

**EPA WITHDRAWING FROM IDAHO FEEDLOT
COOPERATIVE AGREEMENTS**

EPA officials have informed the State of Idaho, more particularly the Idaho State Department of Agriculture (ISDA) and the Idaho Department of Environmental Quality (IDEQ), that it will not renew two memorandum agreements which governed how the two agencies jointly regulated confined animal feeding operations (CAFOs). EPA is ending the formal relationship in large part because it felt that the memorandum agreements were too restrictive of EPA powers and abilities to prosecute enforcement actions.

The joint agreements focused upon the regulation of Idaho's dairy and beef cattle industries. The agreements coordinated agency efforts (both state and federal) concerning the regulation of the discharge of animal wastes into state water bodies. Under the agreements, the ISDA served as the lead inspection and enforcement agency, while EPA and IDEQ served in an enforcement support capacity through technical analysis and administrative support. The dairy agreement was first signed in 1995, and was renewed in 2001. The beef cattle agreement was first approved in 2001.

According to EPA, its decision not to renew the expiring agreements is not the result of anything that either the ISDA or IDEQ have or have not done. Instead, EPA is targeting CAFOs as a national priority, and it felt that it could no longer abide by cooperative agreements which limit its regulatory powers. Both agreements will expire nearly in tandem at the end of April/early May of this year.

With respect to Idaho operations, the EPA is currently drafting a CAFOs General Permit. Despite these changes, however, EPA says that it still intends to continue to work closely with the ISDA for CAFOs regulation and enforcement. Some have raised concerns over duplicative efforts, doubling of fees, and the potential of dual enforcement leading to dual fines at both the federal and state levels. EPA does not deny these possibilities, but did state that dual punishment has always been an option under the agreements, and that the option is only pursued in appropriate circumstances.

During this legislative session, the Idaho Cattle Association introduced S.B. 1070 which would add a new section (22-4909A) to Idaho Code which would preclude or preempt any state-based enforcement action in those instances where EPA initiates an enforcement action of its own with respect to beef cattle feeding operations. The bill cleared the legislature and was sent to the Governor's Office for review on March 18, 2009.

**RECENT ENFORCEMENT ACTIONS PROVIDE
IMPORTANT COMPLIANCE REMINDERS**

March and April provided a lot of news about a wide variety of environmental enforcement actions in Idaho. Of particular interest for Idaho agricultural operations was an approximately \$6,000 fine assessed by EPA against a Jerome-area dairy for discharges of animal waste into a canal. This is a good reminder that under the federal Clean Water Act and the *Talent v. Headwaters Irrigation District* case, discharges of any waste materials into manmade water conveyances, such as canals, ditches, and drains, are prohibited unless permit coverage has been obtained. This has been the subject of much judicial and administrative activity recently, and agricultural operators in Idaho should be sure to either avoid discharges into these types of facilities altogether, or to obtain permit coverage for such discharges.

Other recent enforcement actions by EPA in Idaho include: (1) a \$64,000 fine assessed against an Idaho developer for failure to comply with federal storm water permitting requirements at construction sites; (2) a \$33,000 fine against a bulk storage facility for failure to comply with federal oil storage and spill prevention requirements; and (3) an order requiring a construction company to restore damaged wetlands and stream areas that had been filled and channelized without a permit. These enforcement actions provide an important reminder that environmental regulations apply to a wide variety of activities and facilities, and that Idahoans should carefully and continually assess whether their activities implicate environmental regulations and permitting requirements.

UPDATE REGARDING PESTICIDE APPLICATION PERMITTING

In our February 2009 issue, we reported on a recent court ruling that will likely require agricultural facilities and public health officials to obtain Clean Water Act (CWA) permit coverage before applying pesticides in or near bodies of water, including manmade water conveyances facilities such as canals, ditches, and drains. In summary, in 2006, EPA issued a rule that would have exempted those activities from CWA permitting requirements, as long as the applicator had complied with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). As we reported, a federal court recently struck down that rule and the exemption that it provided, potentially requiring permit coverage to apply pesticides on or near bodies of water, even if the applicator has complied with FIFRA.

While it does not appear that EPA will challenge that court decision, agricultural, forest, and industry groups have filed motions seeking a rehearing of the court's decision. In addition, EPA and a coalition of states are seeking a two-year stay of the decision in order to allow them to implement a permitting program in accordance with the court's decision. If granted, this would essentially alleviate the need to obtain a permit for pesticide application during the pendency of the stay. EPA has also indicated that it is likely to address the court's decision by implementing a general permit program, potentially alleviating the time and expenses involved in obtaining permit coverage.

PROPOSED BILL WILL ASSESS THE EFFECTS OF ENERGY DEVELOPMENT ON WATER RESOURCES

A bipartisan bill has recently been introduced in the United States Senate that would require a number of studies regarding how energy development and production impacts water resources. Section 2 of the Energy and Water Integration Act of 2009 would require the Secretary of Energy to work with the National Academy of Sciences on an assessment of water consumption in the production of transportation fuels and electricity. Section 3 of the Act would require the Department of Energy to work with the Department of the Interior and the EPA to evaluate the best available power plant technologies for water conservation and energy efficiency. Section 4 of the Act would require an evaluation of federal water storage and delivery operations run by

the Bureau of Reclamation in order to identify opportunities to reduce energy consumption at Reclamation projects by the reduction of groundwater pumping, improved operations, infrastructure rehabilitation, water reuse, and the integration of renewable energy generation with existing operations. Section 5 of the Act would require increased research and development of effective brackish groundwater desalination processes in order to provide additional viable water supply. The Act would also amend the Department of Energy Organization Act to require continuing assessment of energy consumption associated with the acquisition, treatment, and delivery of water.

AGENCIES PREPARE TO STREAMLINE PERMIT PROCESS FOR ENERGY TRANSMISSION ACROSS FEDERAL LANDS

The Bureau of Land Management (BLM) and the U.S. Forest Service (USFS) recently completed another step in the process of streamlining the approval process for energy transmission facilities across federal land, by revising dozens of land management plans for federal lands in the West.

More specifically, the BLM recently amended 92 land management plans for identified federal lands in Arizona, California, Colorado, Idaho, Montana, Nevada, Oregon, Utah, Washington, and Wyoming. The USFS similarly amended 38 land management plans. These amendments adjust the width and available uses of certain identified corridors, and promote the inter-agency coordination and consistency necessary for a more streamlined, "one-stop shopping" application process.

This overall effort to streamline the approval process began with Congress's enactment of the Energy Policy Act of 2005. On November 28, 2008, the BLM, USFS, and other federal agencies issued a Programmatic Environmental Impact Statement identifying over 6,000 miles of energy corridors across federal lands that are suitable for renewable energy development, transmission lines, and oil, natural gas, and hydrogen pipelines. The recent land management plan amendments are intended to streamline the approval process for transmission facilities that would cross those identified corridors.

If you would like additional information regarding the topics covered, or if there are additional topics that you would like us to cover in upcoming newsletters, please contact Lela Wood at (208) 345-2000 or llw@moffatt.com, and she will connect you with the appropriate contact. In addition, please contact Ms. Wood if you would prefer to receive the newsletter electronically, or if you would like to be removed from our mailing list altogether.