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**POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON**

SIERRA CLUB; CENTER FOR ENVIRONMENTAL LAW AND POLICY,)	No. 08-__
Appellants,)	NOTICE OF APPEAL
v.)	(Section 401 Certification No. 5492; FERC License No. 2545)
STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; AVISTA CORPORATION)	
Respondents.)	

I. APPELLANTS & REPRESENTATIVE

The Appellants are:

Sierra Club
P.O. Box 413
Spokane, Washington 99210
(509) 209-2899

Center for Environmental Law and Policy
25 West Main, Suite 234
Spokane, Washington 99201
(509) 209-2899

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1 The Appellants are represented by:

2 Rick Eichstaedt
3 Bonne Beavers
4 Center for Justice
5 35 West Main, Suite 300
6 Spokane, Washington 99201
7 (509) 835-5211
8 Fax: (509) 835-3867
9 ricke@cforjustice.org

10 All notice, correspondence and pleadings should be served on the representatives identified
11 above.

12 Sierra Club is a non-profit organization dedicated to protecting and enhancing the
13 nation's valuable natural resources. Locally, through the Upper Columbia River Group, Sierra
14 Club has spent many years focused on restoration and protection of our regional water resources,
15 including active participation in the Avista dam relicensing processes, §401 Certification
16 process, and other regulatory processes impacting the Spokane River.

17 The Center for Environmental Law and Policy (CELP) is a non-profit membership
18 organization dedicated to the development and defense of ecologically and socially responsible
19 water laws and policies. CELP's mission is to leave a legacy of clean, free flowing water for
20 rivers and aquifers of the Pacific Northwest.

21 Both Sierra Club and CELP members actively utilize the Spokane River by engaging in
22 water sports, fishing, and appreciate the natural aesthetics of the river. Sierra Club and CELP
23 have been active participants in every step of the §401 Certification notice and comment process
24 by providing oral and written comments. Ecology's Order, which is the subject of this appeal,
25 will cause significant harm to the members of Sierra Club and CELP through the degradation of
water quality, destruction of fish habitat, impairment of aesthetic river values, and introduction
of toxic substances into the Spokane River.

1 Collectively, Sierra Club and CELP are referred to below as Appellants.

2 **II. ADDITIONAL PARTIES**

3 In addition to the Appellants, listed above, the responding parties to this action are: (1)
4 Washington Department of Ecology (Ecology), the agency which issued the certification order
5 appealed herein; and (2) Avista Corporation (Avista), the named beneficiary of the Order
6 appealed herein. The mailing addresses and contacts for the additional parties are as follows:

7 Washington Department of Ecology
8 Jay Manning, Director
9 300 Desmond Drive SE
10 Lacey, Washington 98503

11 Avista Corporation
12 Elvin Fitzhugh
13 1411 E. Mission Ave.
14 Spokane, Washington 99252-0001

15 **III. ORDER OR DECISION APPEALED FROM**

16 Appellants appeal from Ecology's Spokane River Hydroelectric Project Certification
17 Order No. 5492; FERC License No. 2545 issued on June 10, 2008. A copy of this Order is
18 attached hereto.

19 **IV. GROUNDS FOR APPEAL**

20 The authority for Ecology to issue the Order at issue is grounded in § 401 of the Clean
21 Water Act, 33 U.S.C. § 1341. Section 401 grants Ecology authority to certify that operation of
22 Avista's dams on the Spokane River will comply with the applicable water quality standards.
23 The certification must provide a "reasonable assurance" that water quality standards will not be
24 violated. 40 C.F.R. § 121.2(a)(3).

25 Federal and state courts have held on numerous occasions that FERC must incorporate
Section 401 certification conditions into federal power licenses. *See, for example, S.D. Warren v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006) (dams raise potential for

1 “discharge of pollutants” and are therefore subject to § 401 certification); *Alabama Rivers*
2 *Alliance v. F.E.R.C.*, 325 F.3d 290 (C.A.D.C. 2003); *American Rivers v. F.E.R.C.*, 129 F.3d 99
3 (2d Cir. 1997) (“The [Clean Water Act] . . . has diminished the preemptive reach [of the Federal
4 Power Act] by expressly requiring the Commission to incorporate into its licenses state-imposed
5 water-quality conditions”). In addition to providing for compliance with state water quality
6 standards, Section 401 authorizes states to utilize “other appropriate requirements of state law” in
7 order to protect state waters. 33 U.S.C. § 1344(d).

8 The Order does not comply with the requirements and intent of the federal Clean Water
9 Act, 33 U.S.C. § 1251, *et seq.*, the Washington State Pollution Control Act, RCW Ch. 90.48, the
10 Water Resources Act of 1971, Chapter 90.54 RCW, applicable and implementing regulations for
11 each of these statutes, and other requirements of state law. Specifically, Ecology’s Order fails to
12 comply with applicable law, regulations, and other legal requirements in the following ways:

- 13 1. The provisions of the Order addressing dissolved oxygen within Lake Spokane
14 fail to provide reasonable assurance that applicable water quality standards and
15 beneficial uses will be met and protected.
- 16 2. The provisions of the Order addressing dredging of the pool of the Monroe Street
17 dam fail to provide reasonable assurance that applicable water quality standards,
18 including those associated with toxic pollutants, and beneficial uses of the
19 Spokane River will be met and protected.
- 20 3. The provisions of the Order addressing instream flows fail to provide reasonable
21 assurance that applicable water quality standards, beneficial uses, including
22 fisheries and fisheries habitat, and requirements of the Water Resources Act of
23 1971, Chapter 90.54, will be met and protected.

1 4. The provisions of the Order addressing aesthetic flows fail to provide reasonable
2 assurance that applicable water quality standards and beneficial uses, particularly
3 within the Upper Falls portion of the river, and requirements of the Water
4 Resources Act of 1971, Chapter 90.54 RCW, will be met and protected.

5 5. The Order generally fails to provide reasonable assurance that water quality
6 standards will be met by deferring the design and completion of studies and
7 design and development of mitigation measures until after the issuance of the
8 Order.

9 Appellants reserve the right to add to and/or amend the grounds for appeal as new
10 information is discovered or otherwise becomes available in this matter.

11 V. STATEMENT OF FACTS

12 a. *Procedural Background of Order*

13 The Spokane River Project (Project), which is subject to the appealed Order, is operated
14 and managed by Avista which operates under a license issued by the Federal Energy Regulatory
15 Commission (FERC) as Project Number 2545. The Project consists of four dams located on the
16 Spokane River in Eastern Washington (Spokane, Stevens, and Lincoln Counties). The Spokane
17 River originates at the outlet of Lake Coeur d'Alene in Idaho and flows westerly approximately
18 111 miles to the confluence with the Columbia River in Eastern Washington. The four
19 developments (upstream to downstream) are Upper Falls (river mile 74.2), Monroe Street (river
20 mile 74), Nine Mile (river mile 58.1), and Long Lake (river mile 33.9). Avista operates two
21 other dams on the Spokane River not directly subject to the existing provisions of this Order:
22 Post Falls dam (river mile 100.1) in Idaho and Little Falls dam (river mile 29), located on the
23 Spokane Tribal Reservation.

1 On July 12, 2006, Avista filed an application for § 401 Certification with Ecology for the
2 four Spokane River dams. As the one year deadline provided by § 401 approached, Avista
3 withdrew that application at Ecology's request and reapplied on June 13, 2007. On April 7,
4 2008, Ecology released a Draft § 401 Certification for public comment and conducted a public
5 hearing on April 22, 2008. Extensive written and oral comment was submitted to Ecology that
6 largely asked for Ecology to impose more stringent measures to protect aesthetic flows in
7 Spokane's downtown waterfalls, improve flows for fish, and to address Avista's contribution to
8 dissolved oxygen problems in Lake Spokane.

9 The Final § 401 Certification Order, which was largely unchanged from the draft, was
10 issued by Ecology and submitted to FERC on June 10, 2008.

11 ***b. Impacts of Spokane River Project***

12 1. Lake Spokane Dissolved Oxygen.

13 Avista's Long Lake dam has significant adverse impacts on dissolved oxygen (DO)
14 levels within Long Lake Reservoir (now known as Lake Spokane).

15 Ecology has long been aware of the dissolved oxygen and other water quality impacts
16 associated with the dam. In a 1972 Report, Ecology reported that the "main influence on water
17 quality in the lower Spokane River" was Avista's (then Washington Water Power) dams. Robert
18 A. Bishop, *et al.*, Spokane River Cooperative Water Quality Study, Report No. 72-001, (1972) at

19 3. The report specifically identifies impacts such as "thermal stratification, low dissolved
20 oxygen in the lower strata, accumulation of nutrients, and algal blooms." *Id.* The 1972 Report
21 recommended, "Further study should be made to define feasible projects to modify operations
22 and/or structures of Washington Water Power Company's hydropower developments"
23 specifically to examine "achieving artificial destratification of Long Lake during the summer
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1 months” so that “water quality in the deeper portions of the reservoir would not deteriorate to the
2 degree that occurs during thermal stratification.” *Id.* at 4.

3 In a 1974 Report, Ecology similarly recognized that Long Lake Reservoir acts as a
4 nutrient “sink” and the dissolved oxygen problems that result. *See e.g.*, Raymond A. Soltero, *et*
5 *al.*, Further Investigation as to the Cause and Effect of Eutrophication in Long Lake, Washington
6 (1974).

7 Dams, such as those on the Spokane River, have severe negative impacts on rivers as
8 they alter chemical, physical, and biological processes. Dam impacts include:

- 9 • Blocking free-flowing river systems and impeding a river's flushing function that
10 enables sediment and nutrients to be transported downstream. Instead, sediment
11 builds up behind the dam.
- 12 • Contributing or causing species to become threatened, endangered, extirpated, or
13 extinct, in part because they are located on prime spawning habitat. Many fish
14 species require high gradient, well-oxygenated water and gravelly streambeds for
15 spawning, which, incidentally, are the same parameters that provide a favorable
16 dam site.
- 17 • Altering water temperatures, dissolved oxygen levels, turbidity, and total
18 dissolved gas both upstream and downstream of the structure.

19 As Ecology’s 1972 and 1974 Reports indicate, the Spokane River is not immune from the
20 impacts of dams. Avista’s dams cause a number of impacts that fail to be addressed by this
21 Order. Indeed, the operation and maintenance of the Project impairs beneficial use of the
22 Spokane River as it alters chemical, physical, and biological processes. The four developments
23 that comprise the Project jointly and severally impair water quality standards by altering the
24 natural hydrograph of the river. The Project contributes to reduced levels of dissolved oxygen,
25 the concentration of toxic pollutants in addition to the reduction, interruption, and diversion of
flows.

1
2 Long Lake dam is a storage facility with a capacity of 105,080 acre feet. Lake Spokane
3 has a long history of low dissolved oxygen during summer low-flow months. Long Lake dam
4 significantly contributes to low dissolved oxygen within Lake Spokane by altering the natural
5 hydrograph of the Spokane River resulting in thermal stratification of the reservoir and
6 stagnation of the deep water.

7 The operation of the dam and the resulting change in the hydrograph creates a nutrient
8 sink thus reducing transport of organic materials and nutrients originating from above and within
9 Lake Spokane to below the dam. In other words, nutrients in various forms are being retained
10 and metabolized in Lake Spokane due to the Long Lake dam.

11 Long Lake dam also creates a reservoir where riverine habitat, habitat that assimilates
12 nutrients with different results, once existed. The reservoir is long and deep and thermally
13 stratifies each summer. These temperature-verses-depth gradients exist each summer in the
14 reservoir. Because of the rich supply and biological processing of nutrients received from above
15 the dam, the hypolimnion (the isolated bottom waters) of the reservoir becomes depleted of
16 dissolved oxygen once the reservoir has stratified. The impacts of Avista's operation of Long
17 Lake dam significantly contributes to the listing of the Spokane River on Washington's list of
18 impaired water bodies (known as the §303(d) list) for dissolved oxygen and interferes with the
19 protection of the beneficial uses of Lake Spokane.

20 Low dissolved oxygen levels persist within the Spokane River that impair beneficial uses
21 such as habitat for fish, swimming, and recreation. Fish species are affected through the
22 suppression of growth rates, increase in susceptibility to disease, and high levels of mortality.

23 Throughout the process for the development of the Total Maximum Daily Load (TMDL)
24 for dissolved oxygen in the Spokane River, Ecology repeatedly assured the public that issues
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1 associated with Avista's contribution to the dissolved oxygen problem in Lake Spokane would
2 be addressed in the §401 Certification. Several entities, including the Appellants, the City of
3 Spokane and Inland Empire Paper, urged Ecology to include specific requirements for Avista to
4 address the dissolved oxygen problem. However, the Order fails to require Avista to operate
5 Long Lake dam in a manner that would meet dissolved oxygen water quality standards and
6 protect applicable beneficial uses of the Spokane River. Rather than describing Avista's
7 contribution to the problem and prescribing specific requirements to address that requirement,
8 the Order defers the analysis and development of mitigation measures and, therefore, fails to
9 provide reasonable assurance that dissolved oxygen standards and beneficial uses in Lake
10 Spokane will be met and protected.

11 2. Monroe Dam Sediment.

12 The Monroe Street dam traps sediment deposited during high-flow events. These
13 sediments are comprised of cobble, gravel, and sand. Sediments and fish tissue within the
14 Spokane River are known to be contaminated with elevated concentrations of PCBs, PBDEs, and
15 heavy metals. In fact, the Spokane River is listed on Washington's list of impaired water bodies
16 (known as the § 303(d) list) for PCBs and heavy metals and is recognized as having the highest
17 levels of PBDEs and PCBs in the State of Washington. The Clean Water Act and state water
18 quality standards require that the Spokane River be free of toxic materials.

19 Avista's maintenance operations at the Monroe Street dam, as detailed within the Order,
20 includes periodic dredging and redistribution of the sediment into the spillway and downstream
21 into a free flowing reach of the Spokane River containing important native redband trout habitat.
22 The redistribution of dredge material into the spillway discharges the concentrated toxic
23 pollutants and other substances contained in the sediments into the Spokane River. While the
24 Order does require Avista to characterize its dredged material, it provides no requirement that
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1 dredging and disposal of the material be altered based upon the results of that characterization
2 and therefore fails to provide reasonable assurance that water quality standards will be protected.

3 3. Upper Spokane Falls.

4 Spokane is unique among major cities in the United States as it enjoys spectacular
5 naturally occurring waterfalls within the downtown core. Spokane Falls have extraordinary
6 historic, cultural, and economic significance for the Spokane community. The significance of the
7 Falls to the City's founders is evidenced by the original city name – Spokane Falls.

8 Unfortunately, the name, as well as the natural flow of water over the falls has since disappeared.
9 As Spokane grows and redevelops its downtown core, an increasing number of people are drawn
10 to Riverfront Park to view and experience the Falls. Restoration of the natural aesthetic values of
11 the waterfalls is a priority for the citizens of Spokane and the Appellants. Aesthetic uses of the
12 Spokane River are protected under state water quality standards, WAC 173-201A-602, and the
13 requirements of the Water Resources Act, RCW 90.54.020(2)(b).

14 The Spokane River divides into three channels as it passes through downtown Spokane.
15 The North and Middle channels naturally cascade over rock outcroppings creating a pleasing
16 sensory experience. The flow of water through the three channels is regulated by the Upper Falls
17 dam development. When river flows are in excess of 2,500 cfs, water cascades over the North
18 and Middle channels generate magnificent waterfalls. When flow drops below 2,500 cfs, the
19 entire flow of the river is diverted into the South channel, which serves as a forebay for Avista's
20 powerhouse. The diversion dewateres the North and Middle channels, resulting in an artificial,
21 unsightly de-watered riverbed.

22 The citizens of Spokane value and support higher flows that provide a complete aesthetic
23 and recreational experience. Avista conducted a study of public perception of a range of flow
24 amounts (0-500 cfs) within the North and Middle channels of Spokane Falls. The study
25

1 participants characterized the dewatered channels caused by 0 cfs flow as “barren, dry and
2 unsightly.” The study indicates that the public preference is for higher flows during summer
3 months. Five hundred (500) cfs gained the highest approval by the study participants. These
4 findings are reflected by hundreds of public comments, written and oral, submitted to both FERC
5 and Ecology supporting 500 cfs as the minimum aesthetic flow for the falls.

6 Despite studies and public outcry, the Order requires Avista to provide an aesthetic flow
7 of only 300 cfs to be maintained from 10:00 a.m. until one half hour after sunset. 300 cfs
8 degrades the aesthetic value of Spokane Falls, resulting in a condition that is less desirable and
9 unappealing to the citizens of Spokane and therefore fails to provide reasonable assurance that
10 water quality standards will be protected and to fulfill other, appropriate requirements of state
11 law.

12 4. Native Salmonid Fish below Monroe Street Dam.

13 Two native fish populations, redband trout and mountain whitefish, inhabit the Spokane
14 River. These are remnant populations that remain following extirpation of anadromous salmon
15 runs, and are extremely valuable to the region, providing a unique urban fishery and the genetic
16 potential for re-stocking the Spokane River with steelhead. As with all salmonid populations
17 around the state, Spokane River trout and whitefish require special water quality conditions in
18 order to preserve habitat. Hence, Washington’s water quality standards establish the Spokane
19 River as “core summer habitat” for salmonids. WAC 173-201A-602 (Table 57).

20
21 Among other water quality factors, the Spokane River redband trout and mountain
22 whitefish require protection of specific instream flows in specific reaches of the River, including
23 below the Monroe Street dam, where core summer rearing occurs. As part of the dam
24 relicensing and watershed planning, two studies of fisheries habitat have been completed. In
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1 January 2008, following review of the two studies, the Washington Department of Ecology and
2 the Washington Department of Fish & Wildlife jointly issued an advisory memo identifying 850
3 cfs as the appropriate minimum flow for the river reach below the Monroe Street dam during the
4 period June 16 through September 30 each year. The state agency memo specifically notes that
5 850 cfs is necessary to protect and preserve instream resources as required by Chapters 90.22,
6 90.54 and 90.82 RCW.

7
8 When issuing Section 401 Certifications, the Department of Ecology is required to set
9 instream flow conditions that uphold state water quality standards. The instream flow
10 determination must be based on preservation of aquatic habitat and other environmental values.

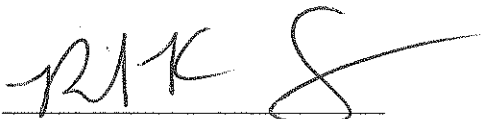
11 The 401 Certification fails to adequately protect instream flows necessary to sustain
12 salmonid habitat in the Spokane River. The specific condition identified in the Order states, in
13 pertinent part:

14 When the daily average discharge is reduced to below 850 cfs for more than five
15 consecutive days at the instantaneous Spokane Gage (USGS 12422500), Avista
16 shall convene with Ecology for the purpose of reviewing and implementing
17 adaptive management remedies that include the implementation of reasonable and
feasible measures to help restore, to the best attainable condition, designated uses
for the Spokane River.

18 This condition does not establish reasonable assurance that state water quality standards
19 will be met as required by the Clean Water Act. This condition also fails to fulfill other
20 appropriate requirements of state law, including the mandate that perennial rivers of the state
21 shall be retained with instream flows necessary to provide for the preservation of fish. Rather
22 than simply require Avista to discharge 850 cfs at the Monroe Street dam, the language of this
23 particular condition establishes a convoluted standard designed to avoid the legal requirements of
24 state and federal water quality laws.

1 DATED this 2nd day of July, 2008.

2 Respectfully submitted,

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5 Rick Eichstaedt, WSBA #36487
6 Bonne Beavers, WSBA # 32765
7 Attorneys for Appellants
8 Center For Justice
9 35 W. Main, Suite 300
10 Spokane, Washington 99201

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on July 2, 2008, I caused to be served the foregoing NOTICE OF
3 APPEAL to the Pollution Control Hearings Board at the Environmental Hearings Office, 4224
4 6th Avenue SE, Rowe Six, BLDG. 2, Lacey Washington, 98504-0903, and the Department of
5 Ecology in compliance with WAC 371-08-335 and WAC 371-08-345; notification of such filing
6 has also been made to the following:
7

8 Washington Department of Ecology
9 Jay Manning, Director
10 300 Desmond Drive SE
11 Lacey, Washington 98503

12 Washington State Office of the Attorney General
13 1125 Washington St SE
14 P.O. Box 40100
15 Olympia, Washington 98504-0100

16 Avista Corporation
17 Attn: Mr. Elvin Fitzhugh
18 1411 E. Mission Avenue
19 Spokane, Washington 99252-0001

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