

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 10 2020

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

IDAHO CONSERVATION LEAGUE,

No. 18-72684

Petitioner,

MEMORANDUM*

v.

U.S. ENVIRONMENTAL PROTECTION
AGENCY; ANDREW WHEELER, in his
official capacity as Administrator of the U.S.
Environmental Protection Agency,

Respondents,

STATE OF IDAHO; et al.,

Intervenors,

On Petition for Review of an Order of the
Environmental Protection Agency

Argued and Submitted March 5, 2020
Portland, Oregon

Before: McKEOWN and PAEZ, Circuit Judges, and HUCK,** District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Paul C. Huck, United States District Judge for the U.S. District Court for Southern Florida, sitting by designation.

Idaho Conservation League (“ICL”) petitions for review of the United States Environmental Protection Agency’s (“EPA”) approval of the Idaho Pollution Discharge Elimination System (“IPDES”). The parties are familiar with the facts, so we do not repeat them here. We have jurisdiction under 33 U.S.C. § 1369(b)(1)(D), and we grant the petition in part, deny it in part, and remand without vacatur in part.

ICL has associational standing to bring this challenge. *See Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000); *Nat. Res. Def. Council v. EPA*, 542 F.3d 1235, 1248 (9th Cir. 2008).

EPA’s conclusion that a two-year statute of limitations for bringing an enforcement action provided “adequate authority” to “abate violations of the permit or the permit program,” 33 U.S.C. § 1342(b)(7), was not arbitrary and capricious. Nor did EPA err by concluding that the Idaho Department of Environmental Quality will have sole responsibility for administering the IPDES program, including the permits for concentrated animal feeding operations (“CAFO”). Therefore, we deny the petition with respect to ICL’s challenges concerning the statute of limitations and the Idaho State Department of Agriculture’s alleged role in administering CAFO permits.

However, EPA abused its discretion in approving a mens rea standard “greater than the burden of proof or degree of knowledge or intent EPA must

provide when it brings an action” 40 C.F.R. § 123.27(b)(2). Because § 123.27(b)(2) is neither ambiguous nor inconsistent with 40 C.F.R. § 123.27(a)(3)(ii), *Auer* deference is not warranted for EPA’s interpretation of its own regulation. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). Regardless of the broad range of state law mens rea standards—spanning the lowest standard of “strict liability” to the highest standard of “criminal negligence”—that could satisfy § 123.27(a)(3)(ii), § 123.27(b)(2) provides a standalone requirement that was not satisfied here.

We have held that EPA may bring an enforcement action for “negligent” violation, *see* 33 U.S.C. § 1319(c)(1), under the ordinary negligence standard. *See United States v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999). Thus, while a state program need not mirror the burden of proof and degree of knowledge or intent EPA must meet to bring an enforcement action, *see* Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,382 (May 19, 1980), under § 123.27(b)(2), a state plan must employ a standard “no greater than” simple negligence, such as strict liability or simple negligence. Because EPA approved the IDPES even though it used a standard greater than simple negligence, “gross negligence,” we grant the petition with respect to invocation of the improper mens rea standard.

We remand without vacatur for EPA to promptly address the IPDES’s deficiency with respect to the mens rea standard, even though remand without

vacatur is appropriate only in “limited circumstances.” *Cal. Cmty. Against Toxics v. EPA*, 688 F.3d 989, 994 (9th Cir. 2012). Congress envisioned state and federal partnerships in achieving the goals of the CWA. *See* 33 U.S.C. § 1251(b); *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). We note that on remand, Idaho, one of the last states to create a state permit program, has the option to enter into that partnership in accordance with the CWA.

PETITION GRANTED IN PART, DENIED IN PART, AND REMANDED WITHOUT VACATUR IN PART.

Each party shall pay its own costs on appeal.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

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- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Form 10. Bill of Costs**

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

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