Nez Perce

TRIBAL EXECUTIVE COMMITTEE
P.O. BOX 305 • LAPWAI, IDAHO 83540 • (208) 843-2253

June 24, 2011

Paula J. Wilson
Hearing Coordinator
Department of Environmental Quality
1410 N. Hilton
Boise, Idaho 83706-1255

Re: Nez Perce Tribe's Comments Opposing Idaho Department of Environmental Quality's Proposed Rulemaking for Site Specific Temperature Criterion for Spawning Fall Chinook salmon.

Dear Ms. Wilson:

The Nez Perce Tribe (Tribe) appreciates the opportunity to comment on the Idaho Department of Quality's (IDEQ) proposed rulemaking for site-specific temperature criterion (SSC) for spawning fall Chinook salmon. For the reasons stated below, the Tribe opposes the proposed rulemaking.

Background

Since time immemorial, the Tribe has occupied and used the lands and waters of what are now north-central Idaho, southwestern Washington, northeastern Oregon and portions of Western Montana for subsistence, ceremonial, commercial, and religious purposes. In Article 3 of the Treaty of 1855 between the Tribe and the United States, the Tribe reserved and the United States secured, among other guarantees, the right to fish at all usual and accustomed fishing places in common with citizens of the territory, as well as hunting, gathering, and pasturing rights on open and unclaimed lands. See Treaty with the Nez Percés, 12 Stat. 957 (June 9, 1855).

The Hells Canyon Reach of the Snake River is within the boundaries of the 1855 Nez Perce Reservation, and the Hells Canyon Complex is located within the Tribe's aboriginal territory determined by the Indian Claims Commission. The Tribe continues to exercise its treaty-reserved rights in Hells Canyon today. As a co-manager of the fisheries resource, the Tribe has also been actively involved in the Federal Energy Regulatory Commission's (FERC) relicensing of the Hells Canyon Complex (HCC) and the associated Clean Water Act § 401 Certification.

The Hells Canyon Project, consisting of Brownlee Dam, Oxbow Dam, and Hells Canyon Dam, is located on the Snake River between the border of Idaho and Oregon and was originally licensed by FERC in 1955, before the passage of the Clean Water Act in 1972. Section 401 of the Clean Water Act requires the Idaho and Oregon Departments of Environmental Quality to certify that a federal license or permit will comply with state water quality standards. The Project's FERC license expired in 2005; since then, FERC has issued annual licenses to Idaho Power Company under terms of the expired license, without any CWA or Endangered Species Act mitigation measures.

The HCC and Temperature

The Snake River-Hells Canyon TMDL, the Environmental Protection Agency (EPA) and the Columbia River Intertribal Commission (CRITFC) have documented the effects of the HCC on the river temperature below the project. The presence and operation of the HCC results in a shift of the natural temperature regime, causing water temperature downstream of the project to be cooler in the spring and warmer in the late summer and fall compared to historic, pre-project temperatures. According to the EPA and CRITFC, the HCC causes the Snake River downstream of the project to be approximately 3°C warmer on average during the September through early November period, with some days up to 5°C warmer.

Temperature Effects on Fall Chinook Salmon

Adult Snake River fall Chinook salmon begin migrating past Bonneville Dam on the Columbia River in early August and begin passing Lower Granite Dam on the Snake River in mid-August. The temperature of the Snake River at this time can be 20°C or higher.

There are several issues of concern regarding the altered thermal regime caused by the Hells Canyon Complex:

1. Potential for pre-spawning mortality for Adult SR fall Chinook and Steelhead, particularly for the first 25% of these runs (i.e., those fish that pass Lower Granite Dam prior to approximately September 14).

2. Potential for reduced survival of eggs and hatched fry due to prolonged exposure of pre-spawning adults to elevated temperatures and spawned eggs exposed to elevated temperatures, (principally for those fish that pass Lower Granite Dam prior to approximately September 14 and spawn prior to approximately November 6).

3. Potential for delayed spawning, which could lead to delayed emergence and increased juvenile mortality due to a greater portion of the juvenile out migrants exposed to harmful lower Snake River temperatures in July and August.

IPC discounts these potential effects primarily by directing attention to the recent increase in adult returns and redd counts and discounting the scientific literature, which clearly supports the premise that the existing temperature regime is harmful to adult fall Chinook.

Site Specific Criteria

The proposed rulemaking to change fall Chinook salmon spawning criterion in the Snake River from Hells Canyon Dam to the confluence of the Salmon River from a maximum weekly maximum of 13° C on October 23rd through April 15th to maximum weekly maximum of 14.5° C from October 23rd through October 31st and a maximum weekly maximum of 13° C from November 1st through April 15th should not be adopted for several reasons. First, the criterion change is inconsistent with the plain language of the Clean Water Act. The goal of the Clean Water Act is to restore (where degradation occurs) and maintain the chemical, physical and biological integrity of the Nation's water quality.[1] Submitting an application to lower a standard designed to be protective of the most sensitive beneficial use, i.e. spawning, is contrary to this statutory goal.

Second, the technology exists for Idaho Power Company to meet both the fall Chinook spawning criterion and the Natural Seasonal Thermal Pattern. Many large dams have been constructed with, or retrofitted with a temperature control structure (TCS) to address temperature exceedences caused by the presence and operation of large dams and reservoirs. These structures offer the advantage of adaptive management for the control of water temperatures (both warm and cold). Further, climate change is predicted to result in warmer Snake River temperatures and a TCS, along with other measures, can help mitigate this problem.

Third, the IPC application cherry-picks information from the scientific literature, discounts other critical scientific studies, and mischaracterizes the status of the existing population of fall Chinook salmon. While it is true that adult returns and redd counts have increased in recent years, these increases are primarily due to the success of the hatchery supplementation efforts, IPC's maintenance of spawning and incubation flows, and favorable ocean conditions. They do not somehow allow for actions that are then detrimental to recovery; the fish are still listed under the Endangered Species Act. To protect, maintain and add to these gains, and lead to delisting the run for the benefit of all Idahoans, existing habitat in the Hells Canyon Reach of the Snake River must be protected and improved. Specifically, temperature improvements in September and October are critical to protect pre-spawned adult salmon. The comments of CRITFC, incorporated by reference, address IPC's selective utilization and mis-interpretation of the scientific literature regarding the temperature effects on fall Chinook.

IPC suggests that fall Chinook are unique and therefore a "one-size-fits-all" temperature standard is inappropriate for the Hells Canyon reach of the Snake River. However, the fall Chinook spawning temperature criterion of 13° C was developed and approved after

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[1] 33 U.S.C.A.§ 1251

extensive research by Idaho, Oregon, EPA and NOAA Fisheries, which determined that it was protective of the designated beneficial use. Other than the increased adult returns, there exists no valid scientifically based reason that this existing standard is now too conservative and therefore should be liberalized. Indeed, the underlying reason that IPC suggests as much is that it wishes to avoid the expense of installing a temperature control structure to mitigate the impacts of the HCC.

Further, relaxing the standard based on IPC's theory that fall Chinook are somehow uniquely situated to thrive under the existing thermal regime ignores the extensive research by NOAA Science Center on the effects of global warming on inland stocks of salmon. . The Tribe and CRITFC are similarly concerned that the existing compromised thermal regime will get worse and that making structural improvements in the HCC to ameliorate these changes is the wiser course of action.

Finally, the existing temperature standard of 13° C is perhaps just barely protective of the designated use. When promulgated, EPA expected this standard to apply to 95% of the spawning run, allowing 5% to spawn earlier at higher temperatures. With the much touted (and desired) increase in adult returns, more fish are exposed to and spawn in temperatures higher than 13° C. As noted above, climate change will likely degrade the thermal regime even further. It makes no sense to liberalize the temperature standard.

For the reasons above, as well as the detailed comments by CRITFC, the Tribe urges the IDEQ to reject the proposed rulemaking for site-specific temperature criterion.

If you have questions, please contact Mike Lopez, staff attorney with the Tribe's Office of Legal Counsel at (208) 843-7355.

Sincerely,

Brooklyn D. Baptiste, Chairman
Nez Perce Tribal Executive Committee