Gary G. Allen, ISB No. 4366
Peter G. Barton, ISB No. 7652
Elizabeth M. Donick, ISB No. 8019
Kelsey J. Nunez, ISB No. 7899
GIVENS PURSLEY LLP
600 W. Bannock Street
P.O. Box 2720
Boise, Idaho 83701
Telephone Number: (208) 388-1200
Facsimile: (208) 388-1300
10676-3, 882625_15

Attorneys for Plaintiffs Hayden Area Regional Sewer Board and City of Post Falls

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

HAYDEN AREA REGIONAL SEWER BOARD, an Idaho joint powers entity, and CITY OF POST FALLS, an Idaho municipal corporation and political subdivision of the State of Idaho, Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTIONAGENCY, an agency of the United States; LISA P. JACKSON, in her capacity as Administrator of the United States Environmental Protection Agency; and DENNIS MCLERRAN, in his capacity as Regional Administrator of Region 10 of the United States Environmental Protection Agency, Defendants.	CASE NO.: **COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

Plaintiffs, Hayden Area Regional Sewer Board ("HARSB") and the City of Post Falls ("Post Falls"), by and through their attorneys of record, Givens Pursley LLP, and for cause of action against Defendants, complain, allege, and aver as follows:

STATEMENT OF THE CASE

1. This case involves the misapplication of the Clean Water Act (the "CWA") and the procedures for establishing Total Maximum Daily Loads ("TMDLs") to allocate pollution loads to dischargers that discharge pollutants into interstate water bodies.

2. The Washington Department of Ecology ("Ecology") issued the Spokane River and Lake Spokane Dissolved Oxygen Total Maximum Daily Load Water Quality Improvement Report, Revised February 2010, Publication No. 07-10-073 (the "Spokane River TMDL").

3. The U.S. Environmental Protection Agency ("EPA") subsequently approved the Spokane River TMDL.

4. EPA is obligated to issue subsequent permits to Idaho dischargers under the National Pollutant Discharge Elimination System ("NPDES") with effluent limitations based on the Spokane River TMDL.

5. Although Ecology is a state agency with jurisdiction only over Washington, the effect of the Spokane River TMDL is to allocate pollution loads to dischargers in both Washington and Idaho.

6. This allocation of pollution loads was tainted by the illegal process employed by Ecology.

7. The Spokane River TMDL is the product of an unlawful, biased, and scientifically flawed decision-making process.

8. Ecology established the Spokane River TMDL in a rushed fashion to avoid political accountability in Washington and transferred a disproportionate burden of cleaning Washington's water bodies onto the citizens of Idaho.

9. Based on geographical and demographic factors, Idaho's impact on the Lake Spokane watershed is substantial and often greater than that of Washington.

10. Idaho currently has 65 percent of the land mass in the Lake Spokane watershed. Washington has the other 35 percent.

11. The portion of the Lake Spokane watershed that is in Idaho provides 90 percent of the water to the Lake Spokane reservoir. The portion of the Lake Spokane watershed that is in Washington provides the other ten percent.

12. Idaho communities discharging to the Spokane River are expected to have 27 percent of the 2027 population of all communities discharging to the Spokane River. Washington communities discharging to the Spokane River will have the other 73 percent.

13. Ecology established waste load allocations ("WLAs") in the Spokane River TMDL that allotted only 2.2 percent to 9.2 percent of the permitted loads to sources in Idaho.

14. Under the Spokane River TMDL, Idaho is projected to serve 27 percent of the region's citizens with only about two to nine percent of the WLAs. Under the Spokane River TMDL, Washington is able to serve 73 percent of the region's citizens with about 91 to 98 percent of the WLAs.

15. The allocation between Idaho and Washington dischargers is inequitable, politically motivated, and unsupported by the facts in the record based on the proportionate share of the land mass in the region.

16. The allocation between Idaho and Washington dischargers is inequitable, politically motivated, and unsupported by the facts in the record based on the proportionate amount of water contributed to the Lake Spokane reservoir.

17. The allocation between Idaho and Washington dischargers is inequitable, politically motivated, and unsupported by the facts in the record based on the proportionate share of the projected 2027 population.

18. The Spokane River TMDL effectively places a growth cap on the communities in Idaho that discharge to the Spokane River, including Plaintiffs, while allowing communities in Washington to continue to grow.

19. Because of the Spokane River TMDL, dischargers to the Spokane River in Washington will financially benefit from a disproportionate right to pollute the water at the expense of the citizens of Idaho.

20. During the comment period and dispute resolution process, Plaintiffs implored Ecology to distribute the WLAs in a manner that was scientifically supportable, independent of political considerations, and equitable to the citizens of Idaho.

21. Plaintiffs and the citizens of Idaho were denied the opportunity to present scientific evidence on the adequacy of the Spokane River TMDL in a fair hearing in front of a neutral magistrate because Ecology was biased against Idaho dischargers throughout the process.

22. Plaintiffs and the citizens of Idaho were again denied the opportunity to present scientific evidence on the adequacy of the Spokane River TMDL in a fair hearing in front of a neutral magistrate when EPA approved the flawed Spokane River TMDL.

23. Plaintiffs have made their best efforts to lead the wastewater treatment industry through environmental stewardship and technological advances.

24. Plaintiffs will be not able to comply with the likely NPDES permit limits resulting from the Spokane River TMDL.

PARTIES

25. Plaintiff HARSB is an Idaho joint powers entity created by an agreement pursuant to Idaho Code § 67-2328 by and between the City of Hayden, Idaho, an Idaho municipal corporation and subdivision of the State of Idaho, the Hayden Lake Recreational Water and Sewer District, an Idaho sewer district, and Kootenai County, Idaho, a political subdivision of the State of Idaho. HARSB owns, operates, and maintains a regional wastewater treatment plant ("WWTP") located in Hayden, Idaho.

26. HARSB serves a substantial area of growing communities which, together, include a population of over 16,000 Idahoans, which is expected to increase to 32,400 people by 2030.

27. HARSB is an environmental steward that supports efforts to improve water quality in the Lake Spokane reservoir and has already made significant efforts to reduce nutrient loading to the Lake Spokane reservoir.

28. Plaintiff Post Falls is an Idaho municipal corporation and a political subdivision of the state of Idaho. Post Falls owns and operates a WWTP that serves the City of Post Falls, the City of Rathdrum, and their areas of city impact.

29. Post Falls serves a growing population of over 33,000 Idahoans, which is expected to increase to 83,850 people by 2030.

30. Post Falls is an environmental steward that supports efforts to improve water quality in the Lake Spokane reservoir and has already made a significant effort to reduce nutrient loading to the Lake Spokane reservoir.

31. Plaintiffs are two of the three point-source dischargers to the Spokane River on the Idaho side of the Idaho-Washington border. The City of Coeur d'Alene is the third.

32. Defendant EPA is a United States agency

33. EPA is a federal agency responsible for the implementation of the CWA.

34. EPA is the agency that issues NPDES permits in the State of Idaho.

35. Defendant Lisa P. Jackson is the Administrator of EPA.

36. Pursuant to 33 U.S.C. § 1313(d)(2), Ms. Jackson is charged with approving TMDLs submitted to EPA by the States.

37. Ms. Jackson is being sued in her official capacity.

38. Defendant Dennis McLerran is the Regional Administrator of Region 10 of EPA ("EPA Regional 10").

39. Pursuant to 40 C.F.R. § 130.7(d)(2), Mr. McLerran is charged with approving TMDLs submitted to EPA Region 10 by the States.

40. Mr. McLerran is being sued in his official capacity.

41. Defendants EPA, Jackson, and McLerran may sometimes be collectively referred to as "EPA" or "Defendants."

JURISDICTION AND VENUE

42. This Complaint addresses the action of Defendants in approving the Spokane River TMDL submitted by Ecology.

43. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 because this matter arises under the laws of the United States, including without limitation the CWA, 33 U.S.C §§ 1251 to 1377, and various federal implementing regulations and guidance.

44. Jurisdiction is proper in this Court under 28 U.S.C. § 1361 because this matter seeks to compel a federal officer to comply with the law, including without limitation the CWA, 33 U.S.C §§ 1251 to 1377, and various federal implementing regulations and guidance.

45. This Court is authorized to review final agency actions by the Administrative Procedure Act, 5 U.S.C. §§ 701 to 706 ("APA").

46. The APA creates a private right of action for persons aggrieved by final agency action.

47. Defendants' approval of the Spokane River TMDL is a final agency action.

48. Post Falls and HARSB are directly aggrieved and adversely affected by Defendants' approval of the Spokane River TMDL.

49. Post Falls and HARSB are directly aggrieved and adversely affected by a final agency action subject to the APA.

50. This Court is authorized to issue declaratory judgment and grant further relief pursuant to 5 U.S.C. §§ 702 to 706 and 28 U.S.C. §§ 2201 to 2202.

51. This Court is the proper venue to hear this matter pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this judicial district; a substantial part of the Lake Spokane watershed affected by Defendants' failure to follow federal law is located in this judicial district; and Plaintiffs are located in this judicial district.

52. Plaintiffs have exhausted all administrative remedies.

STANDING AND RIGHT OF ACTION

53. Plaintiffs are aggrieved and adversely affected by the acts and omissions of Defendants in approving the Spokane River TMDL as alleged herein.

54. The acts and omissions of Defendants alleged herein cause injury to Plaintiffs and Idaho citizens served by Plaintiffs by approving a flawed and unlawful TMDL that does not adequately protect or improve the water quality of the Spokane River.

55. The approval of the flawed and unlawful Spokane River TMDL causes injury to Plaintiffs because EPA is obligated and likely to issue NPDES permits to Plaintiffs that will contain effluent limits that are based on the Spokane River TMDL.

56. The Spokane River TMDL will require the imposition of unachievable effluent limits on Post Falls and HARSB in their NPDES permits. Such limits will severely restrict growth in the communities served by Post Falls and HARSB as soon as those limits become effective, while communities in Washington will not experience such limitations.

57. The approval of the flawed and unlawful Spokane River TMDL causes injury to Plaintiffs by requiring the misallocation of public resources into costly technologies that provide no material improvement to water quality as compared to alternatives that Plaintiffs have already committed to install.

58. The approval of the flawed and unlawful Spokane River TMDL treats Plaintiffs unfairly compared to the dischargers and residents of Washington, thereby causing injury to Plaintiffs.

59. Plaintiffs' injuries are within the zone of interests protected by the APA and the CWA.

60. Post Falls and HARSB are, and have been, excellent environmental stewards that lead and support efforts to improve water quality in Idaho and in the Lake Spokane reservoir.

61. Post Falls has demonstrated its commitment to water quality with sustainable, biological treatment that has removed over 95 percent of nutrient inputs for over ten years.

62. HARSB is the only discharger in the region that reuses its wastewater to grow crops.

63. Post Falls is generally willing to install and operate additional technology to further reduce phosphorous levels.

64. HARSB is generally willing to install and operate additional technology to further reduce phosphorous levels.

65. If the Court provides Plaintiffs with the requested relief, there is a substantial likelihood that the requested relief will be effective and that Plaintiffs' injuries will be redressed.

COMMON ALLEGATIONS

Statutory and Regulatory Framework

66. Congress passed the CWA in 1972 to "restore and maintain the chemical, physical and biological integrity of the nation's waters." 33 U.S.C. § 1251.

67. With limited exceptions, the CWA prohibits the discharge of any pollutant from a point source into waters of the United States without a permit.

68. The term "point source" is defined in relevant part as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

69. The term "point source" has been broadly defined by Congress and construed by EPA and the courts to include a wide variety of sources of water pollution.

70. Despite the broad definition of "point source," not all sources of water pollution are point sources.

71. Generally speaking (and putting aside statutory and regulatory exceptions such as confined animal feeding operations and stormwater which are deemed point sources), a nonpoint source is a non-discrete source, such as runoff from agriculture, which cannot easily be traced back to one single source or "point."

72. Nonpoint sources of water pollution contribute significantly to the pollution of waters of the United States.

73. While point sources are controlled directly by the CWA, nonpoint sources of pollution are largely unregulated by the CWA. Nonpoint sources are addressed primarily through incentives, trading programs, and programs developed under state law under 33 U.S.C. § 1329.

74. Point sources of pollution are controlled through two permitting processes under the CWA.

75. Section 404 of the CWA, 33 U.S.C § 1344, authorizes so-called dredge and fill permits by the U.S. Army Corps of Engineers.

76. Section 404 permits are not relevant to this lawsuit.

77. Section 402 of the CWA, 33 U.S.C. § 1342, authorizes permits for all other discharges of pollutants from point sources into waters of the United States.

78. The Section 402 permitting process is known as the "National Pollution Discharge Elimination System," and Section 402 permits are known as "NPDES permits."

79. NPDES permits are at the core of this lawsuit.

80. The NPDES permit system is administered by EPA or, where properly delegated, by individual states.

81. NPDES permitting authority has been delegated to Washington, but not Idaho.

82. NPDES permits are issued in Washington by Ecology. In Idaho, NPDES permits are issued by EPA.

83. NPDES permits may be individual permits or general permits.

84. General permits are established through rulemaking and apply to broad classes of dischargers.

85. Individual NPDES permits are tailored to the individual permit-holder based on information about that particular discharge.

86. Individual NPDES permits establish specific standards and requirements governing the discharge of pollutants by the permit-holder.

87. These standards and requirements include (i) technology-based limitations and (ii) water-quality-based effluent limitations.

88. Technology-based limitations are established by regulation for various categories of industry and other sources of pollution based on EPA's determination of the availability and cost of various pollution control technologies.

89. An individual NPDES permit reflects the particular technology-based requirements applicable to a particular permit-holder.

90. Although some interpretation may be involved, the identification of technology-based requirements for a particular individual NPDES permit is a largely ministerial function in which the permit-writer simply applies the regulation.

91. Technology-based requirements are based on EPA's determination (reflected in rulemaking) of what technology is reasonably and appropriate for particular classes of industry and other dischargers taking into account the technology's effectiveness, practicality, and cost.

92. Technology-based requirements apply irrespective of the water quality of the water body into which the point discharge is made. In other words, the same technology-based requirements apply to dischargers of a particular category regardless of whether they are discharging into pristine, lightly-contaminated, or heavily-contaminated water bodies. For

example, if the discharger is a cheese-maker, the NPDES permits will dictate certain technologies that all cheese-makers must employ to reduce or eliminate water pollution caused by various stages of the cheese-making process.

93. In effect, the technology-based requirements describe the minimum set of pollution-control measures that must be employed by the point discharger.

94. Congress determined, however, that technology-based controls alone are not sufficient to address all water pollution problems. The CWA authorizes the imposition of water-quality-based limitations in addition to technology-based controls.

95. When both technology-based and water-quality-based limitations are imposed, the permit-holder must meet the more stringent set of requirements. 33 U.S.C. § 1311 (b)(1)(C).

96. In the early years of the CWA, the primary regulatory focus was on technology-based controls. In more recent years, state and federal regulatory officials have increasingly focused on more stringent water-quality-based controls.

97. Water-quality-based requirements are tailored to specific natural water bodies taking into account such things as public water supply, recreation, industrial uses, and protection of fish and wildlife.

98. Water-quality-based requirements consist of a set of rules designed to achieve a given level of quality for a particular natural water body.

99. Unlike technology-based requirements, water-quality-based requirements are based on the impact that a point discharge makes on its receiving waters.

100. Water quality standards are adopted by the states and submitted to EPA for approval.

101. The water quality standards will include ambient criteria expressed as (i) chemical-specific concentrations, (ii) toxicity levels (addressing combinations of pollutants), or (iii) narrative statements, which represent a quality of water that supports a particular use of the water body.

102. The water quality standards will also include an anti-degradation policy, which are generally aimed at preserving high-quality waters.

103. An individual NPDES permit will include limitations necessary to comply with the water quality standards developed by the states.

104. EPA also has developed a separate set of toxic pollutant effluent limitations, which are not relevant to this lawsuit.

105. In addition to the water quality standards described in the preceding two paragraphs, water-quality-based standards may be developed through a TMDL process.

106. The TMDL process which is the center of this lawsuit.

107. Although the CWA has mandated TMDLs since 1972, EPA and the states largely ignored the program for years.

108. In response to litigation brought by citizen groups, EPA has begun to enforce TMDL requirements in recent years.

109. Section 303(d) of the CWA, 33 U.S.C. § 1313(d), requires states to identify waters that have failed to achieve water quality standards despite the application of technology-based requirements on point dischargers and other measures aimed at nonpoint sources.

110. These water bodies are known as Water Quality Limited Segments ("WQLSs"). 40 C.F.R. § 130.2(j). A list of water bodies identified as WQLSs is known as a 303(d) list.

111. Each state must then establish a priority ranking of WQLS taking into account the severity of the pollution and the designated uses to be made of those waters. 33 U.S.C. § 1313(d)(1)(A); 40 C.F.R. § 130.7(b)(4).

112. States are required to establish TMDLs for each WQLS on the 303(d) list in accordance with the priority ranking. 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7(c)(1)(i), (ii).

113. A TMDL is a calculation of the maximum daily quantity (or load) of a given pollutant that may be added to a waterbody from all point and nonpoint sources as well as natural background sources without exceeding the applicable water quality standard for that pollutant.

114. A TMDL may take into account seasonal variation and may include a margin of safety to account for insufficient knowledge. 33 U.S.C. § 1313(d)(1)(C).

115. A TMDL has two components: a WLA and a Load Allocation ("LA").

116. The WLA is the portion of a TMDL allocated to existing and future point sources. 40 C.F.R. § 130.2(h).

117. The LA is the portion of a TMDL allocated to existing and future nonpoint sources including natural background sources. 40 C.F.R. § 130.2(g).

118. The WLA is then allocated to individual point dischargers through the issuance of NPDES individual permits.

119. Ultimately, TMDLs are implemented through incorporation into water-quality management plans under Section 303(e) of the CWA and through the NPDES point-source discharge permits issued under Section 402 of the CWA.

120. The end result is that a point discharger operating under an NPDES permit must ensure that both (i) its discharge meets water quality standards by employing appropriate technology-based standards and (ii) no matter how advanced its technology and no matter how

clean its discharge, its discharge may not exceed the portion of the total maximum daily load for the entire water body that has been assigned to the individual permit holder.

121. The establishment of a TMDL (for the entire water body) does not, in itself allocate that load among individual dischargers.

122. However, it comes very close to doing so because a TMDL identifies each individual permit holder and describes how the load is likely to be distributed among them. Thus, as a practical matter, a TMDL determines how the load will be allocated.

123. Once a state submits a draft TMDL to EPA for review, EPA has 30 days to approve or disapprove the submission. 33 U.S.C. § 1313(d)(2).

124. In the event of disapproval, EPA has 30 days to establish a TMDL. 33 U.S.C. § 1313(d)(2).

Background of Lake Spokane Reservoir

125. Lake Spokane reservoir is a man-made water body that was formed by the construction of Long Lake Dam in 1915.

126. Avista Corporation ("Avista") owns and operates Long Lake Dam.

127. Avista operates Long Lake Dam primarily for purposes of power generation.

128. Lake Spokane reservoir is designated as Core Summer Salmonid Habitat pursuant to the Washington water quality standards. WAC § 173-201A-602.

129. WAC § 173-201A-200, Table 200(1)(d) sets the lowest one-day dissolved oxygen ("DO") level at 9.5 milligrams per liter ("mg/L") for water bodies such as Lake Spokane reservoir that are designated as Core Summer Salmonid Habitat (the "9.5 mg/L DO Standard").

130. Lake Spokane reservoir generally satisfies Washington's water quality standards between November and June.

131. The ability of Lake Spokane reservoir to comply with water quality standards during the November to June period is based primarily on the fact that the residence time of water in the reservoir from November to June is short, which results from the fact Avista operates Long Lake Dam during these months to allow most of the water to flow through the reservoir to downstream locations, thus limiting the flow-through time of waters in the reservoir.

132. During the summer and early fall months, many locations in Lake Spokane reservoir do not meet the 9.5 mg/L DO Standard.

133. Avista maintains a deep pool, up to 180 feet, in Lake Spokane reservoir during the summer and early fall months. The pool typically thermally stratifies during these months.

134. The maintenance of a deep pool during these months is primarily to support power generation, but it also supports recreational uses of the reservoir.

135. The stagnation of the deeper water results in reduced DO concentrations at the lower depths of the Lake Spokane reservoir during the summer and early fall months.

136. Modeling performed at Ecology's request as part of preparation of the Spokane River TMDL demonstrates that these DO deficits are an inherent characteristic of the reservoir that will exist as long as Long Lake Dam is operated to maintain a deep pool, regardless of the levels of oxygen-demanding pollutants in the water.

Background of the Spokane River TMDL

137. The Spokane River TMDL seeks to reduce the amount of oxygen-demanding materials, including phosphorus, ammonia, and materials with carbonaceous biochemical oxygen demand ("CBOD"), discharged into the Spokane River and into Lake Spokane reservoir.

138. The Spokane River TMDL uses an elaborate model of phosphorus, ammonia, and CBOD inputs and the hydrology of the Spokane River and Lake Spokane reservoir to estimate the impact of discharges on DO levels in Lake Spokane reservoir.

139. The Spokane River TMDL purports to apply applicable Washington water quality standards to determine necessary pollution reductions.

140. The Spokane River TMDL purports to allocate loads among point-source dischargers in Washington and Idaho based on the equivalent application of technology.

141. The Spokane River TMDL purports to authorize permitting agencies to consider evidence regarding the bioavailability of phosphorus in a discharger's effluent in connection with NPDES permitting decisions.

142. The Spokane River TMDL purports to support the creation of a bi-state trading or offset system to allow Idaho dischargers to meet their wasteload allocations under the Spokane River TMDL.

Ecology Adoption of the Spokane River TMDL

143. The process to develop the Spokane River TMDL has been ongoing since about 1999.

144. Originally, Ecology's efforts to develop the Spokane River TMDL addressed only sources in Washington. Beginning in 2008, Ecology modified the TMDL process to include sources in Idaho.

145. In July 2009, EPA Region 10 submitted a proposed allocation for Idaho dischargers that was based on consultation with EPA headquarters and the EPA Office of General Counsel.

146. EPA's July 2009 proposed allocation was based on the percentage of dissolved oxygen deficit in the Lake Spokane reservoir attributable to Idaho dischargers and would have allowed EPA permitting in Idaho to set limits for the three municipalities in a manner that would address actual impacts relative to an adopted water quality standard.

147. In the draft of the Spokane River TMDL issued in September 2009, Ecology departed radically from EPA's July 2009 proposal and proposed allocations for Idaho dischargers that were not based on an adopted water quality standard, that grossly favored Washington interests over Idaho's, and that were technologically unachievable.

148. Post Falls and HARSB submitted extensive comments in opposition to the September 2009 draft TMDL.

149. Post Falls submitted additional information to Ecology in January 2010 regarding the inequity of population projections used for different municipal providers in the draft TMDL.

150. Ecology issued the Spokane River TMDL on or about February 12, 2010.

151. The Spokane River TMDL included no changes that were responsive to the concerns raised by Post Falls and HARSB.

152. Ecology has a dispute resolution process purportedly aimed at addressing disagreement and requests for revisions surrounding any TMDL issuance.

153. Post Falls and HARSB submitted requests for dispute resolution to the Director of Ecology on or about February 26, 2010.

154. Post Falls and HARSB submitted a brief to the Director of Ecology on or about March 11, 2010, in an attempt to resolve the disputed terms of the Spokane River TMDL and to request revisions.

155. Post Falls and HARSB participated in an oral presentation and hearing before Ecology's dispute resolution panel on April 5, 2010, in which Post Falls and HARSB outlined the requested revisions to the Spokane River TMDL and the concerns contained in this complaint.

156. On or about May 5, 2010, the Director of Ecology issued his official decision on the dispute resolution process. He dismissed the claims presented by Post Falls and HARSB by indicating there would be no revisions to the Spokane River TMDL and stated that Ecology intended to move forward with the Spokane River TMDL approval process with EPA.

EPA Approval of the Spokane River TMDL

157. EPA approved the Spokane River TMDL in a letter to Ecology on or about May 20, 2010.

158. EPA's approval did not change the Spokane River TMDL or respond to the concerns raised by Post Falls and HARSB.

Overview of Inequities and Errors in the Spokane River TMDL

159. The Spokane River TMDL includes substantial load allocations for pollution originating from septic tanks, which are illegal point source dischargers under the CWA. The CWA does not permit a TMDL to include allocations from illegal point-source dischargers.

160. The Spokane River TMDL unlawfully applies the applicable water quality standards.

161. The Spokane River TMDL unlawfully seeks to regulate Idaho dischargers through the creation of "very specific assumptions" that EPA will apply to Idaho NPDES permits as opposed to the adoption of a load allocation for the Spokane River segment at the Idaho

border, which is the sole means permitted by the CWA for the Spokane River TMDL to affect Idaho dischargers.

162. The Spokane River TMDL unlawfully and arbitrarily relies on inaccurate flow assumptions that are inconsistent with those used for other municipal service providers, most notably the City of Spokane, a point-source dischargers between Plaintiffs and the Lake Spokane reservoir.

163. EPA's approval of the Spokane River TMDL unlawfully creates differential treatment of dischargers in Idaho and Washington regarding the consideration of studies regarding the bioavailability of phosphorus in a discharger's effluent.

164. The Spokane River TMDL arbitrarily imposes ammonia limitations on dischargers in Idaho, ignoring the undisputed evidence in the record that no material amounts of ammonia from Idaho will reach Lake Spokane reservoir.

165. The Spokane River TMDL arbitrarily relies on modeling results that dramatically overestimate the impacts of Idaho dischargers on DO reductions in the Lake Spokane reservoir.

166. The Spokane River TMDL arbitrarily applies different measures of compliance to dischargers in Washington as compared to those in Idaho.

167. The Spokane River TMDL arbitrarily includes a margin of safety that is arbitrary and in excess of EPA's authority under the CWA.

168. The Spokane River TMDL arbitrarily chose TMDL Scenario #1 over TMDL Scenario #2.

169. The Spokane River TMDL arbitrarily creates loading assumptions for Idaho dischargers for times and places where such assumptions are not required to comply with water quality standards.

170. The Spokane River TMDL arbitrarily relies on the conclusion that Idaho dischargers will be able to comply with the Spokane River TMDL solely through the implementation of technology, while conceding to Washington dischargers in the Management Implementation Plan that trading, offsets, "delta management," or some combination thereof, will be required to comply.

171. The Spokane River TMDL unlawfully relied on biased Washington procedures.

172. The Spokane River TMDL unlawfully failed to follow federal rulemaking procedures.

COUNT ONE

Violation of the CWA for Approving a TMDL Including Loads for Unlawful Septic Tanks

173. The allegations of the foregoing paragraphs 1 through 172 are realleged and incorporated herein.

174. The Spokane River TMDL includes substantial load allocations for septic tanks that are discharging pollutants into Lake Spokane reservoir.

175. The Spokane River TMDL offers the potential for Spokane County to obtain offsets or credits for the decommissioning of such septic tanks.

176. Such septic tanks are point sources within the meaning of the CWA and do not have NPDES permits authorizing their discharges.

177. The Spokane River TMDL cannot include load allocations for such septic tanks because the septic tanks are point sources.

178. The Spokane River TMDL cannot include wasteload allocations for the septic tanks because they do not have NPDES permits authorizing their discharges.

179. The Spokane River TMDL cannot permit Spokane County to obtain offsets or credits for the decommissioning of the unpermitted septic tanks beyond the amount needed for Spokane County's operation of its new WWTP, which will treat the sewage from the homes where the septic tanks will be decommissioned.

Unlawful EPA Acts

180. EPA's approval of the Spokane River TMDL including improper load allocations for septic tanks constitutes agency action that is "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" within the meaning of the APA, 5 U.S.C. § 706(2)(A).

181. EPA's approval of the Spokane River TMDL including improper load allocations for septic tanks constitutes agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short or statutory right" within the meaning of the APA, 5 U.S.C. § 706(2)(C).

182. EPA's approval of the Spokane River TMDL including improper load allocations for septic tanks constitutes agency action that is "unsupported by substantial evidence" within the meaning of the APA, 5 U.S.C. § 706(2)(E).

183. EPA's approval of the Spokane River TMDL including improper load allocations for septic tanks constitutes agency action that is "unwarranted by the facts" within the meaning of the APA, 5 U.S.C. § 706(2)(F).

Requested Relief

184. Based on the foregoing, Plaintiffs request a declaration that EPA's approval of the Spokane River TMDL is void.

COUNT TWO

Violation of the APA for Approving Unlawful Application of Water Quality Standards in the Spokane River TMDL

185. The allegations of the foregoing paragraphs 1 through 184 are realleged and incorporated herein.

186. As set forth in the paragraphs below, the Spokane River TMDL unlawfully applies four EPA-approved Washington water quality standards.

The Phosphorous Standard

187. Washington Administrative Code ("WAC") § 173-201A-602, Table 602 states that for Water Resource Inventory Area 54, which includes Lake Spokane reservoir, "The average euphotic zone concentration of total phosphorus (as P) shall not exceed 25 µg/L during the period of June 1 to October 31" (the "25 µg/L Phosphorous Standard").

188. The Spokane River TMDL does not apply the 25 µg/L Phosphorous Standard, concluding that it is insufficiently stringent to allow Lake Spokane reservoir to meet a 0.2 mg/L DO Standard (discussed and defined below).

189. Instead of applying the duly adopted and approved 25 µg/L Phosphorous Standard, Ecology applies an alternate water quality standard for phosphorus in the Spokane River TMDL.

190. In setting the load and wasteload allocations for phosphorus in the Spokane River TMDL, Ecology applies what it calls a "reasonable division of responsibility" between dischargers and Avista. Ecology's "reasonable division" is that phosphorous levels at the mouth

of Lake Spokane reservoir must, as a result of the upstream activities, average 10 micrograms per liter ("µg/L") phosphorus or less (the "10 µg/L Phosphorous Target") and Avista must take such other actions as are necessary to meet the water quality standard.

191. All phosphorous load allocations and wasteload allocations in the Spokane River TMDL are based on the 10 µg/L Phosphorous Target.

192. The 10 µg/L Phosphorous Target cannot be applied to set load and wasteload allocations for Lake Spokane reservoir because it is not a water quality standard established pursuant to Section 303 of the CWA, as required by 40 CFR § 130.7 and other applicable authority.

193. Ecology did not engage in rulemaking either to modify the 25 µg/L Phosphorous Standard or to adopt the 10 µg/L Phosphorous Target as a water quality standard.

194. EPA did not approve a modification of the 25 µg/L Phosphorous Standard or the adoption of the 10 µg/L Phosphorous Target as changes to Washington's water quality standards as required by the CWA.

195. Ecology did not follow the requirements of WAC § 173-201A-230 to establish an alternate nutrient criterion to modify the 25 µg/L Phosphorous Standard.

The 9.5 mg/L DO Standard

196. WAC § 173-201A-200, Table 200(1)(d) sets the lowest one-day DO level at 9.5 mg/L for water bodies such as Lake Spokane reservoir that are designated as Core Summer Salmonid Habitat (as previously defined, the "9.5 mg/L DO Standard").

197. The modeling for the Spokane River TMDL concludes that DO levels in the reservoir are expected to violate the 9.5 mg/L DO Standard in numerous segments and at

numerous times during the critical summer compliance period, even if all upstream sources of man-made pollution are eliminated.

198. The Spokane River TMDL fails to apply the 9.5 mg/L DO Standard to Spokane Lake reservoir during the critical summer period.

199. The Spokane River TMDL fails to analyze the actions necessary to attain the 9.5 mg/L DO Standard.

200. No substantial evidence in the record supports the conclusion that the 9.5 mg/L DO Standard is attainable in Lake Spokane reservoir.

201. No substantial evidence in the record supports the conclusion that the Core Salmonid Summer Habitat designated beneficial use of Lake Spokane reservoir currently exists or is attainable in Lake Spokane reservoir.

The 0.2 mg/L DO Standards

202. The Spokane River TMDL asserts that WAC § 173-201A-200(d)(i) applies to Lake Spokane reservoir at times when DO levels drop below 9.5 mg/L.

203. WAC § 173-201A-200(d)(i) states, "When a water body's D.O. is lower than the [9.5 mg/L criterion] (or within 0.2 mg/L of the criteria) and that condition is due to natural conditions, then human actions considered cumulatively may not cause the D.O. of that water body to decrease more than 0.2 mg/L."

204. DO conditions in Lake Spokane reservoir are below 9.5 mg/L during the summer and early fall when temperatures are higher and the reservoir is managed such that lake turnover is longer than at other times of the year.

205. The fact that DO conditions in Lake Spokane reservoir are below 9.5 mg/L during the summer and early fall is not due to natural conditions.

206. The fact that DO conditions in Lake Spokane reservoir are below 9.5 mg/L is due, in all material respects, to the presence and method of operation of Long Lake Dam.

207. Long Lake Dam does not constitute a natural condition as defined in WAC § 173-201A-200(d)(i).

208. If Long Lake Dam did not exist, DO levels in the area occupied by Lake Spokane reservoir would meet the 9.5 mg/L DO Standard at all times.

209. WAC § 173-201A-200(d)(i) does not apply to Lake Spokane reservoir.

210. Ecology's response to comments in the Spokane River TMDL asserts that WAC § 173-201A-200(d)(ii) applies to Lake Spokane reservoir.

211. WAC § 173-201A-200(d)(ii) states, "For lakes, human actions considered cumulatively may not decrease the dissolved oxygen concentration more than 0.2 mg/L below natural conditions" (the "0.2 mg/L DO Standard").

212. The Spokane River TMDL interprets the 0.2 mg/L DO Standard as follows. "Human actions considered cumulatively" are interpreted to mean both the impact of Long Lake Dam as well the introduction of pollutants into the water. "Natural conditions" are interpreted to mean conditions with the dam in place, but with all human sources of pollution removed.

213. The 0.2 mg/L DO Standard cannot lawfully be applied to man-made reservoirs such as Lake Spokane reservoir because there is no natural condition in a man-made reservoir to which human impacts can be compared.

214. The 0.2 mg/L DO Standard cannot lawfully be applied to man-made reservoirs such as Lake Spokane reservoir because EPA's grant of authority under the CWA does not extend to requiring dischargers to remedy water-quality effects caused by man-made structures such as dams.

215. The 0.2 mg/L DO Standard cannot lawfully be applied to man-made reservoirs such as Lake Spokane reservoir because no nexus exists between the water quality standard and any beneficial use to be protected, as required by the CWA.

EPA's Unlawful Acts

216. EPA's approval of the Spokane River TMDL based on unlawful applications of the water quality standards constitutes agency action that is "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" within the meaning of the APA, 5 U.S.C. § 706(2)(A).

217. EPA's approval of the Spokane River TMDL based on unlawful applications of the water quality standards constitutes agency action that is "contrary to constitutional right, power, privilege, or immunity" within the meaning of the APA, 5 U.S.C. § 706(2)(B).

218. EPA's approval of the Spokane River TMDL based on unlawful applications of the water quality standards constitutes agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short or statutory right" within the meaning of the APA, 5 U.S.C. § 706(2)(C).

219. EPA's approval of the Spokane River TMDL based on unlawful applications of the water quality standards constitutes agency action that is "without observance of procedure required by law" within the meaning of the APA, 5 U.S.C. § 706(2)(D).

220. EPA's approval of the Spokane River TMDL based on unlawful applications of the water quality standards constitutes agency action that is "unsupported by substantial evidence" within the meaning of the APA, 5 U.S.C. § 706(2)(E).

221. EPA's approval of the Spokane River TMDL based on unlawful applications of the water quality standards constitutes agency action that is "unwarranted by the facts" within the meaning of the APA, 5 U.S.C. § 706(2)(F).

Requested Relief

222. Based on the foregoing, Plaintiffs request a declaration that EPA's approval of the Spokane River TMDL is void.

COUNT THREE

Violation of the CWA and the APA for Purporting to Create Loading Assumptions that EPA Intends To Enforce in Idaho NPDES Permits

223. The allegations of the foregoing paragraphs 1 through 222 are realleged and incorporated herein.

224. Pursuant to EPA regulations, a TMDL consists solely of wasteload allocations for point sources plus load allocations for nonpoint sources, natural background, a margin of safety, and loads for tributaries and adjacent segments.

225. Ecology lacks authority to set wasteload allocations for point sources in Idaho.

226. The Spokane River TMDL includes wasteload allocations for point-source dischargers in Idaho.

227. The Spokane River includes no load allocation for the segment of the Spokane River adjacent to the Washington border.

228. Rather than set wasteload allocations or load allocations for sources in Idaho or the river segment adjacent to Idaho, the Spokane River TMDL purports to delineate "very specific assumptions" about "anthropogenic loading of phosphorus, CBOD, and ammonia from wastewater treatment plants and stormwater in Idaho." Spokane River TMDL at 34.

229. The Spokane River TMDL states that EPA will apply these assumptions to NPDES permits it issues for Idaho dischargers.

230. EPA lacks authority to enforce the loading assumptions in the Spokane River TMDL in Idaho permits.

231. Apart from the establishment of a wasteload allocation or a load allocation, EPA may not rely on statements in the Spokane River TMDL to impose NPDES permit conditions on Idaho sources.

EPA's Unlawful Acts

232. EPA's approval of the Spokane River TMDL including improper loading assumptions for Idaho sources constitutes agency action that is "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" within the meaning of the APA, 5 U.S.C. § 706(2)(A).

233. EPA's approval of the Spokane River TMDL including improper loading assumptions for Idaho sources constitutes agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short or statutory right" within the meaning of the APA, 5 U.S.C. § 706(2)(C).

234. EPA's approval of the Spokane River TMDL including improper loading assumptions for Idaho sources constitutes agency action that is "without observance of procedure required by law" within the meaning of the APA, 5 U.S.C. § 706(2)(D).

Requested Relief

235. Based on the foregoing, Plaintiffs request a declaration that EPA's approval of the Spokane River TMDL is void.

236. Based on the foregoing, petitioners request a declaration that EPA may not rely on statements in the Spokane River TMDL to impose NPDES permit conditions on Idaho sources.

COUNT FOUR

Violation of the APA for Using Inaccurate Flow Projections

237. The allegations of the foregoing paragraphs 1 through 236 are realleged and incorporated herein.

238. The Spokane River TMDL bases the wasteload allocations for Washington municipal point sources and the loading assumptions for Idaho point sources on certain seasonal average effluent concentrations (either 36 µg/L or 42 µg/L) and projected effluent flow rates for the year 2027.

239. The City of Spokane received a per capita allocation based on projected 2027 population that is nearly three times higher than Post Falls.

240. The County of Spokane received a per capita allocation based on projected 2027 population that is nearly 60 percent higher than Post Falls.

241. HARSB received a per capita allocation based on projected 2027 population that is significantly smaller than either the City of Spokane or Spokane County.

242. The Spokane River TMDL states that the projected effluent flow rates for the point-source dischargers were based on information submitted by the dischargers.

243. On multiple occasions, Ecology failed to incorporate and update information submitted by Post Falls regarding its projected effluent flow rates.

244. EPA approved the Spokane River TMDL despite the failure to incorporate Post Falls's projected effluent flow rates.

EPA's Unlawful Acts

245. EPA's approval of the Spokane River TMDL that incorporates disproportionate flow projections and ignores Post Falls's flow projections constitutes agency action that is "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" within the meaning of the APA, 5 U.S.C. § 706(2)(A).

246. EPA's approval of the Spokane River TMDL that incorporates disproportionate flow projections and ignores Post Falls's flow projections constitutes agency action that is "unsupported by substantial evidence" within the meaning of the APA, 5 U.S.C. § 706(2)(E).

247. EPA's approval of the Spokane River TMDL that incorporates disproportionate flow projections and ignores Post Falls's flow projections constitutes agency action that is "unwarranted by the facts" within the meaning of the APA, 5 U.S.C. § 706(2)(F).

Requested Relief

248. Based on the foregoing, Plaintiffs request a declaration that EPA's approval of the Spokane River TMDL is void.

249. Based on the foregoing, Plaintiffs request a declaration that EPA may not rely on statements in the Spokane River TMDL to impose NPDES permit conditions on Idaho sources.

COUNT FIVE

Violation of the CWA and the APA for Treating Idaho and Washington Dischargers Differently Regarding Bioavailability

250. The allegations of the foregoing paragraphs 1 through 249 are realleged and incorporated herein.

251. The Spokane River TMDL states that all phosphorus is assumed to be bioavailable.

252. EPA approved the Spokane River TMDL expressly approving this assumption.

253. In addition to the Spokane River TMDL, Ecology approved a management implementation plan (the "Implementation Plan").

254. Among other things, the Implementation Plan states that dischargers may seek to prove a certain fraction of their phosphorous discharge is not bioavailable.

255. The Implementation Plan states that if Ecology agrees with the discharger regarding the non-bioavailability of phosphorus, the pounds of phosphorus that are not bioavailable will be excluded from the discharger's total phosphorous wasteload allocation.

256. EPA's approval of the Spokane River TMDL does not adopt the Implementation Plan, including the potential for a discharger to show that a certain fraction of its phosphorous discharge is not bioavailable and that the non-bioavailable fraction may be excluded from the allowable phosphorous wasteload allocation.

257. The fact that the Spokane River TMDL does not include the bioavailability analysis in the Implementation Plan leads to the potential that Washington dischargers will receive the benefit of bioavailability studies while EPA will ignore any such studies prepared by Idaho dischargers in connection with EPA's issuance of their NPDES permits.

258. EPA's approval of the Spokane River TMDL with differential treatment of Washington and Idaho dischargers regarding bioavailability constitutes agency action that is "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" within the meaning of the APA, 5 U.S.C. § 706(2)(A).

259. EPA's approval of the Spokane River TMDL without fully incorporating Ecology's bioavailability analysis in violation of the CWA constitutes agency action that is "in

excess of statutory jurisdiction, authority, or limitations, or short or statutory right" within the meaning of the APA, 5 U.S.C. § 706(2)(C).

Requested Relief

260. Based on the foregoing, Plaintiffs request a declaration that EPA's approval of the Spokane River TMDL is void.

261. Based on the foregoing, Plaintiffs request a declaration that the Spokane River TMDL allows any permit issued pursuant thereto to consider the bioavailability of phosphorus; alternatively, Plaintiffs request a declaration that EPA must offer the same consideration of bioavailability studies to Idaho dischargers as Ecology offers to Washington dischargers.

COUNT SIX

Violation of the APA for Approving Idaho Ammonia Loads That Fail To Account for the Fact That No Material or Measurable Amounts of Ammonia Will Reach Lake Spokane Reservoir from Idaho

262. The allegations of the foregoing paragraphs 1 through 261 are realleged and incorporated herein.

263. Lake Spokane reservoir is about 40 miles downstream from the Idaho border.

264. Ammonia dissipates quickly in water and does not reach Lake Spokane reservoir from Idaho sources in any measurable or detectable amount.

265. The Spokane River TMDL includes a loading assumption of only 94.4 pounds per day of ammonia for Idaho sources.

266. This assumption is very restrictive and equates to only about 1 mg/L in discharge.

267. No substantial evidence in the record supports the need for this loading assumption.

EPA's Unlawful Acts

268. EPA's approval of the Spokane River TMDL that used inaccurate assumptions regarding the impact of ammonia loading from Idaho dischargers constitutes agency action that is "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" within the meaning of the APA, 5 U.S.C. § 706(2)(A).

269. EPA's approval of the Spokane River TMDL that creates ammonia loads for Idaho dischargers that are not based on substantial evidence, and are in fact inconsistent with substantial evidence, constitutes agency action that is "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" within the meaning of the APA, 5 U.S.C. § 706(2)(A).

270. EPA's approval of the Spokane River TMDL that imposes ammonia load allocations that are not based on the actual impact of such ammonia to the Lake Spokane reservoir constitutes agency action that is "unsupported by substantial evidence" within the meaning of the APA, 5 U.S.C. § 706(2)(E).

271. EPA's approval of the Spokane River TMDL that used inaccurate assumptions regarding the impact of ammonia loading from Idaho dischargers constitutes agency action that is "unwarranted by the facts" within the meaning of the APA, 5 U.S.C. § 706(2)(F).

Requested Relief

272. Based on the foregoing, Plaintiffs request a declaration that EPA's approval of the Spokane River TMDL is void.

COUNT SEVEN

Violation of the APA for Approving a TMDL Based on Arbitrary Results of Water-Quality Modeling

273. The allegations of the foregoing paragraphs 1 through 272 are realleged and incorporated herein.

274. As set forth in the paragraphs below, EPA approved the Spokane River TMDL notwithstanding the fact it is based on random and arbitrary results of water-quality modeling.

275. The Spokane River TMDL imposes obligations on Idaho dischargers, including Post Falls and HARSB, based on modeling performed by Portland State University ("PSU") in 2009 and 2010 at the direction of Ecology and EPA.

276. EPA intends to rely directly on the modeling to impose NPDES permit obligations on Post Falls and HARSB. The Spokane River TMDL states, "EPA will incorporate permit limits into the NPDES permits for Idaho point source dischargers that ensure that the total dissolved oxygen depletion resulting from those dischargers is no greater than that shown in Tables 14 and 15 [of the January 2010 PSU report]."

277. The reference to Tables 14 and 15 is incorrect. The correct reference is either to Tables 15 and 16 or to Tables 9 and 10.

Substantial Increase in November to March Idaho Inputs in January 2010 PSU Report

278. The Spokane River TMDL states that Idaho point source discharger loads are based on estimated permit limits from Table 2 of the September 2009 PSU report.

279. This statement is incorrect in that the January 2010 PSU report significantly increases the estimated inputs from Idaho point source dischargers during November through March as compared to the September 2009 PSU report.

280. The change in the November through February loading assumptions between the September 2009 PSU modeling and the January 2010 modeling in not disclosed in the Spokane River TMDL, the January 2010 PSU report, or elsewhere in the record where it could have been reasonably ascertained.

281. The incorrect statement is material because EPA will rely on the Spokane River TMDL in issuing permits for Post Falls and HARSB and use of inconsistent data sets could lead to the adoption of materially incorrect permit limits.

282. Post Falls and HARSB should be required to meet less restrictive lower winter limits than are included in the January 2010 PSU report, and Post Falls and HARSB are willing to meet such limits.

Overestimation of Idaho Impact by Three to Four Times

283. On information and belief, because of flaws in the model methodology, and changes in data inputs, the January 2010 PSU report overestimates the impact of Idaho point source dischargers on dissolved oxygen reductions in Lake Spokane reservoir by three to four times.

Failure To Account for Known Variability in Model

284. The Spokane River TMDL's direction to EPA to impose permit limits that "ensure that the total dissolved oxygen depletion resulting from [Idaho] dischargers is no greater than that shown in Tables 14 and 15 [sic]" of the January 2010 PSU report fails to account for known and significant variability in model outputs.

EPA's Unlawful Acts

285. EPA's approval of the Spokane River TMDL based on arbitrary results of water-quality modeling constitutes agency action that is "arbitrary, capricious, and abuse of

discretion, or otherwise not in accordance with law" within the meaning of the APA, 5 U.S.C. § 706(2)(A).

286. EPA's approval of the Spokane River TMDL based on based on arbitrary results of water-quality modeling constitutes agency action that is "contrary to constitutional right, power, privilege, or immunity" within the meaning of the APA, 5 U.S.C. § 706(2)(B).

287. EPA's approval of the Spokane River TMDL based on based on arbitrary results of water-quality modeling constitutes agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short or statutory right" within the meaning of the APA, 5 U.S.C. § 706(2)(C).

Relief Requested

288. Based on the foregoing, Plaintiffs request a declaration that EPA's approval of the Spokane River TMDL is void.

COUNT EIGHT

Violation of the APA for Approving a TMDL Based on Inconsistent Application of Water Quality Standards and Targets to Idaho dischargers

289. The allegations of the foregoing paragraphs 1 through 288 are realleged and incorporated herein.

290. As set forth in the paragraphs below, EPA approved the Spokane River TMDL notwithstanding the fact it is based on inconsistent applications of water quality standards and targets to Idaho dischargers.

291. The Spokane River TMDL imposes obligations on Washington dischargers based on achieving "an average total phosphorous concentration in the riverine portion of Lake Spokane (model segment 154) of 10 µg/L from June through September." Spokane River TMDL at 27.

292. The Spokane River TMDL fails to apply the 10 µg/L Phosphorous Target to Idaho dischargers.

293. Instead, the Spokane River TMDL imposes obligations on Idaho dischargers based on the much more stringent standard of achieving a DO reduction of no more than 0.2 mg/L in Lake Spokane reservoir.

294. The direct application of the 0.2 mg/L DO standard to Idaho dischargers treats Idaho dischargers differently from Washington dischargers.

295. The direct application of the 0.2 mg/L DO standard to Idaho dischargers fails to account for Avista's obligations in the Spokane River TMDL.

EPA's Unlawful Acts

296. EPA's approval of the Spokane River TMDL based on inconsistent applications of water quality standards and targets to Idaho dischargers constitutes agency action that is "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" within the meaning of the APA, 5 U.S.C. § 706(2)(A).

297. EPA's approval of the Spokane River TMDL based on inconsistent applications of water quality standards and targets to Idaho dischargers constitutes agency action that is "contrary to constitutional right, power, privilege, or immunity" within the meaning of the APA, 5 U.S.C. § 706(2)(B).

298. EPA's approval of the Spokane River TMDL based on inconsistent applications of water quality standards and targets to Idaho dischargers constitutes agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short or statutory right" within the meaning of the APA, 5 U.S.C. § 706(2)(C).

Requested Relief

299. Based on the foregoing, Plaintiffs request a declaration that EPA's approval of the Spokane River TMDL is void.

COUNT NINE

Violation of the CWA and the APA for Approving TMDL with an Excessive and Arbitrary Margin of Safety

300. The allegations of the foregoing paragraphs 1 through 299 are realleged and incorporated herein.

301. Section 303(d)(1)(C) of the CWA requires that each TMDL include a margin of safety "which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." 33 U.S.C. § 1313(d)(1)(C).

302. The Spokane River TMDL was created based on an extremely detailed analysis of water quality in Lake Spokane reservoir.

303. The Spokane River TMDL includes the following six, conservative assumptions as implicit margins of safety:

- Low flows (2001) were used as the baseline hydrologic condition.
- For each tributary, the headwater phosphorous concentration has been used as the "natural background" concentration at the mouth of the tributary, even though natural phosphorous concentrations may increase between the headwaters and the mouth.
- Stormwater flows from an "average" rainfall year have been assumed to occur during the 2001 low-flow year; similarly, groundwater flows have been assumed which are greater than those that would be expected to occur during a critical low flow year.
- All phosphorus is assumed to be bioavailable.
- The top eight meters of the reservoir are not included in the vertical averaging because of amplified algal activity which increases daytime dissolved oxygen levels.
- Conservative assumptions were used in assignment of a load allocation for groundwater and runoff directly entering Lake Spokane (the "Lake Watershed").

Spokane River TMDL at 51.

304. On information and belief, the cumulative margin of safety in the Spokane River TMDL is as much as 1,000 to 2,000 percent.

305. Low flows alone introduce a significant margin of safety compared to average flows.

306. Federal Energy Regulatory Commission ("FERC") obligations require Avista to maintain flow into the Spokane River from Post Falls Dam that exceeds the low-flow assumptions in the Spokane River TMDL by at least 20 percent. No evidence in the record supports a conclusion that Avista will not be able to meet this obligation during the averaging period required by Ecology's regulations.

307. The best evidence available to EPA and Ecology concludes that about 90 percent of the phosphorus that would be discharged by point source dischargers is not bioavailable.

308. Groundwater entering the Lake Watershed has concentration of phosphorus far less than 25 µg/L.

309. The margin of safety in the Spokane River TMDL arbitrarily and grossly exceeds what is needed to account for "lack of knowledge concerning the relationship between effluent limitations and water quality." 33 U.S.C. § 1313(d)(1)(C).

EPA's Unlawful Acts

310. EPA's approval of the Spokane River TMDL including an excessive and arbitrary margin of safety constitutes agency action that is "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" within the meaning of the APA, 5 U.S.C. § 706(2)(A).

311. EPA's approval of the Spokane River TMDL including an excessive and arbitrary margin of safety constitutes agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short or statutory right" within the meaning of the APA, 5 U.S.C. § 706(2)(C).

Requested Relief

312. Based on the foregoing, Plaintiffs request a declaration that EPA's approval of the Spokane River TMDL is void.

COUNT TEN

Violation of the APA for Approving TMDL with an Arbitrary Selection of Modeling Scenario #1

313. The allegations of the foregoing paragraphs 1 through 312 are realleged and incorporated herein.

314. The Spokane River TMDL presented two modeling scenarios. Ecology selected modeling scenario #1 over modeling scenario #2.

315. Ecology's selection was arbitrary and not supported by the record.

316. EPA approved the Spokane River TMDL notwithstanding the fact that the Spokane River TDML arbitrarily selects modeling scenario #1 over modeling scenario #2.

317. Adoption of the loading assumptions in modeling scenario #1 provides no material benefit to water quality as compared to modeling scenario #2.

318. Adoption of the loading assumptions in modeling scenario #1 imposes harsher hardships on Idaho dischargers as compared to modeling scenario #2.

EPA's Unlawful Acts

319. EPA's approval of the Spokane River TMDL including the arbitrary selection of modeling scenario #1 constitutes agency action that is "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" within the meaning of the APA, 5 U.S.C. § 706(2)(A).

Requested Relief

320. Based on the foregoing, Plaintiffs request a declaration that EPA's approval of the Spokane River TMDL is void.

COUNT ELEVEN

Violation of the APA for Approving Loading Assumptions for Idaho Source for Times and Places Where Such Assumptions are Not Required To Comply with Water Quality Standards

321. The allegations of the foregoing paragraphs 1 through 320 are realleged and incorporated herein.

322. The Spokane River TMDL states that the water quality standard for the Lake Spokane reservoir allows for a decrease in DO of up to 0.2 mg/L below natural conditions.

323. The modeling predictions for DO depletion from Idaho pollutant loads are indicated in Tables 9, 10, 15 and 16 of the January 2010 PSU report.

324. The modeling does not indicate a predicted violation of the 0.2 mg/L DO reduction for most of the times and places analyzed in such Tables.

325. The Spokane River TMDL states that EPA will incorporate permit limits into the NPDES permits for Idaho point source dischargers that ensure the DO depletion is no greater than that shown in the described Idaho scenario tables, regardless of whether the model predicts

that the contribution of Idaho dischargers will cause or contribute to a violation of a water quality standard at that place or time.

326. There is no basis in the record for EPA's approval of limits for all model predictions in Tables 15 and 16 rather than only those predicted to exceed the 0.2 mg/L DO Standard.

EPA's Unlawful Acts

327. EPA's approval of the Spokane River TMDL that imposes all the loading assumptions in the PSU reports rather than only those predicted to exceed the applicable water quality standard constitutes agency action that is "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" within the meaning of the APA, 5 U.S.C. § 706(2)(A).

328. EPA's approval of the Spokane River TMDL that imposes all the loading assumptions in the PSU reports rather than only those predicted to exceed the applicable water quality standard constitutes agency action that is "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" within the meaning of the APA, 5 U.S.C. § 706(2)(A).

329. EPA's approval of the Spokane River TMDL that imposes all the loading assumptions in the PSU reports rather than only those predicted to exceed the applicable water quality standard constitutes agency action that is "unsupported by substantial evidence" within the meaning of the APA, 5 U.S.C. § 706(2)(E).

Requested Relief

330. Based on the foregoing, Plaintiffs request a declaration that EPA's approval of the Spokane River TMDL is void.

COUNT TWELVE

Violation of the APA for Reliance on the Conclusion That Technological Limits are Achievable for Idaho Dischargers, While Conceding to Washington Dischargers That Offsets Will be Required To Comply

331. The allegations of the foregoing paragraphs 1 through 330 are realleged and incorporated herein.

332. The Spokane River TMDL acknowledges that Washington dischargers will likely need to pursue actions to reduce nonpoint sources of pollution in order to reduce their "delta" and meet their wasteload allocation and DO responsibilities.

333. The Spokane River TMDL further states that "delta" refers to the difference between what technology can achieve and the final wasteload allocation.

334. The Spokane River TMDL indicated that Idaho dischargers can meet the assumed loads and limits in the Spokane River TMDL through technology with no opportunity or need for delta management.

335. EPA approved a TMDL that assumes Idaho dischargers will meet their obligations under the Spokane River TMDL solely through applications of current technology.

336. Current technology will not enable Idaho dischargers to meet their obligations under the Spokane River TMDL.

337. No substantial evidence in the record supports a conclusion that offsets exist or can exist for Idaho dischargers.

EPA's Unlawful Acts

338. EPA's approval of the Spokane River TMDL that relies on the conclusion that technological limits are achievable for Idaho dischargers while also asserting that Washington dischargers will likely need to utilize offsets to meet their water-quality obligations constitutes

agency action that is "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" within the meaning of the APA, 5 U.S.C. § 706(2)(A).

339. EPA's approval of the Spokane River TMDL that relies on the conclusion that technological limits are achievable for Idaho dischargers while also asserting that Washington dischargers will likely need to utilize offsets to meet their water-quality obligations constitutes agency action that is "unsupported by substantial evidence" within the meaning of the APA, 5 U.S.C. § 706(2)(E).

340. EPA's approval of the Spokane River TMDL that relies on the conclusion that technological limits are achievable for Idaho dischargers while also asserting that Washington dischargers will likely need to utilize offsets to meet their water-quality obligations constitutes agency action that is "unwarranted by the facts" within the meaning of the APA, 5 U.S.C. § 706(2)(F).

Requested Relief

341. Based on the foregoing, Plaintiffs request a declaration that EPA's approval of the Spokane River TMDL is void.

COUNT THIRTEEN

Violation of Due Process for Approving a TMDL Created By Biased Washington Procedures

342. The allegations of the foregoing paragraphs 1 through 341 are realleged and incorporated herein.

343. During the development of the Spokane River TMDL and the dispute resolution process, Ecology repeatedly ignored professionally prepared data provided by Plaintiffs with regard to flow projections.

344. During the development of the Spokane River TMDL and the dispute resolution process, Ecology repeatedly denied Plaintiffs' requests to treat Idaho dischargers equitably in comparison to Washington dischargers by employing appropriate wastewater flow projections.

345. During the development of the Spokane River TMDL and the dispute resolution process, Ecology repeatedly ignored scientific data provided by Plaintiffs with regard to discharges from unpermitted, leaking septic tanks.

346. During the development of the Spokane River TMDL and the Washington dispute resolution process, Ecology repeatedly denied Plaintiffs requests to treat Idaho dischargers fairly by prohibiting the waste loads from Spokane's numerous unpermitted, leaking septic tanks, thereby allowing Plaintiffs the ability to discharge additional waste loads.

347. During the development of the Spokane River TMDL and the dispute resolution process, Ecology repeatedly ignored scientific data provided by Plaintiffs with regard to the bioavailability of phosphorus in Plaintiffs' discharges.

348. During the development of the Spokane River TMDL and the Washington dispute resolution process, Ecology repeatedly denied Plaintiffs' requests to treat Idaho dischargers fairly by ignoring the issue of bioavailability of phosphorus, thereby artificially and unnecessarily reducing the allowable waste loads for Plaintiffs.

349. Ecology treated Plaintiffs unfairly as a result of its bias against Plaintiffs and not as a result of fair scientific analysis required under the CWA.

EPA's Unlawful Acts

350. EPA's approval of a Spokane River TMDL that was unfair to and biased against Plaintiffs constitutes agency action that is "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" within the meaning of the APA, 5 U.S.C. § 706(2)(A).

351. EPA's approval of the Spokane River TMDL that was unfair to and biased against Plaintiffs constitutes agency action that is "contrary to constitutional right, power, privilege, or immunity" within the meaning of the APA, 5 U.S.C. § 706(2)(A).

352. EPA's approval of the Spokane River TMDL that was unfair to and biased against Plaintiffs constitutes agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short or statutory right" within the meaning of the APA, 5 U.S.C. § 706(2)(C).

353. EPA's approval of the Spokane River TMDL that was unfair to and biased against Plaintiffs constitutes agency action that is "without observance of procedure required by law" within the meaning of the APA, 5 U.S.C. § 706(2)(D).

354. EPA's approval of the Spokane River TMDL that was unfair to and biased against Plaintiffs constitutes agency action that is "unsupported by substantial evidence" within the meaning of the APA, 5 U.S.C. § 706(2)(E).

355. EPA's approval of the Spokane River TMDL that was unfair to and biased against Plaintiffs constitutes agency action that is "unwarranted by the facts" within the meaning of the APA, 5 U.S.C. § 706(2)(F).

Requested Relief

356. Based on the foregoing, Plaintiffs request a declaration that EPA's approval of the Spokane River TMDL is void.

COUNT FOURTEEN

Violation of the APA for Approving a TMDL without Proper Federal Rulemaking Procedures

357. The allegations of the foregoing paragraphs 1 through 356 are realleged and incorporated herein.

358. The APA, 5 U.S.C. § 551(4), defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."

359. The APA, 5 U.S.C. § 551(5), defines "rulemaking" as the "agency process for formulating, amending, or repealing a rule."

360. The APA, 5 U.S.C. § 553, generally requires EPA to publish notice of a proposed rulemaking to be published in the Federal Register and to give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments.

361. The CWA, 33 U.S.C. § 1313(d), requires the Administrator of EPA to approve or disapprove a TMDL submitted to EPA by a state.

362. CWA regulations, 40 C.F.R. § 130.7(d), require the Regional Administrator of EPA to approve or disapprove a TMDL submitted to EPA by a state.

363. EPA's approval of the Spokane River TMDL constituted a rulemaking under the APA because the approval made the Spokane River TMDL generally and specifically applicable to Plaintiffs and other dischargers into the Spokane River and because the Spokane River TMDL has a future effect on the operations of Plaintiffs and other dischargers.

364. EPA approved the Spokane River TMDL without engaging in the procedures required by the APA.

EPA's Unlawful Acts

365. EPA's approval of the Spokane River TMDL without engaging in the rulemaking procedures required by the APA constitutes agency action that is "arbitrary,

capricious, and abuse of discretion, or otherwise not in accordance with law" within the meaning of the APA, 5 U.S.C. § 706(2)(A).

366. EPA's approval of the Spokane River TMDL without engaging in the rulemaking procedures required by the APA constitutes agency action that is "contrary to constitutional right, power, privilege, or immunity" within the meaning of the APA, 5 U.S.C. § 706(2)(B).

367. EPA's approval of the Spokane River TMDL without engaging in the rulemaking procedures required by the APA constitutes agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short or statutory right" within the meaning of the APA, 5 U.S.C. § 706(2)(C).

368. EPA's approval of the Spokane River TMDL without engaging in the rulemaking procedures required by the APA constitutes agency action that violated the rulemaking provisions of the APA, 5 U.S.C. § 553.

Requested Relief

369. Based on the foregoing, Plaintiffs request a declaration that EPA's approval of the Spokane River TMDL is void.

COUNT FIFTEEN

Preliminary and Permanent Injunctive Relief

370. The allegations of the foregoing paragraphs 1 through 369 are realleged and incorporated herein.

371. Defendants application of the Spokane River TMDL to Plaintiffs' NPDES permits would cause further injury and irreparable harm to Plaintiffs by unnecessarily restricting

Plaintiffs' future growth, creating technologically unattainable restrictions and managing for certain impacts on the Lake Spokane reservoir that are currently unlikely to occur.

372. The injury is permanent because the strict limits in Plaintiffs' NPDES permits that would be in place pursuant to the Spokane River TMDL cannot be reversed or made less restrictive due to the anti-degradation requirements of the CWA.

373. Plaintiffs are entitled to the requested preliminary and permanent injunction because there is no adequate remedy at law that can resolve the irreparable injury that is certain to occur if the Spokane River TMDL is not declared void for the reasons set forth in this Complaint.

PRAYER FOR RELIEF

Plaintiffs request the following relief:

A. A declaration that the Spokane River TMDL is void because it improperly incorporates load allocations for illegal septic tanks.

B. A declaration that the Spokane River TMDL is void because it improperly applies the water quality standards.

C. A declaration that the Spokane River TMDL is void because it improperly incorporates loading assumptions for Idaho dischargers.

D. A declaration that EPA may not rely on the loading assumptions in the Spokane River TMDL in issuing NPDES permits to Plaintiffs.

E. A declaration that the Spokane River TMDL is void because it relies on inaccurate flow projections.

F. A declaration that the Spokane River TMDL is void because it offers different treatment to Washington and Idaho sources regarding bioavailability.

G. A declaration that EPA must offer the same consideration of bioavailability studies to Idaho dischargers as Ecology offers to Washington dischargers; alternatively, a declaration that the Spokane River TMDL does not allow any permit issued pursuant thereto to consider the bioavailability of phosphorus.

H. A declaration that the Spokane River TMDL is void because it imposes arbitrary and unsupported ammonia loading assumptions on Plaintiffs.

I. A declaration that the Spokane River TMDL is void because it includes arbitrary application of the water-quality models.

J. A declaration that the Spokane River TMDL is void because it includes inconsistent application of water quality standards and targets to Idaho versus Washington.

K. A declaration that the Spokane River TMDL is void because it arbitrarily creates loading assumptions for Idaho dischargers for times and places where such assumptions are not required to comply with water quality standards.

L. A declaration that the Spokane River TMDL is void because it arbitrarily concludes that Idaho dischargers will be able to comply with the Spokane River TMDL through the implementation of technology, while conceding to Washington dischargers that "delta management" will be required to comply.

M. A declaration that the Spokane River TMDL is void because it includes an arbitrary and excessive margin of safety.

N. A declaration that the Spokane River TMDL is void because EPA did not approve the Spokane River TMDL in accordance with proper federal rulemaking procedures.

O. A declaration that EPA violated the CWA by approving the Spokane River TMDL.

P. A declaration that EPA violated the APA by approving the Spokane River TMDL.

Q. A declaration that the Spokane River TMDL is void.

R. Preliminary and permanent injunctive relief restraining Defendants from applying the Spokane River TMDL to Plaintiffs' NPDES permits.

S. An award of attorneys' fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, the Civil Rights Attorney's Fee Awards Act, 42 U.S.C. § 1988, and other applicable law or rule of court.

T. Retain jurisdiction of this action to ensure compliance with the Court's decree.

U. Such further relief as the Court determines is warranted.

DATED this 16th day of July, 2010.

GIVENS PURSLEY LLP

By /s/ Gary G. Allen
Gary G. Allen
Attorneys for Plaintiffs