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February 6, 2009

Robert Steed
Idaho Department of Environmental Quality
2110 Ironwood Parkway
Coeur d'Alene, ID 83814

James Bellatty
Department of Ecology
4601 N. Monroe
Spokane, WA 99205

RE: Pend Oreille River Temperature TMDL

Dear Mr. Steed and Mr. Bellatty:

By a letter dated October 17, 2007, Lincoln C. Loehr wrote to Mr. Steed and Mr. Paul Pickett to question how the draft TMDL for the Pend Oreille river proposed to set allowable temperatures for the river, among other issues. While the Kalispel Tribe takes issue with a number of the statements made by Mr. Loehr, the Tribe limits its comments here to explain why Mr. Loehr was incorrect with respect to one particular objection to the draft TMDL.

Mr. Loehr offered the opinion that “figures 25 and 26 in the TMDL document mistakenly present the loading capacity as based on the $t=34/(T+9)$ formula. Those figures should be corrected to reflect the 2.8 degrees allowance” As his letter explains, he argues that the 2.8 degrees allowance is appropriate because WAC 173-201A-200(1)(c) should be applied on the grounds that a dam is not a point source.

Leaving aside the question of whether or not a dam is a point source for these purposes (the Tribe believes that dams are point sources), Mr. Loehr’s opinion is an incorrect

interpretation of the applicable regulation. WAC 173-201A-200(1)(c) is applicable only where temperature standards are based on aquatic life use categories. In the case of the Pend Oreille river, a numeric special condition of 20°C is applicable, rather than a temperature standard based on aquatic life use categories. The special condition is set forth in WAC 173-201A-602, Table 602, which provides:

Pend Oreille River from Canadian border (river mile 16.0) to Idaho border (river mile 87.7)¹ 1. Temperature shall not exceed a 1-DMax of 20.0°C due to human activities. When natural conditions exceed a 1-DMax of 20.0°C, no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3°C; nor shall such temperature increases, at any time, exceed $t=34/(T+9)$.

Because Table 602 is specifically applicable to the entire Pend Oreille river in Washington State, the aquatic life category temperature standards are irrelevant within Washington waters of the Pend Oreille river. Thus the maximum permissible increase in temperature from human activities is either 0.3°C when natural conditions exceed a 1-DMax of 20.0°C, or $t=34/(T+9)$ when natural conditions do not exceed a 1-DMax of 20.0°C.

The Tribe brings this to your attention because it appears that Mr. Loehr's opinion may have been accepted by some of the other parties to the TMDL. For example, a Comment Matrix for Pend Oreille River Temperature TMDL Pre-Public Draft, Helen Rueda, EPA 1/22/08 version 5, at page 4, states in response to the comment by Mr. Loehr: "We agree. Ecology will use WAC 173-201-200(1)(c)i, which is the natural conditions +0.3 deg C. A critical period will be selected based on temperature rising above 20 deg C." Similarly, the published notes from a December 13, 2007 meeting at SeaTac Marriott, contains the following statement regarding the application of the $t=34/(T+9)$ formula: "Susan Braley stated that the next draft TMDL will be changed to reflect that only natural conditions plus 0.3°C will be used. The equation $t=34/(T+9)$ is typically used for permitting point sources and does not really apply in this case."

While both these statements appear to address only circumstances where natural conditions exceed a 1-DMax of 20°C, they fail to appreciate that the $t=34/(T+9)$ formula is still applicable for all time periods where the 1-DMax does not exceed 20°C; whether or not a point source is involved is immaterial. The Kalispel Tribe therefore requests that all parties acknowledge the continued applicability of the $t=34/(T+9)$ formula when natural conditions do not exceed the 1-DMax of 20°C and that under no circumstances are temperatures to be permitted to rise 2.8°C as a result of human activities, at least so long as the special condition for the Pend Oreille river remains in place.

Thank you for your attention to this issue.

Robert Steed, James Bellatty
February 6, 2009
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Sincerely,

A handwritten signature in blue ink, appearing to read "Phil Katzen". The signature is fluid and cursive, with the first name "Phil" being larger and more prominent than the last name "Katzen".

Phil Katzen
Attorney for Kalispel Tribe of Indians

C: Keith Cohon
Don Martin
Susan Braley
Karin Baldwin
Deane Osterman
Ken Merrill