



SPOKANE
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ATT: Cheryl Niemi
Department of Ecology
Water Quality Program
PO Box 47600
Olympia, WA 98504

7/10/19

RE: EIS scoping for WAC 173-201A Rulemaking for five discharger variances on the Spokane River (SEPA #201903246)

Dear Ms. Cheryl Niemi,

I am providing the following comments for the State Environmental Policy Act Scoping Process on variance 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 public and the Spokane River. Puget Soundkeeper Alliance joins this letter. Soundkeeper's mission is to protect and preserve the waters of Puget Sound. While the variances at issue are outside of Soundkeeper's jurisdiction, this issue has state-wide ramifications regarding how Ecology will implement Washington's water quality standards for PCBs throughout the state. Stopping toxic pollution and addressing PCBs are a top priority for both Spokane Riverkeeper and the Puget Soundkeeper.

Background on Polychlorinated Biphenyl (PCB) pollution:

Nationally, many of the nation's surface and ground-waters are highly polluted with several persistent, bio-accumulative toxins. One of the most pernicious are PCBs. These chemicals were marketed by Monsanto Corporation between 1935 and 1979 at which time they were banned by the federal government under the Toxics Substance Control Act. In the Spokane River there are many "legacy" sources of PCBs are still found in oils, light ballasts, caulking, building materials, older than 1979. Unfortunately, these chemicals also continue to be inadvertently produced in inks and dyes and dumped in the Spokane River and other waters across Washington State via wastewater discharges. These PCBs then bio-magnify in the aquatic food chain and collect in toxic levels inside the fish that people catch and eat. PCBs are a known carcinogen and endocrine disrupters¹. The Spokane River is currently listed as impaired for PCBs on the Washington State 303d list – a category of the states most polluted waters. Additionally, these toxic chemicals continue to be in species of fish such that they exceed Washington State

¹ Agency for Toxic Substances and Disease Registry
<https://www.atsdr.cdc.gov/toxfaqs/tf.asp?id=140&tid=26>

www.spokaneriverkeeper.org
509.835.5211 | 35 W. Main Ave Suite 300 Spokane, WA 99201



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Human Health Criteria and they trigger the need for the Department of Health to issue Fish Consumption Advisories². Many of the fish in the Spokane River pose risks to those who catch and consume them, especially outside the advised amounts. Further, these chemical pollutants in the river continue to discourage and suppress fish consumption on the part of tribal nations downstream. This is an environmental justice issue in which the 29 treaty tribes of Washington State and the EPA have been active in working to correct.

The WQS in Washington State

It is important to remember that Water Quality Standards (WQS) regulating pollutants like PCBs are put in place to protect the designated uses (like fishing and swimming) for a water body as well as to protect human and aquatic health. Congress directs states to establish water quality standards that “consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based on such uses.”³ WQS are based on several criteria, including Human Health Criteria (HHC) and Ambient Water Quality Criteria to name two. Environmental Protection Agency (EPA) regulations specify “such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use.”⁴ The HHC are based on a policy assumption of how much fish people actually eat (the Fish Consumption Rate, or FCR), and how much fish is safe to eat based on a level of risk deemed acceptable (the Cancer Risk Rate).

Before 2016, Washington’s standards were based on 40 year-old-data, bore the weakest fish consumption standards in the country, and did not meet the mandate of the Clean Water Act (CWA) to ensure that all waters are drinkable, fishable, and swimmable. In 2016, Washington State again approved a water quality standard based on HHC for PCBs that was woefully inadequate compared to how much fish people actually consume in Washington. The HHC was based on a FCR of only 6.5 grams of fish per day. However, Ecology’s research on fish consumption in 2012 revealed that many tribal members eat over 700 grams of fish per day, and up to 380,000 Washington adults eat over 250 grams per day. Salmon is an integral part of the diet and culture of many northwest tribes and fisher-people. More worrisome still are the statistics for children, who have greater sensitivity to many toxins. At least 29,000 Washington children eat over 190 grams of fish per day.⁵

Later in 2016, after a prolonged legal battle, the EPA stepped in and promulgated scientifically based, legally defensible WQS for PCBs that protected the public and tribal fish consumption. This new WQS was based on a FCR of 175 grams of fish per day – the lowest acceptable fish consumption rate that tribes would agree to. This adjusts a water column WQS for PCBs to 7 picograms per liter of water (or 7 parts per quadrillion or ppq). Wastewater dischargers and NPDES permittees, in an effort to resist promulgated WQS, often cite the fact that this is a small number -- while ignoring the actual impact and risk of these carcinogenic pollutants. The risk is exacerbated by their bioaccumulation in a waterbody’s fish. This bioaccumulation (and bio-magnification) serves to concentrate these toxics, rendering them far too easily ingestible by people.

² <https://www.doh.wa.gov/DataandStatisticalReports/HealthDataVisualization/fishadvisory>

³ 33 U.S.C 1313(c)(2)(A); 40 C.F.R.

⁴ 40 C.F.R. 131.11 (a)(1)

⁵ <https://fortress.wa.gov/ecy/publications/publications/1209058.pdf>

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On the Spokane River, downstream from the City of Spokane lies the Spokane Indian Reservation where historically an indigenous population consumed nearly 865 grams per day⁶. Fishing was conducted up and down the Spokane River (on and off current reservation boundaries). This fish consumption has dwindled to historic lows, and is having devastating effects on the cultural heritage and the health and well-being of tribal members. To the end of correcting this issue, the Spokane Tribe promulgated their own water quality standard of 1.3 pg/L in the waters below the city of Spokane. This means that, in effect, no matter the WQS of Washington State, all dischargers must achieve this high standard some 30 miles below their discharge pipes.

The EPA has additionally maintained a long history of working to “effectuate and harmonize” standards set under the CWA in Washington State with treaty obligations that guarantee hunting and fishing⁷. The EPA has pointed out that “when setting criteria to support the most sensitive use in Washington, it is necessary to consider applicable laws, including federal treaties” and that, “in Washington, many tribes hold reserved rights to take fish for subsistence, ceremonial, religious, and commercial purposes, including treaty-reserved rights to fish all usual and accustomed fishing grounds and stations in waters under state jurisdiction, which cover the majority of waters in the state⁸.”

Any discussion of “deregulation,” providing regulatory “off ramps” such as variances, or non-implementation of CWA protections implicates activity that is potentially illegal under the CWA and stalls important cultural protection and recovery. To revise the Washington rule and set it back to 6.5 grams per day – or promulgate a lower standard as a discharger variance HAC, when the heritage fish consumption rate, in our basin, is as high as 865 (nearly 2 lbs) per day -- has grave implications. “When environmental agencies employ a FCR that does not capture fully the consumption that is suppressed – under either scenario in which suppression effects occur – they set in motion a sort of downward spiral whereby the resulting environmental standards permit further and further contamination or depletion of the fish and so diminish health and safety of people consuming fish, shellfish, aquatic plants, and wildlife for subsistence, traditional, cultural, or religious purposes.”⁹

Discharger variances would, if approved, continue the policy and practice of authorizing the discharge of effluent that contains polychlorinated biphenyls (PCBs) into the Spokane River, allowing dischargers to continue to cause and contribute to water quality violations for toxic PCBs in the Spokane River Watershed. In many cases, this means that game fish targeted for food and sport as well other species of fish will continue to contain toxic pollutants at dangerous levels making them “un-useable” to the public – and poisonous to those that do. The discharge

⁶ Harper, B. L., & Walker Jr, D. E. (2015). Comparison of Contemporary and Heritage Fish Consumption Rates in the Columbia River Basin. *Human Ecology*, 43(2), 225-236. doi:10.1007/s10745-015-9734-4

⁷ 80 Fed. Reg. at 55067

⁸ 80 Fed. Reg. at 55066

⁹ FISH CONSUMPTION AND ENVIRONMENTAL JUSTICE A Report developed from the National Environmental Justice Advisory Council Meeting of December 3-6, 2001 (revised November 2002) https://www.epa.gov/sites/production/files/2015-02/documents/fish-consump-report_1102.pdf

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of PCBs by municipal, county and industrial dischargers via wastewater treatment plants and polluted groundwater interchanges continue to expose both aquatic ecosystems and the public who consumes fish and discharger variances would continue a path of delay and entropy in meeting the established Washington Water Quality Standard and ultimately cleaning up our river.

Discharger Variances and Applications: Scoping Comments

We have divided our comments into three general categories regarding the applications for five discharger variances for the Human Health Criteria in the Spokane River. The first section discusses scoping issues including: comments about alternatives, mitigation measures, adverse impacts, and additional considerations that the Washington department of Ecology (WDOE) should consider as they develop an EIS. The second section raises process and policy questions around the implementation of the variances, and the final section raises issues with the applications themselves.

1. Scoping Comments

a. Significant Adverse Impacts Will Result Statewide If Any or All of the Five Discharger Variance Applications are Granted:

- **Statewide impacts on Washington waters:** Any discharger or waterbody variance for PCBs approved of by the WDOE and/or the EPA in the Spokane River Basin will have immediate policy and water quality implications for the future of Washington State surface waters, aquatic species, and the public. Discharger variances codified in the Washington code, will have the effect of providing a “play book” for variances for other Washington waters. Therefore, this process may have far wider, cumulative impacts than in just the Spokane River Basin. These discharger variance applications and Ecology’s decision could set precedent for every Washington State water body listed as impaired on the States 303 (d) list for PCBs. **For this reason, any EIS that looks at Spokane River discharger variances and their impacts must include a cumulative impacts analysis examining each of the impacts/issues outlined below in this letter for all water bodies in Washington State listed as impaired on the States 303 (d) list for PCBs.**
- **Impacts on aquatic food webs:** Conduct a food web analysis, including an impacts analysis of chronic and acute exposure to PCBs for all aquatic and aquatic dependent species in the Spokane River and its tributaries.

The EIS needs to fully evaluate the discharge of PCBs into the Spokane River and evaluate the impacts that these toxins may have on a full range of aquatic plants and animals as well as on terrestrial animals connected to these aquatic environments, i.e. Blue Herons or ospreys. Further, an EIS should examine aquatic and terrestrial biota from the standpoint of acute exposures and chronic exposures to discharged PCBs. These same biota need to be evaluated during several life stages with life histories of

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specific fish examined in order to capture impacts that may be occurring at specific points in that organisms life history.

An EIS should examine:

- To what degree does discharger variances harm the plans on the part of the five Upper Columbia United Tribes to re-introduce salmon? In what ways does discharging PCBs harm the spawning, rearing and migration of both native trout as well as of future salmon and steelhead that may enter the system in the near future? ¹⁰
- To what degree do PCBs discharged in the Spokane river drainage impact biota and food webs downstream from the discharge. Do the Columbia River and estuaries receive PCB burdens from the Spokane River sources?
- **Human Health Impacts of avoiding implementation of Human Health Criteria and Water Quality Standard of 7 picograms/Liter (or parts per Quadrillion – ppq):** Conduct an analysis of the communities that are or that may catch and eat fish in the Spokane River to understand the human health impacts of this consumption. Additionally, this analysis should capture environmental justice issues by understanding what the demographic/ socioeconomic make-up of the communities that are harvesting and eating fish because of economic pressures or cultural norms. This study should include a complete analysis of the Spokane Tribal uses.
- **Economic and Social Impacts for loss of river due to extended timelines for reducing discharger pollution from the Spokane River:** Conduct a full economic analysis of those communities who no longer use the river, nor its fish and/or have had their uses degraded and/or diminished from PCB pollution. An EIS should completely assess the economic and social costs to society, area treaty and non-treaty tribal uses of the river, and individual loss of quality of life and economic values around the use of the Spokane River. This study should include a complete analysis of the suppressed and or degraded Spokane Tribal uses. This set of costs should also include the costs to the public of managing a fish advisory program (including outreach and technical costs), the costs to society of maintaining a presence in the river with technical requirements of treatment of discharge.
- **Impacts of all PCB discharges to the Spokane River:** This should include the discharge of storm water to the Spokane River from MS4 storm water systems, systems as well as Combined Sewer Over flow systems. A full breakdown of PCB Congeners (PCB types), the loading impacts from storm water and the seasonal pattern of that discharge should be completed in an EIS.

¹⁰ Fish Passage and Reintroduction Phase 1 Report; <https://ucut.org/habitat/fish-passage-and-reintroduction-phase-1-report/>

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- **Impacts of pollutants that concomitant with PCBs in discharger effluent.** An EIS should study and report on the impacts of this relationship between PCBs and other persistent organic pollutants, such as dioxin, that are known to be in the waste stream effluent of the five discharger's applying for variances. The study should also consider the relationship between PCBs and other pollutants, including plastics. To what extent and in what ways will PCBs interact with other pollutants in the water, including plastics and micro-plastics that adsorb these toxic chemicals? What impacts will interactions have on the aquatic and aquatic dependent species of the Spokane and its tributaries?
- **Impacts of the lighter congener PCBs on the people who use the Spokane River and its fish:** To what degree are lighter congener PCBs such as PCB 11 affecting, and affecting the Spokane River and specifically the people eating fish from the Spokane River?

b. Mitigation Measures That Must be Considered

- **Mitigating Impacts of PCBs by actually removing waste from the River:** A complete study of discharge reuse and/or reduction should be completed inside an EIS in order to develop alternatives around the removal of wastewater discharge from surface and ground waters. Ultimately, PCBs are a toxic pollutant but they are also a marker for many toxins, such as dioxin, that enter the Spokane River via wastewater discharges.
- **Mitigating Impacts of PCBs by implementing the Best Available Technology in the world:** An EIS should study the best available technologies, **world-wide** and pollutant removal techniques that have been developed world-wide. This analysis should study the efficacy of implementation in the Spokane River Watershed. For technologies that exist capable of meeting the current WQS, Ecology must provide un-biased, full-scale analysis of available technologies by neutral, unbiased experts. Include an alternative that not only denies the variance but also demands compliance with the WQS, mandates the use of the BAT.
- **Mitigating Impacts of PCBs by generating and approving of NPDES permits with compliance schedules and end-of-pipe limits for PCBs:** An EIS should examine in full the (pollution reduction) effects of implementing discharge permits that contain effluent limits for PCBs, compliance schedules that run between two permit cycles (10 years)
- **Other methods of mitigating PCB impacts.** Ecology should consider other options to mitigate PCB impacts not mentioned here.

c. Alternatives That Must be Considered

- **Denial of Variances:** Ecology must consider the denial of the variance applications and variances as an alternative to addressing PCBs in the Spokane River, and by extension, PCB impaired waters of the State of Washington.
- **Development of Total Maximum Daily Load (TMDL):** Ecology must consider developing a Total Maximum Daily Load for PCBs in the Spokane River with Waste Load Allocations and Load allocations applied inside of NPDES permits for the five dischargers in the

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Spokane River. A draft TMDL has been written but never approved and this the approval and implementation should be explored in an EIS as a viable – and legal - alternative to a variance.

Remove Effluent from the Spokane River: Ecology must fully consider the alternative of removing effluent and waste streams from the Spokane River. An EIS should fully examine reuse of wastewater effluent in part or whole to reduce river exposure to PCBs.

- **Removal of any and all profit from discharging to the river:** An EIS should explore the alternate of removing Kaiser Aluminum, LLC and Inland Empire Paper effluent from the river as long as both operations are operating at a profit.

d. Additional Considerations:

- Granting these variances will undermine the rule of law, the CWA, and Ecology's authority to regulate pollutants in Washington State. Ecology should not set this dangerous precedent. In so doing, Ecology would be abandoning its legal requirement to implement and enforce our clean water laws, as well as its own policies and mission to protect, preserve, and enhance Washington's land, air, and water for current and future generations.
- Variances are being offered as a pathway before a TMDL and more conventional CWA tools – this is an inappropriate sequence – the TMDL should be developed before a variance for a bio accumulative toxic pollutant.
- Granting any discharger variances will send a message that polluters are not required to do their fair share to protect residents from their pollution and toxic discharges. The message is that and that Ecology and the State of Washington value corporations and their determination of what is economically viable more than people who use the river throughout their lives and within their communities.

2. Process and Policy Questions and Considerations that Should be Addressed During the SEPA Review.

- **Impacts of Spokane Tribe to meet Water Quality Standards at the Spokane Tribal Boundary:** Fully examine how one or as many as five discharger variances for PCBs would affect the ability of the Spokane Tribe to meet the Water Quality Standards for PCBs of 1.3 ppq. Ecology cannot grant a variance to those standards.
- Downstream considerations are required when designating uses for WQS (40 CFR §131.10(b)).

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- What are the regulations regarding downstream dischargers and discharger variances for the Human Health Criteria?
- How is Ecology going to promote downstream considerations such as the loading from discharges by finned fish hatcheries operated and maintained by Washington State Department of Wildlife?
- Did the Idaho discharges apply for discharger variances? Can WDOE grant a HHC variance to an out of state facility or is this the purview of the EPA?
- **Impact of various evaluation criteria for a Highest Attainable Condition (HAC).** What scientific and engineering evidence, criteria, and or baselines will be developed to construct and evaluate the HAC? What is the impact of these various criteria be on the options and alternatives used in developing an HAC? By extension, how would those various criteria for evaluating the impact of the HAC on the riverine environment? Alternatives and scenarios for various HACs should be developed inside an EIS. How will the science, engineering and economic studies that underlie the development of the HAC be insulated from the inherent bias of a NPDES permittee? In other words, how will the WDOE and the EPA insulate the development of these HAU from the inherent bias of a NPDES permittee/dischargers when these same organizations propose such numbers and terms? The regulatory agencies must put a firewall between the development of these HAU and the influence, inherent conflict of interest and institutional bias of discharger organizations.
- **Impact of continuing to stall the development of a TMDL. What is the impact of delaying the development of a TMDL for PCBs in the Spokane River?** The EIS should examine and explain why variances are being applied for when Ecology has a draft Total Maximum Daily Load (TMDL) that has yet to be approved and implemented (Citation). Wouldn't the development of a TMDL in partnership with Idaho dischargers provide the continuity of loading information, target goal setting for reductions and a uniform plan across the State of Idaho, Washington and the Spokane Tribal Line? Apparently, a PCB TMDL load and waste load allocations are displaced by variance standards when discharger variance is approved. Where is the authority for the hierarchy of WQS tools cited? The EPA understands the Spokane River Regional Toxic Task Force to have begun the work to generate a TMDL and that the SRRTTF would simply be folded into a TMDL. What is the effect of delaying this approach?
 - If variances displace a TMDL, why not implement a TMDL first to assess the validity and success?
- **Impact of Idaho Dischargers discharging under different standards and effluent conditions than Washington State.** Fully examine the issues of Idaho dischargers that will not be under discharger variances. Examine the possibility that Idaho applies and receives variances.

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- **Impacts of discharger variances on the implementation of the Endangered Species Act (ESA).** Fully examine how the discharger variances will interact with the Endangered Species Act (ESA) as it pertains to the Columbia River and listed species therein. The Upper Columbia River is home to ESA listed runs of steelhead and chinook salmon¹¹. PCBs are hydrophobic and may be picked up in the body burden of outgoing salmon smolts, travel long distances in the riverine environments to affect downstream habitats that are critical to ESA listed species.
- **Impact of the various science/engineering/social criteria on the development of the highest attainable uses?** WAC 173-201A-420 (3)(e) states: (e) *“A description and schedule of actions that the discharger(s) proposes to ensure the underlying water quality standard(s) are met or the **highest attainable use** is attained within the variance period. Dischargers are also required to submit a schedule for development and implementation of a pollutant minimization plan for the subject pollutant(s).”* How are the highest attainable uses being determined without loading limits for the Spokane River, or standards for pollution inputs to the River? How will an alternate Human Health Criteria ultimately be derived and on what scientific, social and engineering criteria will it be based? How will these criteria affect what is allowed to continue to be discharged to the river? How will the WDOE and the EPA insulate the development of these HAU from the inherent bias of a NPDES permittee/discharger? The regulatory agencies must put a firewall between the development of the highest attainable uses and the influence and bias of discharger organizations and their considerable political/consultant resources and advantage.
- **Impact of having various highest attainable uses inside the watershed - *Highest Attainable Use* (40 CFR § 131.3(m))** = “Highest attainable use is the modified aquatic life, wildlife, or recreation use that is both closest to the uses specified in section 101(a)(2) of the Act and attainable, based on the evaluation of the factor(s) in § 131.10(g) that preclude(s) attainment of the use and any other information or analyses that were used to evaluate attainability. There is no required highest attainable use where the State demonstrates the relevant use specified in section 101(a)(2) of the Act and sub-categories of such a use are not attainable. Will this highest attainable use vary by discharger or will a waterbody a highest attainable use be developed and promulgated?
- **Impact of Discharger Variances be on the work of the Spokane River Regional Toxics Task Force?** To what degree will Measurable Progress Determination inside the

¹¹ 2016 5-Year Review: Summary & Evaluation of Upper Columbia River Steelhead Upper Columbia River Spring-run Chinook Salmon National Marine Fisheries Service West Coast Region Portland, OR https://www.westcoast.fisheries.noaa.gov/publications/status_reviews/salmon_steelhead/2016/2016_upper-columbia.pdf

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Spokane River Regional Toxics Task Force be linked to discharger Variances?¹² In other words, will the SRRTTF comprehensive plan be linked in any way to the variance five year reviews and/or used to calibrate progress in reducing pollution in the river and recalibrating the HAC inside a discharger variance?

- **Impacts of not using the lawful, traditional approach to writing NPDES discharge permits with compliance plans to meet the WA WQS?** Why does Ecology not issue permits with the WWQHQ and then put compliance schedules inside the permits that run for two (5 year) permit cycles?
- **Impacts of a single discharger or five discharger variances on the slow and steady shifting baseline of pollution in our public waters. What is the potential impact of the slow drift towards the abandonment of public uses like edible fish?** Will a discharger variance push the agencies and dischargers to push for a Use Attainability Analysis (UAA) wherein the uses of a fishable river and clean fish are abandon? What would the impact be of abandoning the baseline of 7 ppq PCBs and adopting a much less stringent Human Health Criteria and Water Quality Standard? Who would make that decision, when would this be made?

The variance application uses the same factors as a UAA but the removal, revision, or addition of a new use using a UAA process is different than that of a variance. When a designated use is revised by the State using the 40 CFR § 131.10(g) criteria and the UAA, the designated use is changed. This is unlike a variance where the use is amended for a limited time. When using a UAA the result is a permanent change in the nature of the designated use. A UAA and the factors used in the variance application are both used because the current use is not attainable, but the variance differs in that there is either an expectation of meeting the use sometime in the future or there is an unknown attainment period. On the other hand, the application for a UAA indicates a permanent change in the uses, and makes the case that the designated use is not attainable. Additionally, WAC 173-201A-420(5)(a) states: Each variance will be granted for the minimum time estimated to meet the underlying standard(s) or, if during the period of the variance it is determined that a designated use cannot be attained, then a use attainability analysis (WAC 173-201A-440) will be initiated. What will the effect on the Spokane Water Quality a, the designated uses of fishing and the States water quality in its surface waters if UAAs are the ultimate outcome of the variance process?

- **Potential impacts of backsliding on Washington Water Quality Criteria?** In 2015 Washington State WQC for PCBs was at 170 ppq. In 2016 a new, more stringent standard was promulgated. The EPA disapproved of the new standard and put in place a rule of 7 ppq for PCBs. This became the Washington State Standard for PCBs. As written, these discharger variance applications have proposed HAC's that are as many as

¹² Spokane River Regional Toxics Task force Memorandum of Understanding, Task Force Vision Statement for 2012 Through 2016, Page 8: <http://srrttf.org/wp-content/uploads/2012/07/SRRTTF-MOA-Final-1-23-2012.pdf>

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100 times less protective (Liberty Lake ppq is 993 ppq) than the EPA promulgated standard for PCBs. Most applications contain HACs of between 500 and 1000 ppq. Implementation of the discharger recommendations will have impacts than need to be documented and examined inside an EIS.

- **Impacts of implementing Pollutant Minimization Plans (PMPs) that contain no common standards between dischargers nor attendant outcomes.** To what degree will the Pollution Minimization Plans (PMPs) affect the amount, loading and concentration of PCBs in discharger effluent and what affect will this have on the Spokane River? To what extent are PMPs variable or consistent between dischargers and are there any common standards and/or outcomes between dischargers and located inside the applications? What will the body of science and engineering be that is used, as the basis of PMPs and what affect will this have on effluent and river ecosystems? Additionally, how will these PMPs be regulated and assurance provided that they will be successful? What will the impact on the Spokane River and State Water Quality on the following policy ambiguities concerning Pollution Minimization Plans? The following are concerns:

- Each discharger variance application contains plans that lack consistency and continuity in their layout.
- The PMP's in the applications lack clarity and consistency in terms of approach and layout. It appears that there is no common understanding of what is required and what each plan needs to contain.
- In the applications it is unclear whether the PMP's need to be completed and submitted at the time of the application:
 - Can they be "developed and submitted" at a later date or time?
- There is a lack of clarity as to the differences between the PMP and the "Schedule of Actions" under WAC 173-201A-420(3)(e)?
 - Do discharger variance applications need to separate the requirements? How is this to be implemented?

3. Deficiencies in the Variance Applications.

- **The Variance Application for the City of Spokane Mischaracterizes and Confuses Terms Creating Fatal Flaws:** In the application, the City of Spokane frequently mischaracterizes, combines, or substitutes the two terms highest attainable use/condition:
 - On page 4 the text of the application reads: "The City proposes a **highest attainable use/condition** as express by an interim effluent condition of 792 ppq total PCBs in RPWRF effluent. The interim effluent condition represents the anticipated greatest pollutant reduction achievable with the pollutant control technologies installed at the time the variance would be adopted." **The statement uses the terms "use" and "condition" interchangeably making the application difficult to understand what the discharger is asking for or understands to be their commitment under the terms of a variance. This ambiguity and misuse of terms renders the application fundamentally and fatally flawed.**

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- Pg. 13: “WAC 173-201A-420(3)(e) requires that entities submitting a variance application provide a “description and schedule of actions that the discharger(s) proposes to ensure . . . the highest attainable [condition] is attained within the variance period.” However, this is a miss-quote of the rule. WAC 173-201A-420(3)(e) actually reads: “description and schedule of actions that the discharger(s) proposes to ensure the ***underlying water quality standard(s) are met or the highest attainable use is attained within the variance period.***”
 - Pg. 14 “Below is a schedule of actions ***the City plans to undertake to ensure the HAC is attained*** within the variance period and to ensure progress toward attaining the underlying designated use and criterion:” Again, there is confusion around the terms of an HAC. An ***HAC is not something that is attained; it is established at the outset of a variance upon the time of approval.***
- **The Applications Fail to Make the Required Demonstration of Non-Feasibility:** Variance applications are required by both federal (*40 CFR § 131.14(b)(2)(ii)*) and Washington (*WAC 173-201A-420(3)(b)*) regulations to demonstrate that attaining a water quality standard is not feasible. To satisfy this requirement, the applicant must show that it is non-feasible to attain the standard based on one of six factors in *40 CFR § 131.10(g)*. The applicants have failed to do so here, and should be required to make such a showing before Ecology proceeds with the scoping process. If the applicants cannot make a showing of Non-Feasibility, this process should cease.

Factor number 6 in *40 CFR § 131.10(g)* further requires a showing by the applicants for a variance that: “Controls more stringent than those required by sections 301(b) and 306 of the Act would result in substantial and widespread economic and social impact.” EPA guidance for demonstrating “substantial and widespread economic and social impact” is found in their publication titled “Interim Economic Guidance for Water Quality Standards Workbook” (EPA-823-B-95-002).¹³ Applicants have made no such showing here. Applicants should be required to make such a showing before Ecology proceeds with the scoping process. If the applicants cannot make a showing of Substantial and Widespread Economic Impact, this process should cease.

The undersigned note that the EPA Guidance for Water Quality Standards Workbook is from 1995 - more than 20 years old. The EPA and Ecology must look into updated science and economics and make sure it is current, up to date and applicable in 2019. Variance considerations must have the most effective, up to date, and accurate standards for checking applications.

- **The Inland Empire Paper and Pulp Variance Application is flawed:** The application lacks significant requirements inside the applications that could or may impact water quality in the Spokane River. For example:
 - No mention is made of 40 CFR § 131.14 HAC requirements. No HAC is provided. In fact, only a date of 2021 is suggested as a schedule for providing an HAC. This is insufficient.

¹³ <https://www.epa.gov/wqs-tech/economic-guidance-water-quality-standards>

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- PMP seems sporadic and not specifically designed for removal or minimization of PCBs
- Nothing is in the application mentioning the re-evaluation frequency required by EPA regulations.

- **The Kaiser Aluminum Variance Application is Flawed.**
 - The application lacks any discussion of HAC, nor is an HAC proposed in the application. This aspect of the discharger variance is required by the EPA.
 - “Schedule of actions” (WAC 173-201A-420(3)(e)) requirement appears to be more alternative based. This is unacceptable. All applications must include concrete actions with clearly identified timelines, milestones, and deadlines for completion.

- **The City of Liberty Lake Variance Application is Flawed:**
 - There are insufficiencies and issues with the PMP & Schedule of Actions: The PMP and schedule of actions are combined in Liberty Lake’s application. WAC 173-201A-420(3)(e) requires, “a description and schedule of actions that the discharger(s) proposes to ensure the underlying water quality standard(s) are met or the highest attainable use is attained within the variance period. Dischargers are also required to submit a schedule for development and implementation of a pollutant minimization plan for the subject pollutant(s).”
 - The language indicates that the schedule of actions and the PMP are two separate requirements. It is unclear as to whether a single plan can address both or if there are requirements that differ between a PMP and a schedule of actions.

Thank you for the opportunity to comment on the health and well-being of the Spokane River and the waters of the state.

Respectfully,

Jerry White, Jr.
Spokane Riverkeeper
Spokane WA
(509) 464-7614

Alyssa Barton
Puget Soundkeeper
Seattle WA
(206) 297-7002