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January 11, 2021

Via CERTIFIED MAIL – Return Receipt Requested

Managing Agent
Brownlee Dam
Idaho Power Company
P.O. Box 70
Boise, ID 83707

Managing Agent
Brownlee Dam
Idaho Power Company
1221 W. Idaho Street
Boise, ID 83702

**Re: NOTICE OF INTENT TO SUE IDAHO POWER COMPANY UNDER THE
CLEAN WATER ACT**

Dear Managing Agent:

This letter is to provide you with sixty days' notice of Snake River Waterkeeper's ("SRW") intent to file a citizen suit against Idaho Power Company ("Idaho Power") under section 505 of the Clean Water Act ("CWA"), 33 U.S.C. § 1365, for the violations described herein. The CWA prohibits any person from discharging any pollutant to waters of the United States except as authorized by a National Pollutant Discharge Elimination System ("NPDES") permit. Continuing to discharge pollutants without securing an NPDES permit constitutes an ongoing violation of the CWA.

Idaho Power has and continues to violate section 301(a) of the CWA, 33 U.S.C. § 1311(a), by discharging pollutants to waters of the United States and to the State of Idaho from the Brownlee Dam and from its associated structures and facilities (collectively "Dam").¹ Specifically, Idaho Power discharges oils, greases, other lubricants, and cooling water from the Dam without the authorization of an NPDES permit in violation of the CWA.

This notice of intent to sue is part of SRW's effort to protect people who rely on the Snake River and its tributaries throughout the Snake River Basin for uses including drinking water, food, and recreation. SRW's mission is "applying science and law to protect, restore, and sustain waters of the Snake River Basin." The organization's strategy for protecting the Snake River and its tributaries includes working with and within communities that depend on local waterways and enforcing laws that promote public health and safety while protecting trout, salmon, and other native fish and wildlife.

¹ The term "Dam," as used herein, includes the Brownlee Dam and all associated structures and facilities, including turbines, powerhouses, transformers, spillways, and cranes. The approximate location of the Dam is identified in Appendix 1.

I. Legal Background.

Idaho's rivers, and the use of rivers by people, fish, and wildlife, are protected by both federal and state law. In 1972, Congress passed the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA is the cornerstone of surface water quality protection in the United States. In the forty years since its passage, the CWA has dramatically increased the number of waterways that are once again safe for fishing and swimming. Despite the great progress in reducing water pollution, many of the Nation's waters still do not meet the water quality goals. In fact, the vast majority of rivers and streams in Idaho are not assessed for or fail to meet basic state water quality standards for pollutants such as toxics and temperature.² These standards are designed to protect designated uses, including aquatic life, fishing, swimming, and drinking water.

The NPDES permitting scheme is the primary means by which discharges of pollutants are controlled. At a minimum, NPDES permits must include technology-based effluent limitations, any more stringent limitations necessary to meet water quality standards, and monitoring and reporting requirements. *See* 33 U.S.C. §§ 1311, 1342, 1318. EPA formerly and now the state of Idaho issue permits for pollution discharges into the rivers and streams of Idaho. These include permits that regulate the discharge of toxic pollution, hot water, bacteria, and other pollutants. According to EPA, improvements to the quality of water in our rivers are directly linked to the implementation of the NPDES program and the associated control of pollutants discharged from both municipal and industrial point sources.³

II. The Heavy Toll of Pollution on the Snake River and Its Tributaries.

The Snake River and its tributaries make up one of the West's most scenic and productive aquatic ecosystems, flowing from the headwaters of Wyoming, across the full breadth of Idaho, and to its mouth near Washington's Tri-cities where it joins the Columbia River. This river system supports rich fishing traditions, provides water for communities and agriculture, recreation opportunities, and power for hydroelectric dams. The river system is also severely degraded by pollution. Toxic pollution threatens the health of people that eat local fish and jeopardizes the public's right to eat fish caught locally. Rising water temperatures also threaten the health of salmon and other aquatic life that rely on cool water for survival. The Columbia River, to which the Snake River is a tributary, faces these same threats.

Indeed, relevant units of the Snake River and Columbia River watersheds have a variety of designated beneficial uses, including cold water aquatic life, salmon spawning, primary contact recreation, domestic water supply, and more.⁴ And unfortunately, waterbodies

² *See* Idaho Dep't of Env'tl. Quality, Integrated Report, *available at* <https://www.deq.idaho.gov/water-quality/surface-water/monitoring-assessment/integrated-report.aspx>.

³ U.S. EPA, *Water Permitting 101* at 11, <http://www.epa.gov/npdes/pubs/101pape.pdf>.

downstream of the Brownlee Dam are listed as impaired and require or have total maximum daily loads (“TMDLs”) for temperature and toxic pollutants, including mercury, PCBs, DDE, dieldrin, dioxins, and toxaphene.⁵ Studies have confirmed the pollution crisis that exists on these critical waterbodies.⁶

Pollution discharges from Idaho Power’s Dam contribute to the pollution crisis on the Snake and Columbia River. According to the National Oceanic & Atmospheric Administration (“NOAA”):

Spilled oil can harm living things because its chemical constituents are poisonous. This can affect organisms both from internal exposure to oil through ingestion or inhalation and from external exposure through skin and eye irritation. Oil can also smother some small species of fish or invertebrates and coat feathers and fur, reducing birds’ and mammals’ ability to maintain their body temperatures.⁷

The impacts of oil pollution are sobering. Yet Idaho Power discharges oil and other pollution from the Dam without the NPDES permit authorization required by the CWA. In turn, Idaho Power fails to monitor and report pollution in a manner that enables the public to fully understand the extent and severity of the problem.

The Dam also discharges heat in the form of cooling water to a river system recognized by EPA as too warm to support designated uses, including salmon habitat. Salmon need cool water to survive. Hot water pollution from point sources, including the Dam, contributes to elevated water temperatures in the Snake and Columbia Rivers. Specifically, Idaho Power uses water to cool a variety of Dam components and materials, including turbines, generators, transformers, and lubricating oils. Idaho Power discharges this cooling water directly to the Snake River, which contributes warm water to a river system that is already too warm to support healthy fish populations.

⁴ E.g., Idaho Admin. Code r. 58.01.02.140; Wash. Admin. Code § 173-201A-602.

⁵ Idaho Dep’t of Env’tl. Quality, Integrated Report, *available at* <https://www.deq.idaho.gov/water-quality/surface-water/monitoring-assessment/integrated-report.aspx>; Wash. Dep’t of Ecology, Washington State Water Quality Assessment, *available at* <https://apps.ecology.wa.gov/ApprovedWQA/ApprovedPages/ApprovedSearch.aspx>.

⁶ E.g., U.S. EPA, *Columbia River Basin State of River Report for Toxics* (hereafter *State of the River Report*) (January 2009), <https://www.epa.gov/columbiariver/2009-state-river-report-toxics>; Lower Columbia River Estuary Partnership, *Lower Columbia River and Estuary Ecosystem Monitoring: Water Quality and Salmon Sampling Report* (2007).

⁷ NOAA, Office of Response and Restoration, *How Oil Effects Fish and Wildlife in Marine Environments*, <http://response.restoration.noaa.gov/oil-and-chemical-spills/oil-spills/how-oil-harms-animals-and-plants-marine-environments.html>.

III. Unpermitted Pollutant Discharges from the Dam.

Section 301(a) of the CWA prohibits discharges of oils, greases, lubricants, cooling water, and other pollutants to the Snake River from the Dam without NPDES permit authorization. 33 U.S.C. § 1311(a). Without an NPDES permit, Idaho Power is failing to monitor, report, and reduce pollution discharges pursuant to the CWA and state and federal implementing rules.

A. Chronic Pollutant Discharges from the Dam.

The Dam discharges oils, greases, lubricants, and other pollutants collected from various sources through sumps, including powerhouse drainage sumps, un-watering sumps, spillway sumps, and/or other systems to the Snake River. Idaho Power violates section 301(a) of the CWA by discharging pollutants from these various drainage and/or un-watering sumps and/or other systems at the Dam. These violations occurred each and every time Idaho Power made these discharges in the past five years and continue to occur.⁸

The Dam discharges cooling water, and the associated heat, used to cool components and/or materials at the Dam, including transformers, lubricating oils, shaft and thrust bearings, turbines, and/or generators, to the Snake River. These discharges of cooling water and associated heat violate section 301(a) of the CWA and have occurred each and every day for the past five years.

The Dam utilizes Francis turbines, which discharge grease and/or other pollutants to the Snake River. Wicket gates control the amount of water flowing through the turbines at the Dam. The Wicket gate bearings are lubricated with grease or another lubricant. This grease or lubricant is continuously fed into the bearings and discharged to the Snake River. Idaho Power has violated section 301(a) of the CWA by discharging grease, lubricant, and/or other pollutants from the bearings at the turbine wicket gates at the Dam each and every day for the past five years.

B. Acute Pollutant Discharges from the Dams.

Idaho Power violates section 301(a) of the CWA every time it discharges oil, a lubricant, or other pollutants to the Snake River from the Dam, including when such discharges occur as a result of machinery, equipment, or structural failure. This includes all acute pollution discharges, including but not limited to discharges resulting from spills, leaks, and accidents that occurred from the Dam to the Snake River during the last five years.

⁸ Idaho Power is in the best position to know the specific location of the point sources (i.e., the structures that discharge pollutants from drainage sumps, unwatering sumps, spillway sumps, and/or other systems into the Snake River) at the Dam.

IV. Idaho Power's History of Resisting Permit Coverage.

Idaho Power has been aware, or should have been aware, for many years that its discharges of oils, greases, lubricants, cooling water, and other pollution to waters of the United States from the Brownlee Dam violate the CWA if made without an NPDES permit. Yet, Idaho Power has not made any significant effort to obtain the legally required NPDES permit, and instead sought to delay the permitting efforts by EPA.

The Oregon Department of Environmental Quality has required NPDES permits for Idaho Power's pollution discharges from the Oxbow Dam and the Hells Canyon Dam to Oregon waters since at least 1995. Discharges from those two facilities that, along with the Brownlee Dam, comprise the Hells Canyon Complex, are substantially similar Idaho Power's discharges from the Brownlee Dam to waters in Idaho. Idaho Power therefore should have known since 1995 that discharges from the Brownlee Dam were subject to NPDES permitting requirements.

Columbia Riverkeeper sued the U.S. Army Corps of Engineers in 2013 for discharging pollutants from the eight primary hydroelectric dams on the Columbia and Snake Rivers without NPDES permits. Discharges from those facilities are substantially similar to those associated with the Brownlee Dam. The Corps settled that case in 2014, agreeing to, among other things, obtain NPDES permit coverage for its discharges. Regional and national news outlets, including the New York Times and Washington Post, reported on the settlement. In 2015, the Corps filed NPDES permit applications pursuant to the settlement. Surely Idaho Power was aware of those proceedings, as well as the subsequent enforcement actions brought by Columbia Riverkeeper for unpermitted discharges from other federal and non-federal hydroelectric dams.

In 2018, EPA promulgated a draft NPDES General Permit for pollutant discharges from hydroelectric facilities in Idaho.⁹ The draft permit was intended to address the type of discharges associated with the Brownlee Dam and subject to this notice letter.¹⁰ EPA explained:

Most discharges that affect water quality are ancillary to the direct process of generating electricity at a hydroelectric facility and result mostly from oil spills, equipment leaks, and improper storage. The General Permit is proposing to require development and implementation of a Best Management Practices (BMP) Plan to minimize or eliminate the discharge of oil and grease and an annual self-certification report demonstrating compliance with the BMP Plan.¹¹

⁹ See THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, NPDES FACT SHEET: WASTEWATER DISCHARGES FROM HYDROELECTRIC GENERATING FACILITIES GENERAL PERMIT (2018), available at <https://www.epa.gov/sites/production/files/2018-04/documents/r10-npdes-idaho-hydroelectric-gp-idg360000-fact-sheet-2018.pdf>.

¹⁰ See *id.* at 14.

¹¹ *Id.* at 15.

Instead of encouraging EPA's permitting process that would have authorized discharges from the Brownlee Dam, Idaho Power urged EPA to halt its efforts. *See* Appendix 2. Specifically, Idaho Power submitted comments noting that the State of Idaho was seeking NPDES permitting authority and expressing its preference that Idaho be allowed to draft the permit instead of EPA. In doing so, Idaho Power knew that its request would result in, at a minimum, several more years of illegal unpermitted discharges. *See id.* Since then, the State of Idaho has taken over permitting authority and has yet to permit Idaho Power's Dam operations.

In short, Idaho Power has been aware since long before this notice of intent to sue letter that discharges associated with the Dam require an NPDES permit. Yet, based upon the information available to SRW, Idaho Power has neither applied for nor obtained an NPDES permit for discharges of oils, greases, lubricants, cooling water, and other pollution from the Dam, but has instead sought to delay permitting efforts.

V. Party Giving Notice of Intent to Sue.

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

Snake River Waterkeeper
2123 N. 16th Street
Boise, ID 83702
(208) 806-1303

VI. Attorneys Representing Snake River Waterkeeper.

The attorneys representing SRW in this matter are:

KAMPMEIER & KNUTSEN, PLLC
Brian A. Knutsen
Emma Bruden
1300 S.E. Stark Street, Suite 202
Portland, Oregon 97214
Tel.: (503) 841-6515 (Knutsen)
(503) 719-5641 (Bruden)
Email: brian@kampmeierknutsen.com
emma@kampmeierknutsen.com

SNAKE RIVER WATERKEEPER
Ferrell S. Ryan, III
2123 N. 16th Street
Boise, Idaho 83702
Tel.: (208) 806-1303
Email: buck@snakeriverwaterkeeper.org

VII. Conclusion.

The violations described herein reflect those indicated by the information currently available to SRW. SRW intends to sue for all violations, including those yet to be uncovered and those committed after the date of this notice of intent to sue.

Under sections 309(d) and 505(a) of the CWA, 33 U.S.C §§ 1319(d), 1365(a), Idaho Power is subject to a separate daily penalty assessment for each CWA violation. The maximum daily penalty assessment for each CWA violation is currently set at \$56,460. 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4; 85 Fed. Reg. 83,818, 83,820 (Dec. 23, 2020). In addition to civil penalties, SRW will seek injunctive relief to prevent further violations of the CWA. SRW will further seek to recover its litigation expenses, including expert and attorneys fees, as authorized by section 505(d) of the CWA, 33 USC § 1365(d), or as otherwise authorized by law.

SRW believes that this notice of intent to sue sufficiently states grounds for filing suit. SRW intends to file a citizen suit against Idaho Power Company under section 505(a) of the CWA, 33 U.S.C. § 1365(a), for the violations described herein at the expiration of the sixty-day notice period or shortly thereafter.

SRW is willing to discuss effective remedies for the violations addressed in this notice of intent to sue letter and appropriate settlement terms. Please direct all correspondence to Brian A. Knutsen at (503) 841-6515 or brian@kampmeierknutsen.com.

Very truly yours,

KAMPMEIER & KNUTSEN, PLLC

By: 
Brian A. Knutsen

CERTIFICATE OF SERVICE

I, Brian A. Knutsen, declare under penalty of perjury of the laws of the United States that I am counsel for Snake River Waterkeeper and that on January 11, 2021, I caused copies of the foregoing Notice of Intent to Sue the Idaho Power Company under the Clean Water Act to be served on the following by depositing them with the United States Postal Service, certified mail, return receipt requested, postage prepaid:

Managing Agent
Brownlee Dam
Idaho Power Company
P.O. Box 70
Boise, ID 83707

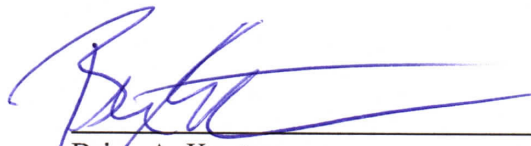
Managing Agent
Brownlee Dam
Idaho Power Company
1221 W. Idaho Street
Boise, ID 83702

Administrator Andrew Wheeler
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Director Jess Byrne
Idaho Department of Environmental Quality
1410 N. Hilton Street
Boise, ID 83706

Registered Agent
Patrick A. Harrington
1221 W. Idaho Street
Boise, ID 83702

Regional Administrator Chris Hladick
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue
Seattle, WA 98101

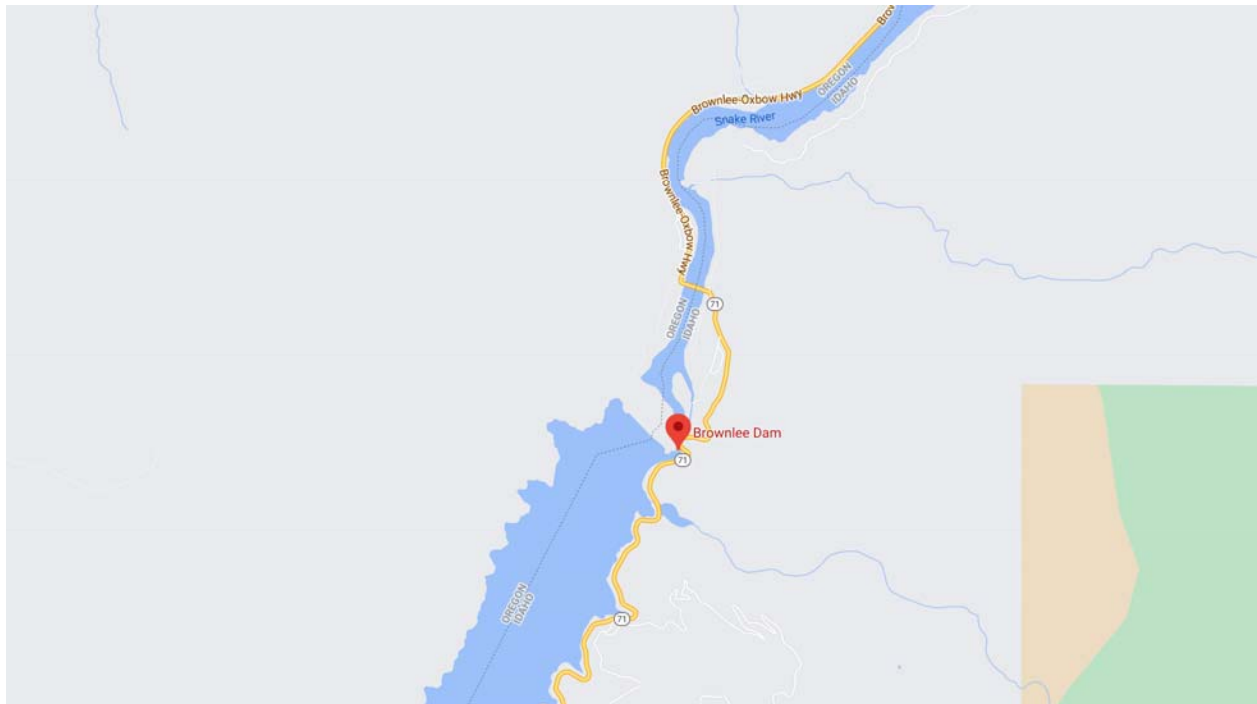


Brian A. Knutsen

APPENDIX 1

Brownlee Dam: Cambridge, Idaho 83610
Approximate Coordinates: 44.836°N, 116.9°W

Map:



APPENDIX 2

July 11, 2018

Comments of the Idaho Power Company on Idaho DEQ's §401 Certification of EPA Region
10's Proposed Hydropower General Permit

Sent Via Email to: Barry.Burnell@deq.idaho.gov

Barry Burnell
Water Quality Division Administrator
Idaho Department of Environmental Quality
1410 N. Hilton
Boise, ID 83706

Dear Mr. Burnell:

Idaho Power Company (IPC) appreciates the opportunity to provide comments on the Idaho § 401 Water Quality Certification issued for the EPA Region 10 General Permit for Hydroelectric Facilities in Idaho. IPC submits the following comments for your consideration.

IPC believes that Idaho Department of Environmental Quality (IDEQ), and not EPA, should be the agency responsible for drafting a general permit for hydroelectric facilities located in Idaho. As you are well aware, on July 1, 2018, Idaho achieved primacy concerning IPDES rules governing individual permits. By the year 2020 Idaho DEQ will begin implementation of general permits in Idaho. During its development of the rules governing the IPDES, IDEQ worked closely in a rulemaking with EPA and potentially affected stakeholders to develop the same. It is anticipated that IDEQ would undertake the same collaborative process in order to develop and implement such a permit. Conversely, EPA Region 10 has developed its Hydropower General Permit without soliciting information before submitting it to potentially affected stakeholders for comment. Idaho Power, in comments submitted today, urges EPA Region 10 to halt its efforts to implement the Region 10 Hydropower General Permit, and allow the state of Idaho, once it has primacy concerning general permits, to develop its own hydropower general permit through collaborative rulemaking should the state believe that such a permit is appropriate.

However, in the event that EPA Region 10 proceeds with the Hydropower General Permit, IPC requests some clarification in IDEQ's § 401 certification. On page 1, the Water Quality Certification indicates that EPA does not intend to cover facilities that have a cumulative CWIS with design intake flow of greater than 2 mgd **and** that uses 25 percent or more of the water the facility withdraws for cooling purposes on an average monthly basis. Later, page 6 indicates that facilities that use or propose to use one or more CWIS with a cumulative design intake flow of greater than 2 MGD **or** that uses 25% or more of withdrawn water for cooling must obtain an

individual NPDES permit and will require individual 401 certifications. Will permits for facilities that meet both or one of the criteria require individual certifications?

Thank you for the opportunity to comment. If there are any questions or need for clarification on any of the, please contact the undersigned. Idaho Power would appreciate any additional opportunity to work through items raised with IDEQ and Region 10.

Sincerely,

A handwritten signature in black ink, appearing to read "Brett Dumas", written in a cursive style.

Brett Dumas
cc: Dru Keenan, EPA