

PETER R. ANDERSON
Presiding Officer
729 W. Braemere Rd.
Boise, Idaho 83702

BEFORE THE BOARD OF ENVIRONMENTAL QUALITY

IN RE: IDEQ REPORT – THE UPPER SNAKE ROCK)
TMDL MODIFICATION, DATED JULY 22, 2005:)

PRISTINE SPRINGS, INC.,)

Petitioner,)

vs.)

TONI HARDESTY, Director, IDAHO DEPARTMENT)
OF ENVIRONMENTAL QUALITY, an executive)
agency of the State of Idaho,)

Respondent,)

and)

BLUE LAKES TROUT FARM, INC., CLEAR LAKES)
TROUT COMPANY, INC., ESTATE OF EARL M.)
HARDY, FISHERIES DEVELOPMENT CO., IDAHO)
TROUT COMPANY INC., RIM VIEW TROUT CO.,)
RAINBOW TROUT FARMS, INC.,)

Intervenors.)

Docket No. 0102-05-02

PRELIMINARY ORDER ON
MOTIONS FOR SUMMARY
JUDGMENT

I. INTRODUCTION

This matter comes before the Board of Environmental Quality (the “Board”) on the *Petition for Contested Case and Declaratory Relief* (the “*Petition*”) of Pristine Springs, Inc. (PSI) challenging *The Upper Snake Rock TMDL Modification* (the “TMDL Modification”) issued by the Department of Environmental Quality (DEQ) on July 22, 2005. PSI filed a *Motion for Summary Judgment* on May 19, 2006. DEQ also filed its *Respondent’s Motion for Summary Judgment* on May 19, 2006. This preliminary order resolves all aspects of both motions.

II. STANDARD OF REVIEW

A. **Scope of Board's Review.**

PSI's *Petition* was brought pursuant to I.C. § 39-3611(2) which provides that:

The director's final decision regarding a TMDL may be appealed to the board of environmental quality in accordance with section 39-107(5), Idaho Code, and the rules governing such appeals.

I.C. § 39-107(5) provides that

Any person aggrieved by an action or inaction of the department shall be afforded an opportunity for a fair hearing upon request therefor in writing pursuant to chapter 52, title 67, Idaho Code, and the rules promulgated thereunder. In those cases where the board has been granted the authority to hold such a hearing pursuant to a provision of the Idaho Code, the hearing maybe conducted by the board at a regular or special meeting, or the board may designate hearing officers, who shall have the power and authority to conduct hearings in the name of the board at any time and place. In any hearing, a member of the board or hearing officer designated by it, shall have the power to administer oaths, examine witnesses, and issue in the name of the board subpoenas requiring the testimony of witnesses and the production of evidence relevant to any matter in the hearing.

The Board has not stated by rule the standard it will apply when reviewing DEQ decisions regarding TMDLs in contested cases. The Board in the past upheld a Hearing Officer's decision that matters before the Board are to be reviewed *de novo* "pursuant to the statutory directive that an opportunity be afforded to all parties to a contested case to respond and present evidence and argument on all issues involved." *Hearing Officer's Findings of Fact, Conclusions of Law, and Proposed Decision and Order on Motions for Summary Judgment*, Dr. Peter Rickards v. Idaho Dept. of Health and Welfare, et al., Docket No. 0101-92-12, at 7 (December 18, 1992) (citing I.C. § 67-5209(c), now codified at I.C. § 67-5242(3)(b)) *adopted by Order*, (June 17, 1993).

DEQ and PSI directly argue, and Intervenors argue by implication, that the correct standard of review in this matter is whether DEQ's decisions were arbitrary and capricious. DEQ cites for this proposition two federal appellate decisions reviewing agency decisions.

Respondent's Memorandum in Support of Motion for Summary Judgment at 12 (citing *Dioxin/Organochlorine Center v. Clarke*, 57 F.3d 1517 (1995) and *NRDC v. Muszynski*, 268 F.3d 91 (2nd Cir. 2001)). PSI cites I.C. §67-5279 for the standard for courts reviewing agency decisions. *Brief in Support of Petitioner's Motion for Summary Judgment*, at 3. The flaw in both of these arguments is that the “agency” in this matter whose decision may well be reviewed by a court is the Board, not DEQ.¹ The Board is made up of members with independent expertise, I.C. § 39-107(1), and has broad authority over the rules, codes and standards of DEQ. I.C. §39-107(7).² The Board does not conduct a contested case on a decision of DEQ in the same fashion or with the same deference as a court reviewing an agency decision.

The general issue raised by the *Petition* is whether the Board should increase the allocation of total phosphorous to PSI in the TMDL Modification. As petitioner, PSI has the burden of proving by a preponderance of the evidence that its allocation of total phosphorous should be increased, IDAPA 58.01.23.102, but the Board will review PSI's request *de novo*.

When considering the *Petition* the Board must consider notions of standing and harmless error. Persons “aggrieved” by an action or inaction of DEQ are granted an opportunity for a hearing before the Board. I.C. § 39-107(5). Persons “adversely affected” by a final determination of the Board may request judicial review. I.C. § 37-107(6). A reviewing court will uphold the Board's decision unless substantial rights of the appellant have been prejudiced. I.C. § 67-5279(4).

B. Standards for Summary Judgment.

Motions for summary judgment before the Board are allowed by IDAPA 58.01.23.213,

¹The parties' arbitrary and capricious standard for the Board would place a reviewing court in the awkward position of deciding whether the Board's arbitrary and capricious determination was, itself, arbitrary and capricious.

²In fact, the Idaho water quality standards implemented by the TMDL at issue were adopted by the Board. IDAPA 58.01.02.001.

and are governed by the Idaho Rules of Civil Procedure. Summary judgment is proper if “there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” I.R.C.P. 56(c). When considering a motion for summary judgment the Board must liberally construe the facts in favor of the party opposing the motion, who is also to be given the benefit of all favorable inferences which might be reasonably drawn from the evidence.

C. Standards for TMDL Pollutant Allocations.

1. Standards in the Clean Water Act

The Federal Water Pollution Control Act, commonly known as the Clean Water Act, 33 U.S.C. § 1251 et seq., is a comprehensive water quality statute designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In order to meet this objective, the Clean Water Act imposes obligations on the EPA and state environmental protection agencies. EPA must establish technology-based standards for discharges from point sources³ to waters of the United States. These technology-based limits are imposed through National Pollution Discharge Elimination System (“NPDES”) permits. 33 U.S.C. §§ 1311, 1314, 1342. The EPA issues the NPDES permits for Idaho.

Technology-based NPDES permits are further limited, in that they must contain sufficient limits to ensure that water bodies meet water quality standards established by states and approved by the EPA. Water quality standards consist of designated uses⁴ of state waters, water quality criteria to protect those uses, and an antidegradation statement. 33 U.S.C. § 1313(c); 40 C.F.R. § 131.6.

³A point source means “... any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged...” 33 U.S.C. § 1362(14).

⁴Designated uses are such things as swimming or drinking.

States are obligated to identify waters that fail to meet water quality standards, despite the application of technology-based controls. 33 U.S.C. § 1313(d). This list of waters is referred to as the 303(d) or water quality limited segments list. For the waters on the 303(d) list, states are required to establish total maximum daily loads (TMDLs). TMDLs are plans that establish the maximum amount of pollutants that can go into a water body from point and nonpoint sources and still meet state water quality standards. 33 U.S.C. § 1313(d)(1)(C). According to Section 303(d) of the Clean Water Act, a TMDL must meet the following test:

Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and 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).

The Clean Water Act regulations further define TMDLs. TMDL is defined in 40 C.F.R.

§ 130.2(i) as follows:

The sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background. If a receiving water has only one point source discharger, the TMDL is the sum of that point source WLA plus the LAs for any nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments. TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure. If best management practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then waste load allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs.

Load allocation (LA), as used in the definition of TMDL, is defined in the Clean Water Act regulations as follows:

The portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources. Load allocations are best estimates of the loading, which may range from reasonably accurate estimates to gross allotments, depending on the availability of data and appropriate techniques for predicting the loading. Whenever possible, natural and nonpoint source loads should be distinguished.

40 C.F.R. 130.2(g). Waste load allocation (WLA), as it is used in the TMDL definition, is defined as follows:

The portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation.

40 C.F.R. 130.2(h).

Based upon these statutory and regulatory definitions a TMDL can be described by a simple algebraic equation:

$$\text{TMDL} = \text{WLAs} + \text{LAs} + \text{margin of safety}^5$$

Several salient points can be drawn from this simple equation. First, the allocation of the fixed TMDL between the WLAs, LAs and margin of safety is assumed to be a zero sum game—one type of allocation cannot be increased without a corresponding decrease in another. Second, the individual allocations are each a portion of the TMDL.⁶ Finally, the relative simplicity of the equation is belied by the definition of “LA” which includes not only non-point sources but apparently also includes natural background sources, tributaries and adjacent segments,⁷ all of which could contain in turn both point and non-point sources of pollution.

Loading capacity, as used in the definition of load allocation and waste load allocation, is defined in the Clean Water Act as follows:

The greatest amount of loading that a water can receive without violating water quality standards.

40 C.F.R. 130.2(f). Load or loading is defined as:

An amount of matter or thermal energy that is introduced into a receiving water; to introduce matter or thermal energy into a receiving water. Loading may be either man caused (pollutant loading) or natural (natural background loading).

⁵ Affidavit of Conde, Ex. 1, at 2.

⁶ For instance: $\text{WLA} = \text{TMDL} - (\text{LA} + \text{margin of safety})$

⁷ 40 C.F.R. § 130.2(i)

40 C.F.R. 130.2(e).

The Federal Clean Water Act and its implementing regulations contain no mandated formula for allocating a TMDL among persons wishing to use the assimilative capacity of the nation's waters.⁸ The EPA has identified 19 different possible allocation schemes in a list that it concedes is non-exhaustive. *Supplemental Brief in Support of Motion for Summary Judgment*, Ex. B, at 69. An environmental law treatise noted that there are a number of allocation schemes:

All that is necessary is to define the universe of discharges of a pollutant (say 100x) that would preserve desired uses in a given watercourse. Write off that capacity used by nature (say 30x), leaving another 70x to carve up according to the allocation scheme desired (e.g. lottery, market, first-come/first-served, merit).

2 W. Rodgers, *Environmental Law Air and Water*, § 4.18.C.1, at 281 (1986). Federal law leaves the allocation of a TMDL within the discretion of the State and EPA, with the only limitation being that they be developed with a basic level of rationality and fairness to implement applicable water quality standards.

The waste load allocations for point sources set out in TMDLs are implemented through the NPDES permits. 33 U.S.C. § 1313(d)(4); 40 C.F.R. § 122.44(d)(vii)(B).

2. Standards in the Idaho Water Quality Act

Like the Clean Water Act, the Idaho Water Quality Act, Idaho Code §§ 39-3601 et seq., sets out the process for developing, and the requirements for, TMDLs without setting any standards for allocating them. The Idaho Water Quality Act directs DEQ to develop TMDLs for water bodies on the state's 303(d) list and defines TMDLs as:

A plan for a water body not fully supporting designated uses and includes the sum of individual waste load allocations for point sources, load allocations for nonpoint sources, and natural background levels of the pollutant impacting the water body. Pollutant allocations established through TMDLs shall be at a level necessary to implement the applicable water quality standards for the identified

⁸ In contrast, the allocation of the use of water quantities is explicitly accomplished in Idaho through the prior appropriation doctrine and the familiar phrase "first in time is first in right." I.C. § 42-106

pollutants with seasonal variations and a margin of safety to account for uncertainty concerning the relationship between the pollutant loading and water quality standards.

I.C. § 39-3602(30). The bedrock legal standard for a TMDL is that it implements applicable water quality standards.

The legislature directs DEQ to undertake a subbasin assessment when it develops a TMDL. A subbasin assessment describes the watershed for which a TMDL is being proposed, water quality concerns, the status and attainability of designated uses and water quality criteria for the individual water bodies, the nature and location of pollutant sources, past and ongoing pollutant control activities, and other information which is relevant to the development and implementation of a TMDL. I.C. § 39-3602(29).

I.C. § 39-3611 provides that subbasin assessments and TMDLs must include, among other things, identification of pollutants impacting the water body, an inventory of all point and nonpoint sources of identified pollutants, if practicable, or an analysis of the land types, land uses, and geographical features within the watershed which might be contributing identified pollutants to the water body, pollutant control strategies for both point sources and nonpoint sources, and an adequate margin of safety to account for uncertainty. I.C. § 39-3611(4). I.C. § 39-3611 mandates that DEQ develop subbasin assessments and TMDLs in consultation with watershed advisory groups. I.C. § 39-3611(6) provides the following:

If a pollutant load is allocated to a tributary inflow as part of a downstream TMDL, the Director shall develop a plan to meet such allocation in consultation with the tributary watershed advisory group as provided in subsection (8) of this section.

The Director's final decision regarding a TMDL is published in the Idaho Administrative Bulletin and must be based on a record that provides the basis for the TMDL. Idaho Code § 39-3611(2).

With these standards in mind, the Hearing Officer, having examined the *Petition* and the written record, makes the following findings of fact:

III. FINDINGS OF FACT

A. Course of Proceedings

1. On July 22, 2005, DEQ issued the TMDL Modification. Notice of the TMDL Modification was published in the Idaho Administrative Bulletin on September 7, 2005. Thirty-four days later, on October 11, 2005, PSI filed the *Petition* with the Board. The Board referred PSI's *Petition* to this Presiding Officer on October 28, 2005.

2. PSI requested that the Board enlarge PSI's allocation of total phosphorous in the TMDL Modification based upon seven alleged errors by DEQ:

- Count 1: DEQ erroneously applied a TMDL to Warm Creek.
- Count 2: DEQ erroneously reduced PSI's non-point allocation of total phosphorous discharge to increase PSI's point source allocation of total phosphorous discharge.
- Count 3: DEQ erroneously determined PSI's point source allocation of total phosphorous discharge by using a limited set of water flow data that does not accurately reflect PSI's actual water use.
- Count 4: DEQ erroneously determined PSI's point source allocation of total phosphorous discharge by determining its warm water use solely from its warm water rights, that do not accurately reflect PSI's actual warm water use.
- Count 5: The amount of total phosphorus independently allocated for the aquaculture industry on Billingsley Creek should be added to the total for all aquaculture facilities and equitably re-allocated.
- Count 6: PSI's correct waste load allocation for total phosphorus should be no less than 96.7 lbs/day.

Count 7: DEQ erroneously determined that the waste load allocation for total phosphorus for the entire aquaculture industry in the TMDL Modification should be 970.2 lbs/day.

3. On November 7, 2005, DEQ filed its *Response to Petition*. On November 9, 2005, Blue Lakes Trout Farm, Inc., Clear Lakes Trout Company, Inc., Estate of Earl M Hardy, Fisheries Development Co., Idaho Trout Company Inc., Rim View Trout Co., and Rainbow Trout Farms, Inc., (collectively “Intervenors”) filed a *Petition to Intervene*. On December 1, 2005, the Presiding Officer issued his *Order Granting Petition to Intervene*. On April 20, 2006, PSI and DEQ filed *Pristine Springs’ and Department of Environmental Quality’s Joint Pre-hearing Statement* which summarizes the differences between DEQ and PSI in this matter.

4. Since the exchange of initial pleadings, a number of prehearing and status conferences have been held, prehearing orders have been issued, the parties have conducted an information exchange, and PSI has taken the deposition of Dr. Balthasar Buhidar, the primary author of the TMDL Modification.

5. On May 19, 2006, PSI filed its *Motion for Summary Judgment and Brief in Support of Petitioner’s Motion for Summary Judgment* and supporting affidavits and deposition transcript. PSI argued that summary judgment was appropriate on counts 1, 2, 3, 6, and 7 of the *Petition*. On the same day DEQ filed *Respondent’s Motion for Summary Judgment and Respondent’s Memorandum in Support of Summary Judgment*, also with supporting affidavit and deposition change sheet. DEQ argued that the *Petition* should be denied in its entirety on summary judgment.

6. Following the opening briefs, PSI filed *Petitioner’s Brief in Response to DEQ’s Motion for Summary Judgment* with affidavit, and *Petitioner’s Reply Brief on Petitioner’s Motion for Summary Judgment*. PSI stated in *Petitioner’s Reply Brief on Petitioner’s Motion for*

Summary Judgment that, “In seeking to have these errors corrected, and its allocation increased, PSI **does not** seek or propose any reduction in BLT’s TP allocation.”⁹ *Id.* at 21 (emphasis in original).

7. The Intervenors filed the *Intervenor’s Brief in Response to Motions for Summary Judgment*, with supporting affidavit. In their brief the Intervenors joined with PSI on counts 1 and 7 of the *Petition*; did not oppose PSI’s attempt to increase PSI’s total phosphorus allocation in counts 2-4, based upon PSI’s statement that it does not seek or propose any reduction in the total phosphorus allocation for Blue lakes Trout Farm; argued that there was insufficient evidence to support a decision on count 6; and supported DEQ’s motion for summary judgment on count 5.

8. DEQ’s briefing after the opening round of briefing consisted of *DEQ’s Memorandum in Opposition to Pristine Springs, Inc.’s Motion for Summary Judgment* and *DEQ’s Reply Memorandum*.

9. A hearing was held on the motions for summary judgment on August 31, 2006. PSI, DEQ and Intervenors participated. Following the hearing PSI filed *Petitioner’s Brief – Response to Hearing Examiner’s Question on “Final” Agency Action* on September 11, 2006. DEQ filed its *Supplemental Brief in Support of Motion for Summary Judgment* on September 12, 2006.

B. Evidence Considered.

10. The Hearing Officer considered the following evidence in making the substantive findings of facts:

a. Affidavit of Wendell M. Starke.

⁹ “BLT” stands for Blue Lakes Trout Farm, Inc., an intervenor, and the only other point source discharger on Warm Creek.

- b. Affidavit of Kathleen Rivers.
- c. Affidavit of Fritz X. Haemmerle, including Exhibits 1-75.
- d. Deposition of Dr. Blathasar B. Buhidar, Ph.D., dated March 24 and April 5, 2006, including correction sheets and Exhibits 1 – 16.
- e. Affidavit of Douglas M. Conde in Support of Respondent’s Motion for Summary Judgment, including Exhibits 1 – 21.
- f. Second Affidavit of Kathleen E. Rivers.
- g. Affidavit of Michael A. Kasel.

C. Total Phosphorus Waste Load Allocation To PSI.

11. PSI owns commercial aquaculture facilities used for raising fish. During the raising of fish, water flows through the facilities and various waste products, including total phosphorus (TP), enter the water. PSI’s aquaculture facilities discharge the water they use into Warm Creek. PSI also owns a cattle operation near Warm Creek that is the only substantial non-point source of TP to Warm Creek. Only one other entity, Blue Lakes Trout Farm, Inc., owns facilities that discharge significant amounts of TP that ultimately enter Warm Creek. Warm Creek discharges directly into the Snake River.

12. Fourteen segments of the Snake River, from Milner Dam to King Hill, referred to as the Mid-Snake River, do not meet state Water Quality Standards.

Specifically, designated beneficial uses, including aquatic life, fishing, swimming, and boating are impaired because of the eutrophic conditions. Total phosphorus (TP) loading from throughout the watershed has been identified as one of the principle excess nutrients causing existing conditions....

Affidavit of Conde, Ex. 1, p. 1. As a result, the State of Idaho developed a TMDL to address the pollutants causing the water quality standards violation, including TP.

13. In 1997, DEQ issued the Mid-Snake TMDL. Affidavit of Conde, Ex. 1. The Mid-Snake TMDL set a water quality concentration target for the Mid-Snake River of .075 mg/L TP, in order to meet state Water Quality Standards. Translated into lbs/day, this concentration was converted to a total TMDL of 3559.60 lbs/day TP, measured at one point—the Gridley Bridge, Hagerman, Idaho. Affidavit of Conde, Ex. 1, pp. 53, 57, Table 22.

14. In Table 22, DEQ set a general allocation in lbs/day of TP for each of the industries contributing TP to the Mid-Snake River. From this Table 22 it is possible to recreate the TMDL zero sum equation (TMDL = WLAs + LAs + Margin of Safety). The allocation for the aquaculture industry is 970.2 lbs/day. Thus, the 970.2 lbs/day allocation for aquaculture discharges cannot be increased without either reducing the TP allocated to another general industry source or increasing the total Mid-Snake TMDL for TP.

15. It is also possible to derive another zero-sum equation: **sum of aquaculture industry TP WLAs = 970.2** (the “aquaculture allocation”). Under the aquaculture allocation equation, the discharge from one aquaculture facility cannot be increased without either reducing the discharge from another facility or increasing the entire aquaculture allocation.¹⁰ The Mid-Snake TMDL did not address tributaries that discharge to the reaches, although it noted:

Tributaries of the Middle Snake River include numerous streams and springs of various sizes and range from artificial, highly turbid coulees to pristine springs.

Affidavit of Conde, Ex. 1 at 15.

16. In December of 1999 DEQ produced the Upper Snake/Rock Subbasin TMDL which was supplemented by a July 2000 Executive Summary. Affidavit of Doug Conde, Ex. 4. The Upper Snake/Rock TMDL expands on the Mid-Snake TMDL by not just addressing the

¹⁰ Pristine Springs received a preliminary WLA of 26.79 lbs/day in the Mid-Snake TMDL. Affidavit of Conde, Ex. 1, p. 59 (PSI is facility #9 in the table).

general industry and other sources of pollutants, but also the locations where those sources impact the Mid-Snake River, including its tributaries. The reason for adding this focus on location was explained by DEQ in the TMDL Modification:

What is demonstrated in the TP and TSS summary of the various TMDLs involved is that the Nutrient Management Plan (DEQ-TFRO1995) and the Mid-Snake TMDL (Buhidar 1997) only took into account Gridley Bridge as a single compliance point. During the process of working on the Upper Snake Rock TMDL (Buhidar 1999), it became obvious that not all inputs had been accounted for in the first TMDLs. Therefore, it became necessary to subdivide the Middle Snake River into decision units or segments and account for all nonpoint source inputs that included unnamed streams, all canalways, plus the entrained pollutants already existing in the Middle Snake River corridor. In so doing, it was also necessary to make the entire stretch of the Middle Snake River meet the 0.075 mg/L TP standard and the 52.0 mg/L TSS standard at seven (7) compliance points or six (6) stream segments. This required more significant monitoring of various existing tributaries and streams....

Affidavit of Conde, Ex. 16, p. 26.¹¹ Dr. Buhidar further explained this process in his deposition:

So, in order to meet the beneficial uses of the river, we had to then go into the tributaries to look at those, because the way the river is set up hydrologically at Milner Dam, at any point past that, that's basically the controller of the flow in that system.

So in order to meet that demand for the beneficial use in the river, we had to then go out into the tributaries. Now, it just so happens that some of those tributaries are 303(d) listed, too. So as part of the process under the Upper Snake Rock TMDL, we then specifically targeted the 303(d) streams.

But then we came to the realization that there are other tributaries that are part of the system, too. And in order for the river to meet the beneficial uses, we had to do something similar with them. However, those are not 303(d) listed streams. In the documents, we do refer to them as TMDLs because they basically have a loading capacity assigned to them.

Deposition of Buhidar, p. 267. To meet water quality standards on the Mid-Snake River discharges of TP from the tributaries to the Mid-Snake River have to be limited.

17. The Upper Snake/Rock TMDL allocated .10 mg/l TP for the tributaries to the Snake River in order to meet water quality goals in the Snake River:

¹¹ "TSS" is total suspended solids.

The instream target of 0.075 mg/L for the Middle Snake River was never suggested or implied for application to tributary waters that feed to the Middle Snake River because it was always assumed that these smaller tributaries were not modified flow regime systems. As previously described, a water quality target of 0.100 mg/L (or less) for all other tributaries throughout their entire length, from their source water (if applicable) to their discharge with the Middle Snake River seems appropriate. Thus, tributaries or streams discharging to the Middle Snake River are to discharge at TP concentrations not exceeding 0.100 mg/L.

Affidavit of Doug Conde, Ex. 4, pp 169-170. This 0.10 mg/L allocation for each tributary provides for a more sophisticated Mid-Snake TMDL.¹² DEQ recognized that these equations were components of the overall TMDL:

Within each major TMDL, based on the Middle Snake River segments, there are TMDLs written for each tributary as subcomponents of the overall Upper Snake Rock TMDL.

Affidavit of Doug Conde, Ex. 4, p. 197. A new, zero sum game, sub-equation results for the tributaries: **tributary TP allocation = tributary TP WLAs + tributary TP LAs** (the “tributary allocation”).

18. The Upper Snake/Rock TMDL resulted in TP discharges being allocated both by industry source, as well as by location, including tributaries. As a result, some aquaculture WLAs were accounted for twice—in both the tributary allocation and the aquaculture allocation. In effect, the Upper Snake/Rock TMDL created multiple, simultaneous equations -- the tributary

¹² The basic model used in the TP loading analysis was a mass balance spreadsheet that summarized five general components for each Middle Snake River segment: point sources directly discharging to the Middle Snake River; spring sources (which might also have point source influence as indirect dischargers to the Middle Snake River); surface waterbodies (which includes tributaries and irrigation canal drains); the instream segment on the Middle Snake river; and other water user industries (CFOs and/or CAFOs, hydropower, and land application facilities).

Affidavit of Doug Conde, Ex. 4 at 217.

allocations and the aquaculture allocation -- that DEQ had to solve together when it allocated TP to the Mid-Snake River tributaries.¹³

19. On July 22, 2005, DEQ issued the TMDL Modification that contains the WLAs for fish production facilities and conservation hatcheries, fish processors and Billingsley Creek facilities and allocations for the tributaries. Affidavit of Doug Conde, Ex. 16. DEQ did so after consulting with the Mid-Snake River Watershed Advisory Group and receiving comment from, among others, both PSI and Blue Lakes Trout Farm, Inc. Affidavit of Conde, Ex. 12, Ex. 14, Ex. 15 and Ex. 16 at 12, 115, 129, 158-162. Warm Creek is a tributary in the Mid-Snake River watershed.

20. DEQ generally allocated the 970.2 lbs/day aquaculture TP allocation by determining the total quantity of water flowing through the facilities and then determining a target water concentration of TP to achieve the 970.2 lbs/day. That load was then allocated to each facility, including PSI, based upon that facility's flow determined by a set of data DEQ calls the Version 13 database.¹⁴

21. In the TMDL Modification, DEQ also allocated the TP, in pounds per day, that each tributary could receive by multiplying the 0.10mg/l target concentration by the water flow in the tributary, expressed in cfs, and then converting that figure to lbs/day by multiplying it by 5.39. DEQ called this figure at various times the load capacity for the tributary or the tributary TMDL. DEQ then compared this number to the WLAs and LAs for each point and nonpoint source on the tributary to ensure that the total WLAs and LAs did not exceed the TP allocation

¹³ A rough example of the simultaneous equations for one tributary would be $x + y = 126.02$ and $x + y + z = 970.2$, where x equals the TP allocation to PSI, y equals the allocation to Blue Lakes Trout Farm Inc., 126.02 equals the tributary allocation to Warm Creek, z equals the remaining aquaculture TP facility allocations, and 970.2 equals the aquaculture allocation. DEQ's general approach to solving these equations was to attempt to equitably allocate TP among the aquaculture facilities, while not over-allocating TP to any individual tributary.

¹⁴ The concentration allocation for TP could be converted to a Lbs/day by the following equation: $\text{lbs/day} = \text{annual average flow (cfs)} \times \text{mg/L} \times 5.39$. Affidavit of Doug Conde, Ex. 4, p. A-8.

for the tributary. If the WLAs or LAs exceeded the tributary allocation, DEQ reduced some of the allocations.

22. DEQ had initially planned to assign PSI an allocation of 26.79 lbs/day TP. In the TMDL Modification DEQ increased PSI's final WLA to a total of 55.46 lbs/day TP.¹⁵ In doing so DEQ explicitly describes simultaneously resolving the zero sum Warm Creek tributary allocation with the zero sum aquaculture allocation:

Pristine Springs discharges its wastewater to Warm Creek, which in turn discharges to the Snake River. The TMDL sets a load capacity for Warm Creek calculated by multiplying the mean flow by 0.100 mg/L TP and multiplying this number by 5.39. The load capacity for Warm Creek is 126.02 lb/day (233.8 cfs x 0.100 mg/L TP x 5.39 = 126.02). DEQ cannot increase the wasteload allocation for Pristine Springs and still meet the load capacity set for Warm Creek unless the allocation of TP for other sources is reduced. Nonpoint sources of phosphorus are also located on Warm Creek, and initially DEQ allocated 29.42 lb/day TP to these non point sources. In order to meet the load capacity for Warm Creek and since Warm Creek resides on Pristine Springs as its private property, DEQ has determined to reduce the load allocation for these nonpoint sources from 29.42 lb/day to 1.33 lb/day.

Of course, DEQ must look at the TP allocations and the load capacity of both Warm Creek and the Snake River. By shifting the TP allocation to Pristine Springs' point source, the total aquaculture industry allocation will be more than 970.2 lbs/day but under the 10% allowable variance as discussed in Section 7.6.a of this document. While the aquaculture allocation has been slightly increased, DEQ has made a commensurate decrease in the total nonpoint source allocation. Therefore, the TMDL will still meet the load capacity for the Snake River and Warm Creek and thereby attain compliance with state water quality standards.

Affidavit of Doug Conde, Ex. 16, p. 21. The allocation of TP on Warm Creek in lbs/day is as follows:

nonpoint source LA	1.33
plus stormwater/construction LA	+ 0.03
plus Blue Lakes Trout Farm WLA	+ 69.20
plus PSI cold water WLA	+ 50.61
<u>plus PSI warm water WLA</u>	<u>+ 4.85</u>
equals total Warm Creek TP allocation	<u>126.02</u>

¹⁵ PSI's cold water allocation was 50.61 lbs/day TP and its warm water allocation was 4.85 lbs/day TP. Affidavit of Doug Conde, Ex. 16, p. 45, Table 2-B.

Affidavit of Conde, Ex. 16, p. 45, Table 2-B. Although PSI challenges the legal authority of DEQ to set the tributary allocation, it did not also challenge the actual 126.02 lbs/day TP target.

IV. CONCLUSIONS OF LAW

Based upon the Findings of Fact, the Board makes the following Conclusions of Law:

A. Count 1 – TP Allocations On Warm Creek

1. PSI argues in Count 1 that because Warm Creek is not on the State’s 303(d) list, DEQ had no legal authority to allocate TP to Warm Creek. PSI’s argument fails as a matter of law. Although they could be clearer in their language, the federal Clean Water Act regulations contemplate that tributaries will receive a load allocation:

The sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background. If a receiving water has only one point source discharger, the TMDL is the sum of that point source WLA plus the LAs for any nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments....

40 C.F.R. § 130.2(i) (underscoring added).

2. An argument could be made under the EPA regulations that DEQ was to allocate a TP load to Warm Creek, but not to further allocate that TP to the point and nonpoint sources of TP in Warm Creek. This, however, would leave the allocation of TP to Blue Lakes Trout and PSI to the technology-based NPDES system. The failure of the NPDES system to achieve water quality standards is one of the primary drivers for the development of the TMDL system:

In its full technical splendor, Section 303(d) is supposed to come into play if the technology-based effluent limitations are deemed too lax to assure compliance with existing water quality standards.

2 W. Rodgers, *Environmental Law Air and Water*, § 4.18.C.1, at 281-282 (1986); 33 U.S.C. § 1313(d)(1)(A).

3. There is no need to resolve the question under federal law, however, because even if federal law is unclear about how far DEQ was to go, the Idaho Water Quality Act is not. It provides that subbasin assessments and TMDLs should take a watershed approach and look at all point and nonpoint sources of pollutants “within the watershed that may be contributing identified pollutants to the water body.” I.C. § 39-3611. In addition, Idaho Code specifically acknowledges that the sources may be on tributaries to the listed water body within the watershed and that loads may be assigned to the sources on those tributaries:

If a pollutant load is allocated to a tributary inflow as part of a downstream TMDL, the Director shall develop a plan to meet such allocation in consultation with the tributary watershed advisory group as provided in subsection (8) of this section.

I.C. § 39-3611(6). This statute recognizes that the aim of a TMDL is to achieve water quality standards, and to achieve that goal the sources of pollutants in a water quality limited stream must be tracked down, no matter where they are located.¹⁶ In the TMDL Modification DEQ set WLAs and LAs on Warm Creek in order to meet state WQS in the 303(d) listed Mid-Snake River, after consulting with the Mid-Snake Watershed Advisory Group and receiving comment from the only two dischargers on the tributary.

4. PSI accurately points out that DEQ labeled the TP allocation for Warm Creek a “TMDL”. *See* Affidavit of Conde, Ex. 16, p. 44. Although DEQ’s label is not strictly wrong, because the load allocation to Warm Creek is part of the Upper Snake Rock TMDL, DEQ’s label is unfortunate because it makes it appear as though a separate TMDL is being set for Warm Creek. DEQ’s ambiguous labeling is understandable. EPA’s regulations do not clearly state how tributary discharges to a 303(d) listed stream are to be labeled. The Clean Water Act regulations seem to say that the allocation to a tributary should be labeled an “LA.”

¹⁶ It is hypothetically possible that if the Snake River at Lewiston is water quality limited, load allocations may need to be made as far away as the Wyoming border if that is what is necessary to achieve water quality standards.

5. Perhaps the best label would be “tributary allocation.” What is being set is the tributary load that DEQ, EPA and others are to achieve through NPDES permits, best management practices, and other actions in order to comply with water quality standards on the 303(d) limited segment. The Board could order that DEQ re-label the TMDL Modification accordingly, but to do so would be to elevate form over substance, provide no real relief to PSI, and cause the State to incur unnecessary cost and delay.

6. Having concluded that DEQ is legally authorized to allocate a TP load to Warm Creek, and PSI having not challenged the actual load established by DEQ¹⁷, the Board concludes that the total load of TP allocated to Warm Creek of 126.02 lbs/day shall not be modified.

B. Count 2 – Reducing the Nonpoint Source Load Allocations on Warm Creek

7. In Count 2 of the *Petition* PSI asks the Board to increase the nonpoint source WLA on Warm Creek. PSI’s request runs into a simple mathematical limitation. The zero sum nature of the tributary equation for Warm Creek means that to increase PSI’s nonpoint source allocation, another Warm Creek allocation must be reduced. PSI specifically stated in its briefing that it is not requesting the Blue Lakes Trout Farm Inc.’s allocation be reduced. Finding of Fact No. 6. Subtracting Blue Lakes Trout Farm Inc.’s allocation from the equation described in Finding of Fact 22 leaves only PSI’s TP WLA and the 0.03 lbs/day allocated to stormwater/construction activities¹⁸ to re-allocate to PSI’s nonpoint activities.

8. PSI asks in the *Petition* that its TP WLA be increased, not decreased. The stormwater-construction activities allocation is insignificant. There are no other allocations of TP on Warm Creek that can be reduced to increase PSI’s TP LA. The Board concludes that PSI

¹⁷ It was incumbent upon PSI to present any factual evidence it had challenging the TP allocation to Warm Creek. I.R.C.P. 56(e).

¹⁸ PSI did not challenge this TP LA.

did not carry its burden to show that the Board should increase the TP nonpoint source allocation on Warm Creek.

C. Count 3 - Use of Version 13 Database

9. PSI requests that the Board increase PSI's TP waste load allocation because the Version 13 database used by DEQ to determine the flow of water through PSI's facility improperly reduced the actual flow of water used by PSI. Even if for purposes of the summary judgment motions the Board construes the facts to find that the use of this database was flawed, for the reasons stated in Conclusions of Law 7 and 8, above, the Board cannot increase PSI's TP waste load allocation.

10. The Version 13 database was used by DEQ to solve the aquaculture allocation, not the tributary allocation. Although DEQ's aquaculture allocation may have been seriously flawed, PSI did not challenge the total quantity of the Warm Creek TP allocation. Even though the Version 13 database was used to divide the total Warm Creek TP allocation between PSI and Blue Lakes Trout Farm, Inc., PSI is no longer challenging that division. The Board concludes that PSI can not carry its burden to show that the Board should increase PSI's TP waste load allocation on Warm Creek, by showing that use of the Version 13 database was flawed.

D. Count 4 – PSI's Warm Water Production Allocation

11. PSI requests that the Board increase PSI's TP waste load allocation for its warm water flows because the use by DEQ of PSI's water right to determine the flow of warm water through PSI's facility improperly reduced the actual amount of warm water used by PSI. Even if the Board assumes for purposes of the summary judgment motions that the use of PSI's water right to determine its warm water use is flawed, for the reasons stated in Conclusions of Law 7 and 8, above, the Board cannot increase PSI's TP waste load allocation. PSI did not carry its

burden to show that the Board should increase PSI's TP waste load allocation for warm water on Warm Creek.

E. Count 5 – Re-allocating the Total TP WLA for Aquaculture.

12. PSI argues that the amount of TP allocated for the aquaculture industry on Billingsley Creek should be added to the total TP for all aquaculture facilities, and then equitably re-allocated. Even assuming that PSI's challenge to the Billingsley Creek and aquaculture allocation is timely, and those allocations were wrong, such re-allocation would provide no relief to PSI, because it is limited by the 126.02 lbs/day allocation of TP on Warm Creek. The Board concludes that PSI did not carry its burden to show that such re-allocation by the Board would provide any relief to PSI.

F. Count 6 – Increase PSI's TP waste load allocation to 96.7 lbs/day.

13. PSI argues that the Board should increase PSI's correct waste load allocation for TP to no less than 96.7 lbs/day. As discussed in Conclusion of Law 6, the Board will not increase the allocation of TP in Warm Creek. Further, as discussed in Conclusion of Law 8, there is no TP available on Warm Creek to re-allocate to PSI. The Board concludes that PSI did not carry its burden to show that there is any additional TP to allocate to PSI.

G. Count 7 – Increase the Total Aquaculture TP Waste Load Allocation.

14. In Count 7 of the Petition, PSI alleges that the overall allocation to the aquaculture industry of 970.2 lbs/day TP should be increased. Again, even assuming that PSI's challenge to the overall aquaculture TP allocation is timely¹⁹, and even if the aquaculture allocation should be doubled or tripled, such increase would provide no relief to PSI. PSI's TP allocation is fundamentally limited by the 126.02 lbs/day allocation of TP on Warm Creek. The

¹⁹ DEQ argues that many of PSI's challenges are time-barred, because the challenged allocations were established initially in earlier TMDL documents. Because PSI's *Petition* is denied on a much more narrow basis, the Board need not address this issue.

Board concludes that PSI did not carry its burden to show that increasing the overall aquaculture TP allocation by the Board would provide any relief to PSI.

H. Equal Protection Violation.

15. Throughout the *Petition* PSI asserts that the method of determining its TP WLA and LA makes it a “class of one” in violation of the equal protection provisions of the Idaho and U.S. Constitution. The Board’s treatment of PSI has a rational basis. PSI and Blue Lakes Trout Farm, Inc. together comprise virtually the only sources of TP in Warm Creek. They are in their own, unique class. PSI might have had an argument, based upon the manner in which it re-uses the water used by Blue Lakes Trout Farm, Inc., that PSI was not treated equally with Blue Lakes Trout Farm in the allocation of TP by DEQ. But for reasons known only to itself, PSI determined that it was not going to challenge Blue Lakes Trout Farm’s TP WLA.²⁰ That position leaves PSI as a uniquely situated class of one on Warm Creek. The Board concludes that there is no violation of equal protection in leaving PSI’s TP allocation unchanged.

I. Takings Claim.

16. In its *Brief in Support of Petitioner’s Motion for Summary Judgment*, at 25, PSI asserts that the TPA WLA assigned to PSI operates a taking without just compensation in violation of Article I, Section 14 of the Idaho Constitution. In *DEQ’s Memorandum in Opposition to Pristine Springs, Inc.’s Motion for Summary Judgment*, at 18, DEQ asserts that the Board has no authority to determine the basis for or award damages to compensate for an unconstitutional taking. In *Petitioner’s Reply Brief on Petitioner’s Motion for Summary Judgment*, at 9, PSI concedes the Board does not have jurisdiction on PSI’s takings claim, and states that it only raised the issue to preserve it for appeal. The Board will not rule on this issue.

²⁰ PSI would receive only an additional 6.87 lbs/day TP if there was a simple division of the TP WLA on Warm Creek.

PRELIMINARY ORDER

Based upon the Findings of Fact and Conclusions of Law, the Board ORDERS that PSI's motion for summary judgment is DENIED, and DEQ's motion for summary judgment is GRANTED, and the relief sought in the *Petition* is DENIED.

PROCEDURAL RIGHTS

Pursuant to IDAPA 58.01.23.052 and 58.01.23.730:

a. This is a preliminary order of the presiding officer. It can and will become a final agency action issuing, among other things, a declaratory order without further action of the Board pursuant to Idaho Code §§67-5232 and 67-5245 unless any party appeals to the Board;

b. Within fourteen (14) days after the service date of this preliminary order, any party may appeal to the Board by filing with the hearing coordinator a petition for review of the preliminary order or exceptions to any part of the preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Board. Otherwise, this preliminary order will become a final order of the Board.

c. If any party appeals or takes exceptions to this preliminary order, opposing parties shall have twenty-one (21) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the hearing coordinator. The Board may review the preliminary order on its own motion.

d. If the Board grants a petition to review the preliminary order, the Board shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. The Board will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The Board may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

e. Pursuant to Sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or operates its principal place of business in Idaho, or

iv. The real property or personal property that was the subject of the agency action, including issuing a declaratory ruling, is located.

f. This appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See Section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

Pursuant to IDAPA 58.01.23.730.03, a petition for reconsideration is not allowed.

DATED this ____ day of October, 2006.

Peter R. Anderson
Presiding Officer