

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In re:)
)
City of Sandpoint)
Wastewater Treatment Plant)
Permit No.: ID-0020842)

PETITION FOR REVIEW

Comes now the Idaho Conservation League and petitions the Environmental Appeals Board to review the Environmental Protection Agency's issuance of an NPDES permit for the City of Sandpoint Wastewater Treatment Plant.

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INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), the Idaho Conservation League (“ICL”) petitions for review of certain conditions of NPDES Permit No. ID0020842 (“Permit”), which was issued to the City of Sandpoint Wastewater Treatment Plant (“Permittee”) on June 8, 2018, by the United States Environmental Protection Agency, Region 10 (“Region”). The permit at issue in this proceeding authorizes the Permittee to discharge wastewater to the Pend Oreille River.

ICL contends that certain conditions are based on clearly erroneous findings of fact and conclusion of law and are counter to EPA permitting regulations and obligations under the Clean Water Act. Specifically, ICL challenges the following permit conditions:

- (1) The phosphorus effluent limitations, as specified at page 5, Table 1 NPDES Permit No. ID0020842.

Petitioner, the Idaho Conservation League, is a 501(c)3 non-profit based in Boise, Idaho, with field offices in Sandpoint, ID and Ketchum, ID. ICL represents members from all across Idaho. Many of our members live, work and/or recreate in areas impacted by the contested NPDES permit. Our members rely on the Pend Oreille River for clean water for industry, recreation and irrigation and are deeply concerned about matters that impact the health of the Pend Oreille River.

ICL is represented by in-house legal staff in this matter before the Environmental Appeals Board (“Board”).

THRESHOLD PROCEDURAL REQUIREMENTS

ICL satisfies the threshold requirements for filing a petition for review under 40 C.F.R. part 124, to wit:

1. ICL has standing to petition for review of the permit decision because it participated in the public comment period on the permit. *See* 40 C.F.R. § 124.19(a). A copy of these comments is attached to this petition. ICL Attachment 1 at 2-4.

2. The issues raised by ICL in its petition were raised during the public comment period and therefore were preserved for review. ICL Attachment 2 at 2-3.

3. The Region served ICL notice of its reissuance of the Permit on June 13, 2018. ICL Attachment 3. According to 40 C.F.R. § 124.19(a)(3), June 13, 2018 is the date notice was served for purposes of the filing deadline for ICL's petition for review.

FACTUAL AND STATUTORY BACKGROUND

The City of Sandpoint owns, operates, and maintains a wastewater treatment plant (WWTP) located in Sandpoint, Idaho. The secondary treatment component of this facility discharges treated municipal wastewater into the Pend Oreille River.

On November 30, 2001, the Region issued the Permittee an NPDES permit, which became effective on January 5, 2002 and expired on January 5, 2007. The Permittee submitted an NPDES application for permit reissuance on September 25, 2006. After determining that this application was timely and complete, the Region administratively extended the NPDES permit under which the Permittee operated between 2002 and 2017 – nearly 15 years.

On October 31, 2014, the Region issued a draft NPDES permit for public comment, which would replace the Permittee's 2001 NPDES permit. ICL submitted comments on the draft

permit, which are included as ICL Attachment 4 in this petition. Following the public comment period, the Region issued a revised draft NPDES permit for public comment on April 19, 2016. Likewise, ICL submitted comments on the revised draft permit, which are included as ICL Attachment 5 in this petition.

On September 5, 2017, the Region reissued NPDES Permit No. ID0020842. The permit authorized the Permittee to discharge treated wastewater to the Pend Oreille River, a regulated water of the United States, subject to certain effluent limits and conditions. On October 6, 2017, ICL filed a petition with the Board for review of Permit No. ID0020842, pursuant to EPA permitting regulations at 40 C.F.R. § 124.19(a). ICL Attachment 6. In its petition, ICL challenged the Region's decision to establish phosphorus effluent limits for the Permittee's discharges based on a water quality standard for mixing zones that had not been approved by the EPA.

On October 26, 2017, the Region sought and subsequently received an extension of time to file a response to ICL's petition for review. *See* Order Granting Motion for Extension of Time to File Response to Petition for Review (EAB Oct. 30, 2017) (extending response deadline to January 16, 2018). On January 9, 2018, the Region filed a notice with the Board withdrawing the disputed phosphorus limits pursuant to 40 C.F.R. § 124.19(j). The Region stated that it failed to consider comments ICL had previously submitted on the mixing zone issue but that it intended to remedy this error. The Region further stated that it would then clarify the basis for establishing a mixing zone, if appropriate, modify, if necessary, the phosphorus limits, and prepare new draft permit conditions to replace the withdrawn provisions. The Region filed a companion motion on January 9, 2017, to dismiss ICL's petition for review of NPDES Permit No. ID0020842. Following a phone conversation between the Region and ICL, ICL confirmed that it would not

object to the Board granting a motion to dismiss. On January 11, 2018, the Board dismissed with prejudice ICL's appeal of the phosphorus effluent limits. *See Order Dismissing Petition for Review as Moot* (EAB Jan. 11, 2018).

On February 23, 2018, the Region issued a new draft permit, which re-proposed the same effluent limits for total phosphorus as the Region had originally proposed in the draft permit issued on April 19, 2016. In the February 2018 Fact Sheet associated with the Region's new draft permit, the Region argued that Idaho's EPA-approved mixing zone rule granted Idaho DEQ the discretion to disregard the water quality standard restricting mixing zones, in flowing waters, to no more than 25% of the volume of the stream flow. *See ICL Attachment 7* at 3.

ICL submitted comments on the Region's re-proposed effluent limits for total phosphorus. ICL Attachment 1. In its comments, ICL notified the Region that the Region's determination to re-propose effluent limits for total phosphorus based on mixing zones that utilized 47% and 60% of the Pend Oreille River's stream flow volume violated the Clean Water Act, 33 U.S.C. §1251 et seq. *Id* at 2-4. Accordingly, ICL requested the Region re-calculate the total phosphorus effluent limits and revise the Permit according to the State of Idaho's EPA-approved mixing zone rule, which states "[t]he mixing zone is not to include more than twenty-five percent (25%) of the volume of the stream flow." IDAPA 58.01.02.060.e.iv. (2014). The Region declined ICL's request, and on June 8, 2018, the Region re-issued the Permit, including effluent limits for total phosphorus based on mixing zones that exceed 25% of the stream flow volume of the Pend Oreille River. *See ICL Attachment 8*

ISSUE PRESENTED FOR REVIEW

Did the Region violate the Clean Water Act and Administrative Procedure Act by issuing NPDES Permit No. ID0020842, which authorized effluent limits for total phosphorus based on mixing zones greater than 25% of the stream flow volume of the Pend Oreille River?

ARGUMENT

The Region unlawfully re-issued the Permit because the Region authorized the permitted effluent limits for total phosphorus based on mixing zones that exceed the volume restrictions set in the State of Idaho's Water Quality Standards.

The Clean Water Act authorizes the Region to issue a permit for the discharge of pollutants, so long as such a permit meets all the applicable requirements under 33 U.S.C. §§ 1311, 1312, 1316, 1317, 1318, and 1343. *See* 33 U.S.C. § 1342(a)(1).¹ One such requirement, under section 301 of the Clean Water Act, mandates that every permit contain discharge limitations sufficient to assure that the receiving waterway satisfies water quality standards. 33 U.S.C. § 1311(b)(1)(C).

In this case, the Region re-issued a pollutant discharge permit that does not satisfy the State of Idaho's Water Quality Standards because the Region misapplied Idaho's EPA-approved mixing zone rule.² To determine whether the Region violated section 301 of the Clean Water Act by misapplying Idaho's EPA-approved mixing zone rule, the Board must start first with the regulatory text to see if the meaning of the EPA-approved policy is clear on its face. *See In re Howmet Corp.*, 13 E.A.D. 272 (EAB 2007).

¹ The Region re-issued the Permit prior to July 1, 2018, when the EPA granted the State of Idaho primacy over permitting discharges for publicly operated treatment works under the Clean Water Act.

² In 2015 the State of Idaho submitted a new Mixing Zone Policy for approval from the EPA. At the time of the

² In 2015 the State of Idaho submitted a new Mixing Zone Policy for approval from the EPA. At the time of the submission of this petition, the EPA has not approved Idaho's new Mixing Zone Policy. *See* IDAPA 58.01.02.060. (2016).

Plain Language of Idaho's Mixing Zone Rule

The plain language of Idaho's EPA-approved mixing zone rule for flowing waters restricts the Idaho Department of Environmental Quality ("Idaho DEQ") from establishing mixing zones that include more than 25% of the volume of the stream flow. In defining a mixing zone, the Idaho Water Quality Standards instruct Idaho DEQ to consider a list of principles. One of the mixing zone principles for flowing waters states:

"The mixing zone is not to include more than twenty-five percent (25%) of the volume of the stream flow."

IDAPA 58.01.02.060.01.e.iv. (2014).

The plain meaning of the regulatory text is clear and unambiguous, in that the regulation creates a mandatory obligation that mixing zones in Idaho are not to include more than 25% of the volume of the stream flow. Accordingly, the Region's re-issuance of the Permit and the effluent limits for total phosphorus based on mixing zones above 25% of the stream flow volume of the Pend Oreille River violated this provision of Idaho's Water Quality Standards.

I. Plain Language of the Text, as informed by Idaho's New—But Unapproved—Mixing Zone Rule

In the Region's June 2018 Response to Comments, the Region claimed that Idaho's EPA-approved mixing zone rule created a mechanism whereby Idaho DEQ could authorize a larger mixing zone if such a larger mixing zone would protect the waterbody's beneficial uses. *See* ICL Attachment 2 at 3. However, the text of Idaho's EPA-approved mixing zone rule simply does not support the Region's claim. If Idaho's Water Quality Standards created such a procedural mechanism, the text of the mixing zone regulation would have plainly stated the procedure. Notably, the text of the new mixing zone rule the State of Idaho submitted to EPA for approval

in 2015 does clearly grant Idaho DEQ discretionary authority to authorize mixing zones larger than 25% and sets out a procedure for doing this, but EPA has not yet approved the new rule. As such, Idaho's mixing zone rule published in the 2014 Idaho Administrative Code controls for the purposes of permitting the Sandpoint WWTP.

The text of Idaho's new mixing zone rule clearly grants Idaho DEQ discretion authorize mixing zones larger than 25% of the volume of stream flow and creates a procedural framework, outlining how Idaho DEQ may appropriately implement this discretionary authority:

“The Department may authorize a mixing zone that varies from the limits in Subsection 060.01.h if it is established that:...

- ii. A larger mixing zone is needed by the discharger and does not cause an unreasonable interference with, or danger to, beneficial uses as described in Subsection 060.01.d., and the mixing zone meets the other requirements set forth in Section 060. The discharger shall provide to the Department an analysis that demonstrates a larger mixing zone is needed given siting, technological, and managerial options.”

IDAPA 58.01.02.060.01.i.ii (2016).

Idaho DEQ's discretionary authority to authorize mixing zones above 25% of the volume of stream flow, as it is stated in Idaho's new mixing zone rule, is markedly absent from Idaho's EPA-approved mixing zone rule. Consulting a dictionary further clarifies that Idaho's EPA-approved mixing zone rule limits mixing zone size to no more than 25% of the volume of the stream flow.

II. *Plain Language of the Text, as informed by the Oxford English Dictionary*

The definitional meanings of the terms used in Idaho’s EPA-approved mixing zone policy substantiate the regulatory interpretation that Idaho DEQ must limit mixing zones to no more than 25% of the volume of the stream flow. Subsection 01. of Idaho’s EPA-approved mixing zone rules states, “In defining a mixing zone, the Department will consider the following principles...” IDAPA 58.01.02.060.01 (2014). In legal documents, use of the modal verb, “will,” creates a promise or contractual obligation. *See* Bryan A. Garner, *A Dictionary of Modern Legal Usage* 941-942 (2d ed., Oxford U. Press 1995). The Oxford English Dictionary (“OED”) defines the verb, “consider,” as “to think, reflect, take note.” Oxford English Dictionary (3d ed., Oxford U. Press 2018). And, the OED defines the noun, “principle,” as “a fundamental source from which something proceeds; a primary element, force, or law which produces or determines particular results.” *Id.*

Taken together, the definitions of the regulatory text in Idaho’s EPA-approved mixing zone rule legally require Idaho DEQ to take note of and apply the fundamental laws of defining mixing zones provided later in the policy. Evaluating the definitions of the terms in Idaho’s EPA-approved mixing zone rule in more commonplace circumstances is instructive too. For example, a state’s driving regulations might say, “In operating an automobile, all operators will consider the following principles: 1) No driver is to operate a vehicle more than 25 miles an hour in a school zone, when school is in session...” In this example, the words “will,” “consider,” and “principle” function just as they do in Idaho’s EPA-approved mixing zone rule, by legally obligating vehicle operators to take notice of a fundamental rule of operating a vehicle *and* to apply the rule. The Region’s and Idaho DEQ’s suggestions that a regulation requiring an agency or individual to take notice of a fundamental rule without necessarily applying that rule are

peculiar interpretations of the regulatory text and contrary to the plain meaning of Idaho's mixing zone rule. Rather, the plain meaning of Idaho's EPA-approved mixing zone rule requires Idaho DEQ to take note of and apply the mixing zone principle that the size of a mixing zone is not to include more than 25% of the volume of the stream flow.

CONCLUSION

Because Idaho's EPA-approved mixing zone rule requires Idaho DEQ to limit the size of mixing zones to no more than 25% of the volume of the stream flow ICL requests the Board to find that the Region's reissuance of the Permit violated the Clean Water Act, 33 U.S.C. § 1311(b)(1)(C), for basing the effluent limits for total phosphorus on mixing zones, which exceed the 25% of the stream flow volume of the Pend Oreille River. In addition, ICL requests the Board to find that the Region's reissuance of the effluent limits for total phosphorus in this case was an abuse of discretion, not in accordance with the law, and unsupported by substantial evidence, in violation of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A), (E).

Accordingly, we request the Board direct the Region to reissue the Permit in accordance with the State of Idaho's Water Quality Standards and the Clean Water Act. Contrary to 40 C.F.R. § 124.16, we further request that the Board not stay the total phosphorus effluent limits, pending the Region's reissuance of the Permit. Directing the Region to reissue the Permit according to the rule restricting mixing zones to 25% of the volume of the stream flow would cause the effluent limits for total phosphorus to become more stringent. As such, allowing the effluent limits for total phosphorus, as currently drafted, to go into effect would better ensure the protection of water quality standards in the Pend Oreille River than staying the limits.

ICL requests:

1. The Board find that the Region's reissuance of NPDES Permit No. ID0020842 violated the Clean Water Act, 33 U.S.C. § 1311(b)(1)(C), by basing effluent limits for total phosphorus on mixing zones, which exceed the regulatory limits set by the State of Idaho's Water Quality Standards;
2. The Board find that the Region's reissuance of the effluent limits for total phosphorus in this case was an abuse of discretion, not in accordance with the law, and unsupported by substantial evidence, in violation of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A), (E);
3. The Board direct the Region to reissue NPDES Permit No. ID0020842 in accordance with the State of Idaho's Water Quality Standards and the Clean Water Act.
4. The Board not stay the total phosphorus effluent limits pending the Region's reissuance of NPDES Permit No. ID0020842;
5. The Board grant ICL the opportunity for oral argument to explain the Petition for Review and the underlying concerns articulated therein; and
6. The Board provide the Parties to this Appeal an opportunity to further brief the interpretation of the regulatory text at issue, should the Board find the regulatory text to be ambiguous.



Matthew Nykiel
Conservation Associate
Idaho Conservation League
PO Box 2308
Sandpoint, ID 83864
Tel: (208) 265-9565
Fax: (208) 265-9650
Email:
mnykiel@idahoconservation.org

Attorney for Appellant

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

This petition for review complies with the requirement that petitions for review not exceed 14,000 words.

This petition for review, excluding attachments, is approximately 2,759 words in length.