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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

IDAHO CONSERVATION LEAGUE,)	
Plaintiff,)	
)	
vs.)	Case No. 10-cv-207
)	
U.S. ENVIRONMENTAL PROTECTION)	
AGENCY,)	
_____ Defendant.)	

NATURE OF ACTION

1. This case challenges the U.S. Environmental Protection Agency’s (“EPA”) refusal to undertake its mandatory duty under the Clean Water Act to promulgate an antidegradation implementation plan for waters within Idaho, a violation which is especially problematic because the State of Idaho and EPA have repeatedly neglected to adopt any antidegradation implementation plan in the nearly 40 years since Congress passed the Clean Water Act. EPA has also failed to provide any reasoned and rational basis for its refusal to exercise its duties to promulgate an antidegradation implementation plan, further violating the Clean Water Act and the Administrative Procedure Act.

2. The Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, requires states to adopt an antidegradation policy and implementation plan to ensure that instream water uses and water quality are maintained and protected. If a state refuses or fails to adopt a lawful antidegradation plan, EPA is obligated to promulgate a legally-sufficient plan.

3. Although EPA has known for nearly 15 years that Idaho lacks any antidegradation implementation plan – indeed, in 1996, EPA warned the Idaho Department of Environmental Quality (DEQ) that it needed such a plan to comply with the Clean Water Act – EPA has refused to promulgate an antidegradation implementation plan. In its most recent submission of revised water quality standards, the State of Idaho again failed to include an antidegradation implementation plan; yet, EPA approved the proposed water quality standards, and then again refused to promulgate a legally-sufficient antidegradation implementation plan.

4. Based on these violations, waters within the State of Idaho lack basic protections designed to ensure against the lowering of water quality and maintenance and protection of instream uses, and these violations harm Plaintiff Idaho Conservation League, its members and staff. Accordingly, this case seeks declaratory and injunctive relief ordering EPA to promulgate forthwith a lawful antidegradation policy and implementation plan.

JURISDICTION AND VENUE

5. This court has jurisdiction over this action pursuant to 33 U.S.C. § 1365(a) (Clean Water Act citizen suit provision); 5 U.S.C. §§ 701-706 (APA); 28 U.S.C. §§ 1331 (federal question), 2201 (declaratory relief), and 2202 (injunctive relief). On September 28, 2009, Idaho Conservation League furnished EPA with written notice of its violations of the CWA, and more than 60 days has passed since this notice.

6. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e) because Idaho Conservation League resides in this district, EPA also has an office in this district, and a substantial part of the events or omissions giving rise to the claim occurred in Idaho.

PARTIES

7. Idaho Conservation League (“ICL”) is a non-profit conservation organization incorporated under the laws of Idaho with its principal place of business in Boise, Idaho. ICL’s mission is to “protect and restore the clean water, wildlands, and wildlife of Idaho,” and ICL and its approximately 9,500 members are dedicated to protecting and conserving Idaho’s natural resources, including its water resources. ICL, as an organization and on behalf of its members, is greatly concerned with protecting and improving the quality of the surface waters of the State of Idaho. ICL and its members are active in public education, administration, and legislation of conservation issues in Idaho, including water quality issues.

8. ICL and its members use and enjoy the waters of the State of Idaho for health, recreation, scientific, and aesthetic purposes. ICL and its members derive health, recreational, scientific, and aesthetic benefit from drinking, fishing, boating, study, contemplation, photography, and other activities in and around the waters of the state. These health, recreation, scientific, and aesthetic interests of ICL and its members are directly affected by EPA’s failure to promulgate an antidegradation policy and implementation plan applicable to all waters in the state. The interests of ICL and its members have been, are being, and, unless the relief prayed for herein is granted, will continue to be irreparably injured by EPA’s failure to fulfill its water quality protection responsibilities.

9. Defendant EPA is an agency of the United States charged with implementing and ensuring compliance with the Clean Water Act, among other environmental statutes. EPA maintains an office in Boise, Idaho.

STATUTORY BACKGROUND

10. In 1972, Congress passed the Clean Water Act (“CWA”) in order “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” through the reduction and eventual elimination of the discharge of pollutants into those waters. 33 U.S.C. § 1251(a). In addition, the CWA establishes an “interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife.” *Id.* at § 1251(a)(2).

11. To meet these goals, the law requires the establishment of water quality standards. Water quality standards are promulgated by the states and establish the desired condition of each waterway within the state’s regulatory jurisdiction. 33 U.S.C. § 1313(a).

12. Water quality standards under the CWA are required to include three elements: (1) one or more designated “uses” of that waterway; (2) water quality “criteria” specifying the amount of various pollutants that may be present in those waters and still protect the designated uses, expressed in numerical concentration limits and narrative form; and (3) an antidegradation policy (with implementation methods) to protect all existing uses. 33 U.S.C. §§ 1313(c)(2), 1313(d)(4)(B); 40 C.F.R. Part 131, Subpart B.

13. Prior to 1987, the antidegradation policy was implemented through federal regulations, but Congress amended the Clean Water Act in 1987 to codify the antidegradation policy in 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) (“*PUD No. 1*”). In general, antidegradation implementation procedures identify the steps and questions that must be addressed when regulated activities are proposed that may affect water quality.

14. In the absence of state-specific antidegradation rules, the Clean Water Act adopts a “fall back” antidegradation policy. 40 C.F.R. §§ 131.12(a)(1), (2), (3). This 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).

15. States are required to review and revise their water quality standards – including their antidegradation policy and implementing plan – at least every three years, and to submit all revised and existing water quality standards to EPA for review and approval. 33 U.S.C. § 1313(c)(1). New or revised standards are to be established “taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.” 33 U.S.C. § 1313(c)(2)(A). Water quality criteria “must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use.” 40 C.F.R. § 131.11(a)(1). The criteria must be set at the level necessary to protect the most sensitive use of a waterbody. *Id.*

16. States must include an antidegradation policy – including an antidegradation implementation plan – as an essential component of the statewide water quality standards that are presented as part of the triennial review process. 40 C.F.R. §§ 131.6(d), 131.12(a). *See also PUD No. 1*, 511 U.S. at 705-06.

17. EPA must notify the state within 60 days if it approves the new or revised standard as complying with the CWA. 33 U.S.C. § 1313(c)(3). If EPA disapproves the standard, it must within 90 days notify the state and specify the required changes. 33 U.S.C. § 1313(c)(3). If the state fails to adopt those changes within an additional 90-day period, EPA is required to “promptly” establish a revised standard for the state. 33 U.S.C. § 1313(c)(3) and (4)(A). EPA is also required to establish a new or revised standard wherever the agency determines that a revised or new standard is necessary to meet the requirements of the CWA. 33 U.S.C. § 1313(c)(4)(B).

STATEMENT OF FACTS

Background

18. Idaho contains over 106,000 miles of rivers and streams, and over 100 lakes and reservoirs are located within state boundaries. These rivers, lakes, streams, and wetlands not only provide great natural beauty, but they supply the water necessary for drinking, recreation, industry, agriculture, and aquatic life.

19. Only a small fraction of these waters are meeting minimum standards for desired water quality, however. According to the Idaho Department of Environmental Quality (“DEQ”), only 27% of Idaho’s streams are currently meeting state water quality standards, and fully 36% percent of streams are currently exceeding water quality standards for one or more pollutant. The DEQ has failed to even monitor 37% of all waters within the state.

20. More specifically, in 2008, DEQ reported that approximately 927 streams and lakes – totaling over 35,000 river miles and over 260,000 acres of lakes and reservoirs – were not meeting water quality standards for one or more of the designated uses for one or more pollutants, and neither DEQ nor EPA had issued a remediation plan (in the form of a Total Maximum Daily Load or “TMDL”¹). Many more waterbodies were failing to meet applicable water quality standards – according to DEQ – but a remediation plan was unnecessary. This same report shows that DEQ has failed to even monitor nearly 2,000 waterbodies, totaling over 35,000 river miles, and nearly 160,000 acres of lakes and reservoirs.

21. In total, only a small fraction of Idaho waterbodies were attaining all water quality standards, according to DEQ.

22. This same DEQ report shows that only 4,000 acres of lakes and reservoirs were meeting all water quality standards and beneficial uses, although nearly 113,000 acres of lakes and reservoirs – include Salmon Falls Creek Reservoir – are impaired due to mercury contamination.

23. Mercury is a known neurotoxin, and is especially harmful to pregnant women and children. Levels of a highly toxic form of mercury – i.e., methylmercury – in the bloodstream of unborn babies and young children is known to harm the developing nervous system, making the child less able to think and learn. Mercury exposure is also known to harm the heart, kidneys, lungs, and immune system of people of all ages.

24. Consumption of fish and shellfish are the main sources of methylmercury exposure to humans, as it builds up in fish, shellfish and animals that eat fish. Recently, DEQ has issued health advisories for consumption of fish from the Salmon Falls Creek reservoir, recommending

¹ A TMDL is a tool for implementing State water quality standards that provides the basis for states to establish water quality based controls on water quality limited streams.

that women who are nursing, pregnant or trying to become pregnant, refrain from eating more than two meals a month of fish caught in Salmon Falls Creek reservoir, and recommending similar health advisories for children under seven.

25. Mercury or methylmercury consumption also is known to have harmful effects on birds, mammals and fish, too, including death, reduced reproduction, slower growth and development, and abnormal behavior.

26. Unfortunately, EPA and DEQ have a long history of neglecting their respective obligations under the Clean Water Act, thus contributing to the degraded water conditions within Idaho. For example, it took DEQ more than a decade after the Clean Water Act was passed to submit to EPA its first set of proposed state water quality standards covering waters in Idaho. DEQ's proposed standards were so deficient that EPA rejected these water quality standards as inconsistent with the substantive requirements of the Clean Water Act. DEQ then refused to submit supplemental standards as required, and the EPA similarly refused to promulgate its own revised water quality standards, as required under the Clean Water Act.

27. Idaho Conservation League and others thus sued EPA over its failure to promulgate new water quality standards. *Idaho Conservation League v. Russell*, 946 F.2d 717, 719 (9th Cir. 1991). Ultimately, ICL settled this lawsuit after DEQ agreed to promulgate new, legally-sufficient water quality standards, and submit them to EPA for its approval. *Id.* at 719.

28. DEQ's then submitted to EPA modified water quality standards as required under *Russell* – which EPA again rejected as unlawful. *Idaho Conservation League v. Browner*, 968 F.Supp. 546 (W.D. Wash. 1997). And again, after EPA rejected these proposed water quality standards, EPA failed to promulgate its own state water quality standards as required under the Clean Water Act. Thus, ICL and others again sued EPA for its failure to promulgate Idaho water

quality standards, and the district court granted ICL's motion for summary judgment. *Id.* at 549. In that case, the district court ordered EPA to promulgate new water quality standards within sixty days.

29. DEQ's and EPA's intransigence in implementing the Clean Water Act is not limited to water quality standards, unfortunately. Indeed, it took DEQ until 1989 – i.e., seventeen years after the passage of the Clean Water Act and ten years after a statutorily-imposed deadline – to submit a list of streams within Idaho that were not meeting state water quality standards (aka Water Quality Limited Streams or 303(d) streams); and, then, EPA refused to approve or disapprove this list, as required under the Clean Water Act. *See Idaho Sportsmen's Coalition v. Browner*, 951 F.Supp. 962, 964 (W.D. Wash. 1996). In 1992, DEQ submitted a revised list of 36 water quality limited streams, and this time EPA approved this list. In *Browner*, ICL and others again sued EPA, claiming that its approval of this skeletal 303(d) list violated the Clean Water Act. The district court agreed with ICL, and reversed EPA's approval as contrary to the Clean Water Act, finding that DEQ's list “included only thirty-six threatened and degraded waters although hundreds manifestly existed.” *Id.*

30. On remand, EPA issued a list of 962 water quality limited streams in Idaho, and then EPA proposed to take fully 25 years to adopt a TMDL for these streams. ICL and others challenged this schedule as again violating the Clean Water Act, and the court agreed. *Id.* at 964. The court rejected the “extreme slowness” of EPA's proposed timeframe, and noted that “nothing in the [Clean Water Act] could justify so glacial a pace.” *Id.* at 967. Instead, the court recommended a five-year timeframe in which to complete all necessary TMDLs.

Antidegradation Policy and Revision of Idaho Water Quality Standards

31. The State of Idaho has adopted rules mirroring the federal antidegradation policy, but the State of Idaho has never identified any methods to implement this policy to ensure water quality is not degraded. Idaho Code Ann. § 39-3603; Idaho Administrative Code § 58.01.02.051.

32. In the years since Idaho adopted an antidegradation policy, DEQ has yet to stratify any water into any antidegradation tier, thus demonstrating that DEQ fails to apprehend how to implement its antidegradation rules – which the Clean Water Act sought to remedy by requiring an implementation plan.

33. In 1994, DEQ submitted for EPA’s review modified Idaho Water Quality Standards. DEQ proposed revisions of the standards for chronic ammonia in warm water and cold water biota, human health criteria for arsenic, and other criteria for copper, cyanide and selenium. DEQ did not include any modified antidegradation policy, and did not propose for EPA’s review any antidegradation policy or implementation plan.

34. On June 25, 1996 – far beyond the statutorily required deadline of 60 or 90 days – EPA approved in part and disapproved in part Idaho's 1994 revisions to its water quality standards.

35. More specifically, EPA disapproved a portion of Idaho's revised antidegradation policy, and EPA determined that the Idaho water quality standards failed to include an antidegradation implementation plan as required under the Clean Water Act.

36. Instead of promulgating a revised standard that included an antidegradation implementation plan as required under the Clean Water Act, EPA simply “recommend[ed]” that DEQ modify its antidegradation policy to include an implementation plan “to better explain how each of these antidegradation levels of protection is implemented.”

37. Between 1996 and the 2005 triennial review (discussed *infra*), the State of Idaho failed to adopt an antidegradation implementation plan, as EPA “recommend[ed].”

38. During this same timeframe – i.e., 1996-2005 – EPA did not separately promulgate an antidegradation policy and antidegradation implementation plan.

39. In 2005, the DEQ commenced its most recent triennial review of state water quality standards. This 2005 triennial review was the latest in a series of modifications undertaken in 1993, 1995, 1997, and 2002.

40. In preparation for its 2005 triennial review, DEQ published a list of potential topics for review, which included adoption of a modified statewide antidegradation policy and implementation plan.

41. ICL and others submitted comments requesting that DEQ adopt a new antidegradation policy and implementation policy.

42. DEQ rejected EPA’s warning (and ICL’s requests) to adopt an antidegradation implementation plan, and DEQ abandoned any effort to bring its water quality standards into compliance with the Clean Water Act by adopting an antidegradation implementation plan.

43. DEQ did, however, modify its water quality standards during this triennial review, resulting in four substantive docket modifications, including:

- A. Docket No. 58-0102-0501: Aquatic life designated use for Soda Creek; Definitions of Zone of Initial Dilution, and of Ephemeral and Intermittent waters;
- B. Docket No. 58-0102-0502: Bacteria criteria consolidation and reorganization; rule format update;
- C. Docket No. 58-0102-0503: Idaho specific Cd aquatic life criteria and update of human health toxics criteria;
- D. Docket No. 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.

44. In these dockets, the State of Idaho did not include a modified antidegradation policy, nor did these dockets identify any methods for implementing the State's antidegradation policy to the waters of Idaho.

45. DEQ submitted these modified water quality standards to EPA for approval.

46. To date, the State of Idaho has taken no action to identify any methods for implementing its antidegradation policy.

47. EPA approved DEQ's water quality standards on August 15, 2006 (Docket No. 58-0102-0501), June 4, 2007 (Docket No. 58-0102-0502) and May 22, 2008 (Docket No. 58-0102-0505).²

48. In approving these dockets, EPA did not discuss or analyze the lack of a state antidegradation implementation plan, did not exercise its discretion under the Clean Water Act and promulgate a new antidegradation implementation plan, and EPA did not provide any reasoned explanation or rational basis for its refusal to exercise its authority under the Clean Water Act to promulgate an antidegradation implementation policy.

FIRST CLAIM FOR RELIEF:

**Violation of the Clean Water Act, 33 U.S.C. §§ 303(c)(4)(A) & (B)
Failure to Promulgate an Antidegradation Implementation Plan**

49. Plaintiff realleges all preceding paragraphs.

50. The EPA's implementing regulations for the Clean Water Act require States to establish an antidegradation policy to protect waters with water quality that exceeds applicable standards established under section 303 of the CWA. 40 C.F.R. § 131.12(a)(1).

² The submission and approval of Idaho docket 58-0102-0503 – which is not at issue in this litigation – prompted ICL to file a 60-day notice letter under the Clean Water Act, which the parties promptly settled.

51. States are required to submit their antidegradation policies and implementation plans to EPA for review and approval. 33 U.S.C. § 1313(c)(2)(B); 40 C.F.R. § 131.20(c).

52. EPA has a non-discretionary duty to promulgate revised or new water quality standards – including an anti-degradation policy and implementation plan – if (1) the state has submitted a revised or new standard to EPA, (2) EPA has rejected those standards, and (3) the state fails to revise the submissions. 33 U.S.C. § 1313(c)(4)(A).

53. EPA has the independent duty to promulgate revised or new water quality standards “in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements” of the Clean Water Act. 33 U.S.C. § 1313(c)(4)(B).

54. As part of its 1994 water quality standard submissions, DEQ submitted a modified antidegradation policy – though this proposed policy lacked an antidegradation implementation plan.

55. In July 1996, EPA determined that some of DEQ’s submissions were inconsistent with the Clean Water Act, including DEQ’s antidegradation policy for want of an implementation plan and other reasons. EPA further determined that an antidegradation implementation plan was necessary to comply with the requirements of the Clean Water Act; EPA recommended that DEQ revise its antidegradation policy to include an implementation plan. For these reasons, *inter alia*, EPA rejected, in part, DEQ’s revised water quality standards.

56. DEQ did not subsequently adopt an antidegradation implementation plan and submit it to EPA for approval.

57. EPA has not proposed and published new or revised regulations setting forth an antidegradation policy, including an implementation plan; nor has EPA promulgated any revised or new antidegradation policy, including an implementation plan.

58. EPA is in violation of the Clean Water Act because it has failed to exercise its nondiscretionary duty in violation of 33 U.S.C. § 1313(c)(4)(A), and has separately violated the Clean Water Act by refusing to exercise its duty under 33 U.S.C. § 1313(c)(4)(B).

WHEREFORE, Plaintiff prays for relief as set forth below.

SECOND CLAIM FOR RELIEF:
Violation of the APA, 5 U.S.C. § 706
Failure to Exercise Duty Under CWA § 303(c)(4)(B).

59. Plaintiff realleges all preceding paragraphs.

60. On July 7, 2006, DEQ submitted revised water quality standards (Docket No. 58-0102-0501) to EPA for its approval.

61. On August 15, 2008, EPA approved these revised water quality standards.

62. On July 7, 2006, DEQ submitted revised water quality standards (Docket No. 58-0102-0502) to EPA for its approval.

63. On June 4, 2007, EPA approved these revised water quality standards.

64. On May 13, 2008, DEQ submitted revised water quality standards (Docket No. 58-0102-0505) to EPA for its approval.

65. On May 22, 2008, EPA approved these revised water quality standards.

66. None of these dockets included a new or revised antidegradation policy, or an antidegradation implementation plan.

67. In approving these new dockets, EPA did not discuss or analyze the lack of a state antidegradation implementation plan; it did not exercise its discretion under 33 U.S.C. § 1313(c)(4)(B) to promulgate a new antidegradation implementation plan as required under the Clean Water Act; nor did EPA provide any reasoned explanation or rational basis for its refusal

to exercise its authority under the Clean Water Act to promulgate an antidegradation implementation policy.

68. EPA's failure to provide a reasoned explanation for its refusal to promulgate an antidegradation implementation policy during its approval of Docket Nos. 58-0102-0501, -0502, and -0505 is arbitrary, capricious, and contrary to the Clean Water Act. *See, e.g., Northwest Environmental Advocates v. U.S. EPA*, 268 F.Supp.2d 1255, 1264 (D. Or. 2003).

WHEREFORE, Plaintiff prays for relief as set forth below.

PRAYER FOR RELIEF

Plaintiff respectfully requests that the Court grant the following relief:

A. Order, declare, and adjudge that EPA violated the Clean Water Act, 33 U.S.C. § 1313(c)(4)(A) and/or 33 U.S.C. § 1313(c)(4)(B) by refusing to promulgate a revised or new antidegradation policy, including an antidegradation implementation plan, for Idaho;

B. Order, declare and adjudge that EPA acted arbitrarily and capriciously and not otherwise in accordance with the Clean Water Act within the meaning of 5 U.S.C. § 706(2)(A) when EPA approved Docket Nos. 58-0102-0501, -0502, and -0505 without any reasoned explanation or rational basis for its refusal to exercise its authority under the 33 U.S.C. § 1313(c)(4)(B) to promulgate an antidegradation implementation policy.

C. Enter injunctive relief requiring EPA to promulgate as expeditiously as practicable an antidegradation implementation plan for all of Idaho's waters in compliance with 33 U.S.C. 1313(d)(4)(B) and 40 C.F.R. §131.12(a);

D. Enter such other temporary, preliminary and/or permanent injunctive relief as may be prayed for hereafter by Plaintiff;

E. Award Plaintiff its reasonable costs, litigation expenses, and attorney's fees associated with this litigation pursuant to the Clean Water Act, 33 U.S.C. § 1365; the Equal Access to Justice Act, 28 U.S.C. § 2412, and/or all other applicable authorities; and

F. Grant such further relief as the Court deems just and proper in order to remedy Defendants' violations of the Clean Water Act and APA.

Dated this 19th day of April, 2010

Respectfully submitted,

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