



City of Spokane

June 24, 2008

**SENT VIA U.S., MAIL AND
VIA E-MAIL TO: dmo0461@ecy.wa.gov**

Mr. David Moore
Eastern Regional Office
Department of Ecology
4601 N. Monroe Street
Spokane, WA 99205

Re: *Spokane River and Lake Spokane Dissolved Oxygen Total Maximum
Daily Load, Water Quality Improvement Report (May 2008)*

Dear Mr. Moore:

Thank you for the opportunity to review the May 2008 Draft *Spokane River and Lake Spokane Dissolved Oxygen Total Maximum Daily Load, Water Quality Improvement Report* ("2008 Draft TMDL"). I want to express my concern that the Department of Ecology ("Ecology") appears to now be stepping back from the mutual commitments we all worked so hard on together in the Foundational Concepts for the Spokane River TMDL Managed Implementation Plan ("Foundational Concepts") and related Memorandum of Agreement approved by the City, Ecology and others regulated entities on March 7, 2007. I want to urge that we all to return to the spirit of good faith negotiations which seemed so positive and productive a few short months ago. In this same spirit, I want to offer my thoughts about the basis of the Foundational Concepts--specifically, why they made sense when we all agreed on them, and why they still do.

1. Foundational Concepts' Commitment and Rationale; 20 year time frame still essential

The Foundational Concepts presented a compromise among various parties developed over two years of meetings and discussions. One of the most important fruits of this negotiation was an agreement that a 20 year period of time was needed, realistically, to achieve final effluent limits for phosphorous. The quid pro quo for this understanding was the City's firm commitment to

- ▶ achieve interim goals in 10 years by installing new technology and
- ▶ fund non-point source water reuse and water conservation programs that also reduce the amount of phosphorous entering to the river.

"Spokane – Near Nature, Near Perfect"

Why 20 years? The 20 year timetable was based on some very practical considerations.

► **Current standards unachievable:** We know that the River will not achieve Ecology's current standards no matter what the City or other dischargers do to reduce the amount of phosphorous discharged to the River through point sources such as the City's wastewater treatment plant. See, e.g., UAA at pp. 3-14 – 3-47, 4-11, and 505 – 5-11; and, Avista Relicensing FEIS at p. 3-142.

► **Major commitments made:** The City (and others) nonetheless were willing to commit to spend tens of millions of ratepayer dollars on wastewater improvements and other pollution controls. The quid pro quo for this was a commitment from Ecology that the technology and controls that the City installs will be useful for at least 20 years, and that at the end of 10 years Ecology would take a hard look at the UAA, new data from the River being collected by the City and Ecology, and the agency's standards for the River, and then reconsider both the interim goals and the final limits in the TMDL.

► **FCs clearly and carefully worded:** The understanding reached was carefully articulated in the Foundational Concepts, which explains that the phosphorus targets are non-binding goals during the first 10 years. The FC document also explains why:

The 2017 phosphorous targets are goals during the first ten years of the MIP. These phosphorous targets will not be binding during the first ten years so as to allow assessment of the beneficial impact on DO from all MIP-related technology improvements and phosphorous reduction actions initiated during this time, and to allow measurement of the actual Delta reduction by the dischargers based on experience. By the end of the 20th year, NPDES permit holders are required to be in compliance with the phosphorous WLA in the right hand column of the chart above.

FC at pp. 3-4 (emphasis added). It is clear that the targets become binding at the 20 year mark:

The MIP's actions necessary to eliminate an NPDES permit holder's Delta will be enforceable over the 20 year life of the MIP and the TMDL phosphorus waste load allocation will become enforceable requirements at the end of the 20 years covered by the MIP.

FC at p. 2 (emphasis added).

By the end of the 20th year of the MIP, NPDES permit holders are required to be in compliance with the then current TMDL phosphorous waste load allocations (the targets may have been modified as a result of the Tenth Year Assessment) to assure applicable Water Quality Standards are being met.

FC at p.5. The Foundational Concepts also clearly records that the City's commitment to significantly invest in wastewater improvements and pollution controls is premised on Ecology's acknowledgment that the investments will be good for 20 years:

Investment Stability: The investment in phosphorous removal technology is recognized by Ecology as having a 20-year life, and no significant modifications or replacements of phosphorous removal facilities will be required during the term of the MIP. Modifications to installed technology that best available data would indicate would enhance phosphorous removal performance and are efficient and cost-effective may be required.

FC at p.6.

2. 2008 Draft TMDL-should not undo the good progress made

The 2008 Draft TMDL sets aside all the progress we made together on this issue with the Foundational Concepts. I would invite your review of the following language in the new draft. It seems to be considerably more than a "clarification":

To the extent that language in the Foundational Concepts document suggests that an initial ten-year compliance schedule in the Dischargers NPDES permits would not include enforceable limits but instead would identify only targets or goals, Ecology is clarifying in this TMDL that the compliance schedules in NPDES permits will include enforceable limits and will be based on reasonable assurances that such limits can be achieved. As described below, final wasteload allocations will be re-evaluated and possibly changed in subsequent permits based on new monitoring and modeling information collected for the biennial and ten-year assessments. Any changed wasteload allocations will be protective of water quality.

2008 Draft TMDL at pp. 37-38.

Likewise, references to "interim goals," "goals" and "targets" as we agreed on together in the Foundational Concepts have all been deleted. For example, these sentences are gone:

- "The interim goal is for the Spokane River and Lake Spokane to meet the equivalent of 10 ug/L of total phosphorus in ten years. The final goal is to meet 10 ug/L of phosphorus in 20 years based on water quality standards for dissolved oxygen."
- "The 2017 phosphorous targets are goals during the first ten years. The phosphorus targets will not be binding during the first ten years after initiation of technology improvements and phosphorus reduction actions to allow assessment of dissolved oxygen and measurement of the actual Delta reduction. By the end of the 20th year, NPDES permit holders are required to be in compliance with the phosphorus wasteload allocation in the far right hand column of Table 9. ... The implementation actions necessary to eliminate an NPDES permit holders' Delta will be enforceable

over the 20 year life of the TMDL. The phosphorous wasteload allocation will become enforceable at the end of 20 years."

2007 Draft TMDL at pp. 33 and 34 (emphasis added).

Instead, the 2008 Draft TMDL now requires the City to comply with effluent limits at point sources, waste load allocations at point sources, and load allocations at non-point sources within 10 years:

- "The TMDL considers that the Dischargers' effluent will meet the equivalent of 10 ug/L of total phosphorus over the first ten years (by 2018). The NPDES permits will have ten-year compliance schedules and will include interim limits and other enforceable requirements, including requirements to implement technology and target pursuit actions ... that match this TMDL expectation."
- "As described earlier, the Dischargers are required to be in compliance with the then-current TMDL phosphorus wasteload allocations to assure water quality standards are being met by the end of ten years, unless Ecology makes adjustments to the TMDL and applicable permits based on new information."

2007 Draft TMDL at pp. 48 and 50.

At this point, I would like to turn to a summary of scientific and legal/regulatory considerations.

3. SCIENTIFIC: 2008 Draft TMDL Approach Not Supported by Science

"Best Available Science" is an important factor considered in the TMDL process. But unlike the 2007 draft, the approach taken in the 2008 Draft TMDL is not supported by the best available science. All the scientific information and analysis that supported the approach taken in the Foundational Concepts cannot logically be reconcilable with this new, fundamentally different approach. The Foundational Concepts were significantly informed by the Use Attainability Analysis that preceded it, as well as the modeling conducted during the Spokane River Collaboration process.

► The UAA analysis showed that no degree of action taken by point sources would suffice to fix the DO issues, due to the loss of assimilative capacity. *See*, Spokane River Use Attainability Analysis (August 2004) 3-14 – 3-37, 4-11, 5-5 – 5-11. This analysis has been reinforced by the recent FEIS prepared in connection with relicensing certain hydroelectric facilities on the Spokane River. *See*, FEIS Spokane River and Post Falls Hydroelectric Projects (July, 2007), at 3-142 ("The model indicates that 8.0 milligrams per liter concentrations would be met under unimpounded conditions, whereas under current impounded conditions the 8.0 milligrams per liter criterion is not satisfied between 3 to 5 months per year in the interflow and hypolimnion of the lower portion of the lake under current conditions.").

In essence, the science shows that standards cannot be met in Lake Spokane no matter what actions are taken by point-sources because the hydroelectric facilities fundamentally changed the physical nature of the River: It is now an impoundment which stratifies each summer and fall.

► The best available science informed a general consensus among most of the stakeholders in the Spokane River Collaboration that there is simply not sufficient information or available technology to set a WLA with which the City can comply in 10 years. Rather, the current best thinking on how to go about meeting water quality standards for DO in the Spokane River was that there should be an interim target of 10 ug/L at the 10-year mark, a commitment to take specific actions to reduce phosphorous during that 10 years, and a commitment to consider the results and experiences at that time which inform a reconsideration of the predicted WLA.

Again, nothing has changed since March of 2007 and now in this area to change the conclusions reached. If the best available science supported these conclusions so recently, it is very difficult to understand how it could now support an about-face in approach. If anything, the 2008 proposed TMDL appears to exacerbate the problem of insufficient information by failing to mesh the timelines in the 401 Certification with those in the TMDL. We were verbally assured in discussions with Ecology that this kind of problem would be avoided in response to our concerns expressed on this regulatory timing issue. Additional information generated in connection with the 401 Certification will not even be available to inform the TMDL process at the 10 year mark.

4. REGULATORY: The Foundational Concepts are Consistent with WAC 173-201A-510(4)

For lack of a better understanding of the reasons for the 2008 changes, Ecology may have been attempting to respond to legal/regulatory concerns in the 2008 TMDL revisions. But any concerns here would be simply incorrect. WAC 173-201A-510(4) (prescribing a maximum 10 year compliance schedule) presented no impediment to the Foundational Concepts in 2007 and still does not, for example. There have been comments from EPA (and perhaps others) regarding the proper application of WAC 173-201A-510(4) to the Foundational Concepts and the 2007 Draft TMDL. We considered this issue during the Spokane River Collaboration when the idea of interim goals in 10 years and final limits in 20 years were being discussed. The City also looked at this issue and commented on it in response to the draft NPDES Permit issued by Ecology for public review.

► **This issue is one of state not federal regulations:** EPA's regulations do not establish any firm timeline for compliance schedule, but instead defer to the States to decide if and when a compliance schedule is appropriate and the duration of such a compliance schedule. *See* 40 C.F.R. 122.47. EPA's regulations merely state that NPDES Permits

may include compliance schedules to the extent allowed in the State's standards. See 40 C.F.R. 122.44(d)(1)(vii)(B)). Thus, it is only Ecology's rule that is at issue here.

► **10 year compliance schedule ≠ 10 year enforceable effluent limit.** WAC 172-201A-510(4) prescribes a maximum 10 year compliance schedule. But it does not necessarily follow that the end-point of the 10 year compliance schedule must be an enforceable final effluent limitation (in this case, the 2027 WLAs). The law provides that NPDES permits for point sources must be consistent with the terms of the TMDL and WLAs. *Dioxin/Organochlorine Center v. Clarke*, 57 F.3d 1517, 1520 (9th Cir.1995).¹ The law does not provide, however, that a TMDL must include an enforceable final effluent limitation at the 10 year mark, even if there is anticipated to be a 10 year compliance schedule. The Foundational Concepts are thus wholly consistent with applicable legal as well as practical considerations.

► The new 2008 Draft TMDL seems to proceed on the erroneous assumption that, because a NPDES permit itself has a maximum 10 year compliance schedule, then the TMDL needs a binding 10 year schedule as well. Again, this is not a correct analysis, I would respectfully submit. Rather, it is the TMDL which does and should drive the end-point of the 10 year compliance schedule, not the other way round. See, *Dioxin, id.*; *Friends of Earth, Inc. v. E.P.A.*, 446 F.3d 140, 143 (D.C. Cir. 2006); 40 C.F.R. 122.44(d)(1)(vii)(B)). It follows that if the TMDL does not have a binding 10 year limit, then the NPDES permit simply has to be consistent with the TMDL and include the interim non-binding limit.

► In support of this interpretation it is worth emphasizing that the law requires NPDES consistency with "specific"² or "available"³ WLAs. See, 40 C.F.R. 122.44(d)(1)(vii)(B) (permits should be "consistent with the assumptions and requirements of any available wasteload allocation"); *Dioxin, id.* ("When a TMDL and specific wasteload allocations for point sources have been established, any NPDES permits issued to a point source must be consistent with the terms of the TMDL and WLA"). It is implicit that TMDLs do not always provide such WLAs; rather, that there is some flexibility as to the goals or limits included in a TMDL. This in turn suggests that the compliance schedules included in related NPDES permits could not have a firm binding limit as their end point.

¹ In its comments on the City's draft NPDES permit, the EPA relies on *Star-Kist Caribe, Inc.* 3 E.A.D. 172, 175, 177-178 (1990), but that case is not applicable. *Star-Kist* concerned the scope of EPA's (as opposed to the State's) authority to establish schedules of compliance for meeting State water quality standards. The Environmental Appeals Board held that the CWA does not authorize the EPA to establish compliance schedules that would postpone compliance with State WQS beyond the initial July 1, 1977 deadline for water quality compliance, unless compliance schedules are authorized by the State in State WQS or regulations. It does not pertain to the issue at hand.

² *Dioxin/Organochlorine Center v. Clarke*, 57 F.3d 1517, 1520 (9th Cir.1995) ("When a TMDL and specific wasteload allocations for point sources have been established, any NPDES permits issued to a point source must be consistent with the terms of the TMDL and WLA"). Emphasis added.

³ 40 C.F.R. § 122.44(d)(1)(vii)(B).

► The Federal definitions of “schedules of compliance” approves of the idea of flexibility in what the end-point of a compliance schedule might be, and is consistent with the notion of an interim target that is part of an adaptive management approach to achieving a WLA. The definitions expressly anticipate that the end-point may not be an effluent limit. They do not rule out end-point compliance with an equivalent effluent limit. They also do not rule out end-point compliance with a standard that will subsequently be revisited:

The term “schedule of compliance” means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.
CWA section 502(17) (emphasis added).

Schedule of compliance means a schedule of remedial measures included in a “permit”, including an enforceable sequence of interim requirements (for example, actions, operations, or milestone events) leading to compliance with the CWA and regulations.
40 C.F.R. 122.2

This interpretation is further supported by the Washington Supreme Court ruling that adaptive management requirements can provide reasonable assurances in the context of water quality compliance. *Port of Seattle v. Pollution Control Hearings Bd.* 151 Wn.2d 568 (2004).

Conclusion; Regulatory requirements

Thus, WAC 172-201A-510(4) requires the TMDL to include a binding WLA within 10 years, or a final effluent limit tied to a WLA at the 10 year mark. WAC 172-201A-510(4) merely says an NPDES discharger must be able to comply with the TMDL requirements within 10 years. Again, it does not speak to or specify the nature of the requirements contained in the TMDL.

Nothing else in the law suggests that the duration of a States’ compliance schedule should somehow dictate the contents of a TMDL. That is indeed, I would submit, putting the cart driving the horse. NPDES permits must reflect TMDLs, not the other way around. Thus, in this case, it makes good practical, scientific, and regulatory sense to have the TMDL stated in term of interim goals in 10 years; specific technology improvements, water reuse, water conservation and non-point source controls during that time period; and, compliance in 20 years with a WLA.

Rule-Making Petition To Amend WAC 172-201A-510(4)

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To the extent Ecology decides it must or should adopt such a dramatic shift in an interpretation of WAC 172-201A-510(4) based on a cramped and impractical reading some may be suggesting, the City requests that Ecology meet with us as soon as possible to discuss a rule-making petition that the City would sponsor to address this issue. It is critical that both Ecology and the City be able to develop a TMDL in a collaborative manner and the only way to accomplish that is for both the agency and the City to have the flexibility to both take immediate action and make immediate investments but to look beyond 10 years for final compliance with WLAs and final effluent limits.

Conclusion

In closing, it is hard to understand how we ended up where we are now. Obviously, my office cannot support the 2008 Draft TMDL after the City and others have engaged with Ecology and other interested parties for so long on these issues. Unless the 2008 Draft TMDL is revised, I can no longer recommend that the City support the Foundational Concepts since the compromises set out in that document are not reflected in the 2008 Draft TMDL. I hope to resolve these issues with Ecology amicably before a final TMDL is issued. In that spirit, I will be contacting you soon to schedule a time to begin discussing this further. In the interim, please include in the administrative record for the 2008 Draft TMDL each of the documents from Ecology's files referenced on the enclosed list.

Sincerely,



Mary B. Verner
Mayor

cc: Jay Manning
David Peeler

***List of Documents Incorporated
By Reference for the Administrative Record***

1. Foundational Concepts dated May 30, 2006
2. MOA with Ecology dated March 7, 2007
3. City CWA 401 comments to Ecology dated May 14, 2008
4. City TMDL comments to Ecology dated November 11, 2007
5. *Spokane River and Long Lake Reservoir Use Attainability Analysis* dated December 2004 (“UAA”)
6. City Letter to Ecology regarding UAA dated February 22, 2005
7. *Final Environmental Impact Statement, Spokane River and Post Falls Hydroelectric Projects* dated July 2007 (“FEIS”)
8. City’s comments on its draft NPDES permit dated November 13 2007.
9. *Spokane River Hydroelectric Project Certification – Order No. 5492* (FERC No. 2545) dated June 10, 2008
10. *Spokane River and Lake Spokane Dissolved Oxygen Total Maximum Daily Load, Water Quality Improvement Report* dated May 2008 (“2009 Draft TMDL”)
11. *Spokane River and Lake Spokane Dissolved Oxygen Total Maximum Daily Load, Water Quality Improvement Report* dated September 2007 (“2007 Draft TMDL”)
12. City letter to Ecology regarding draft NPDES Permit dated November 13, 2007