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DEQ Hearings Coordinator
DOCKET NO. _____

BEFORE THE BOARD OF ENVIRONMENTAL QUALITY

IN THE MATTER OF SECTION 401)	Docket No. 0102-01-06
WATER QUALITY CERTIFICATION)	
FOR RELICENSING OF THE C.J.)	FINDINGS OF FACT, CONCLUSIONS
STRIKE HYDROELECTRIC FACILITY)	OF LAW AND RECOMMENDED ORDER
_____)	ON MOTIONS FOR SUMMARY JUDGMENT

This matter is before the Hearing Officer based upon Motions for Summary Judgment filed by Idaho Rivers United and the Department of Environmental Quality. Oral argument was first conducted on May 14, 2002. The Department of Environmental Quality was represented by Deputy Attorney General, Douglas Conde. Petitioner, Idaho River United, was represented by its attorneys, William Eddie and Laird Lucas. Idaho Power was represented by Travis Thompson.

By Recommended Order dated June 14, 2002, this Hearing Officer recommended granting a Motion to Dismiss filed by Idaho Power upon the grounds the Petitioners lacked standing. As a result of that Recommended Order, the Hearing Officer deferred decision on the substantive issues.

In an Order dated November 4, 2002, the Board of Environmental Quality accepted the Hearing Officer's Recommended Order finding

IRU and American Rivers did not have organizational first party standing and finding American Rivers did not have representational standing. However, the Board found IRU had representational standing to bring this contested case. The matter was remanded to the Hearing Officer for determination of the substantive claims raised by IRU.

Additional pre-hearing conferences were conducted and deadlines were established for the submission of any additional briefing and oral argument was scheduled on the substantive Motions for Summary Judgment. Pursuant to the Stipulation of the parties dated April 30, 2003, further oral argument on the Motions for Summary Judgment was waived and the matter was submitted to the Hearing Officer on the existing record.

FINDINGS OF FACTS

On September 14, 2001, Idaho Power made application to the Idaho Department of Environmental Quality for a Section 401 water quality certification as part of its application for relicensing of the C.J. Strike Hydroelectric Project. Relicensing is required by the Federal Energy Regulatory Commission and as part of that process, Idaho Power must receive a Section 401 water quality certification from the State of Idaho certifying that the project will comply with applicable provisions of the Clean Water Act and state water quality standards.

DEQ provided public notice of Idaho Power's request in a

notice dated July 2, 2001. A public hearing was conducted August 13, 2001, at which IRU appeared and offered testimony in opposition to the request.

On September 13, 2001, DEQ issued a Section 401 water quality certification. The request for certification by Idaho Power was dated September 14, 2000. DEQ has one (1) year from the date of the request for certification to determine whether to issue the certification. (See DEQ Idaho 401 Guidance document.)

Paragraph 4 of the Section 401 certification issued September 13, 2001, notes the segment of the Snake River within which the C.J. Strike facility is located is listed as water quality limited under Section 303(d) of the Clean Water Act. The Bruneau arm of the C.J. Strike reservoir is also listed as water quality limited. Consequently, DEQ is required to develop and submit to the United States Environmental Protection Agency "total maximum daily loads" or TMDLs for those water bodies. However, DEQ will not have the C.J. Strike TMDLs completed until approximately the end of 2004. TMDLs for the Snake River above and below C.J. Strike have been completed or will soon be completed.

Paragraph 6 of the certification noted Idaho Power Company had been and continues to be involved in developing TMDLs for the Snake River. All of the TMDLs are intended to collect information regarding the loading capacity of the Snake River, the sources and contributors of pollutants and development of a plan to achieve state water quality standards on the Snake River. DEQ determined

"the completion of the TMDLs is critical in determining water quality issues" relating to the C.J. Strike facility "and any conditions necessary to ensure compliance with State Water Quality Standards." Paragraph 7, September 13, 2001, Certification.

DEQ issued the 401 certification with conditions which state:

CERTIFICATION AND CONDITIONS

Based on the foregoing, the Department hereby certifies pursuant to Section 401 of the Clean Water Act that, if IPC complies with the conditions listed below, there is a reasonable assurance the C.J. Strike facility will comply with applicable requirements of sections 301, 302, 303, 306 and 307 of the Clean Water Act and the Idaho Water Quality Standards.

1. By January 1 of each year after the date of this certification, and until the C.J. Strike TMDLs are completed, IPC shall pay \$50,000 to the Department to assist in the development of the C.J. Strike and Snake River-Succor Creek TMDLs.
2. After the C.J. Strike, Snake River-Hells Canyon and Snake River-Succor Creek TMDLs are completed, IPC shall implement those measures determined by the Department to be necessary to achieve allocations assigned to the C.J. Strike facility consistent with state and federal law requirements. The Department's final determination regarding such measures shall be a condition of this 401 certification. The Department shall attempt to reach agreement with IPC regarding such measures before making its final determination.

By Petition received October 18, 2001, Idaho Rivers United petitioned for a contested case hearing on DEQ's decision. The Petition was brought pursuant to Idaho Code §39-107(5), the Idaho

Administrative Procedure Act and DEQ rules governing contested case appeals and declaratory rulings, citing IDAPA 16.05.03. In their prayer for relief, Idaho Rivers United prayed that a contested case hearing be conducted; that the 401 Certification be reversed and set aside and remanded to DEQ for further proceedings; and for injunctive or declaratory relief including attorney's fees and costs. Idaho Power was granted the right to intervene in the pending Petition.

IRU and DEQ, through Cross-Motions for Summary Judgment, agree there are no genuine issues of material fact.

Idaho Power Company owns and operates the C.J. Strike hydroelectric facility which impounds water from portions of the Snake River and Bruneau River near Grandview, Idaho. In order to operate the C.J. Strike Facility, Idaho Power is required to obtain a license from the Federal Energy Regulatory Commission (FERC). Idaho Power's facility license for the C.J. Strike project expired November 30, 2000. Idaho Power has applied for renewal of its facility license. If renewed, the license term will be a minimum of 30 years.

The C.J. Strike Dam is located on the Snake River just below the confluence of the Bruneau and Snake Rivers. The dam creates a reservoir that extends twenty-seven miles upstream on the Snake River and eight miles upstream on the Bruneau River.

Since the C.J. Strike facility is subject to a federal license and discharges pollutants to the Snake River, Idaho Power must

obtain certification from DEQ that the facility and its operations will meet water quality standards, pursuant to Section 401 of the Clean Water Act. 33 U.S.C. §1341.

The C.J. Strike reservoir, the Snake River downstream of the project, and the Bruneau River upstream of the project are designated as water quality limited segments, pursuant to Section 303(d) of the Clean Water Act. The Snake River is on the state's Section 303(d) list for various pollutants and the C.J. Strike project does cause changes in water quality within the reservoir and downstream of the project which violate water quality standards. Idaho Power's own studies establish that the water in and around the C.J. Strike facility violate water quality standards with respect to dissolved oxygen, nutrients, ammonia, temperature and sediments. Idaho Power's C.J. Strike FERC license application, attached as Exhibit 2 to Petitioner's Motion for Summary Judgment, states:

The Applicant's data collected in C.J. Strike Reservoir confirm the water quality limited status of C.J. Strike Reservoir. Water quality is likely not adequate for full support of all designated beneficial uses. Specifically, conditions do not meet the criteria for full support of coldwater biota. Dissolved oxygen, ammonia nitrogen, water temperature, and nutrient (and resulting algae) levels were sometimes potentially problematic. Problematic dissolved oxygen and ammonia nitrogen levels occur in the hypolimnion of the reservoir during summer periods of weak stratification. In addition, water discharge from the project failed to meet criteria for hydroelectric discharges in both 1993 and 1994. Warm water temperatures and nutrient enrichment are

problematic throughout much of the Snake River, both upstream and downstream of the project. Application at E.2.-5.

The same application on Page E.2.1 states that water uses within the project boundaries include agriculture, hydropower, recreation, wildlife habitat, industry and aesthetics. The primary consumptive use of water from the Snake River within the project vicinity is irrigation with several irrigation canals diverting water from C.J. Strike reservoir and other irrigation canals diverting water upstream of the intake area on the south side of the reservoir. (Exhibit 2, Page E.2.-1.) Page E.2.-2 states that flow through the project is dependent in large part on water released upstream past Milner Dam. The State of Idaho has established a minimum flow of 0 cfs at the Milner Dam and during irrigation season, all water may be removed from the river at Milner for irrigation purposes. These same pages of the application indicate the State of Idaho has established certain minimum stream flows at the Murphy gauge, 40 miles downstream from C.J. Strike.

Pursuant to the Clean Water Act, DEQ is in the process of establishing TMDLs for the Snake River in the C.J. Strike reach and downstream. Those TMDLs are scheduled to be completed around the end of 2004. The TMDL schedule which is being followed by DEQ has been established by a Court Order resulting from another lawsuit.

The documents submitted with the various Motions for Summary Judgment clearly establish the operation of the C.J. Strike project has a significant effect on the flow of the Snake River downstream

of the project. Idaho Power operates the project to meet peak power demands on a daily basis. As a result, due to "load following" operations, the flow fluctuations within the Snake River below the dam can be up to three feet per day. Idaho Power studies establish this flow fluctuation has a deleterious impact on spawning habitat for white sturgeon.

CONCLUSIONS OF LAW

In its Memorandum in Support of Motion for Summary Judgment, DEQ argues the 401 certification complies with requirements of the Clean Water Act for the reason that Idaho Power is required to comply with all TMDLs when adopted.

In its Motion for Summary Judgment and Brief in support thereof, Idaho Rivers United contends the 401 certification does not comply with the Clean Water Act for the reason that it does not provide "reasonable assurance" that the operation of the C.J. Strike will meet Idaho water quality standards. IRU argues the project already violates water quality standards. TMDLs will not be developed for several years. Consequently, IRU argues the certification is improper because it relies upon non-existent criteria. IRU further argues the certification is improper for the reason that DEQ did not address the effects of flow alteration.

IDAPA 58.01.23.213.02 provides that motions for summary judgment in DEQ proceedings are governed by the Idaho Rules of Civil Procedure. Rule 56, I.R.C.P., states summary judgment may be

granted if the pleadings, depositions and admissions on file establish there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. As noted above, the parties concede there are no genuine issues of material fact. Consequently, this case is appropriate for a summary judgment ruling.

The Idaho 401 Guidance document, Page 3, provides DEQ's final decision regarding 401 certifications may be appealed pursuant to Idaho Code §39-107(6), and the Idaho Administrative Procedure Act. Idaho Code §39-107(6) actually refers to judicial review of final agency determinations. It appears that, when the statute was amended to establish DEQ as a separate state agency, the statutes were renumbered and the 401 Idaho Guidance document was not revised to reflect the new numbering system.

The appropriate, applicable statute appears to be Idaho Code §39-107(5). ~~This provides a person aggrieved by an action or inaction of DEQ has an opportunity to request a fair hearing pursuant to Idaho Code, Chapter 52, Title 67, the Idaho Administrative Procedure Act. In such hearings, the hearing officer is given authority to administer oaths, examine witnesses and issue subpoenas for the testimony of witnesses and the production of evidence at the hearing. The Hearing Officer concludes that the current pending Petition is a contested case, rather than an appeal. See also, IDAPA 58.01.23.001.03. The petitioner in a contested case has the burden of proof by a preponderance of the~~

evidence. IDAPA 58.01.23.102.

The Timing of Development and Implementation of TMDLs Does Not Invalidate the Certification.

IRU argues the 401 certification is defective because the TMDLs will not be completed for several years and will not achieve compliance with water quality standards for many years in the future. Section 401(d) of the Clean Water Act requires that states provide a "reasonable assurance" that a federally licensed "activity will be conducted in a manner which will not violate applicable state water quality standards." 40 C.F.R. §121.2(3); Miners' Advocacy Council, Inc. v. Alaska Department of Environmental Conservation, 778 P.2d 1126 (1989); Bangor Hydro-Electric v. Board of Environmental Protection, 595 A.2d 438 (Me. 1991).

Each state was required by Section 303(c) of the Clean Water Act to establish water quality standards, including designated uses for the waters, water quality criteria to protect those uses, and an anti-degradation provision. 33 U.S.C. §1311(c); PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700, 114 S.Ct. 1900 (1994). The regulations adopted by the State of Idaho designate the Snake River in the vicinity of C.J. Strike for protection of aquatic life and recreation uses. IDAPA 58.01.02.140.01, 02 and 03.

The Clean Water Act, Section 303, also requires states to identify waters which do not currently meet water quality standards. The federal EPA approves the list prepared by the state.

For waters on the 303(d) list, states are required to develop Total Maximum Daily Loads (TMDLs). A TMDL is a plan which determines the amount of pollutants a water body can receive in order to still comply with water quality standards. A TMDL is also used to allocate a load of pollutants to all polluting sources with a plan on reducing sources of pollutants in order to meet water quality standards. 33 U.S.C. §1313(d); 40 C.F.R. §130.7.

Idaho Code §39-3611 reaffirms DEQ's statutory obligation to establish TMDLs to control point sources and non-point sources of pollution on water bodies. That statute further states: "Existing usage shall be maintained on all such water bodies." See also, IDAPA 58.01.02.054.02. Idaho Code §39-3612 provides that, upon completion of the TMDL process, the Director shall adopt such TMDLs which shall be enforceable through normal enforcement practices. The TMDLs are to be integrated with other state programs.

In the recent case of Asarco, Inc. v. State of Idaho, Idaho Department of Environmental Quality, 03.10 ISCR 433 (April 25, 2003), the Idaho Supreme Court considered the legal effect and establishment of TMDLs. The Court summarized the legal requirements as follows:

Pursuant to the federal Clean Water Act and the Idaho Water Quality Act, DEQ is required to take several steps in order to improve water quality in the state of Idaho. The first step requires development of state water quality standards. These water quality standards are specific to each water body and are based on the designated uses of the water. 33 U.S.C. § 1313(c)(2)(A); I.C. §§ 39-3603 and

3604. The second step requires DEQ to identify those water bodies that fail to meet the state water quality standards. 33 U.S.C. § 1313(d)(1)(A); I.C. § 39-3609. This list is also referred to as the 303(d) list or water quality limited segments (WQLS) list. The third step requires DEQ to establish TMDL figures for each water quality limited segment. 33 U.S.C. § 1313(d)(1)(C)¹; I.C. § 39-3611. Once the TMDL's are established for each of the segments, they are incorporated into the state's water quality management plan. 33 U.S.C. 1313(e); I.C. § 39-3612. The purpose of this process is to identify segments of water bodies in Idaho that do not meet the state's water quality standards and, through the TMDL, establish the maximum amount of pollution that can go into those segments from both point and nonpoint sources in an effort to reduce the pollutants and ultimately improve the quality of the water receiving the pollutants.² 03.10 ISCR at 434.

The Court noted that, in contrast to the NPDES permitting system, which focuses on individual point source discharges, the TMDL process considers the water quality of the receiving water body and the cumulative impacts of multiple sources of pollution. The Idaho Supreme Court reviewed the language of Idaho Code §39-3611 and stated:

Clearly these procedures are generally and uniformly applicable and require DEQ to focus on the water body as a whole, as opposed to the individual sources of pollution. 03.10 ISCR at 435.

In the Asarco case, the Idaho Supreme Court determined that TMDLs are rules and consequently, must be adopted pursuant to the rule-making procedures set forth in the Administrative Procedure Act. If correctly adopted, TMDLs have the force and effect of law.

In this case, DEQ has issued a conditional certification. Paragraph 2 of the certification dated September 13, 2001, specifically states Idaho Power shall be required to implement measures determined by the Department to be necessary to achieve allocations assigned to the C.J. Strike facility under the TMDLs being developed.

In the case of American Rivers, Inc. v. Federal Energy Regulatory Commission, 129 F.3d 99 (2nd Cir. 1997), the Second Circuit Court of Appeals upheld the authority of states, pursuant to the Clean Water Act, to establish and impose conditions applicable to Section 401 certifications. In the American Rivers case, FERC had rejected certain conditions imposed by the State of Vermont on 401 certifications which allowed the state to amend conditions in the future and review and approve future changes to projects. The Second Circuit upheld the authority of states to attach conditions to Section 401 certifications. The Court further ruled that the FERC could not exclude state-imposed certification conditions on licenses for hydropower projects.

Both the Clean Water Act and Idaho state law contemplate an integrated process through the development of TMDLs in the Snake River vicinity of the C.J. Strike project. These laws do not contemplate dealing with one pollution source in a vacuum. Consequently, the Hearing Officer concludes federal and state statutes support DEQ's decision to complete development of the TMDLs and require compliance with those TMDLs by Idaho Power.

Neither federal nor state statutes require immediate compliance with water quality standards, as contended by IRU.

Failure to Address Flow.

IRU further argues the 401 certification is invalid for the reason that DEQ has failed to address the issue of significant fluctuations in water flow downstream of the dam. As noted in the Statement of Facts, the daily fluctuation of water can be as much as three feet per day. This flow fluctuation does impact spawning beds for fish.

In the United States Supreme Court case of PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700, 114 S.Ct. 1900 (1994), the United States Supreme Court clearly and unequivocally determined that establishing minimum stream flow requirements for a hydroelectric project was a permissible condition of a Section 401 certification. In that case, Jefferson County and the City of Tacoma wanted to build a new hydroelectric project on the Dosewallips River in Washington. The Supreme Court noted a complex statutory and regulatory scheme governs the Nation's waters. The Clean Water Act is a comprehensive federal statute designed to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 43 U.S.C. §1251(a). The Clean Water Act establishes distinct roles for federal and state governments. States are required to establish comprehensive water quality standards for all intrastate waters.

33 U.S.C. §1311(b)(1)(C), 1313. The Court noted states are free to impose more stringent water quality controls than those set forth in the Clean Water Act.

In the case, the Washington State environmental agency conditioned the hydroelectric project permit on the maintenance of specific minimum stream flows to protect salmon and steelhead runs. After an extensive review of Washington state law, the United States Supreme Court upheld the state's requirement of a minimum stream flow. The Court noted Section 401(d) allows a state to impose "other limitations" on a project to ensure compliance with various provisions of the Clean Water Act and with "any other appropriate requirements of state law."

The United States Supreme Court rejected an argument that the Clean Water Act is only concerned with water "quality" and does not allow regulation of water "quantity." The Court noted that, in many cases, water quantity is closely related to water quality in that a sufficient lowering of the water quantity could destroy all designated uses. 511 U.S. at 719. The Court concluded diminishment of water quantity can constitute water pollution.

The Supreme Court further noted Section 101(g) which provides the authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by the Clean Water Act. 33 U.S.C. §1251(g). The Court concluded the Clean Water Act preserves the authority of each state to allocate water quantity between users. The Court concluded a

state may include minimum stream flow requirements in a certification issued pursuant to Section 401 of the Clean Water Act "in so far as necessary to enforce a designated use contained in a state water quality standard." 511 U.S. at 735.

This United States Supreme Court case turned upon state laws allowing the Washington Department of Ecology to address minimum stream flows. As DEQ has established and argued, Idaho law is much more restrictive. Idaho Code §39-104(5) states:

Nothing in this title shall be construed to allow the department to establish or require minimum stream flows which would prevent any water from being diverted for irrigation purposes pursuant to existing water rights, or to establish or require minimum water levels in any lakes, reservoirs or impoundments in which any water is stored for irrigation purposes which would adversely affect existing water rights or contracts with the federal government.

In a document dated June 8, 1999, entitled "Guidance for Development of Total Maximum Daily Loads," the Department of Environmental Quality established development guidance for TMDLs. Page 19 states:

Factors Other Than Pollutants

It is Idaho DEQ's position that habitat modification and flow alteration, while they may adversely affect beneficial uses, are not suitable for development of TMDLs per §303(d) of the Clean Water Act. There are no Idaho water quality criteria for habitat or flow, nor are they suitable for estimation of load capacity or load allocations. In addition, jurisdiction over stream flow is not the purview of DEQ. Because of these practical limitations, TMDLs will not be developed to

address habitat modification or flow alteration.

For many of the water quality limited waters on Idaho's §303(d) list this will have little effect. This is because concerns which resulted in a listing for habitat modification are often reflected in other listed pollutants--sediment or temperature, for example. In this case, actions taken to address sediment or temperature are likely to improve habitat as well. For flow alteration, other management alternatives, outside the TMDL process, will likely be needed.

Contrary to the laws of the State of Washington, Idaho law restricts the ability of DEQ to establish minimum stream flows on waters used for irrigation. In addition, DEQ has made a policy decision not to address flow alteration in TMDLs. While the Clean Water Act does not preclude DEQ from requiring minimum stream flows as part of a 401 certification, Idaho state law and policy restricts DEQ's ability to do so.

The Hearing Officer concludes that DEQ is not required to establish minimum stream flows if, in its discretion, it chooses not to do so.

RECOMMENDED ORDER

Based upon the foregoing, the Hearing Officer recommends that DEQ's Motion for Summary Judgment be GRANTED. The Petitioners' Motion for Summary Judgment should be DENIED.

DATED This 2nd day of July, 2003.



JEAN R. URANGA
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 2nd day of July, 2003, I served true and correct copies of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER ON MOTIONS FOR SUMMARY JUDGMENTS by depositing copies thereof in the United States mail, postage prepaid, in envelopes addressed to:

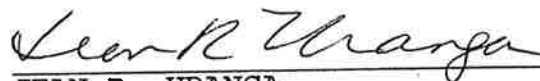
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