



Spokane Tribe of Indians

Department of Natural Resources

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May 2, 2022

Pat Hallinan
Dept. of Ecology - Water Quality Program
4601 N. Monroe Street
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RE: Comments – IEP NPDES permit WA0000825

Dear Mr. Hallinan:

On behalf of the Spokane Tribe of Indians' Department of Natural Resources (Tribe), please accept these comments on the Washington State Department of Ecology's (Ecology) draft NPDES Permit for Inland Empire Paper Company. These comments do not, nor are they intended in any way to impact the Tribe's August 18, 1877 federally reserved water rights within the Spokane River ("River") which includes quantities necessary to carry out the purposes of the Spokane Indian Reservation ("Reservation") which include but are not limited to guaranteeing the Tribe access to fish for food within Tshimakain Creek and the Columbia and Spokane Rivers. This fishing purpose of the Reservation also includes water of a quality necessary to carry out that purpose. Unfortunately, pollution that originates upstream of the Tribe's waters impacts the Tribe's citizens ability to safely exercise their fishing rights.

As you are aware, the Spokane Tribe received "treatment in the same manner as a state" (TAS) status under the Clean Water Act in 2002. The Tribe's first water quality standards were approved by the EPA in 2003. Since that time, attainment of the Tribe's water quality standards within its jurisdictional waters has been difficult, particularly in regards to toxins that bioaccumulate such as PCBs. Accordingly, the Tribe in 2013 intervened in a lawsuit¹ over the lack of a PCB TMDL for the 303d listed sections of the Spokane River. On February 12, 2022 the Court entered a consent decree that binds EPA to develop a PCB TMDL for the Spokane River by no later than December 29, 2024. (Dkt. 253). The Tribe has a significant interest in ensuring that the PCB TMDL is developed and implemented to lead to the attainment of the Tribe's downstream water quality standards. Accordingly, these comments will primarily focus on what it views as shortcomings in these permits as they relate to PCBs.

¹ *Sierra Club, et al v. EPA, et al.*, C11-1759-BJR, Western District of Washington.

For background, the Tribe's first EPA approved fish consumption rate ("FCR") in 2003 was 86.3 grams/per day. This resulted in a surface water quality standard of 3.37 pg/L for PCBs. The Tribe adopted new standards in 2010 based on a fish consumption rate of 865 grams of fish per day to recognize a subsistence quantity of fish consumption, along with 4 liters of water intake all calculated utilizing a 1/1,000,000 cancer risk rate. This resulted in a PCB surface water quality standard of 1.3 pg/L for total PCBs. These new standards were approved by EPA in December of 2013. [Washington State's current water column PCB standard is based on a 1/100,000 cancer risk rate and is 170 pg/L, which is currently subject to two lawsuits in the Western District of Washington²]. Discharges from upstream NPDES permittees contribute to violations of the Tribe's water quality standards for PCBs and other parameters.

The Tribe recognizes the current loophole in the enforcement of PCB water quality standards eloquently described by Justice Gonzalez dissenting in *Puget Sound Keeper v. Dep't of Ecology, et al.*, 191 Wn.2d 631, 646-653 (2018). This as interpreted by Ecology requires that enforcement monitoring for PCBs only be conducted with a method that cannot detect down to the water quality standards for PCBs, method 608. PCBs are currently an unenforceable limit in Ecology's view.

With that said, it is critically important that Ecology revise these draft permits to include appropriate monitoring for PCBs utilizing Method 1668 or an equal and similar method for all monitoring purposes. This is an appropriate use of Method 1668. *Nw. Pulp & Paper Ass'n v. Dep't of Ecology*, No. 55164-1-II, 2021 Wash. App. LEXIS 2970, at *7-8 (Ct. App. Dec. 14, 2021).

It is important that all discharges into the Spokane River be monitored for PCBs appropriately for three important reasons.

First, the PCB TMDL will be completed by the EPA and will include appropriate Waste Load Allocations (WLA) for PCBs. The data EPA uses to develop the WLAs should be the best quality possible to increase the PCB TMDL's effectiveness. Requiring the entities that discharge toxic pollution into the Spokane River to monitor their effluent at all discharge points will help gather the most relevant and current data and will in turn make the PCB TMDL more accurate.

Second, apart from the numeric limits for PCBs, Ecology has narrative limits that must be monitored which Method 1668 can assist with. The following applies to all NPDES permits.

(b) Human health protection. The following provisions apply to the human health criteria in Table 240. **All waters shall maintain a level of water quality when entering downstream waters that provides for the attainment and maintenance of the water quality standards of those downstream waters, including the waters of another state.** The human health criteria in the tables were calculated using a fish consumption rate of 175 g/day. Criteria for

² Washington State's water quality standards are the subject of two cases in the Western District of Washington: *Washington v. EPA*, 19-cv-00884-RAJ and *Puget Soundkeeper Alliance, et al*, 20-cv-00907-RAJ and these cases are currently being held in abeyance pending an EPA review process.

carcinogenic substances were calculated using a cancer risk level equal to one-in-one-million, or as otherwise specified in this chapter. The human health criteria calculations and variables include chronic durations of exposure up to seventy years. All human health criteria for metals are for total metal concentrations, unless otherwise noted. Dischargers have the obligation to reduce toxics in discharges through the use of AKART.

WAC 173-201A-240(b)(emphasis added). Here, the Tribe is a downstream state (with a PCB water column standard of 1.3 pg/L) and Method 1668 monitoring of effluent can help provide data on whether this standard can be attained and maintained under the permit conditions.

Third, 40 C.F.R. Section 122.4(d) requires that: “No permit may be issued: (d) When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States.” Again, the Tribe is an “affected” State for purposes of the Clean Water Act and requiring Method 1668 for effluent monitoring will allow the Tribe and the EPA to better monitor the effectiveness of the permit conditions.

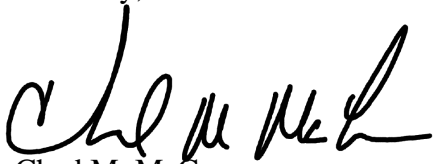
Applicable Standards

This permit should account for the uncertainty presented by developing permits when the very standards used to develop the permits are subject to two separate lawsuits and an EPA administrative process, along with the development of a PCB TMDL. The permits should include an automatic reopener to address any discrepancies that arise if the water quality standards change during the term of these permits and when WLAs are finalized.

Conclusion

The Tribe thanks you in advance for considering these comments and hopes you will incorporate our recommendations in these permits to further our shared goal of a clean and thriving Spokane River. If you have any questions, feel free to contact me at 509-626-4420.

Sincerely,



Chad M. McCrea
Natural Resources Director
Spokane Tribal of Indians

Cc: Carol Evans, Chairwoman, Spokane Tribe of Indians
Brian Crossley, Water and Fish Program Manager, Spokane Tribe of Indians
Brent Nichols, Fisheries Program Manager, Spokane Tribe of Indians
Ted Knight, Special Legal Counsel, Spokane Tribe of Indians