

Riverkeeper Question Response

July 25, 2017

In attendance: Jerry Whitehead, Rick Eichstaedt (Spokane Riverkeeper/Center for Justice)
Janette Brimmer (Earth Justice, by phone)

Format: Responses were provided in a round robin style, each responding to the same question in turn.

A. How does this topic impact you or your organization?

Jerry: The potential impact of the permitting strategy could be broad which is why the Riverkeeper wants the input of statewide contacts and environmental advocates. The organization recognizes that these discharge permits will likely lead the state in the permitting strategy for implementation of the human health criteria. In addition, it may possibly define how the issue will be approached in other states within the western US. An important part of the process includes making sure that these permits protect public health and safety including stemming toxic discharges that may end up in the food web. Ultimately, the Riverkeeper's goal is to ensure the Spokane River becomes a fishable surface water body without any fish advisories. This process is a unique one and potentially affects the organization's efforts by using (or not using) regulatory backstops in the administration of the Clean Water Act.

Rick: I echo Jerry's statement regarding statewide significance and the potential to set precedence on how Ecology administers water quality standards. Earth Justice and other organizations with similar missions to the Spokane River keeper pushed for the creation and adoption of the water quality standards. These new standards reflect Washington State's reality regarding actual fish consumption rates. Our organization has concerns with this atypical process and feel like dischargers have a chance to dictate the permitting process. Dischargers should not be given the opportunity to dictate the regulatory process and we hope that's not what occurs.

B. What would you describe as the major issues associated with this topic?

Jerry: Three issues I see are:

(1) this process will likely determine how the state moves forward with other regions' NPDES permits,

(2) the possibility of addressing all major issues in the basin to achieve the fishing beneficial use for Spokane River, and;

(3) the unknowns of the process and how the process could potentially leave the Spokane River (and others) vulnerable.

We are concerned when listening sessions create negotiations over regulations, river protection, or parts of NPDES program. These negotiations lead to an un-level playing field with larger pocketed industries while placing citizens and their advocates at a disadvantage. We have a fear that process will introduce bias where cost of protection the river becomes more important than the health of the river system.

Rick: The major issue ultimately is water quality standards. Our organization's process is in place to make sure the river meets state surface water quality standards. This becomes an issue of equity. If we perceive that the permits are not strong enough than we wouldn't be entering into this particular discussion. Overall, we think that Ecology listens to the dischargers more than environmental groups. We'd like a predictable process on permit review and issuance. Environmental organizations do not have the resources to hire consultants in a manner similar to the dischargers and it becomes an issue of equity and environmental justice.

Janette: We feel that just because implementing the standards in the permits may be difficult, it shouldn't be an excuse to avoid compliance with the Clean Water Act. Now, it's perceived as being difficult and providing an 'out' for permit non-compliance.

C. *What do you think the path forward is for meeting water quality standards?*

Jerry: We'd like a powerful regulatory backstop requiring adherence to the standards with a demand that requires industry compliance. Solutions should mimic the process used when CWA permits were originally issued. We think that voluntary pieces are important as incentive based programs; however, there's also a need for the regulatory backstop as the single most important path forward.

Rick: [Looks at options chart] We [the Riverkeeper] were the genesis of the SRRTTF. Right now, it seems like the SRRTTF is resistant to discuss permit development and compliance. A discussion of permitting strategies seems an appropriate topic for the SRRTTF. We would like to see a TMDL, especially since it can be formally used to locate toxic sources within the watershed. We agree with compliance schedules and benchmarks identified in EPA's [July 2015] permitting requirements. Other tools are troublesome because they appear to provide an out due to the difficulty of permit implementation. We do not think that permit extensions are acceptable. In addition, SRRTTF actions to date are not enough to change the river's

listing status from a Category 5 to a Category 4B. If there is a listing status change, we'd need to see specific tangible actions with set legal requirements. Water Quality offsets require long-term binding commitments and are not practicable for toxics. Overall, the issue seems to be with a number. What about the possibility of a ND as a limit (using Method 1668) – to get us closer to 7 ppq than before. We believe there are other options that will not result in a change to the water quality standard.

Jerry: Wanted to clarify that the Riverkeeper was happy with the numeric limits in the last permit cycle in addition to the final numeric effluent limit. Moving forward, these permits must also have numeric limits even though Rick may be proposing a potential path around the 7 ppq.

Rick: We require numeric limits in the permit. It is not acceptable to eliminate the numeric effluent limits due to the standards change.

Janette: Rather than pursuing ways to not meet standards, dischargers need to constantly work toward the standards as a goal. There's a need to be able to measure the pollutants at the center of the discussion. We feel Ecology should employ more sensitive lab method rather than [compliance] Method 608 so that there's an understanding of what's happening with water body. Use of a compliance schedules is okay; however, the timeline must keep moving forward. At this time, we understand that technology may not be perfect; however, dischargers should employ treatment upgrades to show that they're doing all they can to obtain the PCB water quality standards including the use of Method 1668. We notice trends at Ecology to stop moving forward when there are difficult problems with no perfect solution. Ultimately, there should be adequate testing with enforceable mechanisms. TMDLs have a place in water quality regulations and we think this is a perfect application. This process would provide an understanding of all the sources early on during TMDL development. Scoping of the TMDL and the implementation plan allows an understanding of the workload, cleanup plan, and dissemination of responsibility within the watershed. We agree that pollutant trading cannot generally work with bioaccumulative toxins, especially for pollutants that reside in sediments. If this is used and for us to not consider the approach an off-ramp, the conversation needs to include a large ratio. For example, one unit of PCB discharge then there's an enforceable guarantee that there will be a 5 year reduction somewhere else. There should be an actual demonstration of this process in order to start the trading conversation for nonconventional pollutants, especially those with human health criteria.

D. How do you think the Department of Ecology should chart a path forward?

Jerry: We actually already answered this question. To restate, Ecology should develop a permit with interim and final effluent numbers. Exploration of a compliance schedule should still be an option. There should be some creativity in the approach with what can actually be measured. Our organization wants to see Ecology hold the line by creating a strong permit that communicates the rising costs associated surface water discharges and the increasing liability related to a continuous surface water discharge. Permits should maintain a clear regulatory line.

Rick: In addition to Jerry's comments, we believe it's acceptable for Ecology to identify the tools that existing in the permitting sphere; however, we must make industry demonstrate what's applicable to their situation. Strong advocacy in the legislature for task force, stormwater, or other upgrades is needed for funding assistance. Previously, these efforts were funded by individual discharges. A strong mechanism led by Ecology should be in place to help provide funding. We believe a longer compliance schedule would be acceptable if dischargers permanently remove their effluent from the river to keep PCBs and other pollutants out of the surface water. *{Note of response from Adriane – trade off for removal would be the impact to low flows downstream of the discharge}*. We believe the dischargers could by existing water rights to mitigate these surface water flow reductions. Also, this is less of an issue in the downstream reaches of the Spokane River. We also recognize that there needs to be an impairment analysis and/or other alternatives to provide makeup water. Only LLSWD has fully investigated this, Spokane County has conducted a partial assessment.

Janette: We agree that removing the discharge from the river is a good thing; however it cannot be too long of a horizon. At most, we would agree to 10 years. We would expect an assessment on the damage resulting from the removal of the discharge. Otherwise, Ecology should get the job done. Part of that includes starting to require lab analysis that actually works and returns usable data. The plan for stakeholder outreach seems long and a resource intensive effort. However, it may prove to be fruitful and or productive.

Jerry: In response, we do not want Ecology to separate out different Aroclors or congeners and keep the effluent limits as total PCB.

E. Do you think others stakeholders and Ecology would have the same opinion about the path forward? If not, why?

Janette: This isn't a productive question and does not matter. The polluters won't agree with anything our organization says. We don't understand what this question is trying to accomplish.

Rick: We understand that this is about the financial bottom line. We have a wide range of thoughts; however, the use of a variance is not okay. We want a permanent solution rather than finding a way to relieve the standard. Utilization for a variance isn't legal and prevents attainment of a cleaner river.

Jerry: Our organization sees this process in different terms from the Spokane River Stewardship Partners. Fundamental differences of opinion exist between the Riverkeeper and the Spokane River dischargers.

F. *Given that the water quality criteria is 7 ppq, what is the best-case scenario for HOW Ecology can issue permits? What is best possible outcome?*

Rick: We feel that an approach using a ND as the numeric effluent limit as measured by Method 1668c would be appropriate. This solution would not work if using Method 608 for compliance. A compliance schedule to get to ND/7 with continued commitment to the SRRTTF as a tool for source ID in and out of the sewer shed and continued discussions related to permit compliance would be a best case scenario. We would like a TMDL to find sources and transfer responsibility for cleanup. We understand that a compliance schedule is not open-ended. Similar to the benchmark approach from the EPA, the ND as an effluent limit may be the best approach. The biggest stumbling block is the identification of the most appropriate testing method and costs associated with the more sensitive method.

G. *What do you think a fair and legal outcome would look like?*

Rick: We'd all like to see all permits and dischargers comply with the water quality standards. The implementation tools available must be used in a legal way. If an unusual approach is pursued, it should be taken through statewide rulemaking with opportunity for public comment

Jerry: Our organization argued that the NPDES program should be undertaken by the SRRTTF to integrate the toxics reduction efforts. However, we're concerned that there may be a conflation of the two efforts. Ultimately, the process must be fair and legal. What we don't want is for the SRRTTF to consider a UAA or other compliance tools where Policy 1-11 bleeds into the discussion. The SRRTTF wants the Spokane River to meet water quality standards.

Rick: If producing a defensible permit is a matter of looking at available technologies for the reduction of PCBs at end of pipe they should be evaluated before talking about strategies for compliance.

Jerry: Overall our concerns are tied to the change in process.

H. What concerns or challenges would need to be addressed?

Jerry: Our organization lives in a constant awareness that resources for public advocacy are lacking for environmental organizations. The dischargers all have deeper pockets for public outreach. Again, there's inherent inequity around the available resources for the processes.

Rick: We believe that no matter what happens the industry groups will sue us. If goal is to avoid litigation, we are going to not get there. Therefore, the challenge becomes avoiding a lawsuit because you're not going to make everyone happy.

Jerry: In addition, Ecology needs to determine how to avoid backing away from regulatory responsibility back. The nonpoint strategy in the Ag program shows how Ecology avoids regulatory responsibility.

I. What suggestions do you have for resolving those concerns or challenges?

Jerry: The best suggestion is that Ecology should avoid political pressure. All stakeholders need to understand why this would be important. A top down approach from Ecology could change what happens in other regions.

Rick: Ecology needs to build a solid record with legal rationale in addition to providing ample time for public comment opportunities. Again, this will have statewide implications. Keeping messaging small at first then expanding the comment effort to reach key players is our suggestion. People need to know that these have potential implications to the fish consumption rate and how it's applied.

[Switch to discussion of table]

J. What specific regulatory tools do you support and why?

Rick: We accept some of these tools you've identified: compliance schedules, removal of discharges from river, TMDL, and continuation of the SRRITF. These are the most legal and keep efforts moving to meet the water quality standards. Effluent removal provides a potential permanent solution for pollutant removal [to surface water] overall. We understand that this route is a more expensive and lengthy process. Development of a TMDL could legally enforce other sources in the water shed and provide a tool to address them.

Jerry: We do not support several of the tools provided on the table.

K. *As tool to achieve water quality standards, what do you think of the Task Force approach? What benefits have you seen and what improvements would you make?*

Jerry: We believe that the SRRTTF has value. One of the successful pieces is the dialogue created in terms of who is at the table and the understanding of issues. We understand the SRRTTF's predicament and that there's value in educating the community. However, the SRRTTF does need to support the other pieces that aren't voluntary. Now that the comprehensive plan is complete, it needs to be fully put into action. There's another piece and we want to reiterate the danger associated with some of the data collected/reviewed as it provides fodder for the discharge community to influence policy and evade long term responsibility. The SRRTTF does speak as a uniform body in the impairment analysis approach. They should provide framework on the approach. There are potential unintended consequences that worry us. A UAA is an example of an approach that needs a lot of oversight. We also feel that dischargers feel like their presence and SRRTTF participation meets expectations. However, the NPDES program and regulations on discharge are very important towards making measurable progress.

Rick: Since the SRRTTF creation, it was clear that the goal can't be to change the water quality standards. This was clear based on experiences in the DO TMDL. Measurable progress forces action from members of the SRRTTF rather than a chance to complain about the standards. The function of the SRRTTF could potentially be more effective without the current facilitator of the task force could be more effective than with a facilitator. Currently, the group benefits individual members. If funds were available to help the SRRTTF achieve their goals then there would be a structure shift. There are examples of this. Look at other multi-stakeholder water shed groups as a model. The SRRTTF could be a better resource for all members. The group has collected good data – if a TMDL approach was pursued, the data will help augment its development. We suggest an advisory group for that process. Part of this involvement is to be seen. Currently, all SRRTTF actions by the group provide no measurable impact. It's the individuals participating that contribute to a measurable change. Moving forward, we want the SRRTTF to implement solutions for achieving water quality standards. The SRRTTF should be able to make recommendations to different discharges. A direct link/directive from the SRRTTF to require actions>inform other actions> reduce PCBs. Right now, the SRRTTF is more of a study group for now and not focused on outcomes.

Jerry: We believe that the NPDES program needs embedment in the SRRTTF's comprehensive plan. Current function of the SRRTTF isn't clear since there are no legal requirements.

L. *Thinking creatively, what solution(s) would you offer?*

Jerry: We believe that a compliance schedule to remove the discharges from the Spokane River, a TMDL, and improvement to the SRRTTF are solutions.

We want to brainstorm on the idea of integrating the SRRTTF into a TMDL process during the development of wasteload allocations. Ultimately, we do need the SRRTTF to stay together.

Rick: unanswered.

M. End of meeting review of potential strategies for Spokane River Permitting. What thoughts do you have about how time impacts the implementation of the solution(s)?

The biggest issue is the time it will take to permit and achieve the water quality standards.

Rick: We are okay with a longer time frame if action items are identified (e.g. 50 yr compliance schedule). We do understand that there are intermediate steps. We have to be comfortable with how specific steps are laid out if we agree to an extended time frame. Some actions will lead to appeals; however, time could be taken to minimize that risk of appeal. Either way, dischargers need to be in compliance with the water quality standards.

Rick: You know that you'll likely get sued either way.

AB: Ecology is trying to get at what's important and write a legal defensible permit. We would rather we take time to write legal permit that meets standards at the issuance and avoid appeals. Our comfort level decreases when considering drawing out the permit development. Ultimately, our end goal is to achieve state water quality standards. The permit is a tool to get there but we need to keep the forward momentum.

Questions from Riverkeeper for Ecology:

- *Jerry wants to reiterate statement re: taskforce. TF functional insofar as we have strong, defensible permits at work. Without permits, we are less confident in integrity of SRRTTF or ability to get things done.*
- *Rick wants to know if we will have a chart of tools that are applicable to the situation.*
- *They would like to see the Spokane Tribe participate in the SRRTTF.*