

ATTORNEY GENERAL OPINION NO. 94-2

To: The Honorable Bruce Newcomb
The Honorable Celia Gould
Idaho State Representatives
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

QUESTION PRESENTED

Must a nutrient management plan developed by the Idaho Department of Health and Welfare pursuant to Idaho Code § 39-105(3)(o) be reviewed by the Board of Health and Welfare and the legislature prior to adoption and implementation?

CONCLUSION

Idaho Code § 39-105(3)(o) is ambiguous on whether the board and the legislature must review the plan prior to its adoption. Rules of statutory construction, however, suggest that the department is required to engage in formal rulemaking to adopt and implement the plan, pursuant to the Idaho Administrative Procedure Act (APA), Idaho Code §§ 67-5201 *et seq.* Therefore, the rule is subject to legislative review pursuant to Idaho Code § 67-5223 and Idaho Code § 67-5291. Further, the limitation on authority granted to the department and the broad authority granted the board supports the conclusion that the plan is subject to review by the board.

BACKGROUND

In 1989, the Idaho Legislature amended the Environmental Protection and Health Act to include the Nutrient Management Act at Idaho Code § 39-105(3)(o) as a result of legislative concerns about the impact of nutrients on water quality and to ensure state-wide consistency in developing the plan. 1989 Idaho Sess. Laws 762. The act requires the department to formulate and adopt a "comprehensive state nutrient management plan for the surface waters of the state of Idaho in consultation with . . . federal agencies, local units of government, and with public involvement." *See* Idaho Code § 39-105(3)(o). The act requires that the plan "shall be developed on a hydrologic basin unit basis" throughout the state "with a lake system emphasis." *Id.* Each component of the plan must "identify nutrient sources [to state waters]; 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.* Once adopted, "[t]he plan shall be used by the department and other appropriate agencies . . . in developing programs for nutrient management." *Id.*

The act also requires that "[s]tate and local units of government shall exercise their police powers in compliance with the . . . plan." *Id.*

The act requires the department to recommend rules for adoption by the board which set forth "procedures for development of the plan, including mechanisms to keep the public informed and encourage public participation in plan development." The act also requires the department to recommend to the board rules establishing procedures to determine consistency of local nutrient management programs adopted by any local unit of government. *Id.* Finally, the act requires the department to "formulate and recommend to the board for adoption rules and regulations as necessary to implement the plan." *Id.*

In 1990, the department recommended and the board approved Rules and Regulations for Nutrient Management, IDAPA 16.01.16000 through -16999. The rules establish procedures for development of the plan, including mechanisms to consult with and inform governmental agencies, affected industries and the public through a "technical advisory committee" and a "public advisory committee." *See* IDAPA 16.01.16100.02. The rules provide that each component of the plan "shall become effective on the date of its adoption by the department" and that the plan will be considered a component of the state water quality management plan.¹ *See* IDAPA 6.01.16100.08. The rules also set forth procedures to determine consistency of local nutrient management programs with the comprehensive state nutrient management plan. The department has not formulated or recommended to the board, at this time, a comprehensive nutrient management plan or any rules to implement the plan. The department is involved, however, with development of a component of the plan for the middle Snake River.

ANALYSIS

1. The Plan Must Be Adopted Pursuant to the APA and Is Subject to Legislative Review

Idaho Code § 39-105(3)(o) specifically grants authority to the department to promulgate and implement a comprehensive nutrient management plan. Idaho Code § 39-105(3)(o) is ambiguous, however, on whether the board and/or the legislature must review and approve the nutrient management plan formulated by the department. This ambiguity exists because of the statute's lack of clarity regarding whether the plan must be adopted pursuant to the APA. If the APA applies, then legislative review is permitted pursuant to Idaho Code § 67-5223 prior to the adoption and implementation of the proposed rule. Further, the rule would be subject to legislative review pursuant to Idaho Code § 67-5291 after implementation, to ascertain whether the rule comports with the legislative intent of the statute under which the rule was adopted.

Idaho Code § 39-105(3)(o) mandates that the department shall consult with appropriate state and federal agencies, with local governmental units and invite public comment consistent with the APA in the formulation of the plan. This provision suggests the plan must be adopted pursuant to the APA. This conclusion is buttressed by the provision that "[s]tate and local units of government shall exercise their police powers in compliance with the comprehensive state nutrient management plan . . ." *Id.* This language requires that upon adoption the plan will have the force and effect of law since state and local governments "shall" comply with the plan. *Id.* In order for the plan to have the force and effect of law, as it applies to the state and local government police powers, the department must adopt the plan as a formal rule under the APA. This requirement is explained in the comments to Idaho Code § 67-5201(16), the Administrative Procedure Act's definition of a rule:

[A]n agency may promulgate a rule only by complying with the procedure set out in the Administrative Procedure Act. If the agency has not complied with these requirements, it has not promulgated a "rule" and the statement lacks the force and effect of law. If an agency wishes to impose legal obligations on a class of persons, it must promulgate a rule.

Where ambiguity exists in a statute it is appropriate to engage in statutory construction in order to ascertain and give effect to the legislature's intent. Easley v. Lees, 111 Idaho 115, 721 P.2d 215 (1986). One method of discerning legislative intent is to examine the purpose of the statute and its structure as a whole. Leliefeld v. Johnson, 104 Idaho 357, 659 P.2d 111 (1983); *appeal after remand*, 111 Idaho 897, 728 P.2d 1306 (1986). Further, in construing a statute, it is necessary to give effect to every word, clause and sentence of the statute adopting the construction that does not deprive any provision of the statute of its meaning. George W. Watkins Family v. Messenger, 118 Idaho 537, 797 P.2d 1385 (1990). Finally, in the face of statutory ambiguity, statutory interpretation may be accomplished by reference to other statutory provisions in the same title or chapter reading the related statutory provisions *in pari materia* in order to determine the legislative intent. Killeen v. Vernon, 121 Idaho 94, 822 P.2d 991 (1991).

Reading Idaho Code § 39-105(3)(o) as a whole, it is apparent that the legislature intended that the plan would be adopted pursuant to the APA. First, it is necessary to give effect to the statutory language that requires the department to promulgate a comprehensive state nutritional management plan in consultation with appropriate governmental entities and with public involvement consistent with the APA. Second, Idaho Code § 39-105 requires that the plan shall have the force and effect of law in order for governmental entities to exercise their police power to require compliance--only a rule has the force and effect of law. An interpretation of Idaho Code § 39-105(3)(o) allowing the department to promulgate the plan without review as provided in the APA would render each of the afore-referenced provisions of the statute meaningless.

Therefore, in order to give effect to Idaho Code § 39-105(3)(o) as a whole, the plan must be adopted pursuant to the APA. Consequently, the plan is subject to legislative review prior to its adoption pursuant to Idaho Code § 67-5223 and after its adoption pursuant to Idaho Code § 67-5291.

2. The Plan Is Subject to Review by the Board

The conclusion that the plan must be adopted pursuant to the APA does not resolve the question of whether the board must review the plan. The answer to this question turns on who the legislature intended would have the duty to promulgate the rules. Idaho Code § 39-105(3)(o) provides that the board shall promulgate the rules to implement the plan. This suggests the plan must be submitted to the board. Other statutory provisions within title 39 (Health and Safety), chapter 1 (department of Health and Welfare), support this interpretation. Idaho Code § 39-105(2) grants the department the authority to regulate subject to review by the board. Idaho Code § 39-105(2) provides that:

The director shall, pursuant and subject to the provisions of the Idaho Code, and the provisions of this act, formulate and recommend to the board, rules, regulations, codes and standards as may be necessary to deal with problems relating to personal health, water pollution, air pollution, visual pollution, noise abatement, solid waste disposal, and licensure and certification requirements pertinent thereto, which shall, upon adoption by the board, have the force of law relating to any purpose which may be necessary and feasible for enforcing the provisions of this act, including, but not limited to the prevention, control or abatement of environmental pollution or degradation and the maintenance and protection of personal health.

In addition, Idaho Code § 39-105(3) qualifies the powers and the duties of the department to be subject to "the rules, regulations, codes or standards adopted by the board"

Further, Idaho Code § 39-107(8) broadly defines the powers of the board as the entity that adopts, amends or repeals all rules, codes and standards of the department dealing with matters necessary for protecting the environment or health of the state. An interpretation of Idaho Code § 39-105(3)(o) allowing the department to formulate and implement the plan without review by the board would contradict the limitation on the department's authority provided in Idaho Code § 39-105(2), (3) and the board's grant of authority provided for in Idaho Code § 39-107(8).

Therefore, the department is required to engage in formal rulemaking to adopt and implement the plan. Formal rulemaking necessitates approval by the legislature. Further,

review by the board is required by reason of the limitation on the department's authority and the broad grant of the board's authority.

AUTHORITIES CONSIDERED

1. Federal Statutes and Regulations:

33 U.S.C. §§ 1251 *et seq.*, Federal Water Pollution Control Act of 1972.
40 C.F.R. part 130.

2. Idaho Code:

§ 39-105.
§ 39-105(2).
§ 39-105(3).
§ 39-105(3)(o), Nutrient Management Act.
§ 39-107(8).
§§ 67-5201 *et seq.*
§ 67-5201(16), Administrative Procedure Act.
§ 67-5223.
§ 67-5291.

3. Idaho Cases:

Easley v. Lees, 111 Idaho 115, 721 P.2d 215 (1986).

George W. Watkins Family v. Messenger, 112 Idaho 537, 797 P.2d 1395 (1990).

Killeen v. Vernon, 121 Idaho 94, 822 P.2d 991 (1991).

Liefeld v. Johnson, 104 Idaho 357, 659 P.2d 111 (1983).

4. Other Authorities:

1989 Idaho Sess. Laws 762.
IDAPA 16.01.16000 *et seq.*
IDAPA 16.01.16100.02.
IDAPA 16.01.16100.08.

DATED this 16th day of February, 1994.

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Analysis by:

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¹ Development of a state water quality management plan is required by the United States Environmental Protection Agency to fulfill minimum requirements of the Federal Water Pollution Control Act of 1972, 33 U.S.C. §§ 1251 *et seq.* See 40 C.F.R. pt. 130.