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 Hearing Officer

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

IN THE MATTER OF SECTION 401 WATER)	
QUALITY CERTIFICATION OF SAND CREEK)	
BYWAY PROJECT)	
_____)	
ASSOCIATION OF CONCERNED)	
SANDPOINT BUSINESSES,)	
Petitioner,)	Docket No. 0102-07-01
)	
v.)	
)	
IDAHO DEPARTMENT OF)	
ENVIRONMENTAL QUALITY,)	
Respondent,)	PRELIMINARY
)	ORDER
IDAHO TRANSPORTATION DEPARTMENT)	
Intervenor,)	
_____)	

A hearing was held June 3-4, 2008 to consider Petitioner's (hereinafter identified as ACSB) request for review of the Idaho Department of Environmental Quality (DEQ) Section 401 Water Quality Certification of the Sand Creek Byway project.

At the close of ACSB's case, Intervenor Idaho Transportation Department (ITD) moved for a directed ruling. DEQ joined in that motion. Idaho Rules of Administrative Procedure 58.01.23.213 allow the use of any motion allowed by the Idaho Rules of Civil

Procedure. IRCP 50(a) provides for a motion for a directed ruling at the close of the opponent's evidence. Following argument on the motion, and in consideration of the evidence entered by ACSB and the files and records in this matter, the motion was granted.

1. Procedural Background

ACSB filed this contested case proceeding to challenge a water quality certification issued by DEQ on December 22, 2006. This certification was issued in accordance with Section 401 of the Clean Water Act to meet requirements of a Section 404 dredge and fill permit to be obtained from the Army Corps of Engineers. ITD had applied for the 404 permit as part of its Sand Creek Byway project. Plans for that project include dredging and filling portions of Sand Creek in Sandpoint, Idaho.

ACSB asserted in its petition and amended petition that the certification was invalid because it was issued for fewer acres of fill than was actually presented in ITD's plans, the purpose of the fills was misrepresented, Sand Creek was mischaracterized as a backwater of Pend Oreille Lake, and DEQ relied on opinions and conclusions of ITD's experts rather than performing their own analysis. Upon motion of DEQ, joined by ITD, ACSB's request to remand the certification to EPA for review was dismissed earlier in the proceedings.

ACSB also alleged, in documents filed after the amended petition and during the hearing, that ITD incorrectly identified the owner of the affected lands as the Idaho Department of Lands and that the information presented to the public was incorrect and misleading so that the public did not receive adequate notice about the project.

2. Findings of Fact

A motion for a directed ruling presents to the presiding officer a pure question of law, so findings of facts are not necessary. Gmeimer v. Yacte 100 Idaho 1, 4 (1979).

3. Conclusions of Law

An applicant for a permit to discharge materials into navigable waters and into wetlands is required to provide a certification from the state that the discharge will comply with that state's water quality standards. 33 U.S.C. § 1341(a)(1). DEQ issued a 401 water quality permit for the Sand Creek Byway that included 25 conditions. *See Exhibit ACSB-6*. By that certification letter, Gwen Fransen, the DEQ Regional Administrator, certified to the Corps of Engineers that:

If construction is completed in accordance with the described work plan and above conditions, DEQ certifies under Section 401 that this construction will comply with the applicable requirements of Sections 301, 302, 303, 306 and 307 of the Clean Water Act, as amended, and will not violate Idaho Water Quality Standards.

Exhibit ACSB-6, *underscore in original*. This certification was "to discharge fill material into 5.53 acres of open water and wetlands adjacent to Sand Creek in a backwater area of Pend Oreille Lake." Exhibit ACSB-6. The final 404 permit allows fill material to be discharged into 5.2 acres. Exhibit DEQ-19.

Pointing to various documents and plans issued by ITD and the Corps of Engineers before the application for the permit, during the permitting process, and in the final 401 certification letter and the 404 permit, ACSB alleges that the anticipated amount of fill areas is actually more than the certification letter allows. ACSB contends that the figures mislead the public into thinking that the project will have less impact than will actually be the case.

ACSB members were not the only ones who thought the figures were confusing. June Bergquist, the DEQ water quality compliance officer who completed the water certification work, testified that the figures were confusing and that the agencies involved in the project had several meetings to reconcile the figures so that they knew they had a common understanding of what was involved in ITD's proposed project. The parties stipulated at the hearing that the figure of 11.05 total acres as described in Table 1, the Corps of Engineers Permit Evaluation and Decision Document (Exhibit ACSB-15 amended) is an accurate description of the total fill areas. However, the actual 404 permit was issued for 5.2 acres of fill in wetlands. The remaining portion of the 11.05 acres is fill in open water. The Corps apparently did not issue a permit for that fill.

Ms. Bergquist also testified that what was described at the hearing as the "project footprint" or project plan has been the same since DEQ received notice of ITD's application for the 404 permit and the request for certification from the Corps of Engineers and remains the same in the final 404 permit, regardless of the various ways the involved agencies have characterized the amount of dredging and filling that will occur. (*See also, Exhibit DEQ-32, deposition of Pierre Bordenave, p. 90*)

Although ACSB has shown that it is apparent that the different agencies classified the area involved in different ways, making the total amount of acreages and fills vary in different documents and plans, ACSB has not shown how those varying figures affect the water quality certification. A water quality certification is a statement that there is a "reasonable assurance" that the activity will not violate applicable water standards. 40 C.F.R. 121.2(a)(3). The purpose of a water quality certification is not to verify what the proposed activity is and how many acres of wetland or open water is to be filled or

dredged; the purpose of the certification is to determine if the activity will affect water quality, and if so, what conditions can be imposed to prevent possible degradation of the water quality. Id. There is no evidence in the record that shows that 11.05 acres of fill will have any different effect on the water quality than 5.53 acres of fill. There is evidence in the record that DEQ confirmed with ITD, the Corps of Engineers, and the Idaho Department Lands the scope of the project and dredging and filling proposed to occur and based its certification on the evaluation of the information received from the agencies.

The record is also devoid of any evidence as to how the characterization of Sand Creek as a backwater of Pend Oreille Lake affects water quality.

ACSB also alleges that DEQ relied on opinions and conclusions of ITD's experts rather than performing their own analysis. The regulations allow and expect DEQ to do so. See 40 C.F.R. 121.2(a)(2).

ACSB's allegation that the owner of the affected land was incorrectly identified in ITD's application for the 404 permit concerns the actions of ITD, over which I have no jurisdiction.

Finally, ACSB alleges that information presented to the public about ITD's project was incorrect and misleading so the public did not receive adequate notice of the project. Exhibit DEQ-2 shows that the Corps of Engineers issued the Public Notice of Permit Application and Public Hearing and set a due date for written comments and a public hearing date. That notice also served as public notice that DEQ was evaluating whether the project would violate water quality standards. Exhibit DEQ-2. Exhibit DEQ-7 shows that DEQ issued a draft preliminary certification so that public comments

on the certification could be received. DEQ-10 shows that the public received notice of a 30-day comment period on the draft preliminary certification. The final 401 certification includes, as Attachment 2, DEQ's response to comments received during that 30-day comment period. Exhibit ACSB-6.

I have no jurisdiction over the public notice activities of the Corps of Engineers or ITD. The record reflects that DEQ received, and responded to, comments about the Preliminary Draft 401 certification. ACSB did not present any evidence that DEQ violated any public notice requirements.

4. Preliminary Order

A directed verdict is proper "only where the evidence is so clear that all reasonable minds would reach only one conclusion: that the moving party should prevail." Powers v. American Honda Motor 139 Idaho 333, 335 (2003). It is clear that ACSB's allegations express dissatisfaction with the water quality certification process for ITD's Sand Creek byway project, but it is also clear that ACSB presented no evidence that the Sand Creek Byway project will not meet the Idaho Water Quality standards. As petitioner, ACSB has the burden of proving by a preponderance of the evidence that DEQ wrongly decided that the Sand Creek Byway project will not affect water quality. IDAPA 58.01.23.102. ACSB failed to carry their burden of proof. Their complaints about the identification of the owner of the affected landowner and about notice the public received are outside my jurisdiction as a presiding officer for the Board of Environmental Quality.

FOR THESE REASONS, ITD's motion for a directed ruling was granted at the close of ACSB's case on June 4, 2008.

Pursuant to Idaho Code § 67-5245 and IDAPA 58.01.23.730:

- a. This is a preliminary order of the presiding officer. It can and will become final without further action of the Board pursuant to Idaho Code § 67-5245 unless any party appeals to the Board;
- b. Within fourteen (14) days after the service date of this preliminary order, any party may appeal to the Board by filing with the hearing coordinator a petition for review of the preliminary order or exceptions to any part of the preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Board. Otherwise, this preliminary order will become a final order of the Board.
- c. If any party appeals or takes exceptions to this preliminary order, opposing parties shall have twenty-one (21) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the hearing coordinator.
- d. If the Board grants a petition to review 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 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 by the parties or for good cause shown. The Board may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.
- e. 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 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.
- f. This appeal must be filed within twenty-eight (28) days of the preliminary order becoming final. See Section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

Pursuant to IDAPA 58.01.23.730.03, a petition for reconsideration is not allowed.

DATED this 10th day of June, 2008.


Jane Spencer, presiding officer

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IDAHO DEPARTMENT OF ENVIRONMENTAL)	
QUALITY,)	
Respondent,)	
)	
IDAHO TRANSPORTATION DEPARTMENT,)	
Intervenor.)	
_____)	

I hereby certify that on this 10th day of June 2008, a true and correct copy of the **Preliminary**

Order was served on the following:

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