(C), I certify that:

This brief contains 9,342 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief complies with the word limit of Cir. R. 32-1(a).

Signature s/ Mark A. Ryan

Date June 26, 2019

CERTIFICATE OF SERVICE

I hereby certify that the foregoing PETITIONER'S OPENING BRIEF was filed with the Clerk this 26th day of June 2019, via ECF.

/s/ Mark A. Ryan
Mark A. Ryan

ADDENDUM

33 U.S.C. § 1319

***

(c) Criminal penalties

(1) Negligent violations

Any person who--

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1322(p), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations

Any person who--

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1322(p), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the

Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(3) Knowing endangerment

(A) General rule

Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1321(b)(3), 1322(p), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than $1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

(B) Additional provisions

For the purpose of subparagraph (A) of this paragraph--

(i) in determining whether a defendant who is an individual knew that his conduct placed another person in imminent danger of death or serious bodily injury--

(I) the person is responsible only for actual awareness or actual belief that he possessed; and

(II) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

except that in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information;

(ii) it is an affirmative defense to prosecution that the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of--

(I) an occupation, a business, or a profession; or

(II) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent;

and such defense may be established under this subparagraph by a preponderance of the evidence;

(iii) the term “organization” means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons; and

(iv) the term “serious bodily injury” means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(4) False statements

Any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than 2 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $20,000 per day of violation, or by imprisonment of not more than 4 years, or by both.

(5) Treatment of single operational upset

For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(6) Responsible corporate officer as "person"

For the purpose of this subsection, the term "person" means, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

(7) Hazardous substance defined

For the purpose of this subsection, the term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of this title, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of Title 42, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of this title, and (E) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15.

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33 U.S.C. § 1342

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after

the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs
At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which--
(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;
(B) are for fixed terms not exceeding five years; and
(C) can be terminated or modified for cause including, but not limited to, the following:
(i) violation of any condition of the permit;
(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;
(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;
(D) control the disposal of pollutants into wells;

(2)
(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or
(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.
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(n) Partial permit program

(1) State submission
The Governor of a State may submit under subsection (b) of this section a permit program for a portion of the discharges into the navigable waters in such State.

(2) Minimum coverage
A partial permit program under this subsection shall cover, at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program required by subsection (b).

(3) Approval of major category partial permit programs
The Administrator may approve a partial permit program covering administration of a major category of discharges under this subsection if--

(A) such program represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the State; and

(B) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b).

(4) Approval of major component partial permit programs
The Administrator may approve under this subsection a partial and phased permit program covering administration of a major component (including discharge categories) of a State permit program required by subsection (b) if--

(A) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b); and

(B) the State submits, and the Administrator approves, a plan for the State to assume administration by phases of the remainder of the State program required by subsection (b) by a specified date not more than 5 years after submission of the partial program under this subsection and agrees to make all reasonable efforts to assume such administration by such date.

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33 U.S.C. § 1369

§ 1369. Administrative procedure and judicial review

(a) Subpenas

(1) For purposes of obtaining information under section 1315 of this title, or carrying out section 1367(e) of this title, the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for effluent data, upon a showing satisfactory to the Administrator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of Title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subsection, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator, to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(2) The district courts of the United States are authorized, upon application by the Administrator, to issue subpenas for attendance and testimony of witnesses and the production of relevant papers, books, and documents, for purposes of obtaining information under sections 1314(b) and (c) of this title. Any papers, books, documents, or other information or part thereof, obtained by reason of such a subpena shall be subject to the same requirements as are provided in paragraph (1) of this subsection.

(b) Review of Administrator's actions; selection of court; fees

(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section

1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(l) of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.
(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.
(3) Award of fees
In any judicial proceeding under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party whenever it determines that such award is appropriate.
(4) Discharges incidental to normal operation of vessels
(A) In general
Except as provided in subparagraph (B), any interested person may file a petition for review of a final agency action under section 1322(p) of this title of the Administrator or the Secretary of the department in which the Coast Guard is operating in accordance with the requirements of this subsection.
(B) Venue exception
Subject to section 1322(p)(7)(C)(v) of this title, a petition for review of a final agency action under section 1322(p) of this title of the Administrator or the Secretary of the department in which the Coast Guard is operating may be filed only in the United States Court of Appeals for the District of Columbia Circuit.

(c) Additional evidence
In any judicial proceeding brought under subsection (b) of this section in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and

conditions as the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

40 C.F.R. §§ 123.27

(a) **Any State agency administering a program shall have available the following remedies for violations of State program requirements:**
(1) To restrain immediately and effectively any person by order or by suit in State court from engaging in any unauthorized activity which is endangering or causing damage to public health or the environment;
Note: This paragraph (a)(1) requires that States have a mechanism (e.g., an administrative cease and desist order or the ability to seek a temporary restraining order) to stop any unauthorized activity endangering public health or the environment.
(2) To sue in courts of competent jurisdiction to enjoin any threatened or continuing violation of any program requirement, including permit conditions, without the necessity of a prior revocation of the permit;
(3) To assess or sue to recover in court civil penalties and to seek criminal remedies, including fines, as follows:

(i) Civil penalties shall be recoverable for the violation of any NPDES permit condition; any NPDES filing requirement; any duty to allow or carry out inspection, entry or monitoring activities; or, any regulation or orders issued by the State Director. These penalties shall be assessable in at least the amount of $5,000 a day for each violation.

(ii) Criminal fines shall be recoverable against any person who willfully or negligently violates any applicable standards or limitations; any NPDES permit condition; or any NPDES filing requirement. These fines shall be assessable in at least the amount of $10,000 a day for each violation.
Note: States 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.

(iii) Criminal fines shall be recoverable against any person who knowingly makes any false statement, representation or certification in any NPDES form, in any notice or report required by an NPDES permit, or who knowingly renders inaccurate any monitoring device or method required to be maintained by the Director. These fines shall be recoverable in at least the amount of $5,000 for each instance of violation.

Note: In many States the State Director will be represented in State courts by the State Attorney General or other appropriate legal officer. Although the State Director need not appear in court actions he or she should have power to request that any of the above actions be brought.

(b)(1) The maximum civil penalty or criminal fine (as provided in paragraph (a)(3) of this section) 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.
(2) The burden of proof and 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 burden of proof or degree of knowledge or intent EPA must provide when it brings an action under the appropriate Act;
Note: For example, this requirement is not met if State law includes mental state as an element of proof for civil violations.

(c) **A civil penalty assessed, sought, or agreed upon by the State Director under paragraph (a)(3) of this section shall be appropriate to the violation.**
Note: To the extent that State judgments or settlements provide penalties in amounts which EPA believes to be substantially inadequate in comparison to the amounts which EPA would require under similar facts, EPA, when authorized by the applicable statute, may commence separate actions for penalties.
Procedures for assessment by the State of the cost of investigations, inspections, or monitoring surveys which lead to the establishment of violations;
In addition to the requirements of this paragraph, the State may have other enforcement remedies. The following enforcement options, while not mandatory, are highly recommended:
Procedures which enable the State to assess or to sue any persons responsible for unauthorized activities for any expenses incurred by the State in removing, correcting, or terminating any adverse effects upon human health and the environment resulting from the unauthorized activity, whether or not accidental;
Procedures which enable the State to sue for compensation for any loss or destruction of wildlife, fish or aquatic life, or their habitat, and for any other damages caused by unauthorized activity, either to the State or to any residents of the State who are directly aggrieved by the unauthorized activity, or both; and
Procedures for the administrative assessment of penalties by the Director.

(d) **Any State administering a program shall provide for public participation in the State enforcement process by providing either:**
(1) Authority which allows intervention as of right in any civil or administrative action to obtain remedies specified in paragraphs (a)(1), (2) or (3) of this section by any citizen having an interest which is or may be adversely affected; or
(2) Assurance that the State agency or enforcement authority will:
(i) Investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in § 123.26(b)(4);

(ii) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and

(iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.

(e) Indian Tribes that cannot satisfy the criminal enforcement authority requirements of this section may still receive program approval if they meet the requirement for enforcement authority established under § 123.34.