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U.S. EPA
Office of Wetlands, Oceans, and Watersheds
Assessment and Watershed Protection Division
Watershed Branch
EPA West Building, Room 7330-A
1301 Constitution Avenue, NW
Washington, DC 20004

RE: Pend Oreille River Temperature TMDL

Dear Sarah:

We understand that EPA is still in the process of responding to the Kalispel Tribe's concerns regarding the Pend Oreille River Temperature TMDL. As you know, while EPA's review has been underway, the Tribe has been seeking additional information through FOIA requests. As a result of what we have learned through EPA's responses to those requests, we want to identify the following concerns. Please share this letter and attachments with your team, and include the attached documents and this letter in the administrative record.

1. *The Tribe does not need to provide a biological basis for disapproving the TMDL.*

On page 1 of Attachment 1, Don Martin opines that the Tribe must provide a "compelling biological basis (in terms of the fish, bull trout) for not approving the TMDL." This is incorrect. State and tribal water quality standards are designed to protect fish, so noncompliance with these standards necessarily harms fish. By showing that the TMDL's cumulative frequency analysis ("CFA") is inconsistent with state and tribal water quality standards, the Tribe has established harm to fish. Biological information may be helpful in understanding the impacts of dams that cause significant "temperature shifts," but EPA acknowledges that such a shift is not present on the Pend Oreille River. See Attachment 2, pages 2-3.

2. *Region 10's overview of Pend Oreille TMDL Issues begs the question raised by the Tribe regarding temperature impacts at Stateline.*

On page 3 of Attachment 2, Region 10 states:

> The TMDL model results show no temperature increase above natural conditions at the Idaho-Washington border. Rather the model showed that Albeni Falls dam in Idaho has a cooling effect on downstream water temperatures in the river.

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The above statement is true when the TMDL's seasonal CFA is applied. However, it is not true when model output is evaluated with a paired analysis. By failing to acknowledge this distinction, the statement answers the question whether the TMDL's seasonal CFA improperly masks the actual impact of Albeni Falls Dam without ever analyzing the underlying issue.

3. *Persistent temperature exceedances bear no relationship to the 1-DMax temperature criterion under state and tribal water quality standards.*

In Attachment 3, Ben Cope opines that the State "believes that the cumulative frequency analysis is a better method to identify persistent temperature exceedances caused by dams," and that this is a "reasonable concern" justifying application of CFA instead of paired analysis. As the Tribe has stated before, a 1-DMax standard requires water temperatures to be evaluated on a daily basis to ensure that a maximum temperature threshold is never exceeded. If the maximum temperature threshold is exceeded at any time during a given day, a violation occurs. By divorcing temperature data from its proper place in time, CFA fails to adhere to the inquiry required by state and tribal water quality standards. Applying CFA is therefore not reasonable.

4. *The State did not choose to apply CFA based on that method's application in the Willamette River TMDL.*

In Attachment 3, Ben Cope writes that "the State chose the cumulative frequency methodology after Region 10 approved its use in the Willamette River TMDL in Oregon." This statement is misleading. The documents cited in the Tribe's previous letter demonstrate that the State chose to use CFA before it ever reviewed the Willamette River TMDL. The State only reviewed the Willamette River TMDL after Region 10 suggested that the Willamette River TMDL might help the State develop a post hoc defense of its decision to use CFA. The State then cited the Willamette River TMDL as precedent even though it recognized that the Willamette River TMDL provided no justification for using CFA.

5. *Region 10's proposed defense against a Kalispel TMDL challenge is rife with problems.*

In Attachment 4, Ben Cope proposes a defense to a hypothetical water quality standards challenge from the Tribe. Mr. Cope's analysis is concerning to the Tribe not only for the substantive reasons described below but also because it ventures so far outside his realm of expertise that it calls his scientific impartiality into question. It appears that Mr. Cope is more concerned with developing a rationale for rejecting the Tribe's request for a proper TMDL than he is with correctly applying the relevant water quality standards.

a. *EPA must confront the issue whether an upstream sovereign's TMDL must meet a downstream sovereign's water quality standards.*

Mr. Cope states that the "[i]ssue is not whether an upstream TMDL must meet a downstream state WQS," but whether EPA has fostered a seamless TMDL across sovereign boundaries, which "we have done here." This TMDL is not seamless. The multi-jurisdictional approach required by the 2005 MOA failed, and this failure has resulted in tribal concerns at each sovereign boundary. If EPA approves a TMDL that masks ongoing impacts to tribal waters, it will be sanctioning an ongoing environmental

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injustice—especially because the sources of unnatural heating are not located within Reservation boundaries.

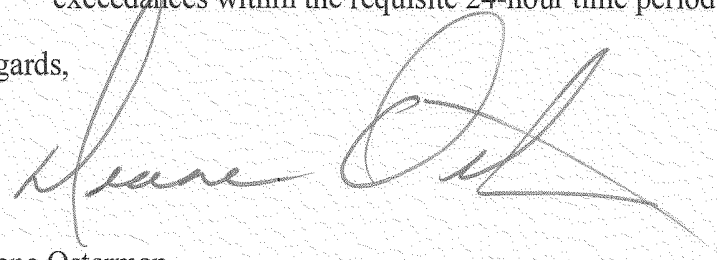
b. *The Tribe does not need to codify its preferred methodology into its water quality standards to be entitled to EPA deference.*

Mr. Cope suggests that EPA should only defend the Tribe's preferred method of determining compliance with its water quality standards if that method is codified into revised tribal water quality standards. This suggestion is absurd. The Tribe is a co-equal sovereign with Washington under the Clean Water Act, and EPA must give the Tribe's analytical choices at least as much deference as it gives the State's. Region 10 has never suggested that the State must incorporate CFA into its water quality standards to be entitled to EPA deference.

c. *The Tribe does not need to prove that the State's interpretation of its water quality standards is clearly erroneous.*

Mr. Cope offers his legal opinion that EPA can only disapprove the TMDL if the Tribe proves that the State's methodology for evaluating Kalispel standards is "clearly erroneous." According to Mr. Cope, the Tribe would need to establish a "clear connection between the disputed methodology and the plain language of the WQS." This novel legal theory would result in multiple waves of revisions to water quality standards throughout the nation as states and tribes would have to codify their various preferred methodologies into their standards only to have to revise them again as new scientific techniques are developed. To disapprove this TMDL, EPA need only determine that the State's methodology for evaluating compliance with state and tribal water quality standards is not consistent with the applicable temperature criteria. The TMDL's seasonal CFA does not comport with either sovereign's standard because it focuses on persistent maximum temperature exceedances instead of maximum temperature exceedances within the requisite 24-hour time period.

Regards,



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