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

In re:	)	Appeal No. NPDES 18-01
City of Sandpoint Wastewater Treatment Plant Permit No. ID-0020842	)	

ICL's REPLY BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

EAB Cases

Statutes

Regulations

State Regulations

Federal Cases

Other Authorities

Pursuant to 40 C.F.R. § 124.19(c)(2), Petitioner, Idaho Conservation League ("ICL"), replies to the brief of Respondent, the U.S. Environmental Protection Agency ("EPA") Region 10 ("Region"), and the brief of Respondent, Idaho Department of Environmental Quality ("IDEQ") (collectively, "Respondents"). On August 17, 2018, ICL requested an extension to file a Reply to the Responses until October 24, 2018. The Environmental Appeals Board ("Board") granted ICL's request on August 30, 2018, and ICL now timely submits this Reply.

INTRODUCTION

The primary issue in this case is whether or not the State of Idaho's Water Quality Standards ("WQSs") create a limit that restricts the size of mixing zones to 25% of the volume of a flowing body of water. The answer to this question is important because the Region has an independent duty under Section 301(b)(1)(C) of the Clean Water Act, 33 U.S.C. § 1311(b)(1)(C), to ensure that state water quality standards are implemented in National Pollutant Discharge Elimination System ("NPDES") permits. If Idaho's WQSs limit the size of mixing zones to 25% of the volume of a flowing waterbody, the Region violated the Clean Water Act ("CWA") by approving the City of Sandpoint Wastewater Treatment Plaint's ("Sandpoint") NPDES permit, which includes effluent limits based on mixing zones that include 47% and 60% of the volume of the Pend Oreille River, a navigable water of the United States.

At the time the Region issued Sandpoint's NPDES permit, Idaho's WQSs authorized mixing zones according to the following rule:

> 01. **Mixing Zones for Point Source Wastewater Discharges**. After a biological, chemical, and physical appraisal of the receiving water and the proposed discharge and after consultation with the person(s) responsible for the wastewater

discharge, the [IDEQ] will determine the applicability of a mixing zone and, if applicable, its size, configuration, and location. In defining a mixing zone, the [IDEQ] *will consider the following principles*:

[...]

e. Mixing zones in flowing receiving water *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;

[...]

IDAPA 58.01.02.060.01 (2014) (emphasis added).

Interpreting the regulatory terms above according to their ordinary meaning and interpreting the regulation so that effect is given to all its provisions, the plain text of this rule limits mixing zones to the principle that no mixing zone is to include more than 25% of the volume of a flowing waterbody. However, contrary to Idaho's WQSs and contrary to ICL's comments submitted during the notice and comment period, the Region issued Sandpoint an NPDES permit that authorizes effluent limits based on mixing zones that include 47% and 60% of the stream flow volume of the Pend Oreille River.

In the Region's Response to Comments ("RTC"), the Region supported its decision to approve Sandpoint's NPDES permit by interpreting the term, "consider," in Idaho's mixing zone rule to allow IDEQ to authorize mixing zones that include more than 25% of the volume of flowing waterbodies, if a larger mixing zone would protect a waterbody's beneficial use. *See* ICL Attachment 2 at 3. Setting aside the fact, for now, that under the Region's interpretation, mixing

zones would not be required to protect a waterbody's beneficial use,[1] the Region concluded its interpretation of the plain text of the regulation without similarly giving effect to the regulatory term, "principle," or the other obligatory terminology in subsections a.-g. of the mixing zone rule. Additionally, the Region relied on prior, non-binding agency interpretation of the mixing zone rule to support its interpretation. Such reliance is only appropriate if the Region also determined that the rule was ambiguous, something that did not happen here. *See Id.* at 3-4.

In ICL's Petition for Review ("Petition"), ICL explained that the Region's response was clearly erroneous, when viewed according to the rules of regulatory interpretation – chief among them is that the first step to interpreting a regulatory term that is not defined in the regulation is to see whether the regulation is clear on its face and, if it is, to use the plain meaning of the words to define the regulatory terms. *See In re Howmet Corp.*, 13 E.A.D. 272, 282 (EAB 2007). Giving effect to the regulatory term, "principle," and interpreting "consider" in context with the words surrounding it and the other provisions of the mixing zone rule, ICL explained how the plain text of the rule unambiguously authorizes mixing zones subject to a set of principles that specifically limit certain mixing zone characteristics, one of which is that mixing zones are not to include more than 25% of the stream flow volume. In essence, ICL showed how the Region's interpretation in its response failed to give effect to all the regulatory terms of the mixing zone rule and inappropriately supplanted the plain text of the rule with non-binding agency interpretations.

Responding to ICL's Petition, the Region and IDEQ make two primary arguments that are the subject of this Reply. First, IDEQ argues that the Board has no authority to review the effluent limits issued in Sandpoint's NPDES permit and no duty to ensure these limits comply

[1] If the mixing zone rule's size limitations under subsection e.iv. are discretionary, subsection b., which states, "The mixing zone is to be located so it does not cause unreasonable interference with or danger to existing beneficial uses," must also be discretionary.
[2] The first instance the Region argues that the plain text of Idaho's mixing zone rule is ambiguous is in the Region's

with Idaho's WQSs. Second, the Respondents both argue that Idaho's mixing zone rule does not limit mixing zones to 25% of the stream flow volume. ICL addresses these arguments in turn.

ARGUMENT

I. The Clean Water Act Authorizes EPA to Review the Effluent Limits Issued in Sandpoint's NPDES Permit and Obligates EPA to Ensure These Limits Comply with State WQSs.

A. Clean Water Act Section 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C)

Section 301(b)(1)(C) of the Clean Water Act provides:

> **(b) Timetable for Achievement of Objectives** In order to carry out the objective of this chapter there shall be achieved--
>
> [...]
>
> **(C)** not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.
>
> [...]

33 U.S.C. § 1311(b)(1)(C).

This section of the Clean Water Act is the basis for EPA's authority and duty to ensure effluent limits comply with water quality standards. *Natural Res. Def. Council v. U.S. E.P.A.*, 279 F.3d 1180, 1188 (9th Cir. 2002); *see also In re City of Haverhill, Wastewater Div. Permittee*, 5 E.A.D. 211, 215 (EAB 1994) (discussing the Regional Administrator's role in ensuring a schedule of compliance meets a State's water quality standards).

In addition, Section 301(b)(1)(C) directs EPA to ensure the implementation of the more stringent limitations necessary to meet water quality standards. *In re City of Moscow, Idaho*, 10

E.A.D. 135, 151 (EAB 2001); *see also In re Ina Road Water Pollution Control Facility, Pima County, Arizona*, 2 E.A.D. 99, 100 (CJO 1985).

IDEQ's Response Brief leads one to believe the opposite of the law and court precedent discussed above because IDEQ mischaracterizes 40 C.F.R. § 124.55(e) as an absolute prohibition on EPA implementing more stringent limitations in cases where, by mistake or intent, a state includes a less stringent condition in its Section 401 Certification. IDEQ ignores subsection (c) of 40 C.F.R. § 124.55, which clarifies that the Regional Administrator must disregard any state certification conditions that allow less stringent permit conditions. Importantly, Section 401 Certification conditions describe only the least stringent limits that a state considers acceptable under state law. *See In re City of Moscow*, 10 E.A.D. at 152. Said another way, the conditions set a baseline, not a ceiling, for effluent limits that EPA may set as necessary to meet WQSs. Therefore, the EPA can, without violating the state's Section 401 authority, implement limits that are more stringent than the limits certified by a state. *See Id.*

B. IDEQ's Citation to Judicial Precedent Does Not Substantiate the Argument that EPA is Unauthorized to Review Sandpoint's NPDES Permit and Prescribe More Stringent Limitations as Necessary to Meet WQSs

IDEQ refers to a variety of judicial decisions, none of which stand for the proposition that EPA lacks discretion to prescribe more stringent limitations, as necessary to meet WQSs, where state conditions in a Clean Water Act Section 401certification ("Section 401 Certification") are less stringent. IDEQ misunderstands EPA's authority in this context because IDEQ ignores the factual circumstances of the caselaw it presents. In the cases IDEQ cited in support of the argument, not one case involves a factual scenario where a state issued less stringent conditions in its Section 401 Certification that conflict with more stringent limitations prescribed by EPA.

See In re City of Fitchburg, Mass., 5 E.A.D. 93 (EAB 1994); *see also Natural Res. Def. Council*, 279 F.3d 1180; *Am. Paper Inst., Inc. v. U.S. E.P.A.*, 996 F.2d 346 (D.C. Cir. 1993); *Keating v. F.E.R.C.*, 927 F.2d 616 (D.C. Cir. 1991); *Am. Rivers, Inc. v. F.E.R.C.*, 129 F.3d 99 (2nd Cir. 1997); *Roosevelt Campobello Int'l Park Comm'n v. U.S. E.P.A.*, 684 F.2d 1041 (1st Cir. 1982); *Lake Carrier' Ass'n v. E.P.A.*, 652 F.3d 1 (D.C. Cir. 2011); *City of Tacoma v. F.E.R.C.*, 460 F.3d 53 (D.C. Cir. 2006); *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.*, 833 F.3d 360 (3rd Cir. 2016); *U.S. v. Marathon Dev. Corp.*, 867 F.2d 96 (1st Cir. 1989); *U.S. Steel Corp. v. Train*, 556 F.2d 822 (7th Cir. 1977).

Although it is well established that EPA may not review a state Section 401 Certification in order to relax a requirement of that certification, *see In re City of Fitchburg, Mass.*, 5 E.A.D. 93,97 (EAB 1994) (citing *In re General Electric Company, Hooksett, New Hampshire*, NPDES Appeal No. 91-13 (EAB, Jan. 5, 1993), it is also well established that EPA may review a state Section 401 Certification to ensure any more stringent limitation necessary to meet WQSs. If this were not the case, states would effectively have immutable authority to subvert limits necessary to meet WQSs, by issuing less stringent conditions in Section 401 Certifications. Similarly, states could also use conditions in a Section 401 Certification as a shortcut to implementing WQSs that have not yet been approved by EPA.

Both the Clean Water Act and the judicial decisions interpreting the statute recognize EPA's authority to review effluent limits in Sandpoint's NPDES permit and duty to ensure these limits comply with state WQSs.

II. The Region's Interpretation of Idaho's Mixing Zone Rule is Clearly Erroneous

A. The Region Did Not Give Effect to the Plain Meaning of the Regulatory Text

The Region's approval of the effluent limits in Sandpoint's NPDES permit is clearly erroneous because the Region incorrectly applied Idaho's mixing zone rule, failing to give effect to the plain meaning of the mixing zone rule's text.

Administrative regulations are interpreted according to the normal tenets of statutory construction – chief among these is the tenet that the plain meaning of words generally supply the definition of regulatory terms. *See In re Howmet Corp.*, 13 E.A.D. 272, 282 (EAB 2007). This tenet of statutory construction is understood to mean that if a regulatory term's language is clear and unambiguous as it is understood in the context of the entire regulation, the interpretative exercise ends with the plain text. *See Rochester Public Utilities*, 11 E.A.D. 583, 603 (EAD 2004). In this case, the Region did not correctly apply this interpretative approach to Idaho's mixing zone rule.

During the notice and public comment period for Sandpoint's NPDES permit, the Region interpreted the meaning of Idaho's mixing zone rule, first, by only giving effect to the term, "consider." *See* ICL Attachment 2 at 3. According to the Region's interpretation, it follows from the term, "consider," that IDEQ "may choose to authorize a larger mixing zone if such larger mixing zone would protect the waterbody's beneficial uses." *See Id*. As ICL explained in its Petition for Review, the Region's interpretation forces the term, "consider," to do a lot of regulatory heavy-lifting, in that the term, "consider," by itself, is supposed to imply an entire regulatory condition that does not exist in the plain text of the effective mixing zone rule. *See* Petition at 9-10. In fact, the Region's own interpretation of Idaho's mixing zone rule negates itself. If it follows from the Region's interpretation that the mixing zone size principles at

subsection e. of Idaho's mixing zone rule are discretionary, then it also follows that the rest of the principles listed in subsections a.-g. of Idaho's mixing zone rule are also discretionary, including the principle at subsection b., which states: "The mixing zone is to be located so it does not cause unreasonable interference with or danger to existing beneficial uses." IDAPA 58.01.02.060.01.b (2014).

Simply because the text of IDEQ's proposed mixing zone rule sets out a regulatory condition does not entitle the Region to impute or imply this condition if it does not exist in the plain text of the effective mixing zone rule – doing so would unlawfully allow IDEQ to bypass the rulemaking requirements and EPA approval process for promulgating rule changes under the Clean Water Act. And, as Idaho's effective mixing zone rule is written, the Region's interpretation leads to untenable results, as described above.

The first step in regulatory interpretation is to confront the plain text of the rule to determine whether the ordinary meaning of the terms and the regulation as a whole is clear on its face – interpretation ends if the plain text is clear. The Region may only look to other sources if it determines that some aspect of the regulation is not clear on its face. However, here, without examining and interpreting the rest of the plain text of Idaho's mixing zone rule (such as the regulatory term, "principle") the Region's interpretation defers significantly to non-binding agency interpretations, despite the fact that the Region did not find the plain text of the rule to be ambiguous.[2] *See* ICL Attachment 2.

Idaho's mixing zone rule unambiguously limits the size of mixing zones, and the Region erroneously skipped over the plain text of the rule in favor of non-binding agency interpretations.

[2] The first instance the Region argues that the plain text of Idaho's mixing zone rule is ambiguous is in the Region's Response Brief. *See* Region's Resp. Br. at 13.

B. The Plain Text of Idaho's Mixing Zone Rule Unambiguously Limits the Size of Mixing Zones

As ICL explained in its Petition for Review, the Region erred by failing to give effect to the ordinary meaning of all the regulatory terms in Idaho's mixing zone rule. Specifically, both Respondents fail to confront the term, "principle," and what it means to give effect to this term in the context of Idaho's mixing zone rule provisions. The meaning of Idaho's mixing zone rule does not end with the interpretation of the term, "consider" – it matters what the rule requires IDEQ to consider. The rule might have required IDEQ to consider guidelines, factors, or ideals, but as the mixing rule is written, IDEQ must consider "principles." And, whatever dictionary is consulted the ordinary meaning of principle is clear – a principle is a fundamental law.[3]

Instead of applying the regulatory term, "principle," the Region and IDEQ interpret the term "consider" to dictate the entire meaning of Idaho's mixing zone rule and argue that this term alone precludes any mandatory limitation on mixing zones in Idaho. However, the judicial precedent cited by the Respondents does not support their argument. IDEQ provided a lengthy discourse of judicial decisions that analyze the ordinary meaning of the term, "consider." But, in each of these decisions the regulations being interpreted required that a particular entity consider "matters," "items," or "mitigating factors." *See State of N.Y. v. E.P.A.*, 50 F.Supp.2d 141, 144 (N.D. N.Y. 1999) (reviewing a statute that required consideration of "the following matters"); *see also Doe v. Schachter*, 804 F.Supp. 53, 62-63 (N.D. Cal. 1992) (reviewing a regulation that required consideration of "mitigating factors"); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580-581 (1998) (reviewing a statute that required the consideration of "factors"); *Service v. Dulles*, 354 U.S. 363, 387-88 (1957) (reviewing a regulation that required the consideration of

[3] Merriam-Webster's Collegiate Dictionary (11th ed. 2009) defines "principle" as "a comprehensive and fundamental law, doctrine, or assumption" and secondarily as "a rule or code of conduct." Similarly, Black Law Dictionary (10th ed. 2014) defines "principle" as "a basic rule, law, or doctrine; esp., one of the fundamental tenets of a system."

"the complete file, arguments, briefs, and testimony presented"). Not one of the cases IDEQ cited involves a statute or regulation requiring an entity to consider "principles," "laws," or "rules." As ICL's Petition explains, it matters what must be considered. *See* Petition at 11 (explaining the example of a rule that requires automobile operators consider the principle that no driver is to operate a vehicle more than 25 miles an hour in a school zone, when school is in session).

Subsections a.-g. of Idaho's mixing zone rule further substantiate that the plain text of the rule requires mixing zones be limited in particular ways. These subsections provide a series of rules that limit certain characteristics of mixing zones, including the size of a mixing zone's surface area, volume, and width. *See* IDAPA 58.01.02.060.01.a.-g. (2014). Importantly, where the mixing zone rule grants IDEQ discretionary authority, the regulatory text indicates this plainly. For example, subsection g. states unambiguously that a mixing zone may exceed chronic water quality criteria, so long as certain conditions are met. *See id.* at g. If it were discretionary for IDEQ to authorize a mixing zone that includes more than 25% of the volume of a flowing waterbody, the mixing zone rule would have explicitly provided this in the regulatory text, as the text for subsection g. reflects.

The Region erroneously interpreted Idaho's mixing zone rule by failing to give meaning to the plain text of all the terms in the rule and inappropriately relying on prior, non-binding agency interpretation. The plain text of Idaho's mixing zone rule requires mixing zones be limited to include no more than 25% of the stream volume of flowing waterbodies.

CONCLUSION

The plain text of Idaho's Water Quality Standards, IDAPA 58.01.02.060.01.e.iv. (2014), limit the size of mixing zones in flowing water to include no more than 25% of the volume of the stream flow. Therefore, the Region's approval of effluent limits in Sandpoint's NPDES permit, which were based on mixing zones that included 47% and 60% of the volume of the Pend Oreille River, violated Section 301(b)(1)(C) of the Clean Water Act, 33 U.S.C. § 1311(b)(1)(C). As such, the Region's approval of Sandpoint's NPDES permit violated the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (E), as an abuse of discretion, not in accordance with the law, and unsupported by substantial evidence.

Accordingly, we respectfully request the Board:

1. Find that the Region's reissuance of NPDES Permit No. ID0020842 violated the Clean Water Act, 33 U.S.C. § 1311(b)(1)(C);
2. Find that the Region's reissuance of NPDES Permit No. ID0020842 violated the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (E); and
3. 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.

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

Date: October 24, 2018

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

This reply brief complies with the requirement that replies not exceed 7,000 words. This petition for review, excluding attachments, is approximately 3,233 words in length.

TABLE OF ATTACHMENTS

Complete versions of the attachments referenced in this reply brief were provided electronically to the Board's Clerks' office. This Table of Attachments only refers to attachments referenced in this reply brief. Any attachments included ICL's Petition for Review maintain the same identification in ICL's Reply Brief.

ICL Attachment 2	EPA Response to Comments on the Re-Proposed Draft NPDES Permit for the City of Sandpoint, June 2018

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing ICL Reply Brief in the matter of City of Sandpoint Wastewater Treatment Plant, Permit No. ID0020842 Appeal No. NPDES 18-01, were served, by the method indicated, on the following persons, this 24th of October, 2018:

Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, NW
WJC East, Room 3334
Washington, DC 20004

[VIA Electronic Filing]

City of Sandpoint
1123 Lake Street
Sandpoint, ID 83864

[VIA EMAIL]
mayor@sandpointidaho.gov

Chris Hladick
Regional Administrator
EPA – Region 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

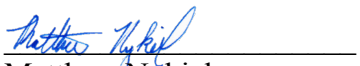
[VIA EMAIL]
hladick@christopher@epa.gov

Courtney Weber
Assistant Regional Counsel
EPA – Region 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

[VIA EMAIL]
weber.courtney@epa.gov

Richard Grisel
Deputy Attorney General
Department of Environmental Quality
1410 N. Hilton, 2nd Floor
Boise, ID 83706

[VIA EMAIL]
rick.grisel@deq.idaho.gov



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