

Spokane Riverkeeper

Please find the Spokane Riverkeeper comments on the informal, preliminary draft rulemaking for Spokane River PCB Variances attached/uploaded. We have also uploaded several other documents for the Record. JW



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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.

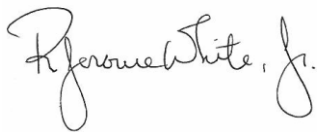
¹⁰ 40CFR131.14(b)(ii)(A)(3) If no additional feasible pollutant control technology can be identified, the interim criterion or interim effluent condition that reflects the greatest pollutant reduction achievable with the pollutant control technologies installed at the time the State adopts the WQS variance,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



Jerry White, Jr
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jerry@spokaneriverkeeper.org

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



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ATT: Heather Bartlett
Program Manager Water Quality Program
Washington Department of Ecology
300 Desmond Drive Lacey, WA 98503

10/26/18

RE: Follow-up to September 25 Meeting on Spokane River NPDES Permits and Variances

Dear Heather:

Thanks very much for meeting with Rick Eichstaedt and me on September 25th. I appreciate that you took the time to discuss the future of the Spokane River with us.

I wanted to recap very clearly where we stand in our interest in getting to a river that is clean, healthy, and safely fishable:

- 1) We appreciate the response of WSDOE to the EPA in terms of the potential to rescind the Water Quality Standard for PCBs.
- 2) We do not feel that variances are a viable solution to addressing the problems in the Spokane River. Variances are an untried mechanism for toxics such as PCBs and have little chance to get us to the clean river we all desire. They have questionable outcomes, as they deviate from the Water Quality Standard promulgated in 2016 by the EPA, which was based on getting the water column down to levels that would produce healthy, edible fish. Variances open the door to unending extensions wherein dischargers are never actually held to high enough standards to effectively get to science-based water quality standards in a timely manner. In effect, variances open the door to an alternate, less protective water quality standard.
- 3) We feel that legally defensible permits (for the five major dischargers in the Washington reach of the river) need to be issued as soon as possible. This also means that permit development should be accelerated and permits issued no later than 2019. Currently, these permits should have compliance plans and schedules that taper effluent PCBs down over time (this position is unchanged since our presentation last November at the Spokane River Forum) and captures the original intent expressed at the time of the development of the Task Force – that the initial permits would be used to collect data and that subsequent permits would gradually meet standards. These compliance plans could run for two permit cycles (10 years). Numeric effluent limits for PCBs should be a functional part of the NPDES permits. These could start at a range of current effluent but taper to meet goals set by Ecology by 2027. Permits should include a range of BMPs (such as running Next Level Treatment all year round) as well as Toxic Management Plans.

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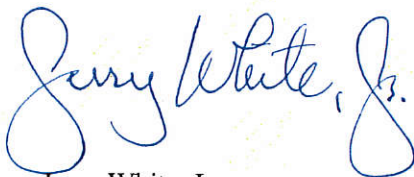
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October 26, 2018

- 4) If current permits (developed in 2011) are extended and provisions for discharging into the Spokane River are further developed inside Agreed Orders, then that process needs to:
- Include some of the improvements that the 2016 draft NPDES permits (for Kaiser, City of Spokane, and Liberty Lake) included, such as numerical effluent limits for PCBs based on current performance.
 - Include an open and public process throughout their development for the public to understand and comment on the Agreed Orders.
 - Provide concrete, fixed, and reasonable expiration dates for the Agreed Orders.
- 5) The WSDOE should begin the creation of a TMDL, and the work of the Spokane River Regional Toxics Task Force should be folded into this effort. Waste load allocations for point sources and load allocations for non-point sources should be developed so that dischargers have a clear idea of what the future holds for their effluent and operations. This is a legal obligation of the WSDOE and consistent with the commitment made to the Federal Court.

We feel that sticking with these tenets and provisions of the Clean Water Act will get our community and our river to clean water much more rapidly than the path currently charted by WSDOE. We also feel that the public needs more inclusion in this process; it is they who bear the cost of a dirty river and fish that are too often unsafe for consumption.

We understand that this is difficult work, but sticking to established law with a great deal of public input is the right path. Thanks for the opportunity to talk and discuss these matters and I hope that we may do so again in the near future.

Respectfully,



Jerry White, Jr.

CC: Maia Bellon
Adriane Borgias
Karl Rains

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 SRRTTF. 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.*



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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>

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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

Electronic signatures collected on Spokane Riverkeeper website.		
www.spokaneriverkeeper.org		
Dear Director Watson, Please reject the applications for PCB variances for the five National Pollution Discharge Elimination System (NPDES) permit holders in the Spokane River. We believe these variances will increase pollution in the Spokane River and create a "playbook" for bypassing pollution standards in the United States.		
Submitted On	Name	
	Lydia Newell	
03/10/2020 13:37:40	Lydia Again	
03/10/2020 13:59:20	Rachael Ashworth	
03/10/2020 14:05:45	Alexa Arpin	
03/10/2020 21:35:15	Jaymie Horowitz	
03/11/2020 7:45:29	Jan Treecraft	
03/11/2020 8:22:05	Jessica Mcphail	
03/11/2020 9:17:07	Cliff Hansen	
03/11/2020 9:31:14	megan schmall	
03/11/2020 10:23:21	Stefani Vandeest	
03/11/2020 11:21:45	Rick Eichstaedt	
03/11/2020 11:31:40	MATT DOVAL	
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03/11/2020 22:46:20	Hannah Hirshfield	
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03/12/2020 9:02:39	Alisha Davis	
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06/13/2020 7:47:52	Brad Reynolds	
06/14/2020 22:52:18	Trena Redman	
06/30/2020 14:05:02	RANDALL RIGGS	
07/06/2020 20:35:21	Cheryl McDaniel	
07/14/2020 10:30:28	Emily Marvin	
07/22/2020 07:52:18	Cheryl Fogg	
07/22/2020 07:54:23	Bill Fogg	