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EPA--REGION 10

BEFORE THE  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	
	)	Docket No. CWA-10-2010-0239
ARK FISHERIES, INC.	)	
	)	<b>COMPLAINT</b>
and	)	
	)	
LYNN BABINGTON,	)	
Hagerman, ID	)	
	)	
	)	
Respondents	)	
	)	

**I. AUTHORITIES**

1.1. This Administrative Complaint ("Complaint") is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA" or "Complainant") by Section 309 of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1319. The Administrator has delegated this authority to the Regional Administrator of EPA Region 10, who in turn has redelegated this authority to the Director of the Office of Compliance and Enforcement in Region 10.

1           1.2. Pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and in  
2 accordance with the “Consolidated Rules of Practice Governing the Administrative Assessment  
3 of Civil Penalties,” 40 C.F.R Part 22, Complainant hereby seeks to assess a civil penalty against  
4 ARK Fisheries, Inc. and Lynn Babington (“Respondents”) for violations of the CWA.

5  
6                           **II.     STATUTORY AND REGULATORY BACKGROUND**

7           2.1. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), makes unlawful the discharge  
8 of any pollutant by any person except as authorized by an National Pollutant Discharge  
9 Elimination System (“NPDES”) permit or other specified statutory sections.

10           2.2. Section 402(a) of the Act, 33 U.S.C. § 1342(a), authorizes the Administrator of  
11 EPA to issue NPDES permits for the discharge of pollutants and to prescribe conditions for such  
12 permits, including conditions on data and information collection, reporting, and such  
13 requirements as she deems necessary to carry out the provisions of the Act.

14           2.3. Section 308 of the Act, 33 U.S.C. § 1318, provides that whenever required to  
15 carry out the objectives of the Act, *i.e.*, the restoration and maintenance of the chemical, physical  
16 and biological integrity of the Nation’s waters (33 U.S.C. § 1251(a)), the Administrator shall  
17 require the owner or operator of any point source to establish and maintain such records, make  
18 such reports, install, use, and maintain such monitoring equipment, and provide such information  
19 as is reasonably required.  
20

21           2.4. “Discharge of a pollutant” is defined by Section 502(12) of the Act,  
22 33 U.S.C. § 1362(12) to mean “any addition of any pollutant to navigable waters from any point  
23 source.”  
24  
25

1           2.5.    “Pollutant” is defined by Section 502(6) of the Act, 33 U.S.C. § 1362(6), to  
2 include, *inter alia*, solid waste, biological materials, agricultural waste, and industrial waste  
3 discharged to water.

4           2.6.    “Navigable waters” is defined by Section 502(7) of the Act, 33 U.S.C. § 1362(7)  
5 to mean “the waters of the United States, including the territorial seas.”

6           2.7.    “Waters of the United States” is defined in 40 C.F.R. § 122.2 to include, *inter alia*,  
7 all waters which are currently used, were used in the past, or may be susceptible to use in  
8 interstate or foreign commerce, including all waters which are subject to the ebb and flow of the  
9 tide and tributaries to these waters.

10          2.8.    “Point source” is defined by Section 502(14) of the Act, 33 U.S.C. § 1362(14), to  
11 include “any discernible, confined and discrete conveyance, including but not limited to any  
12 pipe . . . [or] conduit . . . from which pollutants are or may be discharged.”

13          2.9.    “Person” is defined by Section 502(5) of the Act, 33 U.S.C. § 1362(5), to include  
14 “an individual, corporation, partnership, association, State, municipality, commission, or political  
15 subdivision of a State, or any interstate body.”

16          2.10.   The NPDES General Permit for Aquaculture Facilities in Idaho, NPDES Permit  
17 No. IDG-130000 (“1999 Permit”) became effective on September 10, 1999, and expired on  
18 September 10, 2004. It was administratively extended until November 30, 2007. The 1999  
19 Permit authorized permittees to discharge treated effluent pursuant to specified limitations and  
20 conditions. For example:  
21

22               2.10.1.   Part VI.C.2.f of the 1999 Permit required permittees to sample at a  
23 frequency determined by the amount of fish produced or feed used annually, as specified  
24  
25

1 in the table provided on page 21 of the Permit. Based on data submitted for the Facility  
2 by a previous operator, on data submitted by the Respondents, and on a 2004 EPA  
3 inspection report, EPA believes that the Facility was a Class 3 facility under the 1999  
4 Permit.

5 2.10.2. Part VI.C.2.i of the 1999 Permit required that "Class 3 . . . permittees . . .  
6 report monitoring results for each data set on the Discharge Monitoring Reports . . .  
7 attaching all influent and effluent data for all parameters monitored, and production data.  
8 The reports shall be submitted annually and are to be postmarked by January 20<sup>th</sup> of the  
9 calendar year following the monitoring."  
10

11 2.10.3. Part VI.C.7.e of the 1999 Permit required permittees to certify "that its  
12 annual report of operations log is complete and available upon request to EPA. This  
13 certification shall identify the NPDES permit number and be signed by a principal officer  
14 or a duly authorized representative of the permittee . . . . The certification shall be  
15 submitted within two weeks of the annual report's completion . . . ."

16 2.10.4. Part VIII.K of the 1999 Permit specified that the permit may be  
17 "automatically transferred to a new permittee" if: the current permittee notified EPA "at  
18 least 60 days in advance of the proposed transfer date"; the notice included a written  
19 agreement between the existing and new permittees containing a specific date for transfer  
20 of permit responsibility, coverage, and liability between them; and EPA does not notify  
21 the existing permittee and the proposed new permittee of its intent to modify, or revoke  
22 and reissue the permit (if EPA does not send this notice, the permit states that the transfer  
23 is effective on the date specified in the agreement).  
24  
25

1           2.11. The NPDES General Permit for Aquaculture Facilities in Idaho, Subject to  
2 Wasteload Allocations under Selected Total Maximum Daily Loads, NPDES Permit Number  
3 IDG-130000 (“2007 Permit”) became effective on December 1, 2007, and expires on  
4 November 30, 2012. The 2007 Permit authorizes permittees to discharge treated effluent  
5 pursuant to specified limitations and conditions. For example:

6           2.11.1. Part II.A of the 2007 Permit requires that permittees “limit discharges  
7 from all outfalls authorized under this permit as specified” in the applicable Tables  
8 contained in Part II.A of the Permit. In accordance with the Tables in Part II.A. of the  
9 Permit, Respondents’ Facility is prohibited from discharging Net Total Phosphorus  
10 (“TP”) in excess of 3.3 lbs/day as a monthly average, Net TP in excess of 4.9 lbs/day as a  
11 daily maximum, Net Total Suspended Solids (“TSS”) in excess of 250.4 lbs/day as a  
12 monthly average, and Net TSS in excess of 475.8 lbs/day as a daily maximum.

13           2.11.2. Part IV.D of the 2007 Permit requires permittees to “prepare and submit  
14 an annual report of operations by January 20<sup>th</sup> of each year to EPA and IDEQ. A copy of  
15 the annual report and the data used to compile it must be available to EPA and IDEQ  
16 upon request and during inspections. The report must include the information specified in  
17 Appendix H.”

18           2.11.3. Part III.D.2 of the 2007 Permit requires permittees to “review the BMP  
19 Plan annually” and to include a “certified statement that the annual review has been  
20 completed and that the BMP Plan fulfills the requirements set forth in this permit,” in the  
21 Annual Report of Operations referred to in Paragraph 2.11.2.  
22  
23  
24  
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1 within the meaning of Section 502(6) and (12) of the Act, 33 U.S.C. § 1362(6) and (12), as  
2 Posposel Drain via Outfall 001.

3 3.4. Outfall 001 is a “point source” within the meaning of 40 C.F.R. § 122.2.

4 3.5. The Columbia River is susceptible to use in interstate commerce and is subject to  
5 the ebb and flow of the tide. Therefore, the Columbia River is a “water of the United States” as  
6 defined in 40 C.F.R. § 122.2, and “navigable waters” as defined in Section 502(7) of the CWA,  
7 33 U.S.C. § 1362(7).

8 3.6. As set forth in Paragraph 3.5, the Columbia River is “navigable waters,” as  
9 defined in Section 502(7) of the CWA, 33 U.S.C. § 1362(7). Tributaries of “waters of the United  
10 States” are also “waters of the United States,” according to 40 C.F.R. § 122.2. The Snake River  
11 is a tributary of the Columbia River. Therefore, the Snake River is also “waters of the United  
12 States” and therefore also “navigable waters” under the CWA.

13 3.7. Posposel Drain is a tributary of the Snake River. As set forth in Paragraph 3.6, the  
14 Snake River and its tributaries are “waters of the United States” and therefore “navigable waters”  
15 under the CWA. Therefore, Posposel Drain is a “navigable water” as defined in Section 502(7)  
16 of the CWA, 33 U.S.C. § 1362(7), and is “waters of the United States” as defined in 40 C.F.R.  
17 § 122.2.  
18

19 **Count 1**

20 **Discharge of pollutants without a permit**

21 3.8. Paragraphs 1.1 through 3.7 are realleged and incorporated herein by reference.

22 3.9. No earlier than August 22, 2005, Respondents and a former operator of the facility  
23 jointly submitted a letter to EPA, purporting to transfer permit responsibilities and coverage to  
24  
25

1 respondent ARK Fisheries, Inc., effective on August 22, 2005. This notice of transfer failed to  
2 give the 60 day notice required by Part VIII.K of the 1999 Permit.

3 3.10. Because Respondents failed to give the required 60 days notice referenced in 3.11,  
4 Respondents did not have NPDES permit coverage for the Facility between August 22, 2005,  
5 and October 21, 2005.

6 3.11. Respondents operated the Facility and discharged pollutants from Outfall 001 to  
7 Posposel Drain during each day of the period between August 22, 2005, and October 21, 2005.

8 3.12. The discharges of pollutants described in Paragraph 3.11 were unauthorized  
9 discharges of pollutants to waters of the United States and constitute 60 days of violation of  
10 Section 301(a) of the Act, 33 U.S.C. § 1311(a). In accordance with Section 309(g)(2)(B) of the  
11 Act, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Part 19, Respondents are liable for civil penalties  
12 not to exceed \$11,000 per day for each day during which the violation continued.  
13

## 14 Count 2

### 15 **Violations of the 1999 Permit**

16 3.13. Paragraphs 1.1 through 3.7 are realleged and incorporated herein by reference.

17 3.14. Respondents failed to report sampling or associated lab data for TSS and TP on  
18 the DMRs for July, August, and September 2006, and did not check the "No discharge" box on  
19 the DMR form. This constitutes two violations of Part VI.C.2.f. of the 1999 Permit.

20 3.15. Respondents failed to make the required annual DMR submission for October  
21 through December of 2005 on time. The October – December 2005 DMRs were received by  
22 EPA on March 21, 2006, were missing production data, and were otherwise incomplete. This  
23 constitutes one violation of Part VI.C.2.i of the 1999 Permit.  
24  
25

1 3.16. Respondents failed to make the required annual DMR submission for 2006 on  
2 time. The DMRs were received by EPA on March 26, 2007, were missing production data, and  
3 were otherwise incomplete. This constitutes one violation of Part VI.C.2.i of the 1999 Permit.

4 3.17. Respondents failed to submit complete DMRs for 2007 (due to the new 2007  
5 Permit, the December 2007 DMR was not required in the annual submission for the 1999  
6 Permit). The DMRs were received on January 23, 2008, but were missing production data. This  
7 constitutes one violation of Part VI.C.2.i of the 1999 Permit.

8 3.18. Respondents failed to submit the certifications for the annual report of operations  
9 for 2005 on time. EPA received the report on February 28, 2006. This constitutes one violation  
10 of Part VI.C.7.e of the 1999 Permit.

11 3.19. Respondents failed to submit the certification for the annual report of operations  
12 for 2006 on time. EPA received the report on March 26, 2007. This constitutes one violation of  
13 Part VI.C.7.e of the 1999 Permit.

14 3.20. The violations of the 1999 Permit described in Paragraphs 3.14 through 3.19  
15 constitute seven violations of a permit issued under Section 402 of the Act, 33 U.S.C. § 1342,  
16 and of Section 301(a), 33 U.S.C. § 1311(a) of the Act. In accordance with Section 309(g)(2)(B)  
17 of the Act, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Part 19, Respondents are liable for civil  
18 penalties not to exceed \$11,000 per day for each day during which the violations continued.  
19  
20

### 21 Count 3

#### 22 **Discharge of pollutants without a permit**

23 3.21. Paragraphs 1.1 through 3.7 are realleged and incorporated herein by reference.

24 3.22. Complainant alleges the facts in this Count 3, Paragraphs 3.21 to 3.26, in the  
25

1 alternative to the facts alleged in Counts 1 and 2, Paragraphs 3.8 to 3.20.

2 3.23. No earlier than August 22, 2005, Respondents and a former operator of the facility  
3 jointly submitted a letter to EPA, purporting to transfer permit responsibilities and coverage to  
4 respondent ARK Fisheries, Inc., effective on August 22, 2005. This notice of transfer failed to  
5 give the 60 day notice required by Part VIII.K of the 1999 Permit.

6 3.24. Because Respondents failed to give the required 60 days notice referenced in 3.23,  
7 the permit did not automatically transfer. As a result, Respondents did not have NPDES permit  
8 coverage for the Facility from August 22, 2005, until December 1, 2007, when the 2007 permit  
9 became effective.

10 3.25. Respondents operated the Facility and discharged pollutants from Outfall 001 to  
11 Pospesel Drain each day between August 22, 2005, and December 1, 2007.

12 3.26. The discharges of pollutants described in Paragraph 3.25 were unauthorized  
13 discharges of pollutants to waters of the United States and constitute 831 days of violation of  
14 Section 301(a) of the Act, 33 U.S.C. § 1311(a). In accordance with Section 309(g)(2)(B) of the  
15 Act, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Part 19, Respondents are liable for civil penalties  
16 not to exceed \$11,000 per day for each day during which the violation continued.  
17

18  
19  
20 **Count 4**

21 **Violations of the 2007 Permit**

22 3.27. Paragraphs 1.1 through 3.7 are realleged and incorporated herein by reference.

23 3.28. Respondents reported average monthly Net TP of 4.41 lbs/day on the DMR for  
24 October 2008. This constitutes thirty-one violations of Part II.A of the 2007 Permit.  
25

1           3.29. For the effluent limitation violations alleged in Paragraph 3.28, Respondents did  
2 not provide notice with the DMR submission for October 2008 as required by the 2007 Permit.  
3 This constitutes one violation of Part V.H of the 2007 Permit.

4           3.30. Respondents failed to submit DMRs on time for the following months in 2008:  
5 January-February (received by EPA on April 9, 2008), and April-November (received by EPA  
6 on January 26, 2009). These late submissions constitute ten violations of Part V.B. of the 2007  
7 Permit.

8           3.31. Respondents failed to submit DMRs on time for the following months in 2009:  
9 January-September (received by EPA on November 23, 2009), and November (received by EPA  
10 on January 8, 2010). These late submissions constitute ten violations of Part V.B. of the 2007  
11 Permit.

12           3.32. Respondents failed to submit DMRs for January-June of 2010 on time. These late  
13 submissions constitute six violations of Part V.B. of the 2007 Permit.

14           3.33. To date, Respondent has not submitted to EPA the required Annual Report of  
15 Operations for this Facility for 2007, 2008, and 2009. This constitutes three violations of Part  
16 IV.D and Part III.D.2 of the 2007 Permit.

17           3.34. Respondents reported average monthly Net TP of 4.6 lbs/day on the DMR for  
18 January 2010. This constitutes thirty-one violations of Part II.A of the 2007 Permit.

19           3.35. For the effluent limitation violation alleged in Paragraph 3.34, Respondents did  
20 not provide notice with the DMR submission for January 2010 as required by the 2007 Permit.  
21 This constitutes one violation of Part V.H of the 2007 Permit.  
22  
23  
24  
25





1 nature, circumstances, extent and gravity of the violations, and, with respect to the violators,  
2 ability to pay, any prior history of such violations, the degree of culpability, economic benefit or  
3 savings (if any) resulting from the violations, and such other matters as justice may require.

4 CWA Section 309(g)(3), 33 U.S.C. § 1319(g)(3).

5           4.3.1. *Nature, Circumstances, and Gravity of Violations:* Respondents'  
6 numerous violations of relevant permit requirements, including failing to perform  
7 recordkeeping and sampling, failure to submit to timely submit annual and monthly  
8 reports, and exceeding effluent limitations, as well as discharging pollutants without a  
9 permit, are serious violations that significantly undermine the CWA's regulatory scheme.

10           Environmental harm from exceeding effluent limitations is a significant issue for  
11 this watershed. TP and TSS loading has contributed to seasonal eutrophic conditions  
12 along the Middle Snake River such as extensive growths of aquatic vegetation, low  
13 aquatic biological species diversity, fluctuating oxygen levels, and increased water  
14 temperatures. In accordance with CWA requirements, IDEQ assigned Wasteload  
15 Allocations ("WLA") for facilities discharging to areas of the Snake River identified in  
16 the EPA-approved Upper Snake Rock Total Maximum Daily Load ("TMDL"). The  
17 TMDL was established in an effort to attain applicable water quality standards and to  
18 restore the health of this water body. Wastewater from Respondents' Facility discharges  
19 to the sediment- and nutrient-impaired Segment 3 of the Upper Snake Rock TMDL, so  
20 has been assigned WLAs for TSS and TP.  
21  
22

23           The reporting violations also contribute to environmental harm. The NPDES is a  
24 self-reporting program that relies on permittees to provide EPA with complete  
25

1 information in a timely manner. The accuracy, completeness, and timeliness of such  
2 information is essential to EPA's ability to consistently monitor, evaluate, and make  
3 informed decisions regarding each facility, and to assess whether and what type of  
4 pollution controls are needed to maintain or restore water quality. In this case,  
5 Respondents have failed to make, or to timely make, submissions required by the 1999  
6 and 2007 permits, and to submit some of the documents required by a separate 2010  
7 information request.

8  
9 4.3.2. *Respondents' Ability to Pay:* Complainant has no information indicating  
10 that Respondents are unable to pay a penalty up to the statutory maximum penalty for  
11 these violations. Complainant will consider any information submitted by Respondents  
12 related to their ability to pay a penalty.

13 4.3.3. *Respondents' History of Prior Violations:* EPA is unaware of  
14 Respondents having any history of prior violations of the CWA for *this* Facility.

15 4.3.4. *Respondents' Degree of Culpability:* Respondents are presumed to know  
16 the law. Respondents have been notified on a number of occasions by EPA about the  
17 Permit requirements. EPA sent a letter to Respondents, regarding this and other facilities,  
18 on January 16, 2008, detailing the reporting requirements for the 2007 Permit. During a  
19 records inspection on November 13, 2009, the EPA inspector Carla Fromm provided  
20 information to the Respondents on requirements of the 2007 Permit. EPA also sends  
21 blank pre-printed DMR forms to Respondents annually, and includes a cover letter  
22 detailing requirements for a complete submission. Respondents were also issued a  
23 Compliance Order, dated September 19, 2001, for another, similar aquaculture facility  
24  
25

1 (IDG130066), ordering compliance with Parts VI.C.2.i, VI.C.2.f, VI.C.7.e of the 1999  
2 Permit. Those permit provisions were also applicable to this Facility. EPA also issued an  
3 Information Request for all of Respondents' facilities on July 23, 2010, detailing  
4 numerous missing documents required by the 2007 Permit.

5 4.3.5. *Respondents' Economic Benefit:* Respondents received an economic  
6 benefit by avoiding the costs of complying with the Permits, including labor costs for  
7 performing sampling and monitoring, preparing annual reports and certifying proper  
8 BMP practices are reviewed, revised, and carried out.

9 4.3.6. *Other Matters as Justice May Require:* Credible and consistent  
10 enforcement of the Act's requirements to comply with Section 301(a) of the Act,  
11 33 U.S.C. § 1311(a) and the permitting scheme set forth in Section 402 of the Act,  
12 33 U.S.C. § 1342, is necessary to deter these Respondents and others similarly situated  
13 from violating the Act.  
14

15  
16 **V. OPPORTUNITY TO REQUEST A HEARING**

17 5.1. Respondents have the right to file an Answer requesting a hearing on any material  
18 fact contained in this Complaint or on the appropriateness of the penalty proposed herein. Upon  
19 request, the Presiding Officer may hold a hearing for the assessment of these civil penalties,  
20 conducted in accordance with the provisions of the Part 22 Rules and the Administrative  
21 Procedure Act, 5 U.S.C. § 551 *et seq.* A copy of the Part 22 Rules accompanies this Complaint.  
22

23 5.2. Respondents' Answer, including any request for hearing, must be in writing and  
24 must be filed with:  
25

1 Regional Hearing Clerk  
2 U.S. Environmental Protection Agency, Region 10  
3 1200 Sixth Avenue, Suite 900, Mail Stop ORC-158  
4 Seattle, Washington 98101

5 **VI. FAILURE TO FILE AN ANSWER**

6 6.1 To avoid a default order being entered pursuant to 40 C.F.R. § 22.17, Respondents  
7 must file a written Answer (or separate Answers) to this Complaint with the Regional Hearing  
8 Clerk within thirty (30) days after service of this Complaint.

9 6.2 In accordance with 40 C.F.R. § 22.15, Respondents' Answer(s) must clearly and  
10 directly admit, deny, or explain each of the factual allegations contained in this Complaint with  
11 regard to which Respondents have any knowledge. Respondents' Answer(s) must also state:  
12 (1) the circumstances or arguments which are alleged to constitute the grounds of defense; (2)  
13 the facts which Respondents intend to place at issue; and (3) whether a hearing is requested.  
14 Failure to admit, deny or explain any material factual allegations contained herein constitute an  
15 admission of the allegation.

16  
17 **VII. INFORMAL SETTLEMENT CONFERENCE**

18 7.1. Whether or not Respondents request a hearing, Respondents may request an  
19 informal settlement conference to discuss the facts of this case, the proposed penalty, and the  
20 possibility of settling this matter. To request such a settlement conference, Respondents should  
21 contact:  
22  
23  
24  
25

Jessica Barkas, Assistant Regional Counsel  
U.S. Environmental Protection Agency, Region 10  
1200 Sixth Avenue, Suite 900, Mail Stop ORC-158  
Seattle, Washington 98101  
(206) 553-8183

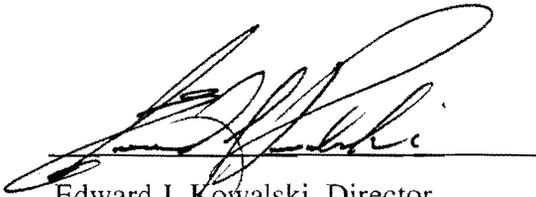
7.2. Note that a request for an informal settlement conference does not extend the thirty (30) day period of filing a written Answer to this Complaint, nor does it waive Respondents' right to request a hearing.

7.3. Respondents are advised that, after the Complaint is issued, the Part 22 Rules prohibit any *ex parte* (unilateral) discussion of the merits of these or any other factually related proceedings with the Administrator, the Environmental Appeals Board or its members, the Regional Judicial Officer, the Presiding Officer, or any other person who is likely to advise these officials in the decision of this case.

#### VIII. RESERVATIONS

Neither assessment nor payment of an administrative civil penalty pursuant to this Complaint shall affect Respondent's continuing obligations to comply with: (1) the CWA and all other environmental statutes; (2) the terms and conditions of all applicable CWA permits; and (3) any Compliance Order issued to Respondents under Section 309(a) of the CWA, 33 U.S.C. § 1319(a), concerning the violations alleged herein.

Dated this 21<sup>st</sup> day of September, 2010.

  
Edward J. Kowalski, Director  
Office of Compliance and Enforcement

**CERTIFICATE OF SERVICE**

I certify that the foregoing "Complaint" was filed and sent to the following person, in the manner specified, on the date below:

Original and one copy, hand-delivered:

Carol Kennedy, Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 10  
1200 Sixth Avenue, Mail Stop ORC-158  
Seattle, WA 98101

A true and correct copy, by certified mail, return receipt requested:

Lynn Babington, President  
ARK Fisheries, Inc.  
2825 S. 1050. E.  
Hagerman, Idaho 83332

Lynn Babington  
2825 S. 1050. E.  
Hagerman, Idaho 83332

Dated:

9/22/10

*Heather Schmidt*

ORC-158

U.S. EPA Region 10