

BEFORE THE ENVIRONMENTAL APPEALS BOARD

U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

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ENVIR. APPEALS BOARD

IN THE MATTER OF: :

CITY OF HOMEDALE WASTEWATER : NPDES Appeal No.

TREATMENT PLANT, : 13-10

NPDES Permit No. :

ID-002042-7 :

ORIGINAL

Wednesday, April 30, 2014

Administrative Courtroom
Room 1152
EPA East Building
1201 Constitution Avenue, N.W.
Washington, D.C.

The above-entitled matter came on for hearing, pursuant to notice, at 11:00 a.m.

BEFORE:

THE HONORABLE CATHERINE R. MCCABE
Environmental Appeals Judge

THE HONORABLE RANDOLPH HILL
Environmental Appeals Judge

THE HONORABLE KATHIE A. STEIN
Environmental Appeals Judge

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ALSO PRESENT:

Eurika Durr, Clerk of the Board

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P-R-O-C-E-E-D-I-N-G-S

11:01 a.m.

MS. DURR: All rise.

Environmental Appeals Board of the United States Environmental Protection Agency is now in session for oral argument in re: city of Homedale Wastewater Treatment Plant, NPDES permit number ID-002042-7, NPDES appeal number 13-10.

The Honorable Judges Randolph Hill, Catherine McCabe, Kathie Stein presiding.

Please turn off all cell phones and no recording devices allowed. Please be seated.

JUDGE McCABE: Good morning on this rainy Washington morning. Welcome to Washington for those of you who've traveled far.

I am Catherine McCabe and on my right is Judge Randy Hill, and on my left Judge Kathie Stein.

1 We would like to begin with the
2 appearance of the petitioners, but before we
3 do that let me just explain the order that
4 we'll go in for oral argument. Today we will
5 have one half an hour for each party. For the
6 petitioner, one half an hour for the
7 petitioner may be -- you may reserve, if you
8 like, five minutes for rebuttal. But please
9 let us know that when you begin.

10 So could we have appearances of
11 Counsel? Starting with petitioner, please.
12 Oh, you're on the other side.

13 MR. HAYES: Your Honors, I'm
14 Justin Hayes. I'm representing the Idaho
15 Conservation League pro se.

16 JUDGE McCABE: Good morning, Mr.
17 Hayes. And with you at counsel table?

18 MR. HAYES: This is an
19 acquaintance of mine, a colleague, Todd Tucci,
20 he's here for moral support and to make sure
21 that if I fall over, he'll pick me up.

22 JUDGE McCABE: Welcome.

1 And for EPA?

2 MS. WEBER: Courtney Weber on
3 behalf of EPA Region 10.

4 MR. CURTIN: Jim Curtin with the
5 Office of General Counsel.

6 JUDGE McCABE: Welcome everyone.
7 With that, we would like to begin with the
8 petitioner, Mr. Hayes.

9 MR. HAYES: Your Honors, thank you
10 for hearing in this matter.

11 I have asked that I reserve five
12 minutes for rebuttal.

13 I'd like to start off by
14 introducing my organization to you. I
15 represent the Idaho Conservation League. The
16 Idaho Conservation League is Idaho's oldest
17 and largest state-based conservation group.
18 We represent about 3000 members across the
19 state and we work on a variety of issues.
20 Water quality is one of the most important
21 issues that we work on though.

22 And this issue specifically, with

1 regard to water quality in the Snake River, is
2 of tremendous importance to our membership.
3 The Snake River is one of the most important
4 rivers in the state of Idaho. And
5 unfortunately, is also one of the most
6 contaminated rivers in the state of Idaho. So
7 this matter is pressing to our membership, and
8 important to be resolved correctly.

9 So I appreciate your intelligence
10 in this matter.

11 This matter is actually quite
12 simple. As I read the amicus that was filed
13 and I read the EPA's response, it struck me
14 that it was simpler than being construed by
15 other folks. We're really talking about up
16 permit limit and whether or not that permit
17 limit is consistent with the TMDL. We're not
18 attempting to challenge statute or regulation,
19 or challenge existing EPA court cases and
20 precedents. We are merely trying to apply
21 those precedents in this particular matter to
22 this particular NPDES permit to ensure that

1 the one limit that we are talking about, the
2 limit for total phosphorus, is being correctly
3 derived and this will be applied to the Snake
4 River to ensure compliance with the relevant
5 TMDL.

6 So this is a relatively narrow
7 issue. And in this regard, we think that EPA
8 has made a factual error.

9 JUDGE McCABE: Mr. Hayes, let me
10 just ask you an initial question and then we
11 can go on. Are you challenging only the
12 consistency of these permit limits with the
13 TMDL or are you also challenging whether the
14 permit limits are adequate to meet the state's
15 water quality standard?

16 MR. HAYES: I think that those are
17 the same thing. The TMDL was created such
18 that the attainment of the target in the TMDL
19 would result in this attaining the water
20 quality standards. And since this water
21 quality limit in the permit, sorry, the permit
22 limit is not consistent with the TMDL, it

1 results in a violation of the water quality
2 standard.

3 JUDGE McCABE: So are you
4 challenging both issues then?

5 MR. HAYES: I guess, in that
6 regard, I am. I'm sorry if I truncated that
7 inappropriately. In my mind, they were
8 connected.

9 JUDGE McCABE: Thank you.

10 MR. HAYES: So we reviewed the
11 draft permit; we saw this issue; we commented
12 on it; and when our comment was not resolved
13 in a matter that we thought it addressed the
14 underlying issue we brought this appeal.

15 The question here really is, does
16 the TMDL allow for implementing waste load
17 allocations on an averaging basis, a monthly
18 average, a weekly average? Or in this
19 particular instance, this unique TMDL, because
20 of the way it is constructed, and the language
21 that is used, and the assumptions that are
22 part of developing it, does it really require

1 that the TMDL waste load allocations in this
2 instance actually be a daily maximum? That's
3 the rub. Is, the permanent limit which uses
4 a monthly or weekly averaging, is it
5 consistent with the assumptions in the TMDL?

6 JUDGE McCABE: So once again, let
7 me just be clear about what you're
8 challenging. You're challenging both the 11
9 pounds per day monthly average limit and
10 you're challenging the 16.5 weekly average
11 limit?

12 MR. HAYES: Yes. They do not
13 comply with the assumptions in the TMDL, and
14 if implemented, will result in violations of
15 the target in the TMDL.

16 JUDGE HILL: So Mr. Hayes, what do
17 you seek or, I mean, obviously, you seek a
18 remand of the permit, but if we were to remand
19 the permit what would the permit look like in
20 your mind after this? Would it have a daily
21 limit? Would the weekly limit be set at 11?
22 Would the weekly limit be set at like 1/7 of

1 11? I'm trying to understand kind of -- I had
2 trouble, from your briefs, understanding what
3 would be a satisfactory permit limit.

4 MR. HAYES: The simple fix is a
5 maximum daily effluent limit of 11 pounds
6 consistent with the target and consistent with
7 the waste load allocations.

8 It is possible that you could
9 create a monthly and a weekly limit, but
10 because of the way that those monthly and
11 weekly averages are created, using the
12 technical documents, you end up creating a
13 very stringent limit so that none of the days
14 in the month that you're averaging result in
15 an accedence of 11. In that regard, I think
16 a monthly or a weekly limit is impractical in
17 this instance.

18 And that is why a maximum daily
19 limit is the best solution. If I may --

20 JUDGE STEIN: Can I asked you just
21 one question? This issue of impracticability,
22 which I saw in your reply brief, did you raise

1 that particular issue in your comments on the
2 draft permit?

3 MR. HAYES: I'm not sure that we
4 used the word impractical but we articulated
5 that a maximum daily limit was required in
6 order to comply with the --

7 JUDGE STEIN: And how do you
8 square that with other portions of the
9 regulations that appear to require that there
10 also be weekly averages and monthly averages?
11 I mean, don't we need to look at all of the
12 applicable regulations?

13 MR. HAYES: We do need to look at
14 all of the applicable regulations. And I
15 believe to be consistent with them you can
16 turn to a non-monthly or weekly permit limit
17 if the use of those is impractical.

18 However, as I said, while the
19 simple fix is a daily maximum, it is possible
20 to create a monthly and weekly. Although I
21 believe that would be somewhat punitive to the
22 city of Homedale.

1 JUDGE STEIN: Wouldn't EPA -- and
2 I'm trying to figure out whose burden it is to
3 raise this impracticability question -- but
4 wouldn't EPA have had to have made a finding
5 in the underlying permit proceeding of
6 impracticability to proceed as you're asking?
7 In other words, don't the regulations, on
8 their face, presume that in the absence of
9 that you should be imposing weekly and monthly
10 limits?

11 MR. HAYES: I believe that because
12 EPA has made a fundamental error in
13 understanding what the TMDL calls for and the
14 assumptions that were generated in creating
15 the TMDL and the waste load allocations,
16 because they erred there, they were blind to
17 this problem.

18 So it would have been wonderful,
19 from my perspective, for them to have it
20 asserted that a maximum daily was necessary
21 but they didn't see it because of the error
22 that they made.

1 If I may, I was going to rely on
2 the projector here but it's apparently not
3 working so I'd like to hand out that document.

4 JUDGE McCABE: For which we
5 apologize.

6 MR. HAYES: That is okay.

7 JUDGE McCABE: This is an historic
8 courtroom and, unfortunately, some of the
9 equipment is as well. And they're not --

10 MR. HAYES: Beautiful --

11 JUDGE McCABE: -- every day does
12 it work well.

13 MR. HAYES: I made some copies,
14 and I could hand them out, I would. May I
15 approach the bench? Or is --

16 JUDGE McCABE: Please. Thank you.
17 Thank you.

18 MR. HAYES: So I've handed out a
19 copy of a page pulled out of the mid
20 Snake/Succor Creek TMDL. And this describes
21 the target. This is the whole goal; this is
22 the point of the TMDL. The target shown to

1 result in attainment of water quality
2 standards and support of designated uses in
3 this reach is an in-stream concentration of
4 less than or equal to .07 milligrams per liter
5 total phosphorus, and it is applied seasonally
6 in this regard.

7 This is not an average target.
8 The target here is for total phosphorus in the
9 river to not exceed the concentration of .07
10 milligrams per liter at any time --

11 JUDGE HILL: Can I bring your
12 attention to page 175 of the same TMDL.

13 MR. HAYES: Okay.

14 JUDGE HILL: That document, I'm
15 looking at table 48. And table 48, the title
16 of the is, "In-stream total phosphorus average
17 concentrations." And then it has location and
18 that it says "May to September average
19 concentration," and it has a Snake River
20 below, CJ Strike Dam, and it says .07.

21 So I'm wondering how that squares
22 with your argument that page 164 is describing

1 it as, essentially, an instantaneous max --

2 JUDGE McCABE: And I also --

3 JUDGE HILL: -- it seems to label
4 it as an average concentration.

5 JUDGE McCABE: I'm also wondering
6 the language that you just cited to us, where
7 it says instantaneous, because you just
8 pointed us to language, on your page 164, that
9 says this is a seasonal target. So that
10 doesn't really say whether it's seasonal every
11 minute, as you seem to be arguing, or seasonal
12 at the end of the season, or seasonal on
13 average through the season.

14 MR. HAYES: I appreciate that
15 confusion. And it is not a seasonal average.
16 The phosphorus target is only applied during
17 a specific season.

18 When this TMDL was created, it was
19 determined that the period of time in which
20 phosphorus needed to be maintained below this
21 threshold was May through September.

22 JUDGE McCABE: Doesn't page 175,

1 as Judge Hill has just pointed out, say
2 average concentration May to September? Do
3 you have that page, Counsel? If you'd like a
4 minute to locate it, please take your time.

5 MR. HAYES: If I could, that would
6 be wonderful. Thank you.

7 JUDGE McCABE: This is 10 pages
8 after the one you were showing to us.

9 MR. HAYES: Thank you.

10 JUDGE McCABE: So what I was
11 suggesting is that what you showed us on page
12 164 seems to be ambiguous; it doesn't specify
13 whether seasonal means every minute in the
14 season or averaged over the season. And what
15 Judge Hill is pointing you to on page 175 is
16 much more explicit.

17 MR. HAYES: What Judge Hill is
18 pointing to, ma'am, it is the current
19 observed phosphorus concentrations in the
20 river, not that targets that were sought to be
21 achieved.

22 JUDGE HILL: Well, I mean, if you

1 look at the language before the table it says,
2 "The allocation strategy used is equal
3 concentration, meaning all sources must
4 discharge a concentration of .07 milligrams
5 are less where they enter the river." So and
6 then, "Seasonal variation critical conditions
7 were accounted for in this allocation. The
8 target applies May to September in-stream
9 seasonal concentration, for instance, at mile
10 49 is .07."

11 In other words, it kind of jumps
12 back and forth between characterizing it as,
13 you know, a not to be exceeded target,
14 although it never uses those words, and an
15 average target. But at the very least, it
16 seems ambiguous to me.

17 MR. HAYES: Thank you for pointing
18 that out.

19 And I will say, again, the table
20 here is representing existing observed
21 concentrations of phosphorus, not the target.

22 And I agree with you that the

1 notion of the equal concentration, with going
2 to be the guiding principle, that would be
3 very important to be implemented. That would
4 allow them to achieve the target of not
5 exceeding .07 milligrams per liter in-stream.

6 JUDGE HILL: So, let me ask you.
7 If we disagreed, if we thought that this
8 language implied that it was an average over
9 the season, and it's not clear what the
10 averaging period is from this language, but if
11 we disagreed and thought that this was an
12 average rather than a maximum, would that be
13 the end of your case?

14 MR. HAYES: Yes, I believe that it
15 would.

16 JUDGE HILL: Okay. So you're
17 hanging your hat on that the TMDL set a not to
18 be exceeded maximum?

19 MR. HAYES: I am. And I feel
20 quite comfortable in doing so because of the
21 plain language in the TMDL, which I referenced
22 you on page 164.

1 JUDGE McCABE: Can you please
2 point us again to the plain language you're
3 relying on?

4 MR. HAYES: Thank you. "The
5 target shown to result in attainment of water
6 quality standards and support of designated
7 uses in the reach is an in-stream
8 concentration of less than or equal to .07
9 milligrams per liter."

10 JUDGE McCABE: Does that mean
11 constant instantaneous to you?

12 MR. HAYES: It does.

13 JUDGE McCABE: And how do you
14 explain the third sentence down which you've
15 also underlined, that this target is seasonal
16 in nature?

17 MR. HAYES: Because this target,
18 it must be achieved but only during that
19 season. This is not saying that it isn't
20 averaged to be -- the average to be achieved
21 during that season. It's saying that this
22 target is only applicable during the season;

1 it is not a seasonal average; it is not a
2 monthly average. The target is, do not exceed
3 this concentration at any point in time during
4 the season.

5 JUDGE HILL: Mr. Hayes, what do
6 you do with the very first sentence of that
7 same paragraph where it says, "The phosphorus
8 load concentration, LC, is identified for an
9 average flow scenario"?

10 MR. HAYES: That is the average
11 flow of the river. When they needed to figure
12 out a concentration to shoot for in their
13 target, the concentration is obviously
14 dependent on the flow of the river and the
15 amount of load being discharged to the river.
16 So in this TMDL, rightly or wrongly, they
17 based that concentration on the average
18 observed flow of the river.

19 JUDGE STEIN: Mr. Hayes, I guess
20 what I'm trying to figure out here is, given
21 the significance of this issue, both to this
22 case and presumably to, you know, other

1 matters in the Snake River, wouldn't you have
2 expected that there would have been greater
3 clarity expressed in the TMDL if, in fact,
4 your reading were correct? In other words,
5 that it would not leave room for, at least,
6 what my colleagues have suggested, maybe a
7 number that could be read in more than one
8 way.

9 MR. HAYES: Right. It would be
10 wonderful if there was clarifying sentences in
11 here saying yes or no. However, I will point
12 out that there is an absence of sentences
13 saying that it is an average. And I will
14 point to a document from that Hells Canyon
15 TMDL, which is -- sorry --

16 JUDGE STEIN: No problem.

17 MR. HAYES: This is clear
18 language. And this is not found in the TMDL.
19 This is found in another TMDL. This language
20 here helps the permit writer faithfully
21 translate the assumptions of the TMDL into a
22 permanent limit by saying that these

1 phosphorus waste load allocations will be
2 applied daily on a monthly average basis based
3 on the design flow.

4 JUDGE McCABE: So this is the TMDL
5 waste load allocation for the next stretch
6 downstream of the Snake River as I understand
7 it.

8 MR. HAYES: That's right.

9 JUDGE McCABE: So it's your
10 understanding -- is your understanding, Mr.
11 Hayes, that this standard would be sufficient
12 to prevent the accedence of water quality
13 standards for total phosphorus and the growth
14 of algae that everyone is trying to prevent
15 here? Would this be adequate to do that?

16 MR. HAYES: It was determined by
17 the TMDL that this would be adequate for the
18 stretch of the river that is governed by this
19 TMDL.

20 MR. HAYES: Why would the next
21 stretch upstream be any different?

22 MR. HAYES: I'm not actually in a

1 position to tell you why they are different.
2 Although I will point out that they are very
3 different stretches of river with dischargers
4 of different magnitudes and quantities and
5 qualities going into them.

6 I believe that it is inappropriate
7 to lift language from one TMDL and apply it to
8 another TMDL. Language like this is not found
9 in the Succor Creek TMDL, the mid Snake/Succor
10 Creek TMDL.

11 MR. HAYES: But if the general
12 approach is protective for segment two of the
13 river, why isn't the same general approach
14 protective for segment one of the river? In
15 the analysis that they did, the state took the
16 flows into consideration when they set the .07
17 milligrams per liter target for total
18 phosphorus.

19 JUDGE McCABE: Right. The
20 language in the Hells Canyon TMDL is unique to
21 Hells Canyon TMDL. It is not found in the
22 Succor Creek TMDL, and it is not found in

1 TMDLs on the Snake upstream.

2 Why it is that it was integrated
3 into decision-making in Hells Canyon is not
4 something that I know the answer to. Although
5 I will point out that it is not found in other
6 TMDLs, TMDLs that were created at the same
7 time by the same people.

8 JUDGE STEIN: Weren't they created
9 a year apart? I mean, one of these documents
10 is dated April 2003.

11 MR. HAYES: Yes.

12 JUDGE STEIN: One is dated June
13 2004. So you're suggesting that there's more
14 precision and more information in the
15 subsequent document, but does the absence of
16 that information in the earlier document
17 dispose of this question?

18 MR. HAYES: Let me start by saying
19 they were created concurrently. They have
20 different finalized submittal dates, but the
21 development of the Snake River TMDLs has been
22 a multi-multi-year process. And there was a

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1 lot of integration of staffing and timing.

2 JUDGE McCABE: Mr. Hayes, as a
3 matter of science, is it your understanding
4 that you need to meet a .07 milligrams per
5 liter concentration of total phosphorus every
6 minute of every day in order to prevent the
7 eutrophication that they're trying to prevent
8 in this river?

9 MR. HAYES: It was determined
10 through the TMDL that they needed to meet that
11 concentration or be below that concentration
12 during the applicable season.

13 JUDGE McCABE: For the mid Snake
14 stretch but not for the next lower one, the
15 Hells Canyon I believe that was?

16 MR. HAYES: The Hells Canyon
17 target is similar to the Succor Creek one.
18 Although they're both different than other
19 upstream TMDLs. There's a little bit of
20 differences in concentrations.

21 JUDGE McCABE: So these are
22 targets that were determined by the state; am

1 I right, when they set the TMDL?

2 MR. HAYES: And approved by the
3 EPA, correct.

4 JUDGE McCABE: So would you agree
5 that it would be appropriate for the Board to
6 defer to the state interpretation of its own
7 TMDL?

8 MR. HAYES: If the language of the
9 TMDL supported that interpretation.

10 We see, in the record, references
11 to 2013 documents that were sent in by the
12 state or conversations that EPA had with the
13 state saying, oh, we meant it to be an
14 average. That is, in fact, not supported in
15 this TMDL. In order --

16 JUDGE STEIN: Why is it not
17 supported? I need to be clear on this point
18 because I saw that in your reply brief. But
19 why is it not supported? Because the TMDL
20 sets this maximum or because the way slowed
21 allocation was not expressed as a monthly --

22 JUDGE McCABE: And please --

1 JUDGE STEIN: -- is it --

2 JUDGE McCABE: -- note that your
3 yellow light has gone on which typically
4 signals that you've got about five minutes
5 left.

6 Eurika, I missed when it first
7 went on. How many minutes does Mr. Hayes have
8 left?

9 MS. DURR: Four.

10 JUDGE McCABE: Okay. We don't
11 necessarily strictly enforce it. Please take
12 your time.

13 MR. HAYES: Thank you. I'm sorry.
14 I got --

15 JUDGE STEIN: Let me state my --
16 you said that, that what the state said is not
17 supported by the TMDL itself. In what way is
18 it not supported? Does the TMDL not set the
19 waste load allocation on a monthly average
20 basis? Or that the TMDL requires this
21 instantaneous maximum and so that trumps?
22 Which is it?

1 MR. HAYES: The target trumps.

2 However, there is no language to
3 trump here. The target is clear that they
4 need to be at or below a certain concentration
5 in-stream during the season. And the waste
6 load allocations are articulated as kilograms
7 per day or pounds per day.

8 I'm familiar with the precedents
9 that have set in other hearings, or cases
10 rather, where that can be broadly interpreted
11 to give the permit writer flexibility to
12 create scenarios that allow those waste loads
13 to be implemented faithfully to achieve the
14 targets in the TMDL. But those are not, they
15 are not in this TMDL.

16 JUDGE STEIN: I know this is a
17 speculation question, but why would the state
18 of Idaho allow for monthly averages of POTWS
19 on a water body that apparently has 98 percent
20 of its loads coming from point sources and yet
21 allow for a monthly average to hit a target
22 and not allow it for a water -- upstream reach

1 of the same river where it's like a half a
2 percent of the total loading? I mean, why
3 would they do that?

4 MR. HAYES: I cannot speculate to
5 that answer, but I can observe that the sorts
6 of facilities that are being allowed monthly
7 averaging on the Hells Canyon stretch are
8 actually different sorts of facilities that
9 are being restricted to daily discharges from
10 the Succor Creek stretch.

11 JUDGE STEIN: Isn't your real
12 problem here with the TMDL?

13 MR. HAYES: I'm not challenging
14 the TMDL actually. I'm trying to faithfully
15 apply it.

16 If the problem with EPA is the
17 TMDL then they should go back to the state and
18 rewrite the TMDL so that they can use monthly
19 averaging.

20 I'm trying to faithfully apply the
21 TMDL as written and approved by EPA. I'm not
22 challenging the TMDL. I'm trying to uphold

1 it.

2 JUDGE McCABE: Mr. Hayes, earlier
3 you said, when I asked you whether you were
4 challenging both the permit's sufficiency to
5 meet the TMDL and the water quality standard,
6 you replied that they were the same thing as
7 far as you could see, taking loosely the water
8 quality target of .07 milligrams per liter as
9 standing for the applicable standard. Why is
10 it that the state certification that this
11 permit meets that .07 limit, why isn't that
12 the final word? Why did the state already
13 speak to whether this permit satisfies the
14 TMDL and their water quality standard?

15 MR. HAYES: I think it is
16 inconvenient for the EPA or the state to
17 develop or certify a permit limit that is a
18 maximum of 11 pounds a day from this facility.
19 There is a concern that that would cause the
20 facility to need to do an upgrade, and that is
21 inconsistent with the wishes of the city.

22 And there is some interesting

1 language in the TMDL that says you won't need
2 to do an upgrade until you exceed your design
3 capacity.

4 JUDGE STEIN: But isn't that an
5 assumption in the requirement of the TMDL as
6 well?

7 MR. HAYES: It is. And I was
8 hoping that we could talk about that.

9 One of the other assumptions of
10 the TMDL is that facilities will be, of this
11 nature, will be discharging at about 3.5
12 milligrams per liter. Unfortunately, the city
13 of Homedale is exceeding that concentration in
14 their effluent. As a result, they're
15 discharging more phosphorus than the city or,
16 I'm sorry, than the TMDL, frankly, presumed
17 that they would.

18 JUDGE McCABE: Is that information
19 in the administrative record of this permit?

20 MR. HAYES: It is and if I had
21 access, I would show it to you. There was a
22 document, Attachment 9, and the EPA response

1 brief which discusses, which demonstrates
2 this.

3 I'm going to run over my time.
4 Can we go continue --

5 JUDGE HILL: Go ahead. And let's
6 finish this point.

7 JUDGE McCABE: Yes, your red light
8 has gone on but, please, go ahead and finish.

9 You may need to read this to us,
10 Mr. Hayes. The print is a little small; we
11 forgot our magnifying glasses.

12 MR. HAYES: For me as well, and my
13 apologies.

14 So what we have here is a
15 spreadsheet that was created by the EPA using
16 information provided by the city and by DEQ.

17 And on the far left where I have
18 penciled in TPA concentration, that's the
19 phosphorus concentration observed in effluent
20 for the days, there next to it on the right.
21 You see the design flow. And on the far
22 right, you see the actual flow and the loading

1 based on the actual flow. And you can see
2 that from this, the city of Homedale is
3 discharging at or below 11 pounds per day;
4 they're in compliance with their waste load
5 allocation as articulated as a daily maximum
6 here.

7 However, if they were to discharge
8 at their design flow, that kind of middle
9 column there that's entitled "Loading based on
10 design flows," you see that this jumps up
11 above 11. So they would be in violation of
12 their waste load allocation here.

13 And the reason why this doesn't
14 square with the language in the TMDL is that
15 the city of Homedale is discharging in a
16 concentration that exceeds the modeled
17 concentration when they were developing the
18 TMDL.

19 JUDGE STEIN: I know you're
20 through with your time, but given what Judge
21 Hill pointed out about the difference between
22 the two TMDLs and the very small percentage

1 that point sources contribute to, what is the
2 environmental significance of looking at this
3 on a daily basis, as you would like us, or an
4 automatic instantaneous versus the averaging?
5 I'm having trouble, you know, understanding,
6 you know, leaving the legalities aside, tell
7 me why this matters.

8 MR. HAYES: This matters because
9 we want the Snake River to achieve water
10 quality standards; we want the target as
11 articulated in the TMDL to be achieved.

12 And although this is a small
13 discharge, if it operates in a way that is not
14 consistent with the TMDL, it will result in
15 the TMDL failing to achieve the target and
16 water quality standards not being met for this
17 stretch of the Snake River.

18 JUDGE STEIN: Assuming that your
19 interpretation of what the TMDL is designed to
20 do, I mean, as I think you pointed out, your
21 case may rise or fall on whether or not this
22 Board agrees with how you're interpreting the

1 TMDL.

2 MR. HAYES: You are correct.

3 If averaging is provided for in
4 the language of this TMDL then this permit
5 limit is acceptable. If averaging is not
6 permitted in this TMDL, because there's no
7 language in the TMDL authorizing such a move,
8 there is language in other TMDLs, so you can
9 see if they were going to insert language like
10 this you'd know what it would look like, you
11 can see it in other TMDLs. It's absent in the
12 Succor Creek TMDL. Therefore, it's not
13 appropriate to bootstrap it in and use it.

14 JUDGE McCABE: One more question,
15 Mr. Hayes. By showing us this difference
16 between the design flows and the actual flows,
17 are you trying to tell us that you think the
18 TMDL itself was inadequate?

19 MR. HAYES: No. I'm demonstrating
20 to you that EPA should not be bound by
21 language in the TMDL that implies that they
22 will not need to upgrade the Homedale facility

1 until they exceed their thing. Because the
2 Homedale facility is not operating as it was
3 modeled to operate in the TMDL.

4 The primary, most important
5 component of the TMDL is the development of a
6 target in the waste load allocations to
7 achieve that target. If, in fact, a facility
8 upgraded is required so that ultimately
9 Homedale can achieve their waste load
10 allocations and thus the target will be
11 achieved then an upgrade will be required.
12 That said, they're already complying with the
13 daily maximum limit of 11. And if a daily
14 maximum limit of 11 was part of the permit, it
15 would not through the city of Homedale into
16 violation immediately.

17 That's not what we're attempting
18 to do.

19 JUDGE HILL: I'm sorry. I have
20 one more question for you. So the permit
21 right now requires weekly sampling. The
22 permit right now is -- the permit, as written,

1 requires weekly sampling. And as far as I can
2 tell, you're not challenging that. So are you
3 -- I mean, again, if this permit were sent
4 back, would you be seeking daily sampling in
5 order to verify compliance with the daily
6 limit?

7 MR. HAYES: No. It is not
8 necessary that a facility sample daily in
9 order to have a maximum daily limit as part of
10 their effluent loads.

11 JUDGE HILL: You just want it
12 always to be below 11 whenever they sample?

13 MR. HAYES: Yes.

14 JUDGE HILL: Okay.

15 JUDGE McCABE: Judge --

16 JUDGE STEIN: I had one final
17 question. You've talked quite a bit about the
18 target. And it strikes me that when you refer
19 to it target you then refer to it as an
20 instantaneous limit. Why would the TMDL call
21 something a target if that target was really
22 a limit?

1 MR. HAYES: The target is the
2 numerical value that allows them to achieve
3 compliance with the water quality standards in
4 the stretch.

5 JUDGE STEIN: So the target itself
6 is not a limit?

7 MR. HAYES: I believe the target
8 is the limit. But it is hard to articulate it
9 as that. The limit is nutrients, a narrative
10 standard in the Idaho water quality standards.
11 So by creating a target, they are creating, in
12 essence, a water quality standard unique to
13 this stretch of the river.

14 JUDGE STEIN: I mean, isn't it
15 really just a bunch of mathematical
16 calculations? The design to be sure that at
17 the end of the day you're going to have
18 compliance with water quality standards? I
19 have difficulty reading a target -- well, let
20 me back up. If it was intended to be an
21 absolute limit why didn't they call it that?

22 MR. HAYES: I believe that the

1 language demonstrates that it is an absolute
2 limit. It's directing that in order to being
3 in compliance with water quality standards and
4 securing the designated uses in that stretch
5 of the river, you need to be at or below .07
6 milligrams per liter. The target is --

7 JUDGE STEIN: Well, that --
8 doesn't then turn that into a separate water
9 quality standard? I mean, aren't the
10 standards ultimately what you need to comply
11 with?

12 MR. HAYES: Yes.

13 JUDGE STEIN: And that EPA, when
14 it issues a permit and puts in limits, it
15 needs to certify, as it has here, that this
16 permit will achieve compliance in water
17 quality standards? It seems like your target
18 is taking on an importance that may or may not
19 have been envisioned when the TMDL was
20 drafted.

21 MR. HAYES: The semantics of that,
22 frankly, elude me at some level.

1 However, I will say, as a person
2 who has participated in the development of
3 many TMDLs in Idaho, that people are working
4 to achieve this target. The waste load
5 allocations are tiered to achieve this target.

6 JUDGE STEIN: Thank you.

7 JUDGE McCABE: And just to make
8 sure we're clear before you close. You are
9 not challenging the TMDL itself?

10 MR. HAYES: I am not challenging
11 the underlying TMDL. I am merely seeking to
12 faithfully apply it.

13 JUDGE McCABE: Okay. Thank you.
14 You still may reserve five minutes of your
15 time because it was the Judge's choice to go
16 over time here. Thank you Mr. Hayes.

17 MR. HAYES: Thank you very much.
18 And I appreciated the questions.

19 JUDGE McCABE: Ms. Weber.

20 MS. WEBER: Good afternoon. And
21 may it please the Court.

22 So the first point that I'd like

1 to make --

2 JUDGE McCABE: Pull the mic down a
3 little but closer so everyone in the courtroom
4 can hear you better.

5 MS. WEBER: Is that better?

6 JUDGE McCABE: Try that. Can you
7 hear her in the back when she speaks?

8 MS. WEBER: Okay. So the first
9 issue or point that I want to raise is that
10 Idaho Conservation League never submitted
11 comments during the permit process on the .07
12 milligram per liter target. That was not an
13 issue that was raised and so ICL has failed to
14 actually exhaust their administrative remedies
15 on that. And the city of Moscow decision
16 actually talks about the failure to raise the
17 administrative -- or exhaust the
18 administrative remedies.

19 JUDGE HILL: Before you go one
20 though, they did say though that 16 and a half
21 wouldn't meet 11.

22 MS. WEBER: That's true. They did

1 say 16 and a half wouldn't meet 11. But 11 --

2 JUDGE HILL: And that 11 on a
3 monthly average wouldn't mean 11 on a daily
4 average.

5 MS. WEBER: That's --

6 JUDGE HILL: So they put all of
7 that in issue.

8 MS. WEBER: But what the region
9 looked at with regard to the 11 was whether or
10 not -- well, we looked at whether we were
11 being consistent with the assumptions that
12 were made in the waste load allocation.

13 And the waste load allocation, the
14 way it was determined, was an average
15 discharge concentration, times the monthly
16 maximum design flow from the facility, times
17 the conversion factor to get it to pounds per
18 day, equals the waste load allocation.

19 The 0.07 target didn't actually
20 factor into that equation for determining the
21 waste load allocation. The 0.07 target has to
22 be met at the point at which the mid Snake

1 Succor Creek watershed meets the Snake River
2 Hells Canyon watershed. So it wasn't
3 something that DEQ used to determine the waste
4 load allocation for this facility.

5 JUDGE HILL: What do you do with
6 Mr. Hayes's argument that in the Hells Canyon
7 TMDL they said explicitly this waste load
8 allocation is a monthly average and didn't say
9 anything of the sort in the mid Snake TMDL?

10 MS. WEBER: While it is true that
11 in the mid Snake TMDL, DEQ didn't actually say
12 that the waste load allocation should be
13 applied as an average monthly effluent limit,
14 they did make a link between the two TMDLs and
15 that's on page 157 of the mid Snake TMDL,
16 where they specifically said, "The
17 determination of targets and the critical
18 season for the Snake River is largely based
19 upon work done in the Snake River Hells Canyon
20 TMDL.

21 JUDGE HILL: I'm sorry. Could you
22 repeat the page number?

1 MS. WEBER: Yes, it's page 157 of
2 the TMDL.

3 JUDGE HILL: 157. Okay.

4 MS. WEBER: Of the mid Snake TMDL.

5 So looking at that statement, the
6 permit greater turned to the Snake River Hells
7 Canyon TMDL. And in that TMDL, DEQ said that
8 the waste load allocations for the POTW should
9 be applied as an average monthly effluent
10 limit. It was the same -- the same equation
11 was used in both TMDLs to determine the waste
12 load allocations for POTWs.

13 So not only did the region look at
14 whether or not we were being consistent with
15 the assumptions made to determine the waste
16 load allocation for the city, but the region
17 also turned to various statements that DEQ
18 made during the development of the TMDL. And
19 those statements had to do with the fact that
20 the city wasn't required to do any upgrades to
21 the facility as long as it stayed at or below
22 the design capacity, the monthly maximum

1 design capacity for the facility.

2 In addition to that, the state,
3 during the permitting process, issued a 401
4 certification on the permit where they made
5 numerous statements that EPA had translated
6 the waste load allocation consistently with
7 the TMDL. And they not only said it in the
8 401 cert they said it in research response to
9 ICL's comment on the 401 cert.

10 And the last thing that the region
11 considered was the fact that 122.45D requires
12 the region to impose average weekly and
13 average monthly effluent limits unless it's
14 impracticable to do so. And we -- there was
15 no finding in the record that it was
16 impracticable to impose average monthly and
17 average weekly effluent limits.

18 JUDGE HILL: What do you do with
19 Mr. Hayes's argument that it was impracticable
20 in this case because it didn't meet the TMDL?

21 MS. WEBER: Well again, I think
22 that goes to the issue of the TMDL target

1 being a .07 milligram per liter. And again,
2 that was, .07 is the target for the water body
3 but that wasn't an assumption that was made
4 when DEQ was determining the actual waste load
5 allocations for the POTWs in the watershed.

6 JUDGE HILL: What about the chart
7 that Mr. Hayes handed out from your attachment
8 9 that shows that at least -- I mean, these
9 are all 2006 data points -- but at least in
10 2006 they were fairly consistently discharging
11 well above 3 and a half milligrams per liter.
12 And if they had been at their design flow,
13 they would have been violating 11 on a fairly
14 regular basis. How does that square with the
15 statement that they don't have to do anything
16 new? It looks like they may well have to do
17 something new if they get up to their design
18 flow.

19 MS. WEBER: If they get up to
20 their design flow, they are currently -- the
21 city is discharging below their design flow.
22 And what the region did for this table was

1 look at the statements that DEQ made in the
2 TMDL to the effect that the facility wouldn't
3 have to upgrade until they hit their design
4 capacity. And we looked -- and they looked at
5 the monitoring that had been done subsequent
6 to the TMDL. So when the TMDL was actually
7 drafted, DEQ used an assumption of 3.5
8 milligrams per liter because there was an
9 absence of data for any of these facilities.
10 None of these facilities were required to
11 monitor and none of these facilities had
12 effluent limits, phosphorus effluent limits in
13 their permit.

14 So what the permit writer looked
15 at were was the actual concentrations that
16 were occurring on a daily basis. And again,
17 I know it's ICL's position that the waste load
18 allocation should be applied on a daily basis,
19 but the assumptions that went into the waste
20 load allocation indicate it should be applied
21 on an average monthly basis.

22 So these numbers are what came out

1 that day from the facility. And then if you
2 multiply that by the actual flow from that
3 day, you'll see that the load that was coming
4 out is bumping up --

5 JUDGE HILL: But Ms. Weber, here's
6 my question. What you just said was that they
7 came up with the 3 and half milligrams per
8 liter in the absence of any data, correct?

9 MS. WEBER: Correct.

10 JUDGE HILL: And they basically
11 said, okay, if they're discharging at 3 and a
12 half milligrams per liter per day, times their
13 design flow, that will meet their waste load
14 allocation and they won't have to do anything.

15 Not all of those statements are
16 true. Because if they do discharge at their
17 design flow, at the current levels they're
18 achieving, which is when you have data it
19 looks like it's more than 3 and a half, they
20 won't be able to do anything without upgrades.

21 So why should we give you credit
22 for paying attention to the statement they

1 don't have to do anything if that was based on
2 a bad assumption about what their current
3 discharge levels were?

4 MS. WEBER: Well, I think, first
5 of all, that the assumptions in the TMDL are
6 not really before the Board. That's a TMDL
7 issue which ICL said that they're not
8 challenging.

9 And second of all --

10 JUDGE HILL: Well, but it is an
11 issue here. Because the regulation requires
12 you to be consistent with the assumptions and
13 requirements of the TMDL. If the assumptions
14 of the TMDL are themselves internally
15 inconsistent, what does a permit writer have
16 to do? What do we have to do on review?

17 MS. WEBER: Well I think under the
18 regulations it says that we have -- that the
19 permit writer needs to be consistent with the
20 waste load allocations of that TMDL. And in
21 this situation, the permit writer look at the
22 waste load allocation for the TMDL, and looked

1 at the fact that it was the same equation that
2 was used in this TMDL as was used for all the
3 POTWs in the Snake River Hells Canyon TMDL.
4 And in that TMDL, DEQ said that the waste load
5 allocation should be applied as an average
6 monthly effluent limit.

7 That's what we did here. We
8 applied it as an average monthly effluent
9 limit. The facility if they -- if the
10 assumptions that what DEQ made is incorrect
11 and DEQ chooses to go back and change those
12 waste load allocations then they have the
13 authority to do that.

14 But the equation remains the same
15 in both the TMDLs. And in the Snake River
16 Hells Canyon TMDL, the state said it should be
17 applied as an average monthly effluent limit.
18 And not only that, they said it in this
19 permitting process to. They said in their
20 certification that EPA had applied the waste
21 load allocation correctly.

22 JUDGE McCABE: Ms. Weber, is the

1 Friends of the Earth decision of the D.C.
2 Circuit controlling here?

3 MS. WEBER: No, it's not
4 controlling in this case. And ICL has
5 actually conceded the fact that they are not
6 trying to say every TMDL, in every waste load
7 allocation has to be applied as the daily
8 maximum effluent limit.

9 I think the heart of this case is
10 whether or not we're consistently -- we're
11 translating the waste load allocation
12 consistently with the assumptions that were
13 made in the TMDL.

14 JUDGE McCABE: Well the D.C.
15 Circuit made a big deal about how the statute
16 says daily and I seem to be hearing a lot of
17 monthly and weekly talk here. Is there
18 anything --

19 MS. WEBER: But again, it's
20 because --

21 JUDGE McCABE: -- that we should
22 pay attention to their --

1 MS. WEBER: -- it's because that
2 what the D.C. Circuit looked at was the fact
3 that it's a total maximum daily load in the
4 statute. And in this case, you have to look
5 at the Regulation 122.44D1 where it says that
6 the permit writer has to be consistent with
7 the assumptions of the waste load allocation,
8 which is what's the region did and petitioners
9 failed to show that we were in clear error.

10 JUDGE HILL: So is the TMDL itself
11 infirm? I mean, should it not -- I mean, or
12 for the Hells Canyon TMDL. I mean, if you
13 have to meet a maximum daily load, how can you
14 have a monthly average waste load allocation?
15 Isn't that just a mathematical problem?

16 MS. WEBER: Well, I think that
17 it's also important to look at what you're
18 dealing with in this case, what the pollutant
19 is. The pollutant is phosphorus. Phosphorus
20 is -- the issue is that it's a bio-cumulative
21 effect. It's not what's being discharged per
22 day that's the concern. It's the accumulation

1 of the pollutants throughout the water body
2 that results in the algal blooms downstream.

3 JUDGE HILL: I think that's sort
4 of the argument the agency made in Friends of
5 the Earth. You want this to be daily because
6 it's a pollutant that's really an annual
7 problem.

8 JUDGE McCABE: And what did the
9 Court say to that argument in --

10 MS. WEBER: But again, Friends of
11 the Earth really was centered on 303D of the
12 Clean Water Act, which is the TMDL section and
13 what that -- and that in 303D, it's a total
14 maximum daily load.

15 Again, I think we have to turn to
16 the regulations and the fact that, you know,
17 the Board's own opinion in the city of Moscow
18 has said that 122.44D1 is the controlling
19 regulation in this case. And that whether or
20 not the permitting authority was consistent
21 with the assumptions of the waste load
22 allocation.

1 JUDGE STEIN: But don't we have to
2 go a step further in this case than the Board
3 did in Moscow? In Moscow, the question was
4 really whether or not you had -- the limits
5 had to be identical rather consistent with the
6 requirements and the assumptions of the TMDL.

7 I don't hear petitioner arguing
8 about the need for identity. I think that
9 this case requires the Board to go beyond what
10 we decided in Moscow. I think this is, on
11 some levels, perhaps a more challenging case.

12 MS. WEBER: Well, and that may be.
13 But I think that, again, in Moscow, the main
14 holding was that the permit writer, because of
15 122.44D1 had flexibility in determining how
16 the waste load allocation should be translated
17 into a permit limit.

18 And in this situation, it may --
19 it's different than the city of Moscow, but
20 the heart of what we are looking at is the
21 same. It's a factual issue in this case.

22 But again, what the region looked

1 at were the assumptions that went into the
2 this waste load allocation. And the
3 assumptions that went into this waste load
4 allocation indicate that the waste load
5 allocation should be applied as an average
6 monthly effluent limit.

7 JUDGE STEIN: But at the time
8 Moscow was decided, if I recall correctly,
9 Friends of the Earth has not yet been decided.

10 MS. WEBER: That is true. But
11 once again, Friends of the Earth had to do
12 with the statute for TMDLs, for total maximum
13 daily loads. And there's nothing in that
14 decision that says that that, once you get
15 that waste load allocation, that daily load,
16 you have to apply it as daily effluent limit.
17 Nor does it make sense for the pollutant of
18 concern in this case, which is phosphorus.

19 JUDGE HILL: I guess it's not
20 surprise the case didn't say that since the
21 case was a challenge to the TMDL. I think the
22 question on the table is, is the logical

1 implication of the holding in that case also
2 mean that a waste load allocation, in order to
3 meet a daily load, has to, essentially, take
4 into account the possibility of daily.

5 That's, you know, I mean, I
6 understand, I mean, Mr. Hayes was very careful
7 to say he's not challenging the TMDL probably
8 because he knows that that's not in this case.
9 But what he is saying is that the TMDL, to be
10 consistent with Friends of the Earth, has to
11 be, in essence, daily and this waste load
12 allocation has to be daily in order to be
13 consistent with the TMDL.

14 JUDGE McCABE: And therefore, if
15 it's ambiguous on its face we should interpret
16 it that way.

17 MS. WEBER: Right. And I do
18 understand what Mr. Hayes is arguing.

19 So you know, I think that there
20 was a Court that spoke to how waste load
21 allocations should be dealt with. And that's
22 the American Farm Bureau Federation which

1 dealt with the Chesapeake Bay TMDL. And in
2 that case, the Court stated that in some
3 circumstances a state may write in NPDES
4 permit limit that is different from the waste
5 load allocation provided that it is consistent
6 with the operative assumptions underlying the
7 waste load allocation.

8 And once again, the region looked
9 at the assumptions that went into this waste
10 load allocation, the same equation in the mid
11 Snake Succor Creek TMDL that was used in the
12 Snake River Hells Canyon TMDL. And in the
13 Snake River Hells Canyon TMDL, for the POTW
14 waste load allocations, DEQ stated they should
15 be applied as an average monthly effluent
16 limit. That's what the region was looking at.

17 JUDGE McCABE: Does the
18 flexibility that our city of Moscow decision
19 indicated in -- I'm not sure the name of the
20 case, the Chesapeake case, farm --

21 MS. WEBER: American Farm --

22 JUDGE McCABE: -- American Farm

1 Bureau -- does it go so far as to enable the
2 permit writer to make an assumption that is
3 inconsistent with the state's own
4 interpretation of its water quality standard
5 as reflected in its target that it used for
6 its TMDL?

7 MS. WEBER: So, no, I don't think
8 it goes that far.

9 But I also don't think that the
10 .07 milligram per liter is the water quality
11 standard. The water quality standards that
12 we're dealing with in this case are narrative
13 standards. They address nuisance algae and
14 excess nutrients. And once again, phosphorus
15 is a bio-accumulative pollutant. The concern
16 is not a daily concern; it's not come what's
17 coming out of the pipes every day. The
18 concern is the effect over the course of the
19 season and the resulting algal blooms that
20 result downstream in the Snake River Hells
21 Canyon watershed.

22 And that .07 milligram per liter

1 is a target that has to be met at the
2 confluence of the mid Snake Succor Creek
3 watershed where it meets the Snake River Hells
4 Canyon watershed.

5 JUDGE McCABE: Does the record
6 show us anything about where these algal
7 blooms are occurring, if they are?

8 MS. WEBER: So you would have to
9 turn to the Snake River Hells Canyon TMDL.
10 There's a detailed discussion about the
11 environmental effects that are occurring.
12 That begins at page 258, and it goes on for
13 quite a few pages about the environmental
14 effects of phosphorus.

15 JUDGE McCABE: And does it tell us
16 anything about where algal blooms are
17 occurring?

18 MS. WEBER: If they -- I actually
19 don't know that off the top of my head. I do
20 knew that it's in the Snake River Hells
21 Canyon.

22 And again, the reason why it's

1 applied over the season is because during the
2 summer months it's hot, it creates the algal
3 blooms downstream. But there is no indication
4 at the point of discharge there are algal
5 blooms that are occurring.

6 JUDGE McCABE: Well, perhaps when
7 Mr. Hayes comes back up for his rebuttal we
8 can ask him since his members apparently are
9 very familiar with this next section of the
10 Snake River.

11 MS. WEBER: So, you know, once
12 again, there were four things that the region
13 looked at when it was determining whether or
14 not we had properly translated the waste load
15 allocation into a permit limit. It was, we
16 wanted to be consistent; we wanted to meet the
17 requirements of 122.44D1, which requires us to
18 look at the assumptions of the waste load
19 allocation. We looked at numerous statements
20 DEQ made during the TMDL promulgation process.
21 We looked at DEQ's statements during this
22 entire process that, yes, we were consistently

1 -- we were applying the waste load allocation
2 appropriately and in compliance with their
3 TMDL. And we looked at 122.45D which requires
4 average weekly, average monthly effluent
5 limits.

6 JUDGE STEIN: Could you enumerate
7 for me what the requirements and assumptions
8 of the TMDL are in this case?

9 MS. WEBER: Yes. So the
10 assumptions that went into determining the
11 waste load allocation was that there was an
12 average discharge concentration of 3.5
13 milligrams per liter, that was in and of
14 itself an assumption that DEQ made, times the
15 monthly maximum design flow of use facilities,
16 times the conversion factor, equals the waste
17 load allocation. It's actually a fairly
18 simple calculation.

19 And the intent was to keep these
20 POTWs discharging at or below what they would
21 discharge at their design capacity, because
22 the point sources are not the issue in this

1 water body. The main issue are the non-point
2 sources.

3 JUDGE HILL: Does the TMDL talk
4 about where the 3 and a half milligrams per
5 liter came from?

6 MS. WEBER: Not in the mid Snake
7 TMDL. And there is very little discussion
8 also in the Snake River Hells Canyon TMDL.

9 But in the Snake River Hells
10 Canyon TMDL, on page 280, it talks about how
11 using available data and estimated discharge
12 concentrations of wastewater treatment plants
13 of 3.5 milligrams per liter, the total
14 phosphorus loading from the point source
15 discharges was calculated at 516 kilograms per
16 year, which is, I mean, those were the point
17 sources for the Snake River Hells Canyon. But
18 that is where they talk about it.

19 And they also talk about it in a
20 footnote to Table 4.0.8 on page 446 of that
21 TMDL. And in the footnote, again, it's not
22 entirely clear how they calculated the 3.5 but

1 it says, "Estimated value provided by Boise
2 for use in absence of monitored data."

3 So looking at those two statements
4 together, what DEQ was really looking at was
5 that they were -- they took the assumption
6 that these wastewater treatment plants didn't
7 have phosphorus removal capabilities at this
8 time. And they made a conservative assumption
9 that 3.5 would be their average discharge
10 without any sort of phosphorus removal at
11 their facility.

12 JUDGE HILL: So it's, in essence,
13 it's not water quality based at all. It's
14 sort of vague engineering judgmental --

15 MS. WEBER: That's correct.

16 JUDGE HILL: -- what comes out of
17 --

18 MS. WEBER: That's correct.

19 And again, it's because the point
20 sources themselves are not the main problem
21 throughout the Snake River. It's the non-
22 point sources. And the fact that the -- you

1 know, in the mid Snake TMDL, in itself, it's
2 a -- the non-point source problem problems are
3 95+ percent of the load capacity.

4 JUDGE HILL: Let me ask, how did
5 you get from 11 to 16 and a half?

6 MS. WEBER: So the 11 to 16 and a
7 half is a conversion factor that permit
8 writers use that come from the technical
9 support document for water quality-based
10 toxics control.

11 It's not an issue that was raised
12 in this appeal so it's not something that I
13 really looked at in detail for this.

14 But I do know that that's discuss
15 in Appendix B of the fact sheet, towards the
16 end. It discusses the conversion factor from
17 average monthly to average weekly.

18 JUDGE HILL: Why not simply have
19 set it at 11?

20 MS. WEBER: I think that if you
21 apply average 11 as an average monthly,
22 average weekly, daily it just, it doesn't make

1 sense. You have to take into consideration
2 that there are going to be fluctuations that
3 occur at a facility. And average, an average
4 monthly effluent is, you know, samples that a
5 facility takes over the course of the month
6 and they average it out into an average
7 monthly, you know, calculation. And average
8 weekly is what they take over the course of a
9 week to determine. It really depends on
10 what's going on at the facility.

11 JUDGE HILL: But to give Mr.
12 Hayes's argument sort of its full credit, I
13 mean, you can imagine a situation -- I mean
14 this is a mathematical, you know, extreme --
15 but on day one, you know, you discharge 330
16 pounds and then you discharge zero the
17 remaining 29 days of the month, and you
18 average that out over 30 and you get, by gosh,
19 11. And 330 pounds is like 20 percent of the
20 load capacity rather than half a percent. So
21 why isn't that a concern in terms of the waste
22 load allocation is 11 kilograms per day, but

1 you can imagine where it really had, you know,
2 had a real measurable affect on the
3 concentration in the water? Why isn't that a
4 concern?

5 MS. WEBER: So again, it turns to
6 the assumptions that went into the waste load
7 allocation. And the fact that in the Snake
8 River Hells Canyon TMDL, DEQ stated that the
9 waste load allocation should be applied as an
10 average monthly.

11 Now turning to that example,
12 again, the concern with phosphorus is not a
13 daily concern; it's not like you're going to
14 discharge that amount and boom there's going
15 to be an algal bloom at the point of the
16 discharge. The concern is the accumulation
17 throughout the season; it depends on
18 temperature, it depends on average flow of the
19 river, what's going on in the river at that
20 time. It's not a daily concern.

21 JUDGE HILL: So that slug load
22 wouldn't suddenly cause a short-term algae

1 bloom?

2 MS. WEBER: I am not a technical
3 person, so I can't say that.

4 But I don't I also can say that I
5 don't think the city would have that large of
6 a discharge.

7 JUDGE HILL: Well presumably, not,
8 no. But I mean, I think Mr. Hayes's point is
9 that, you know, that the permit limit would
10 allow them to do that. And is that consistent
11 --

12 MS. WEBER: Hypothetically it
13 would allow them to do that.

14 But again, the concern with
15 phosphorus is that it's a seasonal concern.
16 It's what's going on over the course of the
17 season. It's not a daily concern.

18 JUDGE HILL: Okay.

19 JUDGE STEIN: When you talk about
20 a seasonal concern, why isn't the petitioner
21 right that it's written in the TMDL the
22 concept of a seasonal average or the season is

1 really just, you know, May to September and
2 not necessarily averaging that? Why do we
3 have to read it in the way you suggest?

4 MS. WEBER: Well, first, I think
5 that there's nothing in the TMDLs that use the
6 word instantaneous. There's nothing that
7 indicates that that target has to be applied
8 instantaneously in the river.

9 And I think that the reason it
10 isn't the case because, again, phosphorus is
11 -- there's a bio-accumulative concern; it's
12 not at that point that is the main concern.

13 And second of all, you know,
14 again, the 0.07 milligram per liter is the
15 target at the point at which the mid Snake
16 meets the Snake River Hells Canyon portion of
17 the watershed.

18 JUDGE STEIN: And where could we
19 find that?

20 MS. WEBER: That is -- if you will
21 give me just a moment. It's on page 161 of
22 the mid Snake TMDL. And it says, "The mid

1 Snake River Succor Creek reach is directly
2 above the Snake River Hells Canyon reach. And
3 thus, must meet the snake River Hells Canyon
4 .07 milligram per liter of total phosphorus
5 target where the two reaches meet."

6 JUDGE HILL: But Ms. Weber, that
7 language that you just read said "must meet
8 the target." Doesn't that actually support
9 Mr. Hayes's argument that what -- I mean, I
10 understand it's an ambient flow in the river.
11 But his argument would be the ambient
12 concentration in the river can't get above .07
13 because it has to meet that target. So it
14 doesn't use the word instantaneous, or daily,
15 or anything else but must meet sounds to me
16 like not to be exceeded. Why doesn't that
17 actually support his argument?

18 MS. WEBER: So even if you assume
19 it's an instantaneous, which again, there's no
20 indication in here that says it's an
21 instantaneous number, you have to look at the
22 assumptions that went to determining the waste

1 load allocation. And the assumptions that
2 went into determining the waste load
3 allocation, nowhere in those assumptions was
4 .07 used.

5 JUDGE HILL: So your argument is
6 that even if it is an instantaneous maximum it
7 didn't have to be met by Homedale because the
8 TMDL assumed that they were going to have an
9 average over a month?

10 MS. WEBER: That's correct.

11 And in fact, in the response to
12 comments that DEQ drafted for the mid Snake
13 TMDL, it specifically stated, "This TMDL
14 allows time to plan for and obtain funds for
15 nutrient removal by stating that the Homedale
16 wastewater treatment plant must meet that
17 nutrient target of .07 if the plant is going
18 to undergo expansion." And the previous
19 sentence to that is, "This TMDL allows the
20 Homedale wastewater treatment plant to
21 continue discharging at their current level."

22 JUDGE HILL: So did the state make

1 a mistake in setting an average waste load
2 allocation to meet that .07 target? Or was it
3 in error for EPA to approve that TMDL?

4 MS. WEBER: I think that if, I
5 think questions regarding the TMDL are not at
6 issue in this case. And it could be that DEQ
7 made an error. But that has to do with the
8 TMDL itself and the assumptions that DEQ made
9 and now is not the time to challenge the TMDL.

10 JUDGE HILL: What about Mr. Hayes
11 --

12 JUDGE McCABE: Do you think that
13 the Board has no jurisdiction to consider a
14 faulty TMDL on which --

15 MS. WEBER: That is correct. The
16 TMDL -- if petitioner didn't like the TMDL,
17 the time at which to challenge the TMDL was
18 when either the state -- in state court when
19 the state promulgated the TMDL or in federal
20 court went EPA approved the TMDL.

21 JUDGE HILL: But it --

22 MS. WEBER: And that approval

1 occurred in 2003.

2 JUDGE HILL: -- but this circles
3 back to the argument that Judge Stein -- or
4 the questions Judge Stein was asking earlier.
5 If the TMDL is infirm then how can EPA certify
6 that this permit meets water quality
7 standards? So we may not be able to review
8 the TMDL but we can review whether the permit
9 limit meets water quality standards.

10 MS. WEBER: That's correct. And
11 the water quality standards here are narrative
12 water quality standards that were intended to
13 address nuisance algae and excess nutrients.
14 And at that the point of discharge, the permit
15 -- at the point of discharge, there's no
16 indication that the facility is exceeding
17 water quality standards.

18 JUDGE McCABE: Hasn't the state
19 already made its position clear in choosing
20 the target of .07 milligrams per liter? Isn't
21 that the state's interpretation of its own
22 water quality standard for total phosphorus

1 for your mid Snake section?

2 MS. WEBER: To determine the .07
3 milligram per liter, the state went through
4 numerous modeling assumption -- and they added
5 assumptions into there. It really is
6 dependent on river flow and the fact that that
7 target is meant to be met in the Snake River
8 Hells Canyon watershed. And the target is
9 supposed to be met at the point at which those
10 two river, portions of the river meet.

11 It's not the standard. The
12 standard is a narrative water quality standard
13 that the state then went through modeling
14 exercise to determine what the target should
15 be in the TMDL.

16 JUDGE McCABE: Doesn't the permit
17 writer need to set a target in order to be
18 able to write the permit limit?

19 MS. WEBER: The permit writer
20 needs to look at the water quality standards,
21 which again, are narrative standards, and the
22 TMDL waste load allocation which --

1 JUDGE McCABE: They never look at
2 what the state's interpretation of it its
3 quarter quality standard is?

4 MS. WEBER: I don't -- the TMDL
5 itself doesn't actually say narrative water
6 quality standards equals .07 milligrams per
7 liter. .07 milligrams per liter is the target
8 for the point at which the two water bodies
9 meet. It's not the standard itself.

10 And I see that my time is up.

11 JUDGE McCABE: Do you have
12 anything further you want to add?

13 MS. WEBER: No.

14 JUDGE McCABE: Judge Hill, any
15 further questions?

16 (No audible response.)

17 Judge Stein?

18 (No audible response.)

19 Thank you very much.

20 MS. WEBER: Thank you.

21 JUDGE McCABE: Mr. Hayes, you have
22 five minutes.

1 MR. HAYES: Thank you very much.

2 A couple of quick clarifications.
3 Again, we're not challenging the .07; that's
4 something we are hanging our hat on. We want
5 that to be the target; we're not challenging
6 that target.

7 And also the notion that the point
8 of compliance, if you will, is at the border
9 between Succor Creek and the downstream
10 segment is actually not supported in the
11 record.

12 JUDGE McCABE: Say that again?

13 MR. HAYES: Opposing Counsel said
14 that we needed to meet the target at the
15 juncture between the two TMDLs. And that
16 actually is part of the Hells Canyon TMDL. We
17 need to meet that target so that we can then
18 proceed -- we need to meet the target there so
19 that the Hells Canyon TMDL can kick in. The
20 target must be met in the reach -- sorry, too
21 many TMDLs, too many targets. The Succor
22 Creek TMDL target is a in-stream

1 concentrations in the entire reach. It is not
2 merely to be judged as being compliant with
3 the target as it flows out of that stretch of
4 the river.

5 And the evidence for that, I
6 believe is in the document that I --

7 JUDGE HILL: Assuming that's true,
8 does that make any difference?

9 MR. HAYES: It doesn't make a
10 difference to my argument; it doesn't make a
11 difference to where you are heading with your
12 questioning. I wanted to just point it out,
13 though, that there is not a downstream point
14 of compliance articulated for this target.
15 This target is applicable within the entire
16 mid Snake Succor Creek stretch.

17 JUDGE McCABE: And where do we
18 look in the record to confirm that?

19 MR. HAYES: The record reflects
20 that on page 164, which I handed out earlier,
21 of the Succor Creek TMDL where the targets
22 shown to result in attainment of water

1 quality standards in support of designated
2 uses in the reach is in-stream concentrations
3 of less than or equal to .07.

4 Other TMDLs have different areas
5 designated within them for compliance to
6 various standards. There are no such
7 intermediate designated points within this
8 TMDL. This target is applicable in the entire
9 reach of this section of the Snake.

10 Again, this target needs to be --
11 can be thought of as the speed limit, if you
12 will. If you're driving down the highway and
13 the speed limit is 55 miles an hour, that
14 means do not go above 55 miles an hour.

15 JUDGE HILL: Yes, but Mr. Hayes,
16 Ms. Weber's argument, to use that analogy is
17 the following: that the flow of traffic can't
18 exceed 55 miles an hour, but that the state,
19 when they allocated speeds to individual cars,
20 said we assume that this car is going to go 55
21 miles per day. And in essence, this car is
22 going to exceed it occasionally, but the total

1 flow will generally still be below 55 miles an
2 hour. That's their whole argument, that the
3 total daily load, the state assumed, would be
4 a monthly average for this one facility. And
5 how do you respond to that?

6 MR. HAYES: I respond to that by
7 pointing out that that is not articulated in
8 the TMDL in any way. It is articulated in
9 other TMDLs. And I don't believe it's
10 appropriate to usurp that language from one
11 TMDL and insert it into this TMDL to make
12 these particular permit limits.

13 I really don't have much else to
14 add, although I would like to thank EPA Region
15 10. In all of the years that I've worked with
16 the Idaho Conservation League, I've reviewed
17 virtually every NPDES permit that has been
18 issued by the region. This is only the second
19 time which we have launched an appeal of
20 something. And this is, frankly, only the
21 first time when the appeal was not able to be
22 resolved within the region.

1 Courtney and her colleagues, up
2 and down the food chain at EPA Region 10, do
3 very important work and it's very tough to do
4 this sort of work in Idaho, and we greatly
5 appreciate their attention.

6 Also I would like to thank Ms.
7 Durr. It's been invaluable as a citizen
8 approaching the Board to have someone on the
9 phone that I could ask questions about how to
10 proceed.

11 So with that, I'll rest my case
12 and I appreciate the opportunity to present
13 this matter before you.

14 JUDGE McCABE: Thank you, Mr.
15 Hayes.

16 Judge Hill, do you have any
17 further questions?

18 (No audible response.)

19 Judge Stein?

20 (No audible response.)

21 Thank you very much. Thank you to
22 all the parties. This has been a very

1 interesting and elucidating argument; and we
2 will take the matter under advisement.

3 MR. HAYES: Thank you.

4 (Whereupon, the above-entitled
5 matter was concluded at 12:12
6 p.m.)

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This is to certify that the foregoing transcript

In the matter of: City of Homedale Wastewater
Treatment Plant

Before: EPA

Date: 04-30-2014

Place: Washington, D.C.

was duly recorded and accurately transcribed under
my direction; further, that said transcript is a
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Neal R. Gross

Court Reporter

NEAL R. GROSS

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