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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY,	)	CV42-22-1195
	)	CASE NO.:
	)	
Plaintiff,	)	<b>CONSENT JUDGMENT</b>
	)	
vs.	)	Filing Fee Exempt
	)	Idaho Code § 31-3212
	)	
IDAHO POWER COMPANY,	)	
	)	
Defendant.	)	
	)	
	)	
	)	
	)	

Plaintiff Idaho Department of Environmental Quality (the Department) and Defendant Idaho Power Company (Defendant) consent to entry of the following Consent Judgment.

**I. BACKGROUND AND FINDINGS**

For purposes of entry of this Consent Judgment, the Court finds as follows:

1. Defendant owns or operates the following hydroelectric dams (Dams) in the State of

Idaho, located on the Snake River or its tributaries, that are the subject of this Consent Judgment:

- A. American Falls hydroelectric dam located on the Snake River at river mile 714.7, 42.7778°N 112.8764°W, in Power County, Idaho;
- B. Bliss hydroelectric dam located on the Snake River at river mile 560.3, 42.9138°N 115.0710°W, in Gooding County, Idaho;
- C. Cascade hydroelectric dam located on the Payette River, 44.5256°N 116.0483°W, in Valley County, Idaho;
- D. C.J. Strike hydroelectric dam located on the Snake River, 42.9449°N 115.9778°W, at river mile 949.0 in Owyhee County, Idaho;
- E. Clear Lake hydroelectric dam located on Clear Lake Creek, 42.6670°N 114.7801°W, in Gooding County, Idaho;
- F. Lower Malad hydroelectric dam located on the Lower Malad River, 42.8643°N 114.8855°W, at river mile 571.2 in Gooding County, Idaho;
- G. Upper Malad hydroelectric dam located on the Upper Malad River at river mile 2.1 in Gooding County, Idaho;
- H. Milner hydroelectric dam located on the Snake River at river mile 639.1, 42.5267°N 114.0369°W, in Gooding County, Idaho;
- I. Lower Salmon Falls hydroelectric dam located on the Snake River at river mile 573.0, 42.8416°N 114.9036°W, in Gooding County, Idaho;
- J. Upper Salmon Falls A hydroelectric dam located on the Snake River at river mile 579.6 in Twin Falls County, Idaho;
- K. Upper Salmon Falls B hydroelectric dam located on the Snake River at river mile

580.8 in Twin Falls County, Idaho;

- L. Shoshone Falls hydroelectric dam located on the Snake River at river mile 614.7, 42.5975°N 114.4033°W, in Jerome County, Idaho;
- M. Swan Falls hydroelectric dam located on the Snake River at river mile 457.7, 42.5975°N 114.4033°W, Ada County, Idaho;
- N. Thousand Springs hydroelectric dam located on Thousand Springs Creek, 42.7405°N 114.8367°W, in Gooding County, Idaho; and
- O. Twin Falls power hydroelectric dam located on the Snake River at river mile 617, 42.5892°N 114.3553°W, in Twin Falls County, Idaho.

This Consent Judgment does not address the Defendant's dams in the Hells Canyon Complex, which include the Hells Canyon, Oxbow, and Brownlee hydroelectric dams.

2. On June 28, 1974, Defendant obtained National Pollutant Discharge Elimination System (NPDES) permits from the United States Environmental Protection Agency (EPA) for its hydroelectric dams including: the Bliss (Permit No. ID-002257-8), C.J. Strike (Permit No. ID-002256-0), Clear Lake (Permit No. ID-002264-1), Lower Malad (Permit No. ID-002258-6), Upper Malad (Permit No. ID-002259-4), Lower Salmon Falls (Permit No. ID-002260-8), Upper Salmon Falls A (Permit No. ID-002261-6) and B (Permit No. ID-002262-4), Shoshone Falls (Permit No. ID-002265-9), Swan Falls (Permit No. ID-002255-1), Thousand Springs (Permit No. ID-002263-2), and Twin Falls (Permit No. ID-002266-7), hydroelectric dams. Defendant subsequently obtained an additional NPDES permit for its American Falls hydroelectric dam (Permit No. ID-002392-2) on March 6, 1975, and its Cascade hydroelectric dam (Permit No. ID-002616-6) in 1984. In 1992,

Defendant added a hydroelectric power plant to the Milner dam, but never applied for or received an NPDES permit. These permits allowed Defendant to discharge certain pollutants from the hydroelectric dams.

3. Based on changes in judicial interpretation of NPDES permitting requirements<sup>1</sup>, and Defendant's consultation with EPA regarding ongoing permitting requirements, EPA cancelled the NPDES permits for the Bliss, C.J. Strike, Cascade, Clear Lake, Upper and Lower Malad, Lower Salmon Falls, Upper Salmon Falls A & B, Shoshone Falls, Thousand Springs, Swan Falls, and Twin Falls power plants on May 1, 1998. Based on the same factors, EPA subsequently cancelled the permit for the Cascade power plant on May 1, 1998, and the American Falls permit effective January 13, 2009.
4. In December 2021, Defendant voluntarily disclosed to the Department that the Dams have continued to operate without a NPDES or Idaho Pollutant Discharge Elimination System (IPDES) permit and the potential for unpermitted discharges from the Dams.
5. On April 7, 2022, the Department filed seven Complaints, including the Complaint filed in this Court, relating to operation of the Dams in this matter pursuant to the EPHA, Idaho Code § 39-101, *et seq.*, and the rules promulgated thereunder, seeking injunctive relief, civil penalties, and the Department's costs, expenses and attorney's fees. The Complaints alleged the following regarding each of the Dams:

- A. Despite mitigation efforts, including installation by Defendant of oil sensing technology and greaseless wicket gates in most of the Dams to mitigate the risk

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<sup>1</sup> See *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982); *National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580 (6th Cir. 1988) (upholding EPA's interpretation that adverse changes to water quality in water passing over and through reservoir and dam spillways do not constitute "pollutants" as defined by the CWA).

that oil and grease will be discharged into the Snake River or its tributaries, the operation of the Dams by Defendant results in periodic discharges of heated non-contact cooling water and occasional small discharges of oil and grease, and pH changes without an applicable permit in violation of IDAPA 58.01.25.102.05 and IDAPA 58.01.25.102.01. Heat, oil and grease, and pH changes are pollutants under IDAPA 58.01.25.010.28 and 58.01.25.010.68.

- B. The pollutants from the Dams are discharged through pipes, sumps, and other systems. Such conveyances are point sources under IDAPA 58.01.25.010.67.
  - C. The Dams discharge pollutants into the Snake River or its tributaries, including the Payette River, Clear Lake Creek, Thousand Springs Creek, and Malad River. The Snake River and its tributaries are ‘Waters of the United States’ under IDAPA 58.01.25.003.bb.
  - D. The discharge of pollutants occurs in the waters of every county in which the Dams are located, including Ada, Gooding, Jerome, Owyhee, Power, Twin Falls, and Valley Counties.
  - E. The Complaints do not allege violations arising from waters that flow over the spillway or pass through the turbines without any addition of pollutants. *See National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580 (6th Cir. 1988); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982).
6. To resolve these matters without further litigation or controversy, and without admission of any fact or law, the parties agree to the following terms and actions:

THEREFORE, it is ORDERED, ADJUDGED, and DECREED:

**II. JURISDICTION AND VENUE**

7. This Court has jurisdiction over the subject matter of this action pursuant to Idaho Code §§ 39-108 and 1-705.
8. This Court has personal jurisdiction over the Defendant pursuant to Idaho Code §§ 5-514(a) and (c) because, upon information and belief, the Defendant has committed acts and omissions within the State of Idaho out of which this cause of action arises, and which violate the laws of the State of Idaho. Additionally, Defendant owns real property within the State of Idaho, which is related to the subject matter involved in this action.
9. Venue is proper in this Court for this matter pursuant to Idaho Code §§ 39-108 and 5-404 because the violations and the causes of action alleged in the Complaint filed in this Court herein occurred and the action arose in the county in which this Consent Judgment has been issued. For purposes of its review and approval, this Court is addressing only those provisions in the Consent Judgment that are applicable to the dams identified in the Complaint filed in this Court.
10. The Complaints state claims upon which relief may be granted against Defendant.
11. For the purposes of this Consent Judgment and the underlying Complaint, Defendant has waived all objections and defenses that it may have to the filing of the Complaint and the jurisdiction of the Court or to venue in this District and will not challenge the filing of the Complaint, the entry of this Consent Judgment or this Court's jurisdiction and authority to enter and enforce this Consent Judgment.

**III. PARTIES BOUND**

12. This Consent Judgment will apply to and be binding upon Defendant. Unless otherwise agreed to by the Department, no change in ownership, corporate, or partnership status relating to the Dams or conveyance of title, easement, or other interest in the Dams, including but not limited to any lease or transfer of assets or real or personal property, will alter Defendant's obligation to comply with the Consent Judgment requirements or to ensure compliance by any successor or assign.
13. Defendant will notify any prospective purchaser of the terms and conditions of this Judgment and the current status of completion of the requirements of this Consent Judgment. Defendant will also provide notice to the Department of the offer for sale or transfer of the Facility, and the identity of the purchaser or party to which the property will be transferred prior to closing of any sale or transfer of the property or any portion thereof.

#### **IV. JUDGMENT**

14. Compliance Schedule: To resolve the allegations set forth in the Complaint filed in the above-entitled case, Defendant will perform the following:
- A. Defendant will submit an industrial IPDES permit application under IDAPA 58.01.25 for each of the Dams in accordance with the schedule found in Exhibit A. All applications will be submitted to the Department by the end of the year 2024.

B. For purposes of compliance with this Paragraph 14, if available and with the Department's approval, Defendant may submit a Notice of Intent (NOI) for an Idaho Hydroelectric Dam general permit under IDAPA 58.01.25.130, instead of an industrial IPDES individual permit application. A Notice of Intent must be submitted on or before the deadlines established in Exhibit A.

15. Interim Measures: Beginning 60 days after the Effective Date and during the period of jurisdiction covered by the Compliance Schedule and Consent Judgment, Defendant will comply with the following measures with respect to the discharge of oil and grease, and pH and heat changes:

A. pH will be maintained at not less than 6.5 and not more than 9.0 standard units as measured by "grab" sampling for all sump discharges at all Dams covered by this Consent Judgment, at a frequency of once per month and be reported to the Department quarterly. The pH monitoring device will have a range of 0-14 with an accuracy of  $\pm 0.2$

B. Discharges of oil and grease must comply with IDAPA 58.01.02.200.05 which states that surface waters shall be free from floating matter of any kind in concentrations causing nuisance or objectionable conditions or that may impair designated beneficial uses, including but not limited to an oil sheen. Compliance will be measured by daily visual observation downstream from the outfall(s). Consistent with the Defendant's Spill Prevention Control and Countermeasure Plan as required by 40 CFR 112, Defendant will immediately report any visible oil sheens to the Department.

- C. Defendant will monitor for temperature (Celsius) of cooling water outflows and sumps on a weekly basis using a “grab” sampling technique. Defendant will use a NIST-certified infrared thermometer. No later than six months after Defendant submits its plant permit application as outlined in Exhibit A, Defendant will install a Department-approved continuous sampling frequency temperature monitoring device in compliance with DEQ’s Protocol for Placement and Retrieval of Temperature Data Loggers. This document is available online at: <https://www2.deq.idaho.gov/admin/LEIA/api/document/download/15037>. Continuous monitoring must begin no later than six months after Defendant submits its plant permit application to the Department.
- D. Sampling will occur at a frequency consistent with the terms of Section 15 (A)-(C) and be reported to the Department quarterly and must be submitted electronically using the Department’s E-Permitting System, no later than the 20<sup>th</sup> of the month following the completed reporting period. Sampling and reporting requirements in this Consent Judgment do not relieve Defendant from its obligation to submit any and all data needed to submit a complete IPDES application as required by the Department.

16. Each Party hereto warrants that it is not relying on any warranties, representations, statements or promises of the other Party concerning any facts, matters or events which are the subject of this Consent Judgment and the releases herein, except as expressly set forth in this Consent Judgment.

17. In the event any provision or authority of this Consent Judgment or the application of this Judgment to any Party or circumstances is held by any judicial authority to be illegal, invalid, or unenforceable, the application of such provisions to other Parties or circumstances and the remainder of the Consent Judgment will remain in force and will not be affected thereby.
18. Nothing herein will be construed to bar, alter, or limit the ability of the Department to pursue (and the Department expressly reserves the right to pursue) any legal or equitable, judicial, or administrative relief available to it to remedy any violation of the terms of this Consent Judgment.
19. Except as provided in Section VII (Release and Covenant Not to Sue), this Consent Judgment does not relieve Defendant from its obligation to comply with any of the provisions of Idaho Code §§ 39-101 et. seq., the Idaho Environmental Protection and Health Act (EPHA), the Department's Rules, including the IPDES rules, IDAPA 58.01.25, or other applicable local, State or Federal law. The Department retains all authority and reserves all rights to take any actions authorized by law to protect human health and the environment.
20. Nothing in this Consent Judgment, including Defendant's actions undertaken pursuant to this Judgment, will be construed as an admission of fact or law except for the purpose of enforcing this Consent Judgment.

21. Force Majeure: Defendant will cause all work or required reporting to be performed within the time limits set forth herein, unless performance is delayed by events, which constitute a force majeure. For the purposes of this Consent Judgment, a force majeure is an event arising from circumstances beyond the reasonable control of Defendant which delays performance of any obligations required by this Judgment. Increases in costs will not be considered an event of force majeure. Defendant will notify the Department within three (3) calendar days after any event which Defendant contends is a force majeure through the Department's E-Permitting System. Such notification will describe the anticipated length of the delay, the cause or causes of the delay, the measures taken or to be taken by Defendant to minimize the delay, and the timetable by which these measures will be implemented. Defendant will have the burden of demonstrating that the event is a force majeure. The decision of whether an event is a force majeure will be made by the Department, subject to dispute resolution under this Consent Judgment. Said decision will be immediately communicated by Defendant in writing. If a delay is attributable to a force majeure, the time-period for performance under this Judgment will be extended, in writing, by the amount of time that is attributable to the event constituting the force majeure.

22. Dispute Resolution: The parties agree to attempt, in good faith, to resolve through informal dispute resolution methods any dispute arising under this Judgment. If such informal resolution is not successful within 30 days, either party may seek resolution of the dispute by the Court.

**V. PENALTIES**

23. The Defendant will pay a civil penalty of \$72,800 (seventy-two thousand eight hundred dollars) for past and continuing violations as listed in the Complaint for each Dam filed in the above-entitled case. Payment will be made to the Department within ninety (90) days from the Effective Date of each consent judgment entered for each hydroelectric dam named in the Complaint filed in the above-entitled case. Payment will be made to:

Fiscal Office  
Idaho Dept. of Environmental Quality  
1410 N. Hilton  
Boise, ID 83706

24. In partial settlement of the civil penalty, Defendant may undertake a supplemental environmental project (SEP) in conformance with Idaho Code § 39-108(5)(b) and DEQ Policy Statement PS20-13, “*Supplemental Environmental Projects.*” SEP proposals must be submitted to the Department for review and approval no later than ninety (90) days from the effective date of each consent judgment for each Dam named in the Complaint filed in the above-entitled case.

**VI. COST OF SUIT**

25. Each Party to this action will bear its own costs and attorney’s fees.

26. In the event this Court subsequently determines that Defendant has violated the terms of this Consent Judgment, Defendant will be liable to the Department for any costs, attorney’s fees, or other expenses incurred by the Department in any action or proceeding against Defendant for non-compliance with this Judgment.

## **VII. RELEASE AND COVENANT NOT TO SUE**

27. Compliance with Section IV of this Consent Judgment and payment of the Civil Penalty under Section V constitutes full and complete satisfaction of all civil liability for all actions, omissions, and violations alleged in the Complaint.
28. In consideration of Defendant's required performance of the obligations in Section IV of this Consent Judgment and payment of the Civil Penalty under Section V and compliance with the remaining terms of the Consent Judgment, the Department and the State of Idaho further release, discharge and covenant not to assert any and all claims for civil liability against Defendant or its successors and assigns based on the facts and alleged violations in the Complaint. This covenant not to sue is expressly conditioned on Defendant's satisfactory compliance with all terms of Sections IV and V of this Consent Judgment and shall continue for each Dam until either (1) the application or NOI submitted for that Dam pursuant to Paragraph 14 of the Consent Judgment is approved and a permit becomes applicable, or (2) the application or NOI submitted for that Dam pursuant to Paragraph 14 of the Consent Judgment is denied by the Department.

## **VIII. NOTICES AND SUBMISSIONS**

29. Unless otherwise provided herein, notifications to, or communications with the Department will be deemed submitted on the date they are sent by facsimile, electronic mail, or postmarked and sent by mail service.
30. Unless otherwise directed by the Department, all communication required to be sent to the Department will be addressed to:

Troy Smith  
IPDES Program  
Idaho Dept. of Environmental Quality  
1410 N. Hilton

Boise, ID. 83706-1255

31. Unless otherwise directed by Defendant, all communication required to be sent to Defendant will be addressed to:

Ryan Adelman  
Vice-President for Power Supply  
Idaho Power Company  
1221 West Idaho St.  
Boise, ID. 83702

**IX. RETENTION OF JURISDICTION**

32. The Court will retain jurisdiction to enforce the terms of this Consent Judgment and to resolve any disputes arising hereunder until the Judgment has been satisfied and the Consent Judgment is terminated in accordance with the provisions of this Judgment.

**X. MODIFICATION**

33. Except as specifically provided for herein, there will be no modifications or amendments of this Consent Judgment without written agreement of the Parties to this Consent Judgment and approval by this Court.

**XI. PUBLIC COMMENT**

34. This Consent Judgment shall be lodged with the Court for a period of not less than 30 Days for the Department's public notice and comment process in accordance with Idaho Code § 39-108(b)(9) and IDAPA 58.01.25.500.04(c). After consideration of public comments, the Department reserves the right to withdraw or withhold its consent if the comments regarding the Consent Judgment disclose facts or considerations indicating that the Consent Judgment is inappropriate, improper, or inadequate.

**XII. EFFECTIVE DATE**

35. This Consent Judgment will take effect on the date it is entered by the Court.

**XIII. TERMINATION AND DISMISSAL**

36. The parties, through their counsel, agree that upon completion of Consent Judgment that they will file a stipulated motion requesting that the Court terminate the Consent Judgment and dismiss the Complaint with prejudice, consistent with the terms set forth in the stipulation.

**XIV. SIGNATORIES AND SERVICE**

37. Each undersigned representative of the Parties certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Judgment and to execute and legally bind such Party to this Consent Judgment.

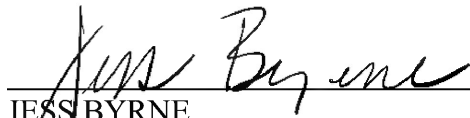
38. The Parties consent to the entry of this Consent Judgment without further notice. The Parties further agree not to oppose entry of this Consent Judgment by this Court or to challenge any provision of this Judgment.

39. Defendant need not file an answer or other responsive pleading to the Complaint in this action unless or until the Court expressly declines to enter this Consent Judgment, in which case Defendant's responsive pleading to the Complaint would be due in the timeframe set forth in the Idaho Rules of Civil Procedure or in a Court order.

THE UNDERSIGNED PARTIES enter into this Consent Judgment in

Case Number CV42-22-1195.

FOR THE STATE OF IDAHO:

  
\_\_\_\_\_  
JESS BYRNE  
Director, Idaho Department of Environmental Quality  
Date: 4/7/2022

Reviewed and approved as to form:



BRENT KING

Deputy Attorney General, Idaho Attorney General's Office

Date: 04/07/2022

FOR DEFENDANT IDAHO POWER



RYAN ADELMAN

Vice President, Power Supply

Date: 04/07/2022

Reviewed and approved as to form:



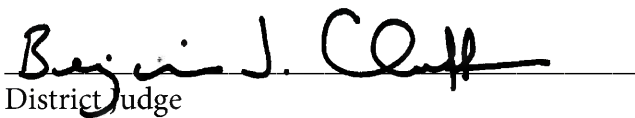
SCOTT PUGRUD

Counsel for Defendant

Date: 04/07/2022

SO ORDERED:

Date: 4/13/2022 8:47:27 AM



District Judge

## **EXHIBIT A TO CONSENT JUDGMENT**

1. Plaintiff Idaho Department of Environmental Quality (the Department) and Defendant Idaho Power Company (Defendant) agree to the Compliance Schedule in this Exhibit, as established in Paragraph 14 of the Consent Judgment.
2. Defendant will submit an industrial IPDES permit application pursuant to IDAPA 58.01.25.105 for each of the Dams listed in Paragraph 1 of the Consent Judgment or otherwise submit a Notice of Intent for an Idaho Hydroelectric Dam general permit pursuant to IDAPA 58.01.25.130, according to the following Compliance Schedule:
  - A. Applications for Tier 1 Dams, will be submitted in 2022 by the following dates:
    - i. On or before May 24, 2022 for American Falls hydroelectric dam;
    - ii. On or before July 15, 2022 for Bliss hydroelectric dam;
    - iii. On or before September 7, 2022 for Cascade hydroelectric dam;
    - iv. On or before October 31, 2022 for C.J. Strike hydroelectric dam;
    - v. On or before December 31, 2022 for Swan Falls hydroelectric dam.
  - B. Applications for Tier 2 Dams which are Dams that, as of the Effective Date of this Consent Judgment, will be submitted in 2023 by the following dates:
    - i. On or before February 14, 2023 for Lower Salmon Falls hydroelectric dam;
    - ii. On or before April 7, 2023 for Upper Salmon Falls A hydroelectric dam;
    - iii. On or before May 31, 2023 for Upper Salmon Falls B hydroelectric dam;
    - iv. On or before July 24, 2023 for Upper Malad hydroelectric dam;
    - v. On or before September 14, 2023 for Lower Malad hydroelectric dam;
    - vi. On or before November 7, 2023 for Milner hydroelectric dam;
    - vii. On or before December 29, 2023 for Twin Falls power hydroelectric dam;

- C. Applications for Tier 3 Dams which are Dams that, as of the Effective Date of this Consent Judgment, will be submitted in 2024 by the following dates:
- i. On or before February 21, 2024 for Shoshone Falls hydroelectric dam;
  - ii. On or before April 15, 2024 for Thousand Springs hydroelectric dam;
  - iii. On or before June 6, 2024 for Clear Lake hydroelectric dam.
3. Defendant shall diligently respond to any requests from the Department related to the IPDES permit applications, and Defendant shall otherwise take all necessary and reasonable steps, in good faith, to facilitate the prompt issuance of IPDES permits for the Dams.
4. The Department will take reasonable steps, in good faith, to facilitate the prompt review of applications submitted by Defendant.
5. By joint agreement, the Parties may make limited adjustments of less than 60 days to the above compliance dates without seeking Court approval pursuant to Section X (Modification) of the Consent Judgment.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this date of 4/13/2022 10:32:04 AM, a true and correct copy of the foregoing ORDER FOR ENTRY OF CONSENT JUDGMENT was served on the following as indicated below:

Brent R. King  
Idaho Attorney General's Office  
1410 N. Hilton Ave  
Boise, ID 83706  
(208) 373-0105  
brent.king@deq.idaho.gov

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Electronic Mail:
- Facsimile:

  
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