UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ENVIRONMENTAL APPEALS BOARD

| | | |
|---|---|---|
| In the Matter of: | ) | Appeal No. NPDES 18-01 |
| CITY OF SANDPOINT<br>WASTEWATER TREATMENT PLANT | ) | |
| NPDES Permit No. ID-0020842 | ) | |

**EPA REGION 10'S RESPONSE BRIEF**

## Table of Contents





**U.S. Environmental Protection Agency**
**1200 Sixth Avenue, Suite 155**
**Seattle, Washington 98101**
**(206) 553-1037**

## Table of Authorities

### Cases



### Statutes



### Regulations



### State Regulations





**U.S. Environmental Protection Agency**
**1200 Sixth Avenue, Suite 155**
**Seattle, Washington 98101**
**(206) 553-1037**

**Other Authorities**





**U.S. Environmental Protection Agency**
**1200 Sixth Avenue, Suite 155**
**Seattle, Washington 98101**
**(206) 553-1037**

## I. INTRODUCTION

Pursuant to 40 C.F.R. § 124.19 and the August 2, 2018 Order Granting Extension of Time and Addressing Service by Email issued by the Environmental Appeals Board ("EAB"), the U.S. Environmental Protection Agency ("EPA") Region 10 ("Region") respectfully submits this response to Idaho Conservation League's ("ICL's") Petition for Review ("Petition") of National Pollutant Discharge Elimination System ("NPDES") Permit No. ID-0020842 ("Permit"). The Petition was filed by ICL on July 11, 2018. For the reasons discussed below, the EAB should deny ICL's Petition by finding that it was appropriate for the Region to rely on the Idaho Department of Environmental Quality's ("IDEQ's") interpretation of the EPA-approved mixing zone policy and accept the mixing zones in IDEQ's Clean Water Act ("CWA") Section 401 certification in calculating the total phosphorus effluent limits in the Permit.

## II. STATEMENT OF THE CASE

### A. Statutory and Regulatory Background

Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants to waters of the United States unless authorized by, among other things, a NPDES permit. Pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, the EPA, or an authorized State, may issue NPDES permits that authorize the discharge of pollutants if such permits include limitations and requirements imposed pursuant to CWA Sections 301, 304, 306, 401, and 403, 33 U.S.C. § 1311, 1314, 1316, 1341, and 1343. Here, at the time of Permit issuance, the State of Idaho did not



**U.S. Environmental Protection Agency**
**1200 Sixth Avenue, Suite 155**
**Seattle, Washington 98101**
**(206) 553-1037**

have the authority to issue the challenged Permit; therefore, the Region was the relevant permitting authority.[1]

In general, the CWA provides for two types of effluent limits to be included in NPDES permits: technology-based effluent limits and water quality-based effluent limits. Technology-based effluent limits reflect a specified level of pollutant-reducing technology available and economically achievable for the type of facility being permitted. Water quality-based effluent limits are included that are necessary to meet applicable State water quality standards (either EPA-approved or EPA-promulgated). Where technology-based limits are not as stringent as necessary to meet water quality standards, a more stringent water-quality based effluent limit for a particular pollutant must be included in an NPDES permit. *See* 33 U.S.C. § 1311(b)(1)(C); *see also In re City of Moscow, Idaho*, 10 E.A.D. 135, 139 (EAB 2001).

Section 401(a) of the CWA, 33 U.S.C. § 1341(a), requires all NPDES permit applicants to obtain a certification from the appropriate State agency that the permitted discharge complies with, among other things, the State's water quality standards. This is called the 401 certification. The Region may not issue a permit until the 401 certification has been granted or waived by the State in which the discharge occurs. 40 C.F.R. § 124.53(a). A State certification shall include conditions necessary to assure compliance with the applicable requirements of the Clean Water Act and appropriate requirements of State law. Any such condition "shall become a condition on

[1] On June 5, 2018, the EPA approved Idaho's application to administer and enforce the Idaho Pollutant Discharge Elimination System ("IPDES") program. Idaho will assume permitting responsibility in phases. On July 1, 2018, NPDES permitting authority of the municipal and pretreatment sectors were transferred to IDEQ. Under the Memorandum of Agreement between the Region and IDEQ, if a permit is appealed prior to the transfer of authority, jurisdiction over the permit is retained by the Region until the appeal is resolved. Therefore, the Region retains jurisdiction over the Permit until this appeal is resolved.



**U.S. Environmental Protection Agency**
**1200 Sixth Avenue, Suite 155**
**Seattle, Washington 98101**
**(206) 553-1037**

any Federal license or permit subject to the provisions of this section." *See* 33 U.S.C. § 1341(d); *see also* 40 C.F.R. § 124.53(e).

Mixing zones are limited areas where dilution of the discharge takes place and within which certain water quality criteria may be exceeded if the designated use of the water segment as a whole is not impaired as a result of the mixing. Inclusion of a mixing zone in a permit generally will result in a less stringent water quality-based effluent limit than if there were no mixing zone authorized. *See National Pollutant Discharge Elimination System (NPDES) Permit Writers Manual* at 6-15, EPA, EPA-833-K-10-001 (Sept. 2010); *see also Water Quality Standards Handbook, Chapter 5: General Policies* at p. 3-4, EPA, EPA 820-B-14-008 (Sept. 2014).

When the Region is the permitting authority, the Region may include a mixing zone in a NPDES permit only if the State's water quality standards or implementing regulations authorize the use of mixing zones. *See* ER 10, Memorandum re: EPA Guidance on Application of State Mixing Zone Policies in EPA-Issued NPDES Permits, from Robert Perciasepe, Assistant Administrator, Office of Water to Water Program Directors, Region I – X (Aug. 6, 1996) ("EPA Mixing Zone Guidance").[2] Where a State's mixing zone regulation allows only the State the discretion to authorize a mixing zone, the Region can use a mixing zone to determine the appropriate effluent limitation(s) only where the State authorizes the mixing zone through a condition in the 401 certification. *See In re Ketchikan Pulp Co.*, 6 E.A.D. 675, 685-686 (EAB 1996) ("...we find nothing that convinces us that the Region's interpretation of Alaska's water

[2] All documents cited in this brief are contained in "Region 10's Excerpts from the Administrative Record." To prevent duplication, the Region has cited to the documents as "ER" instead of including these documents as attachments to the Response Brief.



**U.S. Environmental Protection Agency**
**1200 Sixth Avenue, Suite 155**
**Seattle, Washington 98101**
**(206) 553-1037**

quality standards as reserving to the [state agency] the authority to prescribe mixing zones was unreasonable or contrary to the provisions of the CWA....the Region could properly conclude that it lacked the authority to include a mixing zone absent State certification...."); *see also* EPA Mixing Zone Guidance at p. 4 ("EPA policy dictates that EPA will not grant a mixing zone in such states unless the state interprets its water quality standards or implementing regulations to provide EPA with this discretionary authority and confirms its interpretation in writing. Absent such a statement, and without a permit-specific authorization through the CWA 401 certification process, it would not be reasonable and therefore would not be within EPA's discretion."). In other words, if a State's mixing zone water quality standard allows only the State to authorize a mixing zone, the Region can utilize a mixing zone only if it is set forth in the 401 certification.

**B. The State of Idaho's Mixing Zone Policy**

The State of Idaho adopted a revised mixing zone policy on April 11, 2015 ("2015 Mixing Zone Policy") and submitted the revised policy to the Region on December 22, 2016 for review and approval pursuant to CWA Section 303(c), 33 U.S.C. § 1313(c). To date, the Region has not yet acted upon Idaho's revised 2015 Mixing Zone Policy. ER 18 at p.7. As such, Idaho's prior mixing zone policy, which EPA approved in 1996, remains the applicable water quality standard for CWA purposes ("1996 Mixing Zone Policy"). *See* 40 C.F.R. § 131.21.

The 1996 Mixing Zone Policy states, in relevant part:

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



**U.S. Environmental Protection Agency**
**1200 Sixth Avenue, Suite 155**
**Seattle, Washington 98101**
**(206) 553-1037**

b. The mixing zone is to be located so it does not cause unreasonable interference with or danger to existing beneficial uses....

***

e. Mixing zones in flowing receiving waters are to be limited to the following:....

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

ER 14, IDAPA 58.01.02.060.01 (2014) (emphasis added).[3] The "Department" is defined as the "Idaho Department of Environmental Quality." IDAPA 58.01.02.010.21 (2014).

## C. Factual and Procedural Background

The City of Sandpoint ("City") owns and operates a wastewater treatment plant ("Facility") that treats domestic sewage primarily from local residents and commercial establishments. The Facility serves a population of approximately 8,350 and has a design flow rate of 5.0 million gallons per day ("mgd"). *See* ER 1 at p. 7 and ER 2 at p. 9.

The Facility discharges treated effluent to the Pend Oreille River near Sandpoint, Idaho at river mile 117. The segment of the river that the Facility discharges to is protected for the following designated uses: cold water aquatic life, primary contact recreation, domestic water supply, industrial and agricultural water supply, wildlife habitats, and aesthetics. *See* ER 1 at p. 8-9. In addition, this portion of the Pend Oreille River is listed on the State's CWA Section 303(d) list as impaired for temperature and total dissolved gas supersaturation. *Id.* at p. 10.

At the time the Permit was issued, the Region was the permitting authority for the State of Idaho. The Facility's previous NPDES permit became effective on January 5, 2002 and

[3] Since Idaho has revised the mixing zone policy, the current regulations contain the 2015 Mixing Zone Policy. The archived version of the regulations contains the 1996 Mixing Zone Policy. <https://adminrules.idaho.gov/rules/2014/58/0102.pdf>.



**U.S. Environmental Protection Agency**
**1200 Sixth Avenue, Suite 155**
**Seattle, Washington 98101**
**(206) 553-1037**

expired on January 5, 2007.[4] In October 2014, the Region issued a draft NPDES Permit and Fact Sheet for the Facility for public comment. ER 1. After receiving numerous substantive comments that resulted in significant changes to the draft Permit, the Region issued a revised draft NPDES Permit and Fact Sheet for public comment on April 19, 2016. ER 2. This public comment period also served as the public comment period on IDEQ's draft 401 certification for the Permit. *Id.* In the draft 401 certification, pursuant to the 2015 Mixing Zone Policy, IDEQ authorized a mixing zone that includes 47% of the volume of the stream flow for total phosphorus for discharges from June to September and 60% for total phosphorus for discharges from October to May. ER 5. The public comment period ended on May 19, 2016. *See* ER 2.

During the comment period, ICL submitted a comment letter which, among other things, expressed concern over the justification for the size of the mixing zones. The comment letter combined comments on the draft Permit and comments on the 401 certification.[5] In a footnote in the comment letter, ICL noted that the 2015 Mixing Zone Policy has not been approved by the EPA; therefore, it is not applicable for CWA purposes. ER 3. The Region responded to the comments received during the two comment periods; however, the Region overlooked the comment in the footnote regarding the applicability of the 2015 Mixing Zone Policy and did not respond to that comment. ER 4. On February 3, 2017, IDEQ issued its final 401 certification with the same size mixing zones that were in the draft 401 certification. ER 6. IDEQ did respond to ICL's footnote comment in its Response to Comment document stating that

[4] The Facility's previous NPDES permit was administratively extended until a new permit became effective pursuant to 40 C.F.R. § 122.6.

[5] When the Region receives comment letters that are directed to the Region as well as the State, the Region only responds to the comments directed at the draft permit and fact sheet. The State is responsible for responding to the comments directed at the 401 certification.



**U.S. Environmental Protection Agency**
**1200 Sixth Avenue, Suite 155**
**Seattle, Washington 98101**
**(206) 553-1037**

"[IDEQ's] interpretation of the prior 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." ER 8 at p. 2. The Region issued the final Permit on September 5, 2017.

On October 6, 2017, ICL filed a Petition for Review of the Permit with the EAB. The sole issue on appeal was whether the Region could rely on the State's mixing zone authorization contained in its final 401 certification to calculate water quality-based effluent limits pursuant to the State's 2015 Mixing Zone Policy which has not yet been approved by the Region and, thus, is not applicable for CWA purposes. On January 9, 2018, the Region provided notice to the EAB and ICL that it was withdrawing the Permit's interim and final effluent limits for total phosphorus because the Region had failed to address ICL's comment concerning the use of the 2015 Mixing Zone Policy.

On February 23, 2018, the Region issued a revised draft NPDES Permit and Fact Sheet that addressed only the withdrawn interim and final effluent limits for total phosphorus.[6] ER 18. The interim and final total phosphorus limits remained the same as the effluent limits that the Region withdrew after ICL's initial Petition for Review; however, in the Fact Sheet, the Region explained that the 1996 Mixing Zone Policy allows IDEQ to authorize mixing zones that are larger than 25% of the volume of the stream flow. *See* ER 18 at p. 6-9. Specifically, the Region explained that IDEQ's long-standing interpretation of its 1996 Mixing Zone Policy allows larger mixing zones as long as the mixing zone did not cause unreasonable interference with the beneficial uses of the waterbody. The Region then explained that the modeling that the Region

[6] The only effluent limits that were challenged by ICL, and subsequently withdrawn, were the total phosphorus effluent limits. The remaining conditions in the Permit went into effect on December 1, 2017, the effective date of the Permit.



**U.S. Environmental Protection Agency**
**1200 Sixth Avenue, Suite 155**
**Seattle, Washington 98101**
**(206) 553-1037**

conducted showed that the mixing zones would not cause unreasonable interference with the beneficial uses of the Pend Oreille River. *Id.*

During the comment period, ICL submitted a comment letter that expressed concern over the Region's rationale for including the mixing zones in deriving the total phosphorus effluent limits in the Permit. ER 20. In the Region's Response to Comments document, the Region again explained that the mixing zones that were authorized by IDEQ were consistent with IDEQ's 1996 Mixing Zone Policy as IDEQ interprets that policy. ER 21 at p. 3-4. After reviewing and responding to the comments received during the comment period, on June 8, 2018, the Region issued the final Permit which contains a set of seasonal effluent limits for total phosphorus: (1) For discharges from June to September, an average monthly limit of 61pounds per day ("lb/day") and an average weekly limit of 79 lb/day; and (2) for discharges from October to May, an average monthly limit of 96 lb/day and an average weekly limit of 125 lb/day. ER 22. On July 11, 2018, ICL filed the Petition with the EAB.

## I. STANDARD OF REVIEW

Pursuant to 40 C.F.R. § 124.19(a)(4)(i), the petitioner must demonstrate that the challenge to the permit decision is based on either a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. *See In re Three Mountain Power, LLC,* 10 E.A.D. 39, 47 (EAB 2001). It is not enough that the petitioner merely repeat the objections that it made during the comment period. Instead, where the petition raises an issue that was addressed in the response to comments document, the petitioner must explain why the permit decision maker's "response to the comment was clearly erroneous or otherwise warrants review." 40 C.F.R. § 124.19(a)(4)(ii). As previously stated by the EAB, "[a] petitioner may not simply reiterate comments made during a



**U.S. Environmental Protection Agency**
**1200 Sixth Avenue, Suite 155**
**Seattle, Washington 98101**
**(206) 553-1037**

public comment period, but must substantively confront the permit issuer's subsequent explanations." *In re City of Attleboro, MA Wastewater Treatment Plant*, NPDES Appeal No. 08-08, slip op. at 11 (EAB, Sept. 15, 2009).

## IV. ARGUMENT

ICL's sole issue on appeal concerns the Region's authority to rely on the mixing zones in IDEQ's 401 certification based upon IDEQ's interpretation of the approved 1996 Mixing Zone Policy. ICL contends that the Region violated CWA Section 301, 33 U.S.C. § 1311, by not complying with the 1996 Mixing Zone Policy. Specifically, ICL argues that the 1996 Mixing Zone Policy prohibits mixing zones in Idaho that are greater than 25% of the volume of the stream flow. However, as explained in more detail below, this is not how IDEQ interprets its EPA-approved 1996 Mixing Zone Policy. IDEQ's 401 certification includes a larger mixing zone consistent with IDEQ's interpretation of its approved 1996 Mixing Zone Policy, and it was not clearly erroneous for the Region to rely on IDEQ's interpretation in accepting the mixing zones authorized by IDEQ in the final 401 certification.

### A. IDEQ's Interpretation of its Mixing Zone Policy.

The 1996 Mixing Zone Policy states, in pertinent part:

> 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 Department* will determine the applicability of a mixing zone and, if applicable, its size configuration, and location. In defining a mixing zone, *the Department* will *consider* the following principles:...
>
> ***
>
> b. The mixing zone is to be located so it does not cause unreasonable interference with or danger to existing beneficial uses....
>
> ***



**U.S. Environmental Protection Agency**
**1200 Sixth Avenue, Suite 155**
**Seattle, Washington 98101**
**(206) 553-1037**

> e. Mixing zones in flowing receiving waters are to be limited to the following:....
>
> i. The mixing zone is not to include more than twenty-five percent (25%) of the volume of the stream flow....

ER 14, IDAPA 58.01.02.060.01 (2014) (emphasis added). "Department" means the "Idaho Department of Environmental Quality." IDAPA 58.01.02.010.21 (2014).

During the 2016 public comment period, ICL submitted a comment letter to the Region and IDEQ. In a footnote in its comment letter, ICL noted that the 2015 Mixing Zone Policy has not been approved by the EPA; therefore, it is not applicable for CWA purposes. ER 3. In response to ICL's comment, IDEQ recognized that it used the 2015 Mixing Zone Policy to determine the size of the mixing zones because the 2015 Mixing Zone Policy was the regulation that was in effect for state law purposes. ER 8 at p. 2. However, IDEQ further explained that under either the 2015 Mixing Zone Policy or the EPA-approved 1996 Mixing Zone Policy, IDEQ can authorize larger than 25% in size mixing zones as long as the mixing zones do not cause unreasonable interference with beneficial uses. *Id.* Specifically, IDEQ responded that:

> The mixing zone provisions in IDAPA 58.01.02.060, adopted in 2015, have not yet been approved by EPA.... The [2015] mixing zone provisions are an appropriate requirement of state law.... [IDEQ's] interpretation of the prior provisions [the 1996 Mixing Zone Policy] also allowed the agency to vary from the 25% limit on mixing zones, but only if the mixing zone still ensured protection of uses. The new provision provides further explanation for what constitutes an unreasonable interference and confirm the agency practice of allowing larger or requiring smaller mixing zones.

*Id.* at p. 2-3. IDEQ further clarified in its response to comments that:

> [A] mixing zone larger than 25% can be authorized if it will not cause unreasonable interference with, or danger to, beneficial uses.... The phosphorus limits in Sandpoint's permit will result in less phosphorus in the receiving water during the summertime period. Since under current conditions, nutrients do not cause an impairment of sues, the new limits for phosphorus in the permit should not impair recreational uses.



**U.S. Environmental Protection Agency**
**1200 Sixth Avenue, Suite 155**
**Seattle, Washington 98101**
**(206) 553-1037**

*Id.* at p. 2; *see also* ER 18 at p. 9 (Region's 2017 Fact Sheet discussion that the mixing zones will not cause unreasonable interference with beneficial uses.).

IDEQ's response is consistent with past statements regarding IDEQ's interpretation of the 1996 Mixing Zone Policy. In IDEQ's draft *Mixing Zone Technical Procedures Manual*, IDEQ clarified that "[IDEQ's 1996] mixing zone policy lists specific principles that *should be considered* when evaluating the size and location of a mixing zone. However, it is important to note that these principles *are not* regulatory requirements, and [IDEQ] has discretion to depart from these principles." ER 11 at Section 2.5 (emphasis added). In addition, when IDEQ submitted the 2015 Mixing Zone Policy to the Region for review and approval, it prepared a "Mixing Zone Rule Crosswalk" that compares the 2015 Mixing Zone Policy to the 1996 Mixing Zone Policy. Notably, the Mixing Zone Rule Crosswalk states that the 2015 Mixing Zone Policy makes it "more clear" that the mixing zone size restrictions set forth in the list of principles "can be varied." ER 16 at p. 3. In fact, IDEQ has authorized and the Region has accepted through the 401 certification process mixing zones larger than 25% of the volume of the stream flow in other NPDES permits issued by the Region. *See* ER 13 at p. 4 (*e.g.*, IDEQ authorized and EPA accepted a 52.5% mixing zone for phosphorus in the City of Idaho Falls wastewater treatment plant NPDES permit).

Based on its long-standing interpretation of its approved 1996 Mixing Zone Policy, IDEQ authorized, in its 401 certification, a mixing zone larger than 25%, where it concluded that the mixing zones would not cause unreasonable interference with beneficial uses. ER 6. Accordingly, this interpretation of the 1996 Mixing Zone Policy is not clearly erroneous.



**U.S. Environmental Protection Agency**
**1200 Sixth Avenue, Suite 155**
**Seattle, Washington 98101**
**(206) 553-1037**

## B. The Region Did Not Err in Giving Deference to IDEQ's Interpretation of the 1996 Mixing Zone Policy Where IDEQ's Interpretation Was Not Clearly Erroneous.

The Region has an independent duty under CWA Section 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C), to ensure that State water quality standards are implemented in NPDES permits. *In re City of Moscow, Idaho*, 10 E.A.D. 135, 151 (EAB 2001) ("*City of Moscow*"). In fulfilling this duty, the Region can reasonably defer to a State's interpretation of its own water quality standard unless it is clearly erroneous. *See In re Ina Road Water Pollution Control Facility, Pima County, Arizona*, 2 E.A.D. 99 (CJO 1985) ("*Ina Road*") (rejecting the Region's inclusion of more stringent water quality-based effluent limits based on the Region's interpretation of the State's water quality standards where the Region failed to demonstrate that the State's interpretation was in clear error). Where the State's 401 certification includes a permit condition based on the State's interpretation of its water quality standards, the Region would have to provide a "compelling reason" for rejecting the State's interpretation of that standard. *See In re American Cyanamid Co.*, 4 E.A.D. 790 at n. 12 (EAB 1993) (citing *Ina Road*); *see also City of Moscow* at 156 (Where there were "difficulties inherent" in the State's interpretation of its compliance schedule regulation, the Region had "articulated a compelling reason" for not utilizing the compliance schedules provided in the 401 certification and, thus, was not clearly erroneous in disregarding such interpretation.).

As explained in the 2017 Fact Sheet, IDEQ's interpretation if its 1996 Mixing Zone Policy is not clearly erroneous, and the Region has no "compelling reason" to reject it; therefore, the Region can defer to this interpretation. ER 18 at p. 8-9. In *In re Howmet Corp.*, 13 E.A.D. 272 (EAB 2007), the EAB explained that "when construing an administrative regulation, the normal tenets of statutory construction are generally applied.... The plain meaning of words is



**U.S. Environmental Protection Agency**
**1200 Sixth Avenue, Suite 155**
**Seattle, Washington 98101**
**(206) 553-1037**

ordinarily the guide to the definition of a regulatory term.... Moreover, in interpreting a regulation, we examine not just the provision at issue, but the entire regulation.... Last, we give greater deference to a position when it is supported by Agency rulings, statements, and opinions that have been consistent over time." *Id.* at 282.

Here, ICL contends that the plain language of the 1996 Mixing Zone Policy creates a mandatory obligation that mixing zones are not to include more than 25% of the volume of the stream flow. Petition at p. 9. ICL contends that the phrase "will consider" in the 1996 Mixing Zone Policy requires IDEQ to take note of and apply the fundamental laws of defining mixing zones provided in the policy, including the 25% of the volume of the stream flow principle. *Id.* at p. 11-12. ICL's plain language argument is flawed for a number of reasons. First, ICL's interpretation would require the EAB to read out of the regulation the word "consider." If IDEQ meant for the list of principles to be mandatory, it would not have used the phrase "will consider." As ICL points out, the dictionary definition of "consider" means "to think, reflect, take note." *Id.* at p. 11. Thus, the 1996 Mixing Zone Policy can more plausibly be read to mean that IDEQ must think about or look at the listed principles, including the 25% of the volume of the stream flow, but is not required to implement the 25% volume principle in every situation.

Since the plain language of the text is ambiguous as to how to treat the listed principles, the Region reasonably deferred to IDEQ's interpretation of the 1996 Mixing Zone Policy which, as explained above, has been set forth in previous IDEQ statements and has been used to authorize larger mixing zones in other NPDES permits. *See* ER 11 and 16. ICL does not explain in its Petition why, given these past statements by IDEQ, this interpretation is clearly erroneous. In fact, ICL merely reiterates the comments it submitted during the comment period and has not explained why the Region's responses were inadequate. ER 20 ("Idaho's EPA-approved Mixing



**U.S. Environmental Protection Agency**
**1200 Sixth Avenue, Suite 155**
**Seattle, Washington 98101**
**(206) 553-1037**

Zone Policy restricts DEQ to authorizing mixing zones that include no more than 25% of the stream flow volume....The primary authority defining the meaning of Idaho's EPA-approved Mixing Zone Policy is the plain language of the EPA-approved policy.... EPA inappropriately relied on DEQ's interpretation of Idaho's EPA-approved Mixing Zone Policy.").

Since the Region did not find IDEQ's interpretation to be clearly erroneous, the Region properly used the mixing zones contained in the 401 certification to calculate the total phosphorus effluent limits in the Permit. In doing this, the Region independently concluded that State water quality standards under CWA Section 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) -- including the requirements of the 1996 Mixing Zone Policy -- would be met. Specifically, as the Region explained in the 2017 Fact Sheet:

> The results of the CE-QUAL-W2 modeling show that the mixing zones for total phosphorus which were authorized by IDEQ will not cause unreasonable interference with beneficial uses of the Pend Oreille River.

ER 18 at p. 9. Thus, the Region independently reviewed the mixing zone sizes to ensure that the designated uses (*i.e.*, beneficial uses) of the Pend Oreille River would be protected.

Absent a showing that the State's interpretation of its 1996 Mixing Zone Policy is clearly erroneous, the Region correctly deferred to IDEQ's interpretation. *See Ina Road* at p. 4. Since ICL has not demonstrated that the Region's decision to accept the mixing zones based upon IDEQ's reasonable interpretation of its 1996 Mixing Zone Policy clearly erroneous, the EAB should deny ICL's Petition.

## V. CONCLUSION

ICL has failed to demonstrate that the Region's permit decision is based on a clearly erroneous finding of fact or conclusion of law, and has failed to explain that the permit decision

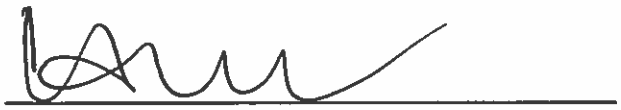


**U.S. Environmental Protection Agency**
**1200 Sixth Avenue, Suite 155**
**Seattle, Washington 98101**
**(206) 553-1037**

involves and important matter of policy. Accordingly, for the foregoing reasons, the Region respectfully requests that the EAB deny ICL's Petition for Review.

DATED: September 24, 2018

Respectfully Submitted



Courtney Weber
Assistant Regional Counsel
EPA Region 10
1200 Sixth Avenue, Suite 155, MS ORC-113
Seattle, WA 98101
Tel: 206-553-1477
Fax: 206-553-0163
Email: weber.courtney@epa.gov

Of Counsel:

Pooja Parikh
Attorney Advisor
Water Law Office
Office of General Counsel
(202) 564-0839



**U.S. Environmental Protection Agency**
**1200 Sixth Avenue, Suite 155**
**Seattle, Washington 98101**
**(206) 553-1037**

## STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I, Courtney J. Weber, hereby certify, in accordance with 40 C.F.R. § 124.19(d)(1)(iv), that this Response Brief, including headings, footnotes and quotations, contains less than 14,000 words.

DATED: September 24, 2018

Courtney Weber
Assistant Regional Counsel



**U.S. Environmental Protection Agency**
**1200 Sixth Avenue, Suite 155**
**Seattle, Washington 98101**
**(206) 553-1037**

## CERTIFICATE OF SERVICE

I certify that the foregoing "EPA Region 10's Response Brief" was sent to the following persons, in the manner specified, on the date below:

By electronic filing to:

Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1200 Pennsylvania Avenue, NW
Mail Code 1103M
Washington, DC 20460-0001

By electronic mail to:

Matthew Nykiel
Conservation Associate
Idaho Conservation League
PO Box 2308
Sandpoint, ID 83864
Email: mnykiel@idahoconservation.org

Richard A. Grisel
Deputy Attorney General
Idaho Department of Environmental Quality
1410 N. Hilton, 2nd Floor
Boise, ID 83706
Email: rick.grisel@deq.idaho.gov

DATED: September 24, 2018

Courtney Weber
Assistant Regional Counsel
U.S. EPA, Region 10



**U.S. Environmental Protection Agency**
**1200 Sixth Avenue, Suite 155**
**Seattle, Washington 98101**
**(206) 553-1037**