SPOKANE COUNTY

UTILITIES DIVISION
N. BRUCE RAWLS, P.E., DIRECTOR
A DIVISION OF THE PUBLIC WORKS DEPARTMENT

March 29, 2010

Mr. Ted Sturdevant
P.O. Box 47600
Olympia, WA 98504-7600

Mr. Dustin Bilhimer
P.O. Box 47600
Olympia, WA 98504-7600

SUBJECT: SPOKANE RIVER DISSOLVED OXYGEN TMDL—
DISPUTE RESOLUTION

Dear Mr. Sturdevant and Mr. Bilhimer:

Spokane County has not submitted a request for dispute resolution on the Spokane River Dissolved Oxygen TMDL, which Ecology forwarded to EPA for approval. However, because six other parties have filed requests for dispute resolution, Spokane County is an affected party and, in that capacity, submits this letter to you for consideration as part of the dispute resolution process.

At the outset, the County wishes to thank Ecology and EPA for their hard work on the TMDL, which has spanned more than a decade. Ecology first started working on the TMDL in 1998. There have been multiple years of study, modeling, refined assumptions, meetings, workshops, collaboration, written communications, and public comments. Virtually every aspect of the TMDL has been scrutinized and debated by every possible stakeholder. No one has been denied a full and fair opportunity to have their voice heard and considered as part of the TMDL process. Several times, Ecology and EPA have stepped back, considered, and often adjusted their assumptions and analysis with regard the TMDL.

The result is a comprehensive, watershed-based TMDL that will vastly improve the quality of water in the Spokane River. This TMDL is not perfect, but that is not the standard required of this TMDL, or any other TMDL. For that reason, this TMDL provides mid-course correction points. Will the TMDL require every discharger to spend significant amounts of money on state of the art treatment technology? Absolutely. But, investing in cleaning up the Spokane River is one

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of the best investments our region can make now because it will pay dividends long into the future.

The County's position is that now is the time for everyone to set aside their differences, join together, and begin implementing the TMDL. There has been more than enough time and money spent arguing about the "issues" and we have reached the point of diminishing returns. Therefore, the County urges Ecology to affirm the TMDL and to continue its efforts to assist the region in implementation. Any other course does nothing more than delay the cleanup of the River – a result that surely everyone can agree provides no environmental benefits.

With regard to the written dispute resolution requests submitted by other parties, we believe that most of the issues and arguments have been addressed by Ecology's Response to Comments in the TMDL. Therefore, we do not respond further here, except to say that the County disagrees with many of the issues raised in the dispute resolution requests.

Because some comments are specifically directed to the County, we wish to briefly highlight a few of the reasons that we believe those comments are misplaced. For the most part, the County-specific comments are raised by Post Falls, Rathdrum, and the Hayden Area Regional Sewer Board ("Post Falls") in letters dated February 26 and March 11, 2010 and by the Sierra Club, Upper Columbia River Group in its letter of March 15, 2010, which are summarized below:

Post Falls:

- "Spokane County receives an allocation as a new point-source discharger in violation of *Friends of Pinto Creek v. EPA, 504 F.3d 1007 (9th Cir. 2007)*"
- "...An illegal allocation for septic tanks which are point sources;"
- "Septic tanks that are hydrologically connected to the Lake Spokane Reservoir and along the Spokane River have not been accounted for as point sources as is required by the Clean Water Act."
- "The Spokane County and septic tanks all receive unfair special treatment, as described above."

The *Pinto Creek* argument is flawed for several reasons. First, the facts in that case are dramatically different than the facts here. Spokane County is an existing, permitted discharger to the regional sewage treatment plant, which currently discharges effluent to the Spokane River. Spokane County's new treatment plant will produce far cleaner effluent than the quality produced at the existing regional plant. Spokane County has identified a number of offset opportunities, one of which is the removal of septic tanks. The offsets from septic

tank removal have been quantified by outside experts, provided to Ecology, and reviewed by Ecology as part of the TMDL process. The Spokane River TMDL contains waste load and load allocations, compliance schedules and other tools that are designed to bring the Spokane River into compliance with water quality standards. The NPDES permit that will be issued for the new plant will be consistent with the TMDL's waste load allocations.

By way of contrast, Carlota Copper was issued an NPDES permit before a TMDL was developed. The permit was issued and premised on Carlota Copper offsetting copper discharges from a new mine by remediating copper discharges from an inactive mine. Provisions of the permit were stayed while a TMDL was developed. The TMDL plan was not designed to achieve compliance with water quality standards. There was no indication of any plan that would effectuate the load allocations to bring Pinto Creek within water quality standards. There were no compliance schedules for existing dischargers designed to achieve compliance.

The use of offsets was not prohibited by the court. Instead, the court stated, there was nothing in the federal Clean Water Act or federal regulation that allowed the use of an offset to entirely avoid the requirements of 40 CFR 122.4(i)(1) and (2). In other words, if a new discharger wants to avoid those subsections, its discharge must not cause or contribute to a violation of water quality standards. The court also questioned whether there really was an offset available to Carlota Copper, who appeared to have undercounted the amount of copper discharged by the new mine. Washington's water quality standards contain an offset provision that specifically applies to a TMDL, and the County's use of offsets is entirely consistent with this regulation. EPA is using offsets in the Chesapeake Bay TMDL and in other TMDLs.

The contention that septic tanks are point sources is simply wrong and ignores Ninth Circuit precedent and federal and state guidance. (*U.S. v. Hagbert,* 207 F.3d 569 (2000) ("EPA's decision to exclude septic tanks from the definition of 'treatment works treating domestic sewage' under the permit program implements its belief that Congress did not intend that all private owners of septic tanks would be required to acquire a permit to operate septic tanks . . . it would serve no useful purpose to require permits for the 22 million homeowners with septic tanks or for portable toilets." *Id.,* at 574.[1] Septic tanks and their drain fields are not point sources. They are not point sources in Washington and they are not point sources in Idaho.

Some, but not all, of the septic tanks in Spokane County and Kootenai County are non-point sources of phosphorus which contribute to the groundwater loading. Ecology properly recognized that a portion of the concentration of phosphorus in groundwater is natural background and the amounts of

[1] Post Falls reliance on a 5th Circuit criminal case where a developer ignored cease and desist orders from federal and state regulatory agencies and built septic tanks in wetlands is irrelevant here. The 9th Circuit has definitively held that septic tanks are not point source discharges regulated by the NPDES program.

phosphorus exceeding natural background are anthropogenic. A portion of this anthropogenic loading is due to the breakthrough of phosphorus from the septic tank effluent. It is reasonable and appropriate for Ecology to recognize and account for this loading in the TMDL as a non-point source as has been recognized in other TMDLs throughout the country. The whole goal of the TMDL is to reduce the loading of nutrients into the Spokane River from both point sources and non-point sources, so that compliance with water quality standards can be achieved.

With regard to Post Falls' "equity" argument, Spokane County is spending hundreds of millions of public dollars to accomplish its Septic Tank Elimination Program, including $170 million to construct a new water reclamation facility to provide very high quality treatment for wastewater that will be diverted from the septic tanks. This program will result in up to 20 pounds per day reduction in non-point source loading of phosphorus into the Spokane River under the TMDL. Spokane County has publicly stated many times that the Spokane River system should be treated as a single watershed and that pollutant management should not be constrained by a state boundary. Under a watershed approach, Spokane County would be an active participant in a pollutant trading program. Spokane County hopes that Ecology and EPA support and implement a watershed trading program as part of the TMDL. When that happens, Spokane County will be an active participant and encourages the same from Post Falls.

If the Idaho dischargers are not interested in trading across the border, or if the regulatory agencies cannot implement a regional watershed trading program, it is worth noting that numerous septic tanks remain in Idaho – many of which contribute to the non-point source phosphorus load in the groundwater. One such area is Dalton Gardens. Perhaps a septic tank elimination program could be initiated in Idaho that could be used as offsets in meeting the TMDL requirements.

Sierra Club:

- "The Spokane River Dissolved Oxygen TMDL makes a waste load allocation to Spokane County for its proposed wastewater treatment plant. We contend this waste load allocation is improper and in violation of the Clean Water Act requirements and regulation governing TMDLs."

- "The Spokane River Dissolved Oxygen TMDL proposes that Spokane County may offset its pollution discharge by utilizing its "septic tank elimination program" (STEP). We contend that the TMDL, combined with other approvals issued by Ecology, improperly approves the County's offsets program pursuant to state regulations."

The argument presented by the Sierra Club regarding compliance with the Clean Water Act is flawed for many of the same reasons discussed above. The Clean Water Act does not prohibit a new discharge to an impaired water body – that

argument was rejected by the Supreme Court in *Arkansas v. Oklahoma,* 503 U.S. 91, 112 S.Ct. 1046, (1992) ("The parties have pointed to nothing that mandates a complete ban on discharges into a waterway that is in violation of those standards. The statute does, however, contain provisions designed to remedy existing water quality violations and to allocate the burden of reducing undesirable discharges between existing sources and new sources.") The Clean Water Act requires a TMDL to provide reasonable assurance that compliance with water quality standard will be achieved, and this Spokane River TMDL meets that requirement.

With regard to offsets, Washington's surface water quality standards specifically authorize water quality offsets (WAC 173-201A-450). There is no prohibition on using offsets to eliminate septic tanks. To the contrary, the elimination of septic tanks in the context of a TMDL is entirely consistent with the offset regulation, which contemplates the use of offsets for new or expanded discharges and for meeting TMDL requirements. Moreover, the method of funding septic tank elimination is irrelevant – a fact that is obvious by the lack of any mention of funding sources in the regulation.

Other Observations

Spokane County has heard arguments presented by the Idaho dischargers that they are being treated unfairly because their phosphorus waste load allocations are based on 0.036 mg/L, while the larger Washington dischargers waste load allocations are based on 0.042 mg/L. The apparent explanation for this difference is based on the frequency of sampling, where less frequent sampling of effluent results in lower statistical confidence and therefore a lower discharge limit. The Idaho dischargers have said that they would be willing to use the more frequent effluent sampling frequency in order to have their waste load allocation based on 0.042 mg/L. Since the higher level of monitoring will increase the statistical confidence level of meeting the seasonal waste load allocation, this adjustment will not have a negative impact on reasonable assurance of meeting the water quality standards in the Spokane River.

Spokane County supports allowing the Idaho dischargers to have a waste load allocation based on the same concentration that was used for the larger Washington dischargers. We believe that this is a clarification of Ecology's intent and would encourage Ecology to clarify this intent in the Spokane River TMDL and encourage EPA to structure the Idaho discharge permits consistent with this intent.

Second, Spokane County is supportive of a regional watershed approach to implementing the Spokane River TMDL. We encourage Ecology to further clarify this intent in the TMDL regarding water quality offsets and pollutant trading across the Washington-Idaho border. We encourage Ecology and EPA to expeditiously develop a trading program that includes all of the dischargers in the watershed, as well as Avista. Because it appears that the Idaho dischargers do

not believe that trading or offsets will be available to them, we encourage Ecology and EPA to make a commitment that trading and offsets are available to the Idaho dischargers.

Conclusions

Thank you for this opportunity to provide our comments to you. Spokane County remains committed to the success of the Spokane River cleanup and is ready to move forward implementing the Spokane River TMDL.

We will attend the Dispute Resolution meeting on April 5th, and will be available to answer any questions that your panel members may have.

Sincerely,

N Bruce Rawls

N. Bruce Rawls, P.E.
Spokane County Utilities Director

WAC 173-201A-450
Water quality offsets.

(1) A water quality offset occurs where a project proponent implements or finances the implementation of controls for point or nonpoint sources to reduce the levels of pollution for the purpose of creating sufficient assimilative capacity to allow new or expanded discharges. The purpose of water quality offsets is to sufficiently reduce the pollution levels of a water body so that a proponent's actions do not cause or contribute to a violation of the requirements of this chapter and so that they result in a net environmental benefit. Water quality offsets may be used to assist an entity in meeting load allocations targeted under a pollution reduction analysis (such as a total maximum daily load) as established by the department. Water quality offsets may be used to reduce the water quality effect of a discharge to levels that are unmeasurable and in compliance with the water quality antidegradation Tier II analysis (WAC 173-201A-320).

(2) Water quality offsets may be allowed by the department when all of the following conditions are met:

(a) Water quality offsets must target specific water quality parameters.

(b) The improvements in water quality associated with creating water quality offsets for any proposed new or expanded actions must be demonstrated to have occurred in advance of the proposed action.

(c) The technical basis and methodology for the water quality offsets is documented through a technical analysis of pollutant loading, and that analysis is made available for review by the department. The methodology must incorporate the uncertainties associated with any proposed point or nonpoint source controls as well as variability in effluent quality for sources, and must demonstrate that an appropriate margin of safety is included. The approach must clearly account for the attenuation of the benefits of pollution controls as the water moves to the location where the offset is needed.

(d) Point or nonpoint source pollution controls must be secured using binding legal instruments between any involved parties for the life of the project that is being offset. The proponent remains solely responsible for ensuring the success of offsetting activities for both compliance and enforcement purposes.

(e) Only the proportion of the pollution controls which occurs beyond existing requirements for those sources can be included in the offset allowance.

(f) Water quality offsets must meet antidegradation requirements in WAC 173-201A-300 through 173-201A-330 and federal antibacksliding requirements in CFR 122.44(l).