

March 26, 2024

Washington Department of Ecology  
Attn: Thomas Starkey-Owens  
300 Desmond Drive SE  
Lacey, WA 98503

Sent via email to: [thst461@Ecology.wa.gov](mailto:thst461@Ecology.wa.gov)

**Re: The Corps' Illegal Water Quality Attainment Plan for Lower Snake River Dams**

Mr. Starkey-Owens:

Columbia Riverkeeper, Snake River Waterkeeper, Northwest Sportfishing Industry Association, and Idaho Rivers United provide the following input on the U.S. Army Corps of Engineers' (Corps) submittal of a Water Quality Attainment Plan ("plan" or "WQAP") for the four Lower Snake River dams—a requirement of the Washington Department of Ecology's (Ecology) Clean Water Act Section 401 Certifications and the U.S. Environmental Protection Agency's (EPA) National Pollution Discharge Elimination System (NPDES) permits. For the reasons below, Ecology should reject the WQAP and instruct the Corps to quickly submit a plan that complies with WAC 173-201A-510(5), the NPDES permits, and the Clean Water Act.

The Corps' plan contains essentially no meaningful details on how the Corps would meet the dams' heat pollution load allocations developed by EPA. Instead, the Corps' plan cites inadequate existing measures to reduce heat pollution proposed in the illegal CRSO EIS and defers the development of additional measures (if any) to a Regional Forum that is not subject to the NPDES permits or Ecology's jurisdiction. The Corps also inappropriately disclaims any responsibility to investigate temperature reduction measures that could 'impact' the dams' purposes and disingenuously claims to have satisfied thermal load allocations developed by EPA via pre-existing "discretionary" releases of Dworshak water. Heat pollution from the Lower Snake dams is a well-documented and serious issue impacting Columbia River Basin fisheries; once again, the Corps tries to ignore and paper over it.

In addition to violating the NPDES permits and Ecology's rules, the Corps' attempt to evade responsibility for the Lower Snake River Dams' heat pollution undermines efforts by the Six Sovereigns, the Biden Administration, and others to find durable solutions to restore abundant salmon in the Columbia River basin. As detailed in Columbia Riverkeeper's comments on the Columbia Snake River TMDL (attached, *see* p.11), the Corps has a decades-long history of opposing regulation of the dams' heat pollution under the Clean Water Act. Continuing these obstruction tactics after the 2023 MOU and Agreement—which specifically obligates the Corps to "collaborate" with EPA and Washington to develop the very WQAP at issue here—undermines confidence in this agreement going forward and may result in Columbia

Riverkeeper or others raising a formal “point of disagreement” to initiate the dispute resolution processes outlined in MOU, as well as litigation under the Clean Water Act.

In short, the Corps’ plan is calculated to *prevent* meaningful progress towards addressing the dams’ significant heat pollution. Ecology should reject the plan and ensure that Ecology’s 401 Certifications result in long-overdue improvements to Washington’s water quality.

**I. The WQAP should specify what temperature reduction measures will be evaluated to meet the dams’ heat pollution load allocations.**

The Corps ignored Ecology’s clear instruction to do more than just re-hash and rely on past and current documents and processes addressing the effects of the hydrosystem on fish and water quality. Instead, the Corps’ plan points to the CRSO EIS and the Regional Forum and generally asserts that these processes will be sufficient to address the dams’ heat pollution. The Corps’ plan does not explain which previously proposed or potential new temperature reduction measures will be studied and implemented to reduce temperature pollution, or why those measures could be expected to meet EPA’s load allocations for the dams. Washington’s rules, incorporated by reference into the NPDES permits, require more.

As a legal matter, the Corps’ WQAP does not contain enough specificity or certainty about planned and potential temperature reduction measures to meet Ecology’s rules. WAC 173-201A-510(5)(b) and (b)(ii) require that WQAPs contain a “detailed strategy for achieving compliance” and identify “all reasonable and feasible improvements that could be used to meet standards.” Further, WAC 173-201A-510(5)(c) requires that WQAPs “*ensure* compliance with all applicable water quality criteria” and load allocations created in a total maximum daily load analysis (TMDL) (emphasis added). The NPDES permits at Section F(2)(a) similarly require the plan to “include a *detailed strategy* for achieving Washington’s water quality standards for temperature and associated designated uses.” (emphasis added). By failing to provide meaningful information about which measures or strategies the Corps will use to meet its heat load allocations, and attempting to defer additional work to the Regional Forum, the Corps’ plan violates Ecology’s rules, which are requirements of the NPDES permit.

The WQAP’s emphasis on the CRSO EIS is misplaced and distracting. While it may be acceptable to reference the EIS’s discussion of certain temperature reduction measures in the WQAP, the Corps’ lengthy recitation of the EIS process is irrelevant to WAC 173-201A-510(5) and lends the appearance of substance to a WQAP that is, in reality, almost devoid of meaningful new information. Reliance on the EIS in the WQAP is also extremely questionable given the pending challenge to the legality of that document by signers of this letter, the significant flaws in the EIS’s description of water temperate issues (see attached comments of Columbia Riverkeeper on the CRSO DEIS), and the likelihood that the EIS will be substantially re-written

beginning later this year. Ecology should not allow the problematic EIS to pollute or live on in the WQAP; the EIS was not designed to meet Washington’s water quality standards.

Undefined potential future actions by the Regional Forum are unlikely to address the dams’ heat pollution. The Regional Forum’s long-standing inability to reduce the Lower Snake River dams’ well-documented effects on average summer water temperature strongly suggests that the Regional Forum should not be entrusted with crafting those measures now. Given the Corps’ history of attempting to evade responsibility for the dams’ heat pollution, the Corps’ willingness to turn the development of temperature reduction measures over to the Regional Forum should also tell Ecology a lot about the Regional Forum’s likely effectiveness. Simply put, if the Regional Forum was willing and able to solve this problem, we wouldn’t need a TMDL or temperature load allocations for these dams. Additionally, because the Regional Forum is composed of many entities not subject to the NPDES permits or Ecology’s Section 401 certifications, it is not a good vessel for the core work required by the CWA here—identifying, analyzing, and ultimately implementing measures to reduce the dams heat pollution. The Regional Forum is probably a good place to discuss and gather perspectives about the implications of temperature reduction measures, once they have been identified by Ecology and the Corps.

Ecology should not approve the plan and, instead, work with the Corps to produce actual temperature reduction measures to be studied and implemented that have a reasonable chance of meeting the EPA’s load allocations. The Corps has been aware of its obligation to comply with the TMDLs’ load allocations for several years; the Corps’ failure to produce an specific, detailed, and concrete plan is inexcusable.

## **II. Ecology should reject or revise the Corps’ proposed evaluation criteria.**

Whether Ecology requires the Corps to provide a new plan or—despite the plain language of the NPDES permits at Section F(2)(a) requiring the plan to “include a detailed strategy for achieving Washington’s water quality standards for temperature and associated designated uses”—accepts the Corps’ invitation to defer the substance of the plan to the Regional Forum, Ecology should reject some of the Corps’ proposals to limit the types of temperature reduction measures that the Corps can be required to analyze.

The potential for a temperature reduction measure to impact the purposes of the dams is not sufficient justification to eliminate that measure from the WQAP. Rather, WAC 173-201A-510(5)(b)(ii) requires WQAPs to identify and analyze “all reasonable and feasible” measures to meet water quality standards. The Corps’ unsupported proposition that “[a]ny measure that impacts [the dams’] Congressionally authorized purposes” is not reasonable or feasible (WQAP at p.54) is untenable for several reasons. The proposed criterion is extremely

broad, incredibly vague, and (given the Corps' decades-long campaign to avoid responsibility for the dams' heat pollution) likely to be abused going forward. Almost any activity related to the dams could be said to 'impact' the purposes for which they were authorized. And in practice, the Corps routinely does all manner of things that could be said to 'impact' the projects' purposes, including spill for fish passage and operating the reservoirs within certain levels to support fish and wildlife. Finally (as explained in Section IV, below) the Corps misunderstands the relationship between the congressional authorization to construct dams and the subsequent congressional enactment of the Clean Water Act. Ecology should reject this criterion entirely or, at the very least, clarify under which circumstances a measure is not "reasonable and feasible" within the meaning of WAC 173-201A-510(5)(b)(ii).

Similarly inappropriate is the Corps' proposal to eliminate potential temperature control measures based on their "Impact to implementing commitments within the 2023 MOU." *See* WQAP at p.54. As above, this proposed criterion is incredibly vague and provides almost no information or restrictions as to how the Corps might use it to eliminate potential temperature control measures. Furthermore, WAC 173-201A-510(5)(b)(ii) requires WQAPs to identify "**all** reasonable and feasible improvements that could be used to meet [water quality] standards"; it does not allow permittees to avoid investigating certain measures because of pre-existing contracts or agreement. Commenters are not suggesting that the Corps or Ecology ignore the MOU; merely that the MOU cannot justify the Corps eliminating potential temperature control measures from consideration and further study. Ecology's response to the WQAP should clarify this.

### **III. Ecology must reject the Corps' self-serving position that existing water releases from Dworshak Reservoir meet the Lower Snake River dams' heat pollution load allocations.**

Ecology should clarify—explicitly and in writing—that the "Memorandum for the Record" (MFR) submitted by the Corps violates the TMDL, the NPDES permits, and is not part of any approved WQAP. The MFR asserts, generally, that the Corps is already meeting its heat pollution load allocations from the TMDL through water releases from Dworshak Reservoir. If adopted by Ecology, this approach would perpetuate the water quality conditions currently decimating Snake River salmon and relieve the Corps of any responsibility for fixing the temperature pollution caused by the Lower Snake River dams.

The Corps' continued, bad-faith efforts to avoid compliance with the Clean Water Act—as evidenced in the MFR—significantly erode Commenters' confidence in the whole-of-government approach to salmon recovery promised by the Biden Administration in the 2023 MOU. In addition to perpetuating the harm to salmon and communities caused by the Lower Snake River dams' heat pollution, the Corps' proposal is unlawful because (as the MFR even admits) **the EPA specifically considered and rejected the MFR's conceptual approach**

**when writing the TMDL.** See [EPA's Response to Comments on the Columbia/Snake TMDL](#), p. 83. Furthermore, the MFR (p.1) disingenuously mischaracterizes ongoing cold water releases from Dworshak as “discretionary” actions. In reality, the Corps is obligated by the CRSO BiOp<sup>1</sup> and the Snake River Basin Agreement<sup>2</sup> to continue releasing this water to support salmon recovery. The Corps’ attempt to collaterally attack and relitigate the substance of the TMDL, and the resulting NPDES permits and 401 Certifications, is not well taken. If the Corps persists in this line of argument, Commenters may resort to litigation to enforce the terms of the NPDES permits and/or exercise the dispute resolution process in the 2023 MOU.

#### **IV. The final WQAP must analyze drawdown below minimum operating pool (MOP).**

Ecology must require the Corps to analyze measures including reservoir drawdown to various levels between MOP and the spillway crest. Temporary drawdowns, especially during periods of exceptionally hot water, are one of the few measures that could provide meaningful progress towards meeting the dams’ heat pollution load allocations. For this reason, the U.S. Government Commitments in Support of the Columbia Basin Restoration Initiative identified the need to “evaluate . . . CRS operational changes to reduce warm summer temperatures, especially during times of predicted excessively warm temperatures.” Even the Corps’ own scoping documents for this WQAP identified operating the dams “Below MOP” as one of the “ATTAINMENT STRATEGIES/MEASURES” to be analyzed in this plan.

The Corps’ decision to renege on these commitments is disingenuous and unacceptable. As a legal matter, omitting key temperature reduction measures from the WQAP—such as drawdown below MOP—would almost certainly violate WAC 173-201A-510(5)(c)’s requirement to “ensure compliance with all applicable water quality criteria” and TMDL load allocations. More broadly, the Corps’ pretext for refusing to examine how drawdown might meet the EPA’s load allocations is overboard and misguided. Temporary interruptions to the dams’ services do not violate congressional authorizations—after all, the dams’ services are regularly temporarily diminished or interrupted for other purposes, including fish spill, dam and turbine maintenance, lock maintenance, and dredging. Even if temporary drawdowns were fundamentally incompatible with the dams’ purposes—which they are not—the Corps’ assertion that “The Clean Water Act cannot be used to override a prior act of Congress (i.e., authorizing construction and operations and maintenance (O&M) of dams) by implication” (WQAP at 10) is incorrect. A subsequently enacted law (*i.e.* the CWA or ESA) repeals, by implication, a

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<sup>1</sup> The Terms and Conditions of the 2020 CRSO BiOp (p.1399) require the Corps to “Continue to implement and evaluate the Dworshak cold water release program to target temperatures below 18°C at Lower Granite Dam and downstream, if possible, during June and most of July to reduce adult sockeye salmon mortality in the lower Snake River.”

<sup>2</sup> See [Summary of the Snake River Basin Adjudication Agreement](#), p.2 (May, 2004) (“The United States, the Tribe, and the State of Idaho will enter into an agreement regarding use of 200,000 acre-feet of water in Dworshak Reservoir as part of a flow augmentation plan for fish.”).

previously enacted law (*i.e.* congressional authorization for dam construction) when the two laws are incompatible. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (explaining that, while repeal by implication is not favored, “where provisions in [ ] two acts are in irreconcilable conflict, the later act[, ] to the extent of the conflict[, ] constitutes an implied repeal of the earlier one”). Accordingly, the Corps’ assertion that the purposes of the dams take precedence over the Corps’ compliance with the Clean Water Act—which appears to underlie the WQAP’s dismissal of any measures involving drawdown to or below MOP—is grounded in a misstatement of law. To be clear, Commenters are not saying that seasonal or targeted drawdowns to or below MOP to address temperatures are necessarily incompatible with the dams’ purposes; merely that the Corps characterization of the law is wrong.

Finally, and fundamentally, refusal by the Corps to include important temperature reduction measures, such as seasonal drawdowns below MOP, in the WQAP would amount to an admission that the Lower Snake River dams cannot comply with Washington’s water quality standards. This could necessitate Ecology’s revocation of the 401 Certifications for the Lower Snake River dams and call into question the Corps’ legal authorization to operate these facilities.

Sincerely,



Miles Johnson on behalf of Columbia Riverkeeper, Snake River Waterkeeper, Northwest Sportfishing Industry Association, and Idaho Rivers United

*Enclosures:*

- Columbia Riverkeeper Comments on CRSO EIS
- NGO Comments on Columbia/Snake River TMDL

*Cc'd via email:*

- Todd Maguire and Martin Merz, EPA
- David Gruen, Oregon DEQ
- Tucker Jones, ODFW
- Michael Garrity, WDFW
- Justin Pidot, EOP/CEQ
- Sara Gonzalez-Rothi, EOP/CEQ
- Kate Marckworth, Yakama Nation
- Brent Hall, CTUIR and Warm Springs Tribe
- Dave Cummins, Nez Perce Tribe
- Julie Carter, CRITFC