



STATE OF IDAHO

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August 3, 1989

The Honorable Stan Hawkins
State Representative
District #33
P.O. Box 367
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The Honorable Tim Tucker
State Representative
District #1
K V Ranch
Porthill, ID 83853

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: House Bill 399

Dear Representatives Hawkins and Tucker:

In your letter of March 20, 1989, you questioned the constitutionality of the amendments to title 39, chapter 1, Idaho Code, adopted by the legislature as 89 Idaho Sess. L., ch.308, p.762, insofar as they preempt local ordinances. The purposes of these amendments as enumerated in section 1 are:

- (a) To establish a comprehensive statewide nutrient management plan.
- (b) To develop the plan on a hydrologic basin unit basis with a lake system emphasis.
- (c) To affirm primary responsibility for nutrient management to the state to assure a consistent and effective program throughout the state.

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- (d) To clearly express the legislature's intent that comprehensive basin planning is necessary to optimize management actions designed to achieve the desired water quality benefits.

The legislature delegates the authority to formulate and adopt the comprehensive plan to the director of the department of health and welfare. Idaho Code § 39-105(3)(o). This section requires state and local units of government to comply with the plan adopted by the department. The legislature established well-defined limits of the department's power. The department must develop and adopt:

a comprehensive state nutrient management plan for the surface waters of the state of Idaho in consultation with the appropriate state or federal agencies, local units of government, and with public involvement as provided for under the administrative procedure act. . . . The plan shall be developed on a hydrologic basin unit basis with a lake system emphasis. . . . Each plan shall identify nutrient sources; the dynamics of nutrient removal, use, and dispersal; and preventative or remedial actions where feasible and necessary to protect the surface waters of the state.

Id. Local government units may continue to regulate in the field, but their authority is restricted.

State and local units of government shall exercise their police powers in compliance with the comprehensive state nutrient management plan of this act. Local nutrient management programs adopted by a local unit of government prior to the completion of the state comprehensive nutrient management plan or a hydrologic basin plan shall be consistent with the criteria for inclusion in the comprehensive state nutrient management plan as enumerated in this subsection, as evidenced by findings of fact by the local units of government and confirmed by the division of environmental quality and the local health district board. The director shall recommend by March 1, 1990, to the board for adoption, rules and regulations for procedures to determine consistency. [Emphasis added.]

Idaho Code § 39-105(3)(o).

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Thus, the department must adopt a set of statewide standards for nutrient waste management and any local ordinances adopted for the same purpose must thereafter comply with the plan adopted by the department. If there is any conflict between the comprehensive state nutrient management plan adopted by the department and local ordinance, the plan prevails. State v. Barsness, 102 Idaho 210, 628 P.2d 1044, appeal dismissed, 454 U.S. 959, 102 S.Ct. 495, 70 L.Ed.2d 373 (1981); Caesar v. State, 101 Idaho 158, 610 P.2d 517 (1980); and Clyde Hess Distributing Co. v. Bonneville County, 69 Idaho 505, 210 P.2d 798 (1949). See also, Citizens for Better Government v. County of Valley, 95 Idaho 320, 508 P.2d 550 (1973). Thus, it is constitutional for the state to partially or completely preempt the field of nutrient waste management.

It is our understanding that several communities in the state have adopted ordinances regulating nutrient management practices. Further, such ordinances became effective prior to the effective date of these amendments. Until such time that the department adopts the state comprehensive nutrient management plan or a hydrologic basin plan, the local ordinances will remain in effect provided they are "consistent with" the criteria for inclusion in the comprehensive state nutrient management plan.

The criteria enumerated in Idaho Code § 39-105(3)(o), as mentioned above, are that the plan identify:

- nutrient sources
- the dynamics of nutrient removal, use and dispersal, and
- preventative or remedial actions where feasible and necessary to protect the surface waters of the state.

So long as the local ordinances are "consistent with" these criteria, they will be allowed to stand until completion of the state comprehensive nutrient management plan or a hydrologic basin plan. (The statute requires that the Panhandle hydrologic basin plan be completed no later than July 1, 1992, and that the remaining basin plans be completed no later than January 1, 1995.)

By March 1, 1990, the director must recommend to the board for adoption, rules and regulations for procedures to determine "consistency." In the meantime, local government units must rely upon generally accepted definitions of consistency. Generally, the term does not mean "exactly alike" or "the same in every detail." Roanoke Memorial Hospitals v. Kenley, 352 S.E.2d 525, 529 (Va. App. 1987). Rather, it means "in harmony with,"

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"compatible with," "holding to the same principles," or "in general agreement with."

The statute further requires that local government units make findings of fact that their local nutrient management programs are consistent with the criteria enumerated above. These findings, in turn, must be confirmed by the department's division of environmental quality and by the local health district board.

Sincerely,

DANIEL G. CHADWICK
Chief, Intergovernmental
Affairs Division