February 16, 2021

Office of Water and Watersheds
U.S. EPA Region 10
Attn: Jennifer Wu
1200 Sixth Ave., Ste. 155
Seattle, WA 98101

Submitted via email to wu.jennifer@epa.gov

RE: Supplemental Comments EPA's Draft NPDES Permits for Eight Federal Columbia and Snake River Dams

Dear Ms. Wu:

Columbia Riverkeeper, Center for Environmental Law and Policy, Institute for Fisheries Resources, Pacific Coast Federation of Fishermen's Associations, Snake River Waterkeeper, and Spokane Riverkeeper (collectively, "Commenters") submit the following supplemental comments on the Draft National Pollution Discharge Elimination System (NPDES) permits (collectively, the "Draft Permits") for the following hydroelectric facilities located on the lower Columbia and Lower Snake rivers (collectively, "the Dams") operated by the applicant U.S. Army Corps of Engineers (Corps):

- Bonneville Project (WA0026778);
- The Dalles Lock and Dam (WA0026701);
- John Day Project (WA0026832);
- McNary Lock and Dam (WA0026824);
- Ice Harbor Lock and Dam (WA0026816);
- Lower Monumental Lock and Dam (WA0026808);
- Little Goose Lock and Dam (WA0026786); and
- Lower Granite Lock and Dam (WA0026794).

Commenters represent tens of thousands of people who rely on clean water and healthy aquatic ecosystems in Washington, Oregon, and elsewhere in the Columbia River basin. Commenters support the U.S. Environmental Protection Agency's (EPA) long-awaited decision to issue the Draft Permits and look forward to the issuance of Final Permits before August 2021.

Like the proposed revisions of the Draft Permits, this letter focuses on the Dams' significant heat pollution. Commenters incorporate by reference the comments of Yakama Nation and the Columbia River Intertribal Fish Commission, especially with respect to the need for daily temperature effluent limits and the applicability of effluent limits during June and

October. Also incorporated by reference are the comments submitted to EPA by Columbia Riverkeeper and Snake River Waterkeeper on May 4, 2020, in response to the first comment period for the Draft Permits.[1] Rather than repeating the background information contained in that first letter, Commenters will briefly highlight new factual and legal developments relevant to this NPDES permitting process that have occurred since then.

RECENT BACKGROUND

The regulatory ground underlying these NPDES permits has shifted significantly since the end of the first comment period in May of 2020. Most importantly:

- On May 7, 2020, the Washington Department of Ecology (Washington) responded to EPA's request for Clean Water Act Section 401 Certifications (401 Certifications) for the eight NPDES Permits by issuing 401 Certifications requiring the Dams' compliance with the Total Maximum Daily Load for temperature in the Columbia and Lower Snake rivers.

- On May 18, 2020—as a result of litigation brought some Commenters—EPA issued a final Temperature Total Maximum Daily Load for the Columbia and Lower Snake Rivers (hereinafter the "temperature TMDL" or "the TMDL") which contained load allocations for the Dams' heat pollution from reservoirs and waste load allocations for the Dams' heat pollution from cooling water discharges. EPA's TMDL unequivocally determined that the Columbia and Lower Snake river dams raise the daily average water temperature and significantly alter the rivers' temperature regime.[2] EPA also sought public comment on the final TMDL.

- On September 11, 2020, EPA and the Corps' new regulations purporting to interpret Section 401 of the Clean Water Act (hereinafter, the "Trump 401 Rule") went into effect.[3]

[1] Columbia Riverkeeper and Snake River Waterkeeper, *Public Comment on EPA's Draft NPDES Permits for Eight Federal Columbia and Snake River Dams* (May 4, 2020).
[2] EPA, *Columbia and Lower Snake River Temperature TMDL*, pp. 47–50 (May 18, 2020) (Columns E and F in Tables 6-6 through 6-9 show the heat pollution caused by the four Lower Snake River dams' reservoirs individually and cumulatively during the summer and fall.).
[3] 85 Fed. Reg. 42,210 (July 13, 2020).

These regulatory changes have significant implications for EPA's permitting process. EPA has requested input on how some of these regulatory developments should affect the final NPDES Permits.

Unfortunately, the water quality and salmon survival problems plaguing the Columbia River basin remain or have intensified since May of 2020. Salmon still need cool water to survive. The Dams still add too much heat to a river system that is already too hot. In 2020, ladder count data suggest that 73% of the returning adult endangered Snake River sockeye died in the Lower Snake River between Ice Harbor to Lower Granite dams. This massive die-off of a severely imperiled species (like similar die-offs in preceding years) was likely caused by water temperatures that exceeded the water quality standards largely or exclusively because of the Lower Snake River dams. Additionally, one of the National Marine Fisheries Service's leading salmon researchers published a paper predicting that, left unchecked, high water temperatures caused by the dams and climate change could lead to the extinction of Snake River sockeye and spring/summer Chinook.[4] Despite these grim realities, the 2020 CRSO Biological Opinion proposed no new actions to reduce temperature.[5] At long last, EPA must use its authority to check the Corps' disregard for the Clean Water Act and the Dams' heat pollution—or be complicit in the Corps' continued destruction of Columbia and Snake river salmon runs.

SUPPLEMENTAL COMMENTS

I. EPA Must Regulate Heat Pollution Added to the Columbia and Snake Rivers by the Dams' Impoundment of Large, Shallow Reservoirs.

Even though the Dams add significant heat pollution to the rivers and routinely cause or contribute to water quality violations, the latest versions of the Draft Permits still fail to regulate heat pollution from the Dams, except for the cooling water discharges.[6] This too-narrow focus fails to address much of the Dams' heat pollution. Commenters—based on new information and

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[4] Lisa G. Crozier *et al.*, *Snake River sockeye and Chinook salmon in a changing climate: Implications for upstream migration survival during recent extreme and future climates*, p. 2 PLOS ONE (Sept. 30, 2020) ("the adult spawning migration requires extended exposure to altered climatic conditions. In addition, eight major hydrosystem dams profoundly affect temperatures and flows experienced by salmon in the Columbia Basin. This convergence of pressures may be a harbinger of future biodiversity loss").

[5] *See* National Marine Fisheries Service, *2020 CRSO BiOp*, p. 525 (July 24, 2020).

[6] EPA, *First Lower Columbia River Dams Fact Sheet* at 18 ("The permits do not address waters that flow over the spillway or pass through the turbines. *See National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580 (6th Cir. 1988); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982).").

regulatory requirements contained in EPA's TMDL and Washington's 401 Certifications—again urge EPA to include effluent limits and permit conditions that address *all* of the heat pollution that the Dams add to the rivers. As written, the Draft Permits do not control heat pollution from the reservoirs, even though EPA just wrote a TMDL addressing precisely this source of pollution.

a. EPA must include all of the temperature-related conditions of Washington's Clean Water Act 401 Certifications in the Final Permits.

As explained below, failure to include the conditions of Washington's 401 Certifications requiring compliance with the temperature TMDL's reservoir load allocations in the NPDES Permits would render EPA's permitting decisions illegal. EPA cannot pick and choose which conditions of a Clean Water Act Section 401 Certification to incorporate into EPA's federal permits.[7] EPA is at least aware of Washington's 401 Certifications, because EPA's website for this permitting process explains:

> "On May 7, 2020, Ecology provided final certifications of these permits under Section 401. ***One condition*** in Ecology's final certifications was a condition to incorporate the wasteload allocations (WLAs) from the Lower Columbia and Snake Rivers Temperature [TMDL]."[8]

What EPA does not say (without explaining its omission) is that ***another condition*** of Washington's 401 Certifications requires the Corps' compliance with all "the load allocations in the Columbia and Lower Snake Rivers Temperature [TMDL]."[9] 'Load allocation' is a Clean Water Act term of art distinct from the term 'waste load allocation;' Washington's use of the term 'load allocation' in this condition unequivocally references the temperature load allocations for the reservoirs in EPA's TMDL. Unfortunately, EPA does not explain its reasoning or justification for ignoring one of the most important conditions of Washington's 401 Certifications. Regardless of its motivations, EPA cannot selectively incorporate certain 401 Certification conditions into a federal permit while omitting others.[10] And with respect to the NPDES Permit at issue, EPA's failure to include *all* of Washington's conditions would result in

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[7] 33 U.S.C. § 1341(d) (requiring that any condition of a 401 certification "shall become" a requirement of the triggering federal permit).
[8] https://www.epa.gov/npdes-permits/proposed-discharge-permits-federal-hydroelectric-projects-lower-columbia-river (emphasis added).
[9] *See* Washington Department of Ecology, *401 Certification for Little Goose Dam*, Condition B(2)(a) (May 7, 2020).
[10] 33 U.S.C. § 1341(d).

the automatic denial of the entire 401 Certification[11]—and EPA having issued obviously illegal Permits.

i. Washington's 401 Certifications were issued before the Trump 401 Rules, and EPA must apply the 401 Certification rules and caselaw in effect at the time of Washington's certifications.

As detailed in comments by American Rivers *et al.* on Washington's 401 Certifications,[12] U.S. Supreme Court decisions in *PUD No. 1 of Jefferson County* and *S.D. Warren* clearly gave Washington the authority on May 7, 2020, to address *all* water quality impacts from the Dams under 401 Certification.[13] EPA—in its fact sheet and elsewhere—does not contest this point. And the regulations effective at the time of Washington's 401 Certification provide no mechanism for EPA to unilaterally refuse to incorporate certain 401 Certification conditions into federal licenses. The procedural vehicle to challenge a 401 Certification condition issued by Washington is an appeal to the Washington Pollution Control Hearings Board—and EPA has not filed such an appeal.[14] As of now, and pursuant to the regulations applicable at the time of certification, Washington has issued valid 401 Certifications that contain conditions limiting the discharge of heat from the reservoirs based on the load allocations in EPA's TMDL. EPA's failure to incorporate those conditions into the Final Permits would be patently illegal.

ii. Even if the Trump 401 Rule applied here, EPA would still be obligated to incorporate all of Washington's 401 Certification conditions into the Final Permits.

Even if EPA—despite Washington issuing the certifications more than four months before the Trump 401 Rule took effect—incorrectly proceeds under the Trump 401 Rule,[15] Washington still has the authority to address the reservoirs' impacts on temperature through the 401 Certifications. Because the TMDL load allocations are requirements of Clean Water Act § 303, they are precisely the type of "water quality requirements" that states may base 401

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[11] *See* Washington Department of Ecology, *401 Certification for Little Goose Dam*, p. 1 (May 7, 2020) ("If EPA issues a final NPDES permit that . . . does not include all requirements outlined in the Certification, EPA's request for Certification is denied . . .) (emphasis in original).
[12] Enclosed.
[13] *Cf. Or. Nat. Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1097–98 (9th Cir. 1998) (explaining that 401 Certifications can impose far-reaching protections for water quality, provided a discharge triggers the state's § 401 authority).
[14] The Corps has, but the basis for the Corps' appeal is questionable, and filing the appeal did not stay the effectiveness of Washington's 401 Certifications.
[15] 85 Fed. Reg. 42,210 (July 13, 2020).

Certification conditions on under the Trump rule.[16] Additionally, discharges of water through a dam are among the types of point source discharges that states may address under the Trump 401 Rule. EPA's interpretive statements in the federal register make clear that the new rule is not intended to disturb the holding in *S.D. Warren* where the Supreme Court found that discharges of water through a dam's hydroelectric turbines were subject to Maine's 401 Certification authority.[17] Therefore, invalidly proceeding under the Trump 401 Rule would not allow EPA to evade Washington's authority to place conditions on the reservoirs' heat pollution.

More to the point, even if EPA incorrectly thinks Washington's 401 Certification conditions for the reservoirs' heat pollution exceed the scope of Washington's authority, **the Trump 401 Rule does not authorize EPA to unilaterally refuse to include such conditions in the federal permits**. Under the Trump 401 Rule, EPA may only reject a 401 Certification condition if the certifying state fails to identify in writing:

(i) Why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements; and
(ii) A citation to federal, state, or tribal law that authorizes the condition.[18]

EPA may not perform a "substantive evaluation of the sufficiency" of Washington's statements justifying a 401 Certification condition;[19] EPA may only determine whether such statements exist. With respect to the first requirement of 40 C.F.R. § 121.7(d)(1), Washington explained that conditions enforcing the TMDL's reservoir load allocations are necessary to meet water quality standards because these conditions "ensure[] that steps will be taken to manage sources of heat that contribute to increased river temperatures."[20] With respect to the second requirement of 40 C.F.R. § 121.7(d)(1), Washington's 401 Certifications cite RCW 90.48.080 and WAC 173.201A –510(5) as specifically authorizing the conditions requiring the Corps to meet the load allocation in the TMDL.[21] Because Washington satisfied the procedural elements of 40 C.F.R. § 121.7(d)(1)(i) and (ii), EPA "shall"[22] incorporate conditions requiring the Corps to meet the

[16] *See* 40 C.F.R. § 121.1(n).
[17] *See* 85 Fed. Reg. 42,210, 42,238.
[18] 40 C.F.R. § 121.7(d)(1).
[19] 85 Fed. Reg. 42,210, 42,267.
[20] Washington Department of Ecology, *Letter Transmitting 401 Certification for Little Goose Lock and Dam* (May 7, 2020).
[21] The preamble to Ecology's 401 Certifications also cite generally to Clean Water Act Section 303, which includes the TMDL program.
[22] 40 C.F.R. § 121.10.

TMDL's reservoir load allocation into the NPDES Permits for dams—even if EPA disagrees about the scope of Washington's 401 Certification authority.

b. EPA should treat the heat pollution added by the Dams' impoundments like any other point source of heat pollution.

EPA's second Draft Permit lacks effluent limits for this heat pollution caused by the Dams' impoundment of reservoirs. This is flatly inconsistent with 33 U.S.C. § 1311(a), which prohibits the addition of any pollutant from any point source to waters of the United States unless authorized by a NPDES permit.[23] Heat is a pollutant;[24] dams' spillways and turbines are point sources;[25] and the Columbia and Snake rivers meet any definition of the waters of the United States. The only formerly outstanding question was whether the Dams cause the "addition" of heat to the rivers, and EPA's TMDL answered that question in the affirmative.[26] **Despite EPA and the Corps' longstanding and illogical attempts to pretend otherwise, dams are not exempt from 33 U.S.C. § 1311(a) just because they are dams.** EPA's reliance on the *Gorsuch* decision is unavailing here. *Gorsuch* is distinguishable on the facts,[27] its reasoning has not convinced subsequent courts,[28] and the near-complete deference shown to EPA's strained interpretation of the Clean Water Act in that case no longer applies.[29] Neither does the Water Transfer Rule support EPA's position, as EPA expressly disclaimed that its rule applies to dams.[30] The reasoning in *LA County Flood Control District* also cannot save EPA's failure to properly apply the NPDES program because that decision was premised on the

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[23] *See generally* Enion, M. Rhead, *Rethinking National Wildlife Federation v. Gorsuch: The Case for NPDES Regulation of Dam Discharge*, 38 *Ecology Law Quarterly* 4, pp. 797–850. (2011).
[24] 33 U.S.C. § 1362(6).
[25] *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 n.22 (D.C. Cir. 1982) ("The pipes or spillways through which water flows from the reservoir through the dam into the downstream river clearly fall within th[e] definition" of point sources.)
[26] *E.g.* EPA, *Columbia and Lower Snake River Temperature TMDL*, pp. 47–50 (May 18, 2020) (Columns E and F in Tables 6-6 through 6-9 show the heat pollution caused by the four Lower Snake River dams individually and cumulatively during the summer and fall.).
[27] The discussion of temperature pollution in *Gorsuch* focused on reservoirs that merely stratified the heat that already existed in the river when it entered the reservoir; in the Columbia and Snake river reservoirs, however, little to no stratification occurs and the reservoirs themselves cause the addition of heat pollution.
[28] *See, e.g., Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 947–48 (7th Cir. 2004).
[29] *See generally Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) and its progeny.
[30] National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697, 33,705 (June 13, 2008).

intervening point source *not* adding a pollutant to the water.[31] Here, by EPA's own admissions, the Dams cause the addition of heat pollution to the rivers. Accordingly, the Final Permits must contain water-quality-based effluent limits for this heat pollution derived from the load allocations in the TMDL.

II. The Permits Must Include Temperature Effluent Limits for Cooling Water Discharges Based on the TMDL's Waste Load Allocations.

Columbia Riverkeeper and Snake River Waterkeeper appreciate EPA taking our suggestion to base the temperature effluent limits for the Dams' cooling water discharges on the waste load allocations (WLAs) in EPA's TMDL.[32] While the current Draft Permits are a step in the right direction, EPA's second comment period—purporting to seek input on cooling water discharge heat effluent limits—is procedurally backwards and will not facilitate meaningful public engagement.

TMDLs dictate the contents of NPDES permits, not the other way around. If EPA wants to entertain the Corps' proposed changes to the TMDL's WLAs, the appropriate and logical approach would be to seek additional public comment on the TMDL. Though EPA's public notice frames this comment period as an opportunity to modify the permit language, the WLAs in the TMDL are actually at issue. Legally, the cooling water effluent limits in the Permits **must** be set at levels necessary to satisfy the TMDL's WLAs. This is EPA's policy; [33] it is also required by Washington's 401 Certifications for the Dams. Commenters have difficulty understanding why EPA is approaching this issue via a comment period on the NPDES permits. The TMDL[34] is the relevant legal and scientific document here; if EPA wants additional public input on the TMDL, EPA should ask for it explicitly.

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[31] *L.A. Cty. Flood Control Dist. v. NRDC, Inc.*, 568 U.S. 78, 82–83 (2013).
[32] Columbia Riverkeeper and Snake River Waterkeeper, *Public Comment on EPA's Draft NPDES Permits for Eight Federal Columbia and Snake River Dams*, pp. 14–15 (May 4, 2020).
[33] EPA, *Guidelines for Reviewing TMDLs under Existing Regulations Issued in 1992*, p. 3 (May 20, 2002) ("EPA regulations require that a TMDL include WLAs, which identify the portion of the loading capacity allocated to individual existing and future point source(s) (40 C.F.R. §130.2(h), 40 C.F.R. §130.2(i)).").
[34] While Commenters appreciate that EPA is currently considering revising the temperature TMDL, the TMDL issued by EPA on May 18, 2020, is a final, controlling legal document. Accordingly, if EPA decides to issue NPDES permits containing the Corps' proposed WLAs, EPA must first issue a new TMDL.

More importantly, asking for comments on WLAs under the guise of seeking input on permit effluent limits has led to a lack of information and context in EPA's public notice and fact sheets. For instance, the entire comment period appears to have been precipitated by a letter from the Corps to EPA about certain WLAs. Where is that letter? It is not in the "Public Comments" documents posted on EPA's websites for the NPDES Permits or the TMDL. Columbia Riverkeeper requested the letter from EPA on February 3, but it has not been provided to date. Commenters would be better equipped to respond to the substance of the Corps' proposal if we were allowed to see it. Also, we could better appreciate the differences between EPA's original WLA and the Corps' proposal—and the implications for Columbia and Snake river temperatures—if these alternatives were presented in the context of the TMDL. As is, the Draft Permits and fact sheets provide very little in the way of explanation or context, hampering public input.

The fact sheets contain no information on how the Corps calculated the proposed heat loads for each dam. As best Commenters can discern from the very limited explanation in the fact sheets, EPA's WLA allocations for the Dams' cooling water discharges were based on limited sampling of dam outfall temperatures. The Corps proposal, however, appears to be based on **no sampling of any outfall temperature at all**. Instead, the Corps:

> "estimated . . . the amount that facility operations would raise influent temperatures in their discharges based on turbine efficiencies and measured data, and appl[ied] these increases to measured August influent temperatures."[35]

Without any information on how the Corps modeled or estimated how much heat the Dams' operations would add to the cooling water, Commenters are unable to test or provide input on the Corps' methodology or conclusions. This is unacceptable.[36] The fact sheets contain no information to on how the Corps' proposed WLAs/effluent limits were developed, whether they meet the requirements of the Clean Water Act, or how they would impact the Columbia and Snake rivers.

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[35] EPA, *NPDES Permit Fact Sheet for Proposal of Heat Load Effluent Limits in Lower Columbia River Hydroelectric Generating Facilities*, p. 7 (January 15, 2021).

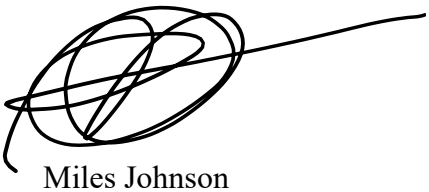
[36] The Corps has spent 20 years derailing and delaying the temperature TMDL, so Commenters cannot take the Corps' assertions about the Dams' heat pollution at face value. Similarly, EPA has proven itself unable or unwilling to hold the Corps accountable for its obligations under the Clean Water Act. Especially under these circumstances, the "trust me" approach to Clean Water Act permit development is a non-starter.

Finally, EPA should consider the undisclosed impacts of the Corps' proposed WLAs on other aspects of the TMDL. EPA's TMDL purportedly gave WLAs (or LAs) to all sources of heat pollution at levels necessary to meet the water quality standards for temperature. If EPA allows the Corps to increase its relative share of the total heat pollution allowed under the TMDL, from what heat source does EPA intend to require a corresponding WLA reduction? If EPA does not plan to decrease some other source's WLA to accommodate the Corps' increase, how will the TMDL ensure compliance with the water quality standards and meet the requirements of the Clean Water Act?

CONCLUSION

Commenters request that EPA revise the Draft Permits as described above to comply with the Clean Water Act and protect the Columbia and Snake rivers. Commenters advise EPA that if EPA does not issue Final Permits by August 2020, the Corps will once again be exposed to liability for illegally discharging pollution without NPDES permits.

Sincerely,



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enclosure