



STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WASDEN

**ATTORNEY GENERAL OPINION NO. 08-1**

To: Mr. Calvin H. Campbell  
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Per Request for Attorney General's Opinion

You, along with E. Scott Paul, Lincoln County Prosecuting Attorney, Mike Seib, Jerome County Prosecuting Attorney, Nikki Cannon, Minidoka County Prosecuting Attorney, and Al Barrus, Cassia County Prosecuting Attorney, have requested an Attorney General's Opinion regarding several questions, each of which can be categorized as asking whether Idaho state law preempts local regulation of confined animal feeding operations ("CAFOs"). This opinion addresses the over-arching question you have presented.

**QUESTION PRESENTED**

Do Idaho's state laws pertaining to the regulation of confined animal feeding operations preempt county regulation of such operations?

**CONCLUSION**

The state CAFO siting laws expressly authorize counties to "enact ordinances and resolutions to regulate the siting of large confined animal feeding operations and facilities . . . ." Idaho Code § 67-6529. The legislature recognized that county regulation is necessary for the purpose of considering the social and environmental impacts associated with CAFOs. Idaho Code § 67-6529B. Thus, even though the legislature has delegated to the Department of Agriculture and the Department of Environmental Quality the responsibility to regulate water quality and waste water management requirements for the ongoing operation of CAFOs, it is unlikely that a court would conclude that state laws pertaining to the regulation of CAFOs fully occupy the field and, therefore, preempt all local ordinances related to similar environmental concerns. For example, county

ordinances that seek to ensure the appropriateness of the location of a CAFO in light of the environmental characteristics of a site, such as setbacks or maximum livestock density requirements, are likely to be upheld by a court. County ordinances, however, that seek to directly impose water quality or waste management requirements on the ongoing operation of CAFOs once sited are likely to be found in conflict with, and therefore preempted by, state law. Whether specific provisions of a local zoning ordinance conflict with state laws applicable to CAFOs requires an analysis of the particular ordinance at issue, along with the applicable state laws. Such an analysis is beyond the scope of this opinion.

The lack of clarity with respect to the limits within which local governments may regulate CAFOs unfortunately pits local government and the regulated industry against one another and leads to costly and potentially lengthy litigation. Legislative action to more clearly define the respective regulatory authority of state agencies and local government is warranted.

## ANALYSIS

### A. Overview of Local Zoning Authority

Article XII, § 2 of the Idaho Constitution provides:

Any County or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws.

While land use planning is primarily within the purview of local government, county ordinances that are in conflict with the general laws of the state are preempted. Idaho Const. art. XII, § 2. A conflict between local and state law may arise in a number of different situations. There may be a direct conflict between the two laws, which usually occurs when local law expressly allows what the state disallows and vice versa. State v. Musser, 67 Idaho 214, 176 P.2d 199 (1946); Envirosafe Services of Idaho, Inc. v. County of Owyhee, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987). A conflict may also arise when state law addresses an entire field or area of regulation. *Id.* When state law provides either expressly or by implication, that it preempts a field or area of regulation, county regulation in that field or area will be held to be in conflict with state general laws and in violation of the Idaho Constitution. Envirosafe, 112 Idaho at 689. Since none of the Idaho statutes applicable to beef or dairy CAFOs expressly preempt local regulation of CAFOs, this opinion analyzes and applies the doctrine of implied conflict preemption.

## B. Implied Preemption

### 1. General Principles

Idaho has adopted the doctrine of implied preemption, set forth by the Idaho Supreme Court as follows:

Where it can be inferred from a state statute that the state has intended to fully occupy or preempt a particular area, to the exclusion of [local governmental entities], a [local] ordinance in that area will be held to be in conflict with the state law, even if the state law does not so specifically state.

Envirosafe Services of Idaho, Inc. v. County of Owyhee, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987) (additional citations omitted). There are two typical situations in which implied preemption is found. The first situation:

[T]ypically applies in instances where, despite the lack of specific language preempting regulation by local governmental entities, the state has acted in the area in such a pervasive manner that it must be assumed that it intended to occupy the entire field of regulation.

“The [local governmental entity] cannot act in an area which is so completely covered by general law as to indicate that it is a matter of state concern.”

*Id.* (citation omitted). The second situation:

[W]ill also apply where uniform statewide regulation is called for due to the particular nature of the subject matter to be regulated.

[I]f the court finds that the nature of the subject matter regulated calls for a uniform state regulatory scheme, supplemental local ordinances are preempted.

*Id.* (additional citations omitted).

### 2. Pertinent Factors

In Envirosafe, the court analyzed Idaho’s Hazardous Waste Management Act (“HWMA”), Idaho Code §§ 39-4401 to 39-4432, to determine whether it implicitly preempted local regulation of hazardous wastes. After noting that the HWMA, like the CAFO statutes analyzed herein, did not expressly preempt local regulation, the court noted the following factors:

1. The HWMA contained a statement of legislative intent which provided, in part, that the purpose of the HWMA was to **enable the state to assume primacy** over hazardous waste.
2. The statement of legislative intent also mentioned the desire to **avoid duplicative, overlapping or conflicting** state and federal regulatory systems.
3. The legislature also directed the Board of Health and Welfare to **adopt rules and regulations** regarding hazardous wastes **within the state**.
4. The legislature gave the DHW director authority to cooperate with other states **to provide for uniform state regulations**.

The court deemed those factors to “evince a strong legislative intent that regulation of the field of hazardous waste disposal be regulated by means of one, uniform statewide scheme enabling this state to enter into meaningful interstate agreements. Taken alone, this clear legislative intent is more than sufficient to preempt the field and preclude local governmental regulation of the subject matter.” *Id.* at 690, 735 P.2d at 1001.

Next, the court used the second or alternate analysis, to determine whether the HWMA was a “comprehensive statutory scheme of the kind which implicitly evidences legislative intent to preempt the field.” *Id.* The HWMA contained the following significant provisions:

1. Regulation, trip permits, and a manifest system for transporters.
2. A permit system for hazardous waste facilities.
3. Recording and reporting requirements for generators and facilities.
4. Fee systems and dedicated funds.
5. Sections dealing with citizen suits, local governmental notice, interstate cooperation, and employment security.
6. Broad enforcement provisions.

The court also found it significant that the local ordinance was mostly duplicative of the HWMA, and noted that courts in several other states had held that uniform, statewide treatment of hazardous waste was critical.

Whether there are state laws that specifically authorize the county as well as the state to regulate in a particular area is also important to the field preemption analysis. In Attorney General Opinion 83-6, the Attorney General's Office reviewed whether the Lake Protection Act preempted local regulation of lake encroachments. The fact that there was no specific authority provided for county regulation of lake encroachments, but instead the county ordinance at issue was based upon general authority provided to the county in the Local Planning Act, supported the conclusion that the Lake Protection Act was intended to be the exclusive means of regulating lake encroachments. Similarly, in Envirosafe, there was nothing in state law that specifically authorized a county to regulate hazardous waste; instead, only the state was given specific authority to regulate.

### 3. Policy and Local Deference

In the Envirosafe decision, the court carefully acknowledged the importance of local control, but noted that local control may be problematic in certain instances.

[T]he safe management and disposal of hazardous wastes is clearly an area which demands uniform, statewide treatment. . . . Michigan is extremely limited in the number of facilities that handle this waste properly. This is due partly because no community wants hazardous waste facility [*sic*] in its vicinity. Thus, local interests strongly want to retain their control. However, the same reasoning easily justifies state control. The legislature recognized that hazardous waste disposal areas evoke such strong emotions in localities that the decision as to where a landfill should go should not be given to the locality, which is far more swayed by parochial interests than the state. The legislature, instead, gave the power to a centralized decision maker who could act uniformly and provide the most effective means of regulating hazardous waste. [*Township of Cascade v. Cascade Resource Recovery, Inc.*, 118 Mich. App. 580, 325 N.W.2d 500, 504 (1982).]

It is important to note that the same considerations which permeated the holding in *Township of Cascade* are equally applicable here. The state of Idaho is limited to very few facilities which handle hazardous waste. Additionally, the treatment and storage of hazardous waste is a subject which inspires a unique amount of interest and concern from this state's citizenry. We recognize the unique importance of and benefit derived from local government regulation and that, ordinarily, local problems are best solved by local regulation, since local governmental entities are uniquely suited to fashioning workable solutions by virtue of their proximity to, and direct awareness of, the issues involved. By our ruling here, we in no way denigrate the function of local government. Instead, we acknowledge the unique importance and complexity of the subject matter.

Envirosafe, 112 Idaho at 691, 735 P.2d at 1002 (additional citations omitted).

### C. Pertinent Acts and Statutes

Idaho Code contains several acts and statutes that authorize state agencies and counties to regulate various aspects of dairy and beef cattle CAFOs. Each will be discussed in turn.

#### 1. The Beef Cattle Environmental Control Act

In 2000 the Idaho Legislature enacted the Beef Cattle Environmental Control Act, Idaho Code §§ 22-4901, *et seq.* (the “BCEC Act”). The BCEC Act contains the following declaration of policy and legislative intent:

(1) The legislature recognizes the importance of protecting state natural resources including, surface water and ground water. It is the intent of the legislature to protect the quality of these natural resources while maintaining an ecologically sound, economically viable, and socially responsible beef cattle industry in the state. The beef cattle industry produces manure and process wastewater which, when properly used, supplies valuable nutrients, and organic matter to soils and is protective of the environment, but may, when improperly stored and managed, create adverse impacts on natural resources, including waters of the state. ***This chapter is intended to ensure that manure and process wastewater associated with beef cattle operations are handled in a manner which protects the natural resources of the state.***

(2) Further, the legislature recognizes that the beef cattle industry is potentially subject to various state and federal laws designed to protect state natural resources and that the Idaho department of agriculture is in the best position to administer and implement these various laws. ***It is therefore the intent of the legislature that the administration of this law by the department of agriculture fully meets the goals and requirements of the federal clean water act and state laws designed to further protect state waters*** and that administration of this chapter by the department of agriculture shall not be more stringent than or broader in scope than the requirements of the clean water act and applicable state and federal laws. ***The department shall have authority to administer all laws to protect the quality of water within the confines of a beef cattle animal feeding operation.*** In carrying out this chapter the department shall prioritize its resources on operations which have the greatest potential to significantly impact the environment and ensure that any requirements imposed under this chapter upon operators of beef cattle

animal feeding operations are cost-effective and economically, environmentally and technologically feasible.

(3) Successful implementation of this chapter is dependent upon the department receiving adequate funding from the legislature and is dependent upon the department executing a memorandum of agreement with the United States environmental protection agency, the department of environmental quality and the Idaho cattle association which sets forth a working arrangement between the agencies to ensure compliance with this chapter and applicable state and federal laws, including the federal clean water act. Moreover, the legislature recognizes that it is important for the state to obtain a delegated national pollutant discharge elimination system (NPDES) permit program from the EPA under the clean water act.

Idaho Code § 22-4902 (Supp. 2007) (emphasis added). The authority granted to the ISDA director by the Idaho Legislature is similarly worded:

(1) The [ISDA director] through the division of animal industries is authorized to regulate beef cattle animal feeding operations to protect state natural resources, including surface water and ground water.

(2) In order to carry out its duties under this chapter, the department shall be the responsible state department to prevent any groundwater contamination from beef cattle animal feeding operations as provided under section 39-120, Idaho Code.

(3) The director shall have the authority to exercise any other authorities delegated by the director of the department of environmental quality regarding the protection of groundwater, surface water and other natural resources associated with confined animal feeding operations, and this shall be the authority for the director of the department of environmental quality to so delegate.

(4) The director of the department of environmental quality shall consult with the director of the department of agriculture before certifying discharges from beef cattle animal feeding operations as provided under 33 U.S.C. section 1341.

Idaho Code § 22-4903 (Supp. 2007).

Each beef CAFO is required to have a nutrient management plan, and once approved, the plan “shall be implemented and considered a best management practice.” Idaho Code § 22-4906 (Supp. 2007). Best management practices (“BMPs”) are defined as:

[P]ractices, techniques or measures which are determined to be cost-effective and practicable means of preventing or reducing pollutants from point sources or nonpoint sources to a level compatible with environmental goals, including water quality goals and standards for waters of the state. Best management practices shall be adopted pursuant to the state water quality management plan, the Idaho groundwater quality plan or this act.

Idaho Code § 22-4904(3). Nutrient management plans, in turn, are defined as “plan[s] prepared in conformance with the nutrient management standards or other equally protective standard for managing the *amount, placement, form and timing of the land application* of nutrients and soil amendments.” Idaho Code § 22-4904(10) (emphasis added).

Each beef cattle CAFO must also be designed and constructed in accordance with specific engineering standards, and plans and specifications must be submitted to and approved by ISDA in order to ensure the engineering standards are met.

ISDA promulgated rules under the BCEC Act, geared toward waste/nutrient management. See Rules of the Department of Agriculture Governing Beef Cattle Animal Feeding Operations, IDAPA 02.04.15.100 (“Beef Rules”). The Beef Rules define BMPs as “[p]ractices as defined in Title 22, Chapter 49, Idaho Code or other practices, techniques, or measures that are determined to be a cost-effective and practicable means of preventing or reducing pollutants from point or non-point sources to a level compatible with *state environmental goals*.” IDAPA 02.04.15.010.05 (emphasis added). In addition, “nutrient management plan” and “nutrient management standard” are defined by reference to the USDA NRCS Conservation Practice Standard, and/or federal regulations. See IDAPA 02.04.15.010.12 and .13.

ISDA and DEQ are parties to The Idaho Beef Cattle Environmental Control Memorandum of Understanding (“Beef MOU”); the other parties are EPA and the Idaho Cattle Association (“ICA”). The stated objectives of the Beef MOU are “to ensure compliance with the [CWA] and [BCEC Act].” Beef MOU, p. 1.

These working arrangements are designed to reduce duplicative inspection and compliance efforts, increase the frequency of inspections of beef cattle animal feeding operations and provide a sound inspection and compliance program, in order to prevent pollution and protect water of the state and other natural resources in an environmentally proactive and economically achievable manner.

Beef MOU, p. 1. The MOU further provides that:

Beef cattle AFOs, regardless of whether the AFO actually has an NPDES permit, are responsible to construct, maintain and operate their facilities to prevent contamination of waters of the state by achieving the conditions specified in the Act and the [Guidelines] or [any applicable NPDES permits].

Beef MOU, p. 2. Under the Beef MOU, ISDA has the lead rule “in development and review of . . . (BMPs) for beef cattle AFOs, which protect Idaho’s natural resources. . . .” Beef MOU, p. 2. The MOU also provides, however, that “Nothing in this MOU shall be construed to release beef cattle AFOs from complying with applicable local, state or federal environmental statutes, regulations, permits or consent orders.” Beef MOU at page 6.

2. Dairy Waste Management Statutes

The statutory provisions pertaining to dairy waste are not contained in a separate act, but instead, are contained in title 37, chapter 4 (Sanitary Inspection of Dairy Products Act). Section 37-401 places certain mandatory duties upon ISDA and specifically conditions the issuance of a milk permit on compliance with applicable county livestock ordinances:

(2) Acting in accord with rules of the department, the director or agent of the department shall review plans and specifications for construction of new, modified or expanded waste systems and inspect any dairy farm to ascertain and certify sanitary conditions, waste systems and milk quality.

....

(4) All dairy farms shall have a nutrient management plan approved by the department. The nutrient management plan shall cover the dairy farm site, and other land owned and operated by the dairy farm owner or operator. Nutrient management plans submitted to the department by the dairy farm shall include the names and addresses of each recipient of that dairy farm’s livestock waste, the number of acres to which the livestock waste is applied, and the amount of such livestock waste received by each recipient. The information provided in this subsection shall be available to the county in which the dairy farm, or the land upon which the livestock waste is applied, is located. If livestock waste is converted to compost before it leaves the dairy farm, only the first recipient of the compost must be listed in the nutrient management plan as a recipient of livestock waste from the dairy farm.

Existing dairy farms shall submit a nutrient management plan to the department on or before July 1, 2001.

....

(6) The director or his agent may issue a permit to sell milk for human consumption to a new or expanding dairy farm only upon presentation to the director by the new or expanding dairy farm of:

(a) A certified letter, supplied by the board of county commissioners, certifying the new or expanding dairy farm's compliance with applicable county livestock ordinances; ....

Idaho Code § 37-401. If a dairy has a violation regarding its waste system, ISDA is authorized to revoke the dairy's milk permit. In practical terms, this means that the milk for the days in question is processed and sold, but the value of the milk goes to the county in which the violation occurred, rather than to the dairy's owner/operator. Idaho Code § 37-403.

ISDA has promulgated Rules of the Department of Agriculture Governing Dairy Waste. See IDAPA 02.04.14.000, *et seq.* (the "Dairy Rules"). The Dairy Rules define "discharge violation" more broadly than the Beef Rules:

A practice or facility condition which has caused an unauthorized release of livestock waste into surface, ground water, or beyond the dairy farm's property boundaries or beyond the property boundary of any facility operated by the producer. Contract manure haulers, producers and other persons who haul livestock waste beyond the producer's property boundaries are responsible for releases of livestock waste between the property boundaries of the producer and the property boundaries at the point of application.

IDAPA 02.04.14.004.05. Like the Beef Rules, the Dairy Rules contain a definition of a nutrient management plan that incorporates by reference a USDA NRCS nutrient management standard.

The ISDA "Findings" contained in the Dairy Rules state:

The Department finds that pursuant to Section 67-5226(1), Idaho Code, these rules are necessary to protect the public health, safety and welfare of Idaho, enhance Idaho water quality and preserve the integrity of the Idaho dairy industry. *These rules establish design, construction, operation, location, and inspection criteria for dairy waste systems on Idaho dairy farms and enable the department to implement the 1999 NRCS nutrient*

*management standards on dairy farms* to appropriately manage livestock waste. These rules also provide penalty provisions.

IDAPA 02.04.14.005 (emphasis added). ISDA must approve the design, construction, operation and location of dairy waste systems, and those systems “must conform to the Idaho Waste Management Guidelines for Confined Feeding Operations, NMP, NMS, and Appendix 10D.” IDAPA 02.04.14.011.

Like the regulation of Beef cattle CAFOs, ISDA, IDEQ and EPA are parties to a Dairy MOU that sets out the manner in which the parties shall coordinate in the regulation of dairy CAFOs. The MOU provides, however, that “[n]othing in this agreement shall be construed to release a dairy from complying with applicable local, state, and federal environmental statutes, regulations, permits, or consent orders.” Dairy MOU, p. 5.

### 3. Agriculture Odor Management Act

In 2001 the Idaho Legislature enacted the Agriculture Odor Management Act, Idaho Code §§ 25-3801, *et seq.* (the “AOMA”). Pursuant to the AOMA, DEQ regulates odors from large swine and poultry operations, while odors from Beef CAFOs are regulated by ISDA under the BCEC Act. ISDA is also the lead agency for regulating odors from “operations where livestock or other agricultural animals are raised, or crops are grown, for commercial purposes, not to include [large swine and poultry operations and beef CAFOs].” Idaho Code §§ 25-3801(3) and 25-3803(3) (Supp. 2007).

The legislature’s declaration of policy provides:

(1) The agriculture industry is a vital component of Idaho’s economy and during the normal course of producing the food and fiber required by Idaho and our nation, odors are generated. It is the intent of the legislature to manage these odors when they are generated at a level in excess of those odors normally associated with accepted agricultural practices in Idaho.

....

(3) . . . In carrying out the provisions of this chapter, the [ISDA] will make reasonable efforts to ensure that *any requirements imposed upon agricultural operations are cost-effective and economically, environmentally and technologically feasible.*

Idaho Code § 25-3801 (Supp. 2007) (emphasis added). The ISDA director is authorized to promulgate agriculture odor rules.

Pursuant to the AOMA, ISDA promulgated the Rules Governing Agriculture Odor Management, IDAPA 02.04.16.100, *et seq.* The Rules provide that management practices which are undertaken in accordance with the Rules Governing Dairy Waste; the Rules Governing Pesticide and Chemigation Use and Application; Rules Concerning Disposal of Cull Onion and Potatoes; Rules Governing Dead Animal Movement and Disposal; the Idaho NRCS Nutrient Management Standard 590, June 1999; Best Management Practices listed in the "Idaho Agricultural Pollution Abatement Plan," August 2001; "Control of Manure Odors," ASAE Standard EP379.2 Sections 5 and 6 in their entirety, November 1997; and/or "Composting Facility," NRCS Conservation Practice Standard 317, March 2001; are considered accepted agricultural practices.<sup>1</sup>

Despite the implementation of accepted agricultural practices, if an agricultural operation still generates odors in excess of those typically associated with that type of agriculture, the operation must develop and submit an odor management plan to ISDA. ISDA is further charged with reviewing and approving design plans for all new or modified liquid waste systems prior to construction. IDAPA 02.04.16.300. The systems must be designed by a professional engineer. The rules set forth general design standards, provide for inspections, and set forth the process and requirements for an odor management plan.

ISDA must respond to all odor complaints lodged against agricultural operations, and handles violations of the Rules.

#### 4. CAFO Siting Laws and Rules

Although state agencies (particularly ISDA and DEQ) have a large role in regulating CAFOs, the Idaho Legislature has also recognized the role of counties in siting of CAFOs. Idaho Code § 67-6529 specifically requires that "[n]otwithstanding any provision of law to the contrary, a board of county commissioners shall enact ordinances and resolutions to regulate the siting of large confined animal feeding operations and facilities, as they shall be defined by the board . . . ." Idaho Code § 67-6529(2) (emphasis added). Section 67-6529 also provides that a county "may reject a site regardless of the approval or rejection of the site by a state agency." This section applies to both dairy and beef CAFOs.

In 2001 the legislature passed the Site Advisory Team Suitability Determination Act, Idaho Code §§ 67-6529A, *et seq.* That Act allows a county to call upon ISDA to form a site advisory team "to assist counties and other local governments in the environmental evaluation of appropriate sites for confined animal feeding operations." Idaho Code § 67-6529B. The site advisory team includes representatives from ISDA, IDEQ and the Idaho Department of

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<sup>1</sup> "Accepted agricultural practices" are "those management practices normally associated with agriculture in Idaho, including but not limited to those practices identified in Section 100 of these rules, and which include management practices intended to control odor generated by an agricultural operation." IDAPA 02.04.16.010.01.

Water Resources. If requested, the team must review information provided by the county and provide the county with a suitability determination that identifies the environmental risks posed by a proposed CAFO site, describes factors that contribute to the environmental risks and sets forth any possible mitigation of risk. Idaho Code §§ 67-6529C(2), (3) and (4); 67-6529F(3). Upon receipt of the report from the team, the county may use the report as the county deems appropriate. Idaho Code § 67-6529G. The Act also provides that counties may require an applicant for siting of a CAFO to submit an odor management plan as part of the application. Notably, the Act specifically provides that “this act does *not* preempt local regulation of a CAFO.” Idaho Code 67-6529D(3) (emphasis added). ISDA has promulgated rules regarding the Act. IDAPA 02.04.18.100, *et seq.*

#### D. Analysis

Since none of the statutes cited above expressly preempt local regulation of CAFOs, the issue presented turns on whether the legislature impliedly preempted local regulation. Implied preemption may occur if the state fully occupies the field of regulation, in which case any local ordinance in the field is preempted. In addition, even when the state has not fully occupied the field, implied preemption may occur when a specific county ordinance is found to be in conflict with state law. There is no doubt that the legislature intended for the Idaho Department of Agriculture to administer a comprehensive program to regulate the operation of beef cattle CAFO wastewater storage and containment facilities. In enacting the Beef Cattle Control Act, the Idaho Legislature stated its intent to protect “state natural resources including, surface water and ground water,” Idaho Code § 22-4902, by ensuring “that manure and process wastewater associated with beef cattle operations is handled in a manner which protects the natural resources of the state.” *Id.* This objective was to be achieved through submission of a nutrient management plan for each CAFO to the Idaho Department of Agriculture. Idaho Code § 22-4905. Through this Act, the legislature sought to preclude conflicting state and federal regulation and stated its intent that “administration of this law by the department of agriculture fully meets the goals and requirements of the federal clean water act and state laws designed to further protect state waters . . . .” Idaho Code § 22-4902(2).

In many ways, the Beef Cattle Control Act standing alone seems to mirror the factors cited by the Idaho Supreme Court in Envirosafe as a basis for finding an implied preemption of local regulation. State law provides authority to ISDA to regulate the design and construction of beef cattle CAFOs and the manner in which nutrients and soil amendments are land applied. The beef cattle law includes statements that indicate the legislature intended to create a state-wide program to protect state natural resources, including surface and groundwater quality. In addition, the legislature sought to ensure state primacy over the regulation of CAFO wastewater storage and containment facilities for beef cattle operations. Finally, the legislature sought to protect a state resource—

water—that has traditionally been exclusively regulated by the State. Idaho Code § 42-201(2) (2003). State law provides similar authority to ISDA regarding dairy CAFOs.

Unlike the situation considered in Envirosafe, however, state law provides specific authority to counties to regulate the siting of dairy and beef cattle CAFOs. Idaho Code §§ 67-6529 through 67-6529G (2006). Indeed, Idaho Code § 67-6529 expressly provides that “[n]otwithstanding any provision of the law to the contrary, a board of county commissioners shall enact ordinances and resolutions to regulate the siting of large confined animal feeding operations and facilities, as they shall be defined by the board . . . .” These siting statutes direct that counties consider the “social and environmental impacts” arising from the location of CAFOs. Thus, counties are authorized to review and take into account information regarding the environmental risks posed by a CAFO. Idaho Code § 67-6529G (2006). This obviously could include risks to ground and surface water quality and air quality. In addition, counties are specifically authorized to require CAFOs to submit odor management plans. Idaho Code § 67-6529D (2006). There are also several other Idaho Code provisions that appear to recognize a more general regulatory role for counties. Finally, the Site Advisory Team Suitability Determination Act provides that it does not preempt local regulation of a CAFO. Idaho Code § 67-6529D (2006). The state dairy law also recognizes the requirement that dairy CAFOs comply with applicable local livestock ordinances.

In light of the significant role provided for counties in the siting of CAFOs, it is unlikely that a court will find that local regulation of the entire field of CAFO regulation is preempted. On the other hand, the legislature’s express delegation of regulatory authority over operational aspects of CAFOs to the Department of Agriculture and the Department of Environmental Quality suggests that a court may, under a conflict analysis, determine an ordinance imposing restrictions that unduly interfere with state operational requirements for CAFOs is preempted. There is no bright line between what constitutes a siting condition and an operational condition. The mere fact that a local siting ordinance contains environmental conditions for the siting of a CAFO that may also be addressed in a nutrient management plan is not determinative of the question of whether the local ordinance is preempted. One must analyze the specific ordinance in question, in light of the pertinent legal provisions described above, in order to determine whether a local ordinance related to siting conflicts with state regulatory authority over the operation of CAFO wastewater storage and containment facilities.

## CONCLUSION

Because the legislature has authorized both the counties and the State to regulate CAFOs, and because these authorities overlap, it is unlikely that a court would conclude the State has completely occupied the field of CAFO regulation or that state law provides an exclusive regulatory program that preempts all local regulation. Although counties

have authority to regulate siting of dairy and beef cattle CAFOs, county ordinances that seek to impose operational constraints on the ongoing operation of a CAFO after it is sited are likely preempted. Each ordinance must be analyzed separately along with applicable state law to determine whether such a conflict exists.

## AUTHORITIES CONSIDERED

### 1. Idaho Constitution:

Art. XII, § 2.

### 2. Idaho Code:

§ 22-4902.

§ 22-4903.

§ 22-4904.

§ 22-4905.

§ 22-4906.

§ 25-3801.

§ 25-3803(3).

§ 37-401.

§ 37-403.

§§ 39-4401 to 39-4432.

§ 42-201(2).

§ 67-6529.

§ 67-6529A.

§ 67-6529B.

§ 67-6529C.

§ 67-6529D.

§ 67-6529F.

§ 67-6529G.

### 3. Administrative Rules:

IDAPA 02.04.14.000, *et seq.*

IDAPA 02.04.14.004.05.

IDAPA 02.04.14.005.

IDAPA 02.04.14.011.

IDAPA 02.04.15.010.05.

IDAPA 02.04.15.010.12.

IDAPA 02.04.15.010.13.

IDAPA 02.04.15.100, *et seq.*

IDAPA 02.04.16.010.01.

IDAPA 02.04.16.100, *et seq.*

IDAPA 02.04.16.300.

IDAPA 02.04.18.100, *et seq.*

**4. Idaho Cases**

Envirosafe Services of Idaho, Inc. v. County of Owyhee, 112 Idaho 687, 735 P.2d 998 (1987).

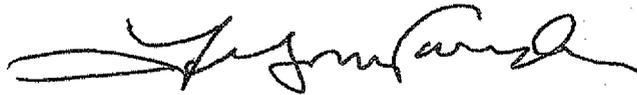
State v. Musser, 67 Idaho 214, 176 P.2d 199 (1946).

**5. Other Authorities**

1983 Idaho Att'y Gen. Ann. Rpt. 69.

The Idaho Beef Cattle Environmental Control Memorandum of Understanding.

Dated this 1 day of August, 2008.



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