

Case No. 18-72684

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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IDAHO CONSERVATION LEAGUE,

*Petitioner,*

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, and  
ANDREW WHEELER, Acting Director of the U.S. EPA,

*Respondents.*

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Petition for Review  
Under the Clean Water Act

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**DECLARATION OF MATTHEW NYKIEL**

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Mark A. Ryan (WSBA #18279)  
RYAN & KUEHLER PLLC,  
P.O. Box 3059  
Winthrop, Washington 98862  
(509) 996-2617

Keith Cohon (WSBA #15103)  
6210 Sycamore Ave.  
Seattle, Washington 98107  
(206) 783-4772

Laurence (“Laird”) J. Lucas  
(ISB #4733)  
Bryan Hurlbutt (ISB #8501)  
ADVOCATES FOR THE WEST  
P.O. Box 1612  
Boise, ID 83701  
(208) 342-7024

*Attorneys for Petitioner Idaho Conservation League*

I, MATTHEW NYKIEL, state and declare as follows:

1. My name is Matthew Nykiel. I am a resident of Sandpoint, Idaho, and am over 18 years of age. The following facts are based on my personal knowledge, and if called as a witness I would and could truthfully testify thereto.

2. I am employed by the Idaho Conservation League (ICL) as a Conservation Associate in ICL's Sandpoint, Idaho office. I have been a Conservation Associate since 2016. I am also a member of ICL and have been a member since 2016.

3. One of my primary goals at ICL is to protect and restore water quality in North Idaho. Surveys of Idaho residents show that protecting Idaho's water quality consistently ranks among the most important conservation issues in the state. In ICL's two other offices, in Boise and Ketchum, Conservation Associates work to achieve the same goal throughout the rest of Idaho. Our work is critical to carrying out ICL's mission to protect Idaho's environment.

4. To this end, I spend a substantial amount of time working at ICL to ensure polluters follow federal and state environmental laws, including Clean Water Act (CWA) permitting requirements. The CWA prohibits the discharge of a pollutant from a point source to a water of the United States unless the discharge is in compliance with a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. § 1311(a). NPDES permits must include technology-based

pollution limits, any more stringent limits necessary to meet water quality standards, and monitoring and reporting requirements. 33 U.S.C. §§ 1311, 1318 & 1342.

5. I regularly review and submit public comments on proposed NPDES permits to ensure permits meet the requirements of the CWA and to advocate for stronger water quality protections, monitoring, and reporting. Occasionally, ICL will appeal NPDES permit authorizations. For example, I recently filed and participated in an administrative appeal for ICL contesting the Idaho Department of Environmental Quality's issuance of an NPDES permit.

6. I also work to investigate CWA violations for pollution discharges not authorized by an NPDES permit, including by conducting field work and submitting and reviewing public information requests. When ICL identifies polluters violating the CWA by discharging without a permit or without complying with the terms of their permit, ICL takes action, including by alerting regulatory agencies and by bringing CWA citizen suit enforcement actions to spur corrective action and compliance and to deter future noncompliance.

7. The CWA citizen suit provision, 33 U.S.C. § 1365, authorizes individuals and organizations like ICL to file suit in federal court against any person discharging pollutants without an NPDES permit, or discharging in violation of the terms of an NPDES permit. In citizen suits, ICL seeks injunctive

relief to remedy the violations and civil penalties (paid to the U.S. Treasury) to deter future noncompliance and eliminate any financial gains the polluter made by avoiding CWA compliance.

8. I regularly advocate for the adoption and strengthening of “water quality standards” and “total maximum daily loads” (TMDLs) for waters in North Idaho. Under CWA Section 303, states set water quality standards for all of their waterbodies, inventory their waters to determine which ones meet or fail to meet water quality standards, and develop TMDLs (essentially, pollution budgets) for all waterbodies that fail to comply with water quality standards. *See* 33 U.S.C. § 1313(c), (d). EPA plays an oversight role by reviewing state-adopted water quality standards and TMDLs and disapproving each standard and TMDL that fails to meet the minimum requirements of the CWA. *Id.*

9. Adopting water quality standards and TMDLs, and strengthening water quality standards and TMDLs, influences NPDES permitting. Where water bodies fail to meet water quality standards, NPDES permits will restrict pollution discharges in accordance with the TMDL with the aim of bringing the polluted waterbody back in to compliance with Idaho’s water quality standards.

10. Water quality in Idaho is deeply important to me personally.

11. Part of why I love living in Sandpoint is that I live near the shore of Lake Pend Oreille, Idaho’s largest lake. During the summer, I enjoy regularly

swimming in Lake Pend Oreille and the Pend Oreille River with my dog, Frisbee. In the heat of summer, taking Frisbee to the Third Street Pier for a dip in the Pend Oreille River is the best way for her to get exercise and cool off. We both swim off this pier at least once a week during the summer. I am comfortable swimming with my dog off this pier because I know it is not too close to any discharges of point source pollution, and I expect the CWA—if fully implemented—will ensure the water remains safe for swimming. I also regularly swim at different beaches around Lake Pend Oreille, including Sandpoint City Beach and Green Bay. It is a joy to swim in the lakes and rivers around Sandpoint; they provide a respite from summer heat, create communal gathering places, and offer serene environments for peace, reflection, and enjoying nature.

12. Year-round, I also regularly walk, hike, and run along or near the shores of Lake Pend Oreille. About once or twice a week, I enjoy the Lake by visiting the Pend Oreille Bay Trail—a 1.5-mile long trail that hugs the Lake Pend Oreille shoreline, not far from downtown Sandpoint. From this trail, I enjoy viewing the Lake’s clear waters, looking for the many different bird species it supports, including bald eagles, osprey, Canada geese, and tundra swans. I also find enjoyment knowing that Lake Pend Oreille shelters the “threatened” bull trout, even though I may not be able to see bull trout from the trail.

13. I also enjoy living in Sandpoint because of its proximity to other lakes, rivers, and streams in Idaho. I enjoy regularly visiting and recreating on the Idaho portion of the Spokane River. Along with hundreds of other people, I launch a small, inflatable kayak from Corbin Park and float down stretches of the Spokane River during the summer months. The Spokane River is another great place to see a variety of birds and fish. In fact, last summer I caught a rare glimpse of a bald eagle skimming the surface of the river to catch a fish.

14. The Spokane River is also an interesting river to float because one can experience, firsthand, the influence of the Rathdrum Prairie-Spokane Valley Aquifer (“RPSVA”). The RPSVA is a federally designated “sole source aquifer” because it provides the sole source of drinking water to over 500,000 people in the Coeur d’Alene-Spokane Valley region in Idaho and Washington. The aquifer is connected to the Spokane River, gaining water from the River in certain stretches and losing water to the River in others. In the stretches of River where the aquifer loses water to the River, one can experience the stark change in water temperature resulting from the aquifer’s influence. In those places, the Spokane River water is dramatically colder. The ability to physically sense the variability in water temperature while floating down the Spokane River is an important reminder to me of the many hydrologic connections in this part of Idaho.

15. My experiences are degraded by water pollution attributable to point sources subject to regulation by NPDES permits, and I have avoided visiting areas I would like to visit due to point source pollution.

16. I avoid swimming or allowing my dog to swim in the Pend Oreille River near the Sandpoint Wastewater Treatment Plant discharge site. This is unfortunate because the discharge site neighbors Lake View Park, which is one of Sandpoint's most visited and most popular city parks. The park is located along the north bank of the Pend Oreille River and provides public shoreline and boat access. Unpleasant smells often emanate, however, from the Sandpoint Wastewater Treatment Plant and appear to dissuade recreators from swimming in this part of the river. Personally, I never swim or allow my dog to swim in this area because I know that historically the wastewater treatment plant has not always complied with its NPDES permit.

17. During my frequent visits to Lake Pend Oreille, the Pend Oreille River, and the Spokane River, I have observed other point source discharges, some of which I believe were unauthorized, including industrial pollution discharges and municipal wastewater treatment plant discharges. These discharges degrade my experiences and cause me to avoid engaging activities I would like to pursue in these locations, like swimming and observing fish and wildlife.

18. During the summer, I also visit the South Fork Coeur d'Alene River about once a month. During one visit in 2018, I wanted to swim in the River, but I was aware of upstream hard rock mining operations that discharged to the River, including one mining facility that discharged pollutants at concentrations exceeding its NPDES permit limits over the last few years. I was also aware that for almost two decades the State of Idaho has recognized that the South Fork Coeur d'Alene fails to meet water quality standards due to dangerous metals contamination but has failed to develop and implement a TMDL. Without a TMDL, the South Fork Coeur d'Alene still fails to meet Idaho's water quality standards and is unlikely to be restored and protected from historical and current mining discharges. Because of this I did not swim for fear that cadmium, lead, and zinc (pollutants these mining facilities regularly discharge to the South Fork Coeur d'Alene) might be at levels that could harm my health.

19. I was also disappointed that the river seemed devoid of fish and other wildlife that may be impacted by water pollution. I like seeing fish and other aquatic life, as well as wildlife that depend on rivers like the South Fork Coeur d'Alene. But point source discharges into this river basin significantly harm fish and wildlife populations. Each spring an average of 150 tundra swans are found dead or sick along the Coeur d'Alene River floodplain, due to mining waste



discharged to the South Fork and Coeur d'Alene Rivers that accumulate in the soils along the river.

20. EPA's action approving the Idaho Pollutant Discharge Elimination System (IPDES) program injures me, because the IPDES program fails to meet the CWA's minimum requirements.

21. The CWA was enacted to restore and maintain water quality throughout the United States. NPDES permitting is the CWA's primary mechanism for achieving the CWA's goals. Civil and criminal enforcement is an important component of the NPDES program and carrying out the CWA's goals. By pursuing civil and criminal enforcement actions, EPA and/or state agencies help ensure violators come into compliance with the CWA. But, more importantly, the threat of CWA civil and criminal enforcement has a deterrent effect on anyone who might discharge pollutants.

22. EPA, however, approved the IPDES program even though the program fails to meet minimum CWA requirements for civil and criminal enforcement. While the CWA explicitly authorizes felony prosecution for violations committed with criminal negligence and misdemeanor prosecution for violations committed with simple negligence, the IPDES program requires criminal negligence to prosecute both felony and misdemeanor CWA violations. As a result, the State of Idaho is unable to bring or threaten criminal liability for

CWA violations in instances where the CWA itself would allow criminal prosecution, and the IPDES program will have less of a deterrent effect than it would if the program complied with the CWA.

23. Additionally, while the CWA has a five-year statute of limitations for civil enforcement actions, the IPDES program has a two-year statute of limitations. Idaho, therefore, will be unable to bring civil enforcement actions for violations dating back more than two years. This is concerning because it can take a long time—sometimes more than two years—to investigate and pursue enforcement actions. Sometimes it takes more than two years to even become aware of violations. As a result, it is less likely under the IPDES program that the government will pursue civil enforcement actions against permit violators, thus further reducing the deterrent effect.

24. Without adequate civil and criminal enforcement, I am concerned that people will take less care to comply with the CWA and are more likely to discharge pollutants to waters I enjoy without complying with an NPDES permit. Such discharges degrade my experiences and prevent me from engaging in the activities I enjoy.

25. The deterrent effect of civil and criminal enforcement is important for highly degraded rivers in Idaho, which include the Snake River. I had the good fortune to hike along the Snake River, in Hells Canyon, during an ICL staff retreat

in 2017. Understanding how the pristine headwaters of the Snake River are transformed, degraded, and heated—due in significant part to point source pollution subject to NPDES regulation—over the course of its western journey through southern Idaho and along the Idaho/Oregon border crystalized for me the critical importance of regulatory tools that authorize administrative agencies to prevent unlawful discharges. While hiking along the Snake River in Hells Canyon, I was warned about the poor water quality in this stretch of the Snake River caused by upstream pollution discharges. For example, the Snake River through Hells Canyon fails to meet nutrient, temperature, and mercury water quality standards due to excess pollution. The hike was less enjoyable than it would have been if the Snake River were clean enough to meet the State’s CWA water quality standards.

26. I plan to visit the Snake River again this summer or early fall with other ICL staff to see Shoshone Falls (the “Niagara of the West”), the Snake River canyon, and Devil’s Corral—a pristine spring that flows into the Snake River above Shoshone Falls. Because public access to Devil’s Corral is limited via land, we hope to paddle kayaks or canoes up the Snake River to Devil’s Corral. I am concerned, however, that the high pollution levels in the Snake River make paddling unsafe, which is causing me to reconsider whether we can visit Devil’s Corral.

27. ICL is engaged in efforts to protect the pristine springs that flow through Devil's Corral, and is involved in a water right protest before the Idaho Department of Water Resources concerning Devil's Corral. ICL staff, including me, plan to visit Devil's Corral to further these efforts. Making on-the-ground observations of the natural resources ICL seeks to protect and advocate for is a critical component of my work, and whether or not we can visit this particular tributary on the Snake River will directly impact the organization's ability to represent the interests of its members. Therefore, not only am I harmed by poor water quality in the Snake River, but so too is ICL as an organization.

28. Restoring and maintaining water quality throughout the State of Idaho are critical to ICL's mission. Full civil and criminal enforcement authority, as called for in the CWA, are important to achieving ICL's goals. ICL devotes organizational resources, including staff time and funding, to investigating and pursuing CWA citizen suits against people who violate the CWA by discharging pollutants without complying with an NPDES permit. Under the IPDES program approved by EPA, ICL will have to devote even more organizational resources to investigating and pursuing citizen suit enforcement due to the State's inability to fully pursue civil and criminal enforcement actions and due to lower deterrence under IPDES.

29. ICL and I are also harmed by EPA's approval of the IPDES program because it allows the Idaho State Department of Agriculture (ISDA) to run the confined animal feeding operation (CAFO) component of the program even though the State never sought such authorization through the means required by the CWA. CAFOs are common in Idaho, particularly in the middle Snake River region in southern Idaho. CAFOs are point sources subject to NPDES permitting, and CAFOs generate large quantities of nutrients and other pollutants that degrade water quality in the Snake River.

30. Without EPA approval for ISDA to run the CAFO NPDES program, as required by the CWA, there are no assurances that ISDA has the authority or resources to properly administer the CAFO program. As a result, the Snake River and other water bodies ICL members, including me, depend on, enjoy, and hope to clean up are at risk of becoming more polluted, failing to meet water quality standards, and otherwise failing to meet the goals of the CWA. Additionally, because EPA has not determined whether ISDA's CAFO program is adequate to regulate CAFOs as required by the CWA, ICL may have to devote additional funding and other resources, through additional investigations, citizen suit enforcement actions, and advocacy to address CAFO pollution.

31. A favorable decision in this case will redress my injuries and ICL's direct injuries. If the Court reverses EPA's approval of the IPDES program and

remands to correct the errors ICL identified, EPA and Idaho can ensure the IPDES program gives the State adequate authority under the CWA to pursue civil and criminal enforcement. This will restore the important deterrent effect of full CWA civil and criminal enforcement and will give Idaho the full suite of enforcement tools under the CWA to prosecute violations. A favorable decision will also allow Idaho to seek proper delegation of the CAFO program, thereby ensuring an adequate program that satisfies the CWA. Each of these changes will result in fewer unpermitted pollution discharges in places I enjoy or wish to enjoy. These changes will also prevent ICL from diverting funds and other organizational resources away from other organizational priorities in order to address NPDES compliance.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 26<sup>th</sup> day of June, 2019, at Sandpoint, Idaho.

/s/ Matthew Nykiel  
Matthew Nykiel