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

February 7, 2014

The Honorable Paul E. Shepherd
Idaho State Representative
Statehouse
VIA HAND DELIVERY

Re: HB 473 - 14-47101

Dear Representative Shepherd:

This letter responds to your request for legal analysis of HB 473 which for purposes of analysis can be summarized as attempting to nullify the regulatory authority of the United States Environmental Protection Agency (EPA) in the State of Idaho.

Summary Analysis: (1) EPA is a validly created agency of the United States' Government. (2) The authority of EPA to promulgate regulations is established by congressional enactments in various federal statutes. (3) Those federal statutes have generally been found to be a valid exercise of the interstate commerce power granted to Congress by the U.S. Constitution. (4) The Supremacy Clause of the United States Constitution makes federal laws controlling in the States and, to the extent a State law conflicts with federal law, it is invalid. (5) The Tenth Amendment is not a substantive limitation upon the power of Congress to act within its authority.

Summary Conclusion: The proposed legislation HB 473 would, with almost certainty, be found unconstitutional as a violation of the Supremacy Clause of the United States Constitution.

Analysis:

HB 473 declares in summary, "that the regulation authority of the United States Environmental Protection Agency is ... invalid in the state of Idaho, shall not be recognized by this state, is specifically rejected by this state and shall be considered null and void and of no force and effect in this state."

This type of legislation - generally referred to as a "nullification bill" - has been introduced with respect to various issues in recent years in some state legislative bodies. The bills have no substantive effect and are generally considered unconstitutional. Attached is an analysis

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provided to State Representative Killen in 2011 on the general concept of state nullification of federal law by the Office of the Idaho Attorney General. I hope you will find this helpful.

The remainder of this opinion letter will address more specifically the issues raised by the proposed bill concerning the constitutionality of EPA authority.

1. EPA is a valid public agency of the United States.

There have been numerous arguments raised over time that EPA was "created by executive order" rather than Congress and thus is an invalid agency. These arguments misunderstand the manner in which EPA was created consistent with federal law. The EPA was created in 1970 by President Richard Nixon in a "plan of reorganization" authorized by United States Code Title 5 section 901. The Plan of reorganization was submitted to Congress for hearings and was approved by Joint resolution of both houses of Congress as required by the Reorganization Act then in effect. In 1984 in the wake of the U.S. Supreme Court decision in Immigration and Naturalization Service v. Chadha, 462 U.S. 219, 103 S.Ct. 2764 (1983), Congress reaffirmed and ratified all prior plans of reorganization and any actions taken under them. See Pub. L. 98-532, 98 Stat. 2705 (Oct. 19, 1984). Accordingly, the creation of was consistent with Federal law and EPA's existence has been ratified by Congress on two separate occasions.

2. EPA has been delegated authority to promulgate regulations by numerous acts of Congress.

EPA has been delegated legal authority to promulgate regulations and to enforce those regulations pursuant numerous federal laws: See *inter alia*, the Toxic Substance Control Act section 203, 15 U.S.C. § 2643; Clean Water Act section 101(d), 33 USC § 1251(d); Safe Drinking Water Act, 42 U.S.C. § 300g-1; Solid Waste Disposal Act section 2002, 42 U.S.C. § 6912; and the Clean Air Act, sections 108-113, 42 U.S.C. §§ 7408-7413. Congress may lawfully delegate to the President and the executive agencies the power to make rules and regulations, A.L.A. Schechter Poultry Corporation v. U.S., 295 U.S. 495, 55 S.Ct. 837 (1935). There is no known constitutional infirmity in any of the enactments granting EPA authority.

3. The Courts of the United States have found the various statutes granting EPA authority to be within the Constitutional authority of Congress.

In numerous judicial opinions the underlying statutory authorities upon which EPA acts have been found to be a proper exercise of federal authority. In general the United States Supreme Court has found "the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." See Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc., 452 U.S. 264, 101 S.Ct. 2352 (1981). The Sixth Circuit explained in United States v. Ashland Oil and Transp. Co., 504 F.2d 1317 (6th Cir.1974) that the Clean Water Act was a proper exercise of Congress's interstate commerce power. In so doing the court specifically addressed how the framers of the Constitution provided authority to Congress over water pollution even though they did not include specific language in the Constitution.

> Our forefathers in writing the Constitution could have had no concept of the water pollution problems of today. But they had a specific concept of the importance of interstate commerce and specifically gave Congress power to regulate it:
>
> The Congress shall have Power . . .
>
> To regulate Commerce . . . among the several States . . .. U.S. Const. art. I, § 8, cl. 3.
>
> Likewise, the authors of the Constitution provided Congress broad legislative authority to pass laws concerning future unknown problems which might affect the health and welfare of the nation:
>
> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. U.S. Const. art. I, § 1.
>
> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; . . .
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof. U.S. Const. art. I, § 8.
>
> We believe that the language of the Federal Water Pollution Control Act and its legislative history show that the United States Congress was convinced that uncontrolled pollution of the nation's waterways is a threat to the health and welfare of the country, as well as a threat to its interstate commerce.

Ashland Oil and Transp. Co., 504 F.2d at 1325-29. See also, National Ass'n of Home Builders v. U.S. E.P.A., 731 F. Supp.2d 50 (D. D.C. 2010) (regulatory jurisdiction under the Clean Water Act derives from Congress's commerce power); U.S. v. Hubenka, 438 F.3d 1026 (10th Cir. 2006) (same).

Similar arguments about the Constitutional validity of various other environmental statutes implemented by EPA such as CERCLA and the Clean Air Act (CAA) have been found to lack merit. See Pennsylvania v. Union Gas, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1993) (CERCLA a proper exercise of Commerce power under the Constitution)(overruled on other grounds, Seminole Tribe v. Florida, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996); United States v. Olin Corporation, 107 F.3d 1506 (11th Cir. 1997) (same) Bolin v. Cessna Aircraft Company, 759 F. Supp. 692 (D. Kan. 1991) (same); U.S. v. Ho 311 F.3d 589, 594 (5th Cir. 2002) (CAA provisions relating to asbestos are within scope of Congress' Commerce Clause

authority); McCoy-Elkhorn Coal Corp. v. U.S. Environmental Protection Agency, 622, F.2d 260, (6th Cir. 1980)(provisions of CAA relating to use of low sulfur coal within power of Congress to regulate commerce); Allied Local and Regional Mfrs. Caucus v. U.S. E.P.A., 215 F.3d 61 (D.C. Cir. 2000) (provisions of CAA within commerce power of Congress); United States v. American Elec. Power Service Corp., 218 F. Supp.2d 931 (S.D. Ohio E. Div. 2002) (CAA within power of Congress to regulate commerce). The regulation of solid waste has been found to be so closely connected with interstate commerce that States are precluded from engaging in regulatory practices that discriminate against it. See e.g. Oregon Waste Systems, Inc. v. Department of Environmental Quality of State of Or., 511 U.S. 93, 114 S.Ct. 1345 (1994).

This is not to say that all regulations by EPA are Constitutional. Indeed there have been notable cases where specific regulations by EPA or the Army Corps of Engineers have been found to exceed the authority of Congress to regulate commerce. See for example, Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 121 S.Ct. 675 (2001). However, these cases have attacked specific regulations as applied to specific circumstances with pointed analysis about the impacts of such regulation upon interstate commerce. Moreover, these cases exemplify use of the judicial system to challenge federal law as contrasted with the nullification concept embraced by HB 473.

The purported intent of HB 473 is to invalidate all regulation by EPA and is thus overly broad. Attached is a letter prepared for Representative Pete Nielsen in 2011 by the Office of the Attorney General regarding the ways in which EPA regulations can be addressed by the State including a discussion of how the Court system can be used to challenge specific regulations.

4. The Supremacy Clause of the United States Constitution makes federal law applicable in Idaho.

Article VI § 2 of the United States Constitution referred to as the "Supremacy Clause" has been interpreted by the United States Supreme Court to provide that duly enacted federal laws preempt inconsistent state laws:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof ...shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

U.S. Const., Art. VI, § 2 (emphasis added).[1] This clause was intended to eliminate the right of any state to regulate operations of the federal government without the federal government's express consent. U. S. v. State Corp. Commission of Com. of Va., 345 F.Supp. 843 (E.D.Va.1972), aff'd 93 S.Ct. 912, 409 U.S. 1094, 34 L.Ed.2d 682. As stated by the Supreme Court during the early years of this nation: "it is of the very essence of supremacy to remove all

[1] The framers of Idaho's Constitution acknowledged the U.S. Constitution as the supreme law of the land in Article I, section 3 of the Idaho Constitution: " The State of Idaho is an inseparable part of the American Union, and Constitution of the United States is the supreme law of the Land."

obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments as to exempt its own operations from their own influence." McCulloch v. Maryland, 4 Wheat. 316, 427, 4 L.Ed. 579 (1819); See also, Public Utilities Commission of State of Cal. v. U. S., 78 S.Ct. 446, 355 U.S. 534, 2 L.Ed.2d 470 (1958). Accordingly, State law that conflicts with federal law is "without effect." Altria Group, Inc., v. Good, 555 U.S. 70, 129 S. Ct. 538, 543, 172 L.Ed.2d 398 (2008) and State officials who attempt to interfere with the legally enacted and valid laws of Congress are enjoined from doing so. See State of Arizona v. State of California, 283 U.S. 423, 51 S.Ct. 522 (1931) (State could not condition construction of a dam on navigable river by the Federal Government); Hunt v. United States, 278 U. S. 96, 49 S. Ct. 38, 73 L. Ed. 200 (1928) (State enjoined from interfering with federally authorized killing of deer in National Forest). As pointed out in the January 21, 2011 letter to Representative Killen (attached), the Supremacy Clause invalidates any state laws which would purport to nullify federal authority.

5. The Tenth Amendment does not limit Congress' power to regulate environmental matters.

The Tenth Amendment to the United States Constitution provides that

"[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

U.S. Const. Amend. X (emphasis added). The plain language of the Tenth Amendment makes clear that it is not a limitation upon the power of the Federal Government, but rather a reservation of powers in the States which are not expressly granted to the Federal Government or prohibited from the States. As accurately summarized by the United States' Supreme Court: "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." New York v. United States, 505 U.S. 144, 156, 112 S.Ct. 2408 (1992) (citations omitted). In U.S. v. Darby, Justice Stone characterized it as follows:

> The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

312 U.S. 100, 124, 61 S.Ct. 451, 462 (1941).

As noted above, the Courts have consistently held that the Commerce Clause gives Congress the power to regulate the environment. Accordingly, the Tenth Amendment provides no basis upon which to claim federal law null and void.

CONCLUSION:

While specific challenges can be brought in the courts of the United States to challenge aspects of EPA regulations, broad attempts to nullify all of EPA's regulatory authority would be invalid under the Supremacy Clause of the United States Constitution.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

BK/tjn

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

January 21, 2011

The Honorable William Killen
Idaho State Representative
VIA HAND DELIVERY

Re: State Nullification of Federal Law – Our File No. 11-35557

Dear Representative Killen:

This letter is in response to your recent inquiry regarding the theory of State nullification of federal law. Nullification generally is considered to take one of two forms. The first is where a State acts within the system, whether through a court challenge, or through concentrated series of efforts designed to repeal or amend offending legislative provisions. The second form is most simply described as outright defiance of the law; in other words, a State simply would ignore a federal provision, or a decision of a federal court.

Nullification, If Meant As A Term Through Which Offending Legislation or Judicial Decisions Are Overturned By Working Within The Existent Constitutional And Legal Framework, Is Permissible And Encouraged By Our System of Checks and Balances.

Idaho has historically participated in a number of these efforts including the current challenge to the Healthcare Reform Law, as well as various resolutions addressed to the Federal Government with respect to the state sovereignty and specific federal legislative enactments. (*See HCR 64, 44,and SJM 106* (2010)). These examples reflect how a State can work within the constitutionally designed system to overturn or amend a provision that offends a State's notion of sovereignty and federal overreaching.

Nullification As Defiance Of Federal Law Or Enactment Is Inconsistent With A State Officer's Duty To Act In Conformity With The Federal And State Constitutions.

Nullification is generally the argument that States have the ability to determine the constitutionality of a federal enactment, and if a State finds the enactment

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unconstitutional it can ignore or otherwise refuse to adhere to the federal requirements. The basis for this argument is that the States came together to create the federal government, and therefore the States retain the ultimate discretion as to the reach of federal authority.[1] The adoption of these Resolutions in some respects represents the apex of the ongoing argument between Alexander Hamilton and Thomas Jefferson over the scope and influence of the fledgling federal government.[2]

These arguments arose cyclically throughout the Nation's early history, reaching a virtual breaking point in 1828-1833 in what was referred to as the "Nullification Crisis." President Andrew Jackson expressly rejected the theory of nullification as incompatible with the existence of the Union and destructive to the very purpose of the the Constitution.[3] Southern State nullification advocates nevertheless continued to press their cause, and their arguments formed a central justification for the Civil War.

The Legal Difficulty Of Idaho's Nullification Claim.

As an historical matter, many of the original States came into existence first as English colonies and then as sovereign parties to the Articles of Confederation. Idaho's road to state status followed a much different path.

Virtually all land within Idaho is the result of the United States making a claim to the land, which was disputed by the British until the adoption of several treaties leading ultimately to the creation of the Oregon Territory.[4] Congress then created the Territory of Idaho and, ultimately, the State of Idaho. Once Idaho was admitted as a State[5] it acquired all of the privileges and immunities held by each of the other States, but as reflected above, the right of nullification, the right of secession, and the compact theory had all been rejected by the United States by the time of statehood.

The framers of the Idaho Constitution were acutely aware of that fact. Article I, § 3 of our Constitution states:

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[1] *See Kentucky Resolutions,* Thomas Jefferson, (November 16, 1798 & December 3, 1799) and *Virginia Resolution*, James Madison, (December 24, 1709).

[2] Hamilton actually suggested sending the Army into Virginia as a pretext—thus even the earliest arguments for nullification were viewed as latent arguments for civil war. *See also* Jonathon Elliot, *"Answers of the Several State Legislatures: "State of New Hampshire" Debates in the Several State Conventions on the Adoption of the Federal Constitution,* pp. 538-539. (1907).

[3] Jackson also expressly rejected the right to secede, noting that the Constitution forms a government, not a league of States. *President Jackson's Proclamation Regarding Nullification*, December 10, 1832.

[4] Joint British and United States Claim was provided for in *Treaty of 1818. The Oregon Treaty* (1846) established the boundary between United States claims and British Claims at the 49th Parallel. The territory of Oregon was created on August 14, 1848. The territory of Idaho was created on March 4, 1863 (12 Stat. L. 808, ch. 117).

[5] Reviewing the Idaho Admission Bill, §19 specifically applies the laws of the United States. *See* 26 Stat.L. 215, ch. 656; am 1998, P.L. 105-296.

> **State inseparable part of Union.**—The State of Idaho is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land.

The framers therefore expressly recognized Idaho's status as a part of the United States and the supremacy of the United States Constitution. Consistent with this recognition, every legislator is required to affirm "that I will support the constitution of the United States and the constitution of the State of Idaho."[6] Legislators and other state officials, in other words, pledge to carry out their duties in a fashion that directly conflicts with the second form of the nullification theory.

The alpha and omega of the nullification theory, in sum, rest upon rejecting the principle that the United States Constitution as the supreme law of the land.[7] The theory runs contrary to the very purpose of the federal constitution and Idaho's express constitutional acknowledgment in Article I, § 3 of that supremacy.

Courts Have Expressly Rejected Nullification

Our history is replete with federal enactments that were unpopular in one State or another, or even within regions. Taking the logic of the nullification theory to its natural extension, federal law would become a patchwork of regulation depending upon which States chose to comply. It is hardly surprising, given this specter, that no court has ever upheld a State effort to nullify a federal law.

The most instructive case on nullification is likely *Cooper v. Aaron*[8] This case arose out of a belief by the State of Arkansas that it was not bound to follow the Supreme Court's decision in *Brown v. Board of Education*.[9] Arkansas, through its governor and legislature, claimed that there is no duty on the part of state official to obey federal court orders based upon the Court's interpretation of the federal constitution.[10] The governor and the legislature, in practical effect, were advancing the theory that the States were the ultimate arbiters of the constitutionality of federal enactments and decisions.

The Court expressly rejected this argument stating: "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."[11] The Court went further: A governor who asserts power to nullify a federal court manifests that the fiat of a state governor, and not the Constitution of the United States, would be the supreme law of the land.

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[6] Idaho Constitution, Article III, § 25 (Oath of Office). *See also* Idaho Code § 59-401.
[7] Article 6 § 2, U.S. Constitution.
[8] 358 U.S. 1, 78 S.Ct. 1401 (1958).
[9] 343 U.S. 483, 74 SCt. 686 (1954).
[10] 358 U.S. at 4, 78 S.Ct. at 1403.
[11] *Id.* at 18, 78 S.Ct. at 1410.

Conclusion

There is no right to pick and choose which federal laws a State will follow. Aside from ignoring the Supremacy Clause in Article VI, Clause 2 of the United States Constitution, that contention cannot be reconciled with Article I, § 3 of the Idaho Constitution or the oath of office prescribed in Article III, § 25. I hope this brief analysis responds adequately to your inquiry.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

BK/tjn

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

January 27, 2011

Sent Via Electronic Mail
Representative Pete Nielsen
4303 SW Easy Street
Mountain Home, ID 83647
Electronic Mail: pnielsen@house.idaho.gov

Dear Representative Nielsen:

In your request received on January 24, 2011, you asked whether there are ways for the state of Idaho "to have supremacy over EPA." From our follow-up conversation, it appears you are seeking guidance regarding methods to ensure that Idaho, rather than the federal Environmental Protection Agency (EPA), is responsible for environmental regulation in the state. You also inquired if there were mechanisms by which Idaho could challenge EPA's regulation in Idaho and if so, an assessment of the likelihood of success and the costs of such challenges. Finally, you asked whether the theory of nullification can be used to support Idaho's exercise of primary authority over environmental issues.

The short answer to your question is that under the Supremacy Clause of the United States Constitution the federal environmental laws enforced by EPA are applicable to the State of Idaho and its citizens. As discussed in a prior opinion from the Idaho Attorney General, the nullification theory is contrary to both the state and federal constitutions, has never been upheld by any court, and would not assist Idaho in its efforts to have primacy over environmental issues. *See* attached opinion.

The majority of federal environmental statutes administered by EPA,[1] however, provide states with the opportunity to assume from EPA primary authority over regulatory programs. Taking advantage of this opportunity provides Idaho with the best and most straight-forward method of exercising control over how these federal environmental statutes will be applied within the state. A second avenue to address objections to EPA regulation is a case by case challenge in federal court to EPA actions or regulations.

[1] This letter does not address environmental statutes that are administered by other federal agencies such as the Endangered Species Act (ESA), Federal Land Policy and Management Act (FLPMA), the Surface Mining Control and Reclamation Act (SMCRA) or the National Environmental Policy Act (NEPA) which are applicable to all federal agencies and lands in the State of Idaho.

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Federal Environmental Statutes Provide Authority for States to Act in Lieu of EPA

Federal environmental statutes authorize EPA to administer various regulatory programs, including programs relating to air quality, water quality, hazardous wastes and public drinking water. The majority of these federal environmental statutes provide states the opportunity to assume primary jurisdiction to implement those environmental programs within the state in lieu of EPA. *See* e.g., Clean Water Act, 33 USC §1342 (b); Clean Air Act, 42 USC § 7411; Solid Waste Disposal Act, 42 USC § 6926; Safe Drinking Water Act, 42 USC § 1413. In order to assume primacy for environmental regulation, states must meet certain minimum requirements, set forth in the federal statutes, which are generally designed to assure that States regulate the area in a manner that is minimally equivalent to EPA.

Idaho has assumed primacy for the majority of the EPA administered federal environmental programs, including those authorized by the Clean Air Act, Solid Waste Disposal Act, and the Safe Drinking Water Act. Idaho has not yet attempted to assume primacy for the NPDES permitting program under the Clean Water Act, and therefore, EPA rather than Idaho issues permits for discharges to surface waters in the state.[2] Assuming primacy allows Idaho the greatest opportunity to exercise control over environmental regulation and decision making.

Idaho can challenge various aspects of EPA regulation in Idaho.

In addition to provisions authorizing state primacy, the majority of federal environmental statutes, the federal Administrative Procedures Act and other federal laws, allow states under certain circumstances to timely challenge specific EPA actions or regulations that appear to be contrary to applicable law. Challenging EPA through administrative and judicial proceedings provides Idaho with an additional avenue to influence environmental decision-making in the state. The chance of success and the costs of challenging EPA in this type of litigation depend, of course, upon the particular facts and law involved in the challenge. No accurate assessment of the costs or probability of success can be provided at this time.

This letter is provided to assist you. The response is an informal and unofficial expression of the views of this Office based upon the research of the author.

Sincerely,

Douglas M. Conde
Deputy Attorney General

[2] The Toxic Substance Control Act (TSCA) does not allow for primacy by a state. The Comprehensive Environmental Response Compensation and Liability Act (CERCLA) does not allow for states to assume primacy over implementation of CERCLA, however, EPA has discretion to defer a CERCLA clean-up site to a State if it determines that a state-lead cleanup will be adequate. CERCLA also provides for states to enter cooperative agreements and to participate in the decision-making process of CERCLA.