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PRESIDING OFFICER

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APR 26 2013

DEQ Hearings Coordinator
DOCKET NO. _____

BEFORE THE BOARD OF ENVIRONMENTAL QUALITY

IDAHO CONSERVATION LEAGUE,)
)
 Petitioner,)
)
 vs.)
)
 IDAHO DEPARTMENT OF)
 ENVIRONMENTAL QUALITY,)
)
 Respondent.)
 _____)

Docket No. 0102-12-03

PRELIMINARY ORDER

COMES NOW the Presiding Officer, Michael J. Kane, and hereby orders as follows:

Although both parties have filed motions pertaining to partial summary judgment, both parties agree that the motions are more akin to a request for legal interpretation of statutory language, as opposed to judgment based upon fact finding, and have stipulated that the Interlocutory Order issued upon their cross-motions for summary judgment be withdrawn and the Interlocutory Order granting DEQ's motion for partial summary judgment be converted into a Preliminary Order of declaratory ruling.

The parties have stipulated to the dismissal of all other claims, thereby making this order ripe for review by the Board of Environmental Quality. Therefore, the undersigned hereby orders that the Interlocutory Order of February 15, 2013, is withdrawn, that this Order is preliminary in nature, and that all further claims raised by the Idaho Conservation League (“ICL”) are hereby dismissed with prejudice.

The Clean Water Act (33 U.S.C. § 1251, *et seq.*) and Idaho’s chapter on water quality (Idaho Code § 39-3601, *et seq.*) begin with a statement of legislative intent that sets forth the underlying goals of each legislative enactment. The very first sentence of the Clean Water Act reads, “[t]he objective of this chapter is to restore and *maintain* the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a) (emphasis added). Idaho Code § 39-3601 contains similar language:

In order to *maintain* and achieve existing and designated beneficial uses and to conform to the expressed intent of congress to control pollution of navigable waters of the United States, the legislature declares that it is the purpose of this chapter to enhance and preserve the quality and value of the navigable waters of the United States within the state of Idaho

Idaho Code § 39-3601 (emphasis added).

Against this backdrop, the ICL challenges the Idaho Department of Environmental Quality (“DEQ”) as to DEQ’s “blanket” certification of numerous nationwide permits (“NWP”) issued by the Army Corps of Engineers (“ACOE”). At issue is whether DEQ violated Idaho Code § 39-3603 dealing with antidegradation policy and implementation. Specifically, ICL charges that DEQ is in violation of subsection (1)(b) of the statute which reads in its entirety:

High quality waters--Tier II protection. Where the quality of waters exceeds levels necessary to support propagation of fish, shellfish and wildlife and recreation in and on the water, that quality shall be maintained unless the department finds, after full satisfaction of the intergovernmental coordination and public participation provisions of this chapter, and the department's planning processes, along with appropriate planning processes of other agencies, that

lowering water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such reductions in water quality, the department shall assure water quality adequate to protect existing uses fully.

Idaho Code § 39-3603(1)(b).

To more fully explain the positions of the parties, it is clear that DEQ certified compliance of some (but not all) NWP's on the assumption that in executing the NWP's:

[S]hort term impacts may occur with respect to sediment, but are not expected to cause long term adverse changes to water quality. As general principle, DEQ believes degradation of water quality should be viewed in terms of permanent or long-term adverse changes. Therefore, short-term and temporary reduction of water quality, if reasonable measures are taken to minimize them, may occur without violating Tier 2 protections.

DEQ's *Memorandum in Support of Motion for Partial Summary Judgment*, p.11.

As described by DEQ, a temporary "impact" or "change" with respect to fill material being placed in navigable water is not degradation at all. Hence, DEQ determined that it need not engage in the steps required by the statute to determine that lowering water quality is necessary. This is so, the argument goes, because there would be no lowering of water quality.

Therefore, DEQ asserts that it complied with Idaho Code § 39-3603(2)(a), which states in pertinent part:

The department will conduct an antidegradation review, including any required Tier II analysis, at the time at which general permits are certified. For general permits that the department determines adequately address antidegradation, review of individual applications for coverage will not be required unless it is required by the general permit.

Idaho Code § 39-3603(2)(a).¹

¹ The parties point to the fifty-one (51) NWP's found in the federal register as those NWP's that have been certified (with some exceptions) by DEQ. These NWP's range from seemingly benign (such as aids to navigation), to irrelevant (cranberry production), to those fraught with issues (agricultural activities, recreational facilities).

Counter to DEQ's position, ICL asserts that Idaho Code § 39-3603 is silent as to "temporary impacts" and that such impacts could, in fact, be degradation, which would require DEQ to comply with the mandatory requirements of Idaho Code § 39-3603(1)(b).

DEQ finds support for its theory of temporary change as being allowable in documents pertaining to other aspects of the Clean Water Act, and particularly suggests that the concept is more fully fleshed out as regarding outstanding resource waters (Tier III). ICL takes the nuanced approach that while there can, at least in theory, be allowable temporary degradation in the context of Tier III waters, such temporary degradation is of a nature as to ultimately restore or enhance the waters. Hence, a temporary degradation resulting from the fixing of a leaking septic system might be acceptable, whereas the building of a new structure would not allow for temporary degradation. ICL points to specific examples found within various documents to support its position. DEQ cites other examples and language that imply that restoration or enhancement of water is not always the factor relied upon when viewing allowable temporary degradation.

The Clean Water Act leaves to the individual states the setting of antidegradation policy and implementation, as long as the implementation and policy is in keeping with the Environmental Protection Agency's ("EPA") rules on antidegradation policy. Because the EPA's antidegradation rules and policies are not rigid, the various states' approach to implementation vary. Hence, Idaho's clean water policy, as set forth in the statutes, and DEQ's interpretations must be viewed under state law, although interpretative guidance may be found in federal materials or cases. The overarching issue, then, is whether DEQ's "temporary change" policy is in keeping with the legislative mandate that water "quality shall be maintained."

In engaging in statutory construction, the Idaho Supreme Court has set forth a general guidance as to the process. One of the better discussions by the court is found in *Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 307, 109 P.3d 161 (2005).

The objective of statutory construction is to derive the intent of the legislature. *Kelso v. State Ins. Fund*, 134 Idaho 130, 134, 997 P.2d 591, 595 (2000). Statutory construction begins with the literal language of the statute. *D & M Country Estates Homeowners Ass'n v. Romriell*, 138 Idaho 160, 165, 59 P.3d 965, 970 (2002). Where a statute is unambiguous, statutory construction is unnecessary and courts are free to apply the plain meaning. *Martin v. State Farm Mut. Auto. Ins. Co.*, 138 Idaho 244, 246, 61 P.3d 601, 603 (2002). Ambiguity occurs where reasonable minds might differ as to interpretations. *State v. Browning*, 123 Idaho 748, 749, 852 P.2d 500, 501 (Ct.App.1993). However, ambiguity is not established merely because the parties present differing interpretations to the court. *Rim View Trout Co. v. Higginson*, 121 Idaho 819, 823, 828 P.2d 848, 852 (1992). In the case of ambiguous language, courts will analyze the reasonableness of proposed interpretations and consider the “context in which language is used, the evils to be remedied and the objects in view.” *Ada County v. Gibson*, 126 Idaho 854, 857, 893 P.2d 801, 804 (Ct.App.1995)(citing *Local 1494 of Intl. Ass'n of Firefighters v. City of Coeur d'Alene*, 99 Idaho 630, 639, 586 P.2d 1346, 1355 (1978)). Generally, interpretations that could lead to absurd or unreasonably harsh results are disfavored. *Id.* at 856, 893 P.2d at 803 (citations omitted).

Hayden Lake Fire Protection Dist. v. Alcorn, 141 Idaho at 312, 109 P.3d at 166.

DEQ asserts that the phrase “quality shall be maintained” is ambiguous given the context of Idaho Code § 39-3603. ICL seemingly argues that the phrase is not ambiguous but does recognize that it cannot be interpreted as being so rigid as to prevent any type of temporary change in water quality, even those designed to ultimately enhance water quality.

The undersigned finds the phrase to be ambiguous in the context of the statute. First, the meaning of the word “maintain” is obscure in and of itself. It can mean “to continue” or “to care for.” In the context of a large water body extending over many square miles, it is hard to envision how such water shall be “maintained” in the sense of keeping it the same at all times. By definition, changes will occur in the water from time to time based upon any number of factors or conditions. To say that “quality shall be maintained” does not speak to what may or

may not be done on the water body, in the water body or near the water body. It does not speak to the duration or the effect of any activity, nor does it speak to whether an activity on one small part of the water body should be considered in the context of the entire water body. In effect, the phrase is setting forth an ideal, with no information as to how quality is to be maintained, either in the long term or on a day to day basis.

If the phrase is deemed to be ambiguous, then it is open to the various methods of statutory construction. First, the intent of the legislature must be considered. If anything is certain, the Idaho legislature did not intend for the statutes pertaining to water quality to be more restrictive than the Clean Water Act. Idaho Code § 39-3601 states in pertinent part:

It is the intent of the legislature that the state of Idaho fully meet the goals and requirements of the federal clean water act and that the rules promulgated under this chapter not impose requirements beyond those of the federal clean water act.

Idaho Code § 39-3601.

Statutes are construed under the assumption that the legislature was aware of all other statutes and legal precedents at the time the statute was passed. *McCann v. McCann*, 138 Idaho 228, 61 P.3d 585 (2002). Given that, it must be assumed that the legislature was made aware of the process of certification of NWP's, and it seems logical that the legislature did not intend to erect a barrier to the use of NWP's by requiring DEQ to engage in a time consuming, expensive and extremely labor intensive process as to each NWP as it pertains to each and every body of water in the state. In choosing between alternative constructions of a statute, it should be presumed that the statute was not enacted to work a hardship or effect an oppressive result. *Higginson v. Westergard*, 100 Idaho 687, 607 P.2d 51 (1979). Given that the basic concept of an NWP is to streamline the process and approve certain activities on or near the waters on a

nationwide basis, the undersigned is persuaded that the Idaho legislature did not intend to bring the process to a standstill.

This is not to say that in a given case that the DEQ's interpretation of what is "temporary" might not be erroneous. Obviously, DEQ's notion of temporary cannot be allowed to swallow the rule against degradation. Nevertheless, the undersigned cannot state as a matter of law that interpretation urged by ICL – that temporary degradation is only allowable where the ultimate goal is to enhance water quality and for no other reason – is correct under Idaho Code §§ 39-3601 and 39-3603. Finally, the undersigned will note that other states have apparently adopted the concept of temporary change in water conditions being allowable without running afoul of the Clean Water Act.

Because Idaho statutes are silent, the parties were forced to hunt like forensic archeologists amid rules of dubious relevance, unadopted drafts, letters, pronouncements pertaining to water bodies two thousand miles from Idaho, and elsewhere. Given what little information could be obtained, both parties presented excellent briefs and argument.

The DEQ's interpretation regarding temporary changes or effects in water – standing alone – does not violate the Idaho statutes in question.

PROCEDURAL RIGHTS

This is a Preliminary Order of the presiding officer. It can and will become final without further action of the Board unless any party appeals to the Board by filing with the hearing coordinator a petition for review of the Preliminary Order.

Within fourteen (14) days of the service date of this Preliminary Order, any party may take exceptions to any part of this Preliminary Order by filing with the hearing coordinator a petition for review of the Preliminary Order. Otherwise, this Preliminary Order will become a

final order of the Board. The basis for review must be stated in the petition. The Board may review the Preliminary Order on its own motion.

If any party files a petition for review of the Preliminary Order, the Board shall allow all parties an opportunity to file briefs in support of or taking exceptions to the Preliminary Order and may schedule oral argument in the matter before issuing a final order. The hearing coordinator shall issue a notice setting out the briefing schedule and date and time for oral argument. The Board will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived or extended by the parties or for good cause shown. The Board may hold additional hearings or may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

Pursuant to Sections 67-5270 and 67-5272, Idaho Code, if this Preliminary Order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition for judicial review 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.

The petition for judicial review must be filed within twenty-eight (28) days of this Preliminary Order becoming final. See Section 67-5273, Idaho Code. The filing of a petition for

judicial review in district court does not itself stay the effectiveness or enforcement of the order under review.

Motions for reconsideration of this Preliminary Order shall not be considered.

DATED this 26 day of April, 2013.

MICHAEL KANE & ASSOCIATES, PLLC

BY: Michael Kane
MICHAEL J. KANE
Presiding Officer

BEFORE THE BOARD OF ENVIRONMENTAL QUALITY
STATE OF IDAHO

IN THE MATTER OF FINAL § 401 WATER
QUALITY CERTIFICATION OF THE U.S. ARMY
CORPS OF ENGINEERS § 404 NATIONWIDE
PERMITS

)
)
) Docket No. 0102-12-03
)

IDAHO CONSERVATION LEAGUE,
Petitioner,
v.

) CERTIFICATE OF SERVICE
)
)
)

IDAHO DEPARTMENT OF ENVIRONMENTAL
QUALITY,
Respondent.

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)

I hereby certify that on this 29th day of April, 2013, a true and correct copy of the **Preliminary Order** was served on the following:

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