Executive Correspondence

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Constituent: **Gannett, Craig - (Representing Avista)**

Subject: Spokane River TMDL

Assigned to: Susewind, Kelly D

Organization: WQ-Ops

Coordinate With: Tom Laurie

Signature Required: DIRECTOR

Contact Person	In	Out
Smith, Diane		

CC (To be noted on letter)

Tom Laurie, Grant Pfeifer

Phone Log (If Appropriate)

Comments:

Tom Laurie to review draft before submitted to Jay (through Bernadette).

3/9 - Hardcopy to Jay

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March 5, 2009

Mr. Jay Manning
Director
Department of Ecology
State of Washington
P.O. Box 47600
Olympia, WA 98504-7600

RE: Spokane River TMDL

Dear Mr. Manning:

On behalf of Avista Corporation (Avista), I am writing in response to the October 24, 2008, letter from Mr. Kelly Susewind of your office to Mr. Michael Gearheard of the EPA Region 10 office regarding the interpretation of Washington's water quality standards applicable to reservoirs, particularly in the context of the Spokane River Dissolved Oxygen Total Maximum Daily Load (DO TMDL). Avista appreciates Ecology's efforts to clarify the application of its water quality standards to the Spokane River, and would like to add its own thoughts as the owner and operator of the Spokane River Hydroelectric Project, which includes Long Lake Dam and the reservoir it creates, Lake Spokane.

It is important to note at the outset that the legal interpretations contained in this letter do not necessarily define or constrain Avista's level of commitment to improving DO conditions in Lake Spokane. Avista is committed to doing its fair share, hopefully as part of an agreed-upon approach that enjoys broad support among stakeholders. Until we reach that point, however, it is important to understand each stakeholder's view of how the law may be applied in the event that broad agreement is not achieved.

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DEPARTMENT OF ECOLOGY
OFFICE OF DIRECTOR

A. Numeric Criteria Should Not be Considered in Isolation

In our view, Ecology should not evaluate compliance with the numeric criteria in isolation. Washington's water quality standards consist of three distinct but related components: (1) numeric criteria; (2) narrative criteria; and (3) existing and designated uses. This is made clear in the opening section of Washington's water quality standards: "Based on the use designations, ***numeric and narrative criteria*** are assigned to a water body to protect the ***existing and designated uses.***" WAC 173-201A-010(1)(a).

The same is true under EPA's regulations. When preparing a list of impaired waters under Section 303(d) of the Clean Water Act (CWA), the state must consider all three components. "For the purposes of listing waters under §130.7(b), the term 'water quality standard applicable to such waters' and 'applicable water quality standards' refer to those water quality standards established under section 303 of the Act, including ***numeric criteria, narrative criteria, waterbody uses,*** and antidegradation requirements." 40 C.F.R. § 130.7(b)(3) (emphasis added).

The relationship among these three components is also key. Numeric and narrative criteria are not promulgated as an end in themselves, to satisfy some theoretical notion of how a water body should perform. Rather, they are designed for a practical purpose: to maintain and protect existing and designated uses.

The Washington Pollution Control Hearings Board (PCHB) has recognized this principle. Relying on the Supreme Court's seminal *Jefferson County* decision, 511 U.S. 700 (1994), the PCHB held in 2004 that "water quality standards are not established for their own sake, but rather, for the purpose of protecting and restoring designated uses." *Confederated Tribes of the Umatilla Reservation & the Columbia River Inter-Tribal Fish Comm'n v. Dep't of Ecology, Pub. Util. Dist. No. 1 of Chelan County*, PCHB No. 03-075, at 27 (2004)(commonly referred to as "the Lake Chelan case").

In doing so, the PCHB firmly rejected a narrow focus on numeric criteria. "Appellants dispute the legality of using biological objectives as a substitute for numeric criteria. Their approach calls for strict adherence to the numeric criteria contained in the water quality regulations, ***as if attainment of such criteria would actually establish or protect the designated uses of the Chelan River.*** The Board disagrees." *Id.* at 25 (emphasis added). The Board concluded that the ultimate goal of numeric criteria is to protect such uses. "Appellants' contention that the Clean Water Act requires strict adherence with numeric water quality criteria is an incorrect reading of the requirements of §401 of the Clean Water Act." *Id.*

Ecology's October 24, 2008, letter focuses solely on the 0.2 mg/L numeric criteria for DO. It makes no mention of either the narrative standards or the current status of the relevant existing and designated uses. We believe that Ecology should evaluate compliance with the numeric criteria in light of the current status of these uses, as explained further below.

B. The Existing Uses in the Spokane River are Being Maintained and Protected, with the Possible Exception of One Species that has Declined for Reasons Unrelated to Avista's Dams

Washington's narrative water quality standards require: (a) that existing uses be maintained and protected, as required by its antidegradation policy; (b) that designated uses be protected; and (c) that dam owners who have caused a violation of the water quality standards undertake all "reasonable and feasible" measures to achieve compliance. Existing uses are the uses that were actually attained on or after November 28, 1975, whether or not designated. WAC 173-201A-020; 40 C.F.R. §131.3(e). In this case, the primary existing uses of the Spokane River are aquatic life, recreation, and water supply for domestic, industrial, and agricultural purposes. Thus far, there has been no debate over whether recreation and water supply uses in the Spokane River are being maintained and protected.

As to aquatic life uses, diverse fish populations inhabit the Spokane River, including Lake Spokane. Resident native fish throughout the River include sucker, northern pikeminnow, redside shiner, resident rainbow trout, and mountain whitefish. Salmonids found in the lower reach include rainbow trout, brown trout, and mountain whitefish.

None of these fish species are listed under the Endangered Species Act or as species of concern to Washington State. To the contrary, WDFW manages the free flowing reaches of the Spokane River as a wild trout fishery, with no supplemental stocking. WDFW manages Lake Spokane as a mixed-species fishery, and has stocked the lake with several species, including rainbow trout, brown trout, and eastern brook trout.

We are aware that Spokane River wild rainbow trout have suffered significant population declines over the last 20 years in the reach of the River ***upstream*** of the City of Spokane's Upriver Dam (O'Connor and McLellan 2008). All of Avista's Washington's dams, however, are located ***downstream*** of the Upriver Dam, and have no influence on the reach above the Upriver Dam. In addition, their operation has not changed significantly in almost half a century. This is strong evidence that the population declines are not being caused by the operation of Avista's Washington dams. Instead, other factors are causing the decline, such as the introduction of predatory and competing non-native fish, illegal harvest, and harm to habitat caused by mining, roads, urban development, and other factors.

C. The Designated Uses of the Spokane River are Being Protected

EPA regulations provide that "designated uses are those uses specified in water quality standards for each water body or segment whether or not they are being attained." 40 C.F.R. § 131.3(f). Water quality criteria must be "sufficient to protect the designated uses." 40 C.F.R. §131.6(c).

Washington's water quality standards designate a total of 13 uses for the three relevant segments of the Spokane River, including various aquatic life uses, recreation uses, water supply uses, and miscellaneous uses. As far as we know, the ***only*** designated use in question is that of "core summer salmonid habitat" in the segment of the River that extends from the Nine Mile Bridge to the Long Lake Dam.

Ecology defines "core summer salmonid habitat" as follows:

> The key identifying characteristics of this use are summer (June 15 -- September 15) salmonid spawning or emergence, or adult holding; use as important summer rearing habitat by one or more salmonids; or foraging by adult and sub-adult native char. Other common characteristic aquatic life uses for waters in this category include spawning outside of the summer season, rearing, and migration by salmonids. WAC 173-201A-200(1)(a)(ii).

It is important to note that most of this definition is in the disjunctive form, describing a series of uses, separated by the word "or" rather than "and." In other words, it only requires salmonid spawning, or emergence, or adult holding, or use as important summer rearing habitat, or foraging by adult and sub-adult native char, or spawning outside the summer season, or rearing, or migration by salmonids. It also does not require that the salmonids be wild. Therefore, this designated use appears to be met by virtue of the fact that numerous mountain whitefish, a salmonid, have been sampled in Lake Spokane (Osborne and Divens 2003).

On this point, Ecology asserted late last year that the: "State Department of Fish and Wildlife staff have documented rainbow trout spawning and rearing activities in" Lake Spokane. http://www.ecy.wa.gov/programs/wq/tmdl/spokaneriver/dissolved_oxygen/docs/TalkingPtsLkSpokane.pdf. In response to a December 11, 2008 request for such documentation, Ecology circulated a memo on February 3, 2009. That memo cites "incidental encounters" and "angler checks" as evidence that: "the river and shallow part of the upper reservoir and tributaries provide for spawning and rearing habitat while the lower reservoir is used for refuge and foraging."

This memo is important for two reasons. First, it indicates that salmonids are currently rearing in the Lake, as evidenced by foraging, thus supporting a finding that the designated use of "core summer salmonid habitat" is being achieved. Second, it indicates that potential habitat for spawning and rearing is provided in the "river and shallow part of the upper reservoir and tributaries . . . ." Avista would appreciate an opportunity to review WDFW's records of "incidental encounters" and "angler checks," in order to determine whether they indicate that rainbow trout spawning is actually occurring in the upper reservoir.

D. Ecology Should Establish Compliance Points for DO Consistent with Available Habitat

Avista understands and appreciates the importance of seeking to achieve numeric criteria. However, in order for numeric criteria to serve their intended purpose of supporting existing and designated uses, Ecology should establish compliance points consistent with the presence of available aquatic habitat. Ecology's water quality standards explicitly authorize such an approach, providing that: "D.O. measurements should be taken to represent the ***dominant aquatic habitat*** of the monitoring site." WAC 173-201A-200(1)(d)(iv) (emphasis added).

In this case, the habitat identified by WDFW is the spawning and rearing habitat in the river and shallow part of the upper reservoir and tributaries. This is consistent with the fact that the dominant aquatic habitat of a stratified water body is the area above the thermocline. In stratified water bodies, the area below the thermocline will have reduced DO due to natural biological processes, and thus cannot serve as the dominant aquatic habitat.

By establishing compliance points in that vicinity, Ecology can provide reasonable assurance that numeric criteria will be met where the other essential habitat conditions exist. Such an approach would also avoid an expensive, futile (not to mention legally indefensible) effort to achieve compliance with numeric criteria in those portions of the Lake where spawning would not naturally occur even under the most favorable DO levels.

Once such compliance points are at least tentatively determined, the ongoing modeling effort should be used to assess the extent to which numeric DO criteria are not being achieved at those points. That will, in turn, give all of the DO TMDL stakeholders a much better sense of the scale of what they are trying to achieve, and how our efforts may actually benefit the aquatic resources that are the object of Washington's water quality standards.

E. Avista does not share Ecology's interpretation of the definition of "lake" in WAC 173-201A-020

Avista agrees with Ecology that Lake Spokane has a mean detention time of greater than 15 days, and is therefore treated the same as a natural lake under WAC 173-201A-020. However, Avista cannot agree with Ecology's interpretation of this regulation, which would effectively nullify it. Rather than spend time debating that issue now, Avista would prefer to focus on a practical solution that Ecology and all stakeholders can wholeheartedly support.

F. The regulation providing a compliance schedule for dams includes important facets not mentioned in Ecology's letter

With respect to WAC 173-201A-510(5), the compliance schedule for dams, Avista would like to add three key points not mentioned in the October 24, 2008 letter. First, this regulation only applies ***after*** it has been shown that the dam caused a violation of a water quality standard. That's why WAC 173-201A-510(5)(b) begins with: "For dams that ***cause or contribute to a***

violation of the water quality standards, the dam owner must develop a water quality attainment plan . . . ." The same result is required by RCW 90.48.422(3), which provides that: "With respect to federal energy regulatory commission licensed hydropower projects, the department may only require a person to mitigate or remedy a water quality violation or problem to the extent there is substantial evidence such person has caused such violation or problem."

Second, the dam owner's responsibilities are limited to measures that are "reasonable and feasible." Third, in the event that the implementation of all reasonable and feasible measures does not achieve compliance with water quality standards, the dam owner may then propose an alternative to achieve compliance with the standards, such as a site specific criteria, a use attainability analysis, or a water quality offset. WAC 173-201A-510(5)(g)(ii).

In closing, I want to re-emphasize that Avista is committed doing its fair share to improve DO levels in Lake Spokane, and desires to move forward promptly with a TMDL that enjoys broad support among stakeholders. As part of that process, we fully agree with you regarding the importance of understanding of how Washington's water quality standards apply to dams. Although you may not agree with our legal interpretation in every instance, we appreciate this opportunity to share our perspective with you.

We hope that the foregoing is helpful in building a commonsense path forward. Avista appreciates the efforts of all involved, and looks forward to working through these issues in the coming months so that a successful, legally defensible DO TMDL can be expeditiously completed. Please feel free to call me if you have any questions or concerns.

Very truly yours,

Davis Wright Tremaine LLP

Craig Gannett

cc: Kelly Susewind – WDOE HQ
Tom Laurie – WDOE HQ
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