March 30, 2010

VIA EMAIL AND USPS MAIL

Washington Department of Ecology
Headquarters Office
Attn: Dustin Bilhimer
PO Box 47600
Olympia, WA 98504-7600

Re: Spokane River and Lake Spokane DO TMDL Dispute Resolution Proceeding

Dear Mr. Bilhimer:

Thank you for the opportunity to respond to the comments provided by other parties to the dispute resolution process regarding the Spokane River and Lake Spokane Dissolved Oxygen ("DO") Total Maximum Daily Load ("TMDL"), which will occur on April 5, 2010.

Having been in the DO TMDL process for some time now, and in reviewing the comments filed to date, it appears that there are a number of important points upon which the dischargers and Avista agree. First, and foremost, we seem to agree that improving the water quality in the Spokane River and Lake Spokane is a joint responsibility, and that we can only succeed if we work together. This is an important starting point, even though we have many other important differences of opinion, both factual and legal, to resolve.

Second, we agree on the need for the broadest possible array of mitigation options, including the opportunity to address non-point sources without delay. It is clear that non-point sources are a significant source of nutrients into the Spokane River and Lake Spokane, that they have not been effectively controlled to date, and that the path forward for controlling them in the future is unclear at best. We need an overall strategy for curtailing those sources, and both the dischargers and Avista should have an opportunity to participate. In turn, Avista and the dischargers should receive full credit for achieving meaningful, durable nutrient reductions that improve water quality in the Spokane River and Lake Spokane.

Third, the focus of our efforts should be on the health of fish and other aquatic life uses in the Spokane River and in Lake Spokane. Currently, little is known about the "dominant aquatic habitat" in the River and Lake, as that term is used in the Department of Ecology's regulations, and additional information needs to be gathered and analyzed in order to better understand it. That should be a high priority of all concerned over the next 5-10 years.

Fourth, it appears that we all agree that water quality modeling is more of an art than a science. Modeling results are driven by the data and assumptions that modelers choose to enter into the computer, and many of those choices are judgment calls. Thus, the numbers that the computer produces should not be regarded as "the answer," as one might regard the answer to a

mathematical problem. Instead, modeling is, at best, a rough approximation of what may be occurring in a particular waterbody. It is therefore useful as one tool for assessing water quality, but should not be regarded as reality itself.

Moreover, modeling is only as good as the quality of the data upon which it is based. With respect to the Spokane River and Lake Spokane, the data set is very thin and dated, and improving that data set should be a high priority, going hand-in-hand with improving our understanding of the dominant aquatic habitat.

Along with these points of apparent agreement, there were several comments with which Avista respectfully disagrees. First, the March 11, 2010 letter from the City of Post Falls and the Hayden Area Regional Sewer Board (HARSB) argues that: "Post Falls and HARSB would not have to make any modifications to their treatment if the Avista's dam did not exist and so Lake Spokane were a river. Indeed, there would be no need for a TMDL." Letter at 4-5. This is incorrect. According to Ecology's 303(d) list, there have been exceedances of the DO standard in the river upstream of the influence of Long Lake Dam, including those measured just below the state line, in Millwood, in the City of Spokane, and in the River downstream of Spokane but upstream of Lake Spokane. Since the river itself is impaired, dischargers would have to reduce the nutrient levels in their effluent even if Long Lake Dam did not exist.

Similarly, Avista disagrees with the argument that DO deficits in the deep part of Lake Spokane would be the same whether or not nutrients are discharged upstream of the Lake. The City of Post Falls and HARSB state in their letter that "these DO deficits [in the reservoir's deeper waters] are an inherent characteristic that will exist regardless of the levels of oxygen-demanding pollutants in the water." Letter at 3. In fact, modeling shows that the more nutrients are discharged, the greater the DO deficit in the Lake.

These comments infer that the dischargers should not be held responsible for the effluent they discharge as long as it is carried downstream into another state. Thankfully, the Clean Water Act does not allow such a result. See 40 C.F.R.§ 122.4(d) (NPDES permit may not be issued unless its conditions can ensure compliance with applicable water quality requirements of all affected States).

Second, the Post Falls/HARSB letter suggests that it is somehow unfair that Avista is required to implement all "reasonable and feasible" measures to meet the DO numeric criteria in Lake Spokane, while the dischargers are given a wasteload allocation more stringent than that which is technologically feasible. Letter at 5. The simple answer is that the law treats dams and dischargers differently because they are different. Dams cannot be required to reduce pollutants in their effluent because they do not discharge effluent at all; instead, Washington law requires dam owners to implement all reasonable and feasible measures to comply with numeric water quality criteria. See WAC 173-201A-510(5)(b)(ii).

More importantly, the implementation of reasonable and feasible measures is a major undertaking, involving a wide range of potential measures that will be expensive and time-consuming. Whereas dischargers can focus on one metric – the quality of the water coming out of the end of their pipe – Avista has been assigned responsibility to improve the DO deficit in all layers of the Lake, during the critical season for an approximate 13 mile stretch of the Lake, as defined in the revised Table 7 (Erratum, Ecology Publication No. 07-10-073b).

In an effort to achieve this, Avista has already proposed to Ecology the following list of potentially reasonable and feasible measures:

- Aquatic Weed Control
- Wetland Restoration/enhancement
- Vegetative Buffer on Avista property
- Reduction of Size and Conversion of Lakeshore Lawns to Native Vegetation
- Hangman Creek Basin Shoreline Stabilization and Agricultural Practices
- Irrigation Pumping System Modifications
- Conversion of Grazing Lands to open Space
- Septic Systems Education and Improvements

In addition, as noted above, Avista will need to identify non-point sources of nutrients and help reduce them in order to obtain credit toward meeting its water quality obligations with respect to the Lake. It is also important to remember that Avista has committed to implementing DO improvements at the Long Lake Dam tailrace in order to address downstream water quality issues. Consequently, and because of the efforts Avista will implement to improve water quality in Lake Spokane and in the downstream River, it will firmly resist any effort to modify the dischargers' wasteload allocations in a manner that increases Avista's already heavy burden.

Finally, Avista believes that a number of other parties have misunderstood the DO standard that Ecology is applying to Lake Spokane. Washington's water quality standards provide that in lakes, "human actions considered cumulatively may not decrease the dissolved oxygen concentration more than 0.2 mg/L below natural conditions." See WAC 173-201A-200(1)(d)(ii). Whether the lake is natural or man-made is irrelevant; this standard applies to all lakes, even those formed by dams.

In conclusion, Avista looks forward to the dispute resolution proceeding on April 5th. We see it as an opportunity to resolve issues and clarify responsibilities before we enter the implementation process. Although we certainly do not agree with all aspects of the TMDL, we intend to implement our responsibilities under it, consistent with the applicable laws and regulations, and we are eager to move forward.

Sincerely,

Speed Fitzhugh

Elvin "Speed" Fitzhugh
Spokane River License Manager