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

In re:	)
	)
City of Twin Falls	)
Wastewater Treatment Plant	)
Permit No.: ID-002127-0	)
	)
	)

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 Twin Falls Wastewater Treatment Plant.

TABLE OF CONTENTS

INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), the Idaho Conservation League ("Petitioner" or "ICL") petitions for review of certain conditions of NPDES Permit No. ID-002127-0 ("the Permit"), which was issued to the City of Twin Falls Wastewater Treatment Plant ("Permittee") on September 22, 2009, by the United States Environmental Protection Agency. The permit at issue in this proceeding authorizes the City of Twin Falls' Wastewater Treatment Plant to discharge wastewater to the Snake River in Idaho and allows the Permittee to sell phosphorus pollutant credits to other dischargers to the Snake River.

Petitioner contends that certain permit conditions are based on clearly erroneous findings of fact and conclusions of law and are counter to EPA policy regarding the use of pollutant trading. Petitioner further raises an important policy question regarding EPA's wholesale adoption of permit conditions from an old draft of a State of Idaho document that was never finalized and was not subject to sufficient public review.

To wit, petitioner challenges permit condition I.B.1 which authorizes the Permittee to engage in pollutant trading and the conditions under which such trades may take place[1].

Petitioner, the Idaho Conservation League, is a 401(c)3 non-profit based in Boise, Idaho and represents members from all across Idaho. Many of our members live, work and/or recreate in areas impacted by the contested NPDES permit. Our members rely on the Snake River for clean water for drinking, industry, recreation and irrigation and are deeply concerned about matters that impact the health of the Snake River.

Petitioners represent themselves in this matter before the EAB.

THRESHOLD PROCEDURAL REQUIREMENTS

Petitioner satisfies the threshold requirements for filing a petition for review under 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. §

---

[1] United States Environmental Protection Agency Region 10, Authorization to Discharge under the National Pollutant Discharge Elimination System, The City of Twin Falls Wastewater Treatment Plant NPDES Permit Number: ID-002127-0, November 2009, Page 7 and Appendix A, pages 37 – 39.

124.19(a). A copy of these comments is attached to this petition[2].

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

FACTUAL AND STATUTORY BACKGROUND

The City of Twin Falls operates the Twin Falls Wastewater Treatment Plant. The facility's previous NPDES permit was issued in May of 2000 and expired on May 1, 2005. The contested permit replaces this prior permit.[3] The contested permit was issued by the EPA. The State of Idaho does not have primacy over the CWA for NPDES permitting.

Wastewater from the Twin Falls facility is discharged into the Snake River at river mile 608.5 in a segment of river referred to as Upper Snake Rock Subbasin.[4] This section of the river does not meet applicable water quality standards for numerous pollutants and is designated at a Water Quality Limited Segment.[5] With regard to our petition for review of this contested permit, the pollutant of concern is total phosphorus (TP).

Numerous permitted dischargers release phosphorus into this segment of the Snake River and the adjacent downstream "Mid-Snake" segment. In addition to the Twin Falls wastewater treatment plant, there are several other municipal and industrial dischargers, 81 aquiculture facilities, 4 fish processing facilities and 12 fish hatcheries. All of these facilities discharge phosphorus.[6]

Pursuant to section 303(d) of the Clean Water Act the State of Idaho has developed the Upper Snake Rock Total Maximum Daily Load (TMDL). This TMDL serves as the State's management plan for limiting total phosphorus in this segment of the Snake River. EPA approved this TMDL in 2000. In 2005, the Idaho Department of Environmental Quality (IDEQ) issued The Upper Snake

---

[2] Idaho Conservation League comments on draft NPDES permit for Twin Falls wastewater treatment plant (ID002170), 6/16/09.
[3] United States Environmental Protection Agency Region 10, Authorization to Discharge under the National Pollutant Discharge Elimination System, The City of Twin Falls Wastewater Treatment Plant NPDES Permit Number: ID0021270, Factsheet, May 11, 2009, p. 7.
[4] Ibid, p. 5.
[5] Department of Environmental Quality Working Principles and Policies for the 2008 Integrated (303[d]/305[b]) Report, May 22, 2009. http://www.deq.state.id.us/water/data_reports/surface_water/monitoring/2008.cfm
[6] Department of Environmental Quality, The Upper Snake Rock TMDL Modification, July 22, 2005. www.scc.idaho.gov/TMDL%20Plans/UpperSnakeRock_aquaculture_wasteload_allocations_modification.pdf

Rock TMDL Modification to account for the aquaculture wasteload allocation of phosphorus[7].

The State of Idaho believes that pollutant trading may be a constructive means of addressing certain water quality issues. In 1997 pollutant trading was recognized in Idaho's Water Quality Standards at IDAPA 58.01.02.054.06[8] which states:

> Pollutant Trading. Development of TMDLs or equivalent processes or interim changes under these rules may include pollutant trading with the goal of restoring water quality limited water bodies to compliance with water quality standards.

Thus, Idaho's DEQ is authorized by its Legislatively approved rules to integrate pollutant trading schemes into TMDLs as a means of achieving the restorative goals of the TMDL.

The EPA appears to generally concur with the belief that pollutant trading may be a beneficial means of achieving water quality standards. In January of 2003 the EPA issued a policy entitled "Water Quality Trading Policy.[9]" This policy expounds upon the potential virtues of pollutant trading to offer greater flexibility and cost saving to dischargers and provides a framework of trading objectives and statements outlining when and where EPA supports the use of a pollutant trading program.

EPA's Pollutant Trading Policy clearly articulates that certain objectives must be met via trading for EPA to support the use of a trading program. See below excerpt from EPA's policy[10]:

> II. Trading Objectives
>
> EPA supports implementation of water quality trading by states, interstate agencies and tribes where trading:
>
> A. Achieves early reductions and progress towards water quality standards pending development of TMDLs for impaired waters.
>
> B. Reduces the cost of implementing TMDLs through greater efficiency and flexible approaches.

---

[7] Ibid, p. 9.
[8] Idaho Administrative Code, Department of Environmental Quality, Water Quality Standards IDAPA 58.01.02.054.06, 2009. Page 17. http://adm.idaho.gov/adminrules/rules/idapa58/0102.pdf
[9] United States Environmental Protection Agency, Office of Water, Water Quality Trading Policy, January 13, 2003. http://www.epa.gov/owow/watershed/trading/finalpolicy2003.html
[10] Ibid, p. 3.

C. Establishes economic incentives for voluntary pollutant reductions from point and nonpoint sources within a watershed.

D. Reduces the cost of compliance with water quality-based requirements.

E. Offsets new or increased discharges resulting from growth in order to maintain levels of water quality that support all designated uses.

F. Achieves greater environmental benefits than those under existing regulatory programs. EPA supports the creation of water quality trading credits in ways that achieve ancillary environmental benefits beyond the required reductions in specific pollutant loads, such as the creation and restoration of wetlands, floodplains and wildlife and/or waterfowl habitat.

G. Secures long-term improvements in water quality through the purchase and retirement of credits by any entity.

H. Combines ecological services to achieve multiple environmental and economic benefits, such as wetland restoration or the implementation of management practices that improve water quality and habitat.

Objectives F and G – the need to achieve greater environmental benefits than those under existing regulatory programs and to secure a long-term benefits via the retirement of credits – are germane to this petition for review and will be discussed in greater detail later.

EPA's policy on this matter further states that pollutant trading may only take place where the trading program (and individual trades) are in alignment with the Clean Water Act. See below excerpt from EPA's policy[11]:

III. Water Quality Trading Policy Statement

A. CWA Requirements. Water quality trading and other market-based programs must be consistent with the CWA.
…
F. Alignment With The CWA. Provisions for water quality trading should be aligned with and incorporated into core water quality programs. EPA believes this may be done by including provisions for

[11] Ibid, pp. 6-8.

trading in water quality management plans, the continuing planning process, watershed plans, water quality standards, including antidegradation policy and, by incorporating provisions for trading into TMDLs and NPDES permits.

When developing water quality trades and trading programs, states and tribes should, at a minimum, take into account the following provisions of the CWA and implementing regulations:

6. Antibacksliding. EPA believes that the antibacksliding provisions of Section 303(d)(4) of the CWA will generally be satisfied where a point source increases its discharge through the use of credits in accordance with alternate or variable water quality based effluent limitations contained in an NPDES permit, in a manner consistent with provisions for trading under a TMDL, or consistent with the provisions for pre-TMDL trading included in a watershed plan.

These antibacksliding provisions will also generally be satisfied where a point source generates pollution reduction credits by reducing its discharge below a water quality based effluent limitation (WQBEL) that implements a TMDL or is otherwise established to meet water quality standards and it later decides to discontinue generating credits, provided that the total pollutant load to the receiving water is not increased, or is otherwise consistent with state or tribal antidegradation policy.

7. Antidegradation. Trading should be consistent with applicable water quality standards, including a state's and tribe's antidegradation policy established to maintain and protect existing instream water uses and the level of water quality necessary to support them, as well as high quality waters and outstanding national resource waters (40 CFR 131.12). EPA recommends that state or tribal antidegradation policies include provisions for trading to occur without requiring antidegradation review for high quality waters. EPA does not believe that trades and trading programs will result in "lower water quality" as that term is used in 40 CFR 131.12(a)(2), or that antidegradation review would be required under EPA's regulations when the trades or trading programs achieve a no net increase of the pollutant traded and do not result in any impairment of designated uses.

[Underlining added for emphasis]

Statements such as pollutant trading “must be consistent with the CWA” and in “alignment” with the Clean Water Act are unambiguous articulations that trading cannot occur in a manner that violates Water Quality Standards and other provisions of the Clean Water Act. Thus it is clearly a “bedrock” issue that trading activities are not authorized if they will result in violations of the Clean

Water Act.

A key aspect of ensuring Clean Water Act consistency and alignment is the heavily reliance the State's antidegradation policy. As we will discuss later in the "Arguments" section of our Petition, this is germane to our petition because Idaho lacks a Clean Water Act compliant antidegradation policy.

In November of 2003, shortly after EPA's release of its Water Quality Trading Policy, the State of Idaho's Department of Environmental Quality issued a *draft* document entitled "Pollutant Trading Guidance[12]." This *draft* document proposed the procedures that would be followed for pollutant trading to occur in Idaho generally. And, critically for the purposes of our petition, proposed specific trading ratios for the Upper Snake Rock Subbasin. The Idaho *draft* Pollutant Trading Guidance proposed that phosphorus trades within the Upper Snake Rock Subbasin be executed at a 1:1 ratio.[13] That is, for each one credit that a buyer needs to acquire, the buyer needs to purchase one credit.

The determination of an appropriate trading ratio is a critical, *perhaps the most critical*, component of pollution trading. Failure to set an appropriate trading ratio can result in violations of water quality standards. EPA offers guidance on the development of trading ratios in its 2007 "Water Quality Trading Toolkit for Permit Writers[14]."

Here, in the Toolkit, a section entitled "Developing Trade Ratios[15]" offers the following guidance:

> In many cases, pollutant credits are not generated on a "one pollutant pound-to-one pollutant credit" basis. Rather, some type of a trading ratio is used to either discount or normalize the value of pollutant credits. For example, a trading program with a trading ratio of 4:1 would require a buyer to purchase 4 pounds of nitrogen reduction to achieve a credit worth one pound of nitrogen reduction from its facility. There is no set limit for how high a trading ratio can be.
>
> Trading ratios depend on the specific circumstances in the watershed. Factors that drive the use of trading ratios might relate to environmental conditions, pollutants, or programmatic goals. Although existing trading programs use various types of trading ratios and different terms to

---

[12] Department of Environmental Quality, Pollutant Trading Guidance, November 2003 DRAFT. www.deq.state.id.us/water/prog_issues/waste_water/pollutant_trading/pollutant_trading_guidance_entire.pdf

[13] Ibid, Appendix C, p. 4

[14] United States Environmental Protection Agency, Office of Wastewater Management, Water Permits Division, EPA 833-R-07-004, Water Quality Trading Toolkit for Permit Writers, August 2007. http://www.epa.gov/owow/watershed/trading/WQTToolkit.html

[15] Ibid, pp. 30-33

> describe them, the basic categories of trading ratios are delivery, location, equivalency, retirement, and uncertainty.
>
> Delivery or location ratios are calculated as part of the overall trading ratio for a particular pair of sources to account for pollutant attenuation because of the fate and transport characteristics of a pollutant, the unique characteristics of the watershed (e.g., hydrology, vegetation), distance, and time. This type of ratio accounts for the fact that a pound of a pollutant discharged upstream will not arrive as a pound of a pollutant at a given point downstream.
>
> [Underlining added for emphasis]

Pursuant to the guidance provided in this Toolkit for Permit Writers, the development of a trading ratio should, at a minimum take into consideration the "delivery ratio."

Trading as authorized in the contested permit involves sources discharging directly into the impaired waterway of concern. Additionally, sources are located up to 50.7 miles apart from each other[16].

On this matter the EPA Toolkit offers the following example[17]:

> Delivery ratios are used when sources are directly discharging to the waterbody of concern. These ratios account for the distance and unique watershed features (e.g., hydrologic conditions) that will affect pollutant fate and transport between trading partners. For example, an upstream point source is interested in trading with another point source that is several miles downstream. Because of the distance between the two dischargers, modeling shows that a 5:1 delivery ratio should be applied to trades between the two sources. This means that the downstream point source would need to purchase 5 pounds of pollutant credits to achieve the equivalent of one pound of pollutant reduction at its own discharge point. Sources that are closer in proximity with less intervening hydrological features are likely to have a lower delivery ratio.
>
> [Underlining added for emphasis]

Idaho's 2003 draft Pollutant Trading Guidance, however, makes no use of the "delivery ratio" concept.

Indeed, Idaho's *draft* guidance states:

---

[16] Department of Environmental Quality, Pollutant Trading Guidance, November 2003 DRAFT, Appendix C, pages 4-6. Distance calculated using river mile location of discharge points.
[17] United States Environmental Protection Agency, Office of Wastewater Management, Water Permits Division, EPA 833-R-07-004, Water Quality Trading Toolkit for Permit Writers, August 2007, page 30.

> "This model does not make any assumptions related to the uptake of phosphorus in the Middle Snake River. A pound in equals a pound out at any place on the river since the overall target for the whole Middle Snake River is 0.075-mg/L TP."[18]

Note that this is directly counter to EPA's guidance in the "Toolkit" that states: "a pound of a pollutant discharged upstream will not arrive as a pound of a pollutant at a given point downstream."[19]

By attempting to create a single trading ratio value to be used throughout the Subbasin, Idaho's 2003 *draft* Guidance fails to account for the fact that some buyers will be near the seller (in this case the Twin Falls Wastewater Treatment Plant) and some will be farther way.

As a result the 'one size fits all' trading ratio of 1:1 flies in the face of the scientific and mathematic reality that greater amounts phosphorus attenuate out of the water column the greater the distance that the water travels; this is influenced also by varying hydrologic features the water travels through.

The factual (and quantifiable) errors in the State's trading ratio are revealed in the Upper Snake Rock TMDL modification, which contains an entire section entitled "Loss and Attenuation." Here, the Idaho DEQ reports that "within this system there is 'loss' (downstream transport) and 'attenuation' (local placement) of sediment and total phosphorus." Local water quality data presented in the report demonstrate that loss/attenuation of total phosphorus is as high as 32.4% in just one of the three sub-segments of the portion of the river where trading is authorized in the contested permit.[20]

This demonstrates that buyers immediately adjacent to the seller may be able to justify a 1:1 ratio. Buyers further away could hypothetically require a 3:1 ratio. Buyers yet still further way could hypothetically require a ratio of 5:1. Individual trades will necessitate unique, individual trading ratio requirements. As a result, the State of Idaho's *draft* one size fits all approach here is not protective of water quality.

Idaho's *draft* guidance fails to integrate one of the most basic concepts of nutrient pollution trading, namely that nutrients such as phosphorus attenuation over

---

[18] Department of Environmental Quality, Pollutant Trading Guidance, November 2003 DRAFT, Appendix C, page 1.

[19] United States Environmental Protection Agency, Office of Wastewater Management, Water Permits Division, EPA 833-R-07-004, Water Quality Trading Toolkit for Permit Writers, August 2007, page 30.

[20] Department of Environmental Quality, The Upper Snake Rock TMDL Modification, July 22, 2005. Page 32.

distance and time. A pound of phosphorus discharged upstream will not arrive as a pound of a phosphorus at a given point downstream. As such, the *draft* guidance fails to establish appropriate trading ratios.

Idaho's *draft* Pollutant Trading Guidance was released to public comment December 3, 2003 - March 5, 2004 but was never finalized. The November 2003 draft version remains unchanged and in draft form to this day.[21]

Notwithstanding the fact that Idaho never finalized its *draft* Pollutant Trading Guidance, Idaho's DEQ modified the Upper Snake Rock TMDL in 2005 to provide that pollutant trading is allowed to aid in the achievement of the goals of the TMDL.[22] However, the TMDL fails to offer unique guidance with regard to what the phosphorus trading ratio will be, even thought the TMDL documents present that total phosphorus attenuation is occurring between sources in the subbasin. Instead, the TMDL defers to the 2003 *draft* Pollutant Trading Guidance, stating, "Trading is allowed on the Middle Snake River as described in the [draft] guidance."[23]

In December of 2007 the EPA issued a general NPDES permit (Permit No.: IDG-130000) for aquiculture facilities[24] in this river segment. Aquiculture facilities with coverage under this permit are authorized to utilize pollutant trading for total phosphorus pursuant to Idaho's 2003 *draft* Guidance. Of note is the fact that these aquiculture facilities are anticipated to be "buyers" of credits – not sellers. There is a section in the aquiculture general permit entitled "How to Buy Credits for Pollutant Trading."[25] There is no corresponding section on how to sell credits.

Pursuant to the TMDL for this segment of the Snake River, individual aquiculture facilities have been assigned a phosphorus wasteload allocation.[26] The general aquiculture NPDES and any individual NPDES permits held by aquiculture facilities, limit an aquiculture facility's discharge to the wasteload allocation assigned in the TMDL.[27] Thus, if all facilities discharged phosphorus in compliance with their respective NPDES permits, the goals of the TMDL would be realized.

---

[21] Idaho Department of Environmental Quality website: http://www.deq.idaho.gov/water/prog_issues/waste_water/pollutant_trading/overview.cfm

[22] Department of Environmental Quality, The Upper Snake Rock TMDL Modification, July 22, 2005. Page 34-35.

[23] Ibid, p. 35.

[24] United States Environmental Protection Agency Region 10, Authorization to Discharge under the National Pollutant Discharge Elimination System, Aquaculture Facilities in Idaho, subject to Wasteload Allocations under Selected Total Maximum Daily Loads, NPDES Permit No.: IDG-130000. December 1, 2007.

[25] Ibid, p. 71.

[26] Ibid, p. 6.

[27] Ibid, p. 10 -29.

The issuance of the contested NPDES permit for the Twin Falls City Wastewater Treatment Plant is the first issuance of a permit for a facility that is expected to "sell" phosphorus pollution trading credits. The Twin Falls permit, as opposed to the aquiculture permits, contains a section entitled "How to Buy or **Sell** Credits for Pollutant Trading."[28] [emphasis added]. Thus, the issuance of the Twin Falls permit is a significant event for phosphorus pollutant trading in this segment of the Snake River.

Adding to the significance of the Twin Falls Wastewater Treatment Plant entry into the "market" as a seller is the fact that the Permittee has a very large phosphorus wasteload allocation relative to the aquiculture facilities.

Twin Falls' contested NPDES permit provides for total phosphorus effluent limits of 710 lbs/day (Average Monthly Limit) and 990 lbs/day (Average Weekly Limit).[29]

In comparison, the 81 aquaculture facilities that are incorporated in the Upper Snake Rock/Mid-Snake TMDL have a cumulative phosphorus wasteload allocation not to exceed 970.2 lbs/day.[30] As a result of this relatively stringent wasteload allocation, many aquiculture facilities have struggled to comply with their NPDES permit discharge requirements.

Thus, EPA's issuance of the contested NPDES permit marks the first time a "seller" with substantial potential to sell a large volume of credits has entered the market. It is anticipated that this will result in the initiation of significant trading activity.

It is this anticipation of large-scale phosphorus trading in this segment of river that has drawn our attention to the issuance of the NPDES permit for the City of Twin Falls Wastewater Treatment Plant.

ISSUES FOR REVIEW

Petitioner seeks review of the follow matters:

1. Has EPA issued permit conditions regarding pollutant trading that are arbitrary

---

[28] United States Environmental Protection Agency Region 10, Authorization to Discharge under the National Pollutant Discharge Elimination System, The City of Twin Falls Wastewater Treatment Plant NPDES Permit Number: ID-002127-0, November 2009, Appendix A, page 37

[29] Ibid, p. 8.

[30] Department of Environmental Quality, The Upper Snake Rock TMDL Modification, July 22, 2005. Page 16.

and capricious and did it do so without allowing meaningful public comment on key aspects of these conditions?

2. Do permit conditions authorizing the use of a 1:1 pollutant trading ratio in this instance violate EPA's policy on this matter and does the 'one size fits all' use of such a ratio provide sufficient assurances that water quality standards will not be violated?

3. Has EPA demonstrated that pollutant trading authorized in the contested permit is in alignment with CWA regulations requiring that trades will not degrade water quality?

ARGUMENTS

1. EPA issued permit conditions regarding pollutant trading that are arbitrary and capricious and did so without allowing meaningful public comment on key aspects of these conditions.

Permit Condition I.B.1. states: "The permittee may engage in pollutant trading for average monthly discharges of total phosphorus, pursuant to the requirements in 'State of Idaho Department of Environmental Quality Pollutant Trading Guidance' (November 2003 draft)."

As discussed previously in this petition, Idaho's 2003 *draft* "Pollutant Trading Guidance" provides that phosphorus trading may take place on this segment of the river at a trading ration 1:1. Thus, permit condition I.B.1 provides that trades may take place at a ratio of 1:1.

We strongly disagree that a ratio of 1:1 is appropriate. As discussed above, such a ratio fails to account for the known (and quantified) phosphorus attenuation that takes place in river segment. As such, this ratio fails to ensure that water quality is sufficiently protected in the vicinity of the dischargers that purchase phosphorus credits from Twin Falls and increase phosphorus discharges at their facilities.

At numerous points in our comments we objected to the use of a six-year old Idaho DEQ *draft* guidance document to dictate the manner in which pollutant trades (specifically trading ratios) will be carried out pursuant to the contested permit.

However, our concerns were brushed aside by EPA at several points in EPA's

"Response to Comments."[31] At each turn EPA cited the fact that the pollutant trading provisions (including the trading ratio of 1:1) were incorporated in the NPDES permit pursuant to provisions in Idaho's 2003 *draft* Pollutant Trading Guidance. See excerpts from Response to Comments below:

EPA Responses…

> The pollutant trading language in the draft permit was written in consultation with IDEQ to ensure consistency with IDEQ's [draft] Pollutant Trading Guidance, including its Appendix C -- Middle Snake River.
>
> Page 4

> EPA disagrees with the claim that the regulations and guidance are inadequate. According to Marti Bridges, IDEQ's Pollutant Trading Coordinator, the State of Idaho Department of Environmental Quality Pollutant Trading Guidance (November 2003 draft) ("the Guidance") is the current guidance governing pollutant trading in Idaho. In 2007, we determined that the Guidance provided sufficient direction to implement a trading program in the mid-Snake watershed; in November 2007, EPA issued two general permits for aquaculture facilities and associated fish processors incorporating the provisions of the Guidance.
>
> Page 4

> It is the State's responsibility to develop water quality standards and strategies, including TMDLs and trading programs, to achieve and maintain water quality standards. In this instance, EPA is incorporating the provisions of the [draft] Guidance and the TMDL developed by the State, both of which have been reviewed by EPA. Therefore, we disagree with the commenter that we should be independently developing credits and ratios.
>
> Page 8

In the "Response to Comments" on this permit EPA asserts that the use of the 2003 *draft* guidance is appropriate because the document has been utilized by EPA in prior actions – including the development of the aquiculture general NPDES permit in 2007 and the updated TMDL in 2005[32]. Petitioner counters that this is not a valid defense but rather an indication that EPA's use of substandard materials to guide its actions may be more pervasive than is readily apparent.

---

[31] United States Environmental Protection Agency Region 10, Response to Comments, City of Twin Falls NPDES Permit, Permit Number: ID-002127-0, September 2009. http://yosemite.epa.gov/r10/water.nsf/NPDES+Permits/Current+ID1319

[32] United States Environmental Protection Agency Region 10, Response to Comments, City of Twin Falls NPDES Permit, Permit Number: ID-002127-0, September 2009. Page 8

Also in "Response to Comments" EPA asserts that Petitioner's comments are somehow no longer ripe because Petitioner did not raise similar comments in regard to the issuance of the aquiculture general permit in 2007[33]. Petitioner disagrees and raises these concerns now, in a timely manner, in light of conditions in this contested permit.

EPA's wholesale adoption of Idaho's 2003 *draft* guidance – guidance that the Petitioner has, in light of changed circumstances over the last 6 years, not had the opportunity to review and provide public comment on – into the permit and EPA's refusal to consider modifying key aspects of the permit conditions (specifically trading ratios) represents inclusion of a permit condition the basis of which is arbitrary and capricious.

There is no foundation to believe that the *draft* Guidance's trading ratio of 1:1 represents anything other than a politically acceptable ratio. Indeed, based on the information presented above and a review of EPA's policy and guidance to aid in crafting trading ratios, Idaho's 2003 *draft* Guidance fails to pass scientific and policy review. There has not been a rigorous opportunity to meaningfully scrutinize this ratio and the associated environmental impacts associated with its inclusion as a condition in the contested permit. Thus, inclusion of the 1:1 trading ration in the contested permit is arbitrary and capricious.

Further Idaho's 2003 *draft* Guidance was not crafted in a manner that is consistent with EPA's public participation requirements pursuant to (40 CFR 130.3(b)(6)) and EPA's public participation regulation (40 CFR part 25). As noted previously in this petition, while Idaho did release their *draft* guidance to public review in December of 2003, no comments were ever integrated into the document and it is the November 2003 version that remains the document used as State Guidance on this matter.

We submit that there are a number changed conditions on this segment of river (water quality, numerous new NPDES permits, an updated TMDL, etc) that render a six-year old draft as outdated and in need of updating and public review prior to utilization.

Further, EPA's dogged refusal to allow for meaningful review and comment on this key aspect of this permit has violated Petitioners right of public participation in the formulation of NPDES permit conditions as provided by the Clean Water Act and EPA's public participation requirements of 40 CFR Part 25.

2. Permit conditions authorizing the use of a 1:1 pollutant trading ratio in this instance violate EPA's policy on this matter and the 'one size fits all' use of such

[33] Ibid. Page 7.

a ratio fails to provide sufficient assurances that water quality standards will not be violated.

EPA's 2003 Water Quality Trading Policy states:

> "EPA supports implementation of water quality trading by states, interstate agencies and tribes where trading:
> …
> F. Achieves greater environmental benefits than those under existing regulatory programs."

However, the manner in which EPA authorizes pollutant trading in the contested permit does not achieve any greater environmental benefits than those under existing regulatory programs. This is the case because EPA is failing to require pollution trading rations greater than 1:1.

All of the aquiculture facilities in this segment of river have phosphorus wasteload allocations pursuant to an EPA approved TMDL.[34] Further, each of these facilities has a phosphorus discharge limit in their existing NPDES permits equal to their wasteload allocation[35]. If the aquiculture facilities would comply with the discharge limits in their NPDES permits the goals of the TMDL would be met "under existing regulatory programs."

Thus, allowing phosphorus trades pursuant to the contested permit will not "[a]chieve greater environmental benefits than those under existing regulatory programs."

Indeed, pursuant to Petitioners prior discussion of the fact that the Idaho 2003 *draft* Guidance utterly fails to incorporate the fundamental concept of "delivery ratio" in setting the trading ratio, the phosphorus trades authorized in the contested permit actually achieves *less* environmental benefit than the existing NPDES program. That is to so, trades carried out pursuant to conditions in the contest permit will lead to further impairment of this segment of the Snake River.

If EPA wants to craft a program that achieves environmental benefits beyond what is already required by compliance with the facilities' NPDES permit then EPA should develop a pollutant trading ratio greater than 1:1. If the trading ration was greater than 1:1, say 5:1 or 10:1, then EPA would be reducing phosphorus discharges beyond (i.e. greater than) what is already required under the

---

[34] Department of Environmental Quality, The Upper Snake Rock TMDL Modification, July 22, 2005.

[35] United States Environmental Protection Agency Region 10, Authorization to Discharge under the National Pollutant Discharge Elimination System, Aquaculture Facilities in Idaho, subject to Wasteload Allocations under Selected Total Maximum Daily Loads, NPDES Permit No.: IDG-130000. December 1, 2007.

preexisting NPDES regulatory program.

As it is currently, the EPA permit condition authorizing trading at a 1:1 ratio is counter to EPA's policy on this matter.

Similar to EPA's policy that trading should result in greater benefits than otherwise already required under exiting regulations is EPA's policy objective to ensure that trading programs result in long-term water quality improvements.

To this end, EPA's 2003 Water Quality Trading Policy states[36]:

> "EPA supports implementation of water quality trading by states, interstate agencies and tribes where trading:
> …
> G. Secures long-term improvements in water quality through the purchase and retirement of credits by any entity."

The permit conditions that authorize pollutant trading in the Twin Falls permit make no mention of any "retirement" of credits. As a result, the implementation of phosphorus trading pursuant to permit conditions found in the Twin Falls permit does not result in any sort of long-term benefit to water quality.

There is no benefit to water quality as a result of this permit's authorization of pollutant trading. Rather, this permit merely initiates a shell game where cumulative phosphorus discharge to the river remains the same, the discharge point just moves around the river as credits are sold and exercised. As a result, water quality (i.e phosphorus concentrations) is likely to actually get worse downstream from sources that purchase and exercise credits sold pursuant to the contested permit. The conditions in the contested Permit that allow for pollutant trading are counter to EPA policy and guidance on this matter.

<u>3. EPA has not demonstrated that pollutant trading authorized in the contested permit is in alignment with CWA regulations requiring that trades will not degrade water quality.</u>

As previously discussed, EPA's 2003 Water Pollution Trading Policy states that as a matter of policy, "Provisions for water quality trading should be aligned with and incorporated into core water quality programs."

EPA's 2003 Policy further directs States, when developing water quality trades and trading programs, to "at a minimum, take into account" EPA's <u>antibacksliding</u> provisions of Section 303(d)(4) of the CWA and the State's

---

[36] United States Environmental Protection Agency, Office of Water, Water Quality Trading Policy, January 13, 2003, page 3.

antidegradation policy.[37]

EPA's Water Pollution Trading Policy concludes that the antibacksliding provisions will generally be satisfied only *if* a point source which generates pollution reduction credits and sells them for a limited duration before continuing to discharge at pre-trading levels does so in a manner that is consistent with the State's antidegradation policy.

EPA's Water Pollution Trading Policy further states:

> "Trading should be consistent with applicable water quality standards, including a state's and tribe's antidegradation policy established to maintain and protect existing instream water uses and the level of water quality necessary to support them, as well as high quality waters and outstanding national resource waters (40 CFR 131.12)."[38]

Clearly EPA policymakers believed very strongly that both EPA and States needed to ensure that trading activities be carried out in a manner that is consistent with a State's antidegradation policy.

However, permit conditions adopted pursuant to Idaho's 2003 *draft* Guidance were not appropriately vetted to ensure compliance with the State of Idaho's Antidegradation Policy. Petitioners assert this with totally confidence because Idaho lacks a Clean Water Act compliant antidegradation policy. Thus, any antidegradation related review of the contested permit conditions was a review using Idaho's unlawful and noncompliant policy.

The Clean Water Act directs that States "shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart."[39]

While Idaho has an "antidegradation policy" codified in Idaho Rules,[40] Idaho does not have an antidegradation implementation plan as required in the plain language of 40 CFR § 131.12(a).

Courts have uniformly interpreted 40 CFR § 131.12(a) to require both an antidegradation policy and identification of methods for implementing this policy. *PUD No 1. Of Jefferson County v. Washington Department of Ecology, 511 U.S. at 719; Kentucky Waterways Alliance v. Johnson, 540 F.3d 466, 477 (6th Cir.*

---

[37] United States Environmental Protection Agency, Office of Water, Water Quality Trading Policy January 13, 2003. Page 7-8.
[38] Ibid, p. 8.
[39] 40 CFR 131—WATER QUALITY STANDARDS § 131.12 Antidegradation policy.
[40] Idaho Administrative Code, Department of Environmental Quality, Water Quality Standards IDAPA 58.01.01 section 051. Page 15.

2008).

Idaho lacks an approved antidegradation implementation plan, thus Idaho does not have a Clean Water Act compliant antidegradation policy. As a result, it is not possible that EPA vetted the contested permit's pollutant trading conditions via a lawful antidegradation policy and implementation plan to assure that these permit conditions do not cause unlawful degradation to the Snake River.

The implications of Idaho *not* having a lawful antidegradation policy and implementation plan are extremely troubling. Indeed, through our review of the contested permit we have become so concerned about implications of this Water Quality Standard shortcoming that we have subsequently notified EPA of our intent to bring legal action on this matter[41].

We are providing our "Noticeof Intent to Sue" letter to the EAB because it forcefully articulates the deficiencies of Idaho's antidegradation policy and lack of implementation plan. Though this Notice Letter was sent subsequent to our comments on the contested permit, the issue of Idaho lacking sufficient authorities and standards to ensure that waters were not further degraded were raised in our comments.

EPA's failure to ensure that the contested permit's pollutant trading conditions are consistent with a lawful antidegradation policy and implementation plan are counter to EPA's stated policy on pollution trading and its obligation generally to ensure that permit conditions do not cause degradation of Idaho's waters.

Further, EPA's shortcomings with regard to this matter demonstrate that the contested permit's conditions which allow pollution trading are not based on fact and sound legal conclusions.

CONCLUSION

Petitioner has demonstrated that the EPA issued permit conditions in the contested permit that were based on errors of law and/or fact, and are counter to EPA policy related to pollution trading. Conditions contained in the contested permit fail to ensure that pollution trading carried out pursuant to the contested permit will not further degrade water quality in this already impaired segment of the Snake River and result in further violation of Idaho's Water Quality Standards. Indeed, trading will likely lead to such violations.

Further, the Petitioner has demonstrated that EPA's inclusion of permit conditions developed (but never finalized) by the State of Idaho (esp. the trading ratio of 1:1)

---

[41] Advocates for the West, 60-Day Notice of Intent to Sue for Violations of the Clean Water Act Regarding Idaho's Antidegradation Policy Implementation Methods. Sent on behalf of the Idaho Conservation League, September 28, 2009.

is a root cause of the contested permit's shortcomings and violated Petitioner's right to review and meaningfully comment on permit conditions.

Beyond the demonstrated failings embodied in Idaho's 2003 *draft* Pollutant Trading Guidance and the inappropriateness of adopting environmentally insufficient trading ratios into the contested permit, Petitioners have also raised the question of whether or not it was appropriate for EPA to wholly adopt significant permit conditions from *draft* State documents that have not been sufficiently vetted for public review and are sufficiently old that changing circumstances may have rendered their guidance imperfect. Petitioner asks the EAB to rule on the appropriateness of this action and seeks guidance on this important policy question.

Petitioners ask that the EAB concur with their claims and find the contested permit deficient. Further Petitioners ask that the EAB direct the EPA to stay all permit conditions authorizing pollutant trading until such time that the permit can be reissued in a manner that is consistent with the Clean Water Act's legal requirements and EPA's own Water Pollution Trading Policy and guidance on this matter.

Petitioners ask that the EAB stay all permit conditions related to pollutant trading until such time that the EAB renders a decision on this matter.

Petitioners ask that the EAB grant the Petitioner the opportunity for an Oral Argument to explain our Petition for Review and our underlying concerns as articulated herein.

Petitioner further asks that the EAB grant such other relief as the EAB deems appropriate in this matter.

Submitted by: ***S/ Justin Hayes*** *(submitted electronically)*

Justin Hayes
Program Director
Idaho Conservation League
PO 844, Boise, Idaho. 83701
Tel: 208-345-6933 ext 24
Fax: 208-344-0344
Email: jhayes@idahoconservation.org

Pro Se Litigant

Date: 10/24/09

LIST OF EXHIBITS

Petitioner has cited numerous documents that are of great length. The complete copying of all of these documents in their entirety would be a waste of resources, would not add to their value in this matter and would run the risk of burying members of the EAB in paper.

To aid the members of the EAB in their review of this matter and their consultation of the materials cited, when petitioner has cited documents of great length, only excerpted copies of the relevant portions of the documents are provided as exhibits.

With the exception of Exhibit #12 (which is provided in full) all of these documents are believed to already be in the administrative record for this matter and their entire contents are incorporated as such. Complete versions are being provided electronically to the EAB Clerk's office. If members of the EAB wish complete hardcopy versions of any of these exhibits we will gladly provide them.

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

Exhibit #1. United States Environmental Protection Agency Region 10, Authorization to Discharge under the National Pollutant Discharge Elimination System, The City of Twin Falls Wastewater Treatment Plant NPDES Permit Number: ID-002127-0, November 2009.

Exhibit #2. Idaho Conservation League comments on draft NPDES permit for Twin Falls wastewater treatment plant (ID002170), 6/16/09

Exhibit #3. United States Environmental Protection Agency Region 10, Authorization to Discharge under the National Pollutant Discharge Elimination System, The City of Twin Falls Wastewater Treatment Plant NPDES Permit Number: ID0021270, Factsheet, May 11, 2009. Excerpted

Exhibit #4. Department of Environmental Quality Working Principles and Policies for the 2008 Integrated (303[d]/305[b]) Report, May 22, 2009. Excerpted

Exhibit #5. Department of Environmental Quality, The Upper Snake Rock TMDL Modification, July 22, 2005. Excerpted

Exhibit #6. Idaho Administrative Code, Department of Environmental Quality, Water Quality Standards IDAPA 58.01.02.054.06, 2009. Excerpted

Exhibit #7. United States Environmental Protection Agency, Office of Water, Water Quality Trading Policy, January 13, 2003.

Exhibit #8. Department of Environmental Quality, Pollutant Trading Guidance, November 2003 DRAFT.

Exhibit #9. United States Environmental Protection Agency, Office of Wastewater Management, Water Permits Division, EPA 833-R-07-004, Water Quality Trading Toolkit for Permit Writers, August 2007. Excerpted

Exhibit #10. United States Environmental Protection Agency Region 10, Authorization to Discharge under the National Pollutant Discharge Elimination System, Aquaculture Facilities in Idaho, subject to Wasteload Allocations under Selected Total Maximum Daily Loads, NPDES Permit No.: IDG-130000. December 1, 2007. Excerpted

Exhibit #11. United States Environmental Protection Agency Region 10, Response to Comments, City of Twin Falls NPDES Permit, Permit Number: ID-002127-0, September 2009.

Exhibit #12. Advocates for the West, 60-Day Notice of Intent to Sue for Violations of the Clean Water Act Regarding Idaho's Antidegradation Policy Implementation Methods. Sent on behalf of the Idaho Conservation League, September 28, 2009.