

**AGREEMENT BETWEEN WASHINGTON DEPARTMENT OF  
ECOLOGY AND SPOKANE RIVERKEEPER RELATING TO  
HANGMAN CREEK TMDL**

This Agreement is by and between Washington Department of Ecology, an agency of the State of Washington, hereinafter referred to as "Ecology," and Spokane Riverkeeper, hereinafter referred to as "Riverkeeper." Ecology and Riverkeeper are collectively referred to as the "Parties."

**RECITALS**

WHEREAS on September 28, 2015, Spokane Riverkeeper brought an action pursuant to the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 702 *et seq.*, alleging that Environmental Protection Agency ("EPA") arbitrarily and capriciously approved the Hangman Creek Total Maximum Daily Load in contradiction to its own policies, regulations, and the Clean Water Act ("CWA"), 33 U.S.C. § 1313.

WHEREAS the Washington Department of Ecology ("Ecology") is authorized by the EPA to implement the National Pollutant Discharge Elimination System ("NPDES") within Washington state, pursuant to the Clean Water Act. 33 U.S.C. § 1342(b).

WHEREAS in June 2009, Ecology published the "Hangman (Latah) Creek Watershed Fecal Coliform, Temperature, and Turbidity Total Maximum Daily Load, Water Quality Improvement Report" ("Hangman TMDL") as part of its duties implementing the NPDES program and to fulfill the requirements of 33 U.S.C. § 1313(d).

WHEREAS pursuant to the CWA, EPA retained final approval authority over the Hangman TMDL and approved the Hangman TMDL on September 29, 2009.

WHEREAS resolution of Spokane Riverkeeper's first and second claims for relief contained within the complaint will directly impact Ecology as the state agency charged with implementing the NPDES program, as the drafter of the Hangman TMDL, and as an interested party.

WHEREAS, Spokane Riverkeeper and Ecology (collectively, "the Parties"), through their authorized representatives and without any admission or final adjudication of any issues of fact or law or waiver of any factual or legal claim or defense with respect to Spokane Riverkeeper's complaint have reached a settlement agreement that they consider to be a fair, adequate, and equitable resolution of Spokane Riverkeeper's claims.

WHEREAS the Parties agree that resolution of this matter without further litigation is in the best interest of the Parties and the public, and that this settlement agreement is the most appropriate means of resolving Spokane Riverkeeper's action.

NOW, THEREFORE, without the trial of any issue of fact or law, upon consent of the Parties, and upon consideration of the mutual promises contained herein,

NOW, THEREFORE, in consideration of the mutual promises contained herein and other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the Parties agree as follows:

**I. ECOLOGY ACTION WITHIN HANGMAN CREEK WATERSHED**

1. Hangman Creek Riparian and In-stream Assessment.

1.1 Ecology will undertake and complete an assessment of the riparian and in-stream conditions of the Hangman Creek watershed within Washington State. The purpose of the assessment will be to:

- Analyze the health of the watershed.
- Monitor changes (deterioration or improvement in conditions) over time.
- Prioritize the water quality/site condition improvement work.
- Document pollution inputs.
- Monitor effectiveness of BMP implementation.

1.2 The primary focus of the assessment will be the riparian condition along streams in the Hangman Creek watershed. The riparian and in-stream assessment will involve GIS analysis with field and stream surveys to ground-truth the outcome. The assessment will be targeted to evaluate conditions that cause turbidity, temperature, and bacteria pollution. This analysis will produce a numeric score (or use some other logical method of ranking conditions) for stream reaches in the watershed and the results of the analysis will be displayed on a map that color codes those stream reaches. The analysis and map will highlight:

- Riparian Cover.
- Riparian Conditions, including but not limited to:
  - Oxbows.
  - Perched and/or disconnected floodplains.
  - Incised channel.
- Identify and inventory sources of nonpoint pollution for bacteria and turbidity, including but not limited to:
  - Livestock access to riparian areas.
  - Tilled fields that are contributing sediment and nutrients to Hangman Creek.

- Compacted soils
- Collapsed stream banks and/or exposed streambanks subject to erosion
- Agricultural ditches which convey pollutants to Hangman Creek
- Runoff and/or ditches conveying pollutants from roads

1.3 The assessment will be unrelated to land-use type and will be applied to the entire watershed, including unnamed tributaries, to the extent practicable. The assessment will be used to set a baseline for conditions in the watershed, to help prioritize subsequent work to address agricultural pollution in the watershed, as an educational tool for stakeholders, and to track improvements in riparian condition and stream health through time (including BMPs implemented throughout the watershed).

1.4 Ecology will design a bioassessment study to determine baseline conditions in the Hangman watershed. Riverkeeper will provide review and critical input where appropriate to the design of the bioassessment. Riverkeeper will look for partnership opportunities. Ecology and Riverkeeper will work together to determine when and how biological conditions will be reassessed to determine whether progress is being made.

1.5 Ecology will undertake the assessment in five steps:

Step 1: Ecology will use GIS analysis to score the health/function of riparian areas in the watershed using the following factors at a minimum: whether a buffer exists, buffer width, plant composition of buffer, % tree and shrub cover, canopy width, land-use setback distance, active bank erosion, evidence of livestock damage, stream channel incision/condition, presence/absence of large wood in channel. Ecology will also identify points of discharge, such

as pipes, trenches, ditches and other structures/activities that affect integrity of the riparian area and serve as conveyances and/or contribute nonpoint source pollution to Hangman Creek.

Step 2: Ecology will ground truth GIS findings from public rights-of-way, including a stream side assessment conducted by boat. This step of the assessment will include video and geo-tagged photographs. This ground-truthing step will allow for the characterization of potential fixes and opportunities to address documented points of discharge. Failed projects, if observed, will also be documented.

Step 3: By June 2019, Ecology will complete the riparian health assessment and will produce a baseline riparian health report that will include the map and other materials. Ecology will design a definition of Priority Reaches (which includes both agricultural and nonagricultural sites, riparian deficiencies, and sources of nonpoint source pollution) and designate a priority ranking of these reaches upon the results of the assessment. Ecology will update Riverkeeper on its progress at each annual meeting, beginning in 2019.

Step 4: Ecology will use the map and other materials from the assessment, as Ecology deems appropriate, as part of the education and outreach program outlined later in this agreement. Ecology may also use the materials to work with stakeholders and partners who could help address problems in the watershed.

Step 5: No later than eight years after the effective date of this agreement, Ecology will repeat its watershed assessment process to determine whether or not riparian health is improving as a result of implementation work being done in the watershed. Ecology will work with the Riverkeeper to determine when and where in the watershed the assessment will be done. Updated results and findings will be assembled into progress reports, given to the Riverkeeper, and used for public education and outreach.

2. Addressing Water Quality Problems in the Hangman Creek Watershed

2.1 Ecology will assign .5 FTE (“full time equivalent employee”) per year, from existing resources, for the term of this agreement (10 years) to address water quality problems in the Hangman Creek watershed. Ecology will designate a point person responsible for producing reports and acting as the point of contact for water quality problems within the Hangman watershed. Although the majority of the watershed is used for agriculture, other potential nonpoint pollution sources include, but are not limited to septic systems, golf courses, urban/suburban residential uses, and runoff from roads.

2.2 To address pollution problems not related to agriculture, Ecology will use its nonpoint authority and existing processes to address those sources.

2.3 To address agriculture-related pollution, Ecology will follow the flow chart entitled *Flow Chart for Addressing Agricultural WQ Problems in ERO*, attached to this agreement as Appendix A. The flow chart outlines the steps Ecology takes to identify agricultural problem sites, prioritize them, and use technical assistance, financial assistance, and enforcement tools to resolve pollution problems.

2.4 For the purpose of this agreement, the following actions that Ecology takes at specified steps in the flow chart will occur:

a. Ecology will consult with the appropriate conservation district to determine whether the conservation district (“CD”) is willing to work cooperatively with Ecology to implement management practices that will achieve compliance with state law (Step 3). If the CD is not willing, Ecology will follow the steps on the left side of the flow chart.

b. Ecology will perform the watershed evaluation and site prioritization annually, for the first five years of this agreement. Starting with the sixth year of the agreement, Ecology will meet with the Riverkeeper to determine future frequency of watershed evaluations. As part of each evaluation, Ecology will determine how many landowners it intends to contact (Step 4 on left; step 6 on right). Ecology will contact a minimum of ten livestock problem sites and ten tillage problem sites. If Ecology identifies fewer than ten livestock problem sites, it will contact all of them. Likewise, if Ecology identifies fewer than ten tillage problem sites, it will contact all of them. If the CD chose the partnership side of the chart (right side), the CD will be invited to discuss each priority site and the management changes needed to achieve compliance with water quality law. Ecology will document the BMPs that it determines are necessary to achieve compliance, and will give that determination to the CD, to the landowner whenever possible, and will keep a copy. Ecology retains the final authority to determine if the water quality BMPs implemented at a site are sufficient to achieve compliance with water quality law. If the CD is not willing to help implement those changes, Ecology will follow the steps on the left side of the flow chart for those sites.

2.5 Ecology will follow the flow chart in the Hangman Creek watershed for the term of this agreement or until the load allocations in the Hangman Creek Bacteria, Temperature, and Turbidity TMDL have been met, whichever comes first. For purposes of this agreement, load allocations will be deemed to have been met when all prescribed load allocations in the Hangman Creek Bacteria, Temperature, and Turbidity TMDL are met for two consecutive years in a row.

### 3. Annual Reporting

3.1 The results of Ecology's evaluation work will be shared with the Riverkeeper annually, at a time and location to be determined by both Parties. This will include providing a map with points marking sites with water quality issues and highlighting the contacted sites.

3.2 Ecology will track the progress of each priority site, whether it is addressed by Ecology or by a conservation district, and will compile a report each year that contains, at a minimum, the following information:

- Number of sites evaluated
- Number of sites identified as Priority Sites, and a priority ranking of sites based on severity of water quality and site condition impacts
- Number of Ecology site visits to discuss issues identified with the landowner
- Number of priority sites addressed by Ecology alone
- Number of priority sites addressed by Ecology and a CD in partnership
- Number of sites certified in Farmed Smart program and at what level
- Number of site visits to monitor BMP implementation
- Number of sites where previously implemented BMPs are not being operated and maintained adequately
- Number of sites brought into compliance without the use of enforcement tools
- Number of recommendations for enforcement
- Number of enforcement actions (and what type) taken by Ecology



- Number of sites brought into compliance after the use of enforcement tools
- For sites contacted that were not brought into compliance, an explanation of why not for each one.

3.3 Ecology will share with Riverkeeper the number of valid complaints in the Hangman Creek watershed, the number of complaints resolved through technical assistance, and the number of complaints resolved through enforcement.

3.4 Ecology will share with Riverkeeper details of outreach tasks completed and on-going within the Hangman Creek watershed as described in the outreach strategy in Section 5 of this agreement.

#### 4. Effectiveness Tracking

4.1 Two measures, riparian condition and level of Best Management Practices (“BMP”) implementation, will be used to determine whether the Hangman Creek watershed is improving and/or is in compliance with the load allocations in the Hangman Creek Bacteria, Temperature, and Turbidity TMDL.

4.2 In order to track water quality improvements and ensure measurable progress is being made within the watershed, the following benchmarks will be used:

- a. For the riparian and in-stream assessment:
  - By June 2019, the Hangman Creek Riparian and In-Stream Condition Assessment will be completed.
  - By August 2019, Priority Reaches will be designated and ranked.
- b. For BMP implementation:

- By three years from the date of execution of this agreement, appropriate BMPs that fully protect water quality will have been implemented on 25% of the designated Priority Sites.
- By five years from the date of execution of this agreement, appropriate BMPs that fully protect water quality will have been implemented on 50% of the sites designated as Priority Sites.
- By eight years from the date of execution of this agreement, appropriate BMPs that fully protect water quality will have been implemented on 75% of the sites designated as Priority Sites.

4.3 No later than eight years after the effective date of this agreement, Ecology will repeat its watershed assessment process to determine whether or not riparian health is improving, as described in Section 1.5, Step 5 of this agreement. If Ecology falls behind in meeting the benchmarks, Ecology will meet with the Riverkeeper and discuss solutions.

## 5. Education and Outreach

5.1 Within one year of the effective date of this agreement, Ecology and the Riverkeeper will jointly develop an outreach strategy for the Hangman watershed that will include the following:

- The outreach strategy will be designed to reach audiences both within and outside the watershed.
- Ecology will work with the Riverkeeper to design and conduct a survey to determine public perceptions about the Hangman Creek watershed in order to focus outreach efforts.

- As part of developing the strategy, Ecology and the Riverkeeper may convene a group of interested stakeholders and groups.

5.2 In designing the outreach strategy, Ecology and the Riverkeeper will use the results of the riparian health assessment to inform and engage citizens about the value of the Hangman Creek watershed and the importance of addressing pollution problems.

5.3 Elements of the outreach strategy to be considered include, but are not limited to:

- Water quality education in schools within the Hangman Creek watershed
- Community outreach programs, including outreach to agricultural producers
- Placing informational materials in libraries throughout the watershed
- Disseminating information through the Spokane River Forum
- Targeted outreach to point source dischargers to the Spokane River and Hangman Creek.
- Producing videos about the watershed
- Posting of interpretive signs at key locations that point out the contributions of NPS pollution and the potential solutions.
  - o 11th street
  - o Centennial Trail on Ohio Street at Mouth of Hangman Creek
  - o Up River drive above Hangman and or along the Hangman Creek trail in Vinegar Flats

5.4 The outreach strategy will contain specific tasks to be accomplished and dates by which they are to be completed.

5.5 Within one year of the effective date of this agreement, the outreach strategy will be completed. Ecology will perform the outreach tasks according to the dates in the outreach strategy, and will report on its progress as part of the annual reporting in Section 3 of this agreement.

6. The obligations between the Parties described herein shall be in effect for ten (10) years from the date of execution of this agreement.

7. On an annual basis, for the term of this agreement, Ecology will meet with Spokane Riverkeeper to report on and discuss actions taken to implement this settlement agreement, including but not limited to providing the report described in section 3. of this agreement. This inperson meeting will provide an opportunity to share where staff went, what staff observed, and steps being taken that year to address water quality priorities.

8. The primary Ecology contact for the Riverkeeper to use as this agreement is implemented is the Watershed Unit Supervisor in Ecology's Eastern Regional Office.

9. Ecology will make good faith attempts to meet with outside entities to explore ways to achieve water quality improvements within the portions of the Hangman Creek watershed located in Idaho. These entities include, but are not limited to, the EPA Flood Plain Recovery Group, Idaho Department of Environmental Quality, and the Coeur d'Alene Tribe.

## **II. RELEASE BY SPOKANE RIVERKEEPER AND PRESERVATION OF RIGHTS**

10. Upon execution, this Agreement shall constitute a complete and final settlement of all claims asserted, or that could have been asserted, by Spokane Riverkeeper in the complaint,

subject to the express reservations of rights in Paragraphs 11 to 14 herein; and Spokane Riverkeeper agrees to dismiss its complaint.

11. Spokane Riverkeeper hereby forever releases, discharges, and covenants not to assert against Ecology (by way of the commencement of an action, the joinder of Ecology in an existing action or in an existing action or in any other fashion) any and all claims, causes of action, suits or demands of any kind whatsoever in law or in equity, that Spokane Riverkeeper may have had, or may now or hereafter have, against Ecology based upon the same transaction or occurrence as that at issue in the complaint.

12. Nothing in this Agreement shall limit Spokane Riverkeeper's ability to make any legal or factual assertions necessary to support any argument, in the event that the Parties are before a court of law pursuant to Paragraphs 15 – 17 (“Dispute Resolution”) or Paragraphs 18 - 21 (“Modifications and Extensions”).

13. Nothing in this Agreement shall otherwise waive or limit Spokane Riverkeeper's rights to challenge in a separate lawsuit the merits of any final agency action taken by Ecology pursuant to this Agreement regarding whether Ecology's final action on Hangman Creek or the Hangman Creek TMDL meets the applicable state or federal requirements. However, Ecology's compliance with this agreement shall be a complete defense to any action initiated by Spokane Riverkeeper pursuant to this paragraph.

14. Nothing in this Agreement shall otherwise waive or limit Spokane Riverkeeper's rights to bring any actions or claims regarding Ecology's obligations in other watersheds or to challenge Ecology's actions in the Hangman Creek watershed except as identified in Paragraphs 11 and 13.

### **III. DISPUTE RESOLUTION**

15. In the event of any dispute, claim, question, or disagreement arising from or relating to this Agreement, the dissatisfied Party shall provide the other Party with written notice of the dispute and a request for negotiations. The Parties agree to negotiate in good faith regarding any disagreement. If the Riverkeeper and Ecology representatives cannot resolve the dispute within thirty (30) calendar days of the receipt of the notice by the other Party, then either Party may pursue any other remedy in law or equity to enforce the provisions of this Agreement, including specific performance.

16. No proceeding to enforce this Agreement shall be filed unless the moving Party has followed the procedure set forth in Paragraph 15.

17. If either Party incurs attorneys' fees, costs, or other legal expenses to enforce the provisions of this Agreement against the other Party, each Party shall bear its own costs.

### **IV. MODIFICATIONS AND EXTENSIONS.**

18. Waiver of any breach of any term or condition of this Agreement shall not be deemed a waiver of any prior or subsequent breach. No term or condition shall be waived, modified, or deleted except by an instrument, in writing, signed by the parties hereto.

19. Entire Agreement and Modification. This Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof. This Agreement may only be amended by written agreement of both Parties.

20. In the event that Ecology seeks to extend any deadline(s) set forth in Section II of this Agreement, Ecology shall notify Spokane Riverkeeper of its intent to seek such extension(s) in writing as expeditiously as practicable after so determining and as far in advance of the

applicable deadline as practicable. The notice shall show good cause, by written explanation with supporting documentation, justifying Ecology's request.

21. If either Party seeks to modify the terms of this Agreement (including deadlines and other terms), that Party shall provide the other Party with written notice of the proposed modifications and a request for negotiations. The Parties agree to negotiate in good faith regarding any proposed modification of the Agreement. If the Parties cannot reach agreement regarding the proposed modification within thirty (30) days after receipt of the notice of the proposed modification by the other Party, or within such other period of time to which the Parties mutually agree, then either Party may initiate a civil action to move for such modification.

#### **V. JURISDICTION AND VENUE**

22. The exclusive jurisdiction and venue for any disputes arising under this Agreement, including matters of construction, validity, and performance, shall be in the Superior Court of Thurston County in Olympia, Washington.

#### **VI. EFFECTIVE DATE**

23. This Agreement shall become effective upon the date it is signed by authorized representatives of both Parties. If for any reason both Parties do not sign this Agreement, the obligations set forth in this Agreement are null and void.

#### **VII. MUTUAL DRAFTING AND CONSTRUCTION**

24. Each Party has been represented by legal counsel or has had the opportunity to consult with legal counsel in connection with the negotiation, execution, and delivery of this Agreement. Each of the provisions of this Agreement has been reviewed and negotiated, and represents the combined work product of both Parties hereto.

25. It is hereby expressly understood and agreed that this Agreement was jointly drafted by Ecology and Spokane Riverkeeper. Accordingly, the parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Agreement.

#### **VIII. EFFECT OF AGREEMENT**

26. This Agreement shall not constitute an admission or evidence of any issue of fact or law, wrongdoing, misconduct, or liability on the party of any party.

#### **IX. SCOPE OF AGREEMENT**

27. Except as expressly provided in this Agreement, none of the Parties waives or relinquishes any legal rights, claims, or defenses it may have. Nothing in this Agreement shall be construed to make any other person or entity not executing this Agreement a third-party beneficiary to this Agreement.

#### **X. COUNTERPARTS**

28. This Agreement may be executed in any number of counterpart originals, each of which shall be deemed to constitute an original agreement, and all of which shall constitute one agreement. The execution of one counterpart by any Party shall have the same force and effect as if that Party had signed all other counterparts.

#### **XI. SEVERABILITY**

29. Subsequent to execution of this Agreement, if any term, condition, or provision of this Agreement, or the application thereof to any person or circumstance, shall to any extent be held by a court of competent jurisdiction or rendered by the adoption of a statute by the United States or the State of Washington invalid, void, or unenforceable, the remainder of the terms, covenants, conditions, or provisions of this Agreement, or the application thereof to any person or



circumstance, shall remain in full force and effect and shall in no way be affected, impaired, or invalidated thereby.

## XII. ENTIRE AGREEMENT

30. This Agreement is the entire agreement between Ecology and Spokane Riverkeeper concerning Spokane Riverkeeper's claims regarding the Hangman Creek TMDL. All prior conversations, meetings, discussions, drafts, and writing of any kind are specifically superseded by this Agreement.

## XIII. REPRESENTATIVE AUTHORITY

31. Each person signing this Agreement certifies that he or she has been duly authorized to enter into and execute the terms and conditions of this Agreement by the party on whose behalf it is indicated that the person is signing, and to legally bind such party to this Agreement. By signature below, all of the Parties consent to the entry of this Agreement.

Dated this 5<sup>th</sup> day of February, 2018.

SPOKANE RIVERKEEPER

By: Jerry White, Jr.  
Jerry White, Jr.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2018.

WASHINGTON STATE  
DEPARTMENT OF ECOLOGY

By: \_\_\_\_\_  
Heather Bartlett  
Water Quality Program Manager