UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, WA 98101

FEB 11 2002

Reply To Attn Of: ECO-087

Mr. Samuel N. Penney, Chairman
Nez Perce Tribe of Idaho
P.O. Box 305
Lapwai, Idaho 83540

Dear Chairman Penney:

I am writing to you as part of an effort by the U.S. Environmental Protection Agency Region 10 (EPA) to coordinate and consult with the Nez Perce Tribe in advance of several important decisions regarding water quality in the mainstem Columbia and Snake River. Specifically, we hope to enhance communication with leaders of your Tribe and Tribal staff to provide opportunities for meaningful involvement, so that EPA can fully consider the rights and concerns of the Tribe before making final decisions on the Total Maximum Daily Loads (TMDLs) that are being prepared for the mainstem Columbia and Snake River.

EPA recognizes its unique legal relationship with Tribal governments as set forth in the United States Constitution, treaties, statutes, executive orders, and court decisions. Federal policies instruct EPA to have regular and meaningful consultation with Indian Tribal governments when developing policies and regulatory decisions on matters affecting their communities and resources. We would like to work with you now in advance of the final decisions to ensure that the final TMDLs reflect a full consideration of tribal concerns and perspectives. It is our hope that this coordination and consultation on the Columbia and Snake River Mainstem TMDLs will build on informal coordination efforts underway for the past year involving Tribal staff and Tribal organizations.

Description of Total Maximum Daily Load Work Efforts

EPA Region 10 is working with the states of Idaho, Oregon, Washington, in coordination with the 14 Columbia Basin Tribes to develop Columbia and Snake River Mainstem TMDLs for dissolved gas and water temperature. These TMDLs will characterize the sources of total dissolved gas and temperature loadings and allocate those loadings to meet state and tribal water quality standards.

Through the end of 2002, EPA will be making important decisions in five related efforts to establish TMDLs for Total Dissolved Gas (TDG) and Temperature TMDLs on the Columbia/Snake River Mainstem under section 303(d) of the federal Clean Water Act. EPA's

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roles can be broken down into three basic categories: technical analysis; issuing a federal TMDL; and approving a state TMDL, which are described in the five efforts below:

- First, EPA will be taking action to approve /disapprove the Lower Columbia TDG TMDLs which will be issued by Oregon and Washington. The geographic scope is from the Pacific Ocean to the confluence with the Snake River;
- Second, EPA will be taking action to approve/disapprove the Lower Snake River Mainstem and Mid-Columbia River TDG TMDLs that will be prepared by the state of Washington;
- Third, EPA will be doing the technical analysis and issuing the TDG TMDL for Indian reservation waters in the Upper Columbia, including Lake Roosevelt;
- Fourth, EPA will be developing and issuing the Temperature TMDL for Washington, Oregon and Tribal Waters. At the request of the states of Oregon and Washington, EPA will be doing the technical analysis and issuing temperature TMDLs for the Columbia/Snake River Mainstem in Oregon and Washington. EPA will be doing the technical analysis and issuing temperature TMDLs for Indian reservation waters in the Upper Columbia, including Lake Roosevelt; and
- Finally, for the portion of the Snake River Mainstem in Idaho, EPA will be doing the technical analysis for the temperature TMDL that will be issued by Idaho and submitted to EPA for approval.

More details on these five efforts can be found in the attached draft strategy document: "Strategy for Consultation and Coordination with Indian Tribal Governments for Completing Columbia River and Snake River Mainstem TMDLs."

Load Allocation is the Scope of Total Maximum Daily Loads

These TMDLs will focus solely on loading allocations for dissolved gas and water temperature. Implementation activities to improve water quality are not within the scope of EPA's responsibilities in this TMDL effort. However, EPA is addressing Columbia and Snake River water quality improvement implementation activities in other policy discussions.

Coordination with the Columbia River Inter-Tribal Fish Commission

As you may know, the Columbia River Inter-Tribal Fish Commission (CRITFC) has been engaged with these work efforts issue and has provided valuable assistance. We recognize, however, that communication with CRITFC is not a substitute for the direct government-to-government consultation represented by this letter.

Grant to National Fish and Wildlife Foundation

EPA has provided a small grant to the National Fish and Wildlife Foundation to help support tribal coordination and consultation for the 14 Columbia Basin Tribes. This grant supported a meeting held on the Confederated Tribes of the Warm Springs Indian Reservation in

September 2001 which provided a forum to discuss the TMDL efforts and tribal issues. Other forums for tribal staff and tribal discussions are being planned right now.

In conclusion, EPA regards coordination and consultation with affected Tribal governments critical as we move forward on this effort. We are interested in establishing the appropriate dialogue and two way communication with the tribal governments to appropriately address tribal concerns. To assist in this process. I have asked Jim Werntz, EPA's Associate Regional Administrator located in Boise, Idaho, to be directly involved in the development of this government-to-government process. Mary Lou Soscia, EPA Region 10 - Columbia River Coordinator, will follow up with Gwen Carter, Director of Water Resources, to find out about the interest of the Nez Perce Tribe in initiating coordination and consultation discussions. If you have any questions or concerns regarding the Columbia and Snake River Mainstem TMDLs, please do not hesitate to call me directly at (206) 553-1234, Jim Werntz at (208) 378-5750 or Mary Lou Soscia at (503) 326-5873.

Sincerely,

L. John Iani
Regional Administrator

Attachments:

1. EPA Draft Strategy for Consultation and Coordination with Indian Tribal Governments for Completing Mainstem Columbia River and Snake River TMDLs
2. U.S. Environmental Protection Agency-Region 10 Tribal Consultation Framework, July 16, 2001

cc: Gwen Carter, Nez Perce Tribe
Rick Eichstaedt, Nez Perce Tribe
Donald Sampson, Columbia River Inter-Tribal Fish Commission
Jim Werntz, EPA - Boise

Draft - January 25, 2002

EPA STRATEGY FOR CONSULTATION AND COORDINATION WITH INDIAN TRIBAL GOVERNMENTS FOR COMPLETING MAINSTEM COLUMBIA RIVER AND SNAKE RIVER TMDLs

I. **Purpose of the Strategy** - This strategy describes EPA's strategy for consultation and coordination with Indian Tribal Governments on the EPA actions to be taken on the Mainstem Columbia/Snake River TMDL. As outlined in the July 2001, U.S. Environmental Protection Agency- Region 10 Tribal Consultation Framework (attached), EPA is committed to consult with federally recognized tribal governments in a manner respectful of tribal sovereignty and culture.

II. **The Columbia/Snake River Mainstem TMDLs** - EPA Region 10 is working with the states of Idaho, Oregon, Washington, in coordination with the 14 Columbia Basin Tribes to develop Columbia and Snake River Mainstem TMDLs for dissolved gas and water temperature to meet state and tribal water quality standards. These Total Maximum Daily Loads will focus solely on loading allocations for dissolved gas and water temperature. Implementation activities to improve water quality are not within the scope of EPA's responsibilities in this TMDL effort.

A. **EPA Temperature TMDL for Washington and Oregon and Tribal Waters** At the request of the states of Oregon and Washington, EPA will be doing the technical analysis and issuing temperature TMDLs for the Columbia/Snake River Mainstem in Oregon and Washington. EPA will be doing the technical analysis and issuing temperature TMDLs for Indian reservation waters in the Upper Columbia, including Lake Roosevelt.

B. **Idaho Temperature TMDL** - For the portion of the Snake River Mainstem in Idaho, EPA will be doing the technical analysis for the Temperature TMDL that will be issued by Idaho and submitted to EPA for approval.

C. **Oregon/Washington Lower Columbia Total Dissolved Gas TMDL** - EPA will be taking action to approve or disapprove the Lower Columbia Total Dissolved Gas TMDLs which will be issued by Oregon and Washington. The geographic scope is from the Pacific Ocean to the confluence with the Snake River.

D. **Washington Total Dissolved Gas TMDL** EPA also will be taking action to approve or disapprove the Lower Snake River Mainstem and Mid-Columbia River Total Dissolved Gas TMDLs that will prepared by the state of Washington.

E. **EPA Total Dissolved Gas TMDL for Colville and Spokane Reservations** - EPA will be doing the technical analysis and issuing the Total Dissolved Gas TMDL for Indian reservation waters in the Upper Columbia, including Lake Roosevelt.

III. **Other EPA Activities in the Columbia/Snake River System** - EPA is addressing Columbia and Snake River water quality improvement implementation activities in other

policy forums. For the mainstem Columbia/Snake River, EPA is engaged with the Federal Columbia River Power System (FCRPS) action agencies - the U.S. Army Corps of Engineers, the Bonneville Power Administration, and the Bureau of Reclamation, in the development of a Columbia River Water Quality Plan. The Water Quality Plan was called for in the 2000 FCRPS Biological Opinion in Appendix B to address water quality actions needed for the Columbia but were considered outside the boundaries of species recovery. EPA is participating in other regional forums including the Federal Regional Executives, the NMFS Implementation Forum, and the Transboundary Gas Group to provide representation on Clean Water Act policy and technical decisions for the Columbia River.

IV. **Affected Tribal Governments** The following 14 Columbia Basin tribal governments are considered affected by the mainstem Columbia/Snake River TMDL:

Burns Paiute Tribe of the Burns Paiute Indian Colony of Oregon
Coeur d'Alene Tribe of the Coeur D'Alene Reservation, Idaho
Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana
Confederated Tribes of the Colville Reservation, Washington
Confederated Tribes of Grand Ronde
Confederated Tribes of the Umatilla Indian Reservation, Oregon
Confederated Tribes of the Warm Springs Reservation of Oregon
Confederated Tribes and Bands of the Yakama Nation, Washington
Kalispel Indian Community of the Kalispel Reservation, Washington
Kootenai Tribe of Idaho
Nez Perce Tribe, Idaho
Shoshone-Bannock Tribes of the Fort Hall Reservation of Idaho
Shoshone-Paiute Tribes of the Duck Valley Reservation, Nevada
Spokane Tribe of the Spokane Reservation, Washington

V. **General Approaches for Consultation and Coordination**

A. Formal Government-to-Government Consultation with Tribal Governments - The Tribe may request formal consultation which may be conducted by the Regional Administrator or his designee.

B. Coordination With Tribes, Their Staffs, and Regional Tribal Groups (CRITFC, UCUT, and Snake River Tribes - Monthly meetings are being conducted with EPA, state and tribal staff to discuss policy and technical decisions. In addition, EPA representatives are available to met with tribal staff and policy representatives to discuss technical and policy issues.

C. Coordination with States, Other Federal Agencies, and EPA - EPA and the states of Oregon, Washington and Idaho signed a Memorandum of Agreement to define roles and responsibilities for the development of the Mainstem TMDLs. For approximately one year, EPA has been coordinating monthly meetings between the states, tribal staff and other interested entities to coordinate TMDL development.

D. Funding -Funding for individual tribal consultation and coordination is not available. However, EPA has provided a small grant to the National Fish and Wildlife Foundation to help support tribal coordination and consultation. This grant supported a meeting held on the Confederated Tribes of the Warm Springs

Indian Reservation in September 2001 which provided a forum to discuss the TMDL efforts and tribal issues. Other forums for tribal staff and tribal discussions are being planned right now. EPA is pursuing additional funding to support tribal consultation and coordination.

E. Issue Resolution - EPA will work with tribal governments to develop a consensus decisions before a final EPA decision is made. The EPA action/decision for these TMDLs is the development and issuance of the loading allocation for the temperature TMDL; for tribal waters, the development and issuance of the loading allocation for the gas TMDL; and the approval of the loading allocation for the state developed gas TMDLs.

VI. **Agency Contacts and Information Sources**

Mary Lou Soscia, Columbia River Coordinator - (503) 326-5873
Richard Parkin, Temperature TMDL Senior Staff - (206) 553-8574
Dan Opalski, Director of the Oregon Operations Office - (503) 326-3250
Jim Werntz, Director of the Idaho Operations Office - (208) 378-5743
Tom Eaton, Director of the Washington Operations Office - (360) 753-8086

U.S. ENVIRONMENTAL PROTECTION AGENCY- REGION 10
TRIBAL CONSULTATION FRAMEWORK
July 16, 2001

REGION 10 WORKING DEFINITION OF TRIBAL CONSULTATION

"Consultation" means the process of seeking, discussing, and considering the views of federally recognized tribal governments at the earliest time in EPA Regions 10's decision-making. Consultation generally means more than simply providing information about what the agency is planning to do and allowing comment. Rather, consultation means respectful, meaningful, and effective two-way communication that works toward a consensus reflecting the concerns of the affected federally recognized tribe(s) before EPA makes its decision or moves forward with its action.

REGION 10 GUIDING PRINCIPLES

1. The Region will consult with federally recognized tribal governments in a sensitive manner respectful of tribal sovereignty and culture.

2. The Region will maintain government-to-government communications with federally recognized tribal governments by interacting through officials of appropriate stature and authority, and as determined by the Regional Administrator and tribal government. For major consultation issues, the time frame and manner in which EPA will consult with a specific Tribe will be negotiated between EPA and the Tribe.

3. In situations where EPA has the ultimate decision-making authority, federal policies direct EPA to consult with affected federally recognized tribal governments prior to decision- making. The Region will work within the following guidelines when deciding how to consult with federally recognized tribes:

   - When the matter may directly affect the environment, resources, treaty rights or other legal rights of a specific or small number of federally recognized tribes, EPA will meet with, have conference calls, and send letters to tribal leaders of the affected individual tribe(s). EPA will provide feedback as specifically requested by the Tribe(s) and take any agreed upon follow-up action on the matter in a timely manner;

   - When seeking perspectives from all interested federally recognized tribes in the Region on national or broad Regional issues, EPA will meet with, or have a conference call, or solicit written views in a letter from EPA;

   - When looking for broad guidance on tribal policy or implementation matters of national or Regional interest either at a preliminary stage or requiring fast turn-around, EPA will rely on the Regional Tribal Operations Committee for assistance and input. This dialogue will not replace the government-to-government relationship and communication between EPA and the Tribe(s);

4. On specific matters, the Region should contact and provide any available materials necessary to the potentially affected federally recognized tribes as early as practicable, to provide time for consultation prior to making a decision.

5. Where feasible and appropriate, the Region will encourage regular participation of federally recognized elected tribal representatives or their designees on Regional planning and work groups.

6. The Region will directly notify federally recognized tribe(s) where specific tribal interest or trust resources may be involved, and offer the respective tribe(s) an opportunity to participate without resolving whether the tribe(s) has a legal right to consultation.

7. The Region will meet with individual federally recognized tribes upon request of the tribe's leaders.

8. The Region should endeavor to build an on-going relationship with federally recognized tribal government(s) to increase communication, and to ensure that consultation on specific proposals will be more constructive and effective.

9. The Region will encourage meetings with federally recognized tribal governments on their homelands, to the extent resources allow, to strengthen the EPA federal-tribal relationship and facilitate EPA understanding of respective tribal issues, concerns and perspectives.

10. Public participation which involves individual citizens of Indian Country, is not the same as consultation with affected federally recognized tribal governments. EPA has the responsibility to consult with federally recognized tribal governments separate from, and in addition to, the public participation process for interested stakeholders.

11. Consultation with tribal governments should occur independent of the public participation process. Tribal consultation does not replace requirements to promote public participation that may apply to a given proposed federal action.

ISSUE RESOLUTION

Should disputes arise between one or more tribes and EPA Region 10, the parties will strive to address the matter informally, at the staff level. In the event that staff are unable to resolve a dispute, the issue will be presented to immediate supervisors, who will attempt to resolve the dispute. If the dispute is not resolved, the staffs will present the matter to progressively higher levels of management until consensus is reached. In the event consensus is not reached, the EPA Regional Administrator, after consulting with the elected leader(s) of the federally recognized Tribe(s), will make the final decision.