

Response to IPC Request Pursuant to IDAPA 58.01.02.070.07.

This document sets out the Department of Environmental Quality's (DEQ) proposed decision in response to Idaho Power Company's (IPC) request dated November 18, 2015 for DEQ to take action pursuant to IDAPA 58.01.02.070.07 for purposes of IPC's application for certification of the relicensing of IPC's Hells Canyon Complex hydroelectric project under Section 401 of the Clean Water Act (CWA). Specifically, IPC has requested DEQ to "waive or raise the salmonid spawning temperature standard by 0.3°C above the 13°C temperature standard for that portion of the Snake River below Hells Canyon Dam." IPC also requested DEQ determine that the 0.3°C increase is consistent with the State of Oregon's 0.3°C Human Use Allowance, thereby setting a common standard for purposes of the 401 certification decisions that must be made by DEQ and Oregon DEQ.

Background

1. Applicable Temperature Criteria

Since 2003, the Idaho Water Quality Standards (WQS) have included site specific water temperature criteria for the Snake River from Hells Canyon Dam to the confluence with the Salmon River. The criteria adopted in 2003 require a maximum weekly maximum temperature of 13°C to protect fall chinook spawning and incubation from October 23 through April 15.

In 2012, DEQ submitted to the Environmental Protection Agency (EPA) new site specific criteria for temperature for this stretch of the Snake River intended to replace the criteria adopted in 2003. In order to be effective for Clean Water Act (CWA) purposes, however, WQS must be approved by EPA. CWA Section 303(c)(3); 40 CFR 131.21. EPA has yet to make a decision with respect to the criteria submitted in 2012. Therefore, the previous criteria—maximum weekly maximum temperature of 13°C from October 23 through April 15-- continues to be the applicable criteria and the standard effective for CWA purposes. (IDAPA 58.01.02.286 explains that until EPA approves of the criteria submitted to EPA in 2012, the previous criterion is effective for CWA purposes and continue to apply.)

2. IPC's Application for a 401 Certification

Under section 401 of the CWA, a federal license or permit to conduct an activity that may result in a discharge into navigable waters can not be issued unless the State in which the discharge occurs certifies that the discharge will comply with certain sections of the CWA and State Water Quality Standards, or unless the State waives its right to so certify. IPC has applied for a new federal license from the Federal Energy Regulatory Commission for the continued operation of

the Hells Canyon Complex (HCC) hydroelectric project. On July 29, 2016, IPC submitted an application to DEQ for certification of the new license pursuant to section 401 of the CWA. Because Idaho shares the Snake River in the Hells Canyon reach with Oregon, IPC has also submitted an identical application to Oregon DEQ.

In order to provide certification, the Idaho and Oregon DEQs must determine that there is reasonable assurance that the operation of the HCC project will comply with applicable WQS, including the salmonid spawning temperature criteria that apply below the Hells Canyon Dam to protect fall chinook. IPC has included in its application for certification measures to reduce temperatures in the Snake River in order to achieve compliance with the applicable temperature WQS.

3. Snake River-Hells Canyon TMDL

Idaho shares the Snake River in the Hell's Canyon reach with Oregon. Thus, both Idaho and Oregon WQS apply. In 2004, the Idaho and Oregon DEQs developed the Snake River-Hells Canyon Total Maximum Daily Load (SR-HC TMDL). Based on Idaho and Oregon WQS, the SR-HC TMDL sets the salmonid spawning temperature target for below Hell's Canyon dam as a maximum weekly maximum temperature of 13°C if and when the site potential (temperature at river mile 345 upstream of the HCC project) is less than a maximum weekly maximum temperature of 13°C. If and when the site potential is greater than a maximum weekly maximum of 13°C, the target is no more than a 0.14°C increase from anthropogenic sources. SR-HC TMDL at page 89. In the TMDL, the DEQs determined that IPC's Hells Canyon Complex was solely responsible for the Snake River exceeding the salmonid spawning criteria, and thus provided an allocation to IPC described as a change in water temperature such that the temperature of water released from Hells Canyon Dam is less than or equal to the water temperature at RM 345 or the maximum weekly maximum temperature of 13°C. SR-HC TMDL at page 469.

The allocation provided IPC in the SR-HC TMDL is critical to determining IPC's compliance with temperature WQS, and therefore, critical to the 401 certification for the relicensing of the HCC project. IPC's application provides measures to meet the allocation set forth in the SR-HC TMDL.

4. IDAPA 58.01.02.070.07.

IPC's request is based on IDAPA 58.01.02.070.07. This provision reads as follows:

"In the application of temperature criteria, the Director may, at his discretion, waive or raise the temperature criteria as they pertain to a specific water body. Any such determination shall be made consistent with 40 CFR 131.11 and shall be based on a finding that the designated aquatic life use is not an existing use in such water body or would be fully supported at a higher

temperature criteria. For any determination, the Director shall, prior to making a determination, provide for public notice and comment on the proposed determination. For any such proposed determination, the Director shall prepare and make available to the public a technical support document addressing the proposed modification.”

Proposed Decision

Based upon the material submitted by IPC with its request, and other relevant information detailed herein, DEQ has tentatively determined to grant IPC’s request. This means that, for purposes of applying the salmonid spawning temperature criteria set forth in IDAPA 58.01.02.286 to IPC’s HCC project and determining IPC’s responsibility for reducing temperatures as proposed in IPC’s application for a 401 certification, DEQ will allow a 0.3°C increase over the maximum weekly maximum temperature of 13°C for the initial portion of the fall spawning period of October 23 through November 26.

Technical Support for the Decision

1. Standard under IDAPA 58.01.02.070.07

In order to raise the applicable temperature criteria under section 070.07 of the WQS, DEQ must find (1) that the decision is consistent with 40 CFR 131.11, which means raising the criteria will protect the designated use and is based on sound scientific rationale, and (2) that the designated aquatic life use is not an existing use or that the aquatic life use would be fully supported at a higher temperature criteria. IPC is not claiming aquatic life is not an existing use, but rather that salmonid spawning would be fully supported at the requested higher temperature—0.3° over 13°C.

DEQ believes that raising the temperature standard by 0.3°C for purposes of applying the salmonid spawning temperature criteria to IPC’s HCC project and determining IPC’s responsibility for reducing temperatures as proposed in IPC’s application for a 401 certification, will fully protect salmonid spawning and is based on sound scientific rationale. The basis for decision is set out below.

2. DEQ’s Criteria for Below the Hells Canyon Dam Adopted in 2012 Demonstrates That Salmonid Spawning is Fully Protected at Temperatures Higher Than 13°C

In 2012, DEQ adopted and submitted to EPA for approval new site specific temperature criteria for fall chinook spawning and incubation in the Snake River from the Hells Canyon Dam to the confluence with the Salmon River that is a weekly maximum temperature of 14.5°C from October 29 to November 6, and 13°C from November 7 through April 15. Laboratory and field studies support the rule and establish that water temperatures higher than 13°C, up to 14.5°C,

are fully protective of fall Chinook spawning below Hells Canyon Dam. NOAA Fisheries also commented during the rulemaking that the 14.5°C was an appropriate spawning criteria. (August 25, 2011 Comments of the National Marine Fisheries Service in Support of Site Specific Water Temperature Criteria For the Snake River Downstream from Hells Canyon Dam, at page 7. This document can be found at DEQ's rulemaking website cited below).

The information that supports the 14.5°C spawning criteria, that shows that 14.5°C fully supports Chinook spawning, also supports a much lower temperature of 13.3°C and shows temperatures of 13.3°C will fully support spawning below Hells Canyon Dam. The 14.5°C criteria is supported by a sound scientific rationale—laboratory, field tests and other scientific studies and analysis. (See DEQ rulemaking record at <http://www.deq.idaho.gov/laws-rules-etc/deq-rulemakings/docket-no-58-0102-1102-final-rule/>). The same information provides the scientific basis for allowing a 13.3°C temperature in connection with IPC's 401 certification.

3. An Increase of 0.3°C is Insignificant and Will Fully Support Salmonid Spawning

As noted above, the SR-HC TMDL allows for a 0.14°C increase from anthropogenic sources. This was based upon the Oregon WQS that, at the time, defined no measurable increase in temperature as 0.14°C. Oregon has since modified its WQS to include a "Human Use Allowance" that allows a cumulative increase from anthropogenic sources of 0.3°C above the applicable temperature criteria. OAR 340-041-0028(12)(b). The Oregon Human Use Allowance is based upon the determination that a cumulative increase of 0.3°C in temperature is insignificant and is still protective of designated uses.

The Oregon provision allows, after a TMDL or other cumulative effects analysis, a cumulative increase from point and nonpoint sources of 0.3°C above the applicable criteria. OAR 340-41-0028(12)(b)(B). When EPA approved this criteria, EPA explained that the increase is insignificant in the context of the scientific understanding of the data concerning water temperature and salmonids, and that the addition of 0.3°C will still protect designated uses, including salmon and steelhead spawning use. (March 2, 2004 Support Document for EPA's Action Reviewing New or Revised Water Quality Standards for the State of Oregon at pages 63-64). EPA's approval of this criteria was challenged and upheld by the US District Court in Northwest Env'tl. Advocates v. US EPA, 855 F. Supp.2d 1199, 1218 n.8 (D.OR 2012).

The Idaho WQS also include a provision that allows an increase in temperature from anthropogenic sources of 0.3°C. Like Oregon's Human Use Allowance, the allowed increase is based upon the belief that a 0.3°C increase in temperature is insignificant and roughly reflects the accuracy of field temperature measurement and thus the ability to reliably detect change. IDAPA 58.01.02.401.01.c allows a 0.3°C increase from point sources when the natural background conditions in the receiving water exceed the applicable aquatic life criteria. DEQ

has interpreted this provision to be restricted to a cumulative increase from all point sources. (February 5, 2004 letter from DEQ to EPA attached as Attachment 1). EPA approved this standard for the same reasons it approved Oregon's human use allowance, i.e., the increase is insignificant given the scientific studies on thermal effects on aquatic species and the error bands associated with typical temperature monitors and the increase will support aquatic life uses. (Technical Justification for EPA's Approval of Idaho's Natural Background conditions, dated July 15, 2004 attached as Attachment 2).

The justification for the Idaho and Oregon WQS that allow a 0.3°C increase over applicable temperature criteria applies with respect to the IPC HCC project and shows that allowing the increase will still fully support fall chinook spawning. Moreover, as demonstrated by the EPA support documents discussed above, allowing such an increase is supported by sound science.

4. Granting IPC's Request is Consistent With the SR-HC TMDL

The SR-HC TMDL sets out the determination of Oregon and Idaho on the temperatures needed to support fall chinook spawning below the Hells Canyon Dam. The TMDL includes an allowance for a small anthropogenic increase over the applicable temperature criteria. Allowing the 0.3°C increase as requested by IPC is consistent with the SR-HC TMDL.

5. Granting IPC's Request Will Ensure a Consistent Temperature Target for the 401 Certifications.

IPC has proposed in its application for certification the use of 13.3 C and Oregon DEQ has determined that this complies with its WQS. IPC's request for DEQ to allow a 0.3°C increase would set a consistent temperature target for IPC and the two State certifications. The application of this 0.3°C increase is appropriate for purposes of IPC's 401 certification and determining the reductions necessary as outlined in the 401 certification, because IPC has been assigned the entire responsibility for the Snake River downstream of the dam failing to meet spawning criteria. Therefore, it is appropriate to allow the entire cumulative increase of 0.3°C to IPC.

Conclusion

DEQ proposes to grant IPC's request and, for purposes of applying the salmonid spawning temperature criteria to IPC's HCC project and determining IPC's responsibility for reducing temperatures as proposed in IPC's application for a 401 certification, allow a 0.3°C increase over 13°C for the a portion of the fall spawning period, from October 23 through November 26. It should be noted that this increase is specific to the HCC project and IPC's 401 certification, and has no application to any other source and is not a change in the criteria that otherwise applies to this stretch of the Snake River.