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March 7, 2006

Dave Peeler
Water Quality Program Manager
Department of Ecology
P.O. Box 47600
Olympia, Washington 98504-7600

RE: Sierra Club's Comments on MIP

Dear Mr. Peeler:

These comments are submitted on behalf of Sierra Club on the Department of Ecology's proposed Management Implementation Plan (MIP) for the Spokane River dissolved oxygen TMDL. Sierra Club looks forward to working with Ecology and the other collaborative participants to address these concerns.

As a general comment, Ecology must ensure that the suite of actions committed by each NPDES discharger, individually and collectively, provides reasonable assurance of meeting water quality standards. As the MIP is revised, adequate data and information must be included to support that there is reasonable assurance that the implementation of the MIP will meet TMDL goals and water quality standards. For example, this requires more than an allocation of a dollar figure for particular actions, but evidence that the allocation of that allocated amount will actually achieve a specific, desired result.

Further, Ecology should revisit the portions of Sierra Club's scenario addressing the enforcement of existing laws, including both local and state laws, as well as the stream flow improvement component. As set forth in great detail in Sierra Club's scenario, these elements could further efforts to meet water quality standards.

1. EPA TREATMENT OF IDAHO PERMITS

Pg. 3, ¶ 1: "EPA is determining the maximum pollutant loadings from those permits that will not cause or contribute to a violation of Washington's water quality standards."

Comment: Sierra Club has significant concerns about EPA's proposal as outlined by Tom Eaton at the last Full Group meeting on January 25, 2006. According to Tom Eaton, EPA's lawyers determined that EPA must model using "natural conditions." EPA modeled the removal of all dischargers in Washington and Idaho, and then added in the Idaho dischargers by allowing Post Falls and Couer d'Alene to discharge at 50 µg/L for phosphorus and Hayden at 400 µg/L on the shoulder months with zero discharge in the summer. The modeling indicated that these discharges caused an estimated 0.2 mg/l decrease below the natural background condition in Lake Spokane.

This scenario is problematic for two reasons. First, the model appears to have been run using "background" and not "natural conditions." Background is defined as "the biological, chemical, and physical conditions of a water body, outside the area of influence of the discharge." WAC 173-201A-020. Natural conditions means "surface water quality that was present before any human-caused pollution. When estimating natural conditions in the headwaters of a disturbed watershed it may be necessary to use the less disturbed conditions of a neighboring or similar watershed as a reference condition." *Id.*

Second, EPA's approach fails to consider the cumulative impact of all human actions on the water quality in Lake Spokane as required by law.

Under the Clean Water Act (CWA), EPA may not issue NPDES permits for discharges that **cause** or **contribute** to an exceedence of **water** quality standards. 33 U.S.C. §1311(b)(1)(c); 40 C.F.R. § 122.4 (d) (permits prohibited when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States); 40 C.F.R. § 122.44(d)(EPA must condition all permits as necessary to achieve water quality standards established under section 303 of the CWA and limitations as necessary to control all pollutants which EPA determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria). Further, § 401(a)(2) of the CWA prohibits the issuance of a federal license or permit over the objection of an affected State unless compliance with the affected State's water quality requirements can be ensured. 33 U.S.C. § 1341(a)(2).

According to Ecology's modeling, the three Idaho dischargers, Post Falls, Hayden, and Coeur d'Alene, all contribute to water quality violations in Lake Spokane. Thus, EPA must condition these licenses to ensure compliance with the standards for Lake Spokane and to ensure that discharges from these facilities will not cause or contribute to excursions above these standards. The water quality standard for Lake Spokane is found at WAC 173-201A-200(1)(d)(ii) which provides:

> For lakes, human actions considered cumulatively may not decrease the dissolved oxygen concentration more than 0.2 mg/L below natural conditions.

Here, EPA considered only Idaho actions and not all "human actions" cumulatively and allowed these three to cause a 0.2 mg/l decrease thereby assuring that when these actions are combined with Washington dischargers, the decrease will be more than 0.2 mg/l – a violation of this State's water quality standards. By failing to consider all human actions, EPA proposes to condition the Idaho permits in violation of the CWA.

In a 1992 case, the U.S. Supreme Court determined that EPA may permit a discharge into an impaired water segment in a downstream state where the discharge did not cause a "detectable" change in water quality. Contrary to that case, the Idaho discharges cause a detectable change and one that contributes to ongoing violations in Lake Spokane. *See Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992).

2. COUNTY PLANT AS A NEW DISCHARGER

Pg. 2, ¶ 4: "In the draft TMDL, permittee #P discharge goals are assigned as presented in the table below. Because Spokane County currently sends its wastewater to the City of Spokane for treatment, the County and City goals are combined. The County is proposing to construct a new treatment plant that would divert flows from the City Plant. The goal needs to be divided to accommodate a County plant assuming some portion of the diverted flow is discharged in the Spokane River."

Pg. 10, § 2.1.2.1.3: "In year 6 Ecology will issue a new NPDES permit to Spokane County for the operation of a new POTW consistent with the TMDL and MIP. Until the 10 µg/L goal is achieved, the sum of the City and County # will remain unchanged with the City and County each having a #P target."

Pg. 10, § 2.2.4.1.1: "The proposed new Spokane County wastewater treatment facility, as a "new source" is not eligible for receiving a compliance schedule."

Pg. 12, § 2.1.2.5.2: Cannot exceed Spokane County's allocation of total phosphorus pounds (how the 2.93 lbs. of total phosphorus identified and allocated to the existing City of Spokane ……)

Comment: As stated above, it appears to us that Ecology's plan accords with federal and state law concerning the County's proposed plant. Pursuant to 40 C.F.R. § 122.4(i), no permit may issue to a new source or a new discharger if the discharge will cause or contribute to water quality violations. In addition, where the proposed discharge is to a water segment on the § 303(d) list, no permit may issue unless the discharger can show there are sufficient remaining load allocations for the discharge and the existing dischargers are subject to compliance schedules designed to bring the segment into compliance. *Id.* Schedules of compliance may not be issued to new discharges. WAC 173-20A-510(4).

As correctly stated in Ecology's MIP, a new County plant would be new discharger under the CWA. The CWA definitions of new and existing dischargers are linked to particular facilities at particular sites. The distinguishing factor between new and existing dischargers is whether or not the facility had ever received an NPDES permit at that site. The policy behind the regulations governing new dischargers accommodates the costs and equities associated with forcing existing facilities to upgrade versus requiring new facilities to incorporate the latest technologies. "This distinction is based on the concept that new facilities have the opportunity to install the best and most efficient production processes and wastewater treatment technologies." Rules and Regulations, EPA, 40 C.F.R. Parts 122, 134, and 125, National Pollutant Discharge Elimination System Permit Regulations, 49 Fed. Reg. 37998 (September 26, 1984). "The legislative history of the CWA indicates that the new source requirements were intended to apply where new construction allows flexibility to incorporate new pollution control technology." *Id.* at 38043, 44.[1]

In furtherance of this policy, there are numerous regulations, both federal and state, providing for compliance schedules to existing dischargers. In fact, the federal regulations also give the EPA the discretion to grant compliance schedules to new facilities under some circumstances. Washington State, however, adopted a more stringent regulation and expressly forbids compliance schedules to new discharges.

In accord with these laws, then, upon commencement of discharge, the proposed County plant cannot cause or contribute to water quality violations and must be in compliance with Washington's water quality standards. The only allocation which would not contribute to water quality violations is the County's portion of the 2.93 pounds which, because the County does not have the luxury of a compliance schedule, it must meet upon commencement.

Sierra Club would hope that Ecology will encourage the County to carefully analyze its options for reuse through wetlands construction, aquifer recharge, and the provision of reused water to already existing commercial/industrial facilities such as IEP, and then to amend its facilities plan accordingly. In addition, the County should be requiring purple pipes for all new construction and cluster sites for developments where appropriate to accommodate ongoing growth.

3. RESTRICTION ON CHANGES IN TECHNOLOGY

Pg. 6, ¶ 4: "…no wholesale scrapping of that technology unless there is compelling financial reason to change it."

Comment: It would seem that there should be compelling financial and/or environmental reasons to change technologies.

[1] This section also applies the same policy rationale to new dischargers.

4. FACTORING GROWTH

Pg. 10, §2.1.2.1.1.5: "All permits will incorporate a reasonable growth in wastewater flows over time, including both new population/customers to wastewater collections systems as well as septic tank elimination projects."

Comment: So long as the river remains critically impaired, increases in volume cannot cause or contribute to violations of water quality standards. Hence, any new increase in volume must comply with the TMDL which means that the increase will not increase phosphorus above the allotted pounds or concentration. Utilizing a pounds-based approach provides a cap on discharge that a concentration-based TMDL does not.

5. PRETREATMENT REQUIREMENTS

Pg. 11, § 2.1.2.4.1.3: "Write pretreatment permits for priority sources of important target pollutants which include strategies for reducing or eliminating such pollutants."

Comment: Ecology should encourage pretreatment processes that not only reduce pollutants but reclaim and reuse wastewater in situ.

6. OXYGENATION OF LONG LAKE

Pg. 25, § 5.5.2.1: Feasibility study.

Comment: Additional measures/operation scenarios should be included to address both in reservoir and downstream water quality, including turbine venting and timing of draw downs. These studies should be included the §401 certification for Avista's Spokane River hydro projects and funded by Avista.

Further, although the TMDL shows that point sources are the major contributors to excess nutrients during the growing season, there remain questions concerning sediment phosphorus flux in impounded waters. Accordingly, mitigation measures to address the existing and projected sedimentation should be addressed, including sediment remediation, particularly if the system does not adequately respond after implementation of the next level of treatment for point sources and the most cost effective nonpoint source programs.

7. COMPLIANCE SCHEDULES

Pg. 26, § 5.7.1 – "Each permitted facility will be issued an NPDES permit and compliance schedule…"

Comment: As acknowledged in § 2.1.2.4.1.1 of the MIP, this must exclude new dischargers. Washington law, WAC 173-201A-510(4), does not authorize a compliance schedule for new dischargers.

8. COMBINED SEWER OVERFLOWS

Pg. 11, § 2.1.2.4.1.2.7: Combined Sewer Overflow Reduction or Elimination

Comment: Sierra Club supports Ecology's call to meet or accelerate implementation of the City's CSO reduction program. Sierra Club strongly objects to the City's proposal to extend this program beyond 2017.

Further, Ecology should include measures to require the City to assess and eliminate unpermitted "dry weather" overflow events that are in violation of the existing NPDES permit. For example, during 2005, the City discharged approximately 139,323 gallons of untreated wastewater during the course of 13 "dry weather" events. *See* http://www.spokanewastewater.org/csoupdate.asp.

9. 10 YEAR REVIEW

Pg. 7, ¶ 7: "The tern year review, however, is a very complete, data-based, objective review."

Page 24, §5.3.3.4: Review of Goal/DO Standards – Appropriate?/Attainable?

Comment: The detailed "check-in," including review of the appropriateness of water quality standards and beneficial use designations, needs to be based upon adequate monitoring data, particularly data indicating the effectiveness of control measures over time. Accordingly, any changes to "weaken" standards through a UAA or other process, must be based on at least ten years of data upon full implementation of new technologies, including the full implementation of the City's CSO reduction program.

10. CONSERVATION

Pg. 2, ¶ 1: "Also, reducing the volume of waste water through indoor water conservation efforts will reduce phosphorus discharges …"

Comment: Conservation efforts should be expanded to include outdoor watering, which impacts runoff of phosphorus directly into stormwater systems and streams (nonpoint source). Further, reducing outdoor watering may benefit the river by reducing groundwater withdrawals and increasing instream flows of the river.

11. NONPOINT SOURCE CONTROLS

Pg. 2, ¶ 1: "…aggressively managing non-point sources of phosphorus can bring further improvements to the river."

Pg. 7, ¶ 1: "The Non-point tool may be employed by a Permittee as part of the Permittee's Delta elimination commitment."

Pg. 13, §3: Non-point Source Tools

Comment: While Sierra Club supports efforts to address the non-point source problems in the Spokane River Basin, the MIP should not rely on nonpoint as a solution to this problem. As Ecology knows, the benefits of nonpoint source actions are often questionable, often take a considerable amount of time to both implement and see benefits, and are expensive. Resources should be directed to technologies and reuse, which have a concrete and measurable benefit in phosphorus reduction.

Any inclusion of nonpoint source actions in the final MIP should be preceded with data/estimates as to the benefits of those actions and should require a study, utilizing the earmarked EPA funding, that outlines specific stream reaches and specific actions to be addressed in each of those reaches. Further, any use of nonpoint as an offset is limited by state regulations. WAC 173-201A-480 states that water quality improvements from non-point remediation "must be demonstrated in advance" before they can be used to "offset" new or expanded point source discharges that would otherwise lead to pollution levels exceeding surface water quality standards.

Pg. 15, § 3.5.2: Evaluation of Near-shore Developments

Comments: Pend Oreille County should be added to the list of counties in this section. Failing septics in the Little Spokane River Basin, including those located on Lake Sacheen undoubtedly contribute to phosphorus load in the Little Spokane River. Ecology should further reexamine the "pilot" drainfield program under development by the Sacheen Water and Sewer District for the east portion of Sacheen Lake and require the development of a treatment system.

12. SOURCE CONTROL

Pg. 20, §4.3: *Toolbox*: Source Control

Comment: This section should include measures to discourage the use of the garbage disposals through incentives/education programs designed to encourage increased residential composting.

13. INSTREAM FLOWS

Pg. 26, § 5.4 Minimum In-stream Flow

Comment: The WRIA 57 watershed plan recommends an instream flow of 500 cfs at Barker Road. Sierra Club strongly supports this recommendation and believes that this flow could provide measurable benefits to water quality in the Long Lake Reservoir portion of the River. Accordingly, Ecology should model the benefits of that flow and work through the §401 certification process/FERC proceeding to meet the recommended instream flow.

Sierra Club appreciates the time and effort that you and your staff have given to the development of the MIP. Thank you for the opportunity to comment and your consideration of these comments.

Sincerely,

/s/

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