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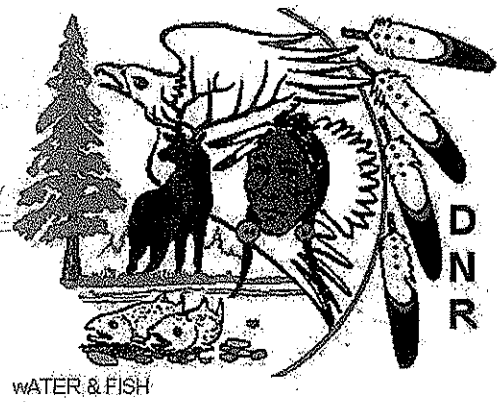

DATE: November 12, 2007

TO: Mr. Dave Knight
Eastern Regional Office
State of Washington Department of Ecology
4601 N. Monroe St.
Spokane, WA 99205

FROM: Spokane Tribe of Indians

Re: Washington Department of Ecology proposed Dissolved Oxygen TMDL for the Spokane River and Lake Spokane (Long Lake). A hard copy will be sent via slow mail.

The following comments with data were sent to:

cc: Tom Eaton, EPA
Laurie Mann, EPA

The following comments were sent to:

cc: Mike Gearheard, EPA
Jay Manning, DOE
Dave Peeler, DOE

SHANNON D. WORK, P.C.
ATTORNEY AT LAW

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November 12, 2007

Mr. Dave Knight
Eastern Regional Office
State of Washington Department of Ecology
4601 N. Monroe St.
Spokane, WA 99205

Re: Washington Department of Ecology proposed Dissolved Oxygen TMDL for the Spokane River

Dear Mr. Knight:

Please accept this letter, together with the enclosed memorandum by Chris Butler of the Spokane Tribe of Indians' Department of Natural Resources, as the Tribe's comments on the proposed Dissolved Oxygen TMDL for the Spokane River. It is the Tribe's position that Ecology should re-examine its proposal in light of these comments and make appropriate modifications before seeking to finalize the TMDL.

The Tribe understands that the River is of deep importance to the citizens of eastern Washington, whose leaders have described it as their "gem," and that Ecology has a difficult job in preserving its values to the region. It is also critically important to the Spokane people. Known as the "Path of Life" to the Tribe, the river is revered for providing the Spokane people with both physical and spiritual sustenance. The river's importance to the Tribe has long been recognized by the United States government as demonstrated by the uncommon approach President Rutherford B. Hayes employed in 1881 to establish the Reservation's boundaries.

Using as borders Chamokane Creek to the Reservation's east, the Columbia River to its west, and the Spokane River on the south, President Hayes set the actual boundary at the opposite bank of each waterway, explicitly including the streams within the Reservation. This unique executive action was relied upon by a federal court – in a case in which Ecology was a party – as evidence that a fishery is one of the primary purposes of the Spokane Indian Reservation for which the Tribe holds water rights. *See, United States v. Anderson,* 591 F.Supp. 1, 5 (E.D.Wash. 1982)(recognizing that water quality must be sufficient to support the Reservation's fishery purpose). And of course, the fishery use reserved nearly a century and a half ago was a cool or cold water fishery, leading the *Anderson* court to hold that "[t]he quantity of water needed to carry out the reserved fishing purposes is related to water temperature." *Id.*

Beyond the fishery purpose, the *Anderson* court determined that an additional primary purpose of the Spokane Indian Reservation is agriculture, and that the Tribe holds federally reserved rights sufficient to satisfy its agricultural needs. Thus, the Tribe holds judicially determined rights to waters for fish and for agriculture – rights that include both quantity and quality that must be protected.

In the 1990s, the Tribe was confronted with myriad threats to its Reservation resources and to the health of its people. For decades, uranium mining and milling both on and off the Reservation released hazardous substances into the Reservation's waters. Heavy metals flowing down the Spokane River from Idaho's Silver Valley and down the Columbia River from British Columbia contributed to the threats. In response, Tribal leadership determined to assert its sovereignty pursuant to federal environmental laws, including the Clean Water Act. Tribal representatives endured under that Act an arduous six-year process, ultimately securing for the Tribe "Treatment as a State" status for administering Reservation water quality standards under Section 303(c) and for certification authority under Section 401. And in 2003, following public comment, EPA approved the Reservation's surface water quality standards developed by the Tribe with an eye specifically toward protecting the health of its membership and Reservation resources.

The Spokane Tribe characterized the Spokane River as excellent, and classified it as a Class A water body, as has the State of Washington. Both governments have also designated uses for the river that include salmonid migration, rearing, spawning and harvesting. These uses are consistent with the Tribe's federally reserved fish rights, and are also consistent with the Clean Water Act's stated goal of restoring and maintaining the chemical, physical and biological integrity of the nation's waters and to have water quality that provides for the protection and propagation of fish, shellfish and wildlife and for recreation. A high bar is thus set which, as discussed below as well as in Mr. Butler's attached memo, Ecology's proposed TMDL fails to clear.

The September, 2007 *Draft Spokane River and Lake Spokane Dissolved Oxygen Total Maximum Daily Load Water Quality Improvement Report* ("Draft TMDL") cites the fact that the Spokane Tribe's water quality standards are not being met as one of the reasons a TMDL is needed. Draft TMDL at vii, 7, 15. This fact is correct, and for several years has been repeated to Ecology both verbally and in writing by representatives of the Spokane Tribe's Department of Natural Resources. *See,* Chris Butler memorandum, attached. Unfortunately, the Draft TMDL then offers nothing of substance to indicate that Ecology's efforts will lead to attainment of the Tribe's standards. Rather, the TMDL contemplates staying the course it sets for ten years, at which time Ecology may entertain eliminating one or more of the Spokane River's designated uses pursuant to a use attainability analysis ("UAA"). The fallacy in this approach is that it wrongly employs UAA and elimination of a critical designated use as a default position when such measures were instead intended by Congress to be used only in rare instances.

The national goals stated in the federal Clean Water Act are to restore and maintain the chemical, physical and biological integrity of the nation's waters and to have water quality which

provides for the protection and propagation of fish, shellfish and wildlife and for recreation. 42 U.S.C. Sec. 1251(a). Given such goals, Congress structured the Act to include a savings clause that allows sovereigns like the Spokane Tribe and the State of Washington to set standards more stringent than federal standards when necessary. 42 U.S.C. Sec. 1370. *See,* Amendments to the Water Quality Standards Regulations That Pertain to Standards on Indian Reservations, 54 Fed. Reg. 390098, 39099 (1989)(applying the savings clause of Clean Water Act Section 510 to Indian tribes). The savings clause thus enables states and tribes to aggressively act toward meeting the nation's goals through stringent standards that will "force the development of technology." *City of Albuquerque v. Browner,* 97 F.3d 415, 422 (10th Cir. 1996). The status quo was unacceptable to Congress when enacting the Clean Water Act, and remains so where the nation's goals remain unmet, like on the Spokane Indian Reservation. The TMDL improperly perpetuates this status quo.

Through its standards, the Tribe sought to protect its federally reserved rights to a cold water fishery. And through attending numerous meetings and repeatedly submitting comments over the years, the Tribe sought to advise Ecology of problems in attaining the quality needed for its fishery and to engage in meaningful intergovernmental cooperation toward a solution. Unfortunately, as discussed more thoroughly in Chris Butler's memorandum, the TMDL appears destined to fall short of meeting the Tribe's needs despite the Clean Water Act's direction that downstream standards be addressed. *See,* 40 C.F.R. 122.4(d)(standards); 40 C.F.R. 123.44(c)(2)(permits); 40 C.F.R. 131.10(b)(use designations). *See also,* Amendments to the Water Quality Standards Regulations That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64876, 64887 (1991) (NPDES permits). The Draft TMDL contains no analysis directed at the Tribe's impaired waters, nor any suggestion of how those waters might in the future be improved. In establishing a TMDL, the load shall include a margin of safety that accounts for any lack of knowledge about the interplay of effluents to water quality and protection of propagation of species. 33 U.S.C. Secs. 1313(d)(1)(B) and C). Because Ecology has failed to consider such relevant factors, analytical gaps exist and this requirement has thus not been met.

But even if Ecology doesn't attempt to take the extreme step of eliminating river uses in ten years, the TMDL still is set to be in place for the unreasonable period of twenty years. The Tribe's water quality is impaired today, and if the TMDL proves a failure, the likelihood of improvement may well be diminished by the procedural and legal inertia the TMDL establishes. Moreover, as noted earlier, one of the primary purposes of the Spokane Indian Reservation is agriculture. With the load allocations set upstream, little room for the Tribe to exercise its rights – rights that are federally-protected and which pre-date virtually all on the Spokane River system. Tribal representatives throughout the process have heard upstream interests complain that their ability to engage in economic pursuits will be hampered by enforcement of applicable standards. The social and economic impacts, it is said, will be tremendous. But the consequence of moving forward under a failed approach is exponentially greater for the Spokane Tribe, whose ability to exercise its agriculture right already is stunted, and its cold water fishery is in jeopardy. In this regard, the social and economic impacts to the Tribe associated with the potential for failure and with the unreasonable twenty-year period for the TMDL have improperly not been addressed by the State.

Two additional problems exist with the TMDL's approach that Ecology should address, both of which are discussed in Chris Butler's memo. First, Ecology's approach of setting TMDLs separately for branches of a stream, and even segments within the same stream, not only defies logic as Mr. Butler points out, but confounds the Clean Water Act's intent of ensuring that downstream standards are appropriately addressed, and is, therefore, improper. Second, given that the reach of the Spokane River that lies within the Reservation is impaired, the point of compliance for the TMDL should be located there, rather than upstream. A nearby example of this approach is Long Lake, which serves as the point of compliance for TMDLs in Idaho's Silver Valley.

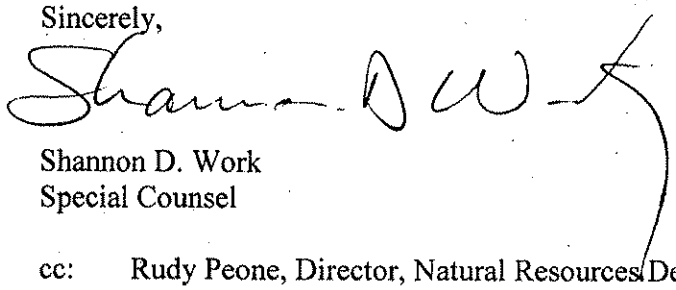
The Tribe takes issue with implications of intergovernmental coordination contained in the Draft TMDL at page 60. There Ecology states that it "will *continue* to work on a government-to-government basis with the Spokane Tribe of Indians to *ensure compliance with downstream Tribal water quality standards*." (Emphasis added.) Given the absence of analysis directed at the Tribe's waters, despite the issues being regularly raised by tribal representatives and despite Tribal offers since 2004 of relevant related data, it is a misstatement that Ecology has worked with the Tribal government to "ensure compliance" with its standards. Many people today view Indian tribes as historic relics. As shown above, however, modern tribes are vibrant governments, actively exercising sovereignty to protect their people and their Reservations. Inviting a tribe to stand with myriad "stakeholders" is far from working on a "government-to-government" basis. In fact, because the Ecology's process has not appropriately included the Tribe as a government, policy-level representatives asked that these comments include a request for the Tribe's name be removed from the Foundational Concepts document, Appendix B to the Draft TMDL. Furthermore, the Tribe views the structure of the Oversight Committee suspect, with the dischargers being placed in a decision-making capacity and the Tribe – an affected downstream government – merely playing an advisory role. Nonetheless, the Tribe will continue to work toward a cooperative relationship with the State of Washington with the hope that it will result in the protection of the Spokane River and all who use it.

In that vein, the Tribe is scheduled imminently to provide the Department with recently compiled data that would be useful to solving mutual intergovernmental problems in the Spokane River. Ecology should revisit its analysis in light of the Tribe's often-raised concerns and of the new data to be provided. Doing so would lend credence to the above challenged statement and to the process employed by Ecology.

As noted above, the attached memorandum prepared by Chris Butler of the Tribe's Natural Resources Department raises additional technical and procedural issues, and provides recommendations that are now directed to Ecology by virtue of this submittal. Those comments support this letter and the Tribe's view that, consistent with its comments, Ecology should fill numerous analytical gaps and revisit various important parts of its analysis before finalizing its TMDL.

The Tribe appreciates this opportunity to submit comments, and hopes they will be given due consideration. Please advise my office of all further activities pertaining to this matter.

Sincerely,



Shannon D. Work
Special Counsel

cc: Rudy Peone, Director, Natural Resources Department, Spokane Tribe of Indians
Brian Crossley, Program Manager, Water and Fish Program, Spokane Tribe of Indians
Chris Butler, Biologist, Water and Fish Program, Spokane Tribe of Indians
Mike Gearheard, Director, Office of Water, Region 10, U.S. EPA

Spokane Tribal Natural Resources
P.O. Box 100 • Wellpinit, WA 99040 • (509) 258-9042 • fax 258-9600

MEMORANDUM

TO: Rudy Peone, Director

From: Chris Butler, Water and Fish Biologist

Date: October 29, 2006

Subject: Comments pertaining to the draft Dissolved Oxygen Total Maximum Daily Load (D.O. TMDL).

cc: Brian Crossley, Program Manager

The following memo is in regard to the draft D.O. TMDL that was released by the Department of Ecology (DOE) for the Spokane River and Lake Spokane (Long Lake). This program focused on issues affecting water quality and tribal uses. This TMDL has long term implications for water quality in Tribal waters as the implementation plan is being stretched out for 20 years.

This department's motivation for the Tribes Water Quality Standards are to *protect and enhance tribal traditions*. Through the TMDL process we have been expecting that the Environmental Protection Agency (EPA) trust responsibility to ensure that the State of Washington and up river point sources do not ***cause or contribute*** to violations of our water quality (would be protected). Though this D.O. TMDL should improve both phosphorus and no-point source reductions, Tribal waters will suffer low levels of dissolved oxygen (D.O.). The following comments are based on Tribal water quality standards and the efforts of maintaining a ***cold and cool water fishery*** **(salmonids)** for the Spokane Tribe of Indians.

1. As we have commented before and we will do so again, **the boundaries of the TMDL do not ensure attainment of the Tribe's standards**. A point of compliance in the Spokane Arm of Lake Roosevelt would. When treating a water body for impaired waters we believe that you cannot be successful in only treating portions of that water body ie; the Spokane River. You need to look at the watershed as a whole. The TMDL should start at the confluence of the Spokane River and Columbia River and continue to the headwaters above Coeurd'Alein Lake. This should also include the TMDL's that are being implemented or developed on additional water bodies within this same watershed. Department of Ecology needs to challenge EPA on cross boundary issues as well the Tribe needs to insist on a point of compliance within Tribal waters so the watershed may be treated as a whole.

The Spokane Tribe has commented since 2004 that we have impaired waters downstream of Long Lake Dam. The Tribe has offered up the Spokane Tribes river data to DOE, EPA, and CH2MHILL which showed exceedances of the Washington State water quality standards as early as 1988 and the Tribes water quality standards since 2003. In addition we have pursued some recent studies that took place in the year of 2006 that indicates that the problems are more severe than previously thought.

Due to recent events, (a presentation at the WALPA conference of our 2006 data); DOE is finally interested in what the tribe has had to offer for many years. The disc that is being submitted with these comments contains the raw data that was collected in 2006. The data will show how impaired the waters are in the lower arm of the Spokane River. This is the data that has been requested and will be release to DOE. This technique by DOE appears as two governments working together; though it is a little late based on the D.O. TMDL time line.

Because of the events and the order for which everything took place, I am recommending that the Spokane Tribe with the support and guidance of EPA conduct a TMDL on the Spokane River below Long Lake Dam down to the confluence of the Spokane River and Columbia River (tribal waters) as a point of compliance for the current TMDL. By doing so, **the Spokane Tribe can request to reserve the right to implement their TMDL onto the Spokane River D.O. TMDL in the future.**

2. Dischargers report that Technology is not available to regularly achieve the limits set by the D.O TMDL. In addition they also report that it will cause to much hardship to the residences of Spokane County, ***however the technology is available and it is affordable***. The Spokane Tribe recognizes that in ***rare*** events the technology might not allow them to meet the TMDL limits.

I would like to point out that EPA Region 10 released: "*Advanced Wastewater Treatment to Achieve Low Concentration of Phosphorus*". This report shows target numbers that are being met and cost range from $18.00 to $48.00 per household. I would also like to reference another study: Professor Petter D. Jenssen ; *Design and Performance of Ecological Sanitation Systems in Norway*; University of Norway. This technology shows how they are recycling phosphorus out of waste because phosphorus is a limited resource. **Technology is here and available.** I would also like to point out that the Spokane Tribe spends millions of dollars in a cold and cool water fishery in the Spokane River and Lake Roosevelt. Dischargers need to realize that the Spokane Tribe has an enormous amount of equity in the waters down stream of Long Lake Dam. A recent survey by Robison Research shows that the largest percent of the people in Spokane County, Stevens County, and Lincoln County spend their time between Long Lake Dam and Lake Roosevelt. These individuals are utilizing the resource that the Tribe is working hard to protect and it should not be ignored by municipalities state or federal agencies.

The hardship actually appears to be with the Spokane Tribal members and all the individuals that utilize the Spokane River and Lake Roosevelt below Long Lake Dam. **The Spokane Tribe cannot accept the excuse of the discharges "***technology is not available***".** The dischargers upstream of the reservation need to realize that actions done today will most definitely impact them in the future.

In addition, discharges also appear to be over relying on non-point source reductions. Discharges hope to meet the targeted loads by reducing non-point sources and receiving that credit. The best known reports show a reduction of 6%-18% for non-point source removal. Dischargers should not be allowed any credit for non-point source removal until a **D.O. TMDL limit is met**. In addition, *as I have commented before and I will do so again the Spokane Tribe is opposed to additional dischargers or additional loading limits in the Spokane River*. Just because the county has been partaking in the TMDL does not mean they should be allowed into the Spokane River as a new discharger. Although the Tribe supports the septic tank elimination program, the County plant should not be allowed to gain credit to discharge to already impaired waters. With the growth of the City of Spokane and outlying areas, now is the time to consider one hundred percent reclaimed water and aquifer recharge by the county plant.

3. The Spokane River TMDL Oversight Committee is a good group to have for the future of the Spokane River. This department also agrees with the advisory group and technical groups; however, the Oversight Committee is made up of entirely dischargers whereas DOE is a non-voting member. This Oversight Committee has the fate of the Spokane River in its hands. **The Oversight Committee should include independent scientists, members of elected governments, and one discharger from each state to represent the group of dischargers.** Discharges have already shown what they can do to the Spokane River.

4. The D.O. TMDL is quiet to Avista's contributions in Spokane River. Dams on the Spokane River cause a lower dissolved oxygen level. The Spokane Tribe needs to

demand that the TMDL include the reservoir effects caused by Avista and incorporate Avista into the overall solution.

5. The D.O. TMDL **lacks incentive for the dischargers**. There are no enforceable limits in the D.O. TMDL for the dischargers for 20 years. Dischargers don't have to have new technology's in place or up and running for the first 12 years; *the TMDL calls for a 10 year assessment or check in*. The TMDL states that if sufficient improvements have *not been* met; the dischargers have insisted, and *DOE has agreed*; **to consider lowering the standards**. The draft D.O. TMDL states many times "Other strategies could include Lake Spokane oxygenation, **modify the dissolved oxygen water quality standard for the Spokane River or Lake Spokane**, or issuing variances". In addition, the draft D.O. TMDL, Pg. 69 has the, "Managed Implementation Plan (MIP) Tenth Year Decision Diagram", which modifies the standard. The Spokane Tribe has commented on these issues before.

This does not support tribal water quality standards. It does not protect the cold and cool water fishery that exists below Long Lake Dam. The Clean Water Act states that if a "**use**" exists, it has to be protected. **I recommend that the Spokane Tribe demand removal of any referencing to the lowering of the standards**. Simply put, the tribe cannot support lowering of water quality standard prior to getting discharges out of the Spokane River.

6. The draft D.O. TMDL, Pg. 74 "Spokane River TMDL Collaboration Members and committee" shows a list of everyone that has participated within the Collaboration. The list comes across that myself and the Spokane Tribe has agreed with everything that is said within the TMDL, MIP and the Foundational Concepts.

I recommend that the **Spokane Tribe ask that there name be removed from the list of agreement.** The Tribe cannot support "modifying standards / UAA". I have commented on these issues before, yet these recommendations appear as no concern. They do not protect the tribe's efforts for a cold and cool water fishery.

7. The **loss** of three scientists that were heavily involved in the D.O. TMDL project. Suspiciously, the TMDL might be set for failure even with the reductions that are being proposed for Long Lake. The three scientists were effectively removed, stepped down, or quit due to upper management decisions.

I think the Spokane Tribe should comment to DOE on this issue simply because it shows **extreme caution** to everyone but DOE and EPA.

8. In addition, I have gone back and reviewed every comment/comment letter that we have produced since our participation with the TMDL. I am submitting portions of those comments that have not been addressed. I am submitting a graph that shows D.O. exceedances from 1988 to 2006, collected by the Lake Roosevelt Fisheries Evaluation Program (LRFEP) and another, showing profiles of D.O. from Little Falls Dam to the mouth of the Spokane River (SA1-SA5); from the study that was done in 2006 by Water and Fish Program and LRFEP.

December 20, 2004

Kenneth Merrill
Department of Ecology
4601 N. Monroe Street
Spokane, WA 99205-1295

Dear Ken

The following letter is regarding concerns and comments that the Spokane Tribal, Dept. of Natural Resource have on the Total Maximum Daily Load for Dissolved Oxygen (TMDL D.O.) that is being developed for the Spokane River. First and foremost the Spokane River is very significant to the Spokane Tribe for spiritual and cultural reasons, it's resources, and great measures need to be taken to ensure the rivers health.

The Spokane Tribe has Water Quality Standards that apply to the lower 34 miles of the Spokane River. These Water Quality Standards were approved by Tribal council in 1997 and promulgated by EPA in April of 2003. Department of Ecology needs to consider the Tribes water quality standards when finalizing the TMDL. It was brought to our attention many years ago that the river had severe problems with dissolved oxygen, temperature and total dissolved gas. It was also brought to our attention more recently when CH2MHILL demonstrated that the D.O. levels coming out of Long Lake have been exceeding Washington State Water Quality Standards for many years (April 1999 through March 2002 for Avista). Our monitoring on the Spokane River has indicated that D.O. is well below the 8 mg/L standard.

We feel that in order to solve the low D.O. problem in the Spokane River, specifically the waters below Long Lake Dam, it is imperative that the dischargers work with Avista as they look at obtaining 401 certification of the Spokane River Dams for the next 50 year license. WDOE will certify through the 401 certification that water quality standards will be met, as well as identifying which measures will need to be taken in order to meet those standards. There should be close coordination between the TMDL process and the 401 certification process as they are both attempting to accomplish the same result.

During the critical low flow months of June through September, the data released from CH2MHILL shows a low of 4.7 mg/l in August of 2000 and 4.7 mg/L for September of 2001. The Lake Roosevelt Fisheries Evaluation Program showed D.O.

levels exceeded State and Tribal Standards in the months of July and August at Porcupine Bay (Lee, C. B. Scofield, D. Pavlik, K. Fields. 2003 LRFEP 2000 AR BPA Proj. # 94-043-00 Portland, OR.). The Water and Fish Program has a monitoring station located on the Spokane River, above the confluence of Tshimikain Creek. This station showed a low of 3.89 mg/L on September 2, 2004 (see D.O. summary at the end of this letter). Another monitoring station located below Little Falls Dam showed a low of 4.19 mg/L on September 23, 2004. This monitoring has revealed D.O. levels below our standard of 8.0 mg/L from mid July to October of this year.

For many years the Spokane River has been in trouble and not just regarding D.O. but also for total dissolved gas, temperature, and metals. The nutrient loading that is produced by both dischargers and non-point discharges is exceeding what the Spokane River can assimilate. With talks of another waste water treatment plant wanting to discharge to the river, now is the time to plan for the future and not allow another discharger into the river. Technology should allow for this new plant to find alternate means of waste disposal instead of relying on the Spokane River. Because of population growth, re-use technology is mandatory. Now, is the time to stop looking at the river as a means of disposing of waste and start looking at the river as an asset that needs protecting.

The UAA group is recommending that the D.O. standards should be lowered and that the fishery should be changed to a mixed fishery. This would shift Long Lake's cold and cool water fishery to a cool and warm water fishery. The D.O. levels the UAA representatives are recommending should be a level that allows for salmonids to thrive, rather than merely a level that would only allow for salmonid survival. The Lake Roosevelt Developers Association, Washington Dept. Fish and Wildlife Hatcheries, and Tribal Hatcheries have been releasing salmonids since July of 1988 into Lake Roosevelt and the Spokane Arm. They release 500,000 rainbow trout and 1,000,000 kokanee annually. This year alone 1.8 million kokanee were released. In 2002, the creel survey revealed 2.2 million angler hours on Lake Roosevelt and the Spokane Arm, which equates to 433,917 angler trips with 75% of the anglers targeting salmonid fishing (Lake Roosevelt Fisheries Evaluation Program, 2002 A.R. preliminary). Downstream efforts have been to maintain a cold and cool water fishery. Changing Long Lake to a cool and warm water fishery would only make years of downstream effort seem insignificant. If the UAA's efforts were approved, the reduction in the salmonid fishery in Lake Roosevelt and the Spokane Arm would have an impact on the economy surrounding Lake Roosevelt, the Spokane Arm, and Tribal businesses. Lowering the D.O. standards in Long Lake, and then having to meet our D.O. standards just downstream is ludicrous. It is the responsibility of EPA to consider our water quality standards first, and to ensure that lowering the standards up stream and changing the fishery is ***NOT*** the pathway considered, and that regulating point and non-point discharges is the best option for everyone.

An additional concern of the Spokane Tribe is the UAA groups recommendation that the river be divided into sections that are utilized by certain aquatic species for certain times of the year. The Tribal and State Standards below Long Lake Dam will continue to be exceeded and this does not provide a viable solution to the problem.

The Spokane Tribal Water and Fish Program is glad to see that the low D.O. levels are being addressed at this time, however we were concerned to see the comment

period extended another month and think this should be avoided in the future. The TMDL has been put off now for two years and it is time to move forward with finalizing it.

It has come to the Spokane Tribal Water and Fish Programs attention recently that CH2MHILL is one of the lead contractors for EPA on the clean up of Lake Roosevelt. We commend CH2MHILL for the steps that they will be taking in the future to clean the Columbia River system. We are concerned that this may be considered a conflict of interest for CH2MHILL or EPA. On one hand you have a corporation making major strides in a leading role of water clean up, yet you have that same corporation's effort protecting major dischargers on the Spokane River of continued efforts of degrading a water system. It would appear that CH2MHILL and stakeholders have little regard for downstream water quality.

Sincerely,

_____

Brian Crossely,
Water and Fish Program, Manager

April 26, 2005

Dear Mr. Gearheard and Mr. Manning

1. We understand that the TMDL has escalated to upper management but feel that local experts from Ecology that have worked on the TMDL be represented in the work groups. (i.e. Kenneth Merrill)
2. It appears that the focus is only on the technology for the end of pipe discharge. We feel it should be focused on all processes for phosphorus removal, as now is the time to move forward with reuse options with the building of a new plant for Spokane.
3. At the meeting on April 13, 2005, several drafts were released. Draft 4.3, paragraph **Workgroups**, reads as follows; "To facilitate faster consideration of several issues, reach agreement on a Proposed Implementation Plan, and develop and employ the **Use Attainability Analysis**, several workgroups will

undertake different charges simultaneously." Although a UAA may declare that upstream waters are a cool and warm water fisheries, the waters below are considered a cold water fishery and the species are present to verify it. It is our recommendation that the focus be on the **Implementation Plan** not on the development of the UAA.

4. The Non-point source work group, identified in draft 4.3 is an excellent work group. This work group is excellent for targeting non-point sources, but should be considered a long term effort not likely to make changes within five years. Whereas controlling point sources could show improvements much sooner.

DOE Meeting 1/10/2006

History on Tribe and Traditions?

Tribal Concern

- **Tribe started conducting water quality surveys in 1988.**
  D.O levels have exceeded state standards since 1988 and tribal standards since 2003.

Long Lake Dam discharge at the tribal boundary:

- 2004 dissolved oxygen low was 3.89
- 2005 dissolved oxygen low was 3.86

Reported in; Lake Roosevelt Fisheries Evaluation Program, and Water and Fish Resource annual reports.

Dischargers Scenario states: Avista will develop and implement a tailrace D.O. enhancement program aimed at achieving the D.O. standards downstream of Long Lake Dam.

Tribal concern: These efforts are commended but our concern is that this has the potential to increase water temperatures downstream.

- 2005 highest temperature recorded at Tshimikain boundary was 20.48 C.

The tribe is trying to maintain a cold and cool water fishery. The tribal interests are; maintaining a salmonid fishery and re-establishing anadromous runs to the area. Return of anadromous runs to the area would change "USES" for the Spokane River.

Glad to see a recommendation of class (A) water for the dischargers by DOE.

But!

Discharges scenario states: When river flow exceeds 25,000 cfs, flows into the city of Spokane's Riverside Park Water Reclamation Facility increases to the point that filtration

systems are not effective. Therefore, final filtration will not be required for the City of Spokane when river flows exceed 25,000 cfs.
DOE'S scenario response: Re-use is in greatest demand during the months of greatest concern for the river.
Tribal Concern: Because of Grand Coulee dam holding water back and the level of the pool; the nutrients and sediment that come down the Spokane River will fall out once they enter the slack waters by the Sand Bar in the Spokane Arm. The tribe is dealing with anoxic waters due to nutrient loading. It would be best if dischargers maintained a class (A) discharge year round.

The Tribe cannot support a Use Attainability Analysis or site specific criteria and we would hope that DOE and EPA would not be able to either.

Dischargers scenario states: If the recalibrated TMDL model establishes that the dischargers and Avista have not met the TMDL's target, then Ecology, the dischargers and Avista shall jointly develop a UAA and/or site specific criteria for waterbodies that are the subject of the TMDL (Spokane River and Long Lake Reservoir) to determine existing and attainable uses in those waterbodies and/or the appropriate numeric and narrative criteria for supporting the designated uses.
Tribal Concern: A UAA is not protective of tribal uses such as: mountain whitefish, brown trout, kokanee, sturgeon, and of course the Lake Coeur d'Alene Chinook fall outs. The solution would be the removal of phosphorus and/or dischargers. An additional concern of the Spokane Tribe is the dischargers recommendation that the river be divided into sections or (site specific criteria), that are utilized by certain aquatic species for certain times of the year. Once again this is just another attempt to promote the UAA. The Tribal and State Standards below Long Lake Dam will continue to be exceeded and this does not provide a viable solution to the problem.

February 8, 2005

Mr. David Peeler
Water Quality Program Manager
Department of Ecology
P.O. Box47600
Olympia, WA 98504-7600

Dear Mr. Peeler

We would like to thank you for involving us in the decision process and would like to add that we would like to be notified of any and all decisions pertaining to the UAA and the Spokane River in the future.

We are assured that EPA will not approve of something that moves further away from our already exceeded dissolved oxygen (D.O.) standard.

The Spokane Tribe feels that the efforts made upstream do not give much consideration for the tribe's efforts down stream. We will continue to operate a cold and cool water fishery and we will continue our efforts to restore anadromous runs.

TO: Rudy Peone, Director

From: Chris Butler, Fisheries Biologist

Date: February 15, 2005

Subject: Comments pertaining to the use attainability analysis (UAA) being done on the Spokane River and effects that it will have on tribal waters.

The following memo is regarding water quality on the Spokane River and the use attainability analysis UAA. This program has attempted to focus on issues that would have an effect on both uses and tribal traditions. Because of the time line given, I will be commenting on a general overview on the UAA and issues pertaining to tribal waters.

General Comments

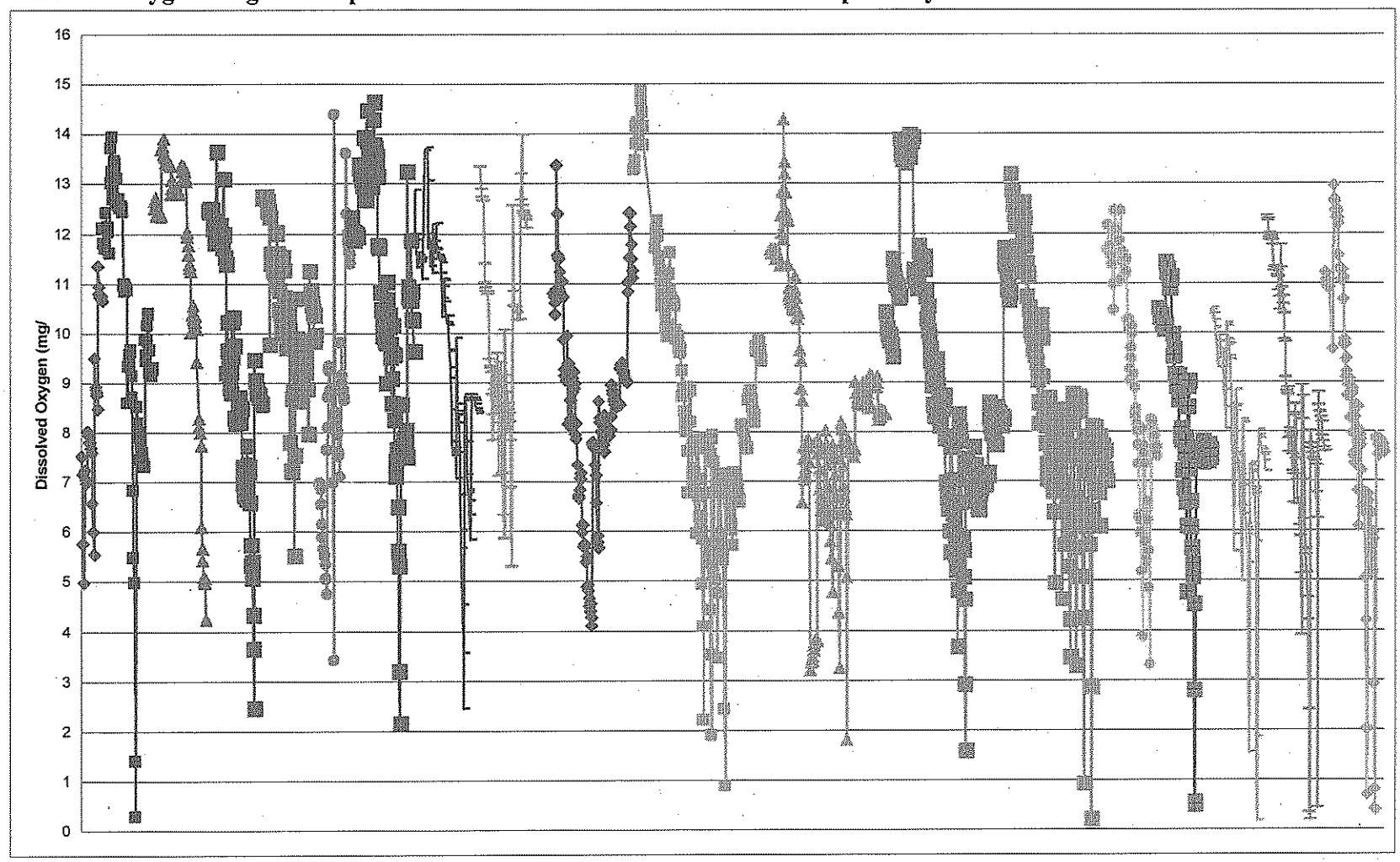
1. The executive order of 1881 lists the southern boarder of the Spokane Tribe as the south bank of the Spokane River. Our Water Quality Standards list the Spokane River as a class A water body which is set in order to protect all aquatic species and tribal lifeways. The UAA that was done above tribal waters is not being protective of our uses.
2. Over the last year our program has been monitoring total dissolved gas (TDG), dissolved oxygen (D.O.), and temperature on the Spokane River. All three standards are being exceeded throughout the year. Monitoring has indicated measurements as low as 3.89 mg/L at our eastern boundary this year for D.O. Our Lake Roosevelt Fisheries program can concur this as well for there monitoring at Porcupine Bay each year has shown exceedances as far back as 1998 and sporadic exceedances since 1988. Monitoring by CH2MHILL for Avista 1999-2002 showed D.O. being exceeded in the months of July, August, and September.

3. This is a concern of our department because the low D.O. levels and high temperatures are most definitely going to have an impact on our salmonid fishery in the Spokane River and tribal traditions. Long Lake has the same uses as we do, yet the UAA wants to ignore certain species in order to lower D.O. levels during the low flow period. The low D.O. levels received are during the fall spawning. The adfluvial fall run that we receive in tribal waters is forced to stage and spawn in levels that can have enormous mortality rates on our salmonid fishery. Low oxygen levels passing over the eggs may not just increase mortality rates but may also increase genetic deficiencies within the developing fry.
4. From the beginning of the UAA process, this department was informed that our standards downstream from the discharges would be considered and that communications between the tribe and UAA representatives (CH2MHILL, stakeholders) would be ongoing. Other than our first meeting with CH2MHILL in August of 2003, there have been no attempts to consult on specific issues that our department may have, except for the UAA work groups. On June 15, 2004 I requested the UAA references and only received one quarter of them. The calendar schedule released by CH2MHILL when the UAA began showed time periods for working with the tribe, this has not been met, and some of my emails have had no response. Comments for the UAA, produced by the tribe, have gone unanswered (until the final draft was released) and recommendations within the UAA have not been considered. Under the consultation section with tribal governments, it is said that a meeting on August 5, 2004 took place between the City of Spokane and tribal fisheries management staff. According to our records there was no such meeting. It is the Spokane Tribe's fishery staff's perspective that the biological assessment data is misinterpreted and only serves the interest of reducing D.O.
5. In the UAA species are listed yet preference and tolerance levels in most of the species are left out. This was brought to their attention before but UAA representatives choose to ignore in hopes to not acknowledge certain species, such as mountain white fish, kokanee, brown trout, and Chinook fall outs from Lake Coeurd'Alein. By targeting these species all other species will be protected. These are all fall spawners and these are the main species the UAA representatives would like everybody to forget about. This would allow them to change the fishery to a mixed fishery which would allow them to lower the D.O. standard for the low flow months. We have these uses and more sensitive species just down stream in tribal waters so we are forced to protect our uses in tribal waters.
6. The City of Spokane is going to continue to grow. The low D.O. levels are going to become an increasing problem as time passes. Currently D.O. levels fall below the standard three months out of the year. Lowering the D.O. standards and separating season and uses in order for dischargers to meet the standards is not the solution to the problem. On July 27, 2004 the Spokane Tribe fisheries staff attended a seminar put on by Micro-Media filtration sponsored by DOE. It was recognized that not only is dual-sand filtration

proven technology but that it would meet the target of the TMDL on a seasonal basis and it is most definitely cost effective for the City of Spokane. Other technology such as two stage filtration of secondary effluent is also considered proven technology and should be considered by the dischargers instead of just "the next level of treatment".

7. There are many water quality processes underway on the Spokane River. Besides the D.O. TMDL and the UAA, the Spokane FERC project re-licensing is proposing extensive changes to the way water is managed in the river and 401 certifications are required for license approval. We would hope that the dischargers can work with the other interest (mainly Avista) to jointly improve the water quality and create a partnership acceptable by all.
8. This department feels that the efforts made upstream do not give much consideration for the tribe's efforts down stream. We will continue to operate a cold and cool water fishery and we will continue our efforts to restore anadromous runs.

Dissolved Oxygen ranges from profiles collected from 1988 to 2006 at Porcupine Bay.



Dissolved Oxygen ranges from profile data collected in the Spokane River and Seven Bays 2006.