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RE: Comments to the Spokane River TMDL Dispute Resolution Panel regarding the Spokane River and Lake Spokane Dissolved Oxygen Total Maximum Daily Load, Water Quality Improvement Report (February 2010)

Dear Mr. Sturdevant and Mr. Bilhimer,

The Gonzaga Environmental Law Clinic hereby submits the following comments on behalf of the Kootenai Environmental Alliance (“KEA”). KEA is an interested party to this action and provided oral and written comments to the Washington Department of Ecology (“Ecology”) pertaining to the development of the Spokane River and Lake Spokane Dissolved Oxygen Total Maximum Daily Load, Water Quality Improvement Report (February 2010) (“TMDL”). These comments regarding the TMDL are submitted to the Spokane River TMDL Dispute Resolution Panel pursuant to WQP 1-25 § 1(C)(1).

KEA is a non-profit membership organization dedicated to conserving, protecting, and restoring the environment. The members of KEA live, recreate, and/or use and enjoy the waters impacted by the low dissolved oxygen in the Spokane River and Lake Spokane.

As KEA’s prior TMDL comments explained, KEA finds fault with many aspects of the February 2010 TMDL. Although those issues were for the most part ignored by Ecology in their response to comments, KEA is concerned that if the four (4) point source dischargers that requested Dispute Resolution are successful in this process, the water quality of the Spokane River will be further degraded to the detriment of KEA’s members. KEA therefore submits the following comments to Ecology for consideration by the Spokane River and Lake Spokane Dissolved Oxygen TMDL Dispute Resolution Panel.

1. The TMDL Must Ensure Compliance with Water Quality Standards.

The purpose of this TMDL is to improve the water quality of the Spokane River and Lake Spokane to protect the designated uses of those waters. The Federal Water Pollution Control Act's, 33 U.S.C. §§ 1251 *et al.* ("Clean Water Act" or "CWA"), National Pollution Discharge Elimination System ("NPDES") permits that are adopted pursuant to the TMDL must ensure compliance with applicable water quality standards for dissolved oxygen. The Clean Water Act provides that "[e]ach State shall identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) are not stringent enough to implement any *water quality standard* applicable to such waters." 33 U.S.C. 1341, § 303(d)(1)(A) (Emphasis added). Section 303(d)(1)(C) provides, "[e]ach State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 304(a)(2) as suitable for such calculation. *Such load shall be established at a level necessary to implement the applicable water quality standards* with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." 33 U.S.C. 1341, § 303(d)(1)(C) (Emphasis added). The purpose of a TMDL is to ensure that permits adopted pursuant to the TMDL shall ensure compliance with all applicable water quality standards. The TMDL at issue is accordingly designed to force dischargers to meet applicable water quality standards for dissolved oxygen.

Assertions by Inland Empire Paper, Post Falls/Hayden, and Coeur d'Alene regarding their inability to technologically meet the TMDL phosphorous standards fail to grasp the actual purpose of the TMDL. The Spokane River and Lake Spokane are currently 303(d) listed because the waters are impaired from years of discharges of elevated levels of phosphorous in part from the facilities now challenging the TMDL. Each of these facilities played a role in contributing to that impairment, and those entities must now reduce phosphorous levels to protect the designated uses of the water bodies. The purpose of the TMDL is to return the waters to a quality at which they can meet applicable water quality standards for dissolved oxygen. The Clean Water Act is a technology forcing statute that protects water quality rather than merely relying on current technology to protect the water. The question therefore is not whether the technology exists for these dischargers to meet their phosphorous limits, but whether these limits are stringent enough to ensure compliance with water quality standards. It is a privilege to discharge to the Spokane River, not a right, and if these facilities are unable to meet their new permit limits, they need to cease discharging to the River.

Whether dischargers can utilize technology sufficient to reduce their discharges of phosphorous to meet water quality standards is irrelevant in determining whether the TMDL is valid; relevant here is the compulsory attainment of water quality standards for dissolved oxygen. Ecology must remain committed to the primary purpose of the TMDL and focus on what is required to achieve dissolved oxygen water quality standards. This involves compelling dischargers to the waters to make whatever changes necessary to achieve these water quality standards, even if doing so requires the dischargers to make dramatic changes to their facilities and standard operating practices. Therefore, an increase in any dischargers waste load allocations ("WLAs") represents impermissible backsliding. Ecology should reject all assertions favoring increases in WLAs for dischargers and all assertions by dischargers treating the TMDL as based on what is technologically feasible instead of achieving compliance with water quality standards.

2. **Inconsistent growth predictions for the City of Post Falls**

The City of Post Falls asserts that their TMDL WLA would act as a moratorium on growth, and would essentially cap the City's population at 40,000. Post Falls' growth projections are at odds to prior growth projections and are artificially inflated to support Post Falls' request for an increase in its TMDL WLA.

Post Falls' Supplemental Brief to its Dispute Resolution Request (dated March 11, 2010) projects that Post Falls' population in 2027 will be approximately 83,000.¹ However, the 3% growth rate used to reach the 83,000 projection is different than the one used in the City's own 2010 Comprehensive Plan. The City of Post Falls Comprehensive Plan (2010) (at page 6) "establishes an annual growth rate projection of 2.5% for future planning purposes." This plan has been adopted formally by the Mayor and City Council of Post Falls, and a 2.5% rate would yield a population not greater than 41,500 in 2028.

Additionally, the City's own Growth Report (Demographic Analysis & Growth Projections for City of Post Falls, ID 83854 on January 2nd, 2007) ("Report") does not support any such proposed level of growth. The Report uses three different predicted levels to predict future growth, the largest of which (5% growth rate) predicting a population in 2028 of 66,841 within the Post Falls City Limits. The substance of the Report begins with the following statement: "In 2028 the population of Post Falls could be as high as 65,000 or greater if development continues at current densities." Considering the growth rates used in the City's Comprehensive Plan and Growth Report, Post Falls' projected growth rate in its Supplemental Brief to its Dispute Resolution Requests appears inconsistent and significantly greater than the growth rate projections the City uses internally. Therefore, any use of Post Falls' projected population should include an appropriate growth rate consistent with the City's own internal predictions.

Further, Post Falls characterizes the TMDL as a moratorium on growth because it proposes a numeric phosphorous limit for the Post Falls Wastewater Treatment Plant similar to the dischargers in Washington's WLAs. Post Falls and the other Idaho dischargers fail to acknowledge that the TMDL is not an NPDES permit, but will merely guide EPA in determining the appropriate WLA for each of the Idaho dischargers. Although the TMDL assigns WLAs to each of the Idaho dischargers, based on assumptions agreed upon by Ecology and EPA the reality is that EPA may apportion the NPDES permit limits as it sees fit to protect the downstream designated uses and meet water quality standards. EPA may also determine that additional and alternative methods of discharging (such as land application) and delta reductions might allow the regulated facilities to increase their discharge levels. While the TMDL is restricted to providing delta management opportunities to the Washington dischargers that is because Washington does not implement the NPDES permit program in Idaho and cannot therefore include specific permit requirements in the TMDL for Idaho dischargers.

¹ Post Falls started its growth calculation with a 2010 population of over 33,000, but Post Falls' own website indicates that the 2009 population was 26,053. *Available at* <http://www.postfallsidaho.org/demographics.html>

3. Idaho Does Not Have a State's Rights Claim

Post Falls and Hayden Area Regional Sewer Board, in their supplemental brief to this dispute resolution, assert (on page 9, footnote 20) that “Washington does not have authority to regulate sources in Idaho” for this TMDL. In doing so, they rely on *Int'l Paper Co. v. Ouellette*, 479 U.S. 841, 493 (1987). However, *Int'l Paper Co.* is not the controlling case in this action. *Int'l Paper Co.* involves a State common law nuisance claim by a downstream plaintiff suing a discharger in another State. The Supreme Court denied the State law claims and specifically noted that remedies available in the Federal Clean Water Act trump State law nuisance actions. As the Idaho dischargers are well aware, this is not a nuisance action and does not involve potential violations of State laws.

In *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), the Supreme Court found that the “[Clean Water Act] clearly does not limit the EPA’s authority to mandate ... compliance” by a point source in one State with the water quality standards of a downstream State. *Arkansas*, 503 U.S. at 104. While this TMDL was crafted by Ecology, in close consultation with EPA, it comes into legal force by the authority of the EPA and the Clean Water Act, the Federal statute that authorizes TMDLs.

Section 402 of the Clean Water Act “establishes the NPDES permitting regime, and describes two types of permitting systems: State permit programs that must satisfy federal requirements and be approved by the EPA, and a federal program administered by the EPA.” *Id.*, 503 U.S. at 102. “In the absence of an approved [or delegated] State program, the EPA may issue an NPDES permit under § 402(a) of the Act.” *Id.*, 503 U.S. at 103. Here, Washington is a delegated State with an approved program and Idaho is non-delegated and still receives its NPDES permits from the EPA. Regardless of whether a State is delegated or non-delegated, all “TMDLs established under paragraph (c) [of 40 CFR § 130.7, prescribing the development of TMDLs,] for water quality limited segments shall continue to be submitted to EPA for review and approval.” 40 CFR § 130.7(d)(1). As such, this TMDL, as well as all others, ultimately falls under the approval and authority of the EPA, even when developed by the State of Washington.

In *Arkansas*, the Court found that “[s]ince 1973, EPA regulations have provided that an NPDES permit shall not be issued ‘[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States.’ 40 CFR § 122.4(d) (1991); see also 38 Fed.Reg. 13533 (1973); 40 CFR § 122.44(d) (1991).” *Id.*, 503 U.S. at 105. “This restriction applies whether the permit is issued by the EPA or by an approved State program. See 40 CFR § 123.25 (1991).” *Id.* For the purposes of this TMDL, “Ecology worked closely with EPA to develop very specific assumptions about the anticipated permit-driven reductions of [pollutant loadings] ... in Idaho.” (TMDL page 34.) Further, the TMDL provides “EPA will incorporate permit limits into the NPDES permits for Idaho point source discharges” (TMDL page 35.)

Based on the foregoing authority, it is clear that the TMDL is under EPA’s authority; EPA controls the NPDES permitting in Idaho; and EPA has the authority to mandate compliance by Idaho point sources with the water quality standards, in conjunction with the TMDL, in Washington. The Court in *Arkansas* concluded that, “[t]he application of State water quality standards in the interstate context is wholly consistent with the [CWA’s] broad purpose ‘to restore and maintain the chemical,

physical, and biological integrity of the Nation's waters.' 33 U.S.C. § 1251(a). Moreover, ... § 301(b)(1)(C) [of the CWA] expressly identifies the achievement of State water quality standards as one of the Act's central objectives. The Agency's regulations conditioning NPDES permits are a well-tailored means of achieving this goal." *Arkansas*, 503 U.S. at 105-106. Therefore, any allegation that Ecology has no authority to enforce the TMDL's proposed limits on Idaho dischargers is without support and incorrect.

4. The TMDL Should Not Contain Delta Options for Nutrient Offsets and Trading

The TMDL maintains that its goal of achieving water quality standards for dissolved oxygen will be met through a variety of methods, including offset programs and pollutant trading programs that will be developed in the future. However, neither EPA nor Ecology has been able to cite even one instance where nutrient trading and/or offsets have been successful in the United States. The TMDLs proposed nutrient offset and trading programs are ambiguous and provide no reasonable assurances they will be sufficient to achieve water quality standards for dissolved oxygen. For instance, the TMDL (at page 78) discusses a Delta Elimination Plan which is supposed to "provide reasonable assurance[s] of meeting ... permit holder[s'] wasteload allocation[s]." However, the plan lacks any specific language as to the explicit duties of the dischargers, and only vaguely describes how such plans will *in the future* be created. The TMDL (at page 80) creates Regional phosphorous reduction programs but fails to provide any details, guidance, or restrictions on such programs. This again fails to provide reasonable assurances of meeting water quality standards.

Further, the Regional Nonpoint Source Reduction Program (at page 83) lays out funding and oversight plans for nonpoint pollution trading and offsets, but again lacks specific information such as how nonpoint source pollution will be monitored and how the program provides reasonable assurances of meeting water quality standards when no opportunities to achieve reductions have been specifically identified. Additional plans in the TMDL for pollutant trading and offsets are based on inexact details and requirements and rely on unspecified monitoring methods. The TMDL's plans for pollution offsets and trading programs should be revised to remedy these issues if they are to provide reasonable assurances of meeting water quality standards for dissolved oxygen on the Spokane River and Lake Spokane.

5. Improper addition of the Spokane County Facility and use of STEP

KEA concurs with Sierra Club's comment challenging the TMDL's addition of WLAs to Spokane County for its proposed wastewater treatment plant, and for the use of offsets that the County is already required to do to protect the Spokane Aquifer.

Spokane County claims in its comments to the Dispute Resolution Panel that it "is an existing, permitted discharger to the regional sewage treatment plant, which currently discharges effluent to the Spokane River." As such, it claims the ability to receive offsets through WAC 173-201A-450. However, according to the February 2010 TMDL (at page 61), "Spokane County is planning to construct a new wastewater treatment plant near the eastern city limits of Spokane, upstream of the city of Spokane's existing plant. Currently, county wastewater is treated and discharged at the city's plant." The creation of a new wastewater treatment plant by the County would clearly constitute a new

discharge source on the Spokane River, requiring its own, new NPDES permit. The County facility would also discharge at a rate far greater than that which the County currently does through the City of Spokane facility, further strengthening its classification as a new source with new, additional discharges.

Further, this facility, which remains to be completed, proposes to discharge into the Spokane River, which is not in compliance with applicable dissolved oxygen water quality standards. 40 C.F.R. § 122.4(i) dictates that, “No permit may be issued: to a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. The owner or operator of a new source ... proposing to discharge into a water segment which does not meet applicable water quality standards ... must demonstrate, before the close of the public comment period, that: (1) there are sufficient remaining pollutant load allocations to allow for the discharge....” The County facility has failed to demonstrate there are sufficient remaining dissolved oxygen load allocations to allow for the discharge of additional dissolved oxygen into the Spokane River and Lake Spokane.

We are also in disagreement with the County’s analysis of *Friends of Pinto Creek v. EPA*, 504 F.3d 1007 (9th Cir. 2007), which the County uses to justify receiving an NPDES permit. However, assuming *arguendo* we accepted the County’s analysis, it remains that the Spokane River and Lake Spokane are impaired under CWA § 303(d)(1) for pollutants in addition to dissolved oxygen. No TMDLs have been issued for any of these other pollutants. As such, a grant of an NPDES permit to the County facility would necessarily mandate a zero-discharge limit on all pollutants for which the River and Lake are impaired, including PCBs, for the facility. No information has been provided demonstrating the County facility could satisfy such restrictions, and it is very likely that the County would be immediately out of compliance with all other pollutants for which the waters are impaired as soon as it started discharging. Therefore, the TMDL’s improper inclusion of WLA’s for a proposed facility, to the detriment of all the other dischargers’ WLA’s, may be a moot point because the facility might not even be able to get an NPDES permit.

We also concur with Sierra Club’s comment challenging the TMDL’s assertion that Spokane County may offset its pollution discharge by utilizing its “septic tank elimination program” (“STEP”). The TMDL describes (beginning at page 67) the potential of the County receiving offsets through its STEP program. This description is purely aspirational as applied to the TMDL, and provides no reasonable assurances the County will meet water quality standards for dissolved oxygen using this program. “*Pending approval of the TMDL by EPA and final approval by the proponents offset actions by Ecology, the County may use the pounds of phosphorus prevented from reaching the river and Lake Spokane through septic tank elimination as part of an offset for the county’s new treatment plant.*” TMDL at 68 (Emphasis added). The conjecture and potential benefits do not provide the reasonable assurances required by Federal law. Moreover, the Septic Tank Elimination Program was instituted for the purpose of protecting the Spokane Aquifer, and it would be unacceptable to allow the County to additionally use this plan for its own benefit with regard to offsetting its dissolved oxygen WLA for this TMDL.

6. No WLA allocation increases for current dischargers

We concur with the Spokane Tribe of Indians' comment opposing any increase in the WLAs for any of the current dischargers along the river. The TMDL states (at page 7) that "the continuing water quality problems ... indicate the current limits and current discharge rates are not adequate to protect water quality (Cusimano 2004). This TMDL is expected to improve dissolved oxygen conditions, not only upstream of Long Lake Dam, but downstream as well" Further, the TMDL states (at page 35), "The goal of this TMDL is to achieve water quality standards for dissolved oxygen." Any increase in the waste load allocations of current dischargers would serve only to frustrate the goal of the TMDL to improve dissolved oxygen conditions on the Lake and River, and should not occur.

Conclusion

While KEA does not support all aspects of the TMDL, it does appreciate the benefits it presents for the Spokane River and Lake Spokane. KEA appreciates Ecology's consideration of the foregoing comments, and urges the Spokane River TMDL Dispute Resolution Panel to reject all suggestions that would decrease the TMDL's ability to achieve water quality standards on the River and Lake.

Sincerely,

/s/ Ryan K. Gardner

Ryan K. Gardner, Student Intern
Gonzaga Environmental Law Clinic

/s/ Michael J. Chappell

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