LAWRENCE G. WASDEN
Attorney General

DARRELL G. EARLY
Deputy Attorney General
Chief, Natural Resources Division

RICHARD A. GRISEL, ISB No.: 10485
Deputy Attorney General
Department of Environmental Quality
1410 N. Hilton, 2nd Floor
Boise, Idaho 83706
Telephone: (208) 373-0494
Facsimile: (208) 373-0481
Electronic Mail: rick.grisel@deq.idaho.gov

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
ENVIRONMENTAL APPEALS BOARD

In re:	NPDES Appeal No. 18-01
CITY OF SANDPOINT, Wastewater Treatment Plant NPDES Permit No. ID-0020842	**IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY'S RESPONSE TO IDAHO CONSERVATION LEAGUE'S PETITION FOR REVIEW**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

Federal Regulations

EAB Cases

Federal Statutes

Federal Cases

Attachment

State Regulations

State Statutes

I. INTRODUCTION

Pursuant to Section 124.19 of Title 40 of the Code of Federal Regulations ("C.F.R."), the Idaho Department of Environmental Quality ("IDEQ") respectfully submits this response to the Idaho Conservation League's ("ICL") Petition for Review ("Petition") of National Pollutant Discharge Elimination System ("NPDES") Permit No. ID 0020842 ("Permit"). For the reasons discussed below, the Environmental Appeals Board ("EAB" or "Board") should dismiss ICL's Petition with prejudice.

II. FACTUAL AND PROCEDURAL BACKGROUND

On June 8, 2018, the United States Environmental Protection Agency, Region 10 ("EPA"), reissued NPDES Permit No. ID-0020842 ("Permit") to the City of Sandpoint, Idaho ("City" or "Permittee") under § 402, 33 U.S.C. § 1342, of the Clean Water Act ("CWA"). The Permit authorizes the City to discharge wastewater from the City's wastewater treatment plant outfalls to the Pend Oreille River in accordance with the conditions and requirements in the Permit. On July 11, 2018, ICL filed a petition for review of the Permit with the EAB, NPDES Appeal No. 18-01, alleging that EPA developed erroneous effluent limitations for total phosphorus based on impermissibly-sized mixing zones under Idaho state law. Petition pp.4, 8, 12, 13. Under 40 C.F.R. § 124.19(b)(4), IDEQ submitted a Notice of Appearance in this matter to the Board on July 27, 2018. IDEQ requested—and on August 2, 2018 the Board granted—an extension to file a Response to the Petition until September 24, 2018. IDEQ now timely submits this Response.

III. STANDARD OF REVIEW

Appeals of NPDES permits are governed by 40 C.F.R. § 124.19. In determining whether to review a petition filed under 40 C.F.R. § 124.19(a), the Board generally will not grant review unless the permit decision at issue is based on clearly erroneous findings of fact or conclusions of

law, or involves important policy considerations that the Board should exercise its discretion to review. *In re City of Attleboro, MA, Wastewater Treatment Plant*, 14 E.A.D. 398, 405 (EAB 2009); *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 471 (EAB 2002); EAB Practice Manual § IV.E.2., pp.54-55. The Board's power in reviewing NPDES permit decisions should be exercised sparingly, and EPA policy favors final adjudication of most permits at the Regional level by the permitting authority. Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980) (codified at 40 C.F.R. parts 122-125); *In re City of Moscow, Idaho*, 10 E.A.D. 135, 141 (EAB 2001); *In re Dist. of Columbia Water and Sewer Authority*, 13 E.A.D. 714, 727 (EAB 2008). The petitioner bears the burden of demonstrating that review is warranted, and the Board traditionally assigns a heavy burden to petitioners seeking review of issues that are essentially technical in nature. *In re City of Marlborough, Mass. Easterly Wastewater Treatment Facility*, 12 E.A.D. 235, 247 (EAB 2005).

IV. ARGUMENT

Because ICL's Petition challenges the size of the mixing zones authorized in IDEQ's CWA § 401 water quality certification ("401 certification"), the Petition challenges "conditions attributable to State certification" and should therefore be dismissed as unreviewable by the Board. In addition, adjudication of the Petition before the Board and the requested relief implicate important issues of sovereign immunity which counsel strongly in favor of the Board declining to exercise jurisdiction over this matter. However, should the Board find that the EAB is a permissible forum, ICL's argument nevertheless fails as contradictory to the plain text, context, and longstanding agency interpretation of Idaho mixing zone regulations. IDEQ's 401 certification authorized mixing zones sized over 25% of flow volume that are protective of the Pend Oreille River's beneficial uses—as allowed under Idaho rules—and EPA properly

incorporated those mandatory 401 certification conditions in the City of Sandpoint's Permit, as required by federal law.

A. Because EAB adjudication of the Petition would constitute a collateral attack on IDEQ's CWA § 401 certification and a significant intrusion upon state sovereign immunity, the Board should dismiss the Petition with prejudice.

EPA regulations prohibit EAB review of "conditions attributable to State certification." 40 C.F.R. § 124.55(e). ICL argues that EPA violated the Administrative Procedure Act by using mixing zones that allegedly violate flow volume restrictions in Idaho water quality standards ("WQS"). Petition pp.4, 8, 12, 13. Mixing zones are exclusively governed by and derived from Idaho law, and in this case were authorized through Idaho's 401 certification. Therefore, the authorized flow volumes underlying the Permit's phosphorus effluent limits are conditions attributable to state certification, and consequently the Board lacks jurisdiction over the claims in the Petition. In addition, ICL's allegations would require interpretation of Idaho law and the requested relief would necessitate ordering state officials regarding how to conform to state law, thereby implicating significant issues of sovereign immunity.

1. Mixing zones are wholly derived from state law.

Federal regulations commit policies regarding the application and implementation of mixing zones to state discretion as part of state WQS. 40 C.F.R. § 131.13. A mixing zone is a defined area or volume of the receiving water where a discharge undergoes initial dilution and secondary mixing. IDAPA 58.01.02.010.61 (2014). Only IDEQ may approve a mixing zone and its characteristics, after a biological, chemical, and physical appraisal of the receiving water. IDAPA 58.01.02.060.01. (2014). Water quality criteria can be exceeded within an approved mixing zone, so long as criteria are met at the boundary. IDAPA 58.01.02.060.01.g. (2014); *see* Attachment 1, p.33; *see also* Water Quality Standards Regulation, 63 Fed. Reg. 36,742-01, 36,788 (July 7, 1998) (codified at 40 C.F.R. part 131)(defining mixing zones as areas where

water quality criteria can be exceeded so long as there is no lethality to organisms passing through, no significant risks to human health, and no resulting beneficial use impairment). Once a state's mixing zone policy is approved by EPA under CWA § 303(c), the decision to authorize a mixing zone—and its specific characteristics for a particular discharger—is a state decision and purely a matter of state law. *In the Matter of Star-Kist Caribe, Inc.*, 3 E.A.D. 172, 1990 WL 324290 at *6 (EAB 1990).

Mixing zone conditions are thus the product of the state's evaluation of what conditions are necessary to meet the requirements of "substantive state environmental law—an area that Congress expressly intended to reserve to the states and concerning which federal agencies have little competence." *Keating v. F.E.R.C.*, 927 F.2d 616, 622 (D.C. Cir. 1991).

2. Mixing zone authorization is solely a state action through CWA § 401 certifications.

Section 401(a), 33 U.S.C. § 1341(a), of the CWA provides, in relevant part:

> Any applicant for a Federal license or permit to conduct any activity...which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate....No license or permit shall be granted until the certification required by this section has been obtained or has been waived....No license or permit shall be granted if certification has been denied by the State[.]

Importantly, § 401(d), 33 U.S.C. § 1341(d), reads, in pertinent part:

> Any certification provided under this section ... *shall* become a condition on any Federal license or permit subject to the provisions of this section.

(emphasis added).

After a state determines the conditions required to assure compliance with appropriate requirements of state law—including mixing zones under state WQS—the conditions and

limitations in the CWA § 401 certification are required to "become a condition on any Federal license or permit[.]" 33 U.S.C. § 1341(d); *see also Am. Rivers, Inc. v. F.E.R.C.*, 129 F.3d 99, 107 (2nd Cir. 1997). The federal permitting agency has no authority to reject state certification conditions or to decide whether such conditions are legally required under state law or under the CWA. *Am. Rivers*, 129 F.3d at 107–11 (federal agencies lack authority to decide which certification conditions comport with CWA § 401); *Roosevelt Campobello Int'l Park Comm'n v. U.S. E.P.A.*, 684 F.2d 1041, 1056 (1st Cir. 1982) (conditions in state certifications must be included in a NPDES permit; CWA § 401(d) precludes EPA review of state certifications).

As such, EPA has no independent authority or ability to include a mixing zone in an NPDES permit—rather, EPA must rely on state authorization for a mixing zone approval via CWA § 401 certification or other state-issued approval mechanism. *See*, e.g., Issuance of Final NPDES General Permit for Groundwater Remediation Discharge Facilities in Idaho (Permit No. ID-G91-0000), 72 Fed. Reg. 26114-01, 26115 (May 8, 2007) (mixing zones are available at the discretion of IDEQ, and will be granted through individual State certifications). In light of this, at a minimum, any requested relief involving development or implementation of a different mixing zone should be denied.

3. Conditions in CWA § 401 certifications, including mixing zone authorizations, are reviewable only through state procedures.

The EAB's procedural regulations expressly preclude review of conditions attributable to a state's CWA § 401 certification: "Review and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State and may not be made through the procedures in this part." 40 C.F.R. § 124.55(e). Consistent with this regulation, the Board's Practice Manual declares that "the EAB does not have jurisdiction to review state certification decisions under [CWA § 401]…even though such certifications may

determine certain conditions of a federally-issued permit." EAB Practice Manual § IV.B., p.38 n.39 (Aug. 2013) (citing *In re City of Fitchburg, Mass.*, 5 E.A.D. 93, 97 (EAB 1994)).

Accordingly, it is well-established under EAB and federal precedents that federal courts and agencies are without authority to review the validity of requirements imposed in a state CWA § 401 certification, and that instead any challenge must be sought through state procedures. *See, e.g., In re City of Fitchburg*, 5 E.A.D. at 97-98; *Natural Res. Def. Council v. U.S. E.P.A.*, 279 F.3d 1180, 1188 (9th Cir. 2002) (EPA does not act as a reviewing agency for state certification, and the proper forum for review of state certification is through applicable state procedures; citing 40 C.F.R. § 124.55(e)); *Am. Paper Inst., Inc. v. U.S. E.P.A.*, 996 F.2d 346, 352 (D.C. Cir. 1993) (quoting 40 C.F.R. § 124.55(e) and concluding that state certification ensures state standards are accurately interpreted by federal permit writers); *see also Keating*, 927 F.2d at 622; *Am. Rivers*, 129 F.3d at 107-11; *Roosevelt Campobello*, 684 F.2d at 1056; *Lake Carriers' Ass'n v. E.P.A.*, 652 F.3d 1, 10 (D.C. Cir. 2011); *City of Tacoma v. F.E.R.C.*, 460 F.3d 53, 67–68 (D.C. Cir. 2006); *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.*, 833 F.3d 360, 368 (3rd Cir. 2016); *U.S. v. Marathon Dev. Corp.*, 867 F.2d 96, 100 (1st Cir. 1989); *U.S. Steel Corp. v. Train*, 556 F.2d 822, 837-39 & n.22 (7th Cir. 1977). This rule derives from the CWA itself, in which Congress expressly empowered states to impose and enforce water pollution control requirements and crafted the CWA § 401 certification process as "[o]ne of the primary mechanisms through which the states may assert the broad authority reserved to them." *Keating*, 927 F.2d at 622–23.

A permit condition is "attributable to State certification" if i) the state's certification indicates in writing that the condition is necessary in order for the permitted activity to comply with water quality standards, and ii) the condition cannot be made less stringent and still comply with state law. *City of Fitchburg*, 5 E.A.D. at 98 (quoting *In re: Gen. Elec. Co. Hooksett, N.H.*, 4

E.A.D. 468, 471 (EAB 1993)). The mixing zone conditions issued by IDEQ in the 401 certification satisfy both prongs of this test, and the Board should therefore decline review of the Petition.

i. IDEQ's 401 certification states in writing that the mixing zone condition is necessary for the permitted activity to comply with Idaho water quality standards.

IDEQ's 401 certification clearly states that the authorized mixing zone is necessary under Idaho WQS. First, by definition, state certifications include the minimum conditions which are necessary to assure compliance with the CWA and state law. 40 C.F.R. § 124.53(e)(1). The 401 certification also expressly states that "if the permittee complies…with the conditions set forth in this water quality certification, then there is reasonable assurance the discharge will comply with…Idaho Water Quality Standards." Attachment 2, p.1. One such condition is the authorized mixing zone flow volume, which occurs in a section explicitly titled "Conditions Necessary to Ensure Compliance with Water Quality Standards and Other Appropriate Water Quality Requirements of State Law." *Id.*, p.7. The certification states in writing that the mixing zone condition is necessary to comply with Idaho WQS, and thus satisfies the first prong of the standard for a permit condition to be "attributable to State certification."

ii. The mixing zone conditions in IDEQ's 401 certification cannot be made less stringent and still comply with state law.

The mixing zone flow volume condition also satisfies the second prong of the "attributable to State certification" standard because it cannot be made less stringent without violating state law. The Permit authorizes the City of Sandpoint's Wastewater Treatment Plant to discharge to the Pend Oreille River in compliance with its conditions. One of the pollutants of concern in the plant's effluent is phosphorus, which is a "nutrient" under Idaho WQS. IDAPA 58.01.02.010.68. The water quality criterion for nutrients is a narrative criterion prohibiting "excess nutrients that can cause visible slime growths or other nuisance aquatic growths

impairing designated beneficial uses." IDAPA 58.01.02.200.06. (emphasis added). Per 40 C.F.R. § 122.44(d)(1)(vi), EPA translated Idaho's narrative criterion into a numeric criterion of 10µg/L for phosphorus.[1] *See* Attachment 2, E-1, E-2; Attachment 3, p.vi).

Instead of setting the phosphorus effluent limit at 10µg/L, though, the total phosphorus limits in the Permit are more stringent and represent the lower phosphorus load currently discharged by the City, and with good reason. Attachment 4, Response #2-3; *see also* Attachment 6 (showing calculations of water quality given various assumptions, including mixing zone sizings). Given Idaho's determination that the "Pend Oreille River has little or no remaining assimilative capacity for phosphorus," the effluent limits in the Permit represent the loadings beyond which the receiving water body would be likely be impaired. Attachment 2, Appendix B, p.14. In other words, the effluent limits matching the Permittee's current phosphorus removal performance—including the mixing zone sizing that is a component of the effluent limit calculations—could be made no less stringent and still comply with state water quality standards, including protection of the designated recreational use. *See* Attachment 2, p.5.

iii. Mixing zones in EPA-issued NPDES permits are "attributable to State certification" within the meaning of 40 C.F.R. § 124.55(e).

As demonstrated above, the mixing zone condition issued in IDEQ's 401 certification fully satisfies the test to qualify as "attributable to State certification." A closely analogous case—*In the Matter of Gen. Elec. Co. Hooksett, N.H.*, 4 E.A.D. 468 (EAB 1993)—supports this conclusion that mixing zones in EPA-issued permits, and their specific characteristics such as flow volume, are "attributable to State certification" within the meaning of 40 C.F.R. § 124.55(e). In *General Electric*, the permittee appealed the final effluent limitation for pH in their EPA-issued NPDES permit, which was developed without a mixing zone. Even though

[1] While ICL commented in detail regarding several aspects of the development of the final TP effluent limit, ICL did not comment on or challenge EPA's translation of Idaho's narrative criterion for nutrients. *See generally* Attachment 5.

New Hampshire's CWA § 401 certification did "not explicitly say that the permit conditions are necessary or that they cannot be made less stringent" but were instead only implied in a state letter, the Board nevertheless held that the permittee's mixing zone-related objections to the permit were "attributable to State certification" within the meaning of 40 C.F.R. § 124.55(e), and therefore were not reviewable in that forum. *In the Matter of Gen. Elec.*, 4 E.A.D. at 472-73; *accord In re City of Haverhill, Wastewater Div. Permittee*, 5 E.A.D. 211, 215 (EAB 1994) (challenge to condition "attributable to State certification" may not be entertained by the Board, and can only be raised in the appropriate state forum).

Here, precisely as in *General Electric*, ICL challenges a permit condition relating to a final effluent limitation and mixing zones, and the permit condition clearly satisfies both elements of being "attributable to State certification." Despite this well-established rule, ICL asks the EAB to do exactly what is prohibited in 40 C.F.R. § 124.55(e) and what the Board lacks jurisdiction to do under the well-established precedent cited above: review a state's CWA § 401 certification-authorized mixing zone used by EPA to introduce phosphorus effluent limitations into the Permit, when instead the proper forum is exclusively under state procedures. Idaho's procedures provide that any person aggrieved by a final CWA § 401 water quality certification may appeal within thirty-five (35) days from the date of the final certification by initiating a contested case with IDEQ.[2] Here, the final 401 certification was issued by IDEQ on February 3, 2017, and ICL did not initiate a contested case to challenge any aspect of the 401 certification. *See* Attachment 2. Not only is ICL's appeal of Idaho's 401 certification mixing zone condition filed in the incorrect forum, the deadline for filing such appeal has long passed.

[2] I.C. § 39-107(5); I.C. § 67-5270; IDAPA 58.01.23.100. Even the Petition itself demonstrates that the agency action ICL actually wishes to challenge is an IDEQ, not EPA, action: "the Idaho Water Quality Standards *instruct Idaho DEQ* to consider a list of principles" (p.9); "the definitions of the regulatory text in Idaho's EPA-approved mixing zone rule legally *require Idaho DEQ* to take note of and apply the mixing zone principle…" (p.11); "The plain meaning of Idaho's EPA-approved mixing zone rule *requires Idaho DEQ* to take note of and apply the mixing zone principle…" (p.12); "Because Idaho's EPA-approved mixing zone rule *requires Idaho DEQ* to limit the size of mixing zones…" (p.12) (all emphases added).

4. Because EPA had no discretion to alter or reject 401 certification conditions, ICL is actually challenging IDEQ's 401 certification.

ICL's claim that EPA acted improperly by incorporating IDEQ's authorized mixing zone from the 401 certification—and ICL's requested relief to order EPA to reissue the Permit—suggest ICL believes EPA was required to reject (or should have rejected) conditions in the 401 certification. To the extent ICL believes EPA can reject conditions in IDEQ's 401 certification, ICL is simply incorrect. Moreover, ICL asks the Board to direct EPA to re-issue the Permit in accordance with Idaho WQS, which in ICL's view would mean EPA should ignore IDEQ's 401 certification, implement a mixing zone with twenty-five percent ("25%") flow volume, and recalculate the phosphorus effluent limits based on that *unauthorized* mixing zone sizing. *See* Petition pp.4, 8, 12, 13. Any of ICL's desired outcomes would violate federal law.

Granting the requested relief by ordering EPA to re-calculate the total phosphorus effluent limits would be tantamount to ordering EPA to ignore a condition of a CWA § 401 certification, which is plainly prohibited under federal law. *Am. Rivers*, 129 F.3d at 110–11 ("Commission does not possess a roving mandate to decide that substantive aspects of state-imposed conditions are inconsistent with the terms of § 401") (citing, *in accord, Escondido Mut. Water Co. v. La Jolla, Rincon, San Pasqual, Pauma & Pala Band of Mission Indians,* 466 U.S. 765, 772 (1984) ("[t]he mandatory nature of the language chosen by Congress appears to require that the Commission include the Secretary's conditions in the license even if it disagrees with them.")). Instead, as established above, the only allowable challenge to CWA § 401 certification conditions is via state procedures. 40 C.F.R. § 124.55(e); *In re City of Fitchburg*, 5 E.A.D. at 97-98; *Natural Res. Def. Council*, 279 F.3d at 1188.

Without a revision by IDEQ of their certification, there would be no legal basis for EPA to alter the mixing zone sizing, and in turn no mechanism by which to recalculate the phosphorus effluent limits in the Permit. This would place EPA in a no-win situation, facing a choice

between either violating a Board order or violating federal law. The better—and legally correct—approach is to find that the Petition is barred in this forum because it actually challenges a 401 certification condition, or in the alternative to hold that the plain language and longstanding IDEQ interpretation of the mixing zone rule does not contain a 25% limit on flow volume.

5. EAB adjudication of the Petition would constitute a significant intrusion upon Idaho's sovereign immunity.

Importantly, because ICL's claims and the requested relief are both inextricably rooted in state law, adjudication of the Petition by the EAB would intrude significantly on Idaho's sovereign immunity.[3] State sovereign immunity precludes federal agencies from administratively adjudicating a private party's complaint that the state violated federal law, or from awarding any requested relief. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 765 (2002). Nor can state sovereign immunity be negated simply by shifting the adjudication of private claims to administrative fora. *R.I. Dep't of Envtl. Mgmt. v. U.S.*, 286 F.3d 27, 39 (1st Cir. 2002).

Nonetheless, ICL is asking the Board to decide that substantive aspects of state-imposed certification conditions are impermissible under CWA § 401 or state WQS—namely, that Idaho mixing zone rules contain a hard 25% limit on mixing zone flow volumes. Petition pp.4, 8, 12, 13. Relatedly, IDL is also asking the Board to direct EPA to reissue the Permit with phosphorus effluent limits based on mixing zone flow limits of 25% or less. Petition p.13. Because EPA has no ability to ignore or alter conditions in a lawfully-issued § 401 certification, ultimately ICL requests could only be accomplished by either an abrogation of IDEQ's lawfully-authorized

[3] The State of Idaho expressly reserves its full quantum of sovereign immunity in this proceeding, including but not limited to that provided under the 11th Amendment of the U.S. Constitution. Neither the State of Idaho's participation nor this response brief constitutes consent to suit or to any relief granted to the extent such consent is required— waiver of sovereign immunity in Idaho requires statutory or Constitutional language that clearly and specifically evinces such waiver. *Sanchez v. State, Dep't of Correction*, 143 Idaho 239, 244 (2006); *Univ. of Utah Hosp. & Med. Ctr. v. Twin Falls Cty.*, 122 Idaho 1010, 1018 (1992).

mixing zone in the 401 certification, or an order for IDEQ to re-issue the certification with differently-sized mixing zones.

Either of these dispositions would constitute a considerable invasion of Idaho's sovereign immunity, since "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Joseph v. Boise State Univ.*, 998 F. Supp. 2d 928, 948–49 (D. Idaho 2014), aff'd, 667 F. App'x 241 (9th Cir. 2016) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984)).

Instead, as discussed above, if ICL wanted to challenge the mixing zone conditions in IDEQ's 401 certification it was required to do so under state procedures. As such, the Board should bar ICL from using this proceeding to collaterally attack Idaho's 401 certification for the Permit.

B. Plain text, context, and history clearly and unambiguously demonstrate that IDEQ's mixing zone rules do not contain a 25% of flow volume limit.

As established above, this Petition is an impermissible collateral attack on IDEQ's 401 certification, and should be dismissed for lack of jurisdiction. However, should the Board reach the merits of this case, the Board should hold that ICL's argument contradicts the plain text, context, and longstanding agency interpretation of the regulatory schema for mixing zones.

Since the whole of ICL's argument rests on an interpretation of state regulatory language, the Board would employ its normal approach to textual interpretation. When construing an administrative regulation, the Board generally applies the normal tenets of statutory construction. *In re Rochester Public Util.*, 11 E.A.D. 593, 603 (EAB 2004); *In re Consumers Scrap Recycling, Inc.*, 11 E.A.D. 269, 293-95 (EAB 2004) (citing *Black & Decker Corp. v. Comm'r*, 986 F.2d 60, 65 (4th Cir. 1993)); *accord In re Bil-Dry Corp.*, 9 E.A.D. 575, 595 (EAB 2001). The Board's first step is to rely on the plain meaning of words as the guide to the definition of a regulatory term. *Consumers Scrap Recycling*, 11 E.A.D. at 292 (citing *T.S. v. Bd. of Educ.*, 10 F.3d 87, 89

(2nd Cir. 1993)). If the term is clear and unambiguous, the Board generally follows the unambiguous intent expressed by the language. *Id.*, 11 E.A.D. at 292-93. If the language is ambiguous, the Board may need to assess the broader context to ascertain the meaning. *See id.* ("[t]he meaning…of certain words or phrases may only become evident when placed in context," quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)); *accord Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 466 (2001) ("Words that can have more than one meaning are given content, however, by their surroundings[.]").

Here—*contra* ICL's assertions—the plain text, the context, and IDEQ's consistent history of interpretation of Idaho's mixing zone regulation all clearly establish that mixing zones are not limited to 25% of flow volume.

1. The plain text clearly and unambiguously demonstrates that Idaho's mixing zone rules do not contain a 25% of flow volume limit.

The language at issue in the Petition is Idaho's EPA-approved mixing zone regulations[4] (included as Attachment 7), which state, in relevant part:

> **01. Mixing Zones for Point Source Wastewater Discharges**. After a biological, chemical, and physical appraisal of the receiving water and the proposed 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:
>
> [...]
>
> e. Mixing zones in flowing receiving waters are to be limited to the following: (7-1-93)
>
> [...]
>
> iv. The mixing zone is not to include more than twenty-five percent (25%) of the volume of the stream flow;

[4] Though Idaho submitted revised mixing zone rule language for EPA approval in October of 2016, EPA has not yet acted on that submission. The EPA-approved mixing zone rule in Idaho—and thus currently-applicable for Clean Water Act purposes—is IDAPA 58.01.02.060 as published in 2014. *See Alaska Clean Water Alliance et al. v. Clarke*, No. C96-1762R, 1997 WL 4464499, at *3 (W.D. Wash. July 8, 1997).

[...]

IDAPA 58.01.02.060.01 (2014). Specifically, the Petition asks the Board to analyze the statement that IDEQ "will" "consider" "the following principles." Petition p.11.

Black's Law Dictionary ("Black's") defines "will" (when utilized as an auxiliary verb) as commonly having the mandatory sense of "shall" or "must." BLACK'S LAW DICTIONARY 1433 (5th ed. 1979). While Webster's Ninth New Collegiate Dictionary's ("Webster's") second applicable definition is "frequent, customary, or habitual action or natural tendency or disposition," it also contains a less-discretionary seventh definition as "a command, exhortation, or injunction." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1350 (1990).[5] Thus, "will" as used in IDAPA 58.01.02.060.01 likely establishes a mandatory requirement for IDEQ.

"Will" modifies the word "consider," which Black's defines as "[t]o fix the mind on, with a view to careful examination…To deliberate about and ponder over. To entertain or give heed to." *Black's Law Dictionary* 277 (5th ed. 1979). Similarly, Webster's defines "consider" as "to think about carefully" and "to take into account." *Webster's Ninth New Collegiate Dictionary* 279-80 (1990). Thus, "will consider" requires IDEQ to carefully examine, deliberate, think about, and take into account something.

Here, what the plain language of IDAPA 58.01.02.060.01 required IDEQ to do[6] was to carefully examine, deliberate, think about, and take into account whether the mixing zone in the

[5] A keyword search of EAB decisions on both Westlaw and the EAB website indicates that Webster's Dictionary is the overwhelming preference for plain language analysis in EAB opinions and orders: at least fifty-six (56) cite Webster's, compared with a total of only three (3) citations to the Oxford English Dictionary. As this brief will demonstrate, however, the plain language analysis will result in the same legal conclusion that 25% flow volume for mixing zones is ultimately a discretionary "consideration," not a required limit, irrespective of the particular dictionary one uses.

[6] As discussed, though EPA conducted calculations and modeling exercises regarding potential mixing zone for the Permit in this case—and in doing so followed Idaho mixing zone rules—ultimately it is IDEQ, not EPA, that authorizes through its CWA § 401 certification both the incorporation of a mixing zone in a federally-issued CWA § 402 permit and what specific properties it has, including flow volume sizing. This illustrates again that ICL is actually challenging an *IDEQ* decision, not an EPA permitting action, and consequently is strictly limited to state procedures.

Permit could include more than twenty-five percent (25%) of stream flow volume. The administrative record in this case represents precisely this careful consideration regarding what size mixing zone will be sufficiently protective of designated uses in the receiving water, and as such IDEQ met the requirements of Idaho's mixing zone rule. *See*, e.g., Attachment 5, Attachment 6, Attachment 23.

Caselaw interpreting the plain meaning of "consider" supports this interpretation. In a matter very similar to the instant case, New York State sued the EPA claiming that EPA failed to abide by a statutory mandate under the Clean Air Act. *See State of N.Y. v. EPA*, 50 F.Supp.2d 141 (N.D. N.Y. 1999). The relevant part of the statute stated that a particular required study "shall include, but not be limited to, consideration of the following matters[,]" and then proceeded to enumerate a list of six items to be considered in the study. *State of N.Y.*, 50 F.Supp.2d at 142, 144. Relying on the plain meaning of "consideration" in Webster's and Black's, the court rejected New York's "overly-broad reading" of the statute that EPA was actually required to undertake any of the six listed items. *Id.* at 144. Because "consider" and "consideration" mean a "careful examination," the court reasoned in dismissing the complaint, the statute did not obligate EPA to act on any of listed items but only to "include a careful examination." *State of N.Y.* at 144-45, 146. Likewise, in another case treating the question of whether an agency followed regulatory procedures requiring that "any [security clearance determination *must* include a *consideration* of …Mitigating Factors," the court held that "consideration" allowed for the agency, in practice, to not apply any of the factors. *Doe v. Schachter*, 804 F.Supp. 53, 62-63 (N.D. Cal. 1992). The U.S. Supreme Court, too, has held that the use of "consideration" (and its variants) in statutory or regulatory language—by its plain meaning—does not mandate any particular decision or adherence to any enumerated item. *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580–81 (1998) (provision requiring

agency to "[take] into consideration" factors simply adds "considerations" to the process and does not preclude action contrary to those factors or even specify that those factors must be given any particular weight); *Service v. Dulles*, 354 U.S. 363, 387-88 (1957) (compliance with mandate to include "consideration of" enumerated items did not mean Secretary was obligated to any particular outcome).

Consonant with the caselaw, conspicuously absent from Webster's, Black's, *and ICL's own* plain language definitions is any suggestion that the mixing zone rule requires IDEQ to *apply* the "principles." ICL's plain language definitions comport with the above definitions of "will" and "consider," but nevertheless concludes that somehow the resulting requirement is not only to think about and take note of the listed principles, but also to *necessarily apply* them. *See* Petition pp.11, 12. Thus, even if the Board adopts ICL's own definitions, ICL's conclusion does not follow: *mandatory application* of the specific flow volume "principle" is simply nowhere in the plain meaning of the operative words of the mixing zone regulation. Instead, where an agency has "considered" whether to limit a mixing zone to 25% of flow volume, the agency has satisfied the requirements plainly laid out in IDAPA 58.01.02.060. This is true irrespective of the actual flow volume percentage that results from the EPA-approved state procedures used to develop a mixing zone protective of beneficial uses.

Even more problematic is that ICL's argument would require the Board to interpret "consider" to mean something the plain meaning simply does not include. If IDEQ had meant to require one to do more than "consider" the principles and necessarily *apply* them as ICL suggests, then IDEQ could have easily said so. But instead of saying that the Department "will apply," IDEQ clearly specified that the requirement is to carefully think about and take into account the 25% flow volume principle when developing a mixing zone. ICL's argument asks the Board to force a meaning into the regulation that simply is not there, unnecessarily

introducing tension and inconsistency within the mixing zone rule and its longstanding interpretive history.

Instead, the best reading—which not only preserves the plain meaning of "consider" but also aligns it with the broader context and consistent interpretive history—is that whether and to what extent to apply a 25% flow volume limit to mixing zones is a discretionary decision so long as the agency genuinely "considers" it.

2. ICL's reading ignores the broader context of Idaho's mixing zone rules.

If the Board finds that the plain text does not clearly and unambiguously establish the 25% flow volume principle as a "consideration" rather than a strict quantitative cap, the underlying purpose of the rule and ultimately how it fits within the broader regulatory scheme should then be examined. *In re Rochester Pub. Util.*, 11 E.A.D. at 603. While the substantive requirements of mixing zone rule itself are indispensable, those requirements must be understood in the broader context of water quality law in Idaho and read to harmonize with that context wherever possible.

In addition to misreading the plain text of the mixing zone rules, ICL ignores the touchstone of Idaho mixing zone rules and policy, which is the protection of beneficial uses. The overarching purpose and goal of all Idaho water quality law and regulation is to preserve and enhance the quality of state waters. Idaho Code ("I.C.") § 39-3601. To that end, as directed by the CWA, IDEQ catalogs state waters to assess the chemical, physical, biological, and other information regarding each water body. 33 U.S.C. § 1315(b); IDAPA 58.01.02.054 (2014). IDEQ determines the beneficial uses and develops criteria to fully protect those uses. I.C. § 39-3604; IDAPA 58.01.02.054 (2014); 33 U.S.C. § 1313(c); 33 U.S.C. § 1314(a); *see generally* 40 C.F.R. Part 131. Several mechanisms have been developed to address this fundamental goal of protecting beneficial uses. A robust anti-degradation policy protects and maintains existing uses,

and requires a socio-economic justification before any significant degradation of high quality waters can be allowed. I.C. § 39-3603, 3608; IDAPA 58.01.02.051-.052. (2014). In addition, the more stringent of technology- or water quality-based effluent limitations necessary to protect water quality is applied to dischargers during the NPDES permitting process. *See* 40 C.F.R. § 125.3(a); 40 C.F.R. § 122.44(d)(1); EPA, NPDES Permit Writers' Manual, 5-1 (Sept. 2010). A core component of effluent limitation development is mixing zones: because the effect of a discharge on water quality is based on the calculated change in concentration of a pollutant, the calculation should "take into account" dilution under the most conservative assumption of critical low flow conditions. IDAPA 58.01.02.052.06.a. (2014).

In short, all aspects of water quality law and regulation in the State of Idaho—including the mixing zone rules—are designed not to achieve a particular quantitative mixing zone metric, but are focused on protecting beneficial uses. The requirement to "consider" a mixing zone size of 25% flow volume should be understood in this context, just as it is plainly written and interpreted by IDEQ: as a general guideline that can be tailored within the permit development process to what ultimately is protective of beneficial uses in the receiving water.

3. Idaho's longstanding interpretation and practice has been to develop mixing zones, where applicable, to protect beneficial uses of the receiving water, not to meet a particular quantitative sizing limitation.

As discussed above, the heart of the Idaho's WQS regime—including the subset addressing mixing zones—is the protection of beneficial uses. This underlying purpose and goal is reflected in and adhered to throughout the history of mixing zones rulemaking and guidance.

i. The history of mixing zone rulemaking in Idaho demonstrates that the central requirement for mixing zones to protect uses, not achieve a specific percentage flow volume limit.

Mixing zones have been incorporated into Idaho WQS from their inception. Even in their original form, IDEQ's mixing zone rules centered on protection of beneficial uses, not ensuring a particular numerical sizing limit.

> The earliest mixing zone rules in Idaho during the CWA era were promulgated in 1973, and stated in relevant part:
>
> X. […]
>
> J. The total area and/or volume of a receiving stream assigned to mixing zones shall be as described in valid discharge permits and limited to that which will
>
> Not interfere with biological communities or populations of important species to a degree which is damaging to the ecosystem.
>
> Not diminish other beneficial uses disproportionately.

Attachment 8, p.15. No specific numerical sizing consideration was present in this first version of the mixing zone rules. Importantly, nearly the entirety of the text describes the key features of mixing zones as ensuring no interference with aquatic life and no diminishment of beneficial uses. The overall context of the initial mixing zone rule further strengthens this focus on protection of beneficial uses, requiring dischargers to provide any and all information required "to evaluate the effects of [sic] any receiving waters," requiring limitations to be as stringent as "necessary to meet the water quality standards," and granting IDEQ discretion to grant exceptions only when they "will not adversely affect classified water quality and uses are adequately protected." *Id.*, p.13.

This focus on protection of uses—rather than adherence to any specific quantitative sizing metric—continued when Idaho's mixing zone rules were next revisited in a 1979-1980 rulemaking. Here, the language in the current mixing zone rules first appears:

> [1-2400].03 Mixing Zone. After a biological, chemical, and physical appraisal of the receiving water and the proposed 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. (1-30-80)
> […]
> (e) Mixing zones in flowing receiving waters are to be limited to the following:
> […]
> (4) The mixing zone is not to include more than twenty-five percent (25%) of the volume of the stream flow. (1-30-80)

Attachment 9, p.47. During the public comment period for these rules, IDEQ repeatedly interpreted this language consistent with the plain language and context analyses discussed above. In response to questions about whether the list of principles were regulatory requirements, IDEQ explained that the list constituted non-mandatory mixing zone design considerations, pointing to the plain meaning of the mixing zone rule's prefatory language that they are to be "considered." Attachment 10, pp.7-8. Because each discharge and water body "is different" and must be treated individually, the rule represents "the ideal" starting point, from which the mixing zone's particular characteristics are developed "depending upon the quality of the discharge" and the protection of uses "on a case-by-case basis." Attachment 11, p.18; Attachment 12, pp.7, 35. The "considerations for establishing mixing zone dimensions" are guidelines to help a potential discharger plan but "do not inflexibly bind the department to those principles." Attachment 13, p.6 (explaining to the Idaho Legislature the purpose and effect of the proposed mixing zone rule in 1-2400 (1980)). This flexibility goes both ways, IDEQ clarified, meaning that "[u]nder some circumstances…no mixing zone" would be allowable, while in others it may exceed 25% flow volume. Attachment 14, p.14. Ultimately, what determines the mixing zone sizing in practice is designing so as to have "the least impact on the communities that you are trying to protect." *Id.*, p.15.

ii. IDEQ and EPA guidance also establish that protection of beneficial uses is the governing tenet for understanding Idaho's mixing zone rules.

Though IDEQ has not issued final guidance regarding mixing zones, multiple drafts have undergone public comment and all consistently explain that while Idaho's "mixing zone policy lists specific principles that should be considered when evaluating the size and location of a mixing zone…these principles are not regulatory requirements, and IDEQ has discretion to depart from these principles." Attachment 15, p.2-17. So long as the mixing zone size "will not unreasonably interfere with the beneficial uses of the receiving water body," the rules provide IDEQ with "discretion to depart from" the principles to authorize mixing zones that include more than 25% of the critical stream flow volume. *Id.*, p.2-18; Attachment 16, p.2-15.

IDEQ's longstanding interpretation and practice closely follows federal guidance. Though agency records do not speak to the genesis of a stream flow principle being expressed as a specific percentage in the 1973 (or any subsequent) rulemaking, "25%" was adopted from early federal water quality standards guidance pre-dating the CWA. EPA's "Green Book" explains that to maximize the chances of adequate aquatic life passage, a mixing zone should "preferably" contain 25% of flow volume and/or width, but that the volume will vary depending on the character and size of the water and "should be established by proper administrative authority." Attachment 17, p.31. That this specific percentage was a suggestion and not a requirement is further evinced by subsequent EPA guidance, which omits any reference to "25%" or any specific quantitative metric for mixing zone flow volumes and instead expressly enshrines protection of beneficial uses and aquatic life as the fundamental limiting factor. *See* Attachment 18, pp.112-13 (recommending mixing zone characteristics be defined case-by-case based on water characteristics and use protection); Attachment 19, pp.193-94 (stating rationale that permissible mixing zone size depends on specific water body, and that the "prime purpose" of

sizing “is to protect the aquatic life”); Attachment 20, pp.5-1 through 5-9 (committing mixing zone policies to state discretion and recommending mixing zone characteristics be defined case-by-case with protection of designated uses and aquatic life as the “primary consideration”); Attachment 21, pp.1-7 (describing mixing zones as site-specific aspects individual permit development, and requiring size evaluations to avoid impairment of uses). IDEQ retained the numeric 25% flow volume principle even after it was phased out of federal guidance as a starting point that will presumptively provide an adequate zone of passage—however, because “there is no a priori assurance” of this, IDEQ works from there to develop mixing zone sizing protective of uses, just as recommended in all federal guidance for at least the past fifty years. Attachment 22, Response 3-58.

One reason IDEQ has incorporated mixing zone sizing discretion into state rules is to address situations where considerable or full mixing occurs before any adverse impact can occur. The nutrient discharge at issue in this case qualifies as precisely this situation: nuisance aquatic growth from nutrient discharge (e.g. total phosphorus) usually takes longer to occur than the time for the effluent to fully mix with the receiving water. Attachment 3, p.18; Attachment 23, p.2. Accordingly, IDEQ was able to safely authorize a mixing zone sized over 25% of flow volume for phosphorus without risk to beneficial uses of the Pend Oreille River—a longstanding practice that, as demonstrated above, is wholly consistent with the text and context of Idaho mixing zone regulations. In many instances mixing zones of even 100% can be authorized for nutrients, but here IDEQ ensured protection of beneficial uses by integrating the actual, localized mixing characteristics at the City’s outfall and limited the phosphorus mixing zone sizes to 47% and 60% flow volume. Attachment 2, p.10; Attachment 23, p.2.

V. CONCLUSION

EPA did not "misapply" Idaho's mixing zone rule as ICL claims—EPA correctly incorporated mandatory 401 certification conditions into the City of Sandpoint's Permit, as required by law. ICL failed to timely challenge those conditions via state procedures, and now attempts to collaterally attack IDEQ's 401 certification in a forum prohibited under federal regulations for such challenges. Moreover, even if the Board finds the EAB to be a proper forum to adjudicate the Petition, the plain text, context, and longstanding history all demonstrate that ICL is incorrect in its assertion that Idaho's mixing zone rule contains a 25% flow volume limitation.

For these reasons, the Idaho Department of Environmental Quality respectfully requests that the Board deny review and dismiss the Petition with prejudice.

RESPECTFULLY SUBMITTED this 24th day of September, 2018.

Richard A. Grisel
Deputy Attorney General
State of Idaho, Office of the Attorney General
1410 N. Hilton, 2nd Floor
Phone: (208) 373-0494
Facsimile: (208) 373-0481
Electronic Mail: rick.grisel@deq.idaho.gov

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I, Richard A. Grisel, hereby certify, in accordance with 40 C.F.R. § 124.19(d)(1)(iv), that the Idaho Department of Environmental Quality's Response to Idaho Conservation League's Petition for Review, including all relevant portions, contains less than 14,000 words.

CERTIFICATE OF SERVICE

I certify that on September 24, 2018, copies of the foregoing IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY'S RESPONSE TO IDAHO CONSERVATION LEAGUE'S PETITION FOR REVIEW were sent to the following persons in the manner described below:

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

[Via Electronic Filing]

Matthew Nykiel
Conservation Associate
Idaho Conservation League
PO Box 2308
Sandpoint, ID 83864

[Via Email]
mnykiel@idahoconservation.org

City of Sandpoint
1123 Lake Street
Sandpoint, ID 83864

[Via Email]
mayor@sandpointidaho.gov

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

[Via Email]
hladick.christopher@epa.gov

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

[Via Email]
weber.courtney@epa.gov

Richard A. Grisel
Idaho Office of the Attorney General
1410 N. Hilton, 2nd Floor
Boise, Idaho 83706
Telephone: (208) 373-0105
Facsimile: (208) 373-0481
Email: rick.grisel@deq.idaho.gov