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ATT: Marla Koberstein
Department of Ecology
Preliminary draft variance comments
PO Box 47696
Olympia, WA 98504-7696

7/25/20

RE: Submission of informal comments on preliminary draft rulemaking 173-201A WAC (variances)

Dear Ms. Koberstein,

I am providing the following comments on the draft, preliminary variance process WAC 173-201A on behalf of the Spokane Riverkeeper. The Spokane Riverkeeper is a member of the International Waterkeeper Alliance and is an advocate for the Spokane River Watershed. Our organization works for a fishable and swimmable Spokane River. We use education, outreach, collaboration, and litigation to further policy goals that are a benefit to the Spokane River, the public, and their uses of the Spokane River.

These are informal comments that are meant to express our perspectives about the specifics of some of the draft materials provided as well as the general process of using variances in addressing complex environmental problems in the Spokane River Basin and the State of Washington.

General Comments:

For additional background, please re-visit the attached Spokane Riverkeeper/Puget Soundkeeper Alliance, scoping comments that have been re-submitted.

Discharger variances for PCB pollution do not protect downstream uses.

In our view, the obligation to protect downstream uses is not respected using the variance process. Additionally, any effort to coordinate around and/or accommodate for this lack of protection appears to be missing in the draft preliminary documents. While the discharger variances apply at the end of discharge pipes, toxic effluent can manifest its effects and degrade designated uses miles downstream in the food web through bioaccumulation and biomagnification of pollutants.

Federal and state water quality standard (WQS) regulations mandate that meeting and not harming downstream uses is a clear legal requirement. Yet in the Spokane River, all

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five variance applications are above a downstream jurisdiction, the Spokane Tribe, who has a tribal promulgated PCB water quality criterion of 1.3 pg/L. This central flaw calls into question the entire process and is only briefly mentioned in the Draft Technical Document (p.7). The EPA must disapprove of discharger variances if their requirements either do not represent the highest attainable condition of the water body or water body segment applicable throughout the term of the variances, or the variance would result in any lowering of the currently attained ambient water quality. According to sections 303 and 101(a) of the CWA, the federal regulation at 40 CFR 131.10(b) requires that “In designating uses of a water body and the appropriate criteria for those uses, the State shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters.”¹

Write a Total Maximum Daily Load (TMDL) Cleanup Plan for PCBs in the Spokane River. The Draft Environmental Impact Statement (DEIS) makes an argument that to proceed with the tool that the CWA has given us, the TMDL, is not adequate for several reasons. First, the Washington Department of Ecology (WDOE) cites a delay in the time to produce the PCB TMDL. In their guidance, WDOE asserts that a TMDL takes four years to produce. According to Washington State TMDL Guidance, the second and thirds years of TMDL production are those years where the data collection and analysis are accomplished². However, this is not a barrier to producing a PCB TMDL in under two years as much of this work has been accomplished by the Spokane River Regional Toxics Task Force (SRRTTF)³. In their letter to judge Rothstein in 2015, the EPA said that a TMDL could be produced using the SRRTTF scientific data if necessary.⁴ From a process standpoint, the Spokane River needs and deserves a Spokane River PCB TMDL that will establish total daily loading limits for toxic pollutants and timing is not a legitimate barrier.

A TMDL is superior to a variance because, under the CWA, a TMDL sets a pollution budget for the affected water body, and then distributes that budget among various point and nonpoint sources of pollution. See 33 U.S.C. § 1313(d); 40 C.F.R. § 130.7. These waste load allocations and load allocations can then develop cleanup plans and use sources of pollutants such as stormwater in their calculus. Variances do not do this and are therefore a poor substitute for a TMDL.

¹ Protection of Downstream Waters in Water Quality Standards: Frequently Asked Questions June 2014, EPA-820-F-14-001 <https://www.epa.gov/wqs-tech/protection-downstream-waters-water-quality-standards>

² Guidance Document for Developing Total maximum Daily Loads (TMDLs) Water Cleanup Plans, Revised by Ann Butler & Elaine Snouwaert, June 2002 Document No. 99-23-WQ

³ Spokane River Regional Toxics Task Force Mass Balance http://srrtf.org/?page_id=10184 Technical Report http://srrtf.org/wp-content/uploads/2019/04/SRRTTF_2018_TechnicalActivitiesReport_Final_03-27-2019.pdf

⁴ EPA's Plan for Addressing PCBs in the Spokane River July 14, 2015 Case 2:11-cv-01759-BJR Document 129-1 Filed 07/14/15 Page 9 of 31 (attached)

Additionally, a TMDL sets what is called “reasonable assurances” that the pollution removal and protection of the designated uses will occur. This is in line with Ecology Guidance (Pg 4) and federal EPA guidance:

“When a TMDL is developed for waters impaired by point sources only, the issuance of a National Pollutant Discharge Elimination System (NPDES) permit(s) provides the reasonable assurance that the waste load allocations contained in the TMDL will be achieved. This is because 40 C.F.R. 122.44(d)(1)(vii)(B) requires that effluent limits in permits be consistent with “the assumptions and requirements of any available waste load allocation” in an approved TMDL”⁵

It is important to note that under the proposals that are now in the preliminary draft form the discharger variance for PCBs **are missing** a “reasonable assurance” mechanism and any real system of accountability, therefore, subjecting Spokane River PCB cleanup to delay, bias, political meddling, and ultimate failure.

To deviate from the CWA and the TMDL process is to abandon a process that was effective at providing accountability and clean water upgrades in the form of dissolved oxygen (DO) TMDL. The Spokane Basin is the site of noted success with the use of TMDLs mentioned as a successful “multi-jurisdictional” TMDL by the Congressional Research Service in 2012⁶. In the Spokane River DO TMDL identified phosphorus loading and developed phosphorus limits which provided appropriate waste load allocations that were included in NPDES permits. The standards developed required the construction of tertiary, Next Level Treatment (NLT) which has resulted in real improvements in the water quality of the Spokane River⁷. While PCBs are complex and technically challenging, the public deserves a TMDL process, like the DO TMDL process, that will respect the legal, public uses and be congruent with the spirit, intentions, and legalities of the CWA. Without the loading numbers to reverse-engineer, NPDES permit waste load allocations, and nonpoint source load allocations, clean up efforts are devoid of any target or actionable number that provides the legal incentive and the regulatory accountability to meet the goals demanded through Washington State WQS.

⁵ EPA Guidelines for Reviewing TMDLs under Existing Regulations issued in 1992 May 20, 2002 https://www.epa.gov/sites/production/files/2015-10/documents/2002_06_04_tmdl_guidance_final52002.pdf

⁶ Clean Water Act and Pollutant Total Maximum Daily Loads (TMDLs) Claudia Copeland Specialist in Resources and Environmental Policy September 21, 2012 Congressional research Service, Page 11 <https://fas.org/sgp/crs/misc/R42752.pdf>

⁷ Spokane River and Lake Spokane Dissolved Oxygen Total Maximum Daily Load, Feb 2010 Pub. Number 07-10-073

Additionally, the development of a TMDL is superior to the discharger variance in that Washington State guidance requires early and often coordination with downstream, Spokane Tribal government. Again, Washington State TMDL guidance reads⁸:

“Individual attention must be given to tribal governments with reservation land or with treaty interests in the affected basin. Ecology has not been delegated Clean Water Act programs within Indian reservations or on off-reservation tribal trust land. State water cleanup plans will not apply to these tribal lands without agreement from the tribe and EPA. A number of tribes within the state have received or are in the process of receiving “treatment as a state” status from EPA for the purpose of setting water quality standards. EPA approved tribal water quality standards may differ from state standards and should be taken into account within the TMDL. Where tribes have not been delegated programs under the Clean Water Act, EPA retains jurisdiction. Tribal governments may also have laws under their independent authority for managing water quality within reservations. In addition, most of the 28 tribes within the state have off-reservation treaty reserved rights for fishing and hunting throughout the state. Early consultation with tribal governments is the best way to ensure a cooperative and coordinated state/tribal/federal approach to water quality and TMDLs. In addition, public involvement is a vital part of every TMDL. In most cases, the public must develop real solutions to improving water quality. Early identification and contact with those entities that are most affected and involved are strongly recommended.

Ecology has created an Environmental Justice (EJ) Checklist to aid staff in planning public outreach. The EJ Checklist and other resources are available on the agency sustainability intranet site (<http://ecy-hqapp10/Sustainability/index.htm>) and a copy is in Appendix B of this document. Consideration should be given to providing all interested parties with information throughout all phases of the project, from start-up through implementation and effectiveness monitoring. Begin with basic explanations of a TMDL, its purpose, sequence, timing, implications, and projected schedule. Later, provide technical findings as they are developed. Finally, engage the public in the design of water quality improvement strategies. The implementation phase will be greatly enhanced with the cooperation of the affected public”(page 4).

It would appear from the supporting, preliminary documents that little or none of this coordination nor consultation has occurred.

The variance period of 20 years (to meet WQS) is too long and hyperextended without reason.

⁸ Guidance Document for Developing Total maximum Daily Loads (TMDLs) Water Cleanup Plans, Revised by Ann Butler & Elaine Snouwaert, June 2002 Document No. 99-23-WQ

Variance applications that request twenty years are excessive and will contribute to a permanent default to weaker PCB WQSs and limited uses for the watershed. The request for twenty-year variances in the Draft Preliminary Rule, the DEIS, as well as other documents means that the State mandated WQS with its attendant body of science, designed to protect the public will be put on hold for a generation if not longer. Washington State's regulations make clear that a variance should only be granted "for the minimum time estimated to meet the underlying standard(s)." WAC 173-201A420(5)(a). There must be evidence that at the end of the variance period, the permittee will be capable of complying with applicable water quality standards. None of the supporting documents makes the case that the Washington State WQS for PCBs will ever be met. What's more, they prepare the way for permanent violation by wiring in the draft rule, the use of a Use Attainability Analysis (UAA) if the variance is not successful. This is unacceptable.

Of note is that in 2016, Draft NPDES permits were issued that contained ten-year compliance schedules to achieve a WQS of 170 ppq of PCBs. No variance was ever considered at that time. We fail to understand, and the supporting documents fail to make the case that a ten-year compliance schedule will not be sufficient for the five discharger permittees requesting variances to be successful at meeting WQS. This point is especially strong, given that variances were not considered for the identical situation in 2016. In 2021, we would most certainly expect that if a PCB WQS of 170 ppq stands under legal challenge, the variance process will be terminated and a process of compliance schedules like those in 2016 will be used in the permitted development. To issue PCB variances for dischargers when the State WQS for PCBs is 170 ppq would represent a profound backslide and disingenuous maneuver.

The application and approval of discharger variances for PCBs is an inappropriate use of the variance guidance.

We take issue with discharger applications to use variances to address bioaccumulative toxins that continue to be discharged from the ends of pipes that are permitted under the NPDES program. Variances were a guidance that appeared to have some utility for non-point source pollution and parameters such as temperature that are not discharged from permitted discharges. However, to approve of variances for bioaccumulative toxins that do not respect the end of pipes or discharge zones (rather they bioaccumulate in aquatic ecosystems sometimes miles from discharge) is an egregious misuse of the variance guidance.

Further, this guidance would be actively promoted and facilitated by EPA, and WDOE leadership is inappropriate. Regulators are the only defense the public has to ensure that their values and the public good are protected from and respected by the externalities of the market place. With the adoption of the federal 2015 guidance and changes to federal water quality standards regulations that included more detail about how variances can be used, EPA has developed the WQS Variance Building Tool and

seems to be pushing states and dischargers to use variances⁹. Further evidence of this agency bias towards the use of the variance tool is inside the DEIS. On page vi it states *“On June 12, 2019, Ecology responded to each of the applicants letting them know we would proceed with rulemaking for the five variance applications. This preliminary draft EIS is in response to those applications”*. Curiously, WDOE would signal directly that it would move to rulemaking before the completion of a DEIS wherein a public discussion of the alternatives, the impacts, and mitigation are determined and a public discussion informs the final decision as to whether to proceed and make a rule.

There are damaging implications nationally for the expansion and use of this (variance) approach especially concerning bioaccumulative contaminants. Extended timelines on clean up and recovery of our waterways, the turn away from TMDLs, and the rise of shifting baselines in pollution due to the ultimate redesignation of uses through the use of UAAs are but a few of the long term damages that could result from agency bias towards the use of these policies.

Locally, we now understand (from public records investigations) that in some cases, the discharger variance concept originated as a dialogue between NPDES permittees and EPA/WDOE leadership as a response to dischargers who were questioning the Water Quality Standards for PCBs in Washington State. Records revealing draft Agreed Orders for pollution dischargers contain the modified language and terminology from the federal variance guidance (such as preparation of Pollution Minimization Plans) from at least 2 years ago. It appears that WDOE has had intentions to front-load dischargers and NPDES permittees with the language and tools to aggressively move ahead with variance applications and then facilitate variance application approvals perhaps regardless of public input.

In our view, this is a profound and historic miss-use of agency time, resources, and responsibilities. Additionally, this is an inappropriate bias in favor of using the public commons to facilitate the dumping of toxic waste into our public rivers and waterways and thereby undervaluing other designated uses.

Attached and submitted are several documents for the record that validate our record of opposing the use of variances to address the PCB issues in the Spokane River Basin after the promulgation of federal guidance in 2015 (see attachments). Not attached are numerous public presentations and materials that additionally support the Spokane Riverkeeper’s long-standing position that variances are an inappropriate approach to achieving WQS for PCBs in the Spokane River. These are available upon request.

The Draft Environmental Impact Statement (DEIS) is flawed.

⁹ Water Quality Standard Variance Tool Doc. EPA 820-F-17-016
<https://www.epa.gov/sites/production/files/2017-07/documents/variance-building-tool-faqs.pdf>

Approaching the DEIS from a program orientation rather than project orientation was not mentioned during the scoping process nor is it appropriate to adequately address the impacts of a variance process for bioaccumulative toxins being discharged through the NPDES program to the Spokane River and the Waters of Washington State (See page vi in the DEIS). Only two alternatives are presented which in isolation, are inadequate. The alternatives as they exist, 1) issue NPDES permits - illegally under the Clean Water Act (CWA), or 2) approve of discharger variances and issue permits that have alternate WQS. Both violate the spirit of the CWA and continue to pollute the Spokane River at levels that cause and contribute to WQS violations for PCBs. Nowhere in the DEIS are there other alternatives, such as the examination of discharge removal, or the development of a Spokane River PCB Total Maximum Daily Load (TMDL) to address pollution loading, Several alternatives need to be generated and explored to include their impacts and ways to mitigate those impacts.

Issues identified by multiple stakeholders in various comments during the SEPA scoping process are not addressed anywhere in the Draft Rule or the DEIS, Nor does it address issues and impacts identified in the scoping comments. The DEIS does not address the profound impacts that either of the two alternatives present in the DEIS would have on aquatic ecosystems and the designated uses of the Spokane River under the CWA, nor does the DEIS address the profound public impacts caused by these alternatives. During the scoping process, numerous stakeholders defined many issues that the collective body of draft, preliminary materials fails to address. Examples include examining the impacts of limited fish consumption, salmon recovery, etc. (please refer to submitted Spokane Riverkeeper/Puget Soundkeeper Alliance scoping documents).

WQS evaluated in the draft, preliminary documents are no longer relevant.

Our review of these documents is qualified and conditional as the preliminary draft documents are all written and refer to the PCB WQS of 7 ppq and the current standard is now 170 ppq. As of May 13, 2020, that PCB WQS is no longer applicable in the Spokane River. Therefore, the targets, shortcomings, and logic inside the draft, preliminary documents are all no longer appropriate or relevant.

WDOE: Develop ways to remove wastewater from Washington's surface waters.

We will use this public input opportunity to address a larger issue that the variance process brings up - expanding challenges due to the continued discharge of persistent organic pollutants (POPs) into our waterways. We call upon WDOE to prepare for the next generation and move forward in facilitating progressive, far-thinking ways to help society remove, remediate, and regulate POPs without undermining the regulatory frameworks that keep our public safe and healthy. Doubling down on ways to continue dumping POPs and other bioaccumulative pollutants through the use of processes that effectively loosen standards and stall timelines, in inappropriate and myopic. What follows are several examples of ways to reduce pollution that WDOE could be more proactive on. We recommend that WDOE Petition the EPA to:

- Reform Toxic Substances Control Act (TSCA) by actually petitioning the EPA to reduce inputs of PCBs that are up to 50 ppm (see attachment).
- Reform PCB testing methods for use in compliance in the NPDES program. The use of the test method 608 instead of the more sensitive and accurate 1668c is not an appropriate barrier to measuring compliance under the NPDES program. We are asking Ecology petition the EPA to approve of test method 1668c for the use in determining compliance under the NPDES program.
- Develop a program that addresses the growing need to remove effluent from the Spokane River, and use low impact development, land application, and methods to reuse water. The need to follow through and develop this approach will only grow as expanding numbers of POPs are found in wastewater and the regulatory efforts to control them expands.
- Use ordinances to facilitate the development of LID and other methods to capture PCBs before they ever enter the waste stream.

Discharger variance approval sets precedent for all PCB-impaired waters in Washington.

We believe that this approach represents a “camel's nose under the tent” in the regulation of toxics/persistent Organic Pollutants (POPs) nationally. That is, if the current rule language were to be proposed, adopted by Washington and approved by EPA, it would immediately set a precedent for all dischargers contributing to Washington's PCB, (and perhaps dioxin)-impaired waters through wastewater or stormwater. We believe that this will attract the significant attention and resources of dischargers and powerful interests who externalize their operational costs to the surface waters of the United States. An approved variance will, therefore, inevitably lead to efforts to modify NPDES permits, scuttle potential future TMDL efforts that address PCBs, and usher in the pathway to allow generational extensions of commitments to reducing PCBs in waste streams. Further, if the draft rule is any indication, then at the end of these variances either further extensions will be given, and/or Use Attainability Analysis (UAA) will be used in dealing with toxic legacies. The draft preliminary rule and the supporting documents, therefore represent a dark new shadow over the original aspirations and spirit of cleaning up our nation's waterways.

Variances are being issued before the understanding of removal efficiencies and they are, therefore, out of sequence with appropriate cleanup plans.

Because of this, they effectively create a variance to a variance for IEP and Kaiser. Until the removal efficiencies are understood and documented at a scaled-up level, no one knows if a variance is needed. A discharger should not receive a variance for the interim period that they are attempting to optimize their Best Available Technology (BAT) to arrive at the Highest Attainable Condition (HAC) - a requirement of the discharger variance. This situation is also inappropriate in the application of variance guidance.

Additionally, HAC appears to represent a status quo effluent condition is based on effluent conditions that would illegally cause and contribute to water quality violations in

the Spokane River. Confusion over whether the HAC refers to the attainable condition with current technology or that which is being pursued at the time of the interim review needs to be settled. In the federal regulation, HAC can be the "...greatest pollutant reduction achievable with the pollutant control technologies installed at the time the State adopts the WQS variance and the adoption and implementation of a Pollutant Minimization Program."¹⁰ However, preliminary draft documents appear to be representing the HAC as the pollutant reduction attainable at some future moment. There is still confusion as to whether the HAC represents the effluent condition at the time of variance approval, at first interim review, or is it the effluent condition reached at the end of the twenty-year variance. In discharger applications, it would be helpful to understand if there is variability between permittees on this point.

In any case, the HAC needs to exceed the status quo effluent condition. While currently, there is disagreement and uncertainty about what the appropriate water quality standard may be for PCBs, there is an agreement under the CWA that total PCB numbers (and all PCB congener types) need to decrease. Removing sources from the effluent in wastewater is both the legal pathway as well as the ethical way to protect the public and abide by the CWA. Additionally, the likelihood is that treatment technology will continue to improve so that defining HAC as the status quo effluent condition makes little sense in terms of meeting Washington State WQS for PCBs.

To further refine the discussion of the HAC inside these supporting documents, we feel that the HAC should not be represented in terms of percentage reduction of pollution. This way of calibrating removal is deceiving as this effluent number is a variable driven by the pollutant numbers and loading found in *influent*. This makes percentage removal more about technical capacity and efficiency of treatment technologies, (Next level Treatment effectiveness), rather than a water quality number or criteria that is based on the achievement of biological integrity and/or public uses and safety.

Stronger accountability to actions in Pollutant Minimization Plans (PMPs) and PCB reductions.

Both the Preliminary Draft Variance language and the Preliminary Draft Implementation Plan are unclear as to the mechanisms for accountability and to measurable commitments for reducing PCBs in their PMPs. Both documents need more detail about how they are to develop and report on milestones in a transparent way. Additionally, strong, concrete connections and replication of language between the PMP and the NPDES permits are necessary. The PMPs should be incorporated directly into the NPDES permits as enforceable conditions and into the rule.

¹⁰ 40CFR131.14(b)(ii)(A)(3) If no additional feasible pollutant control technology can be identified, the interim criterion or interim effluent condition that reflects the greatest pollutant reduction achievable with the pollutant control technologies installed at the time the State adopts the WQS variance, and the adoption and implementation of a Pollutant Minimization Program.

Additionally, many of the PMP conditions are flawed or inappropriately sized/matched to the task of creating reductions of effluent PCBs promised in the variance applications.

- An example of the latter is the inclusion of TSCA reform inside a PMP. While TSCA reform might be a positive work-plan for a TMDL implementation plan, TSCA reform will not reduce PCBs in wastewater effluent in a way that has a direct, measurable effect on IEP's effluent in the next decade. Therefore it is not a genuine pollution minimization plan with direct respect to IEP wastewater pollution. To include this as "pollution minimization" is a misguided and inappropriate measure when looking to minimize pollution in the near term under the NPDES program.
- There is no regulatory driver inside the draft rule to account for ratchet down the amount of PCB pollution in WWTP effluent.
- There is no schedule or plan to arrive at BAT that is pre-planned or scheduled.
- No clear mechanism to hold agency and pollution dischargers accountable for meeting legal/lawful standards.
- What regulatory tools that will oversee or drive the PMP to initiate the reductions of effluent pollutants to meet the WQS of either 170 ppq or the possible future WQS of 7 ppq? Are there or will there be schedules to pilot new technology?

We appreciate the opportunity to comment on the draft, preliminary rulemaking for PCB variances. Please do not hesitate to call or email me for clarification.

Respectfully,



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Ancillary Submissions:

- Four documents establishing the Spokane Riverkeeper record on the use of variances, compliance schedules and TMDLs
- Spokane Riverkeeper and Puget Soundkeeper Alliance Scoping comments
- Variance petition signatures from the Spokane Riverkeeper website www.spokaneriverkeeper.org
- TSCA Petition for EPA