

**BEFORE THE BOARD OF ENVIRONMENTAL QUALITY**

**STATE OF IDAHO**

IN THE MATTER OF SECTION 401 )  
WATER QUALITY CERTIFICATION FOR )  
RELICENSING OF THE C.J. STRIKE )  
HYDROELECTRIC FACILITY. )  
\_\_\_\_\_ )

**Docket No. 0102-01-06**

**ORDER**

**I. PROCEDURAL BACKGROUND**

This contested case was initiated by a petition filed by Idaho Rivers United (“IRU” or “Petitioner”) and American Rivers (“AR”), challenging the water quality certification for Idaho Power Company’s (“IPC”) C.J. Strike Hydroelectric facility (“401 certification”) issued by the Idaho Department of Environmental Quality (“IDEQ”) on September 13, 2001, pursuant to Section 401 of the Clean Water Act (“CWA”), 33 U.S.C. § 1341. IPC intervened in the proceedings and challenged IRU and AR’s legal standing to initiate this case. In an order dated November 4, 2002, the Board of Environmental Quality (“Board”) accepted that portion of the Hearing Officer’s recommended order finding that IRU and AR did not have first-party organizational standing and finding that AR did not have representational standing. However, the Board determined that 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. The matter came before the Hearing Officer on cross-motions for summary judgment filed by IRU and IDEQ. On July 2, 2003, the Hearing Officer issued an order recommending that

IDEQ's motion for summary judgment be granted and IRU's motion for summary judgment be denied. *Findings of Fact, Conclusions of Law and Recommended Order on Motions for Summary Judgment*, July 8, 2003 ("Recommended Order"). IRU filed exceptions to the *Recommended Order*.

Having fully considered the record and the oral and written arguments of the parties, the Board unanimously voted on October 23, 2003, to adopt the Hearing Officer's *Recommended Order*.

## **II. STATUTORY REQUIREMENTS**

### **A. Section 401 Certifications**

Section 401 of the CWA requires an applicant for a federal license or permit to conduct any activity that may result in any discharge into navigable waters, to obtain from the state a certification that the discharge will comply with the provisions of the CWA and state Water Quality Standards ("WQS"). 33 U.S.C. § 1341(a)(1). Section 401(d) further provides that the state may include any conditions or limitations necessary to ensure the applicant complies with state WQS and other appropriate requirements of state law. The terms included in the certification become a condition of any federal license. 33 U.S.C. § 1341(d).

### **B. Water Quality Standards**

Section 303(c) of the CWA requires each state to establish WQS that include designated uses for waters of the state, 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 Dep't of Ecology, 511 U.S. 700 (1994). The Idaho WQS designate the Snake River in the vicinity of the C.J. Strike project for protection of aquatic life and recreation uses. IDAPA 58.01.02.140.01, -02, and -03. The Idaho WQS also include both numeric and narrative criteria that set limits for

pollutants necessary to protect aquatic life and recreational uses of the river. IDAPA 58.01.02.200 and -250. There are no narrative or numeric WQS that mandate a certain level of water quantity or flow.

### **C. Total Maximum Daily Loads**

Section 303 of the CWA requires states to identify waters that do not meet WQS. Such waters are placed on a list that must be approved by the United States Environmental Protection Agency (“EPA”), generally referred to as the 303(d) list. For those waters on the 303(d) list, states must develop Total Maximum Daily Loads (“TMDLs”). TMDLs are plans that determine the amount of pollutants a water body can receive and still meet WQS. TMDLs allocate a load of such pollutants to all sources. 33 U.S.C. § 1313(d); 40 C.F.R. § 130.7.

Idaho Code § 39-3601 *et seq.*, sets forth state law with respect to TMDLs. Idaho Code § 39-3611 provides that the TMDL process must include, among other things, the identification of pollutants and an inventory of sources in the watershed. Idaho Code § 39-3611 also requires, as part of the TMDL process, the identification of pollution control strategies to reduce sources of pollutants.

Once completed, TMDLs are integrated into the state’s water quality management plan. Idaho Code § 39-3612. To implement the TMDL and meet the requirements in Idaho Code § 39-3611, IDEQ prepares a separate document called an Implementation Plan that identifies the pollutant control actions that need to be taken to meet WQS and the parties responsible for taking such actions. *See* Guidance for Development of Total Maximum Daily Loads (June 8,1999). As a result of a lawsuit under the CWA, a schedule for the development of TMDLs in Idaho was established. Idaho Sportsman Coalition v. Browner, CV-93-943 (W.D. Wash.). This schedule requires that TMDLs for all 303(d) listed waters be developed within an eight-year time frame.

The Snake River and the Bruneau River in the vicinity of the C.J. Strike project do not comply with WQS and are on Idaho's 303(d) list. The stretch of river immediately downstream of the project is referred to as the Snake River-Succor Creek stretch of the river. The next stretch downstream to the confluence with the Salmon River, including Hells Canyon, is referred to as the Snake River-Hells Canyon stretch. Both of these segments of the Snake River are also on Idaho's 303(d) list.

TMDLs for the immediately upstream segments have been completed. These are referred to as the Mid-Snake TMDLs. A TMDL for the C.J. Strike segment is due by the end of 2004. A TMDL for the Snake River-Succor Creek stretch has been completed and submitted to the EPA, and a TMDL for the Snake River-Hells Canyon stretch will soon be finalized. These TMDLs will determine the amount of pollutants the river can receive and still meet WQS, identify the sources of pollutants and relative contribution of the various sources, and allocate the pollutants to the sources in order to meet WQS. The process includes a review of the C.J. Strike project and its contribution to water quality in the Snake River.

### **III. THE C.J. STRIKE 401 CERTIFICATION**

On September 14, 2000, IPC submitted a request for water quality certification as part of its application to the Federal Regulatory Energy Commission ("FERC") for relicensing of the C.J. Strike facility. IDEQ has one year from the date of request for certification to determine whether to issue the certification. *See* 33 U.S.C. § 1341(a)(1). In July 2001, IDEQ issued a draft 401 certification for the project and requested public comment. IRU and AR submitted comments on the draft certification by letter to IDEQ dated August 14, 2001. IDEQ subsequently issued a final 401 certification to IPC for the project on September 13, 2001.

IDEQ issued the 401 certification with the following conditions:

## 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.

All parties are in agreement as to the standard under which the lawfulness of a 401 certification is evaluated. Section 401 does not require states to certify with absolute certainty that an activity will comply with state WQS. Instead, states need only provide a "reasonable assurance" that the activity meets applicable state WQS. 40 C.F.R. § 121.2(3); Bangor Hydro-Electric Co. v. Bd. of Env'tl. Prot., 595 A.2d 438, 443 (Maine 1991); Miner's Advocacy Council, Inc. v. Alaska Dep't of Econ. Conservation, 778 P.2d 1126, 1138 (Alaska 1989).

IRU contends that the 401 certification does not provide reasonable assurance that the C.J. Strike project will comply with state WQS because: (1) the relevant TMDLs will not be completed immediately and will not achieve compliance with WQS for many years in the future; (2) the TMDLs do not address flow regimes for aquatic resources; and (3) the certification does not require immediate actions on the part of IPC to address known violations of WQS. We address each argument in turn.

IRU argues that the 401 certification is unlawful because it relies upon TMDLs that will be developed and implemented in the future. The Hearing Officer concluded that federal and state law support IDEQ's decision to complete development of the relevant TMDLs and require compliance with those TMDLs by IPC through the 401 certification. We agree.

Federal and state law require the state of Idaho, through IDEQ, to establish water quality standards, designate waters that do not meet water quality standards and develop TMDLs for those water bodies. The TMDL process addresses the water quality of the receiving water body and the cumulative impacts of multiple sources of pollution. Here, the relevant TMDLs will allocate to the C.J. Strike facility responsibility for its contribution to pollutants. The 401 certification authorizes IDEQ to require IPC to implement all measures necessary to achieve allocations assigned to the C.J. Strike facility.

While we share Petitioner's concerns about the length of time it may take to achieve WQS in the Snake River, we find nothing in the CWA or state law to suggest that 401 certifications must require immediate compliance with WQS. To the contrary, federal law requires FERC to include in hydropower licenses conditional certifications like the one at issue here. *See American Rivers, Inc. v. FERC*, 129 F.3d 99 (2d Cir. 1997). The TMDLs for the relevant stretches of the Snake River are critical in determining the sources of pollutants and how to allocate pollutant loads among various sources, including the C.J. Strike project. Thus, the agency's decision to tie the 401 certification to the completion of the relevant TMDLs represents a rational approach to ensuring that facility operations meet WQS.

Petitioner next argues that the 401 certification is unlawful because TMDLs do not treat water flow as a pollutant. In advancing this argument, Petitioner cites to a United States Supreme Court case, *PUD No. 1 of Jefferson County v. Washington Dep't. of Ecology*, 511 U.S.

700 (1994). There, the Court held that establishing minimum stream flow requirements to protect salmon and steelhead runs for a hydroelectric project is a permissible condition of a 401 certification. However, that case turned, in part, on state law allowing the Washington water quality agency to impose minimum flows for the benefit of salmon and steelhead. Thus, as the Hearing Officer concluded, while states are free to impose more stringent water quality controls than those set forth in the CWA, they are not required to do so. *See* 33 U.S.C. § 1251(g); Idaho Code § 39-104(5); and Guidance for Development of Total Maximum Daily Loads (June 8, 1999).

An additional argument raised before the Board posits that the 401 certification is invalid because the draft Snake River-Succor Creek TMDL allegedly does not and will not address WQS violations identified by IPC in its FERC application. In support of this argument, IRU has submitted to the Board excerpts from the draft Snake River-Succor Creek TMDL, a document not in the record when the Hearing Officer made her decision.

In response, IDEQ submitted to the Board excerpts from the final Snake River-Succor Creek TMDL that has been submitted to EPA for approval. That TMDL documents that the water quality concerns specific to the C.J. Strike facility will be addressed through the 303(d) listing process and through existing and subsequent TMDLs. The TMDL documents that violations of the total dissolved gas (“TDG”) standard occur below C.J. Strike dam and that TDG will be listed as a pollutant on the next 303(d) list. This will require the development of a TMDL for TDG. In addition, the document states that dissolved oxygen (“DO”) will continue to be monitored and addressed through the TMDL for nutrients. Other concerns specific to water quality in the reservoir will be developed in the C.J. Strike TMDL.

In summary, the Hearing Officer found that the CWA and state law contemplate an integrated, comprehensive process, through the development of TMDLs, to address waters that do not meet WQS and are therefore on the state's 303(d) list. We agree. The water quality issues in the Snake River are complex. The TMDLs will address violations of WQS and are essential in determining the sources of pollutants, the loading capacity of the Snake and Bruneau rivers in the vicinity of the project, and how to allocate pollutant loads among various sources relevant to the C.J. Strike project. Because the waters in question do not currently meet WQS, IDEQ must look to future measures to achieve compliance with those standards. The certification at issue here requires that IPC implement any of those measures IDEQ determines are necessary to meet the allocation of pollutants assigned to the project. We therefore conclude that tying the terms and conditions of the 401 certification for the C.J. Strike facility to load allocations in the relevant TMDLs provides a rational process for certifying that there is reasonable assurance the operation of the facility will comply with state WQS.

#### **IV. CONCLUSION**

In consideration of the foregoing, we adopt the Hearing Officer's *Recommended Order* in full. Accordingly, IDEQ's motion for summary judgment is GRANTED and Petitioner's motion for summary judgment is DENIED.

This is a final order of the Board. Pursuant to Idaho Code §§ 67-5270, -5272, any party aggrieved by this final order or orders previously issued in this case may appeal this final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which (i) a hearing was held; (ii) the final agency action was taken; (iii) the party seeking review of the order resides, or operates its principal place of business in Idaho; or (iv) the real property or personal property that was the subject of the agency action is located.

An appeal must be filed within twenty-eight (28) days of the service date of this final order. *See* Idaho Code § 67-5273. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

DATED THIS \_\_\_\_\_ day of December 2003.

BOARD OF ENVIRONMENTAL QUALITY

---

Paul C. Agidius

---

Donald J. Chisholm

---

Dr. Joan Cloonan

---

Craig D. Harlen

---

Dr. J. Randy MacMillan

---

Nick Purdy

CERTIFICATE OF SERVICE

I hereby certify that on this \_\_\_\_ day of December 2003, a true and correct copy of the foregoing **ORDER** was served on the following by U.S. Mail, postage prepaid and addressed as follows:

WILLIAM M. EDDIE  
LAIRD J. LUCAS  
P.O. BOX 1612  
BOISE, ID 83701

JAMES C. TUCKER  
IDAHO POWER COMPANY  
P.O. BOX 70  
BOISE, ID 83701

TRAVIS L. THOMPSON  
BARKER ROSHOLT & SIMPSON LLP  
P.O. BOX 2139  
BOISE, ID 83701-2139

DOUG CONDE  
DEPUTY ATTORNEY GENERAL  
DEPARTMENT OF ENVIRONMENTAL QUALITY  
STATEHOUSE MAIL

---

Paula Gradwohl  
Hearing Coordinator