

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

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

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PETITION FOR REVIEW

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

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## INTRODUCTION

Pursuant to 40 C.F.R. §124.19(a), the Idaho Conservation League (“Petitioner” or “ICL”) petitions for review certain conditions of NPDES Permit No. ID-0020842 (“Permit”), which was issued to the City of Sandpoint Wastewater Treatment Plant (“Permittee”) on September 5, 2017, by the United States Environmental Protection Agency (“EPA”). The permit at issue in this proceeding authorizes the City of Sandpoint Wastewater Treatment Plant to discharge wastewater into the Pend Oreille River.

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

(1) The phosphorus effluent limitations, as specified at page 6, Table 1 of the Permittee’s final NPDES permit.

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

Petitioner is represented by in-house legal staff in this matter before the EAB.

## THRESHOLD PROCEDURAL REQUIREMENTS

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

1. Petitioner has standing to petition for review of the permit decision because it participated in the public comment period on the permit. See 40 C.F.R. §124.19(a).

Copies of the Petitioner's comments are included in Attachments 1 and 2 to this petition.

2. The issues raised by Petitioner in its petition were raised during the public comment period and therefore were preserved for review.<sup>1</sup>

## FACTUAL AND STATUTORY BACKGROUND

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

The State of Idaho does not have primacy over the CWA for NPDES permitting. Therefore, the EPA issued the Permittee's most recent NPDES permit on November 30, 2001. This permit became effective on January 5, 2002 and expired on January 5, 2007. The Permittee submitted an NPDES application for permit reissuance on September 25, 2006. After determining that this application was timely and complete, the EPA administratively extended the NPDES permit under which the City of Sandpoint WWTP has operated since 2002. To this day, the Permittee operates its WWTP according to the NPDES permit issued in 2001.

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<sup>1</sup> See Attachment 3 at 4-7; 38-40.

<sup>2</sup> See Attachment 4 at E-5; See also Attachment 5 at 6.

<sup>3</sup> See Attachment 4 at E-5.

<sup>4</sup> See Attachment 3 at 7-8; 39.

<sup>5</sup> See EPA Actions on Proposed Standards, Idaho Department of Environmental Quality available at <http://www.deq.idaho.gov/epa-actions-on-proposed-standards> (last accessed on October 6, 2017).

<sup>6</sup> United States Environmental Protection Agency Region 10, Authorization to Discharge under the

On October 31, 2014, the EPA issued a draft NPDES permit for public comment, which would replace the Permittee's 2001 NPDES permit. ICL submitted comments on the draft permit, which are included as Attachment 1 in this petition. Following the public comment period, the EPA issued a revised draft NPDES permit for public comment on April 19, 2016. Likewise, ICL submitted comments on the revised draft permit, which are included as Attachment 2 in this petition. The EPA issued a final NPDES permit for the Permittee on September 5, 2017, which is the subject of this Petition for Review and is included as Attachment 4 in this petition.

In the Permittee's final NPDES permit approved and issued by the EPA, the EPA set effluent limitations for phosphorus based on the EPA's determination that the Permittee's discharge has the reasonable potential to cause or contribute to excursions above Idaho's narrative water quality criterion for excess nutrients.<sup>2</sup> The EPA developed the phosphorus effluent limitations based on mixing zones encompassing 47% of the volume of the receiving water from June – September and 60% of the volume of the receiving water from October – May.<sup>3</sup>

Before the EPA issued these final phosphorus effluent limitations, ICL submitted comments on both the draft and revised draft permits, explaining why these mixing zones violated Idaho Water Quality Standards and the Clean Water Act. The EPA responded to ICL's comments and justified the phosphorus effluent limitations and corresponding mixing zones pursuant to a proposed Mixing Zone Policy, which the IDEQ submitted to the EPA on December 22, 2016.<sup>4</sup> The EPA has not approved this proposed Mixing Zone

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<sup>2</sup> See Attachment 4 at E-5; See also Attachment 5 at 6.

<sup>3</sup> See Attachment 4 at E-5.

<sup>4</sup> See Attachment 3 at 7-8; 39.

Policy. The previous mixing zone standards published in the 2014 Idaho Administrative Code continue to apply.<sup>5</sup>

#### ISSUE PRESENTED FOR REVIEW

Is the EPA final action approving and issuing phosphorus effluent limitations in the City of Sandpoint WWTP NPDES permit arbitrary and capricious, in violation of §706 of the Administrative Procedure Act?

#### ARGUMENT

The EPA violated the Administrative Procedure Act by approving and issuing phosphorus effluent limitations in the Permittee's final NPDES permit that are based on proposed but, as yet, ineffective Idaho Water Quality Standards.

The EPA approved and issued effluent limitations in the Permittee's final NPDES permit based on mixing zones that include 47% of the volume of the receiving stream flow during June - September and 60% of the volume of the receiving stream flow during October - May.<sup>6</sup> The EPA cited IDAPA 58.01.02.060.01.i (2016) as the regulatory justification for issuing phosphorus effluent limits that are based on mixing zones that exceed 25% of the volume of the stream flow.<sup>7</sup> However, the subsection to which the

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<sup>5</sup> See EPA Actions on Proposed Standards, Idaho Department of Environmental Quality available at <http://www.deq.idaho.gov/epa-actions-on-proposed-standards> (last accessed on October 6, 2017).

<sup>6</sup> United States Environmental Protection Agency Region 10, Authorization to Discharge under the National Pollutant Discharge Elimination System, City of Sandpoint Wastewater Treatment Plant NPDES Permit No. ID0020842, September 5, 2017. (Attachment 5)

<sup>7</sup> EPA's Response to Comments on the Draft NPDES Permits for the City of Sandpoint, NPDES Permit Number ID0020842, September 2017 at 7-8; 39. (Attachment 4)

EPA referred is part of a revised water quality standard that the EPA has not approved and, therefore, is not effective for purposes of CWA permitting.

In *Alaska Clean Water Alliance v. Clarke*, the court held that state water quality standards cannot be effective until they are approved by the EPA. 45 E.R.C. 1664, 1997 WL 446499 (W.D. Wash. 1997). Following this ruling, the EPA enshrined this holding in federal regulation:

“A State or authorized Tribe’s applicable water quality standard for purposes of the [Clean Water] Act remains the applicable standard until EPA approves a change, deletion, or addition to that water quality standard, or until EPA promulgates a more stringent water quality standard.”

40 C.F.R. §131.21(e) (2017).

The 2016 Idaho Administrative Code at Subsection 060.01 provides the Mixing Zone Policy on which the EPA based the phosphorus effluent limitations in the Permittee’s final NPDES permit (the Mixing Zone Policy as published in the 2016 Idaho Administrative Code will be referred to as the “2016 Mixing Zone Revisions”). See IDAPA 58.01.02.060.01. (2016). The 2016 Mixing Zone Revisions revised portions of the Mixing Zone Policy as published in the 2014 Idaho Administrative Code (the Mixing Zone Policy as published in the 2014 Idaho Administrative Code will be referred to as the “2014 Mixing Zone Standards”). See IDAPA 58.01.02.060.01. (2014).

The IDEQ submitted the 2016 Mixing Zone Revisions to the EPA on December 22, 2016, but the EPA has not approved the revisions.<sup>8</sup> As such, the 2016 Mixing Zone Revisions are not effective, and the 2014 Mixing Zone Standards continue to apply. In

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<sup>8</sup> See EPA Actions on Proposed Standards, Idaho Department of Environmental Quality available at <http://www.deq.idaho.gov/epa-actions-on-proposed-standards> (last accessed October 6, 2017). The Petitioner confirmed the status of the 2016 Mixing Zone Revisions in a phone conversation on October 2, 2017 with EPA Region 10 Permit Writer, Brian Nickel.

effect, this means that the EPA determination of phosphorus limits, which incorporate mixing zones that include more than 25% of the volume of the stream flow, has no regulatory justification. As a result, the EPA final action setting the Permittee's phosphorus effluent limits was arbitrary and capricious, in violation of §706 of the Administrative Procedure Act. 5 U.S.C. §706.

The Petitioner requests the EAB to find that the EPA's action setting the Permittee's phosphorus effluent limits was arbitrary and capricious. Further, the Petitioner requests the EAB to direct the EPA to stay the final NPDES permit authorizing the Permittee to discharge into the Pend Oreille River. The stay should not be lifted until such time that the EPA reissues the permit in a manner consistent with the Clean Water Act. Prior to reissuing the Permittee's final NPDES permit, the Petitioner requests the EAB direct the EPA to provide a 30-day public comment period for interested parties to evaluate the Permittee's final NPDES permit in light of any changes resulting from this Petition for Review.

It is the Petitioner's position that the phosphorus effluent limits in Permittee's final NPDES permit also violate the 2014 Mixing Zone Standards and thereby violate the §303 of the Clean Water Act. However, because the EPA's action setting phosphorus effluent limits in this instance was solely based on the 2016 Mixing Zone Revisions, the EAB need not reach the issue of whether or not the Permittee's phosphorus effluent limits violate the 2014 Mixing Zone Standards. Should the EAB wish to evaluate the propriety of the Permittee's phosphorus effluent limits according to the 2014 Mixing Zone Standards, the Petitioner requests that the EAB provide the Parties to this appeal an opportunity to brief this issue.



## CONCLUSION

The Petitioner requests:

1. The EAB find that the EPA's action setting the Permittee's phosphorus effluent limits was arbitrary and capricious;
2. The EAB direct the EPA to stay the final NPDES permit authorizing the Permittee to discharge into the Pend Oreille River until such time that the EPA reissues the permit in a manner consistent with the Clean Water Act;
3. The EAB direct the EPA to provide a 30-day public comment period for interested parties to evaluate the Permittee's final NPDES permit in light of changes made to the final permit as a result of this appeal;
4. The EAB grant the Petitioner the opportunity for an oral argument to explain the Petition for Review and the underlying concerns articulated therein; and
5. The EAB provide the Parties to this Appeal an opportunity to brief the propriety of the EPA's phosphorus effluent limitations according to the 2014 Mixing Zone Standards, should the EAB wish to address this issue.



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Date: October 6, 2017

## STATEMENT OF COMPLIANCE WITH WORD LIMITATION

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

This petition for review, excluding attachments, is approximately 1,730 words in length.

## LIST OF ATTACHMENTS

Complete versions are being provided electronically to the EAB Clerks's office.

Attached are the following exhibits, numbered in order of appearance in the petition:

**Attachment 1:** Idaho Conservation League comments on draft NPDES permit for the City of Sandpoint WWTP (ID0020842), January 30, 2015.

**Attachment 2:** Idaho Conservation League comments on revised draft NPDES permit for the City of Sandpoint WWTP (ID0020842) and Idaho's 401 certification of same, June 29, 2016.

**Attachment 3:** EPA's Response to Comments on the Draft NPDES Permits for the City of Sandpoint, NPDES Permit Number ID0020842, September 2017.

**Attachment 4:** EPA Revised Fact Sheet, City of Sandpoint Wastewater Treatment Plant, NPDES Permit Number ID0020842.

**Attachment 5:** United States Environmental Protection Agency Region 10, Authorization to Discharge under the National Pollutant Discharge Elimination System, City of Sandpoint Wastewater Treatment Plant NPDES Permit No. ID0020842, September 5, 2017.

## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Review in the matter of the City of Sandpoint Wastewater Treatment Plant, Permit No. ID-0020842, were served, by the method indicated, on the following persons, this 6th of October, 2017:

Clerk of the Board  
U.S. Environmental Protection Agency  
Environmental Appeals Board  
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