IN RE CITY OF SANDPOINT WASTEWATER TREATMENT PLANT

NPDES Appeal No. 18-01

ORDER DENYING REVIEW

Decided June 13, 2019

Syllabus

The Idaho Conservation League ("League") has petitioned for review of the effluent discharge limits in a National Pollution Discharge Elimination System ("NPDES") permit issued by the U.S. Environmental Protection Agency, Region 10, to the City of Sandpoint, Idaho, for Sandpoint's wastewater treatment facility. In its petition, the League objects to the size of the mixing zones used to set the effluent limits for phosphorus discharges in the City of Sandpoint's permit. A mixing zone is a limited area or volume of water surrounding the pollutant discharge point in which water quality criteria do not apply. Water quality criteria must be met outside a mixing zone and the mixing zone must maintain the designated use of the waterbody. The mixing zones for the Sandpoint facility's phosphorus discharge were authorized by the Idaho Department of Environmental Quality ("Idaho DEQ") and included in its Clean Water Act certification of the permit.

The League argues that the mixing zones are too large, violating what it views as plain language in an Idaho regulation specifying a numerical limitation on mixing zone size. Idaho DEQ has long interpreted this regulation as giving it flexibility in choosing the size of mixing zones. The Region argues that it did not clearly err in accepting Idaho DEQ's longstanding interpretation and relying on Idaho DEQ's authorized mixing zones in establishing effluent discharge limits for the City of Sandpoint permit.

Held: The Board denies the League's petition for review. We generally give substantial deference to a state's interpretations of its own laws. Accordingly, a challenger to a Region's acceptance of a state interpretation of its own regulation would have to provide a "compelling reason" why the Region should have rejected that interpretation. The League has not offered a compelling reason demonstrating that the Region clearly erred in accepting Idaho DEQ's interpretation of the EPA-approved state mixing zone regulation in issuing the City of Sandpoint's NPDES permit.

Here, the meaning of the pertinent regulation is ambiguous, not plain. The regulation requires Idaho DEQ to establish mixing zones by "consider[ing]" various rule-

like "principles." However, the regulation does not make clear how a discretionary decisionmaking command ("consider") is to be harmonized with the nature of the listed principles. Thus, we reject the League's contention that Idaho DEQ violated the plain language of the regulation in authorizing the mixing zones used in setting phosphorus effluent limits for the City of Sandpoint's permit. Further, other than its argument concerning the plain language of the regulation, the League has not addressed Idaho DEQ's overall interpretation of the regulation, the longstanding nature of Idaho DEQ's interpretation, or the Region's acknowledgement of that interpretation over twenty years ago. For all of these reasons, the petition is denied.

Before Environmental Appeals Judges Mary Kay Lynch, Kathie A. Stein, and Mary Beth Ward.

Opinion of the Board by Judge Stein:

I. *STATEMENT OF THE CASE*

The Idaho Conservation League ("League") has petitioned for review of the effluent discharge limits in a National Pollution Discharge Elimination System ("NPDES") permit issued by the U.S. Environmental Protection Agency, Region 10, to the City of Sandpoint, Idaho, for Sandpoint's wastewater treatment facility. In its petition, the League objects to the size of the mixing zones used to set the effluent limits for phosphorus discharges in the City of Sandpoint's permit. For the purposes of NPDES permitting, a mixing zone "is a limited area or volume of water where initial dilution of a discharge takes place and where certain numeric water quality criteria may be exceeded." Office of Water, U.S. EPA, *Water Quality Standards Handbook, Chapter 5: General Policies* § 5.1, at 1 (Sept. 2014), *available at* https://www.epa.gov/sites/production/files/2014-09/documents/handbook-chapter5.pdf. The U.S. Environmental Protection Agency has explained that the Clean Water Act "does not require that all [water quality] criteria be met at the exact point where pollutants are discharged into a receiving water prior to the mixing of such pollutants with the receiving water." *Id*. A mixing zone may be appropriate if "it is possible to expose aquatic organisms to a pollutant concentration above a criterion for a short duration within a limited, clearly defined area of a waterbody while still maintaining the designated use of the waterbody as a whole." *Id*. Where regulatory agencies establish a mixing zone defining the size of an area or volume of water in which an initial discharge may exceed certain numeric water quality criteria, these mixing zones are factored into the calculation of effluent discharge limits. *Id*. at 3.

The mixing zones for the Sandpoint facility's phosphorus discharge were authorized by the Idaho Department of Environmental Quality ("Idaho DEQ") and included in Idaho DEQ's Clean Water Act certification of the draft permit. The

League argues that the mixing zones are too large, violating plain language in an Idaho regulation specifying a numerical limitation on mixing zone size, and, thus, Region 10 clearly erred in using the mixing zones in establishing phosphorus discharge limits. In response, the Region contends that the text of the regulation in question is ambiguous and that it did not clearly err in accepting Idaho DEQ's longstanding interpretation of the rule as granting Idaho DEQ discretion in establishing the size of mixing zones. For the reasons below, we deny the League's petition for review.

II. *LEGAL FRAMEWORK*

A. *The Clean Water Act's NPDES Permitting Requirements*

In 1972, Congress enacted the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Clean Water Act ("CWA") § 101(a), 33 U.S.C. § 1251(a). To achieve this objective, the Act prohibits the discharge of pollutants into the waters of the United States, unless authorized by an NPDES or other Clean Water Act permit. *See* CWA §§ 301(a), 402, 404, 502(7), 33 U.S.C. §§ 1311(a), 1342, 1344, 1362(7).

Effluent limitations serve as the primary mechanism for imposing limits on the types and amounts of particular pollutants that a permitted entity may lawfully discharge. *See* CWA §§ 301(b), 401(a)(1)-(2), 33 U.S.C. §§ 1311(b), 1341(a)(1)-(2). The Clean Water Act provides for two different kinds of permit effluent limits: those based on the technology available to treat a pollutant and those necessary to protect the designated uses of the receiving waterbody. The first variety – a federal technology-based limit – reflects a specified level of pollutant-reducing technology required by the Clean Water Act for a given type of facility. *See* CWA § 301(b)(1)(A)-(B), 33 U.S.C. § 1311(b)(1)(A)-(B). The second type of effluent limit – a water quality-based effluent limit – is used to ensure that applicable state water quality criteria are met in circumstances where technology-based effluent standards do not achieve that objective. *See* CWA § 302(a), 33 U.S.C. § 1312(a). State water quality standards, including the criteria necessary to ensure the water quality standards are met, must be approved by EPA before they become effective. *See* CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.10-.12. By regulation, EPA has confirmed that states have the discretion to include in their water quality standards "policies generally affecting their application and implementation, such as mixing zones." 40 C.F.R. § 131.13.

To ensure that any needed water quality-based effluent limits are incorporated in permits, section 401(a)(1) bars EPA from issuing a permit until the state in which the facility is located either certifies that the permit complies with

the state's water quality standards or waives certification. *See* CWA § 401(a)(1)-(2), 33 U.S.C. § 1341(a)(1)-(2). Section 401 specifies that the certification "shall set forth any effluent limitations and other limitations * * * necessary to assure" compliance with state water quality standards, and such limitations "shall become a condition on any Federal license or permit." CWA § 401(d), 33 U.S.C. § 1341(d). Regulations establishing procedures for state certifications on draft permits are codified at 40 C.F.R. §§ 124.53-.55. *See In re City of Taunton Dep't of Pub. Works,* 17 E.A.D 105, 113-15 (EAB 2016), *aff'd*, 895 F.3d 120 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 1240 (Feb. 19, 2019) (containing a fuller explanation of NPDES permitting requirements).

B. *Idaho's State Water Quality Standards*

Idaho has established regulations governing water quality, and those regulations were approved by EPA in 1996. *See* Idaho Admin. Code r. 58.01.02 (2014); Letter from Philip G. Millam, Acting Dir., Office of Water, U.S. EPA Region 10, to Wallace Cory, Idaho DEQ, *EPA Approval/Disapproval Action on the Idaho 1994 Water Quality Standards and 1995 Revisions* (June 25, 1996) (A.R. 13) ("EPA Approval Letter").[1] Idaho's EPA-approved water quality criteria regulations authorize Idaho DEQ to evaluate the appropriateness of establishing mixing zones in evaluating discharges of wastewater. Idaho Admin. Code r. 58.01.02.060.01 (2014); *see id*. r. 58.01.02.060.001.61 (definition of mixing zone).[2] Additionally, the regulations contain several provisions addressing the size, configuration, and location of mixing zones. *See id*. r. 58.01.02.060.01.b, .c, .f.

Idaho's EPA-approved mixing zone regulation specifies that Idaho DEQ is required to "consider" various "principles" in establishing such zones, including

---

[1] EPA's 1996 letter approved all but one clause of the mixing zone regulation. *See* EPA Approval Letter at 4 & encl. § 5.a (disapproving Idaho Admin. Code r. 16.01.02.060.01.g). Idaho DEQ amended the disapproved subsection in 1998. *See* 97-8 Idaho Admin. Bull. 82-83 (Aug. 6, 1997) (temporary rule and proposed rule, Docket No. 16-0102-9701); 98-5 Idaho Admin. Bull 15 (May 6, 1998) (adoption of Docket No. 16-00102-9701 by Idaho legislature effective March 23, 1998).

[2] The mixing zone regulation is titled "Mixing Zone Policy." Idaho Admin. Code r. 58.01.02.060.01 (2014); *see id*. r. 58.01.02.060.001.61. To make clear that the Mixing Zone Policy is a binding regulation, we have referred to it throughout as the mixing zone regulation and not as a policy.

the principle that "[t]he mixing zone is not to include more than twenty-five percent (25%) of the volume of the stream flow." *Id*. r. 58.01.02.060.01.e.*iv* (2014).

In 2015, Idaho revised portions of its water quality regulations, including the section on mixing zones. After modification, the revised mixing zone regulation states that a "[m]ixing zone[] shall meet the * * * restriction[] * * * [that it] shall not include more than twenty-five percent (25%) of the low flow design discharge conditions * * *." Idaho Admin. Code r. 58.01.02.060.01.h.*i*(2) (2015).[3] Additionally, the revised regulation explicitly authorizes Idaho DEQ to vary from 25% flow limitation if "[a] larger mixing zone is needed by the discharger and does not cause an unreasonable interference with, or danger to, beneficial uses." *Id*. r. 58.01.01.060.01.i.*ii*. EPA, however, has not yet taken action on these revisions and so they do not govern this proceeding.

III. *FACTUAL HISTORY*

The City of Sandpoint owns and operates an NPDES-permitted wastewater treatment facility that discharges treated effluent into the Pend Oreille River in northern Idaho. The City applied for renewal of the NPDES permit in 2006. As part of its request for a renewed permit, the City sought approval for an increase in design flow from three to five million gallons per day. *See* Idaho DEQ, *Final § 401 Water Quality Certification* 3 (Feb. 3, 2017) (A.R. 9) ("Final § 401 Certification").

The administrative process for the City's permit renewal application has included three draft permits for public comment, two final permits, a partial withdrawal of one of the final permits, and one prior appeal to the Board. The following timeline lists the key dates and actions:

1) October 2014. The Region issued a draft permit and fact sheet for public comment.
2) April 2016. Given the volume and nature of comments, the Region issued a revised draft permit and fact sheet for comment. Attached to the Region's fact sheet was a draft section 401 state certification from Idaho DEQ.
3) September 2017. The Region issued the first final permit renewal.

---

[3] The EPA-approved mixing zone regulation and the revised mixing zone regulation are cited in this opinion to the 2014 and 2015 Idaho Administrative Codes, respectively. All other citations to the Idaho Administrative Code are to the current (2019) version.

4) October 2017. The League filed a petition for review of the September 2017 permit with the Environmental Appeals Board. That petition challenged the Region's reliance on Idaho DEQ's mixing zones in establishing phosphorus effluent limits.
5) January 2018. The Region withdrew the September 2017 permit's phosphorus effluent limits, and the Board dismissed the League's petition as moot.
6) February 2018. The Region issued a revised draft permit covering phosphorus effluent limits along with a fact sheet for public comment. Attached to the fact sheet was Idaho DEQ's final section 401 state certification.
7) June 2018. The Region issued a second final permit renewal. This permit replaced the phosphorus effluent limits withdrawn from the September 2017 permit.

Pertinent details relevant to the disputed phosphorus effluent limits and mixing zones are provided below.

The phosphorus mixing zones that are the subject of this appeal were first detailed in Idaho DEQ's February 2016 draft certification of the revised draft permit under section 401 of the Clean Water Act. *See* Idaho DEQ, *Draft § 401 Water Quality Certification* 9-10 (Feb. 23, 2016) (A.R. 8) ("Draft § 401 Certification"). In that document, Idaho DEQ authorized a mixing zone sized as 47% of the volume of the Pend Oreille River flow for the period of the year from June through September and a mixing zone sized as 60% of the volume of the flow for the remainder of the year. Draft § 401 Certification at 9 tbl.3 & app. C at 17. The Region relied on these mixing zone sizes in calculating phosphorus effluent limits in the Region's April 2016 revised draft permit. U.S. EPA, *Revised Fact Sheet: City of Sandpoint Wastewater Treatment Plant* app. E, at E-5 to -6 (Apr. 19, 2016) (A.R. 5) ("Fact Sheet for Revised 2016 Draft Permit"). The proposed phosphorus effluent limits in the draft permit varied seasonly. For discharges from June to September, the effluent limit was an average monthly limit of 61 pounds per day and an average weekly limit of 79 pounds per day. For discharges from October to May, the effluent limit was an average monthly limit of 96 pounds per day and an average weekly limit of 125 pounds per day. *Id*. at 11 tbl.2.

The selection of phosphorus effluent limits and mixing zones was a joint effort of Idaho DEQ and the Region. In participating in these efforts, the Region was exercising EPA's independent duty to ensure that the Sandpoint permit met

Idaho's water quality standards.[4] To establish effluent limits and mixing zones for phosphorus, Idaho DEQ and the Region modeled the impact of the Sandpoint facility's discharge on the Pend Oreille River, using two separate models. Draft § 401 Certification app. C, at 16, 20. The modeling results led Idaho DEQ to conclude that the proposed phosphorus effluent limits and mixing zones would ensure that phosphorus discharges would not degrade water quality. Draft § 401 Certification at 5, 9 & apps. B-D; *see* Idaho DEQ, *Response to Comments on City of Sandpoint Wastewater Treatment Plan § 401 Water Quality Certification* 7-8 (undated) (A.R. 11) ("RTC § 401 Certification"). Similarly, the Region found that the modeling using the proposed effluent limits showed that "the City of Sandpoint's discharge of phosphorus, combined with other discharges from other point sources to the Pend Oreille River * * *, would not cause violations of the State of Idaho's water quality criteria for [dissolved oxygen] or pH, and that periphyton accumulations and water column chlorophyll a concentrations are below nuisance thresholds." Fact Sheet for Revised 2016 Draft Permit app. E, at E-8; *see also* U.S. EPA, *Fact Sheet for Reproposal of Total Phosphorus Limits: City of Sandpoint Wastewater Treatment Plant* 9 (Feb. 23, 2018) (A.R. 83) ("Fact Sheet for 2018 Draft Permit") (noting that the modeling shows that "the mixing zones for [total phosphorus] which were authorized by [Idaho] DEQ will not cause unreasonable interference with the beneficial uses of the Pend Oreille River").

In comments on the 2016 revised draft permit, the League objected to the size of the phosphorus mixing zones authorized by Idaho DEQ's certification of the draft permit and used by the Region in setting the phosphorus effluent limits. Letter from Justin Hayes, Program Dir., Idaho Conservation League, to Brian Nickel, U.S. EPA Region 10, and June Berquist, Idaho DEQ at 2 (June 29, 2016) (A.R. 6). One of its objections to the mixing zones was that the Idaho DEQ had relied on the 2015 revisions to Idaho's water quality standard regulations in setting the size of the mixing zones even though those revised regulations had not been approved by EPA. *Id*. at 1 n.1.

Region 10 issued its first final permit renewal in September 2017. In issuing this final permit, the Region responded to all the League's comments respecting the

---

[4] *See* CWA § 301(b)(1)(C), 33 U.S.C. 1311(B)(1)(C); 40 C.F.R. § 122.4(d); *In re Teck Cominco Alaska Inc.*, 11 E.A.D. 457, 493 (EAB 2004) (remanding a NPDES permit to Region due to Region's inconsistent explanations on why the permit's conditions complied with Alaska's water quality standards). The Region's independent evaluation is discussed in detail in the appendices to the 2016 Fact Sheet. *See* Fact Sheet for Revised 2016 Draft Permit apps. C, at C-2 to -3, D, at D-3 to -5, E & F.

phosphorus mixing zones except for the League's comment questioning the legality of Idaho DEQ relying on the unapproved 2015 mixing zone regulation in establishing those zones. *See* U.S. EPA Region 10, *Response to Comments on the Draft NPDES Permits for the City of Sandpoint* 7-8 (Sept. 2017) (A.R. 7).

The League petitioned the Board for review of the phosphorus effluent limits in the September 2017 final permit, raising as its only issue that Idaho DEQ relied on the unapproved 2015 revision to the mixing zone regulation in certifying mixing zones for phosphorus discharges that exceeded 25% by volume of the Pend Oreille River flow. Idaho Conservation League Petition for Review, NPDES Appeal No. 17-06, at 6 (Oct. 6, 2017). Without explaining its reasoning, the League also asserted that the permit's phosphorus effluent limits violated the EPA-approved mixing zone regulation. *Id*. at 8. Shortly after the filing of the October 2017 petition, the Region notified the Board that it was withdrawing the final permit's phosphorus effluent limits "because it [had] failed to address [the League's] comment concerning the use of a mixing zone policy that was not part of the state's approved water quality standards."[5] Letter from Daniel D. Opalski, Dir., Office of Water & Watersheds, U.S. EPA Region 10, to Eurika Durr, Clerk of the Board, Environmental Appeals Board, and Matthew Nykeil, Idaho Conservation League 1 (Jan. 9, 2018). In the letter, the Region explained that withdrawal of the permit's phosphorus effluent limits would allow it to "consider the comment, clarify the basis for establishing a mixing zone, if appropriate, and modify, if necessary, the withdrawn permit provisions in a new permit proceeding." *Id*. Given the withdrawal of the challenged portion of the September 2017 final permit, the Board dismissed the League's petition on that permit as moot. *In re City of Sandpoint Wastewater Treatment Facility,* NPDES Appeal No. 17-06, at 2 (EAB Jan. 11, 2018) (Order Dismissing Petition for Review as Moot).

---

[5] In its brief in the present proceeding, the Region further explains that "[w]hen the Region receives comment letters that are directed to the Region as well as the State, * * * [t]he State is responsible for responding to the comments directed at the 401 certification." EPA Region 10 Response Brief at 6 n.5 (Sept. 24, 2018). Here, however, although Idaho DEQ addressed the League's comments on DEQ's reliance on the unapproved mixing zone regulation in its draft and final responses to comments on its section 401 certification of the draft permit, the final response to comments was not issued until after the approval of the September 2017 final permit renewal. *See* EPA Region 10, *Certification and Index to the Administrative Record* 3 (Sept. 24, 2018) (listing final response to comments as "undated" but "rcvd" on November 22, 2017).

After examining the League's comment that Idaho DEQ relied on an unapproved mixing zone regulation, the Region in February 2018 issued a draft permit retaining the previously proposed and finalized phosphorus effluent levels. Fact Sheet for 2018 Draft Permit at 1-2. In the Fact Sheet accompanying the draft permit, the Region explained that it was not modifying the effluent limits because the EPA-approved mixing zone regulation gave Idaho DEQ the discretion to establish mixing zones that exceed 25% of the stream flow. *Id*. at 6-9. The Fact Sheet quoted Idaho DEQ's confirmation of this interpretation in DEQ's response to the League's comments on the draft Idaho certification for the Sandpoint permit: "'[Idaho] DEQ's interpretation of the prior [EPA-approved] provisions also allowed the agency to vary from the 25% limit on mixing zones, but only if the mixing zone still ensured protection of uses.'" *Id*. at 8 (quoting RTC § 401 Certification at 2). The Region noted that this interpretation was consistent with the regulation's direction to "consider" the mixing zone size principle and also ensured that "mixing zones are not to cause unreasonable interference with or danger to beneficial uses." Fact Sheet for 2018 Draft Permit at 9. Thus, the Region concluded that the previously proposed and finalized effluent limits calculated using mixing zones of 47% and 60% of stream flow did not need to be changed.

Commenting on the new draft permit, the League again objected to the mixing zones, arguing that the "plain language" of the EPA-approved mixing zone regulation bars Idaho DEQ from establishing mixing zones greater than 25% of stream flow under any circumstances. Letter from Matthew Nykiel, Idaho Conservation League, to Brian Nickel, U.S. EPA Reg. 10, and June Berquist, Idaho DEQ at 3 (Mar. 26, 2018) (A.R. 86). The League pointed out that unlike the 2015 revision to the mixing zone regulation, the EPA-approved mixing zone regulation "has no provision[] which authorizes [Idaho] DEQ to design a mixing zone that exceeds 25% of the stream flow volume." *Id*. Finally, the League argued that the Region erred in relying on interpretive statements by Idaho DEQ because such statements "cannot supersede the plain language of * * * effective rules." *Id*.

The Region disagreed with the League's comments. In its response to comments on the February draft permit, the Region reiterated and expanded on its prior statements in the February 2018 Fact Sheet. The Region explained that because the EPA-approved mixing zone regulation requires only that Idaho DEQ "consider" the 25% volumetric limitation, the DEQ can "choose to authorize a larger mixing zone if such larger mixing zone would protect the waterbody's beneficial uses." U.S. EPA Region 10, *Response to Comments on the Reproposed Draft NPDES Permit for the City of Sandpoint* 3 (A.R. 87) ("RTC 2018 Permit"). Further, the Region stated that this had been the consistent and longstanding interpretation of the regulation as reflected in Idaho DEQ's response to comments

on its draft section 401 certification, in draft guidance on the regulation, and in prior permits establishing mixing zones exceeding the 25% limitation. *Id*. at 3-4. Finally, the Region noted that it had explicitly recognized in its 1996 letter approving the mixing zone regulation that the 25% size limitation and other "principles" in the regulation are "not binding." *Id*. at 3. Accordingly, in June 2018, the Region reissued a final permit renewal with phosphorus effluent limits that are identical to the ones in the withdrawn 2017 final permit renewal.

This petition for review from the League followed on July 12, 2018. Idaho Conservation League Petition for Review (July 12, 2018) ("Pet.").[6] The Region and Idaho DEQ sought and were granted extensions on due dates for the filing of their response briefs and the League sought a similar extension for its reply brief. The matter was fully briefed on October 24, 2018.[7]

IV. *STANDARD OF REVIEW*

Under part 124, the petitioner bears the burden of demonstrating that review is warranted. *See* 40 C.F.R. § 124.19(a)(4). Ordinarily, the Board will deny review of a permit decision and thus not remand it unless the petitioner demonstrates that the permit decision is based on a clearly erroneous finding of fact or conclusion of law or involves a matter of policy or exercise of discretion that warrants review. *Id.* § 124.19(a)(4)(i)(A)-(B); *see, e.g.*, *In re La Paloma Energy Ctr., LLC*, 16 E.A.D. 267, 269 (EAB 2014). The Board's power to grant review "should be only sparingly exercised," and "most permit conditions should be finally determined at the [permit issuer's] level." Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *see also* Revisions to Procedural Rules Applicable in Permit Appeals, 78 Fed. Reg. 5281, 5282 (Jan. 25, 2013).

V. *ANALYSIS*

Idaho DEQ has interpreted its EPA-approved mixing zone regulation as giving DEQ discretion to establish mixing zones exceeding 25% of the volumetric flow of the receiving waterbody. In line with that interpretation, Idaho DEQ authorized phosphorus mixing zones of 47% and 60% of the volume of the Pend

---

[6] In its petition for review, the League requested the opportunity for oral argument. Pet. at 13. Because oral argument would not materially assist us in considering the issue raised in the petition, the League's request is denied.

[7] Due to a lapse in federal appropriations, EPA was shut down from December 29, 2018, to January 26, 2019. The Board was closed during this period.

Oreille River in its certification of the draft Sandpoint permit. The Region accepted Idaho DEQ's legal interpretation, modeled the impact of the Sandpoint facility's discharge on the Pend Oreille River, and calculated the permit's phosphorus effluent limits based on Idaho DEQ's specified mixing zones. In its appeal, the League challenges the permit's phosphorus effluent limits, arguing that they are based on mixing zones established in violation of the mixing zone regulation's plain language.[8] The sole issue on appeal is whether the Region clearly erred in accepting Idaho DEQ's interpretation of Idaho's EPA-approved mixing zone regulation.

Importantly, we "generally give substantial deference to [a] state's interpretation of its own laws." *In re Teck Cominco Alaska Inc.*, 11 E.A.D. 457, 489 (EAB 2004). Accordingly, a challenger to a Region's acceptance of a state interpretation of its own regulation would have to provide a "compelling reason" why the Region should have rejected that interpretation. *See In re City of Moscow,* 10 E.A.D. 135, 154 (EAB 2001) (holding that a Region must have a "compelling reason" for not following a state's interpretation of a state regulation); *In re Am. Cyanamid Co.*, 4 E.A.D. 790, 801 n.12 (EAB 1993) (same). In conducting this analysis, we keep in mind the Chief Judicial Officer's ruling in *In re Ina Road Water Pollution Control Facility*, 2 E.A.D. 99 (CJO 1985), that a "Region's demonstration that [the State's] regulations are susceptible to a different but * * * equally persuasive interpretation, falls far short of showing that the State, by failing

---

[8] Idaho DEQ argues that the Board lacks jurisdiction to hear the League's particular challenge to the permit's phosphorus effluent limits because these limits are based on conditions (i.e., the mixing zones) that are attributable to Idaho DEQ's certification and involve questions of Idaho law. Idaho DEQ Response to Idaho Conservation League Petition for Review 8 (Sept. 24, 2019) ("Idaho DEQ Resp. Br."). In support, Idaho DEQ cites to 40 C.F.R. § 124.55(e), specifying that conditions "attributable to State certification" are subject to review only by state procedures, and to selected Board precedent and federal caselaw. Idaho DEQ Resp. Br. at 8; *see, e.g., In re Star-Kist Caribe, Inc.*, 3 E.A.D. 172, 181 (Adm'r 1990); *In re City of Fitchburg*, 5 E.A.D. 93, 97-98 (EAB 1994); *Roosevelt Campobello Int'l Park Com. v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982). However, Idaho DEQ does not confront a long line of Board and pre-Board cases that have held that EPA has an independent responsibility under the Clean Water Act to review challenges to state certifications in which the petitioner argues that the conditions in the state certification are insufficient to meet state law. *See, e.g., In re Teck Cominco Alaska Inc.,* 11 E.A.D. 457, 487-88 (EAB 2004); *In re City of Moscow,* 10 E.A.D. 135, 154 (EAB 2001)*; In re City of Jacksonville,* 4 E.A.D. 150, 157-58 (EAB 1992); *In re Ina Rd. Water Pollution Control Facility*, 2 E.A.D. 99, 100 (CJO 1985). Accordingly, we have resolved this petition on the merits.

to choose such interpretation, committed clear error." *Id*. at 101. Correspondingly, a petitioner challenging a Region's acceptance of a state's interpretation of its own regulation cannot meet its burden of showing the Region clearly erred simply by demonstrating that the regulation has more than one plausible reading.

In what follows, we first describe the mixing zone regulation itself and the positions of the parties on its interpretation. Next, we address the League's primary argument that the "plain language" of the mixing zone regulation prohibits mixing zones greater than 25% of stream volume. Our analysis shows that the meaning of the mixing zone regulation is ambiguous, not plain, and thus the League's "plain language" argument does not provide a "compelling reason" demonstrating that the Region should have rejected Idaho DEQ's longstanding interpretation. Finally, we examine whether the League has offered any other "compelling reason" why the Region should have rejected Idaho DEQ's interpretation. We conclude that the League has not.

A. *The EPA-Approved Mixing Zone Regulation*

The EPA-approved mixing zone regulation authorizes Idaho DEQ to establish a mixing zone for a discharge into a waterbody as a component of an effluent limitation.[9] In determining the size, configuration, and location of the

---

[9] The mixing zone regulation, excerpted to include relevant portions, reads:

> 01. Mixing Zones for Point Source Wastewater Discharges. * * *. In defining a mixing zone, the Department will consider the following principles:
>
> > a. The mixing zone may receive wastewater through a submerged pipe, conduit or diffuser.
> >
> > b. The mixing zone is to be located so it does not cause unreasonable interference with or danger to existing beneficial uses.
> >
> > * * * *
> >
> > d. Multiple mixing zones can be established for a single discharge, each being specific for one (1) or more pollutants contained within the discharged wastewater[.]
> >
> > e. Mixing zones in flowing receiving waters are to be limited to the following:
> >
> > > * * * *
> > >
> > > iv. The mixing zone is not to include more than twenty-five percent (25%) of the volume of the stream flow[.]

zone, the Idaho DEQ is required by the regulation to "consider" a list of eight "principles." Idaho Admin. Code r. 58.01.02.060.01 (2014). These eight principles contain a heterogenous mix of instructions. One principle states a general safety or protection standard: "The mixing zone is to be located so it does not cause unreasonable interference with or danger to existing beneficial uses." *Id*. r. 58.01.02.060.01.b. Two other principles define the characteristics of a mixing zone, specifying through what type of conveyance a mixing zone may receive effluent and whether multiple, partially overlapping mixing zones may be established for a single discharge. *Id*. r. 58.01.02.060.01.a, .d. Most of the remaining principles contain specific, rule-like pronouncements. *Id*. r. 58.01.02.060.01.c, .e, .f, .h. Falling into this latter category is the principle at the heart of the present dispute: "Mixing zones in flowing receiving waters are * * * not to include more than twenty-five percent (25%) of the volume of the stream flow." *Id*. r. 58.01.02.060.01.e.*iv*.

B. *The Positions of the Parties*

1. *The Idaho Conservation League's Challenge*

In its petition, the League argues that the "plain language" of the EPA-approved mixing zone regulation removes any discretion from Idaho DEQ to exceed the 25% volume limitation in establishing mixing zones, and, thus, the Region's use of Idaho DEQ's phosphorus mixing zones of 47% and 60% was a "clearly erroneous * * * conclusion of law." Pet. at 4, 12. This plain language argument focuses primarily on the text requiring Idaho DEQ to consider the principle limiting the size of mixing zones, but it also cites in support other principles in the regulation that do not directly address mixing zone size.

The League's textual argument concerning the mixing zone size principle has three steps. First, the League quotes the mixing zone size principle – "The

---

* * * *

> g. The water quality within a mixing zone may exceed chronic water quality criteria so long as chronic water quality criteria are met at the boundary of any approved mixing zone. Acute water quality criteria may be exceeded within a zone of initial dilution inside the mixing zone if approved by the Department.

Idaho Admin. Code r. 58.01.02.060.01.a-.g (2014).

mixing zone is not to include more than twenty-five percent (25%) of the volume of the stream flow" – and argues that this language "clear[ly] and unambiguous[ly] * * * creates a mandatory obligation" to cap mixing zones at 25% of stream flow. *Id*. at 9. Unlike the 2015 revised mixing zone regulation, the League notes, the mixing zone size principle in the EPA-approved regulation contains no explicit language authorizing Idaho DEQ to deviate from the size limitation. *Id*. at 10.

Second, the League contends that the mixing zone regulation's "mandatory" cap on mixing zone size is confirmed by the regulation's labeling of the 25% limitation as a "principle." *Id*. at 11. The League emphasizes that the term "principle" is defined by the dictionary as "'a fundamental source from which something proceeds; a primary element, force, or law which produces or determines particular results.'" *Id*. (quoting Oxford English Dictionary (3rd ed. 2018)).

Third, the League insists that the regulation's direction for Idaho DEQ to "consider" the listed principles in establishing a mixing zone does not affect interpretation of the mandatory language in the principle on mixing zone size. Rather, the League asserts that the meanings of the terms "consider" and "principle" – when viewed in the context of the regulation – confirm that the principle on mixing zone size establishes a mandatory cap on zones greater than 25% by volume. Pet. at 11; Idaho Conservation League Reply Brief at 7 (Oct. 24, 2019) ("Reply Br."). The League reaches this conclusion by focusing on a single dictionary definition in the Oxford English Dictionary of the term "consider" as meaning to "take note"[10] and emphasizing that the term "principle" means a "fundamental law." Pet. at 11-12. In the League's view, it would be "contrary to the plain meaning of Idaho's mixing zone rule" to interpret that regulation's command to the Idaho DEQ "to take notice of a fundamental rule [i.e., the mixing zone size limitation] without necessarily applying that rule." [11] *Id*.

---

[10] The Oxford English Dictionary definition that the League relies on reads in full "to think, reflect, take note." Pet. at 11; *see* 3 Oxford English Dictionary 767 (2d ed. 1989) (fourth definition).

[11] Additionally, the League calls attention to the mixing zone regulation's direction that Idaho DEQ "will consider" the listed principles, noting that the inclusion of the term "will" makes it mandatory that Idaho DEQ engage in such consideration. Pet. at 11. Idaho DEQ concedes as much, Idaho DEQ Response to Idaho Conservation League Petition for Review at 19 (Sept. 24, 2019), and the Region does not dispute that Idaho DEQ must consider the principles. EPA Region 10 Response Brief at 13 (Sept. 24, 2019).

The League also argues that its plain meaning interpretation of the mixing zone regulation is supported, at least implicitly, by the other principles in that rule. Reply Br. at 12-13, 15. In fact, the League contends that Idaho DEQ's discretionary approach to the eight principles produces "untenable results" and conflicts with the explicit discretion accorded Idaho DEQ in one of those principles. *Id*. at 13-15.

The untenable result the League identifies is that if the direction to "consider" makes the principle on mixing zone size discretionary, it follows that all eight principles, including the general principle barring unreasonable interference with beneficial uses, would be entirely discretionary as well. *Id*. at 12-13. Additionally, the League argues that Idaho DEQ's discretionary approach to the eight principles is inconsistent with the principle addressing chronic water quality criteria because that principle "states unambiguously that a mixing zone may exceed chronic water quality criteria, so long as certain conditions are met." *Id*. at 15.

Finally, the League argues that the Region erred by relying on prior interpretive statements by Idaho DEQ and the Region as to the meaning of the mixing zone regulation. According to the League, "[t]he Region may only look to other sources if it determines that some aspect of the regulation is not clear on its face," and here, the Region failed to examine "the plain text of Idaho's mixing zone rule" other than the requirement to "consider" the mixing zone size limitation. *Id*. at 13.

2. *The Region's and Idaho DEQ's Responses to the Petition*

The Region and Idaho DEQ reject the League's "plain language" arguments. The Region argues that the League's interpretation would "read out of the regulation the word 'consider,'" and Idaho DEQ similarly asserts that the League's "argument would require the Board to interpret 'consider' to mean something the plain meaning simply does not include." EPA Region 10 Response Brief at 13 (Sept. 24, 2019) ("Reg. Resp. Br."); Idaho DEQ Response to Idaho Conservation League Petition for Review at 21 (Sept. 24, 2019) ("Idaho DEQ Resp. Br."). Both parties rely on the dictionary to support their arguments, and Idaho DEQ additionally cites caselaw interpreting the term "consider" in other regulatory provisions. *See* Reg. Resp. Br. at 13; Idaho DEQ Resp. Br. at 20-21.

Further, the Region contends that the "plain language of [the regulation's] text is ambiguous,"[12] and thus "the Region reasonably deferred to [Idaho DEQ's] interpretation." Reg. Resp. Br. at 13. The Region and Idaho DEQ emphasize the Idaho DEQ's interpretation – giving the DEQ flexibility in sizing mixing zones – is protective of beneficial uses and has been both longstanding and consistent. *Id.* at 10-11; Idaho DEQ Resp. Br. at 22-26. They note that this interpretation is reflected in the rulemaking record from when this regulatory language was first codified in 1980, in the Region's 1996 approval of the regulation, in Idaho DEQ's implementation of the regulation, and in Idaho DEQ's contemporaneous explanation of the 2015 revision to the rule. Reg. Resp. Br. at 13-14; Idaho DEQ Resp. Br. at 23-26.

C. *Examination of the League's Plain Meaning Arguments*

Bearing in mind our standard of review, we first examine the League's argument that the mixing zone regulation's requirement that Idaho DEQ "consider" the principle on mixing zone size bars Idaho DEQ from establishing mixing zones greater than 25% of stream volume. Second, we consider the League's assertion that when the principle on mixing zone size is examined in the context of other principles in the regulation, that context confirms the League's plain language interpretation of the regulation.

When evaluating a dispute over the meaning of an administrative regulation – federal or state – we apply the normal tenets of statutory construction. *See In re Howmet Corp.*, 13 E.A.D. 272, 282 (EAB 2007) (federal regulation), *aff'd*, 656 F. Supp. 2d 167 (D.D.C. 2009); *In re Bil-Dry Corp.*, 9 E.A.D. 575, 595 (EAB 2001) (state regulation). Under this approach, "the Board looks first to the plain meaning of the regulatory text, then considers the regulations as a whole, the regulatory history, and the [administrative agency's] post-promulgation guidance documents on the topic." *In re San Pedro Forklift, Inc.*, 15 E.A.D. 838, 856 (EAB 2013). When a term or phrase "is clear and unambiguous, the Board generally follows the unambiguous intent expressed by the language." *In re Rochester Pub. Utils.,* 11 E.A.D. 593, 603 (EAB 2004). Nonetheless, "'[t]he meaning – or ambiguity – of certain words or phrases may only become evident when placed in

---

[12] In its response brief, Idaho DEQ is more equivocal on this issue. At one point, Idaho DEQ describes its interpretation of the mixing zone regulation as "the best reading" of the regulation; however, that statement is made in a section titled: "The plain text clearly and unambiguously demonstrates that Idaho's mixing zone rules do not contain a 25% of flow volume limit." Idaho DEQ Resp. Br. at 18, 22.

context.'" *Id*. (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 132 (2000)). In weighing the persuasive value of regulatory history and post-promulgation statements, the Board "give[s] greater deference to a position when it is supported by [an administrative agency's] rulings, statements, and opinions that have been consistent over time." *Howmet*, 13 E.A.D. at 282. Finally, because the League here is challenging Idaho DEQ's interpretation of its own regulation, our entire interpretative examination of the mixing zone regulation must accord "substantial deference" to that interpretation. *Teck Cominco*, 11 E.A.D. at 489.

1. *The Requirement to "Consider" the Mixing Zone Size Limitation Principle*

The crux of the parties' dispute over the interpretation of the mixing zone regulation turns on the meaning of the term "consider." In interpreting this key term, all of the parties rely on dictionary definitions, and we start there as well. Idaho DEQ also cites to judicial decisions construing other regulatory directions to "consider" and we examine such caselaw second.

a. *The Dictionary Definition of the Term "Consider"*

The Region and Idaho DEQ rely on dictionaries to argue that "consider" means "to think about or look at," Reg. Resp. Br. at 13, or "to carefully examine, deliberate, think about, and take into account." Idaho DEQ Resp. Br. at 19. In short, both the Region and Idaho DEQ read the mixing zone regulation's direction to *consider* various principles as giving Idaho DEQ some measure of discretion in weighing those principles, including the principle limiting mixing zone size to 25% by volume of the stream. In support of this approach to the term "consider," the Region cites to a definition of "consider" in the Oxford English Dictionary that reads "to think, reflect, take note." [13] Reg. Resp. Br. at 13 (referencing Pet. at 11 (citing Oxford English Dictionary (3rd ed. 2018))). Idaho DEQ relies on Black's Law Dictionary and its definition of "consider" as "'[t]o fix the mind on, with a view to careful examination * * *. To deliberate about and ponder over. To

---

[13] The Oxford English Dictionary includes nine separate definitions of the term "consider" when used as a verb. 3 Oxford English Dictionary 767-78 (2d ed. 1989). Two of those definitions other than "to think, reflect, take note" that appear relevant to the use of "consider" in the mixing zone regulation, read: "To view or contemplate attentively, to survey, examine, inspect, scrutinize"; and "[t]o contemplate mentally, fix the mind upon; to think over, meditate or reflect on, bestow attentive thought upon, give heed to, take note of." *Id*. at 767.

entertain or give heed to.'" Idaho DEQ Resp. Br. at 19 (quoting Black's Law Dictionary 277 (5th ed. 1979)).

Also looking to the dictionary, the League defines "consider" as meaning "to take note of," a definition the League regards as so elastic that when the phrase "to take note of" is viewed in the context of the mixing zone regulation it takes on a meaning quite different than "to think about" or "to examine"; rather, it means "to apply." Pet. at 12. In this manner, the League reads "consider" as "plainly" barring Idaho DEQ from setting mixing zones larger than the 25% volumetric limitation. *Id*. at 13. The League finds its definition of "consider" as meaning "to take note of," in the same source relied on by the Region: the Oxford English Dictionary's definition of "consider" as "to think, reflect, take note." *Id*. at 12.

Looking beyond the dictionaries cited by the parties, the American Heritage Dictionary defines "consider" as "[t]o think carefully about; * * * to take into account." American Heritage Dictionary 392 (4th ed. 2006). Similarly, Webster's Third New International Dictionary specifies that "consider" means "to reflect on[,] think about with a degree of care or caution." Webster's Third New Int'l Dictionary 483 (2002) ("Webster's"). Expanding on this definition, Webster's explains that "'consider' often indicates little more than *think about*. It may occasionally suggest somewhat more conscious direction of thought, somewhat greater depth and scope, and somewhat greater purposefulness." *Id*.

A definite theme emerges from these multiple dictionary definitions. They emphasize that "consider" means to "think" or "examine," and most also stress that the thought and examination is to be careful in nature. *See* 3 Oxford English Dictionary 767 (2d ed. 1989) ("think"); Black's Law Dictionary at 306 ("careful examination"); Am. Heritage Dict. at 392 ("think carefully"); Webster's at 483 ("think about with a degree of care or caution"). The Region and Idaho DEQ's approach to the term "consider" is consistent with this theme of careful thought and examination.

On the other hand, the League focuses on a less prominent definition of "consider" – as meaning "to take note of" – and extrapolates from that definition to its view that the mixing zone regulation's direction to consider or "note" principles means that the principles must be applied. The League, however, does not present a persuasive reason for treating the terms "note" and "apply" as synonymous. The term "note" means "to record or fix in the mind or memory[,] take due or special notice of[,] notice or observe with care." Webster's at 1543; *see* 10 Oxford English Dictionary 545 (2d ed. 1989) (defining "note" as "[t]o observe or mark carefully; to give heed or attention; to notice closely" and "to take notice of; to observe,

perceive"). Yet, the term "apply," as used in the legal context, means more than "to take notice of"; it means "[t]o put to use with a particular subject matter." Black's Law Dictionary 109 (8th ed. 2007). Black's Law Dictionary provides the following two examples of legal usage of "apply:" "apply the law to the facts"; and "apply the law only to transactions in interstate commerce." *Id*. The term "note" cannot easily substitute for "apply" in either of these two examples.

And even if the League were correct that one less prominent definition of "consider" – as meaning "to take note of" – could be read as suggesting that "to consider" may mean "to apply," such a claim does not advance the League's plain language argument. Reading the definitional phrase "to take note of" to mean "to apply" is at odds with the primary theme of the definitions of "consider" outlined above – i.e., to think or examine carefully. A requirement to carefully think about or examine a principle plainly does not demand that the principle be applied.[14] Thus, the League's interpretation of the definition of "consider" is premised on the proposition that the dictionaries have defined "consider" by using definitional words with significantly different meanings. But "'[t]he existence of alternative dictionary definitions of [a term],' or the failure of dictionary definitions to provide a plain and unambiguous meaning of [regulatory] language, 'indicates that the [regulatory text] is open to interpretation,'" not that it has a plain meaning. *See Info. Tech. & Apps. Corp. v. United States*, 316 F.3d 1312, 1320–21 (Fed. Cir. 2003) (quoting *Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 418 (1992)).

Accordingly, we conclude that the Region and Idaho DEQ's interpretation of "consider" is more faithful to the dictionary definition of that term. At most, the League has shown that the dictionary definition of "consider" may be ambiguous, undercutting its own argument that the meaning of the mixing zone regulation is plain. Thus, contrary to the League's assertion, "[t]he definitional meanings of the terms used in Idaho's EPA-approved mixing zone [regulation]," Pet. at 11, do not support the League's contention that the text of the regulation "unambiguously limits the size of mixing zones." Reply Br. at 13.

b. *Judicial Interpretation of the Term "Consider"*

Idaho DEQ also relies on federal caselaw interpreting the regulatory term "consider" to support its argument that "consider" means to "think about" and not

---

[14] The League's argument concerning how the use of the term "principle" in the regulation affects its interpretation is discussed further in Part V.C.1.b.ii below.

to "apply." Our research confirms that both state and federal courts consistently interpret the common regulatory term "consider" in that manner. For its part, the League cites no caselaw supporting its interpretation of "consider." Instead, it argues that the decisions relied on by Idaho DEQ involve regulatory provisions that are distinguishable from the mixing zone regulation.

(i) *State and Federal Cases*

Idaho DEQ argues that federal caselaw interpreting a regulatory requirement to "consider" supports the dictionary definition of the term "consider" as requiring careful examination but not more. For example, Idaho DEQ cites to *New York v. Browner,* 50 F. Supp. 2d 141 (N.D.N.Y. 1999), a case in which the State of New York claimed that EPA had failed to comply with a requirement in the Clean Air Act that EPA submit a report to Congress "on the feasibility and effectiveness of an acid deposition standard." *Id*. at 144. The Clean Air Act specified that the report "shall include, but not be limited to, consideration of the following matters[,]" and then listed six items for consideration, including "description of the nature and numerical value of a deposition standard or standards that would be sufficient to protect such resources." Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 404, 104 Stat. 2632 (1990). New York argued that a requirement for "consideration" of deposition standard "required [EPA] to actually set acid deposition standards." 50 F. Supp. 2d at 144. After consulting Webster's II New Riverside University Dictionary and Black's Law Dictionary, the court rejected New York's argument, concluding that the statutory directive for consideration of the listed matters factors required "careful examination" of an acid deposition standard but not that a standard be established. *Id.* at 144-45. The Court pointed out that the statutory requirement "did *not* read that 'the study shall include the nature and numerical value of a deposition standard' * * * [; r]ather, the statute reads that the study 'shall include * * *consideration of'" such a standard." *Id.* at 144 (quoting Clean Air Act § 404). Idaho DEQ also relies on another federal district court case in which it was contended that an agency in revoking a security clearance had failed to comply with a regulation requiring "consideration" of various mitigating factors in taking such action. *Doe v. Schachter*, 804 F. Supp. 53, 63–65 (N.D. Cal. 1992). In that case, the court held that the agency had "considered" the factors by reviewing the factors and determining they were not applicable to the complaining party.[15] *Id*. at 65.

---

[15] Idaho DEQ briefly cites to two U.S. Supreme Court decisions as confirming that "the use of 'consideration' (and its variants) in statutory or regulatory language − by its plain meaning − does not mandate any particular decision or adherence to any enumerated

The meaning of the term "consider" was also examined in two U.S. Circuit Court of Appeals cases involving a federal statutory sentencing requirement that courts in imposing sentences must "consider" certain policy statements setting forth imprisonment ranges for various offenses. In *United States v. Bruce*, 285 F.3d 69 (D.C. Cir. 2002), the District of Columbia Circuit cited Webster's Third New International Dictionary as demonstrating that "[t]o 'consider' means to 'reflect on,' 'think about,' 'deliberate,' 'ponder' or 'study.' * * * It does not mean to 'adhere to,' 'be bound by' or 'follow.'" *Id*. at 73 (citation omitted). The Second Circuit decision in *United States v. Cohen,* 99 F.3d 69 (2d Cir. 1996), concluded that it was obvious that that same statutory provision did not make the policy statements binding:

> The added language of § 3553(a)(4)(B) requires a district court to *consider* "the applicable guidelines or policy statements issued by the Sentencing Commission" in sentencing a defendant for a violation of a supervised release. The fact that a court must consider the policy statements, of course, does not mean that it is bound by them. In contrast, § 3553(b) *requires* a court to sentence within ranges set by the guidelines.

Id. at 71. Thus, in both cases, the courts concluded that the judges were not bound by the imprisonment ranges in the policy statements.

A similar decision was reached in *Central Valley Chrysler-Jeep v. Witherspoon,* 456 F. Supp. 2d 1160 (E.D. Cal. 2006). There, a federal district court examined whether corporate average fuel economy standards set by the National Highway Traffic Safety Administration ("NHTSA") preempted a California rule designed to limit various pollutants by regulating car and truck fuel economy. The California Air Resources Board argued that state standards were not preempted because in setting the federal standards NHTSA is required by statute to "consider" various factors, including the effect of the federal standards on state standards. This regulatory formulation, according to the California Board, constituted a "mandate" that the federal standards "accommodate" state standards. *Id.* at 1174. However, the court ruled otherwise, reasoning that "Congress's use of the term 'consider' in a statute requires an actor to merely 'investigate and analyze' the specified factor, but not necessarily act upon it." *Id*. at 1173. The court explained that "[a]fter having investigated and analyzed all of the required factors, the agency is free to

---

item." Idaho DEQ Resp. Br. at 20-21 (citing *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580-81 (1998); *Service v. Dulles,* 354 U.S. 363, 387-88 (1957)).

set the maximum feasible average fuel economy based on all of the information properly before it." *Id*. at 1174.

Finally, we note that the Idaho Supreme Court examined the meaning of the term "consider" in the context of an Idaho statute requiring the governor, in appointing members of the state board of horticultural inspectors, to "consider" persons recommended by an Idaho horticultural association. *Ingard v. Barker*, 147 P. 293, 297 (Idaho S. Ct. 1915). The question before the court was whether this statutory provision limited the governor to appointing only persons recommended by the horticultural association. To answer the question, the court looked to a dictionary definition of "consider" as meaning "[t]o think deliberately about; reflect upon; give close attention to; ponder; as, consider the matter well before deciding. To regard in a certain aspect; to look upon; hold; estimate." *Id*. In light of this definition, the court held that the governor's authority was not restricted to choosing only recommended individuals. To reach the contrary position, the court explained, "it would be necessary for this court to read into said section a mandatory provision * * * that the Governor, in making such appointment, shall not only consider any recommendation made by the State Horticultural Association as proper persons to be so appointed, but shall, from the list of names so recommended, appoint said state board of horticultural inspectors." *Id*.; *accord Ky. Bd.* of *Med. Licensure v. Strauss*, 558 S.W.3d 443, 455 (Ky. 2018), *cert. denied*, 139 S. Ct. 1354 (2019) (relying on a dictionary to interpret the regulatory term "consider" in a similar fashion); *State v. Thompson*, 752 N.E.2d 276, 280 & n.1 (Ohio 2001) (same).

(ii) *The Relevance of Judicial Precedent on the Meaning of the Term "Consider" to the Mixing Zone Regulation*

The League's response to the judicial precedents defining the term "consider" cited by Idaho DEQ is to argue that they are irrelevant to interpretation of the mixing zone regulation because, unlike that regulation, the provisions examined in such decisions do not require the consideration of "principles," but only "factors" or the like. Reply Br. at 14-15. As described above, the League relies on the dictionary definition of "principle" as a "fundamental law" as its basis for concluding that the mixing zone's direction to "consider * * * principles" actually means to "apply" the principles. Pet. at 11-12; Reply Br. at 14. While not disputing that the cited cases relied upon by Idaho DEQ properly held that "consider" does not mean "apply," the League argues that "principle" has such a different meaning from a term like "factor" that caselaw interpreting the meaning of a direction to consider factors is inapposite to a requirement to consider principles. Just as with its approach to the definition of the term "consider," the

League cites no caselaw supporting this interpretation of the use of the term "principle" in statutory or regulatory provisions.

Essentially, the League is asserting that because a principle is so definitionally fundamental and inflexible, a requirement to consider principles cannot be construed as granting a decisionmaker any discretion in that consideration process. Yet, the manner in which Idaho has used the term "principle" in its regulations does not indicate that Idaho intends that term to be interpreted in such a rigid manner. To the contrary, Idaho regulations frequently include very general principles and also include a variety of directions on how such principles are to be incorporated in agency decisionmaking.

There is broad variation in the type of statements listed as "principles" in the Idaho Administrative Code. A principle may be defined using language of recommendation rather than of a binding nature. For example, a "principle" included for analyzing alternatives to proposed discharge levels that cause degradation to high water quality states that "[c]ontrols to avoid or minimize degradation *should be considered* at the earliest possible stage of project design." Idaho Admin. Code r. 58.01.02.052.08.c.*i* (emphasis added). Principles may include vague qualifications limiting the principle's effect. A principle adopted by Idaho from a U.S. Office of Management and Budget ("OMB") circular on financial management specifies that costs "should be allocated" between different projects so long as proportioning of those costs between the projects can be done "without undue effort or cost." *Id*. r. 15.01.20.066.02 (incorporating OMB Circulars A-21 and A-122);[16] *see also id.* r. 58.01.02.052.08.c.*ii* (another principle in the water quality standard cited above states that "[a]lternatives that must be evaluated *as appropriate,* are") (emphasis added). Other principles are general in nature or are not further defined. Examples of general or undefined principles include: "safety of aircraft operations" principles, *id*. r. 39.04.04.200; "the principle[] of * * * the protection of the environment," *id*. r. 20.03.15.055.02; "generally accepted accounting principles," *id*. r. 15.10.01.034; and "sound engineering principles," *id*. r. 20.03.15.056.04. And some statements listed as principles do not appear to fit the broadest definition of that term. For example, the water quality regulation on analyzing alternatives to avoid degradation cited above lists as a "principle" a statement that "[t]he Department retains the discretion to require the applicant to examine specific alternatives." *Id*. r. 58.01.02.052.08.c.*iii*.

---

[16] *See OMB Circular No. A-21: Cost Principles for Educational Institutions* § C.4.d(3), at 12 (rev'd May 10, 2004) (using "undue effort or cost" qualifier as part of "[d]irect cost allocation principles").

Thus, to the extent the League argues that designating a consideration for decision as a principle necessarily removes any discretion from the decisionmaker's consideration of the principle, that argument is not consistent with the types of principles included in Idaho regulations.

Further, the Idaho Administrative Code contains a wide range of instructions on how listed principles are to be incorporated into the decisionmaking process. For example, in addition to requiring decisionmakers to "consider" principles, the Administrative Code may also direct decisionmakers to be "guide[d]" by, *id.* r. 16.07.19.350.01, maintain "consistency with," *id.* r. 16.03.15.420.03, act "in accordance with," *id.* r. 15.10.01.034, "base[]" their decision on, *id.* r. 39.04.04.200, "follow," *id.* r. 58.01.02.052.08.c, "apply," *id.* r. 35.01.01.340, or "adhere to," *id.* r. 57.01.01.300.01.a, principles in making a determination. Importantly, the use of terms such as *follow*, *apply*, and *adhere to* show that Idaho rule-writers, including those in Idaho DEQ, choose to use more constraining directions to decisionmakers on some occasions. *See id.* r. 58.01.01.052.08.c (Idaho DEQ regulation directing that "principles shall be followed"). Yet, the League would sweep away all distinctions in the examples above based on the theoretical argument that it is definitionally inaccurate for a decisionmaker to do anything other than "apply" a principle.

Given this wide variety in how the term "principle" is used in Idaho regulations, we find unconvincing the League's argument, based solely on a dictionary definition, that the use of the term "principle" in a regulatory decisionmaking process overrides all other regulatory direction on the nature of the decisionmaking process. Accordingly, we reject the League's claim that the terminology of the mixing zone regulation's requirement that Idaho DEQ "consider * * * principles" renders irrelevant all caselaw interpreting directions to "consider" factors, matters, and statements.

The League's argument concerning the relevance of the caselaw on the meaning of the term "consider" fares no better if the focus is shifted from the abstract names of the items to be considered ("principles" versus "factors," "matters," or "statements") to the substance of the items for consideration as listed in the mixing zone regulation compared to the items addressed in the above cases. It is true that the mixing zone regulation's rule-like principles differ markedly from the general fact-based factors in the statutes or regulations in several of the cases cited by Idaho DEQ. *See, e.g., Doe v. Schachter,* 804 F. Supp. at 63-65 (examining regulation on revocation of security clearance requiring consideration of, among other things, "[t]he nature, extent, and seriousness of the conduct; * * * [t]he circumstances surrounding the conduct" under 32 C.F.R. part 154 app. H); *Nat'l*

Endowment for the Arts v. Finley, 524 U.S. 569, 572, 576, 580-82 (1998) (discussing statute requiring a federal agency to "'tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public'" in awarding grants) (citation omitted).

However, the *New York v. Browner* decision relied upon by Idaho DEQ and several of the other cases cited above involve factors of significantly more specificity. In *New York v. Browner*, various states challenged the adequacy of an EPA feasibility report on use of acid deposition standards to protect sensitive aquatic and terrestrial resources, which was mandated under the Clean Air Act. *N.Y v. Browner,* 50 F. Supp. 2d at 142. The Act required EPA, in preparing the report, to consider, among other things, "matters" such as the "description of the nature and numerical value of a deposition standard or standards that would be sufficient to protect such resources [and] * * * description of the use of such standard or standards in other Nations or by any of the several States in acid deposition control programs." *Id*. at 144. An even more detailed directive was evaluated in *Central Valley* involving a statutory requirement to consider, among other things, state regulations on car fuel economy. The California regulations at issue were quite specific as to what levels of fuel economy must be achieved. *See Cent. Valley Chrysler-Jeep*, 456 F. Supp. 2d at 1169 (noting that "[t]he California regulations require a fuel economy standard 'approaching' 27 miles per gallon for certain vehicles that must only meet the 'light duty truck' standard of 22.2 miles per gallon under the federal scheme"). Equally, if not more prescriptive, were the sentencing policy statements required to be considered under the sentencing statute that was evaluated in the *Bruce* and *Cohen* decisions. Those policy statements specify numerical imprisonment ranges for various criminal offenses. *Bruce*, 285 F.3d at 71 (policy statement specified a sentence of "six to twelve months" as to the violation); *Cohen*, 99 F.3d at 70 (policy statement specified a sentence with a "range of four to ten months" as to the relevant offense); *accord Ingard*, 147 P. at 298 (requiring governor to "consider" specific recommended individuals for appointment).

c. *Conclusion on the Meaning of the Term "Consider"*

Neither dictionaries nor the caselaw support the League's "plain language" argument concerning the meaning of the term "consider." Dictionary definitions of "consider" uniformly emphasize that a requirement to "consider" is a direction to think carefully and examine as opposed to a result-oriented command. Similarly, the Idaho and federal caselaw indicate that the term "consider," when used to structure a regulatory decisionmaking process, grants discretion to a decisionmaker in reaching a required finding. In fact, the courts' consistent holding is that the core

meaning of a requirement to consider is illuminated by its contrast to a direction to apply or follow – the very meaning that the League attempts to ascribe to the term "consider." For the reasons explained above, the League's attempt to distinguish these cases fails.

Nonetheless, the relative clarity of the meaning of "consider" that emerges from dictionaries and caselaw does not provide that same level of lucidity to the overall mixing zone regulation. Simply put, pairing a discretionary decisionmaking instruction ("consider") with a list of rule-like pronouncements creates ambiguity, not plain meaning. *See N.Y. State Dep't of Soc. Servs. v. Bowen*, 835 F.2d 360, 364 (D.C. Cir. 1987) (finding statute "ambiguous" due to its "inconsistent[]" and "contradictory" provisions). That ambiguity is heightened by the inclusion in the list of principles for consideration of a narrative standard for evaluating mixing zones ("do[] not cause unreasonable interference with or danger to beneficial uses") and definitional statements concerning mixing zones (e.g., "[m]ultiple mixing zones can be established for a single discharge"). Idaho DEQ, itself, recognized that the regulation had proven "ambiguous" in practice and cited this fact as a reason in its rulemaking proposal for the 2015 revisions to the rule. 14-4 Idaho Admin. Bull. 20 (Apr. 2, 2014) ("DEQ has also determined from working with dischargers that the current mixing zone rule is ambiguous and does not clearly articulate mixing zone requirements."). Thus, contrary to the League's argument, the requirement in Idaho's mixing zone regulation for Idaho DEQ to "consider" various rule-like "principles" in establishing mixing zones does not "plainly" impose a mandatory cap on the size of mixing zones; rather, it makes the meaning of the regulation ambiguous.

We consider below whether the ambiguity in the mixing zone regulation is eliminated by the League's specific arguments based on principles in the mixing zone regulation other than the one on mixing zone size.

2. *The Meaning of the Mixing Zone Size Limitation as Informed by the Other Principles*

The League also argues that Idaho DEQ's interpretation of the mixing zone regulation fails to take into account all of the eight principles enumerated as bearing on mixing zones. These other principles, the League contends, "further substantiate that the plain text of the rule requires mixing zones be limited in particular ways." Reply Br. at 15. The League asserts that Idaho DEQ's discretionary approach to eight principles produces "untenable results" and conflicts with the explicit discretion accorded Idaho DEQ in one of those principles. *Id*. at 12-15. However, these arguments were raised neither in the League's comments on the revised permit nor in its petition for review of the final permit. EPA regulations require

that persons petitioning the Board for review of a permit must show that "each issue being raised in the petition was raised during the public comment period." 40 C.F.R. § 124.19(a)(4)(ii); *see id.* § 124.13 (requiring that persons objecting to a permit "must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period"). Moreover, even if these arguments were preserved for inclusion in a petition for review, the League did not raise the arguments at that time but rather raised them for the first time in its reply brief, giving the Region and Idaho DEQ no opportunity to respond. Arguments presented to the Board for the first time in a reply brief will not be considered on appeal. *In re Arecibo & Aguadilla Reg'l Wastewater Treatment Plants*, 12 E.A.D. 97, 123 n.52 (EAB 2005); *In re Exxon Co., USA,* 6 E.A.D. 32, 39 n.7 (EAB 1997); *see* 40 C.F.R. § 124.19(a)(4)(ii).

In any event, these arguments cannot overcome the regulation's inherent ambiguity. The untenable result the League identifies is that if the direction to consider makes the principle on mixing zone size discretionary, it follows that all eight principles, including the general principle barring unreasonable interference with beneficial uses, would be entirely discretionary as well. The League contends that this implication from Idaho DEQ's interpretation causes the interpretation to "negate[] itself," Reply Br. at 12, presumably based on the reasoning that it would be inconceivable for the narrative standard barring unreasonable interference with beneficial uses to be a discretionary consideration. While treating the unreasonable interference standard as a consideration rather than a requirement may not be the preferred approach,[17] it would not be untenable. The Idaho DEQ cannot simply ignore any of the listed principles it is required to consider. Basic administrative law requires agencies to "consider[] the relevant factors and articulate[] a rational connection between the facts found and the choice made." *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983); *accord In re The Port Authority of New York*, 10 E.A.D. 61, 91 (EAB 2001). Thus, in creating a mixing zone, Idaho DEQ would have to articulate a rational connection between its decision to establish a mixing zone of a certain size and its finding on the reasonableness of any interference with beneficial uses caused by that size mixing zone.

Additionally, the League argues that Idaho DEQ's discretionary approach to the eight principles is inconsistent with one of those principles addressing

[17] As we note above, including the narrative unreasonable interference standard as one of the considerations is one source of the regulation's ambiguous meaning.

chronic water quality criteria because that principle "states unambiguously that a mixing zone may exceed chronic water quality criteria, so long as certain conditions are met." Reply Br. at 15. The League asserts that such qualifying language would be unnecessary if the mixing zone regulation actually gave the Idaho DEQ the discretion to depart from the listed principles. However, the League misinterprets the chronic water quality principle's discussion of exceedances of such criteria.

That principle states that "[t]he water quality within a mixing zone may exceed chronic water quality criteria so long as chronic water quality criteria are met at the boundary of any approved mixing zone." Idaho Admin. Code r. 58.01.02.060.01.g (2014). This principle would appear to be a basic description of the purpose of a mixing zone regarding chronic risks – the mixing zone is an area or volume of water where the initial dilution of a discharge takes place and where certain numeric water quality criteria may be exceeded so long as they are met at the boundary of the zone. In this sense, this principle is similar to the two principles that laid out various definitional characteristics of a mixing zone. *See id.* r. 58.01.02.060.01.a, .c (describing the discharge conveyances for mixing zones and the permissibility of overlapping mixing zones). Again, while it may have been unusual to require *consideration* of a principle explaining that chronic water quality criteria can be exceeded inside a mixing zone, nothing in this principle's reference to chronic water quality criteria explicitly grants Idaho DEQ discretion in applying chronic water quality criteria in a mixing zone if certain conditions are met. Thus, the language on exceedance of chronic water quality criteria in a mixing zone does not unnecessarily duplicate the discretion granted by the regulation's requirement that the principles be considered.

In the end, the League's arguments based on other principles in the mixing zone regulation do not remove ambiguity; rather, by emphasizing the regulation's unusual structure, the League simply reinforces the regulation's ambiguous nature. Thus, we conclude that none of the League's arguments in support of its plain meaning reading provides a compelling reason to reject Idaho DEQ's interpretation of its mixing zone regulation or demonstrates that the Region otherwise clearly erred in accepting Idaho DEQ's interpretation.

D. *The League Offers No Other Compelling Reason for Finding the Region Clearly Erred in Accepting Idaho DEQ's Interpretation*

In examining whether the Region clearly erred in accepting Idaho DEQ's interpretation of its mixing zone regulation, we note that the Region relied on Idaho DEQ's explanation of how it interpreted the regulation, the longstanding nature of Idaho DEQ's interpretation of the rule, and the fact that the Region had acknowledged Idaho DEQ's interpretation when it approved the regulation in 1996.

See Fact Sheet for 2018 Draft Permit at 8-9; RTC 2018 Permit at 3-4. The League, however, focuses in its petition solely on its argument that Idaho DEQ's interpretation violates the plain language of the rule – an argument we reject – and fails to address any of these aspects of the Region's decision.[18]

As to the language of the mixing zone regulation, Idaho DEQ interpreted that language in a manner that attempts to give meaning to both the term "consider" and the principles bearing on mixing zone size: the principle containing the 25% volume limitation and the principle barring unreasonable interference with beneficial uses. As Idaho DEQ explains, "[Idaho] DEQ's interpretation of the [EPA-approved] provisions also allowed the agency to vary from the 25% limit on mixing zones, but only if the mixing zone still ensured protection of uses." *See* RTC § 401 Certification at 2. The Region accepted this interpretation, noting that it was both grounded in the regulatory direction that Idaho DEQ "consider" the principle on mixing zone size and that "[r]egardless of a mixing zone's size," the interpretation honored the principle that "mixing zones are not to cause unreasonable interference with or danger to beneficial uses." Fact Sheet for 2018 Draft Permit at 9.

The Region also took into account that Idaho DEQ has long interpreted the regulation in this manner, and that the Region has long understood that to be the case. The language on mixing zones in the EPA-approved regulation was first promulgated in January 1980.[19] Idaho DEQ Resp. Br. attach. 9 (Div. of Env't,

---

[18] In its reply brief, the League claims that Idaho DEQ's interpretations of the mixing zone regulation are irrelevant because "the Region erroneously skipped over the plain text of the rule in favor of non-binding agency interpretations." Reply Br. at 13. Given that the mixing zone regulation is ambiguous, the League's claim does not justify ignoring Idaho DEQ's interpretations of its regulation.

[19] Idaho DEQ has attached public documents concerning this rulemaking to its response brief. The Board takes official notice of these public rulemaking documents. See *In re Russell City Energy Ctr.*, LLC, 15 E.A.D. 1, 36 (EAB 2010) (explaining that the Board uses the doctrine of official notice in relying on "certain relevant non-record information, generally public documents such as statutes, regulations, judicial proceedings, public records, and Agency documents"), pet. for review denied sub nom. *Chabot-Las Positas Cmty. Coll. Dist. v. EPA*, 482 F. App'x 219 (9th Cir. 2012); *In re Stevenson*, 16 E.A.D. 151, 154 n.1 (EAB 2015) (taking official notice of Texas Parks and Wildlife Department report); *In re Indianapolis Power & Light Company*, 6 E.A.D. 23, 29 & n.12 (EAB 1995) (taking official notice of a response to comments document in a Clean Air Act rulemaking).

Idaho Dep't of Health & Welfare, *Idaho Water Quality Standards & Wastewater Treatment Requirements* § 1-2400.03, at 47-49 (Jan. 30, 1980) ("1980 WQS")). That regulation contains identical precatory language requiring Idaho DEQ to "consider * * * principles" and also identical language on the 25% volume limitation on mixing zones. 1980 WQS § 1-2400.03(e)(2), at 47-48. In a "Statement of Effect" released contemporaneously with the promulgation of the regulation, Idaho DEQ announced an interpretation of the mixing zone principles similar to the flexible approach endorsed by Idaho DEQ in establishing the City of Sandpoint's mixing zones:

> The considerations for establishing mixing zone dimensions (Subsection 1-2400.03) provide a potential discharger criteria upon which to plan but do not inflexibly bind the department to those principles when they achieve no water quality improvement or are unnecessary.

Idaho DEQ Resp. Br. attach. 13 (Idaho Dep't of Health & Welfare, *Statement of Effect of the Revised Water Quality Standards and Wastewater Treatment Requirements* § 1-2400 , at 7 (Jan. 31, 1980)).

In public meetings prior to adoption of the 1980 regulation, Idaho DEQ officials made it clear that because the proposed regulation only required that the listed principles be considered, Idaho DEQ retained the discretion to vary from specifics in the principles. For example, when Idaho DEQ was questioned at a 1979 public meeting in Coeur d'Alene, Idaho, as to whether the principles were "regulatory statements" or "guidelines," an Idaho DEQ official explained that "the wording of [the regulation] says, 'These principles will be considered,' so that does not make them mandatory." Idaho DEQ Resp. Br. attach. 10 (Idaho Dep't of Health & Welfare, Transcript of Public Meeting on Water Quality Standards, Coeur d'Alene 8 (Sept. 26, 1979) (statement of Dennis Gray)); *accord* Idaho DEQ Resp. Br. attach. 11 (Idaho Dep't of Health & Welfare, Transcript of Public Meeting on Water Quality Standards, Pocatello 18 (Oct. 2, 1979) ("Those are principles that are to be considered in establishing a mixing zone. * * * They're not a cold, fast requirement.") (statements of Al Murrey)); Idaho DEQ Resp. Br. attach. 12 (Idaho Dep't of Health & Welfare, Transcript of Public Meeting on Water Quality Standards, Twin Falls 35 (Oct. 3, 1979) ("Basically, we are saying that we have to consider each [mixing zone] on a case-by-case basis.") (statement of Al Murrey)).

The Region was well aware of this contemporaneous interpretation of the mixing zone regulation, noting explicitly in its partial approval letter of 1996 that the principles in the rule are "non-binding on the State." EPA Approval Letter encl.

§ 5.b . The non-binding nature of the principles was viewed as problematic by the Region with respect to the principle in section 060.01.g, which "exempts water quality within a mixing zone from the narrative [water quality] criteria." *Id.* Accordingly, the Region disapproved the section 060.01.g principle, finding that given the non-binding nature of the mixing zone principles, "narrative criteria are needed to ensure that designated and existing uses are protected notwithstanding the mixing zone." *Id.* Idaho DEQ subsequently proposed and finalized an amended section 060.01.g. *See supra* note 1.

Following EPA's approval of the mixing zone regulation, Idaho DEQ has consistently adhered to the interpretation of the regulation it first announced at the 1979 public hearings. Idaho DEQ put forward the interpretation in multiple versions of a draft *Mixing Zone Technical Procedures Manual* and has also taken and responded to public comment on this manual. Idaho DEQ, *Mixing Zone Technical Procedures Manual* § 2.5, at 2-17 (draft Aug. 2008) (A.R. 17) (explaining that while Idaho's "mixing zone policy lists specific principles that should be considered when evaluating the size and location of a mixing zone * * * these principles are not regulatory requirements, and [Idaho] DEQ has discretion to depart from these principles"); Idaho DEQ Resp. Br. attach.16 (Idaho DEQ, *Mixing Zone Technical Procedures Manual* § 2.4, at 2-15 (draft Feb. 2014)) (same); Idaho DEQ Resp. Br. attach. 22 (Idaho DEQ, *Response to Comments: Idaho Mixing Zone Implementation Guidance* (draft Dec. 2009)). The Region has also cited one other permit in which Idaho DEQ has established a mixing zone greater than 25% of the volume of the stream. *See* Reg. Resp. Br. at 11 (citing Idaho DEQ, *Final § 401 Water Quality Certification for NPDES Permit for the City of Idaho Falls* 3 (Aug. 6, 2012) (A.R. 19) (authorizing a phosphorus mixing zone at 52.5% of stream volume)). Finally, in the package Idaho DEQ submitted to EPA for approval of the 2015 revision to the mixing zone regulation, Idaho DEQ included an explanation of the reasons for the regulatory modifications that notes that explicit language authorizing Idaho DEQ to vary from the 25% volume limitation on mixing zones was added to make "more clear these size restriction [sic] can be varied from." Idaho DEQ, *Mixing Zone Rule Crosswalk* 3 (Mar. 22, 2016) (A.R. 25).

In its petition, the League does not grapple with any of this. It does not address: (1) Idaho DEQ's attempt to give meaning to both the regulation's mixing zone size limitation and its mandate to avoid unreasonable interference with beneficial uses; (2) Idaho DEQ's longstanding interpretation of the regulation as allowing it to authorize mixing zones exceeding the 25% volumetric limitation; or (3) the Region's approval of the regulation based on that same understanding. Notably, the League has not offered any reason as to why Idaho DEQ's

interpretation would not protect against unreasonable interference with beneficial uses. By failing to address these points in its petition, the League fails to show that there is a compelling reason the Region should have rejected Idaho DEQ's interpretation or that the Region otherwise clearly erred in accepting it, particularly given the substantial deference afforded to a state's interpretation of state law. At very best, the League may have shown through its argument on the meaning of the regulatory text that there may be more than one plausible interpretation of the regulation. But as previously noted, demonstrating that a regulation has more than one plausible interpretation "falls far short" of showing that the Region clearly erred in accepting a state's interpretation of its regulation. *See In re Ina Rd. Water Pollution Control Facility*, 2 E.A.D. 99, 101 (CJO 1985).

VI. *CONCLUSION*

For all of these reasons, the Board holds that the League has not shown that the Region clearly erred in accepting Idaho DEQ's interpretation of the EPA-approved state mixing zone regulation in issuing the City of Sandpoint NPDES permit.

So ordered.