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October 28, 2005

Karen Dinicola
Washington Department of Ecology,
Water Quality Program
P.O. Box 47696
Olympia Washington 98504

SENT VIA EMAIL (kdin461@ecy.wa.gov)

RE: Comments on Phase II Eastern Washington Preliminary Draft Permit

Dear Ms. Dinicola:

Thank you for the opportunity to comment on Ecology's Phase II Eastern Washington Preliminary Draft Permit. These comments are submitted on behalf of the Sierra Club, Upper Columbia Group (Sierra Club). Sierra Club has dedicated significant time and resources to working to protect the water of the Spokane-Coeur d'Alene Basin, including participation in the development of the TMDL for the Spokane River. The development of this permit is an important step toward improving the water quality of the Spokane River and its tributaries. Accordingly, we would like to work closely with Ecology toward the finalization of this permit.

General Comments:

Sierra Club is concerned because it appears that this permit needs more substantial measures to meaningfully address water quality issues in Eastern Washington. While we appreciate that many of the Phase II communities in Eastern Washington will be challenged to implement a stormwater program, this permit establishes very long timeframes to establish a very basic stormwater regulatory framework. An enormous amount of discretion in developing and implementing the program is left to local municipalities without a clear set of standards. Further, many of actions (as set forth in Appendix 4) are not required to be completed until near the expiration of the permit. Ecology should provide a clearer set of minimum standards to be included in the stormwater program and require an aggressive implementation schedule to ensure that the program is expeditiously implemented.

MISSION STATEMENT

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The draft permit fails to consider or adopt any element of watershed planning or consideration of specific land use issues. Sierra Club recommends that Ecology consider the adoption of a permit scheme based upon Michigan's watershed-based stormwater discharge permit program.¹ Under this program, extensive watershed planning among municipal dischargers occurs to ensure that the problem of stormwater is adequately addressed on a holistic basis in a watershed by identifying and implementing actions needed to resolve water quality/quantity issues. The permit requires the development of the watershed plan within 2 years of its issuance and must identify specific water quality problems, long/short term goals, and specific actions to reach these goals. Such an approach is very appropriate for a watershed such as the Spokane River, which is a rapidly growing urban area, contains a number of large municipal stormwater systems, and is water quality impaired.

It is unclear for the draft whether and how a party may petition Ecology to expand coverage of the general permit to encompass other communities that may be adversely impacting water quality through its storm water discharge or for rapidly expanding communities. Federal regulations require such a petition process. Sierra Club suggests that the permit include language to allow such a petition, such as:

Any person may petition the Department of Ecology to evaluate a municipal separate storm sewer for the need to obtain permit coverage. The petition shall contain relevant information to assist the Department in this evaluation. In response to a petition, the Department may perform an evaluation of the municipal separate storm sewer system for which the petition is received. If the evaluation indicates that a municipal separate storm sewer contributes to a violation of water quality standard or if the sewer system is in a rapidly developing watershed, Ecology shall require that the sewer system obtain coverage under this program.

It is further unclear under what circumstances, if any, the application of the general permit is not appropriate and when an individual permit would be required. Are there any circumstances under which a general permit would not be appropriate based upon the condition of the receiving water? Further, it is unclear how, if at all, the application of this permit would be altered based upon watershed conditions. How does the listing of receiving waters as impaired or waters of concern impact the application of this permit? How does permit implementation consider use designations and current condition of the receiving water, high quality waters (ONRWs), and the presence of threatened and endangered species? The permit further fails to address anti-degradation requirements of the Clean Water Act.

¹ A copy of this permit is available at www.crw.org/programs/phase2pdfs/watershedpermit.pdf.

Specific Comments:

Condition S1: The City of Spokane should not be included in the Phase II permit program. The population of Spokane is more than 195,000. Given that the population exceeds 100,000, it appears that Spokane shall be required to be covered under the Phase I program.

Condition S1.C.1.a: Federal facilities should not be exempted from the Phase II permit program. Ecology has delegated authority in the State of Washington to administer the NPDES program. Under Section 313 of the Clean Water Act, 33 U.S.C. § 1313, federal facilities must meet state water quality standards to the same extent of any other entity. Accordingly, Ecology should remove this exemption and extend coverage of the Phase II permit program to federal facilities.

Condition S4.A: This condition states that the permit “does not authorize” violations of water quality standards, sediment standards, or National Toxics Rule criteria. This is not a meaningful or enforceable permit condition and leaves wide room for interpretation.

RCW 90.48.520 sets a standard for permits: “In no event shall the discharge of toxicants be allowed that would violate any water quality standard, including toxicant standards, sediment criteria, and dilution zone criteria.” State NPDES and general permit regulations require permits, “whenever applicable,” to include “limitations or requirements” necessary to “meet water quality standards.” WAC 173-226-070(3) (a); WAC 173-220-130(1) (b) (i). RCW 90.48.520 admits of no exception and makes compliance with water quality standards “applicable” to these general permits. WAC 173-201A-040(1), -070(1), and -160(3) all also require compliance with water quality standards.

The permit condition should state, “The permit prohibits any discharge that causes or contributes to a violation of water quality standards.”

Condition S4.B: This condition calls for a reduction of discharge to the “maximum extent practicable.” This standard shall be tightened to prohibit discharges that cause or contribute to water quality standard violations.

Condition S4.C: Sierra Club strongly supports the requirement of new dischargers to not cause or contribute to water quality standard violations set forth in this section. However, provisions must be included for new sources particularly in the event that a receiving water is listed as impaired or as a water of concern on the State’s §303(d) list. In particular, additional analysis must occur to ensure that the application of the default technical standards that will be included in Appendix 2 will prevent a discharge that will further contribute to a water quality standard violation. Additional precaution is certainly warranted in the case of already impaired waterbodies.

The Clean Water Act specifically requires that new sources do not cause or contribute to water quality violations or are consistent with TMDLs. Section 122.4(i) provides in relevant part:

No permit may be issued: ... [t]o a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards even after the application of the effluent limitations required by [Section 301(b)] of [the] CWA, and for which the State or interstate agency has performed a pollutants load allocation for the pollutant to be discharged, must demonstrate, before the close of the public comment period, that:

- (1) There are sufficient remaining pollutant load allocations to allow for the discharge; and
- (2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.

40 C.F.R. § 122.4(i).

Two basic propositions may be derived from the regulation. One is that a new source cannot discharge if it will contribute to the violation of water-quality standards. The other is that, when a new discharge is proposed and a TMDL has been established, the proponent must demonstrate that the discharge complies with the TMDL. The permit should be modified to reflect this.

Condition S4.C.1: Sierra Club objects to the limitation that new stormwater discharge requirements are limited to projects that result in a disturbance of one-acre or more. Both AKART and MEP standards require consideration of sites under one-acre, particularly when such new sources would threaten to cause or contribute to a violation of water quality standards. This is of particular concern where a new source may discharge into an impaired waterbody. Ecology should expand the scope of the application of new stormwater discharge requirements to include smaller sites.

Condition S5.B.1&2: Public outreach and participation should be required in all aspects of permit implementation. This should include providing the public with specific information about proposed authorized discharges, including providing information on the status of receiving waters (impaired, ESA-issues, etc.). Public input opportunities must be provided. The permit should be modified to specifically require the distribution of information and requirements for public participation during site-specific implementation of the permit.

Condition S5.B.3.b.iii: This section lists a number of discharges that are prohibited, but do not require sanctions. What is the definition of a sanction? At a minimum, the permittee should be required to actively educate the public that such discharges are prohibited and otherwise not good for water quality.

Condition S5.B.4 & B.5: More specifics are needed on how often these sites will be inspected (by the operator and by the permittee) and what are the consequences when they are out of compliance. Also, these requirements should make reference to how the sites will not cause or contribute to standards violations and how they will comply with applicable TMDLs.

It is important for the permittee to coordinate with the state construction stormwater permit requirements, as it develops its programs and ordinances to address construction- and post-construction-related stormwater pollution into their system. This is necessary to assure compliance with the state requirements, assist in enforcement, and to make it possible for the developers and contractors to succeed at implementation of their program.

Condition S7: The permit fails to require compliance with specific waste load allocations found in TMDLs and provides that Ecology “may” incorporate other TMDL requirements through permit modification or reissuance. This should be rewritten to state, “shall.”

Once a TMDL allocates a load for a pollutant to various sources, those allocations must be made to the permit at its reissuance, if not sooner. Accordingly, the permit should contain a “reopener clause” to allow site-specific amendment of a permit to incorporate load allocations set forth in the TMDL.

Condition S8: Sierra Club strongly objects to the lack of water quality monitoring requirements in the first permit period. Further, the draft permit leaves the development of a monitoring program exclusively to the permittees with no specific minimum requirements that must be developed. An initial framework for monitoring should be developed for implementation during the first permit period, including the implementation of a sampling plan that includes wet weather sampling of key points within a watershed (including tributaries) and at locations where stormwater enters the river.

Further, it is unacceptable that the development of a BMP effectiveness monitoring program is delayed until four years in the program. A BMP effectiveness monitoring program with an adaptive management component should be included in the final permit.

Sierra Club suggests that the permit be revised to: (1) require a minimum level of water quality monitoring of receiving waters to better assess the impacts of stormwater discharges; (2) require more extensive monitoring where discharges occur into water quality impaired waters; and (3) require the development and implementation of a BMP

effectiveness monitoring program (including Ecology review and approval) within the first two years of permit implementation.

Conditions G.12, 14, & 15: These conditions should include language that authorizes revocation, modification, and requires reporting for, “a violation of any term or condition of this general permit.”

Appendix 1: As set forth above, the City of Spokane’s population exceeds 100,000 and should therefore be required to obtain a Phase I permit.

Appendix 2: Ecology should require that alternative BMPs and control measures are utilized, public notice and comment be required, and Ecology approval occur for all exceptions and variances to the application of the Core Elements as set forth on page 6.

Sierra Club strongly objects to the exemptions for the Spokane River from controls on direct discharge of metals on page 14 and flow control requirements on page 19. The Spokane River is listed as impaired for a number of pollutants and fish advisories throughout the river exist due to high levels of metals migrating from the Coeur d’Alene Basin Superfund site. Likewise, inflow of sediments and phosphorous is of critical concern in the Spokane River. Nonpoint sources from the river’s tributaries and urban runoff contributes to high levels of phosphorous and the resulting low levels of dissolved oxygen in Long Lake (which is §303(d) listed for dissolved oxygen). Accordingly, the Spokane River must not be exempt from either of these sections.

The Spokane River is water quality impaired for dissolved oxygen due in large part to point and nonpoint phosphorous discharges. Accordingly, specific phosphorous treatment requirements, as described on page 16, must be developed to prevent additional contributions of phosphorous into the river.

Appendix 4: As set forth above, the schedule set forth for permit implementation must be adjusted to more quickly implement permit requirements. Sierra Club does not believe that the current schedule achieves the MEP standard, particularly in watersheds, such as the Spokane River, that are impacted by urban stormwater discharges.

Thank you for the opportunity to comment on the preliminary draft permit. We look forward to working with Ecology throughout the finalization process for the permit.

Sincerely,

/s/

Rick Eichstaedt
on behalf of Sierra Club,
Upper Columbia River Group