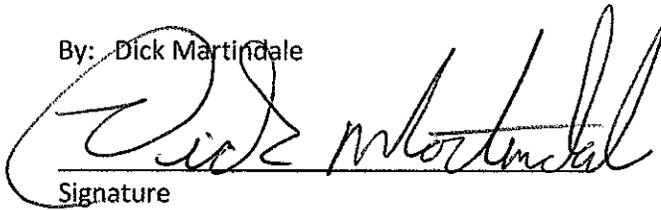


I hereby certify than on July 26, 2016, a true and correct copy of the foregoing Petition To Initiate A Contested Case was served on the following as indicated below:

Hearing Coordinator  
Department of Environmental Quality  
1410 N. Hilton  
Boise, ID 83706-1255

Delivered via USPS Priority Mail

By: Dick Martindale

  
Signature

7-26-16  
Date

RECEIVED

JUL 28 2016

DEQ Hearings Coordinator  
DOCKET NO. 0102-16-01



physical, or biological integrity of a water identified in paragraphs (o)(1)(i) through (iii) of this section. The term "in the region" means the watershed that drains to the nearest water identified in paragraphs (o)(1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (o)(1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (o)(3)(v)(A) through (l) of this section. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (o)(1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (o)(1) through (3) of this section.

For a legal reference you can refer to Philip M. Quatrochi, *Groundwater Jurisdiction Under the Clean Water Act: The Tributary Groundwater Dilemma*, 23 B.C. Envtl. Aff. L. Rev. 603 (1996)

Perhaps more importantly Section 401 of the Clean Water Act grants IDEQ the authority to review Section 404 permit applications within the scope of the State's rights and responsibilities. The following citations allow IDEQ to require a more comprehensive application process by the applicant.

#### IDAPA 58.01.02 Idaho Water Quality Standards

##### 001. TITLE AND SCOPE.

01. Title. These rules shall be cited as Rules of the Department of Environmental Quality, IDAPA 58.01.02, "Water Quality Standards."

02. Scope. These rules designate uses which are to be protected in and of the waters of the state and establish standards of water quality protective of those uses. Restrictions are placed on the discharge of wastewaters and on human activities which may adversely affect public health and water quality in the waters of the state. In addition, unique and outstanding waters of the state are recognized. These rules do not provide any legal basis for an additional permit system, nor can they be construed as granting to the Department any authority not identified in the Idaho Code.

##### 010. DEFINITIONS

08. Beneficial Use. Any of the various uses which may be made of the water of Idaho, including, but not limited to, domestic water supplies, industrial water supplies, agricultural water supplies, navigation,

*recreation in and on the water, wildlife habitat, and aesthetics. The beneficial use is dependent upon actual use, the ability of the water to support a non-existing use either now or in the future, and its likelihood of being used in a given manner. The use of water for the purpose of wastewater dilution or as a receiving water for a waste treatment facility effluent is not a beneficial use.*

*112. Waters and Waters Of The State. All the accumulations of water, surface and underground, natural and artificial, public and private, or parts thereof which are wholly or partially within, which flow through or border upon the state.*

*IDAPA 58.01.11, Rules of the Department of Environmental Quality, IDAPA 58.01.11, "Ground Water Quality Rule".*

*02. Scope. Under Section 39-120, Idaho Code, the Department of Environmental Quality is designated as the primary agency to coordinate and administer ground water quality protection programs for the state. This rule establishes minimum requirements for protection of ground water quality through standards and an aquifer categorization process. The requirements of this rule shall serve as a basis for the administration of programs which address ground water quality. This rule does not in and of itself create a permit program.*

The application seems to only address sediment as the contaminant of concern. As we have learned, nearly two miles of train containers, with one or more engines running at all times, is planned for the proposed siding. These containers and cars would be over and surrounded by the remaining wetlands, a perennial stream, and an intermittent stream. We also learned that the trains can and will carry any product that a client wishes to have transported by UPRR. Literally thousands of chemicals/contaminants could be listed but basic categories of products that leach off of trains to the ground, especially when sitting still, include:

1. Lubricant oils
2. Condenser fluids
3. Transportation of oil derivatives
4. Metal ores
5. Fertilizers
6. Multiple toxic chemicals
7. Herbicides
8. Polycyclic Aromatic Hydrocarbons
9. Polychlorobiphenyls

In addition, creosote can leach from the railroad ties. It is important to note that most surface and ground water contamination from trains is not due to a catastrophic event. Those events are reported quickly and met with a robust remediation response. What is more of a concern is the inevitable, slow, daily discharges at sidings that are not easily recognized or reported. See "Railway transportation as a serious source of organic and inorganic pollution: B. Wiłkomirski, B. Sudnik-Wójcikowska, H. Galera, M. Wierzbicka, and M. Malawska"

This proposal has been granted a Tier 1 and Tier 2 level of protection. Tier 1 "requires demonstration that existing uses and the level of water quality necessary to protect existing uses shall be maintained

and protected". Tier 2 "ensures that no lowering of water quality will be allowed unless deemed necessary to accommodate important economic or social development". In order to determine if beneficial uses or water quality will be impacted, existing background water quality will need to be established for surface and ground water. Due to the wide variety of products/chemicals that could be used during construction or that leak while trains are parked on the siding, a significant sampling plan needs to be developed and approved.

There are two residential subdivisions on the west *and downgradient* side of the proposed siding that will be impacted: Twin Bridges Subdivision and Queen Mountain subdivision for a total of 36 residential lots. The lots range in size from 1 acre to 2.5 acres. Property owners use private, individual wells for drinking water that are 300 to 500 feet from the proposed siding. Most of the well logs indicate ground water encountered between 35 and 45 feet. This shallow ground water table (that is influenced by the affected surface water) is the source of drinking water. How would this project, if approved, impact those wells and the public's health? How could impact even be determined without robust background data? What recourse would property owners have if contamination was detected?

Mention is made for UPRR to assure that the on-site sewage disposal systems used by the property owners are not impacted, though there is no indication on how that would or could be accomplished. This is a critical component of our residential infrastructure. Each septic tank and drainfield is strategically placed in order to comply with IDAPA 58.01.03 - Individual/Subsurface Sewage Disposal Rules. I know in my particular case that there are NO alternative sites. UPRR did a poor job of describing potential changes in the water table due to construction of a new, two-mile long railroad embankment. Increased saturation on my lot would make my septic system non-compliant with state rules, or worse, unusable. In turn, this would render our home (our primary residence) uninhabitable. The applicant cannot provide assurance that beneficial uses would not be severely impacted.

During the field visit with agencies and UPRR on April 26, 2016 property owners asked questions regarding delineation of the wetlands. We were told that the wetland area (size and locations) was determined by UPRR's consultant. This critical fact was confirmed in IDEQ's July 1, 2016 letter, which also stated the "functions and values of the 0.43 acre of wetlands proposed to be filled will be lost". There is a significant consequence to the estimate (0.43 acres) provided by UPRR: ***if the impacted wetland area is 0.5 acres or greater, an Individual Permit would be required.*** IDEQ has deferred acceptance of the wetland delineation to the ACOE which in turn simply accepted the applicant's estimate. Per IDEQ's legal authorities listed above, IDEQ should require an independent third party to conduct a delineation (using the 1987 Corps of Engineers Wetlands Delineation Manual and Regional Supplements) which would then be verified by the ACOE. According to a United States Environmental Protection Agency guidance document: *"The presence of water by ponding, flooding or soil saturation is not always a good indicator of wetlands. Except for wetlands flooded by ocean tides, the amount of water present in wetlands fluctuates as a result of rainfall patterns, snow melt, dry seasons and longer droughts. Some of the most well-known wetlands, such as the Everglades and Mississippi bottomland hardwood swamps, are often dry. In contrast, many upland areas are very wet during and shortly after wet weather. Such natural fluctuations must be considered when identifying areas subject to Federal wetlands jurisdiction. Similarly, the effects of upstream dams, drainage ditches, dikes, irrigation and other modifications must also be considered."*

As mentioned in the beginning of this petition, the concern is the very narrow and general scope of review conducted for the proposed project. IDEQ responded in its July 1, 2016 certification letter as follows:

9. Concern:

Idaho Conservation League (ICL) cites the Clean Water Act section 401(a)(1) that states, "Any applicant for a federal license or permit to conduct any activity including but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State...that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this Act." ICL believes DEQ has not satisfied these requirements in that DEQ disregarded operations of the facility in our draft certification.

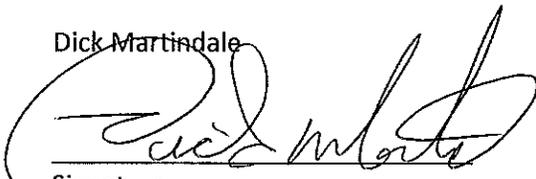
Response:

ICL is correct that section 401 authorizes States to impose conditions, not only related to ensuring the discharge complies with WQS, but also related to the permitted or licensed activity as a whole. The U.S. Supreme Court in PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700, 114 S.Ct. 1900 (1994) upheld conditions that were imposed to ensure that the operation of a hydroelectric project as a whole, not just the discharge associated with the project, would comply with Washington WQS. Unlike the PUD No.1 case, however, the Corp only permits the placement of the fill and not the operation of the railroad siding. Therefore, it is questionable whether under section 401 DEQ could include requirements relating to the operation of the siding. Assuming, however, that 401 provides such authority, DEQ believes that water quality issues relating to the operation of the siding will best be handled by the application of WQS sections, such as 800 (hazardous and deleterious material storage), 850 (hazardous material spills) and 851 (petroleum releases) that DEQ can apply outside the certification on a case by case basis in the event it is necessary.

IDEQ references this response four times in the letter. This statement certainly supports IDEQ's authority and ability to require the applicant to conduct a more thorough analysis prior to project approval. Simply reacting to contamination (which may show up years or decades later) would be tragic to the environment, and to the citizens in the established subdivisions. I respectfully ask that IDEQ utilize the powers and duties afforded to it by law and rule to protect all the beneficial uses that may be impacted by this project and require an Individual Permit.

Sincerely,

Dick Martindale



Signature

July 24, 2016

Date