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AUG 10 2012

DEQ Hearings Coordinator
DOCKET NO. 0102-12-03

Attorney for Petitioner Idaho Conservation League

**BEFORE THE BOARD OF ENVIRONMENTAL QUALITY
STATE OF IDAHO**

IDAHO CONSERVATION LEAGUE,)
)
Petitioner,) Docket No.
)
V.) PETITION TO INITIATE A
) CONTESTED CASE RE: IDAHO
) DEPARTMENT OF
IDAHO DEPARTMENT OF) ENVIRONMENTAL QUALITY'S
ENVIRONMENTAL QUALITY,) FINAL §401 WATER QUALITY
) CERTIFICATION OF 2012 U.S.
) ARMY CORPS OF ENGINEERS §404
) NATIONWIDE PERMITS
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Pursuant to DEQ Board Rules of Administrative Procedure, IDAPA 58.01.02.23, IDAHO CONSERVATION LEAGUE (hereinafter "ICL") hereby petitions to initiate a contested case with regards to the Idaho Department of Environmental Quality's Final §401 Water Quality Certification of the Army Corps of Engineers §404 Nationwide Permits (NWPs).

The Petitioner's address is:

Idaho Conservation League
Attn: Jonathan Oppenheimer
P.O. Box 844
Boise, ID 83701

This Petition is timely under Rule 100, which allows petitions to initiate contested cases to be filed within thirty-five (35) days of the action of the Department. DEQ issued their final §401 Certification of the Army Corps of Engineers (ACOE) §404 NWP on July 5, 2012.

ICL has a direct and substantial interest in this proceeding, and thus the petition should be heard. As explained below and in the attached Affidavit of Justin Hayes, ICL, its staff and members, will suffer distinct, individualized and palpable injuries if DEQ's §401 Certification is upheld. ICL is an Idaho non-profit membership conservation organization. ICL and its approximately 20,000 supporters are dedicated to protecting and conserving Idaho's clean water, wilderness and quality of life. In addition to their generalized interests in protecting and conserving Idaho's natural resources, ICL, its members and staff have longstanding specific and individual interests in protecting water quality in waters of the State of Idaho, including those which have been and will continue to be impacted by the issuance of NWPs. In July 2012, according to reports issued by the ACOE, some of the waterways impacted by the issuance of NWPs include the Little Wood River, Lake Pend Oreille, Spokane River, Snake River, South Fork Snake River, Big Lost River, East Fork Weiser River, North Fork Coeur d'Alene River, Emerald Creek, West Fork Eagle Creek and others. Among other activities, ICL, its staff and members reside along, recreate within and rely upon waters that will be impacted by the issuance of NWPs and have concrete and material interests in the protection of water quality consistent with state Water Quality Standards. ICL has been, and continues to be, the leading Idaho conservation group advocating for enforcement of Clean Water Act (CWA) requirements applicable to Idaho waters. The attached Affidavit of Justin Hayes describes these interests and the harm incurred by DEQ's action in further detail.

ICL has a long history of involvement with regards to developing and enforcing Idaho Water Quality Standards and ensuring compliance with the Clean Water Act. ICL initially brought federal court litigation over the inadequacy of Idaho's Water Quality Standards in 1989. *Idaho Conservation League v. Russell*, 946 F.2d 717, 720 (9th Cir. 1991), resulted in a settlement brokered by then-Governor Andrus requiring improvements in Idaho's anti-degradation policies. In 1993, ICL joined in litigation challenging the inadequacy of Idaho's list of water quality limited segments under Section 303(d) of the Clean Water Act. This case, *Idaho Sportsmen's Coalition v. Browner*, C93-943-WD (W.D. Wash.), resulted in a settlement requiring the State to list numerous water on Idaho's 303(d) list and a timetable for establishing Total Maximum Daily Loads (hereinafter "TMDLs"). In 2000, ICL filed another case which resulted in a settlement requiring Idaho to timely submit TMDLs for water quality limited segments in Idaho waterbodies. *Idaho Conservation League v. Iani*, Civ. No. C00-972 Z (W.D. Wash.) In 2009, ICL filed litigation challenging EPA's long-term failure to develop an antidegradation implementation plan pursuant to requirements of the CWA. This litigation resulted in DEQ's development of an antidegradation implementation plan, that was approved by EPA in 2012.

In addition to the above-mentioned legal proceedings, ICL has been involved in the development of NWP's. ICL submitted comments on the ACOE proposal to reissue NWP's in April 2011. In December 2011, the Walla Walla District of the ACOE offered a public comment opportunity with regards to regional conditions and provisions associated with the NWP's. ICL commented to the Idaho DEQ in May 2012 on the DRAFT §401 certification for ACOE NWP's. Further, ICL communicated with personnel at Idaho DEQ to discuss and voice their concerns regarding the water quality certification of NWP's and their attendant effects on Idaho's waterbodies.

DEQ's 401 Certification is Arbitrary, Capricious and Contrary to Applicable Law

Under CWA Section 313, the DEQ cannot approve a §404 permit without complying with all state water quality and CWA requirements. We are concerned that activities approved pursuant to NWP's will contribute sediment and other pollutants to Idaho waters that are listed under CWA §303(d) listed for physical substrate habitat alterations, sediment, water temperature, cadmium, zinc, lead, arsenic and other pollutants based. We are concerned that the projects approved pursuant to NWP's may result in additional discharges to these streams that are not in compliance with the TMDL and therefore inconsistent with the CWA. Further, where streams are not listed under §303(d), we are concerned that the cumulative impact associated with issuance of NWP's and blanket §401 certification will lead to ongoing degradation of water quality that is inconsistent with state Water Quality Standards and the State's Antidegradation Policy and Implementation Procedures.

Idaho's Anti-degradation Policy sets forth three tiers of waters and applies a varying level of protection to each. All Idaho waters are Tier I waters where "existing uses shall be maintained and protected." IDAPA 58.01.02.51.01. Waters where existing water quality exceeds current standards may be classified at Tier II waters where "that quality shall be maintained and protected[.]"¹ IDAPA 58.01.02.51.02. The legislature may also designate Tier III or "outstanding resource waters" where "that water quality shall be maintained and protected" without exception. IDAPA 5801.02.51.03. Along with this policy, Idaho also has an Anti-degradation Implementation rule that specifically governs DEQ's certification of General Permits.

¹ The DEQ can allow some degradation in Tier II, but this provision is not applicable in this case since the 401 certification report does not include the necessary satisfaction of intergovernmental coordination and public process, nor necessary findings.

IDAPA 58.01.02.52.03. The 2012 Army Corps of Engineers 404 Nationwide Permit (“NWP”) is such a general permit.

When certifying a general permit the DEQ must “conduct an anti-degradation review including any required Tier II analysis[.]” IDAPA 58.01.02.52.03. If DEQ determines the general permit adequately addresses anti-degradation, then no further review of site-specific actions is required. *Id.* If instead DEQ determines the general permit does not adequately address anti-degradation, then it must require further site-specific information or certification. *Id.* Alternatively, DEQ may “presume that discharges authorized under the general permit are insignificant or that the pollution controls required in the general permit are the least degrading alternative as specified in Subsection 052.08.c.” *Id.* In regards to Tier II waters DEQ’s final 401 water quality certification fails to meet any of these three options and thus is contrary to applicable law.

Regarding Tier II waters, the Idaho Department of Environmental Quality 401 Certification claims the NWP will not violate Tier II protections for two reasons, both of which fail: First, the 401 Certification explains projects authorized under the NWP “must be carried out in a manner that will not cause or contribute to an exceedance of water quality standards.” *401 Certification at 4.* But this is not the applicable legal standard. Under Idaho’s anti-degradation policy it is the existing water quality level, regardless of the applicable standards, that “shall be maintained and protected[.]” IDAPA 58.01.02.51.02. The 401 Certification is contrary to applicable law.

Second, the 401 Certification reports: “The Corps’ does not authorize projects which have more than “minimal impacts on the aquatic environment.” *401 Certification at 4.* Then the

401 Certification attempts to explain why “minimal impacts,” as long as they are short term, somehow will not cause degradation to existing water quality.

Compliance with Idaho’s Water Quality Standards is an ongoing obligation – dischargers may not choose to comply with these standards when it suits their fancy. Similarly, DEQ cannot choose to require compliance part-time; doing so would be the epitome of arbitrary and capricious implementation of DEQ regulations.

Not only is this provision of the 401 Certification completely unsupported in Idaho statute or rule, it violates Idaho’s Water Quality Standards. DEQ is not authorized to allow “short-term” violations of Idaho’s Water Quality Standards. Imagine the chaos that would reign if dischargers were authorized to violate discharge permits short-term. How long is short-term? How often can a discharger have short-term discharges in violation of permit conditions? How large of an exceedance would be acceptable for this short-term period? Clearly, Idaho’s Water Quality Standards would be completely unworkable if certain entities were authorized to allow short-term violations of standards and permits. A 401 Certification is not an appropriate place to establish new law or policy. Because the 401 Certification makes no attempt to resolve this exceeding ambiguous and vague new policy it is arbitrary and capricious.

DEQ’s justification for allowing short-term violations of Idaho’s Water Quality Standards seems to hinge on their belief that short-term sediment discharges do not cause long-term harm to water quality. But this justification is irrelevant because it plainly violates of Idaho’s Water Quality Standards. Setting its legality aside for a moment, this justification is factually incorrect as well. The discharge of sediment can cause turbidity in the water column. When the discharge ceases, the turbidity eventually clears up – by washing downstream and settling out of the water column. As sediments settle out of the water column, they are deposited

on the river and lake bottoms. Here sediments can smother spawned fish eggs and render spawning gravels less productive. This in turn causes long-term harm to the aquatic species. This is but one example of how short-term sediment releases can cause long-term impacts. Because the 401 Certification does not discuss how short term violations will ensure long-term compliance it is arbitrary, capricious and contrary to law.

The 401 Cert's reliance on "minimal impacts" also fails because it does not attempt to comply with applicable law. The 401 certification does not define "minimal impacts" beyond the failed attempt to limit them to "short-term." Fortunately, Idaho Water Quality Standards do provide an applicable definition for insignificant impacts. For General Permits: "If supported by the permit record, the Department may also presume that discharges authorized under a general permit are insignificant ..." IDAPA 58.01.02.052.03. "The Department shall determine insignificance when the proposed change in an activity or discharge, from conditions as of July 1, 2011, will not cumulatively decrease assimilative capacity by more than 10 percent (10%)." IDAPA 58.01.02.052.08.a.i. But the 401 Certification does not perform this insignificance review.

To determine if the assimilative capacity is decreased by ten percent one must know the numbers to input to the calculation, including the existing capacity and the amount of pollution. Because the 401 Certification covers a vast number of activities authorized in waterbodies of varying sizes, it cannot make this showing of insignificance. Neither the Corp's NWP's, nor the State's 401 certification, require that any site-specific data be collected and analyzed to determine what the assimilative capacity of the receiving water is or if a project's impact will decrease the receiving water's assimilative capacity by more than 10 percent. Therefore, the 401 Certification fails to comply with applicable law.

The 401 Certification also imposes some Idaho specific conditions on the NWP including that: “All projects must be carried out in a manner that does not violate Idaho’s numeric criterion for turbidity which states, ‘Turbidity shall not exceed background turbidity by more than 50 NTU instantaneously or more than 25 NTU for more than 10 consecutive days’(IDAPA 58.01.02.250.02.e).” *401 Certification at 6*. However, there is nothing in the 401 Certification that ensures that compliance with the State’s numeric turbidity criteria results in compliance with the mandate to protect existing water quality in Tier II waters, nor whether the impact is “insignificant” pursuant to the Idaho antidegradation policy. IDAPA 58.01.02.051.02; 58.01.02.053.08.a.i.

In addition, ICL disputes the notion that discretionary water quality monitoring will be sufficient to demonstrate that Idaho Water Quality Standards are being met. Specifically the §401 Cert states in one place the DEQ “will require”, but in another “may require” turbidity monitoring. See 401 Cert at 3 and 6. Even with this discretionary monitoring approach, no repetitive, regularly scheduled, and frequent monitoring is required, and DEQ states that it will not require monitoring for projects “done in the dry.” This is inappropriate as the effects from projects approved pursuant to NWPs are likely to have lasting impacts on water quality, should be subject to regularly scheduled monitoring and should also include monitoring associated with projects conducted “in the dry.” After all, suspension of sediment and other pollutants is likely to occur when water levels rise and inundate disturbed areas where sediment can be easily mobilized.

ICL does not feel that the §401 Certification adequately considered specific projects approved under the NWPs and cannot adequately anticipate actions that will be proposed and permitted pursuant to these permits sufficient to meet their responsibility under the CWA.

Specifically, CWA (33 U.S.C. § 1344(e)) only authorizes projects that “will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment.” Further, pursuant to section 401(a)(1) of the CWA, the State has the responsibility of “assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated.”

Another fatal flaw is the fact that neither the NWP, nor the 401 Cert, preclude the application of multiple NWPs in close proximity, in both space and time. Indeed, under the 401 Certification it would be legal for dozens, even hundreds, of NWP projects to simultaneously occur side by side, lining the banks of a Tier II creek with no consideration for the cumulative impacts that these projects would have on water quality. As such, DEQ cannot reasonably conclude that the effects of these projects will not degrade water quality beyond limits established by the Antidegradation Policy.

Second, the NWPs do not give sufficient consideration to – and contrary to the requirements of Clean Water Act § 404(e) do not protect – the vitally important functions served by the nation’s wetlands and streams. The permits also do not take into account the increasingly important role that the nation’s wetland and streams will serve as fewer and fewer of these aquatic resources remain. As more and more land is developed, which is generating more pollution and destroying the hydrology of the Nation’s water resources, and with it the quality of life that we have come to rely on. A recent study found that nearly 90 percent of assessed streamflows had been altered, that these alterations contributed to degraded river ecosystems and loss of native species, and that the likelihood of biological impairment doubled with increasing

severity of diminished streamflows.² The 401 Cert makes no attempt to ensure these actions individually or cumulatively will comply with Idaho water quality standards.

Third, DEQ lacked sufficient data about the past, present and ongoing impacts associated with projects carried out pursuant to NWP's. In fact, the §401 certification cited no basis for the approval (or denial) of specific NWP's even though ICL and the Environmental Protection Agency (EPA) raised specific concerns in comments. Further, neither DEQ nor the Corps provided necessary scientific data or analysis to support claims that these NWP's have no more than a minimal adverse effect, individually or cumulatively, on the environment. Further, neither DEQ nor the Corps has properly evaluated the impacts of climate change in its analysis with regards to decreased water quality, negative impacts to wetland, or other individual and cumulative effects associated with the issuance of NWP's. The decision documents that accompany the NWP's are replete with repeated and rote statements that are not supported by any studies, reports, or data – and that often fly in the face of facts about the adverse environmental consequences of the NWP program that the Corps has been aware of for years.

Conclusion

The 401 Certification fails to apply the proper legal standard because it judges compliance with Tier II anti-degradation in relation to water quality standards instead of existing water quality. The DEQ's justifications that short-term or minimal impacts to existing water quality are appropriate fails as a matter of law. Further, there is nothing in the permit record to support the notion that discharges (both individual discharges and the cumulative impacts of multiple discharges) authorized under the Corps' NWP's are insignificant as defined by Idaho's

² Carlisle, D.M., D.M. Wolock, and M.R Meador. 2010. Alteration of streamflow magnitudes and potential ecological consequences: a multiregional assessment. *Front Ecol Environ* 2010; doi:10.1890/100053

Water Quality Standards with regard to antidegradation. Thus, the DEQ violated the State's antidegradation policy by not conducting or requiring a full Tier II analysis for each discharge proposed under the Corps' NWP's. DEQ's §401 Certification fails to provide adequate assurance that water quality standards will be met, and as a result the water quality and beneficial uses of Idaho's streams, rivers, and wetlands will be impaired, including primary contact recreation and cold water aquatic life, that ICL has worked so hard to protect.

RELIEF REQUESTED

ICL requests the following specific relief:

- A. That the Board withdraw the §401 Certification of the ACOE's NWP's and conduct site-specific §401 Certification for projects proposed within Idaho's waters;

ICL reserves the right to seek discovery and participate as a party in this proceeding with respect to all issues. Pursuant to Rule 304, ICL reserves the right to amend or modify this Petition as may be appropriate.

ICL respectfully requests that the foregoing Petition to Initiate a Contested Case be granted.

Dated: August 10th 2012

Respectfully submitted,



Benjmain J. Otto
Idaho Conservation League

CERTIFICATION OF SERVICE

I hereby certify that on this 10th day of August, 2012, I caused a true and correct copy of the foregoing PETITION TO INITIATE A CONTESTED CASE and AFFIDAVIT OF JUSTIN HAYES to be served upon the following persons:

Via Hand Delivery:

Idaho Department of Environmental Quality
1410 N. Hilton
Boise, ID 83706-1255

Deputy Attorney General
Idaho Department of Environmental Quality
1410 N. Hilton, 2nd Floor
Boise, Idaho 83706



Justin Hayes

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IDAHO CONSERVATION LEAGUE,)	Docket No.
Petitioner,)	
)	AFFIDAVIT OF JUSTIN HAYES
V.)	
)	RE: IDAHO DEPARTMENT OF
IDAHO DEPARTMENT OF)	ENVIRONMENTAL QUALITY'S
ENVIRONMENTAL QUALITY)	FINAL §401 WATER QUALITY
)	CERTIFICATION OF 2012 U.S.
)	ARMY CORPS OF ENGINEERS §404
)	NATIONWIDE PERMITS

My name is Justin Hayes. I am a resident of Boise, Idaho. I am a member of the Idaho Conservation League ("ICL"), and employed by them as the Program Director. This affidavit demonstrates my direct and substantial interest in this matter as an individual person and as a member and employee of ICL.

As an individual and both a member and employee of ICL I frequently enjoy boating and fishing on waterbodies throughout Idaho; including but not limited to rivers, tributaries, lakes, and reservoirs in the Snake River Basin, the Owyhee River Basin, the Boise River Basin, the Payette River Basin, the Weiser River Basin, the Salmon River Basin, the Pashimeroi Basin, the Wood River Basin, the Big Lost River Basin, the Little

Lost River, the Clearwater River Basin, the Selway River Basin, the Lochsa River Basin, the St. Joe River Basin, the Coeur d'Alene River Basin, the Pend Oreille River Basin, the Clark Fork River Basin and the Kootenai River Basin. Within these watersheds, and more, I continually and reliably boat and fish in the large "mainstem" rivers, lakes, and reservoirs, and in tributaries thereof both large and small. I have undertaken and will continue to participate in these activities at all times of the year including both high flow and low flow periods.

The waterbodies listed above are designated by Idaho to be used for boating and fishing and the water quality to support these uses is protected by Idaho's water quality standards. Any activity that could negatively impact water quality and designated uses including specifically the quality and abundance of fishing and boating in the waterbodies I mention above will directly and substantially impact my interest. Because I specifically seek out waters to recreate in that are high quality, and particularly support plentiful populations of cold-water dependent fish, I am less likely to visit areas that do not meet these criteria, and if I do visit them the quality of my experience will be greatly diminished. I am deeply concerned that Idaho Department of Environmental Quality's (DEQ) 401 certification of the Army Corps of Engineer's 2012 Section 404 Nationwide Permits (NWP), authorizes activities that will impact existing water quality, and my interests that depend upon this quality, in several ways.

The DEQ's 401 Certification of the Corp's 404 NWPs allows activities, generally without any further site-specific review, that disturb or fill wetlands, riparian areas, and the beds of lakes and rivers. These activities have the potential to mobilize sediments into the waters. These activities can also result in the removal of waterside vegetation

and the reduction in water column depth – both of which cause the waters to warm from the increased solar gain. All of these impacts will directly and substantially impact my interest in boating and fishing in every waterbody in which they occur by reducing the water quality necessary to support fish populations and changing the hydrological structure of waters in which I boat. Moreover, to the extent sediments contain other pollutants such as nutrients, heavy metals, and other toxics material, mobilization could violate water quality standards that protect aquatic health and human contact – both of which impact my interest in fishing a boating on these waters.

The enjoyment that I derive from fishing and boating in these waters is diminished in instances where the sediment increase and water warms up because the varieties of fish that I prefer to fish for thrive in waters that are clear and cold. Further, my enjoyment is directly and substantially linked to bountiful opportunities in the Idaho water bodies I listed above for me to see, interact with, and catch cold water fish. Increased levels of sediment in these waterways make these waters less likely to function as high quality spawning and rearing habitat for fish, since the sediments impact the spawning gravels. This linkage between increased sediments and reduced fishery health results in reduced fish populations, which lessens my opportunity to see, interact with and catch fish. Further, reducing the depth of the water column, and reducing waterside vegetation causes greater exposure to solar gain and thus increase water temperatures. In addition, the knowledge that I am recreating in areas with diminished water quality reduces the enjoyment that I derive from the experience.

The DEQ's 401 Certification fails to protect water quality from the impacts of individual projects. DEQ's 401 Certification does not consider or limit in any way the

number of individual NWP activities that can be implemented in an area. As a result, there is no consideration of, or limit upon, the cumulative impacts of numerous projects adjacent to each other. Thus, even if individual projects may not harm water quality and cause direct and substantial to my interests, the DEQ 401 certification endorses a 404 NWP that can lead to death by a thousand cuts. This further directly and substantially impacts my interests in boating and fishing throughout Idaho by allowing for unchecked increases in sediment mobilization, increases in pollutant releases, increased solar heat gain, and other negative impacts that Idaho's water quality standards are intended to control.

The DEQ's 401 certification of the 404 NWP also endorses activities without properly ensuring they will not degrade the existing water quality and beneficial uses in the receiving waters. Idaho's anti-degradation rule protects the existing water quality of waters throughout Idaho. Some of my favorite water bodies on which I regularly boat and fish have existing water quality that is much better than the current standards. This exceptional quality allows for particularly robust fisheries and particularly unique and enjoyable boating experiences. The DEQ's 401 certification directly and substantial impacts my interests in this existing water quality by certifying activities authorized by the 404 NWP without any further site-specific analysis and without reviewing the cumulative impacts to existing water quality.

The DEQ's 401 certification also allows short-term negative impacts to water quality. Because I visit the waterbodies identified above, and more, regularly throughout the year, even a short term impact can directly and substantially affect my interest in boating and fishing.

Because the DEQ's 401 certification certifies activities authorized by the 404 nationwide permits without further site-specific review, my interests are directly affected by the DEQ's actions. With this certification, permittees are free to engage in potentially polluting activities in waters throughout the state, including those I specifically reference above. As noted in the Idaho Department of Environmental Quality's (DEQ) 401 Certification: "Because of the statewide applicability, all of the jurisdictional waters within Idaho could potentially receive discharges either directly or indirectly from activities authorized under the NWP's." In effect, DEQ is saying that these activities may occur on any, or every, waterbody in the entire State of Idaho. As such, I am very concerned that any individual river, lake or stream that I enjoy fishing and boating on will be harmed by this activity. Because the 401 certification does not ensure compliance with existing water quality standards whenever a potential actor operates under a 404 nationwide permit, the DEQ certification directly impacts my interests. If this certification stands, I will have no other opportunity to protect my interest in fishing and boating that the water quality standards are intended to protect.

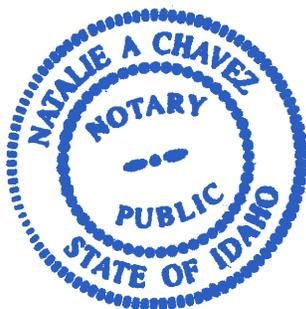
I declare under penalty of perjury pursuant to Idaho law that the foregoing is true and correct.

Dated this 10th day of August 2012,



Justin Hayes

Subscribed and Sworn before me this 10th day of August, 2012



Notary Public for Idaho

Residing at: Boise, Idaho

My commission expires: 07/14/17