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April 5, 2006

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RE: Spokane River Dissolved Oxygen TMDL

Dear Mr. Manning, Mr. Kreizenbeck, and Mr. Eaton:

As you know, Sierra Club's Upper Columbia River Group has been a longstanding and active participant in the efforts to develop a dissolved oxygen (DO) TMDL for the Spokane River. We are writing to express concern about the current direction of the TMDL process.

On March 28, we met with Dave Peeler and others and received from them a "Foundational Concepts" paper that proposes a new framework for issuing NPDES permits to Spokane River dischargers. We spoke with Mr. Peeler again this past Tuesday, April 4. We appreciate the time Mr. Peeler and his staff and consultants have provided to consider our viewpoints and these meetings have been constructive.

MISSION STATEMENT

THE CENTER FOR JUSTICE IS A NON-PROFIT LAW FIRM COMMITTED TO THE EXPERIENCE OF JUSTICE WITH THOSE OF LIMITED OR NO RESOURCES OR INFLUENCE THROUGH COMPASSION AND AN AWARENESS OF THE SACREDNESS OF THE EARTH.

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However, as we have examined and discussed the Foundational Concepts we are struck by three issues. First, the paper departs from the framework Ecology established in the draft DO TMDL (October 2004) and the draft Management Implementation Plan (January 2006).

Second, some of the concepts put forth in this paper do not comport with legal requirements of the Clean Water Act. Sierra Club cannot and will not agree to any framework for the TMDL and subsequent NPDES permits that do not uphold the law.

Finally, some of the concepts contained in the March 28 "Concepts" paper are extremely bad policy. Our concerns are further explained below.

1. Water Quality Based Goals

First and most importantly, Ecology appears to be abandoning the requirement that existing dischargers meet the 10 µg/L effluent concentration for phosphorus (P) that was determined appropriate through extensive scientific modeling of the Spokane River. This goal is no longer identified as an enforceable water quality goal, but is instead a non-binding "target."

This approach conflicts with the basic requirements of the Clean Water Act. To state the obvious, TMDLs are conducted when technology-based effluent limits are inadequate to achieve water quality standards. In that circumstance, the focus shifts to water quality based permitting. TMDLs must contain waste load allocations, load allocations, and a margin of safety. NPDES permits must include enforceable limits that comport with the waste load allocations that are designed to achieve water quality standards. Requiring Spokane River dischargers to meet the 10 µg/L loading concentration is not an option. It is the law.

The most salient differences between the "Foundational Concepts" approach and the MIP is that the latter is built on science and outcome based. The science shows that the River is over-assimilated for phosphorus and hence all sources need to reduce loading to 10 µg/L. The January 2006 MIP required the dischargers to choose a technology that would get them as close as possible to 10 µg/L and then to make up the difference (or delta as it has been called), through the other actions (such as reuse and conservation).

From a policy standpoint, the MIP gave the dischargers an incentive to choose a technology wisely and to plan and implement nonpoint source reduction, conservation and reuse with care. Clearly, the better the technology, the fewer other actions with less certainty of outcome (other than reuse) would be needed. The worse the technology, the more reductions needed from other actions.

Under the "Concepts" paper there is no delta. Not only is there no delta, there are no waste load allocations and no enforceable goals. Instead, the only legally binding requirements are effluent limits for which there is no upward bound. Apparently, a

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discharger could choose a technology that allows 100 µg/L or more. Without targets and waste load allocations based on the science, there can be no reasonable assurance of achieving water quality standards.

2. New Discharge Permit for Spokane County

The "Concepts" paper contains language that could be interpreted to allow the proposed County treatment plant to discharge phosphorus to the Spokane River in excess of the 10 µg/L goal. This approach contrasts with the January 2006 MIP, which explicitly states the County's plant, "as a 'new [discharger] is not eligible for receiving a compliance schedule.'" This is a correct statement of the law; a permit that allows the County to add phosphorus to the River in excess of the TMDL goal would be illegal.

Mr. Peeler has clarified (to us) that the above statement from the MIP still holds true. However, ambiguity on this point serves no one. Spokane County may understandably interpret ambiguity in its favor and in a way that does not comport with Ecology's intentions. We urge you to work to achieve perfect clarity with County officials concerning NPDES permit requirements that will allow them to move forward to build the plant.

We are also concerned about the County offset program to obtain a waste load allocation in the River. We agree with Ecology's concern that new sewage treatment capacity is (or will be) needed in order to remove on-site systems from the Spokane Aquifer. However, the septic problem is a direct result of the County's own and ongoing activities. The current Spokane County Commission is extremely pro-growth and new systems are going in at a startling rate. The County accepts state funding for its septic tank elimination program, but no longer requires landowners to hook up to sewer lines when they become available.

Mr. Peeler has assured us that Ecology will not allow offset credits for new septic systems, and that the offset will be calculated from a reasonable baseline (approximately 14,000 systems). He also acknowledged the difficulty in calculating the phosphorus reduction benefit to the River that would accrue from septic removal (including the time and attenuation unknowns). If this program is to work and to be legally compliant with the offset provision in the state water quality standards, scientific integrity in answering these questions will be an absolute necessity.

3. Twenty-Year Guarantee

The Foundational Concepts paper offers that Ecology will not require significant modifications or replacements for phosphorus removal technology during the 20 years of implementation (unless the dischargers agree). This type of guarantee is bad policy and may violate Clean Water Act requirements to re-issue permits on a 5-year basis. If reissuance is more than a rubber-stamping exercise – and we believe the Clean Water Act so intends – then a 20-year guarantee is not legal.

A 20-year guarantee might make sense if TMDL targets are binding and a framework is in place to determine that good faith progress is being made toward achieving effluent limits and water quality standards. A 20-year guarantee combined with non-binding limits makes no sense at all (especially when a Year 10 UAA is added in, see below.)

The 20-year guarantee is also a bad idea from the standpoint of other Spokane River water pollutants and TMDLs, particularly for PCBs that are soon to be addressed by Ecology. See below.

4. Use Attainability Analysis

In the January 2006 MIP, Ecology agreed to a "major check-in" at Year 10 in order to evaluate phosphorus reduction activities and determine whether changes are appropriate. The discharger proposal had demanded that Ecology agree to conduct a UAA, a commitment that Ecology wisely declined to make. The "Concepts" paper, however, changes course. Ecology now agrees to "modify standards (UAA)" if the River is not meeting the DO standard and other actions are not "reasonable." This position is objectionable for many reasons, including:

- As Ecology's detailed reviews of the Spokane Dischargers' UAA suggested, there is no legal basis for removing the protection of coldwater fish as a beneficial use in the Spokane River.
- Because of the schedule for implementation, including the City's ongoing CSO elimination program, at Year 10 information will be inadequate to make changes to water quality standards.
- Agreement to conduct a UAA (subject to a highly ambiguous test) undermines the incentives for dischargers to achieve compliance. Basically, Ecology is offering a "get out of jail free" card to the dischargers.
- The Spokane River DO TMDL is setting the bar for other TMDLs around the State. The promise to conduct a UAA here will be heard and repeated far and wide.

We urge you to not agree that Ecology will consider a UAA for the Spokane River and return to the more reasonable and effective milestone of evaluating all evidence and re-visiting the TMDL at Year 10.

5. Idaho Dischargers

Three of the seven NPDES-permitted plants that contribute phosphorus to the Spokane River are located in Idaho and underway with NPDES permit renewal. In order to meet its interstate obligation to meet water quality standards, EPA has devised a novel theory

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that allocates to these plants all of the available DO capacity under the Washington standards (i.e., 0.2 milligram/liter deviation in Lake Spokane reservoir). In response, we understand that Ecology proposes to allocate another 0.2 mg/L deviation to the Washington dischargers. We believe this interpretation violates the spirit and the requirements of the Clean Water Act.

6. PCBs and Other Toxics

As the DO TMDL process has (slowly) moved forward, a TMDL to address Spokane River PCBs has also been under development. Pursuant to a draft technical assessment to be issued later this month, PCBs are a significant problem and will require substantial control measures, including removal technology to achieve up to 99.9% reductions of PCBs in discharger effluent.

Meanwhile, as discussed above, the "Concepts" paper proposes to guarantee the dischargers a 20-year life for new P-removal treatment upgrades. How does this guarantee fit with the practical need to reduce PCBs and, ultimately, other toxics from discharger effluent (e.g., dioxins, furans and PBDEs)?

Mr. Peeler assured us that the 20-year guarantee will clearly apply only to P removal technology. However, we are very concerned about the political backlash that will occur when and if it is determined that the dischargers will be required to fund and install toxics removal technology.

We urge Ecology & EPA to undertake several actions. First, go public with the news that more or different technology may be required and is necessary for public health (recall there are fish advisories on the Spokane River due to PCBs). Second, require the dischargers to test for PCB removal when they conduct pilot testing for P-removal methods. Third, help out with funding for that pilot testing. Fourth, complete the PCB TMDL quickly so that those requirements can be coordinated with DO TMDL activities.

7. Public Process

In December 2004, more than 150 people turned out for the public hearing on the draft DO TMDL for the Spokane River and expressed enthusiastic support for Ecology's proposal. Another 300-400 letters were received from the community, mostly supporting the draft. Since then, two polls have been conducted, one by Ecology and one by the dischargers, that reveal strong regional support for cleaning up the Spokane River. Of particular interest, poll respondents indicated they are willing to pay for cleanup on their utility bills.

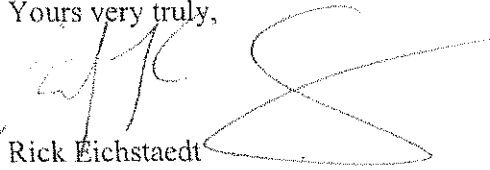
Respectfully, we think the public interest in and support for a strong cleanup plan is a factor which is not being properly considered by the Department of Ecology.

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Thank you for your attention to these concerns. Sierra Club has invested an enormous amount of time and financial resources to this TMDL process and, like Ecology and EPA, wants to reach a solution that works for everyone in our community while meeting the requirements of the Clean Water Act. Unfortunately, for the reasons outlined above, the proposal set forth in the Concepts Paper does not meet the requirements of the law or make sense from a public policy perspective. We do, however, look forward to working with your agencies to resolve these concerns.

Yours very truly,



Rick Eichstaedt
Bonne Beavers
Rachael Paschal Osborn
On behalf of the Sierra Club

cc: Dave Peeler, Ecology
Adrienne Allen, EPA
Christine Psyk, EPA
Ron Lavigne, Attorney General's Office