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DATED THIS 25th day of November, 2008.

IDAHO BOARD OF ENVIRONMENTAL QUALITY



Craig D. Harlen

Nick Purdy

Kermit V. Kiebert

Dr. Joan Cloonan

Donald J. Chisholm

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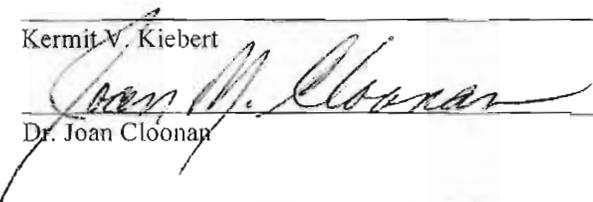
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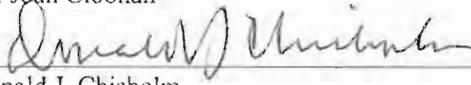
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BEFORE THE BOARD OF ENVIRONMENTAL QUALITY
STATE OF IDAHO

IN THE MATTER OF SECTION 401)
WATER QUALITY CERTIFICATION,)
WETLAND FILL AND BOAT DOCKS)
ALONG LAKE CASCADE,)
REFERENCE NO. 052100024)
NEIGHBORS FOR A HEALTHY GOLD)
FORK)
Petitioners,)
vs.)
IDAHO DEPARTMENT OF)
ENVIRONMENTAL QUALITY,)
Respondent.)
WILDWOOD DEVELOPMENT, LLC,)
Intervenor)

Docket No. 0102-07-04

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND PRELIMINARY ORDER

RECEIVED

JUL 07 2008

DEQ Hearings Coordinator
DOCKET NO. _____

I. INTRODUCTION

The Neighbors for a Healthy Gold Fork ("Neighbors") filed the Petition initiating this contested case on May 8, 2007. Neighbors for a Healthy Gold Fork is an unincorporated association comprised of owners of homes on land adjacent to a proposed development called the Gold Fork Bay Village. The Gold Fork Bay Village ("Gold Fork project" or "project") is proposed to be located adjacent to the Gold Fork section of Lake Cascade. The Gold Fork

project is proposed by the Intervenor Wildwood Development LLC ("Wildwood"). In order to build the development, Wildwood had to get a permit from the Army Corps of Engineers, pursuant to section 404 of the Clean Water Act ("CWA"). Section 401 of the CWA authorizes the State of Idaho to issue a water quality certification related to the 404 permit. The respondent, Idaho Department of Environmental Quality ("DEQ"), is the agency in the State of Idaho responsible for section 401 certifications. DEQ provided a 401 certification regarding the Gold Fork project. Neighbors filed this contested case to challenge the 401 certification. Neighbors' allegations against DEQ in the Petition are:

(a) DEQ did not adequately consider water quality standard violations reasonably expected to arise from sources of pollution associated with the Gold Fork project.

(Petition page 5, paragraph 180);

(b) The construction and use of the docks built as part of the Gold Fork project, and the operation of boats by residents in the Gold Fork project, will have adverse water quality impacts that DEQ did not address in the certification. (Petition page 11, paragraph 40);

(c) The storm water Best Management Practices ("BMPs") proposed for the Gold Fork project are not feasible or adequately designed and will not ensure water quality impacts from the development and the docks will meet state Water Quality Standards and be consistent with the Lake Cascade TMDL. (Petition pages 11-12, paragraphs 41-44).

The relief Neighbors seek in the Petition includes an Order from the Board of Environmental Quality that:

(a) The certification by DEQ was made in violation of federal and state law and regulations and rules promulgated thereunder and/or was based on an erroneous interpretation of such law;

- (b) The certification by DEQ exceeded the agency's authority and authority under rules adopted by the Board;
- (c) The certification by DEQ was made upon unlawful procedure and irregularities;
- (d) The certification by DEQ was arbitrary, capricious or an abuse of discretion;
- (e) The certification by DEQ was affected by other errors of law;
- (f) The certification by DEQ was not supported by substantial evidence on the record as a whole;
- (g) The certification by DEQ prejudiced substantial rights of Neighbors.

DEQ filed a Response to the Petition on May 31, 2007. Wildwood was granted leave to intervene. Pre-hearing discovery was allowed. The Hearing on the Contested Case was held before the undersigned Hearing Officer in Boise on February 13 through February 15, 2008, at which time testimony and documentary evidence was introduced by the parties. Written Closing Arguments were filed April 4, 2008. The parties were also given an opportunity to file proposed findings of fact and conclusions of law.

Wildwood has objected to Neighbors' claims to be an unincorporated association of property owners in the vicinity of Wildwood's development project, formed pursuant to Chapter 7, Title 53, Idaho Code, The Uniform Unincorporated Non-Profit Association Act. Further, that the only evidence of the existence of the Association is the unsupported testimony of Phil Aldape that the Association exists.

Wildwood further objected that Neighbors has failed to produce any other evidence in support of its claim that an association in fact exists, such as information regarding its membership, formation, governance, decision making and operation. No stated purpose was provided, no documents governing its organization or operation were provided, and no proof that

responsible officers had been elected pursuant to the governing documents whose powers, duties and identities could be ascertained. Further, that Neighbors failed to prove that it had filed a certificate of assumed business name in accordance with the requirements of Chapter 5, Title 53, Idaho Code.

II. STANDARD OF REVIEW

Pursuant to the Rules of Administrative Procedure before the DEQ Board ("DEQ Board Rules"), IDAPA 58.01.23.102, Neighbors, as the Petitioner, had the burden of proving by a preponderance of the evidence the allegations in the Petition. In a contested case, the Board or a Hearing Officer conducts a de novo review of the challenged action or inaction of DEQ. See Amended Final Order on Petition for Review of and Exceptions to Preliminary Order, In RE: IDEQ Report-The Upper Snake Rock TMDL Modification (June 11.2007). DEQ's experience, technical competence, and specialized knowledge may be utilized by the Board or a Hearing Officer in the evaluation of evidence presented at a contested case hearing. Idaho Code § 67-5251(5); DEQ Board Rules, IDAPA 58.01.23.600.

III. APPLICABLE LEGAL PRINCIPLES

A. General Clean Water Act Provisions

The Federal Water Pollution Control Act, commonly known as the CWA, 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); *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 114 S.Ct. 1900 (1994). In order to meet this objective, the CWA imposes obligations on the federal

Environmental Protection Agency ("EPA") and state environmental protection agencies. EPA must establish technology-based standards for discharges from point sources¹ 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. NPDES permits are issued by the EPA, unless states have been authorized by the EPA to issue the permits. Idaho has not been authorized or given primacy for the NPDES permit program by EPA. Therefore, EPA issues the NPDES permits for Idaho.

In addition to NPDES permits, the CWA requires a permit for the discharge of any dredged or fill material into navigable waters, CWA section 404, 33 U.S.C. § 1344. These permits are issued by the U.S. Army Corps of Engineers, and are often referred to as 404 permits.

While EPA is required to set technology-based limits, the states are required to adopt Water Quality Standards. Water Quality Standards ("WQS") consist of designated uses 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. WQS must be submitted to and approved by EPA before they are effective for CWA purposes. In addition to technology based limits, NPDES permits and 404 permits must meet any more stringent limits necessary to meet state WQS.

States are also obligated to identify waters that fail to meet WQS, 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 then

¹ A 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).

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 WQS. 33 U.S.C. § 1313(d)(1)(C).

TMDLs are not self-enforcing. Once developed by states, they must be submitted to and approved by the EPA. 33 U.S.C. § 1313(d)(2). Once approved by the EPA, the TMDLs become a part of the state's water quality management plan. 33 U.S.C. §§ 1313 (d)(2) and 1313(e)(3); 40 C.F.R. § 130.7(d)(2).

Section 401 of the CWA provides another authority for states to protect water quality. This section provides that any applicant for a federal license or permit to conduct any activity that may result in any discharge into navigable waters must obtain a certification from the state in which the discharge originates that the discharge will comply with applicable provisions of the CWA and state WQS. Under section 401, a 401 certification, or a waiver of the right to certify, must be obtained by the applicant for a NPDES permit under section 402 and a dredge and fill permit under section 404. If the state denies certification, the permit can not be issued by the federal agency.

In Idaho, DEQ is responsible for implementing the above-described provisions of the CWA. DEQ is responsible for developing Water Quality Standards, creating the 303(d) list, developing TMDLs and providing certifications under section 401 of the CWA. Idaho Code §§ 39-3601 et seq. (the Idaho Water Quality Act); Idaho Code § 39-105.

B. Standard for Certification

Section 401 does not require states certify with absolute certainty that the discharge authorized by a federal permit or license will comply with state WQS. Instead, states need only provide a "reasonable assurance" that the discharge meets applicable State WQS. 40 CFR § 121.2(3); *Port of Seattle v. Pollution Control Hearings Board*, 90 P.3d 659 (WA 2004); *Miner's Advocacy Council, Inc. v. Alaska Department of Environmental Conservation*, 778 P.2d 1126 (1989); *Bangor Hydro-electric Company vs. Board of Environmental Protection*, 595 A.2d 438 at 443 (Maine 1991).

The reasonable assurance standard was explained by the Washington Supreme Court in *Port of Seattle v. Pollution Control Hearings Board (PCHB)*, supra, as follows:

The PCHB has stated that "'reasonable assurance' means something is reasonably certain to occur. Something more than a probability; mere speculation is not sufficient." (citation omitted) Clearly, the 'reasonable assurance' standard does not require absolute certainty. The inherent predictive nature of a § 401 certification must address future events and the likelihood that those events will result in violations of water quality standards.

90 P.3d at 676.

Relying upon the reasonable assurance standard, courts have upheld an agency's use of models and studies to support a 401 certification, even when there was some uncertainty regarding the results of the modeling or studies. *Port of Seattle v. Pollution Control Hearings Board*, supra; *Deep River Citizens' Coalition v. North Carolina Department of Environment and Natural Resources*, 165 N.C.App.206, 598 S.E.2d 565 (2004).

C. Water Quality Standards Applicable to Lake Cascade

State WQS include designation of uses for water bodies and criteria to protect those uses. The Idaho WQS provide that the uses designated for Cascade Reservoir are domestic water supply, agricultural water supply, cold water aquatic life, salmonid spawning and primary contact recreation. IDAPA 58.01.02.140.17. The numeric criteria applicable to these uses are set forth in IDAPA 58.01.02.250, 251 and 252. These sections set forth numeric levels for constituents such as dissolved oxygen (generally 6 mg/L) and temperature (generally 22 degree C for the protection of cold water aquatic life).

In addition, the narrative criteria set forth in IDAPA 58.01.02.200 are applicable. Of particular importance for this contested case, section 200.06 provides that "Surface waters of the state shall be free from excess nutrients that can cause visible slime growths or other nuisance aquatic growths impairing designated beneficial uses." In addition, section 200.08 provides that "Sediment shall not exceed quantities specified in section 250 and 252, or, in the absence of specific sediment criteria, quantities which impair designated beneficial uses."

The WQS prohibit discharges of pollutants from a single source or in combination with pollutants discharged from other sources that violate the applicable criteria noted above in sections 250 through 252, or that injure existing or designated uses. IDAPA 58.01.02.080.

D. WQS Allow New Discharges to Lake Cascade if Consistent with the Lake Cascade TMDL

DEQ has determined that Lake Cascade is a water body that fails to meet the above-described WQS and that does not support its designated uses. As a result, IDEQ has developed a TMDL for Lake Cascade that is set forth in the Cascade Reservoir Phase I and Phase II

Watershed Management Plans. The TMDL has been approved by EPA. In accordance with DEQ policy, DEQ has also prepared Implementation Plans for the TMDL that outline the measures DEQ expects will be taken to meet the targets set by the TMDL.

TMDLs are not themselves enforceable. As the Idaho Legislature has indicated, a TMDL is not a rule, but instead is a plan without the force and effect of law. Idaho Code § 39-3602(27) (definition of TMDL); 39-3611(2) (TMDLs are not rules). Federal courts have also repeatedly held that TMDLs are not self-executing or enforcing. *City of Arcadia v. EPA*, 265 F.Supp.2d 1142, 1144 (N.D. Calif. 2003) ("TMDLs established under Section 303(d)(1) of the CWA function primarily as planning devices and are not self-executing"); *Pronsolino v. Nustri*, 291 F.3d 1123, 1129 (9th Cir. 2002) ("TMDLs are primarily informational tools that allow the states to proceed from the identification of water requiring additional planning to the required plans"); *Idaho Sportsmen's Coalition v. Browner*, 951 F.Supp. 962,966 (W.D. Wash. 1996) ("TMDL development in itself does not reduce pollution...TMDLs inform the design and implementation of pollution control measures"). Thus, the Cascade Reservoir TMDL is not itself enforceable and does not itself create a standard that must be met by groups that discharge pollutants to the reservoir.

While the Cascade Reservoir TMDL itself is not enforceable, section 401 of the CWA provides DEQ with a mechanism to apply the TMDL. The state WQS at section IDAPA 58.01.02.054.04 provides that once a TMDL is completed, any new discharges will be allowed only if consistent with the approved TMDL. Therefore, DEQ under section 401 must determine whether any new discharges resulting from the Gold Fork Bay Village, reasonably connected to the 404 permit at issue in this contested case, are consistent with the Lake Cascade TMDL.

E. Storm Water Runoff is a Nonpoint Source of Pollutants

Under state WQS, storm water runoff is considered a nonpoint source of pollution. IDAPA 58.01.02.010.58.g. Unlike point sources, nonpoint sources, such as storm water, result in discharges that are diffuse, and result from water running over a land area. See WQS definition of nonpoint source, IDAPA 58.01.01.010.58. The levels of pollutants discharged, therefore, vary greatly depending upon the particular storm event and other site-specific events.

Also unlike point sources, federal and state law requires, not numerical limits, but the application of best management practices, to prevent or reduce pollutants in nonpoint source runoff. WQS, definition of BMP, IDAPA 58.01.02.010.07. The state WQS address nonpoint sources as follows:

The areal extent of most nonpoint source activities prevents the practical application of conventional wastewater treatment technologies....As provided in Subsections 350.01.a and 350.02.a. for nonpoint source activities, failure to meet general or specific water quality criteria, or failure to fully protect a beneficial use, shall not be considered a violation of water quality standards for the purpose of enforcement. Instead, water quality monitoring and surveillance of nonpoint source activities will be used to evaluate the effectiveness of best management practices in protecting beneficial uses as stated in Subsections 350.01.a and 350.02.b.

IDAPA 58.01.02.350.01.a and b.

The federal CWA also requires the use of BMPs to control storm water runoff. CWA section 402(p) requires permits for certain industrial and municipal storm water discharges. Of importance for this contested case, EPA has issued a General NPDES permit that is applicable to storm water discharges from construction activities, such as the construction of the Gold Fork Bay Village. For such construction activities, no individual permit is issued, but rather the owner

must provide EPA with a Notice of Intent ("NOI") to be covered by the General Permit. The General NPDES Permit requires the owner to develop a Storm Water Pollution Prevention Plan ("SWPPP"). The SWPPP describes the BMPs that will be used by the owner to control and manage storm water runoff. Wildwood filed a NOI with EPA to gain coverage for the Gold Fork Bay Village, and developed a SWPPP in compliance with federal law.

F. The DEQ Catalogue of Storm Water Best Management Practices for Idaho Cities and Counties and the Handbook of Valley County Storm Water Best Management Practices Provide Guidance Regarding BMPs to Meet WQS

As noted above, storm water is controlled through the use of BMPs. DEQ has developed a Catalogue of Storm Water Best Management Practices for Idaho Cities and Counties ("DEQ Storm Water BMP Catalogue" or "catalogue"). This catalogue is not a rule, and there is nothing in the WQS or other state law that requires the use of the BMPs in the catalogue. The catalogue, however, does provide guidance to developers regarding how to reduce the discharge of pollutants associated with runoff.

The DEQ Storm Water Catalogue includes a list of potential storm water BMPs and a step-by-step guide to planning for storm water control. The critical planning steps include evaluating site conditions, characterizing storm water flows that may occur, selecting BMPs and designing the storm water system. Catalogue, Volume 4 at pages 7-18. The catalogue includes a table to assist in choosing BMPs, including certain site constraints. The catalogue makes it clear, however, that the site restraints and other selection criteria are intended to provide a general sense of BMPs that may be appropriate, and that the ultimate selection of BMPs will depend upon the particular site and the design professional's judgment. Catalogue, Volume 4 at page 10. The catalogue also emphasizes that the combination of BMPs, and using them sequentially in a

"treatment train" increases the effectiveness of the BMPs in removing pollutants in storm water. Catalogue, Volume 4 at page 12

Valley County has also developed a storm water guidance document called the Handbook of Valley County Storm Water Best Management Practices ("Valley County Storm Water Handbook"). The Cascade Lake TMDL Implementation Plan encourages the use of the Valley County Storm Water Handbook. This Handbook contains much of the same information and description of BMPs and planning for storm water control that is contained in the DEQ catalogue. Like the DEQ catalogue, the Valley County Storm Water Handbook emphasizes that the book is a guide, and that in the end site specific considerations and the judgment of the design professional determine what storm water controls to use:

This Handbook was developed to assist local agencies and the development community in Valley County, Idaho with the selection, design, installation and maintenance of best management practices ("BMPs") to reduce storm water pollution....Due to site specific conditions, this handbook must be used in conjunction with best professional judgment and sound engineering principles to assure proper selection, design, function and performance of BMPs in the handbook.

Valley County Storm Water Handbook, page 1.

IV. FINDINGS OF FACT

A. Procedure Followed by DEQ in Issuing the 401 Certification

1. The Gold Fork project is proposed for a 30 acre parcel of land. As part of the project, on May 9, 2006, Wildwood applied for a permit from the Army Corps of Engineers to discharge fill material into an old irrigation pond and some low value wetlands

that existed along the fringe of the irrigation pond. (R-5). The total amount of fill to be discharged is 1.15 acres. (R-5).

2. On October 2, 2006, Wildwood filed an amended application for an Army Corps permit. (R-6). On October 19, 2006, the Army Corps published Notice of the Application. (R-7). This notice also provided notice that DEQ was considering certification of the permit under section 401 of the CWA. (R-7). The notice invited the public to submit comments on both the permit application and the 401 certification of the permit. The comment due date was November 9, 2006.

3. On November 9, 2006, Neighbors submitted comments to DEQ regarding the certification of the 404 permit. (R-10). On November 17, 2006, DEQ sent Neighbors a letter informing them that DEQ provided a 401 certification for the project dated October 26, 2006. (R-12).

4. Because DEQ issued the 401 certification prior to the close of the public comment period, and had consequently not had an opportunity to consider all public comments, DEQ on December 15, 2006 notified Wildwood that DEQ intended to rescind or withdraw the October 2006 certification. (R-13). On December 21, 2006, DEQ by letter to Wildwood rescinded the October 2006 certification. (R-14).

5. On February 8, 2007, DEQ published notice that it had prepared a draft certification for the Army Corps permit for the Gold Fork project. (R-16). The notice provided for submission of public comments until March 12, 2007. DEQ both published a news release, and placed the notice and draft certification on the DEQ website. DEQ also sent the draft certification to Neighbors, Wildwood and the Army Corps of Engineers. (R-15).

6. On March 12, 2007, Neighbors provided comments on the draft certification. (R-11).

7. On April 4, 2007, DEQ issued its final 401 certification regarding the 404 permit for the Gold Fork project. (R-17). DEQ attached to the certification a response to the public comments. It is this April 4, 2007 certification that Neighbors challenge in this contested case.

B. DEQ's Review and Evaluation of the Gold Fork Project

8. In connection with the 401 certification, DEQ received and reviewed the May 2006 application for the 404 permit, and the October 2006 revised application. DEQ also received and reviewed the public notice for the permit application prepared by the Army Corps of Engineers and supplemental information submitted to the Corps on January 22, 2007 by Wildwood's engineers, Secesh Engineering, Inc., in response to questions raised by the Army Corps of Engineers. (R-7, R-8 and R-9).

9. DEQ also reviewed a substantial amount of additional information that Secesh Engineers prepared regarding the storm water BMPs for the project. This information was compiled in the Gold Fork Bay Village Storm Water Management Handbook ("Gold Fork Handbook"). (Exhibit R-18). The Gold Fork Handbook contains: (1) calculations of storm water runoff from the site both pre- and post-development; (2) detailed descriptions of each of the components of the system designed to convey and treat storm water resulting from the Gold Fork Project; (3) calculation of the predicted efficiencies of the storm water BMPs in removing pollutants; (4) engineering plans and specifications of the storm water facilities; (5) a description of the operation and maintenance of the BMPs, including copies of the Covenants, Conditions and Restrictions for the development; and (6) the Storm Water

Pollution Prevention Plan required by the general NPDES permit applicable to the project. (Exhibit R-18).

10. DEQ also received and reviewed the comments provided by Neighbors and other members of the public regarding the 401 certification and the 404 permit. (Exhibit R-17; Barry Burnell testimony, T-190-191).

11. In connection with the Hearing and the contested case, DEQ also reviewed site specific soil and ground water information contained in the GeoEngineers Report (R-21), and the opinion of the Valley County Engineers that the storm water BMPs are appropriate for the site and are reasonable and feasible. (Parametrix Report, Exhibit R-22). (Barry Burnell testimony, T-203-206; 227-233).

12. Barry Burnell, Craig Shepard (DEQ Boise Regional Office Surface Water Program Manager), Jack Gantz (DEQ Boise Regional Office P.E.) and Darcy Sharp (DEQ Modeling Expert) all reviewed and evaluated the material presented by Secesh, in particular the Gold Fork Handbook. (T-196-241). The DEQ team met with Secesh Engineers on several occasions and went through and examined in detail the storm water calculations and each of the BMPs proposed by Secesh. (T-202-203; 244-245).

13. Although it is not something DEQ normally does for a 401 certification of a federal 404 permit, DEQ did modeling to predict the load of TP that would be discharged by the Gold Fork development with BMPs in place in comparison to the agricultural use of the land with no BMPs. (T-191-193; 214-217; 234-235). DEQ's modeling specifically addressed issues regarding the modeling effort raised by Neighbors. (T-234-235).

14. DEQ also specifically evaluated the comments proposed by Neighbors concerning high ground water, rain on snow events and the docks proposed for the development. (T-203-214; 226-227).

15. DEQ also visited the site of the proposed development. (T-205-206).

C. The 401 Certification

16. On April 4, 2007, DEQ issued its final 401 certification of the 404 permit for the Gold Fork project. (R-17).

17. DEQ's final 401 certification provides that, "if the proposed project is implemented in accordance with the information provided in the application, the developer's Storm Water Management Handbook, the Storm Water Pollution Prevention Plan and the supplemental information provided to the Army Corps of Engineers, and in accordance with the conditions provided in this certification, there is a reasonable assurance the discharges associated with the Gold Fork Bay Village will comply with the applicable requirement of Sections 301, 302, 303, 306, and 307 of the Clean Water Act, including the Idaho Water Quality Standards (WQS)(IDAPA 58.01.02)." (R-17). Barry Burnell testified that the plain language of the 401 reflects exactly what DEQ intended-compliance with the BMPs proposed by the developer was a requirement of the 401 certification. (T-193-194). The certification, therefore, requires compliance with the plans and specifications and the BMPs contained within the 404 permit application and the Storm Water Management Handbook and other material listed in the certification.

18. In addition to requiring compliance with the Storm Water Management Handbook and other referenced material, the certification contained a number of conditions, mostly related to minimizing water quality impacts during construction. DEQ also included

several conditions specifically related to ensuring that the construction of the docks and the material used in the docks would create no water quality impacts. DEQ responded to comments received from the public, and attached the response to comments to the 401 certification.

D. The Cascade TMDL

19. As indicated above, state WQS provide that new discharges to an impaired water body may be allowed if consistent with an approved TMDL. Lake Cascade is an impaired water body that does not meet state WQS principally due to excess nutrients and low dissolved oxygen. DEQ prepared a TMDL for Lake Cascade which has been approved by EPA. Thus, the storm water discharges to Lake Cascade from the new Gold Fork development will comply with state WQS if they are consistent with the Lake Cascade TMDL.

20. The Lake Cascade TMDL set a water quality goal in order to meet the narrative standard in the WQS for excess nutrients. The TMDL provides that the narrative standard for excess nutrients in the WQS will be met if a total phosphorus level of .025 mg/L and a chlorophyll a concentration of 10 ug/L is achieved. In order to meet the targets, the TMDL provides that the total phosphorus levels in the Lake must be reduced. The TMDL then sets allocations, in the form of total phosphorous reductions, to the various sources of pollutants. (R-3, pages 72-79).

21. The TMDL provides that, in order to meet the narrative WQS for excess nutrients, there needs to be a 30% overall reduction of total phosphorous ("TP") discharged to the Lake from all nonpoint sources. Urban, suburban storm water discharge is one small component of the nonpoint source load. The 30% reduction, however, is not intended to be

applied to every project or even to every part of the Lake. The TMDL at page 73 sets this out plainly:

Attainment of the 30% overall nonpoint-source reduction may be difficult in some subwatersheds (i.e. Gold Fork) where natural phosphorus loads represent the majority of the total load (Figure 3.6). It should be understood that an overall reduction of 30% of the nonpoint-source total phosphorus load (management load plus natural and/or background load) is required to reach water-quality standards. It is recognized that efficient use of management efforts and available implementation monies should be of primary concern. Therefore, it is reasonable to expect that the 30% nonpoint source reduction goal may be reached by implementation measures resulting in greater than 30% in some subwatersheds to offset less than 30% reductions in others. To this effect, it may be more cost-effective to eliminate or reduce certain significant pollutant sources, rather than reduce phosphorus from all sources equally. It is also possible that certain projects may present exceptional opportunities for achieving significant reductions, thus allowing other sources to seek less than a 30% reduction.

(TMDL, R-3 at page 73). (italics in original).

The plain language of the TMDL quoted above makes it clear that a reduction of TP is needed, but that the reduction may not be the same for all areas of the Lake, and may not be the same for all projects. In other words, the TMDL takes a flexible approach to the load reduction goal, that provides discretion to DEQ and other agencies in the manner in which this goal is to be achieved.

22. For nonpoint sources in general, and urban/suburban development like the Gold Fork project specifically, the TMDL provides that the reductions are to be achieved through the implementation of appropriate BMPs. (R-3, page 74-79). The TMDL specifically notes that new urban/suburban development will be reviewed to determine the appropriate application of BMPs and consistency with the TMDL. (R-3, page 78).

23. DEQ in connection with the local Watershed Advisory Group (WAG), developed an implementation plan for the TMDL. Using the flexibility afforded by the TMDL, DEQ and the WAG determined that, for storm water from new development, the TMDL would be implemented by preventing additional TP loading above that delivered to the Lake by the pre-development use of the land. (R-4, Urban/suburban Implementation Plan at page 4, and pages 8-10, and Pre-Hearing Memo at pages 11-13).

24. Barry Burnell's testimony is consistent with the plain language of the TMDL. Barry testified that the reduction goal for nonpoint sources of 30% was intended as an overall goal for the Lake in general, and that for storm water from new development, the goal was to prevent additional TP discharged over the amount discharged from the pre-development use of the property. (T-175-179). This is also the interpretation of the TMDL by the local Soil and Water Conservation District that is also involved in helping to implement the TMDL. This was explained by Paul Kleint, one of Neighbors' witnesses, in a letter from the Valley County Soil and Water Conservation District to Valley County Planning and Zoning: "Lake Cascade is a 303(d) listed water body with required TMDL allocations of 30% reduction in non-point source phosphorus loading in order to meet water quality standards. As part of this TMDL, new developments need to demonstrate that they will not cause an increase in phosphorus loading to Lake Cascade." (R-26).

25. Neighbors initially argued that for DEQ to certify the project, the TMDL requires a 30% reduction in the existing pollutant load. In their closing argument, however, Neighbors for the first time argued that the TMDL provides NO allocation at all for new development. There are no facts to support Neighbors' position. If there is no allocation at all for new development, no new development could occur. The TMDL, however, on page 78

discusses new development and how the nonpoint source reduction will be implemented for new development by the application of BMPs and through county ordinances. In addition, the TMDL implementation plan, discussed above, specifically addresses new development. Moreover, Neighbors' argument ignores the fact that the Gold Fork project replaces an existing agricultural use that IS addressed as part of the general nonpoint source allocation.

26. Neighbors also argue in their closing argument that a specific number of pounds is allocated to the existing agricultural land on which the Gold Fork project will be located. (Neighbors' Closing Argument at pages 9-10). There are no facts on the record to support this position, and the position is directly contradicted by the plain language of the TMDL quoted above. There is nothing in the TMDL that allocates a specific nonpoint source load to any specific project or land area. Neighbors point to several tables in the TMDL. These tables, however, are not tables in which allocations to sources are set. Instead, these tables are in the section 3.3 entitled "Estimates of Existing Pollutant Loads". Table 3.1 is captioned: "Annual total phosphorus load (kg/yr) to Cascade Reservoir averaged from 1993-1996 in stream monitoring data." The description of the other tables referenced by Neighbors is similar. Thus, each table describes existing loads, and not any specific allocation for an existing source. Neighbors' argument that there is an allocation for the Gold Fork property of 3.8 pounds is without any factual support in the record.

E. Expert Witness Testimony Regarding Storm Water BMPs and Pollutant Reductions

27. Barry Burnell made the final decision regarding the Gold Fork 401 certification. Barry has over 20 years experience with storm water control and regulation. He has worked for DEQ for 18 years and is currently the Administrator of the DEQ Water

Quality Division. (T-157-159). During his work at DEQ, Barry Burnell helped develop the Idaho Catalogue of Storm Water Best Management Practices (DEQ Storm Water BMP Catalogue-Exhibit R-1), which is a guidance document that contains recommendations regarding practices that can be used to reduce pollutants in storm water. (T-162-164). Prior to working at DEQ, Mr. Burnell worked for the Southeastern District Health Department, and part of his job included regulating and monitoring storm water facilities. (T-160-161; 204). Mr. Burnell also worked for the City of Eau Claire, Wisconsin where he helped monitor the effectiveness of storm water BMPs. Mr. Burnell has specific experience with storm water issues in Valley County. (T-204; 250-251). Mr. Burnell has a B.S in Fishery Science. (T-160). Mr. Burnell worked on the 401 certification with Craig Shepard, the Boise Regional Office Surface Water Program Manager, Jack Gantz, a DEQ P.E, and Darcy Sharp, who does water quality modeling for DEQ, specifically modeling to determine the effectiveness of BMPs.

28. Jim Fronk is a principal in Secesh Engineering, Inc., and worked as the project manager for the Gold Fork development. (T-315). Fronk is a licensed landscape architect with 25 years experience designing storm water BMPs. (T-305). Mr. Fronk has been designing storm water BMPs for developments in Valley County since 1991, and so he has extensive experience dealing with the specific environmental conditions present in the Gold Fork project area. (T-305; 314). Mr. Fronk's design of constructed wetlands has proven successful at other developments. (T-387). Mr. Fronk was one of the principal authors of the Valley County Storm Water BMP Handbook. (T-310-311). Mr. Fronk worked with the engineers at Secesh to develop the storm water BMPs for the Gold Fork project. (T-327).

29. Nathan Stewart is a staff engineer with Secesh Engineering, Inc. Mr. Stewart has a degree in water resource management, a degree in civil and environmental engineering and a masters degree in environmental engineering. (T-533-535). Mr. Stewart has worked for the Vermont Department of Environmental Conservation and for environmental consulting firms in Vermont and in Idaho. (T-534-535). Mr. Stewart did the storm water volume calculations for the Gold Fork project, and helped to prepare the engineering plans and specifications for the storm water facilities.

30. Darcy Sharp is a Scientist 3 with DEQ, and specializes in environmental modeling. She has worked for the last 5 years doing modeling work for DEQ, including modeling to determine pollutant load reductions from the use of various BMPs. She has done modeling on approximately 40 to 50 projects. (T-597-600). Darcy Sharp did modeling to predict the load of TP that will be discharged from the Gold Fork development, and compared this to an estimate of TP discharged from the pre-development agricultural use of the land with no storm water controls in place.

31. In addition, the Valley County engineers also provided their opinion that the BMPs are suitable for the site and are reasonable and feasible. (R-22).

32. The above listed individuals, all experts in an area relating to storm water BMPs, testified that the storm water BMPs proposed for the Gold Fork project are suitable for the site, and will operate to reduce the TP load on the site, up to 60%, from the prior land use, in a manner consistent with state WQS and the Cascade Lake TMDL. Neighbors, on the other hand, produced no witnesses at all that could testify as to the suitability or effectiveness of the storm water BMPs.

F. The Design and Operation of the Gold Fork Project Storm Water BMPs.

(1) The BMPs Are Designed to Be Four Times Larger Than the Size Recommended by Idaho and Valley County, and Therefore, Will Remove More of the TP Load From the Storm Water

33. The Gold Fork storm water system was designed to serve two functions: (a) convey storm water through the project in order to control flooding, and (b) treat the storm water to control the amount of pollutants, specifically TP, that will be discharged to Cascade Lake as a result of storm water runoff.

34. In order to properly size and design storm water systems, there must be an estimate of pre-and post-development storm water flow and volumes. Models are used to predict storm water runoff, using different size storm events based on historic weather records. Different storm events are used to design storm water conveyance or flood control facilities and water quality treatment facilities. For water conveyance systems, the difference between pre-and post-development runoff during a 10 year storm event is recommended by the Valley County BMP Handbook. (Valley County Handbook, R-2 at Appendix D, page D-2).

35. Storm water facilities intended to provide water quality treatment are designed using smaller storm events than flood control facilities, for several reasons. First, it has been determined that most pollutants runoff in the "first flush" of a storm event. Therefore, designing facilities using smaller storm events will capture the first flush of pollutants which is most important. (R-2, Appendix D, page D-3-D-4; T-226-227; 391). Second, "although an ideal situation might be to capture and treat all storm water runoff, it is obvious that the size, and therefore, cost, of the facilities required would quickly become prohibitive." (R-2, Appendix D, page D-3; T-227; 352). Therefore, the Valley County

Handbook recommends using 1/3 of the 2-year storm volume to design storm water quality facilities. (Id. at D-3).

36. The storm water, water quality treatment facilities proposed for the Gold Fork project was designed using a 25 year/24 hour storm event. (T-330-331; 334-335). This means that the facilities proposed are four times larger than the 1/3 of the 2 year storm size recommended in the applicable guidance documents. (T-338). While no storm water treatment facility will or can treat 100% of the storm water, the larger facilities proposed by Secesh will treat a larger portion of storm water runoff and remove a larger volume of pollutants than the facilities recommended by both the state and Valley County.

37. Secesh used the TR-55 model to estimate storm water volumes. This model is regularly used and accepted in the engineering community for use in estimating runoff volumes. (T-539-542).

38. During the Hearing, Neighbors suggested that the BMPs should have been designed to treat 100% of the storm water generated at the site. As discussed above, there is no rule or guidance that requires this level of treatment. Moreover, installing a system that would treat 100% of any storm water generated would be impossible to build, because it would be both too costly, and so large that it would be impractical. (R-2, page D-3; T-227; 352). The BMPs for the Gold Fork project were designed in a very conservative fashion, and will treat more of the storm water than is recommended or required by any state or local law or guidance.

(2) The Storm Water BMPs Work in a Treatment Train to Remove Pollutants

39. Secesh designed BMPs for the Gold Fork project that work sequentially as storm water runs from off-site down through the development towards Lake Cascade. This

is called a treatment train, and is something recommended by both Idaho and Valley County. (See e.g., Idaho guidance, R-1, page 12). Using BMPs in a treatment train increases the cumulative effectiveness of the pollutant removal. It also was important for the Gold Fork project because it ensured that, while some BMPs might not work at top efficiency during certain times of the year, others would and the overall effect would be continue to remove pollutants at the recommended efficiency.

40. Jim Fronk describes the layout of the BMPs at pages 336 through 341 of the Transcript. The BMPs are set out in a multi-tiered and multi-elevation approach, with the storm water dropping in elevation first through vegetated filter strips and then vegetative swales into a series of sedimentation or settling ponds, and then into a multi-cell constructed wetland, and finally into the 600 to 800 feet of native vegetation and wetlands before entering Lake Cascade. (See also, T-498-500). The native vegetation along the shoreline was retained for the Gold Fork project. In contrast, on the Neighbors adjacent property, all the native vegetation has been removed, and replaced by retaining walls that, in the absence of native vegetation, are needed to prevent shoreline erosion. (T-500).

(3) The Constructed Wetlands

41. The constructed wetlands were properly designed and are consistent with the BMP guidance documents. The Valley County guidance document referenced by Neighbors states that the "primary function of a constructed wetland is to provide runoff treatment of both conventional pollutants and nutrients, using a permanent pool of water which has extensive shallow marsh area." (R-2, BMP#49, page 1). The guidance document continues to suggest certain configurations and geometry to meet the goal of the constructed wetland. The recommendations are, of course, not framed as absolutes. For example, the guidance

document generally says one part of the wetland should be deeper, and uses terms like "approximately". (R-2, BMP#49, page 2).

42. As Mr. Fronk testified the constructed wetland for the Gold Fork project will do exactly what is intended for such a treatment facility--it will provide runoff treatment of nutrients with water levels set just below the hydrophytic plant material root zone so that there is a successful vegetative area to take up pollutants. (Fronk testimony, T-489-491). So, the constructed wetland is consistent with and serves the purpose described in the guidance documents.

43. While some parts of the constructed wetlands do not have the exact configuration suggested in the guidance document, Mr. Fronk testified that his design will result in "greater fallout of sediments and better--more efficient uptake of the nutrients..." (T-386-387). Mr. Fronk's opinion is based on his own experience using this design at other sites, and his subsequent 5 years of monitoring that showed the design was successful. (T-387-388; 491-492).

44. The site conditions were appropriate for the constructed wetlands. The soil types used in the constructed wetlands are consistent with guidance document recommendations. C or D type soils are recommended. Mr. Fronk testified that while the predominant soils on site are B soils, there is C soils on site. Specifically, soils excavated from the old irrigation pond are C type soils, and these soils were stockpiled and placed back in the constructed wetlands and the pre-settling basins. (T-384; 398). Thus, C type soils were used in the constructed wetlands.

45. Neighbors argued that the constructed wetlands can not be used to treat storm water because they are wetlands created to mitigate for the loss of wetlands resulting

from the development, as required by the Corps of Engineers. This is a question, however, for the Corps of Engineers, not DEQ to decide. And, at any rate, the issue was raised by Neighbors to the Corps and the Corps determined that the use of the mitigation wetlands by Wildwood was appropriate.

46. The ground water level will not prevent the constructed wetlands from operating properly. There is relatively high ground water at the site. Mr. Fronk testified, however, that the relatively shallow ground water actually benefits, rather than negatively impacts, the use of the constructed wetland by ensuring water for the wetland plant community to grow and get established in order to uptake pollutants. (T-490-492). This design has been used successfully by Secesh at other developments. (Id.).

47. The constructed wetlands have replaced some very marginal wetlands that were the result of the use of the old irrigation pond. The pre-development wetlands may have served some treatment function, but it was of very little value. (T-489-490). The constructed wetlands will provide a much greater reduction in pollutants, including TP, and provide greater benefits in terms of habitat. (T-490).

(4) The Pre-settling/Sedimentation Basins

48. Pre-settling basins, along with vegetated swales and vegetated filter strips, operate to settle out sediment and TP in storm water. At the Gold Fork project, they will serve to reduce TP loads, and by settling out sediment, will also help pre-treat water that enters the constructed wetlands.

49. The site conditions are appropriate for the pre-settling/sedimentation basins. Soil type C, which is one of the recommended soil types for pre-settling basins, has been

excavated from the old irrigation pond and was used for the pre-settling basins. (T-384; 398; 402).

5 50. During cross-examination, Neighbors asked about the use of outflow devices. Outflow devices will be installed as recommended in the guidance documents. (T-404).

5 51. The Valley County guidance document says the following regarding the design of pre-settling/sedimentation basins: "If possible, a long, narrow basin is preferred, as this is less prone to short-circuiting and tends to maximize available treatment area. The length to width ratio should be at least 3:1 and preferably 5:1." (R-2, BMP#50, page 1). Thus, typical of a guidance document, the statement here is not prescriptive, but suggests a general design of a long narrow basin when possible. Therefore, ponds that are not exactly a 3:1 length to width ratio are not necessarily inconsistent with the guidance. There was no testimony presented that the basins do not meet this long and narrow recommendation. Mr. Fronk testified that 5 of the basins appeared to meet the 3 to 1 recommendation, but was unable, without more in-depth review that was not allowed, to testify regarding any of the other basins. (T-406-407). So, there was no testimony establishing that the basins are inconsistent with the length to width recommendations.

 52. The Valley County guidance document provides: "Pre-settling basins may need to be located "off-line" from the primary conveyance/detention system if used to protect infiltration or filtration BMPs from siltation." (R-2, BMP#50, page 1). During cross examination of Mr. Fronk, Neighbors seemed to contend that the Gold Fork design did not take this possible precaution into account. There was no testimony, however, that off-line basins are needed at this site or that the basins will not function well as designed. To the

contrary, Mr. Fronk testified that, given the fact that Secesh designed the basins to be 4 times larger than recommended in the guidance documents, and given proper maintenance in which sediment is removed, the pre-settling basins will function exactly as suggested in the guidance documents. "Q: Isn't it true that, in order to treat it successfully in a pre-settling sedimentation basin, there needs to be an isolated situation such that that sediment has an opportunity to settle out without the water being disturbed? A: And what you just described is what we have portrayed on this site. Certain portion of the water will be treated as certain storm--the storms that we're trying to capture, which is the first flush storms. We maintain the BMPs. We clean them out. We keep them in maintenance order. Any anything else that happens, if it's a bigger storm or more flow goes on through." (T-396-397).

53. High ground water at the site will not diminish the effectiveness of the pre-settling basins. (T-405-406).

(5) Vegetated Swales and Filter Strips

54. High ground water in certain places during a short period of time will not affect the performance of the swales or filter strips. (T-428-429).

55. The guidance documents recognize particular flexibility afforded the designer with respect to swales:

Biofiltration should be regarded as one possible element of an integrated storm water management plan for any given site or class of sites. Since flexibility exists in many design features, biofiltration success depends more on proper construction and maintenance than any other factors; effective inspection and enforcement programs should be emphasized to ensure that approved plans are implemented.

(R-2, BMP#38, page 1).

5 56. Consistent with the flexibility in the design of vegetated swales, the Valley County guidance, in Appendix G-1, which has supplemental information regarding swales, shows a number of different geometric shapes and configurations for swales, from v-shaped to trapezoidal. All of these can be appropriate. (R-2, Appendix G-1, Figure G-1 in document entitled: "Biofilter Design Procedure and Example").

57. The guidance documents include recommendations regarding the side slopes for swales. The vast majority of the swales and filter strips either meet or exceed the guidance recommendations. Mr. Fronk testified that 80% of the swales and strips meet the recommendations. (T-477). While some of the swales and filters were on greater slopes or had side slopes less than the recommended ratios, others far exceeded the recommendations. (T-426; 497-498). On the whole, Mr. Fronk testified that the swales and strips would provide the needed residence time to remove pollutants and otherwise will meet the pollution reduction goals set out in the guidance documents. (T-420; 432-433).

(6) The Valley County Engineers Determined the BMPs Were Appropriate For Site Conditions and Were Reasonable and Feasible

58. On May 23, 2005, Valley County issued a Conditional Use Permit ("CUP") approving of the Gold Fork Bay Village. Condition No. 5 of the CUP requires that a final site-grading plan be approved by the Valley County Engineer prior to construction. Condition No. 15 of the CUP requires the Valley County Engineer determine if the Wildwood's geotechnical study is adequate for the design of the storm water disposal system. These conditions, and the County's conclusion that the development's design

complied with the county requirement to meet BMPs was upheld by the Idaho Supreme Court.

59. On October 19, 2007, Valley County's engineer, Parametrix, issued a Technical Memorandum. (R-22). In the Memorandum, Parametrix, acting as Valley County's engineer, approved the final drainage and grading plan and concludes that the final plan added additional details and information from the preliminary plans and improved the features and treatments provided in the preliminary plans. Thus, Parametrix determined Wildwood met condition No. 5 of the CUP. (R-22, page 1-2).

60. In addition, after reviewing the geotechnical information provided, Parametrix concluded that: (a) the information was sufficient; (b) the "BMP system is reasonable and feasible"; and (c) "the BMPs proposed by the applicant are appropriate for the site water table conditions." (R-22, page 2).

61. The author of the Technical Memorandum, Doug Camenisch, was deposed by Neighbors. The deposition transcript was entered into evidence at the Hearing. While Mr. Camenisch could remember little of his work on this project, and did not have the time at the deposition to reconstruct his reasoning in any detail, he did reaffirm his opinion as a professional engineer that the BMPs were suitable for the site, and were reasonable and feasible. (Camenisch deposition at pages 81-83).

(7) Ground Water Conditions

62. Neighbors contend that high ground water at the Gold Fork project site will prevent the storm water BMPs from functioning properly. Neighbors' argument is based, not on any site-specific evaluation or expert testimony, but solely on recommendations in the Valley

County guidance document regarding minimum depth to ground water for the storm water BMPs.

63. The state and Valley County guidance documents do not prohibit the use the storm water BMPs chosen for the Gold Fork site when there is ground water at levels higher than the recommended levels. The Valley County Handbook, Chapter 1, section 1.1, page 1-1, describes some of the particular problems facing Valley County. With respect to high ground water, the guidance document states that because of high ground water, "infiltration BMPs are not recommended for Valley County unless site specific testing demonstrates that infiltration will work. Two possible infiltration BMPs are presented in this handbook." (R-2). The two infiltration BMPs presented on page 1-5 are infiltration trench, and infiltration basin. (R-2, page 1-5). Infiltration BMPs use soils below the ground to filter and remove pollutants. (T-207-208; 211-212). With very high ground water, the soils will not be available to serve this filtering function, and ground water quality could be impacted. (T-211-212).

64. There are no infiltration BMPs recommended for the Gold Fork project. (T-208; 346). Therefore, the main BMPs Valley County was concerned should not be used with high ground water are not even being proposed at the Gold Fork site.

65. As noted with respect to the infiltration BMPs, the minimum ground water levels in the BMP guidance document were intended to protect ground water quality. The high ground water levels will not impact the effectiveness of the BMPs in removing TP from the storm water in order to protect surface water from pollutant runoff. (T-212-213; 346-347).

66. The site specific conditions establish that high ground water will not adversely affect the BMPs. Ground water information shows that there is high ground water for only a few weeks of the year in the spring. (R-21; T-346). Even this short duration of high ground water will, however, be significantly lowered by a trench installed to carry water and sewer lines. The trench is backfilled with permeable material, which will transport high ground water away from the Gold Fork site. (R-21; T-205-206; 349-350). In addition, the BMPs are installed in a series at different elevations, and while there might be high ground water for some, it will not affect all the BMPs. (T-212-213; 346-347). Both Barry Burnell and Mr. Fronk testified there is little chance the high ground water will negatively affect the ability of the BMPs to function effectively.

67. The guidance documents do not support Neighbors' argument that no BMPs with minimum ground water levels can be used at the Gold Fork site. ALL of the BMPs include a minimum ground water level recommendation. (T-213-214). If Neighbors are correct, NO BMPs could be used at the Gold Fork site. The guidance documents are set up to accommodate site specific conditions where BMPs are needed but there is high ground water.

(8) Rain or Snow Events

68. Neighbors contend that the BMPs for the Gold Fork project should have been designed to take into account the runoff generated by a rain on snow event. There is nothing in the guidance documents that indicates that rain on snow events should be used to design water quality treatment facilities. The Valley County Storm Water Handbook recommends using 1/3 of the 2 year storm event to design water quality treatment facilities. In making this recommendation, the authors note that trying to size facilities to capture more of the

storm water runoff (a) was totally impractical; and (b) was not needed because the first flush of storm water events is the most important to control for water quality treatment. (R-2, Appendix D, page D-3).

69. In addition to addressing storm water events for the design of water quality treatment facilities, the Valley County Storm Water Handbook also makes suggestions for flood control or water conveyance facilities. In this regard, the Handbook recommends using the difference between pre-and post-development runoff using a 10 year storm event. (R-2, Appendix D, page D-2). The Handbook also, however, discusses the impact of runoff during snowmelt and how this often contributes to flooding. (R-2, Appendix D, page D-4). The entire discussion regarding rain on snow events in the guidance documents is aimed at the potential for flooding, not water quality treatment. In fact, the guidance document points out that the very reason that rain on snow events can contribute to flooding are also the reasons that these events are less important for water treatment purposes: the runoff occurs "when the ground is still frozen." (R-2, Appendix D, page D-4). When the ground is frozen, there is obviously less potential for sediments and attached phosphorus to move with the storm water and create a water quality problem.

70. The testimony of both Barry Burnell and Jim Fronk is consistent with the storm water guidance documents. Secesh's design for the BMPs exceeded the recommendations for water conveyance and water quality treatment. But, the facilities were not designed to control a rain on snow event. Jim Fronk testified that the major concern about rain on snow events is not water quality, but life and safety, and so the water from these events must be moved through the system in order to avoid flooding. (T-351-352). Mr. Fronk also testified

that it would simply be impractical to design large enough facilities to treat rain on snow event. (Id.)

71. Mr. Burnell's testimony was similar. He confirmed there is nothing in the state or local guidance documents that recommended taking rain on snow events into account when designing water quality treatment facilities. (T-227). He also testified that rain on snow events are not used to design water treatment facilities because it would be impractical to do so, and the first flush of storm water is what is important for water quality treatment. (T-226-227).

72. The Valley County Storm Water Handbook states that it difficult to estimate flows from snowmelt. (R-2, Appendix D, page D-4). Darcy Sharp, the modeling expert for DEQ testified that, after extensive research, it was her opinion that there were too many variables and not enough information to estimate rain on snow volumes for the Gold Fork site. (T-620).

73. Even if some kind of estimate of runoff from rain on snow events could be estimated, there is nothing that requires or even recommends that such runoff be used to design water treatment facilities, and it would be impractical to try to do so. The Gold Fork BMPs were designed using the 25 year storm event, which exceeds any of the recommendations for the design of water quality treatment facilities.

74. Neighbors presented no site specific analysis or expert testimony regarding the need to design for rain on snow events.

(9) The Gold Fork BMPs Will Result in a Substantial Reduction of TP Discharged to Lake Cascade

75. There will be a substantial reduction, up to 60%, in the TP discharged from the Gold Fork property as a result of the conversion of the agricultural land use to residential use with storm water BMPs.

76. In order to determine whether there is a reduction in TP as a result of the development, the pre-development use of the property must be examined. Mr. Fronk did an evaluation of the site prior to beginning work on the design of the BMPs. The land generally slopes toward the lake. The area immediately along the shoreline had natural wetlands in a pristine condition. This natural area extended for 600-800 feet inland from the shore. (T-499). Above this, the land was used for agricultural purposes. Mr. Fronk testified that the land had been grazed heavily, which was obvious from the fact that there were compacted layers of soil, bare ground and existing vegetation grazed to the ground. (T-316-319). There was also an irrigation pond on the property. (T-317; 322-324). The irrigation pond was created in an existing swale, and was used to water livestock. (T-322-324). There was a house on the land with a septic tank.

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77. The land uphill from the Gold Fork site was and is used to grow crops. Irrigation water from approximately 100 acres of cropland drained onto the Gold Fork property. Some of the water drained into the old irrigation pond. The water level in the pond fluctuated, and when full helped create a very marginal wetland area that was along the fringe of the old irrigation pond. (T-489-90).

78. Existing vegetation and the old irrigation pond provided some attenuation of pollutants in storm water running across the property. But, there were no storm water BMPs intended to provide water quality treatment on the property.

79. The condition of the property, and its use, prior to development was confirmed by Darcy Sharp by using aerial photographs taken when the land was used for agricultural purposes. (T-611-613).

80. The Gold Fork development will include storm water BMPs, including vegetated filter strips, vegetated swales, a number of pre-settling/sedimentation basins and a multi-cell constructed wetland. In addition, the existing wetlands and natural vegetation along the shoreline will be retained. The proposed BMPs are rated in the state and county guidance documents as reducing a certain percentage of pollutants, including TP. The ratings provided in the guidance documents are based on experience of using the BMPs and studies conducted across the county. (T-164; 309-310). Both Mr. Burnell and Mr. Fronk testified that the Gold Fork BMPs would reduce pollutants in the amount rated in the guidance documents, which ranges individually from 30% to 45%. Cumulatively, a greater percentage reduction is achieved. Both experts also testified that replacing the agricultural land used heavily for grazing with virtually no effective BMPs with the Gold Fork residential use with the proposed BMPs will result in substantial reduction of the TP delivered to Lake Cascade.

81. The opinion of Mr. Burnell and Mr. Fronk is supported by the modeling work done by Darcy Sharp. Ms. Sharp used a model called STEPL that was developed specifically to determine whether BMPs would reduce the discharge of pollutants to surface water. The model is approved and promoted by the federal EPA. (T-602-604). Ms. Sharp entered information regarding the pre-development use of the property, the use of the property with the BMPs, information regarding storm water volumes generated by a 25 year storm event, and other relevant information and the model predicted a 60% reduction in TP discharged

from the property once the land was developed with storm water BMPs in place. (T-617-618; R-20).

82. Ms. Sharp also made changes in her model to reflect concerns expressed by the Neighbors regarding the pre-development use of the property, the soil types used in the model and the BMP efficiencies. None of these changes made any substantive difference in the model output. (T-618-620; R-27).

83. The model assumes that the BMPs will remove TP in the percentages rated in the guidance documents. While Neighbors object to this assumption, the DEQ experts testified that the BMPs would work as rated, and Neighbors offered no evidence to the contrary.

84. The model assumes 100% of the storm water will be treated by the BMPs. The Gold Fork project BMPs will not, however, treat 100% of the storm water. But, DEQ took a very conservative approach to the model runs, including using the existing irrigation pond as a constructed wetland, and assuming the irrigation pond would achieve the full reduction of pollutants that a wetland would. (T-646-647). DEQ did this despite the fact that the irrigation pond with its marginal quality fringe wetlands probably provided very little if any water quality treatment (T-489-490), and despite the fact that normally, a surface water pond of this sort is treated in the model as an impermeable surface with no water quality treatment capability. (T-646-647). So, while the assumption regarding the treatment of 100% of the storm water may have overestimated the pollutant removal of the BMPs, there are other inputs to the model that almost certainly overestimated the pollutant removal from the pre-development conditions on the property.

85. The model did not take into account a rain on snow event. But, the model was used to predict reductions in pollutant loading as a result of BMPs. Ms. Sharp testified that entering data regarding rain on snow events, even if you could somehow determine the volume produced, would increase the volume of storm water and the pollutant loading both pre-and post-construction, and would therefore NOT affect the percentage reduction in pollutants achieved by the BMPs. (T-620-621).

86. It is not unusual that the conversion of the agricultural land to the Gold Fork development will result in a reduction in pollutants delivered from storm water. Mr. Burnell testified that DEQ has done studies and analysis regarding the effect of the conversion of agricultural land to urban/suburban uses in Valley County and in the Lower Boise drainage. The results of these studies show that the conversion to an urban use results in a reduction in TP discharged from the land. (T-224-226).

G. DEQ Considered the Installation and Use of the Docks Associated with the Project

87. During the public comment period, Neighbors commented on the potential of water quality impacts from the construction and use of boat docks. DEQ considered the Neighbors' comments. In the final 401 certification, DEQ included several conditions specifically related to ensuring that the construction of the docks and the material used in the docks would create no water quality impacts. DEQ also looked at the use of the docks. Since the docks were not to be used for any refueling, repair work or permanent storage of boats, and would only be used on a seasonal basis and only by those residents of the Gold Fork Bay Village, DEQ concluded that the use of the docks would not cause violations of state WQS. (R-17, attached Response to comments). In this regard, DEQ compared the use

of private boat docks to the use of marinas. Marinas include fueling and repair of boats. They include solid waste facilities, bathrooms and the pump-out of sewage from boats. There is normally a much heavier use of a public marina compared to a private boat dock. For all these reasons, DEQ determined that the private boat dock at the Gold Fork development would not contribute to WQS violations. (T-238-239).

88. DEQ did not consider conditions in its 401 certification relating to the operation of boats out on Lake Cascade. DEQ did not consider this within its jurisdiction.

89. Barry Burnell and Neighbors' spokesman, Mr. Aldape, testified that water quality impacts from boat usage on the lake are mostly the result of the behavior of individuals operating the boats at high speeds. (T236-238). In fact, Mr. Adalpe testified that the Neighbors have instituted a no wake zone which has helped reduce water quality impacts from the boats. (T-60-61). DEQ, however, has absolutely no regulatory control over the operation of boats on the Lake, and therefore, no ability to control the very conduct that Neighbors contend contribute to water quality problems.

90. Mr. Adalpe testified that there is nothing that prevents people from launching their boats at public docks or marinas on the Lake and then operating them in the Gold Fork area, and in fact, some Gold Fork owners do just that when they can no longer access their own boat docks due to low water. (T-99-100). Thus, even assuming DEQ somehow had the authority to restrict the number of boats that could be launched from the docks at the Gold Fork Bay Village, there is no way that DEQ could prevent the launch of boats at public docks and their use on the Gold Fork arm of the Lake. Again, there is no way through the 401 certification that DEQ can control the operation of boats out on the Lake that Neighbors are opposed to.

91. Mr. Adalpe testified that the worst water quality problems occur in late summer, usually in mid to late August. (T-98-99). But, because of low water, the docks in the Gold Fork area are no longer useable at this time of year. (T-97-98). In fact, the docks in the area usually can not be used from August to April. Thus, any adverse impacts from boats during the time when there are water quality problems could not be caused by the existence of the boat docks.

CONCLUSIONS OF LAW

1. Section 401 of the CWA does not require states to certify with absolute certainty that the discharge authorized by a federal permit or license will comply with state WQS. Instead, states need only provide a "reasonable assurance" that the discharge meets applicable state WQS. 40 CFR § 121.2(3); *Port of Seattle v. Pollution Control Hearings Board*, 90 P.3d. 659 (WA 2004).

2. Lake Cascade is an impaired water body that does not meet WQS. The Lake fails to meet WQS principally due to excess nutrients and low dissolved oxygen. DEQ prepared a TMDL for Lake Cascade that has been approved by EPA. Idaho WQS at section 58.01.02.054.04 provides that, once a TMDL is completed, any new or increased discharge of causative pollutants will be allowed only if consistent with the approved TMDL. Therefore, discharges of TP from the new Gold Fork project must be consistent with the approved Lake Cascade TMDL in order to meet WQS.

3. In order to meet state WQS, the Lake Cascade TMDL allocates pollutant loads to sources in the form of reductions from current levels of TP discharged to the Lake. The TMDL provides a general allocation to all nonpoint sources. This allocation provides that there needs to be a 30% overall reduction of TP discharged to the Lake from all nonpoint

sources. Runoff from agricultural lands and storm water runoff from urban/suburban development are both nonpoint sources of TP included in this general allocation. The TMDL, however, is clear that the overall 30% reduction is not intended to be applied equally to every project or even to every part of the Lake. Instead, the TMDL provides that a reduction of TP is needed from nonpoint sources, but that the reduction may not be the same for all areas of the Lake, and may not be the same for all projects.

4. The TMDL specifically addresses TP reductions from urban/suburban development like the Gold Fork project. The TMDL provides that reductions will be achieved through the application of BMPs set out in the Valley County Storm Water Handbook. The TMDL further provides that a resolution passed by Valley County provides that new development should be evaluated for water quality/TMDL impacts. Thus, the TMDL anticipates new development and new discharges from development.

5. The DEQ and the local WAG developed an implementation plan for the TMDL. The implementation plan provides that there should be no additional loading of TP from storm water runoff from new development above that delivered to the Lake by the pre-development use of the land.

6. There is no evidence on record to support Neighbors' view that the Lake Cascade TMDL provides no allocation and will therefore allow no discharge of TP from new development. Nor is there any evidence in the record to suggest that there is a specific allocation to the land on which the Gold Fork project will be located, including any specific allocation of 3.8 pounds. The Neighbors' arguments ignore the plain language of the TMDL, and the testimony of DEQ and the local Health District regarding the intent of the TMDL.

7. Storm Water runoff is treated as a nonpoint source of pollutants under the Idaho WQS. IDAPA 58.01.02.010.58. Unlike point sources, the discharge from nonpoint sources vary greatly depending upon the particular storm event and other site-specific events. Also unlike point sources, federal and state law require, not numerical limits applied to the end of a pipe, but the application of best management practices, or BMPs, to control pollutant loading. Therefore, storm water runoff from the Gold Fork project is to be controlled by BMPs.

8. The DEQ Catalogue of Storm Water Best Management Practices for Idaho Cities and Counties and the Handbook of Valley County Storm Water Best Management Practices provide guidance regarding storm water BMPs to meet state WQS. These guidance documents were relevant and applicable to the Gold Fork project and it was appropriate for DEQ and the developer to use these documents for guidance. These guidance documents provide guidance and are not rules. Alternative BMPs may be employed if the BMPs will achieve state WQS.

9. There is reasonable assurance that discharges from the Gold Fork project will be consistent with the Cascade Lake TMDL and will comply with state WQS. This conclusion is based on a number of findings, including most importantly: (a) the 401 certification requires Wildwood comply with the BMPs contained in the Storm Water Management Handbook developed by Secesh Engineering for the Gold Fork project; (b) the BMPs for the project are suitable for the site conditions and are properly designed; (c) the BMPs will reduce TP discharged to Lake Cascade up to 60% from the amount of TP discharged to the lake from the pre-development agricultural use of the property; and (d) DEQ's certification properly considered WQS violations reasonably expected to arise from the

Gold Fork project. Each of these conclusions is addressed in more detail below, and in the Findings of Fact.

10. The 401 certification in very plain terms makes the certification contingent upon Wildwood complying with BMPs developed for the site that were included in the Storm Water Handbook developed by Secesh Engineers. Neighbors' argument that DEQ did not include a requirement for Wildwood to comply with the BMPs is contrary to the plain language in the certification.

11. The Neighbors alleged and argued in this contested case that the BMPs developed for the Gold Fork project were not suitable for the site, and were improperly designed. As Petitioner, it was Neighbors' burden to prove these allegations. Neighbors, however, introduced no expert testimony or other substantive evidence at all regarding these issues. On the other hand, DEQ introduced engineering plans and specifications for the storm water facilities; calculations of storm water runoff from the site, pre-and post-development; detailed descriptions of each of the components of the storm water facilities; calculations of the predicted efficiencies of storm water BMPs in removing pollutants; a description of the operation and maintenance of the BMPs; site-specific ground water and soil data; results of modeling; and observations from an inspection of the site. DEQ also provided testimony from experts regarding the design and evaluation of BMPs, including two individuals, Barry Burnell and Jim Fronk, who were instrumental in the development of the state and Valley County BMP guidance documents. This evidence and testimony established that the Gold Fork project BMPs are suitable for the site and properly designed to reduce the TP discharged to Lake Cascade in a manner consistent with the Lake Cascade TMDL.

12. Neighbors did cross examine DEQ witnesses, and during the cross examination raised issues concerning whether the BMPs were consistent with the Idaho and Valley County guidance documents. While agreeing that in some respects the Gold Fork BMPs do not meet some of the recommendations in the guidance documents, the DEQ witnesses, specifically Barry Burnell and Jim Fronk, testified that the alternative BMPs proposed for the site will work as effectively or even more effectively than the recommendations in the guidance documents. In addition, DEQ witnesses testified that in some respects the BMPs far exceed the recommendations of the guidance documents. These witnesses also testified that the BMPs are suitable for the site and will provide a significant reduction in TP over the level discharged from the property before the development. Thus, while Neighbors criticized some aspects of the BMPs, the experts in the relevant fields testified that the BMPs were suited for the site and will provide the needed reduction in TP discharged to Lake Cascade and Neighbors provided no testimony or witnesses to refute these expert opinions.

13. The evidence at the contested case hearing established that the BMPs for the Gold Fork project would reduce the TP discharged to Lake Cascade by between 30 and 60% compared to the amount of TP discharged from the prior agricultural use of the property. DEQ provided expert testimony and modeling results to support this conclusion. It is significant that, while Neighbors' cross examination aimed at showing defects in the BMPs, Neighbors provided no testimony that any of the alleged defects would prevent the BMPs from reducing TP in a manner consistent with the TMDL.

14. Under any reasonable interpretation of the Lake Cascade TMDL, a reduction of TP of 30 to 60% from the existing agricultural use of the land is consistent with

the Lake Cascade TMDL. A 30 to 60% reduction far exceeds the requirement for new development set out in the Implementation Plan for the TMDL. In this document, DEQ and the local WAG set out how the general nonpoint source reduction was to be implemented with respect to new development, and determined that new development should be prevented from discharging more TP to the Lake than the existing use of the development property. Since the TMDL sets an allocation for all nonpoint sources, and makes it clear it is an overall reduction and more reduction can occur from some areas and projects than from others, it was appropriate and consistent with the overall nonpoint source allocation for DEQ and the WAG to implement the TMDL with respect to new urban/suburban development in this way. However, even ignoring the Implementation Plan, a 30 to 60% reduction in TP is consistent with the 30% overall reduction allocated to all nonpoint sources. The TMDL provides an allocation for all nonpoint sources, including runoff from agricultural lands. Before the development, the Gold Fork land was used for agricultural uses, and therefore, was part of the allocation and part of the general expectation that TP should be reduced by 30%. Replacing the agricultural land with new development that will achieve a 30 to 60% reduction in TP is obviously consistent with the overall reduction goal of 30% set for all nonpoint sources.

15. DEQ's certification properly considered WQS violations reasonably expected to arise from the Gold Fork project. DEQ went through a detailed and lengthy evaluation of the water quality impacts from the proposed Gold Fork project prior to providing certification. Contrary to Neighbors' allegations, DEQ did consider water quality impacts associated with the construction and use of the boat docks. DEQ's conclusion that there is a reasonable assurance the construction and use of the boat docks will not result in a violation of state WQS is supported by substantial evidence in the record. The fact that the

DEQ certification contained no conditions on the operation of boats on Lake Cascade was appropriate for several reasons. First, there was no evidence that the development of boat docks would cause the water quality impacts from the use of boats on the lake complained about by Neighbors, which Neighbors testified are due to the high speed operation of boats. DEQ has no regulatory control over the operation of boats on the Lake, and therefore no ability to control the behavior about which Neighbors complain. The operation of boats on the Lake is also not reasonably related to the activity permitted by the 404 permit, and thus beyond the scope of the 401 certification.

16. The certification by DEQ was not made in violation of federal and state law and regulations and rules promulgated thereunder and/or was not based on an erroneous interpretation of such law. Federal and State law require a reasonable assurance that discharges will comply with state WQS. The findings of fact and the reasoning set forth above in the Conclusions of Law establish that DEQ met Federal and State law with its certification.

17. The Certification by DEQ did not exceed the agency's authority or the authority under rules adopted by the Board. As stated above, DEQ met all requirements of Federal and State law.

18. The Certification by DEQ was not made upon unlawful procedure and irregularities. There are no state rules or laws that require a particular process be followed by DEQ when it makes a 401 certification decision. Section 401 of the CWA provides, however, that states must provide public notice in the case of all application for certification Section 401(a)(1). When DEQ made its initial certification of the 404 permit, the public was not given a full opportunity to comment on the certification. DEQ, however, rescinded the initial

certification, and provided a new public notice and a full opportunity for the public to review a draft certification, and to provide comments on the draft certification. Neighbors were specifically provided with the draft certification and informed of the right to comment. Neighbors provided comments, both during the first certification decision, and with respect to the second. DEQ reviewed and responded to the Neighbors' comments. Proper public notice and an opportunity to comment were provided, and the decision was not made upon any unlawful procedures.

19. The Certification by DEQ was not arbitrary, capricious or an abuse of discretion.

20. The Certification by DEQ was not affected by other errors of law.

21. The Certification by DEQ was supported by substantial evidence on the record as a whole.

22. The Undersigned was granted authority to issue this Preliminary Order pursuant to appointment by the Board of Environmental Quality under IDAPA 58.01.23.410, and IDAPA 58.01.23.413.04.

23. The Petitioner, Neighbors for a Healthy Gold Fork, has standing to challenge the issue of the Permit in the instant matter as a private organization or entity of any character, or at least, as a "person" pursuant to IDAPA 58.01.23.12., and as an "aggrieved person" under IDAPA 58.01.23.010, and IDAPA 58.01.23.11.a.

24. Further, the Undersigned is directed to apply a liberal construction to the Agency Rules to secure determination of all issues present to the Agency. IDAPA 58.01.23.011, and has allowed ample opportunity to the Petitioner to present their issues.

PRELIMINARY ORDER

Therefore, pursuant to the authority conferred upon the Hearing Officer under Rule 413, Section 4, Rules of Administrative Procedure before the Board of Environmental Quality, the Hearing Officer preliminarily orders that the subject Certification be affirmed in its entirety and remanded to the Department for further action consistent with this Decision.

As required by Rule 730, section 2, Rules of Administrative Procedure before the Board of Environmental Quality (the "Board"), the Hearing Officer advises the parties that:

- a. This is a preliminary order of the presiding officer. It can and will become final without further action of the Board 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,

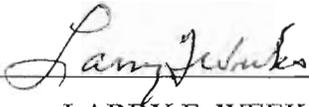
ii. The final agency action was taken,

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 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.

DATED this 2nd day of July, 2008.



LARRY F. WEEKS
Hearing Officer