



P.O. Box 1612, Boise, ID 83701
Phone: 208-342-7024
Fax: 208-342-8286
www.AdvocatesWest.org

September 28, 2009

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

RECEIVED

SEP 30 2009

Dept. of Environmental Quality
Director's Office

Ms. Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Ms. Michelle Pirzadeh
Regional Administrator (acting)
U.S. EPA, Region 10
RA-140
1200 Sixth Avenue Suite 900
Seattle, WA 98101

**Re: 60-Day Notice of Intent to Sue for Violations of the Clean Water Act
Regarding Idaho's Antidegradation Policy Implementation Methods.**

Dear Mss. Jackson and Pirzadeh:

This letter provides notice that my client, Idaho Conservation League (ICL), intends to sue the Environmental Protection Agency (EPA) in federal court under § 505(a)(2) of the Clean Water Act, 33 U.S.C. § 1365(a)(2), for violations of nondiscretionary duties imposed by this Act and its implementing regulations. Specifically, EPA has repeatedly approved new water quality standards for Idaho over the past several years, although Idaho's water quality standards lack any antidegradation implementation plan. EPA's approval of new standards – in the absence of an antidegradation implementation plan – runs afoul of the Clean Water Act and its implementing regulations. *See* 40 C.F.R. §§ 131.5(b), 131.21(b) (imposing a mandatory and nondiscretionary duty to disapprove standards that do not comply with an antidegradation policy); § 131.12(a) (requiring an anti-degradation implementation plan). EPA has been aware of the lack of an antidegradation implementation plan in the Idaho water quality standards since at least 1995, and, yet, EPA has approved new standards without first requiring an antidegradation implementation plan.

EPA has further violated the Administrative Procedure Act, 5 U.S.C. § 706, by, first, approving Idaho's water quality standards under 33 U.S.C. § 1313(c)(3) when the Idaho water quality standards clearly fail to meet the minimum requirements outlined in the Clean Water Act; second, by refusing to promulgate an antidegradation implementation plan that will meet the requirements of the Clean Water Act as required by 33 U.S.C. § 1313(c)(4)(A) & (B); and, third, by failing to articulate a reasoned explanation for its refusal to promulgate an antidegradation implementation plan under 33 U.S.C. § 1313(c)(4)(B).

39716

I. Idaho's Antidegradation Policy and Changes to Water Quality Standards.

One of the primary purposes of the Clean Water Act is to ensure that no activity will lower water quality necessary to support existing uses and to maintain and protect high quality waters – this requirement is called the antidegradation policy. Prior to 1987, the antidegradation policy was implemented through federal regulations. In 1987, however, the antidegradation policy was officially codified in the Clean Water Act at Section 303(d)(4)(B). 33 U.S.C. § 1313(d)(4)(B). The U.S. Supreme Court has noted that the “1987 amendment [to the Clean Water Act] makes clear that sec. 303 also contains an antidegradation policy - that is, a policy requiring state standards be sufficient to maintain existing beneficial uses of navigable waters, preventing their further degradation.” *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 705 (1994). In general, antidegradation implementation procedures identify the steps and questions that must be addressed when regulated activities are proposed that may affect water quality.

In order to ensure that existing beneficial uses are maintained, the antidegradation policy creates three tiers of waters. Tier I requires that existing uses, and the water quality to protect these uses, “shall be maintained and protected.” 40 C.F.R. § 131.12(a)(1). Tier II applies where water quality exceeds that necessary to protect existing uses and mandates that any action that could lower water quality be approved only after a public process, and only if all existing uses are fully protected. 40 C.F.R. § 131.12(a)(2). Tier III applies to outstanding National resource waters, typically associated with protected lands, where existing quality regardless of existing uses “shall be maintained and protected.” 40 C.F.R. § 131.12(a)(3). Idaho has adopted rules mirroring these tiers, but has never identified any methods to implement this policy to ensure water quality is not degraded. *See Idaho Code Ann. § 39-3603; Idaho Administrative Code § 58.01.02.051.* In fact, Idaho has yet to stratify any water into any tier.

In the past, EPA has expressed concern and disapproval of Idaho's antidegradation policy. For example, by letter dated June 25, 1996, EPA approved in part and disapproved in part Idaho's 1994 revisions to its water quality standards. More specifically, EPA disapproved a portion of Idaho's revised antidegradation policy because the definition of Tier III waters did not include protections from nonpoint sources of pollution, and EPA further noted that the Idaho water quality standards failed to include an antidegradation implementation plan.

Although the State of Idaho revised its definition of Tier III waters in response to EPA's concerns, the State has failed to adopt an antidegradation implementation plan since that time. In fact, in the intervening 15 years since, the State of Idaho has failed to place any waters across the entire state into any antidegradation tier. Idaho's refusal to stratify waters into antidegradation tiers demonstrates that the State fails to apprehend how to implement its antidegradation rules – which the Clean Water Act sought to remedy by requiring an implementation plan.

One available method for modification and revision of state water quality standards – including an antidegradation implementation plan – is the statutory triennial reviews process. The triennial review process requires each state to periodically, but at least once every three years, review and, when appropriate, revise its existing water quality standards. 33 U.S.C. § 1313(c); 40 C.F.R. § 131.20. EPA describes this review as potentially encompassing “additions to and modifications in uses, in criteria, in the antidegradation policy, in the antidegradation implementation procedures, or in other general policies.” See EPA, *Water Quality Standards Handbook*, § 6-1 (2d ed. 1994).

In 2005, the Idaho DEQ commenced its most recent triennial review of state water quality standards. Although Idaho DEQ claims to review and revise its water quality standards on a rolling or piecemeal basis, this 2005 triennial review is the latest in a series of modifications undertaken in 1993, 1995, 1997, and 2002. In preparation for its 2005 triennial review, Idaho DEQ published a list of potential topics for review, which included adoption of a statewide antidegradation policy, about which the Idaho DEQ wrote:

DEQ has been evaluating its policy on antidegradation and may develop guidance to clarify and expound on the current policy stated in the rule. This may include more clarity regarding the definition of public process, expounding on the important economic and social development considerations, and specifying tracking/ reporting requirements. DEQ is also examining the range of sources/activities that the antidegradation policy may apply to. As this evaluation moves forward, it may be that rule making is required in place of, or in addition to, antidegradation guidance.

Idaho Dept. of Env'tl. Quality, *Potential Topics for Triennial Review, Short Descriptions*, http://www.deq.state.id.us/water/data_reports/surface_water/monitoring/tri_review_topics_mar05.pdf (March 2, 2005).

In response to this scoping notice, ICL and others submitted comments requesting that Idaho DEQ adopt an antidegradation implementation policy. Idaho Dept. of Env'tl. Quality, *Triennial Review Public Scoping Written Public Comment Summary*, http://www.deq.state.id.us/water/data_reports/surface_water/monitoring/tri_review_public_scoping.pdf (July 19, 2005).

After reviewing these comments and holding public meetings on its revised water quality standards, Idaho DEQ noted that:

There was some concern about the lack of an implementation policy for antidegradation in Idaho. A few participants expressed that antidegradation is important to consider because it is the only preventative measure to keep waters off the 303(d) list. It was further suggested that DEQ should make a concerted effort to ensure a more robust antidegradation policy is developed and implemented.

Idaho Dept. of Env'tl. Quality, *Triennial Review Phase 1 – Public Scoping, Public Meeting Summary*, http://www.deq.state.id.us/water/data_reports/surface_water/monitoring/tri_review_phase1_public_scoping_0705.pdf (July 2005).

Despite EPA's warning to adopt an antidegradation implementation plan, and similar requests from the public, Idaho DEQ abandoned any effort to bring its water quality standard into compliance with the Clean Water Act by adopting an antidegradation implementation plan. Idaho Dept of Env'tl. Quality, *Triennial Review Phase 1 – Prioritization*, http://www.deq.state.id.us/water/data_reports/surface_water/monitoring/tri_review_phase1_public_scoping_priority_topics.pdf (November 2005).

Idaho DEQ did, however, modify its water quality standards during this triennial review, resulting in the following five docket modifications:

58-0102-0501: Aquatic life designated use for Soda Creek; Definitions of Zone of Initial Dilution, and of Ephemeral and Intermittent waters;

58-0102-0502: Bacteria criteria consolidation and reorganization; rule format update;

58-0102-0503: Idaho specific Cd aquatic life criteria and update of human health toxics criteria;

58-0102-0504: Changing the name of the Idaho rule chapter from "Water Quality Standards and Wastewater Treatment Requirements" to "Water Quality Standards"; and

58-0102-0505: Weight of evidence and data quality in beneficial use assessment; process for waterbody specific salmonid spawning determinations; and consolidation and/or revision of 23 definitions.

EPA has subsequently approved dockets -0501, -0502, and -0505; and Idaho DEQ did not submit docket -0504 for EPA approval as DEQ considered it a non-substantive change. Idaho Admin. Bull. 06-6 at 124 (June 7, 2006), <http://adm.idaho.gov/adminrules/bulletin/bul/06jun.pdf>.¹ None of these dockets included any mention of an antidegradation policy, nor identified any methods for implementing antidegradation protections for the waters of Idaho.

To date, the State of Idaho has taken no action to identify any methods for implementation of antidegradation protections for the waters of Idaho. In the meantime, EPA continues to review and approve Idaho's water quality standards. As explained below, EPA lacks

¹ The submission and approval of Idaho docket 58-0102-0503 prompted ICL to file a 60-day notice letter under the Clean Water Act, which the parties promptly settled.

the authority to approve state water quality standards in the absence of an antidegradation policy that complies with the Clean Water Act. 40 C.F.R. § 131.12(a). In fact, the EPA administrator has an affirmative obligation to reject state standards where, as here, the state lacks an antidegradation implementation plan. 40 C.F.R. §§ 131.5(b) & 131.21(b).

II. EPA Review and Approval of State Water Quality Standards Must Ensure Compliance with the CWA Antidegradation Requirements.

Section 303(c)(3) of the Clean Water Act, 33 U.S.C. § 1313(c)(3), allows EPA to approve any new or revised state water quality standards only if those standards “meet the requirements of [the Clean Water Act]”; and the “approval or disapproval of a State water quality standard shall be based on the requirements of the Act as described in §§ 131.5 and 131.6.” 40 CFR § 131.21(b).

Under 40 C.F.R. § 131.5(b), “EPA must disapprove the State . . . water quality standards . . . if [they] are not consistent with the factors listed in paragraphs (a)(1) through (a)(5) of this section.” Paragraphs (a)(1) through (a)(5) lay forth minimum criteria for state submitted standards, including “whether the State submission meets the requirements included in sec 131.6 of this part.” 40 C.F.R. § 131.5(a)(5). In turn, 40 C.F.R. § 131.6 sets forth the “minimum requirements for water quality standard submission” including “an antidegradation policy consistent with § 131.12.” *Id.* at § 131.6(d). And, 40 C.F.R. § 131.12(a) requires that each state “shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such [antidegradation] policy.”

In other words, before EPA can approve a new or revised state water quality standard, the state must have a legally adequate antidegradation implementation plan, and any new or revised water quality standard approved in the absence of an implementation plan runs afoul of the requirements of the Clean Water Act and implementing regulations.

III. Idaho's Antidegradation Policy is Inconsistent with the Clean Water Act.

Courts have uniformly interpreted 40 C.F.R. § 131.12(a) to require both a policy and identification of methods for implementing this policy. *PUD No 1. of Jefferson County v. Washington Department of Ecology*, 511 U.S. at 719; *Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466, 477 (6th Cir. 2008). *See also American Wildlands v. Browner*, 260 F.3d 1192, 1194 (10th Cir. 2001)(“[E]ach state must adopt an antidegradation review policy which will allow the state to assess activities that may lower the water quality of the water body.”)

As detailed above, Idaho's antidegradation policy is inconsistent with the Clean Water Act because the state lacks an antidegradation implementation plan, as EPA noted in 1996. And, despite several rounds of triennial reviews, Idaho has failed to adopt an implementation plan. Yet, EPA has repeatedly approved new water quality standards for Idaho over the past several years, in direct violation of the Clean Water Act and its implementing regulations.

A. EPA's Approval of New Water Quality Standards Violates the Clean Water Act.

Idaho does not have an antidegradation policy consistent with 40 C.F.R. § 131.12. Therefore, EPA lacks authority to approve any new water quality standards, and any EPA action approving new water quality standards violates EPA's mandatory duties under 33 U.S.C. §1313(c), 40 C.F.R. §131.5(b), and 40 C.F.R. § 131.21(b), and is otherwise arbitrary, capricious, and not in accordance with the law in violation of 5 U.S.C. § 706(2)(A).

EPA has run afoul of its legal obligations under the Clean Water Act and the APA in approving Idaho's new water quality standards in Docket Nos. 58-0102-0501, -0502, and -0505.

B. EPA Violated the Clean Water Act By Refusing to Promulgate an Antidegradation Implementation Plan.

Under Section 303 of the Clean Water Act, EPA "shall promptly prepare and publish proposed regulations" if the State submits water quality standards that are inconsistent with the Clean Water Act, or "in any case where the Administrator determines that a revised standard is necessary to meet the requirements of this chapter." 33 U.S.C. § 1313(c)(4)(A) & (B). This requirement applies equally to an antidegradation implementation plan. *Northwest Environmental Advocates v. EPA*, 268 F.Supp.2d 1255 (D. Or. 2003).

EPA has run afoul of these requirements. First, by refusing to submit a complete antidegradation policy – including an antidegradation implementation plan – since its initial submission in 1995, Idaho DEQ has constructively submitted an inadequate plan as a matter of law, and EPA is under the mandatory obligation to "promptly prepare and publish" a revised implementation plan under 33 U.S.C. § 1313(c)(4)(A). See *Scott v. Hammond*, 741 F.2d 992, 996 (7th Cir. 1984) (holding that a state cannot thwart the purposes of the Clean Water Act simply by failing to submit a required plan).

EPA has also run afoul of the Clean Water Act by refusing to exercise its discretion under 33 U.S.C. § 1313(c)(4)(B), and prepare and publish a revised implementation plan, after concluding that the State of Idaho's antidegradation policy was inadequate for want of an implementation plan.

C. EPA Failed to Explain its Refusal To Promulgate an Antidegradation Implementation Plan.

As discussed above, under 33 U.S.C. § 1313(c)(4)(B), EPA "shall promptly prepare and publish proposed regulations . . . in any case where the Administrator determines that a revised standard is necessary to meet the requirements of this chapter." Identification of methods to implement a statewide antidegradation policy is necessary to meet the requirements of 40 C.F.R. § 131.12, which in turn is necessary to meet the requirements of 40 C.F.R. §131.6(d), which in turn is necessary to meet the requirements of 40 C.F.R. §131.5.

Because EPA has refused, without rational explanation, to either promulgate federal

9/28/2009

Page 7 of 8

standards under the authority provided by 33 U.S.C. § 1313(c)(4)(B), or explain why identification of methods for implementing a statewide antidegradation policy is not necessary to meet the requirements of 33 U.S.C. § 1313(c), EPA's actions are arbitrary, capricious, and not in accordance with the Clean Water Act, and are otherwise an abuse of discretion under 5 U.S.C. § 706(2)(A).

IV. Persons Giving Notice.

The name, address, and telephone numbers of the party providing this notice follows.

Justin Hayes
Program Director
Idaho Conservation League
P.O. Box 844
Boise, Idaho 83701
Phone: 208-345-6933 x 24.

The contact information for the attorney representing Idaho Conservation League is:

Todd C. Tucci
Advocates for the West, Inc.
P.O. Box 1612
Boise, ID 83701
(208) 342-7024
(208) 342-8286 (fax)
ttucci@advocateswest.org

V. Conclusion.

Because of EPA's violations of nondiscretionary duties imposed by the CWA and its implementing regulations, ICL is putting you on notice that it intends to file suit under the Clean Water Act citizen suit provision, 33 U.S.C. § 1365(a), after expiration of 60 days from this notice; and ICL intends to seek appropriate injunctive and declaratory relief, as well as recovery of attorneys fees and litigation costs as provided under the Act, unless EPA takes immediate steps to rectify the ongoing violations of law.

As the U.S. Supreme Court and other courts have held, one of the principal purposes of the notice requirements in the Clean Water Act is to allow the parties to discuss resolution of claims short of litigation. I am sending this notice letter, in part, to encourage settlement negotiations which could avoid the need for litigation. We would be happy to discuss possible settlement arrangements with you, if you wish. Additionally, should you have any facts, documents or other information which you believe might bear upon the alleged violations set forth in this letter, you should provide those to us now in order to avoid unnecessary litigation.

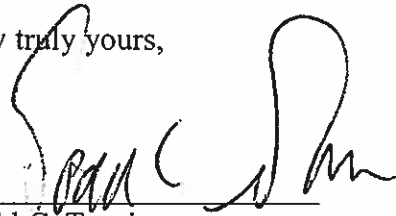
In that spirit, I encourage you to contact Idaho Conservation League or me to seek an amicable resolution of this matter.

60-Day Notice Letter Re: Antidegradation Implementation Plan

9/28/2009

Page 8 of 8

Very truly yours,



Todd C. Tucci

Advocates for the West, Inc.

P.O. Box 1612

Boise, ID 83701

(208) 342-7024

ttucci@advocateswest.org

cc: Eric H. Holder Jr., U.S. Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

✓ Toni Hardesty, Idaho DEQ Director
DEQ State Office
1410 N. Hilton
Boise, Idaho 83706