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ADVOCATES for the West
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OFFICE OF THE EXECUTIVE SECRETARIAT

December 8, 2014

Via Certified Mail, Return Receipt Requested

Gina McCarthy
Administrator
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dennis McLerran
Regional Administrator
U.S. EPA Region 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

Re: Notice of Intent to Sue EPA Under Clean Water Act for Approving Idaho's Antidegradation Rule

Dear Administrator McCarthy & Regional Administrator McLerran:

I am writing on behalf of my client, the Idaho Conservation League (ICL), to provide this notice of intent to sue for violations of the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (CWA), and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (APA). Idaho's Antidegradation Rule—as promulgated by the Idaho Department of Environmental Quality (DEQ) and approved by the U.S. Environmental Protection Agency (EPA) —violates the CWA by permitting discharges into "high quality" Tier II waters absent a comprehensive socioeconomic analysis and determination required under the CWA. Idaho's Antidegradation Rule circumvents this obligation for all discharges DEQ deems to be "short-term" or "temporary." As set forth in further detail below, EPA's approval of Idaho's Antidegradation Rule is unlawful.

Unless EPA takes the steps necessary to remedy these violations, ICL intends to file suit against you in your professional capacity and the EPA in U.S. District Court under the citizen suit provision of the CWA, 33 U.S.C. § 1365(a)(2), and under the APA, immediately following the expiration of the required 60-day notice period, seeking injunctive and declaratory relief as well as attorney and expert fees.

PERSON GIVING NOTICE

The full name, address, and telephone number of the party providing notice is:

Idaho Conservation League
P.O. Box 844
Boise, ID 83701
208.345.6933

REPRESENTING ATTORNEY

The attorney representing ICL in this notice is:

Bryan Hurlbutt
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ICL'S COMMITMENT TO WATER QUALITY IN IDAHO

ICL is a non-profit conservation organization incorporated in Idaho with its main office in Boise. ICL's mission is to protect and restore Idaho's clean water, wild lands, and wildlife. ICL and its approximately 20,000 supporters are dedicated to protecting and conserving Idaho's natural resources, including water resources. ICL, as an organization and on behalf of its supporters, is concerned with protecting and improving surface water quality in Idaho. ICL and its supporters are active in public education, administration, and legislation of conservation issues in Idaho, including water quality.

ICL and its staff and supporters use and enjoy the waters of the State of Idaho for health, recreational, scientific, and aesthetic purposes. ICL and its staff and supporters derive health, recreation, scientific, and aesthetic benefits from drinking, fishing, boating, study, contemplation, photography, and other activities in and around the waters of the State. These interests are directly affected by EPA's approval of Idaho's Antidegradation Rule. The interests of ICL and its staff and supporters have been, are being, and will continue to be irreparably injured by EPA's failure to fulfill its CWA responsibilities.

BACKGROUND

The Clean Water Act and EPA's Duty to Review of Water Quality Standards

In 1972, Congress passed the CWA "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). To meet these goals, Section 303(c) of the CWA 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). 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) and (d)(4)(B); 40 C.F.R. Part 131, Subpart B. CWA Section 303(c) directs each state to review water quality standards and, when appropriate, modify and adopt standards. 33 U.S.C. § 1313(c)(1).

When a state revises or adopts a new standard, the state must submit the revised or new standard to the EPA Administrator for review and approval or disapproval under the minimum standards set by the CWA. 33 U.S.C. § 1313(c)(2)(A). If EPA approves the state's new or revised water quality standard, EPA must so notify the state within 60 days of submission. 33 U.S.C. § 1313(c)(3). If EPA disapproves the standard, EPA must so notify the state within 90 days and must specify the required changes. *Id.* If the state fails to adopt those changes within an additional 90-day period, EPA "shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard" and "shall promulgate such standard". 33 U.S.C. §§ 1313(c)(3) and (4)(A).

EPA's Minimum Requirements for State Antidegradation Policies

EPA regulations require states to develop and adopt statewide antidegradation policies and implementation methods that meet certain "minimum" standards. 40 C.F.R. § 131.12(a). A state's antidegradation policy must offer three levels of protections to water bodies depending largely on the existing water quality in that particular water body. The highest level of protection—Tier III—is for waters of "exceptional" significance and requires *existing water quality* to be maintained and protected. *See* 40 C.F.R. § 131.12(a)(3). The minimum level of protection—Tier I—is granted to all water bodies and requires that all *existing uses and the water quality necessary to protect those uses* be maintained. *Id.* at § 131.12(a)(1).

The middle level of protection—Tier II—is required when "the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water." 40 C.F.R. § 131.12(a)(2). For Tier II waters, *existing*

water quality "shall be maintained and protected unless the State finds . . . that allowing lower water quality is necessary to accommodate important economic or social development." *Id.* If a State finds that allowing lower water quality is necessary, it must also assure water quality will be adequate to protect existing uses fully and "assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control." *Id.*

EPA Approval of Idaho's Antidegradation Rule

In 2011, DEQ submitted Idaho docket 58-0102-1001 (hereinafter the "Antidegradation Rule" or "Rule") to EPA. The Antidegradation Rule included new and revised water quality standards, implementation methods for Idaho's antidegradation policy (something Idaho did not previously have), and revisions to Idaho's existing antidegradation policy. On August 18, 2011, EPA took action and approved the Rule.

While Idaho's Antidegradation Rule requires Tier II antidegradation review for some activities and discharges to high quality waters, the Rule exempts other discharges and activities from undergoing Tier II review. For example, the Rule explicitly exempts from Tier II review activities and discharges that DEQ determines cause only a 10 percent or less decrease in assimilative capacity in the receiving water. Idaho Administrative Procedure Act (IDAPA) 58.01.02.052.08.a. EPA specifically considered and approved this "insignificant discharge" exemption in its August 18, 2011 approval package.

Similarly, Idaho's Antidegradation Rule explicitly exempts "restoration projects designed to trend toward natural characteristics and associated uses to a water body where those characteristics and uses have been lost or diminished." IDAPA 58.01.02.052.02. EPA specifically reviewed and approved this "restoration project" exemption from Tier II review. EPA explained in its approval of this provision that—for restoration projects which are designed to ultimately result in a water quality improvement—short-term or temporary lowering of water quality is allowed without Tier II review.

Additionally, the Antidegradation Rule allows DEQ to exempt from Tier II review <u>any</u> discharges and activities DEQ deems to be short term or temporary—not just restoration projects. ICL filed a contested case in Idaho challenging DEQ's use of this "short-term exemption" when DEQ issued certain 401 certifications for certain U.S. Army Corps Nationwide Permits. ICL argued that Idaho's Antidegradation Rule contains no such short-term exemption. However, the hearing officer ruled in favor of DEQ, finding that the Rule is written broadly enough to allow for this short-term exemption and that EPA has approved the Rule.

As a result, under Idaho's EPA-approved Antidegradation Rule, DEQ regularly exempts new, non-restoration project activities and discharges from Tier II antidegradation review when DEQ deems them to be short-term or temporary.

EPA'S APPROVAL OF IDAHO'S ANTIDEGRADATION POLICY VIOLATES THE CLEAN WATER ACT

EPA's approval of Idaho's Antidegradation Rule is unlawful because EPA failed to satisfy its burden to show that it evaluated Idaho's "short-term exemption" and that it reasonably concluded this short-term exemption would result in only *de minimus* lowering of water quality. Nothing in the CWA or EPA's regulations exempt short-term or temporary activities or discharges from the Tier II antidegradation review requirement. However, courts recognize an administrative law principle that allows agencies to create exceptions to a statute or rule for *de minimus* matters. *See Ober v. Whitman*, 243 F.3d 1190, 1193–95 (9th Cir. 2001) (finding that EPA may exempt "*de minimus*" sources of pollution from Clean Air Act pollution controls); *Ala. Power Co. v. Costle*, 636 F.2d 323, 360 (D.C. Cir. 1979) (it is "permissible as an exercise of agency power, inherent in most statutory schemes, to overlook circumstances that in context may fairly be considered *de minimus*"). And courts have recognized that EPA can approve exemptions to Tier II antidegradation review for *de minimus* discharges; however, the "[d]etermination of when matters are truly *de minimus* naturally will turn on the assessment of particular circumstances, and the agency will bear the burden of making the required showing." *Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466, 491–92 (6th Cir. 2008) (quoting *Ala. Power*, 636 F.2d at 360).

Courts have found EPA's approval of *de minimus* exemptions to Tier II antidegradation review to be arbitrary and capricious where EPA failed to meet its burden to show that it assessed the particular circumstances and reasonably concluded that that the matter was truly *de minimus*. *See, e.g.*, *Kentucky Waterways Alliance*, 540 F.3d at 492–93 (even though EPA provided detailed technical analysis on the significance of each of five categories exempt from Tier II review under Kentucky's regulations, EPA failed to assess the "cumulative effects on the State's antidegradation compliance" and failed to present estimates as to how much assimilative capacity would be lost for each exemption); *Ohio Valley Envtl. Coal. v. Horinko*, 279 F.Supp.2d 732, 770–71 (S.D.W. Va. 2003) (EPA cited no evidence to support its finding that a 20 percent loss in assimilative capacity under Ohio's *de minimus* exemption can be considered insignificant). EPA approval of an antidegradation rule is also arbitrary and capricious if the rule permits the state to subsequently create an exemption without EPA review. *See id.* at 763–64 (invalidating EPA approval of state rule which allowed state to later exempt certain activities from antidegradation review without further EPA approval because this circumvented the CWA requirement for EPA to review and approve or disapprove water quality standards).

According to DEQ, and as confirmed by a state hearing officer, Idaho's Antidegradation Rule allows DEQ to exempt from Tier II review any short-term and temporary discharges and activities, not just those associated with restoration projects. But in its approval package for the Rule, EPA never evaluated this short-term exemption and never made a finding that the exemption was truly *de minimus*. Such an assessment would likely require EPA to estimate the number, location, and duration of short-term and temporary activities and discharges to Idaho's Tier II waters. EPA would also have

to evaluate both the individual and cumulative impact each activity or discharge would have on water quality in Idaho's Tier II waters for different pollutants. But because EPA never evaluated the exemption, EPA's approval of Idaho's Antidegradation Rule is arbitrary and capricious, an abuse of discretion, and not in accordance with law, and violates the APA and CWA.

ICL INTENDS TO FILE SUIT IN FEDERAL COURT; POTENTIAL FOR SETTLEMENT

EPA is in violation of the CWA and the APA. ICL anticipates filing suit 60 days from the date of this notice letter in United States District Court under the citizen suit provision of the CWA, 33 U.S.C. § 1365(a)(2), and the APA, requesting injunctive and declaratory relief as well as attorney and expert fees, unless EPA takes appropriate action to remedy the violations. If EPA has any facts, documents, or other information which you believe might bear upon the alleged violations set forth in this letter, please provide those to us now in order to avoid unnecessary litigation. ICL sends this notice letter, in part, to discuss potential settlement. Please contact Justin Hayes at Idaho Conservation League or Bryan Hurlbutt at *Advocates for the West* to discuss settlement.

Sincerely,

Bryan Hurlbutt
Advocates for the West

Attorney for Idaho Conservation League

cc:

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