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pro bono publico

March 21, 2008

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**Re: Draft WPDES Stormwater Discharge Permit for the
Charter Street Heating Plant**

Dear Mr. Liska:

Thank you for sharing with us the draft WPDES permit for the Charter Street Heating Plant ("CSHP"). We appreciate the opportunity to review an advance copy of the permit, on behalf of our clients, the Sierra Club. We are glad to see that the Department is proceeding expeditiously to bring the CSHP into compliance with the Clean Water Act.

Generally speaking, we believe this draft permit will make important progress towards compliance. We are particularly happy to see a TSS limit of 50 mg/L included in Table 1.2.3. This limit comports with the CSHP follow-up action plan addressed by Kenneth Johnson of the DNR in a letter to the Department of Administration dated June 21, 2007, and will ensure that the stormwater discharges from CSHP are not contributing to a violation of water quality standards.

We have a few comments on the draft permit, as explained below. We would be happy to meet with you to discuss these comments, should you have any questions or concerns.

A. The permit allows for an unnecessary delay in preparing an SWPPP.

The draft permit states that "[a] Storm Water Pollution Prevention Plan (SWPPP) shall be developed and implemented for the Charter Street Heating Plant facility" by August 1, 2008. Draft Permit, Section 1.3. We question the need for an additional four months to prepare an SWPPP when the CSHP has been working to address its stormwater violations for well over a year. Our understanding is that the plant has already

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implemented a series of Coal Yard Best Management Practices (“BMPs”) to reduce stormwater runoff; we suggest that, at a minimum, the permit be amended to clearly require the continued implementation of these BMPs.

It is common for SWPPPs to be developed and implemented *prior to* permit coverage or, in some circumstances, prior to initiation of industrial operations. While NR 216 is not clear on this subject, the DNR’s Notice of Intent for coverage under the Industrial Storm Water Discharge General Permit states that the “[d]evelopment of a [SWPPP] and submittal to the Department of a SWPPP Summary is required prior to initiating industrial operations.” DNR Form 3400-163 at p. 2. Similarly, the EPA’s proposed Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (“2006 MSGP”) states emphatically that permittees “must prepare and implement a SWPPP for [the permitted] facility before submitting [a] Notice of Intent (NOI) for permit coverage.” 2006 MSGP, Part 2.

While we recognize that the CSHP is in a unique situation, there is a pressing need for immediate and mandatory BMPs prior to the rainy season that is fast approaching. These BMPs are crucial for preventing the discharge of contaminated stormwater from the coal yard and surrounding areas.

B. The permit should make clear that a failure to implement or follow the SWPPP is a violation of the permit itself.

There is a considerable difference between having a SWPPP in place and actually following the SWPPP. The permit should make clear that the contents of the SWPPP are at the core of the permit, and therefore that violations of the SWPPP are considered violations of the permit itself.

Making this clarification may be as simple as adding a single sentence, such as: “Failure to implement any portion of the SWPPP constitutes a violation of the permit.” This is precisely the language used by other NPDES permitting entities in the stormwater context. *See, e.g.*, Oregon Department of Environmental Quality, General NPDES Permit for Stormwater Discharges (Permit No. 1200-COLS), Schedule A, part (1)(e). Likewise, the EPA’s 2006 MSGP includes the following provision:

Any noncompliance with the requirements of this Permit constitutes a violation of the Clean Water Act. For provisions specifying a time period to remedy noncompliance . . . the initial BMP or SWPPP deficiency constitutes a violation of the Permit and the Clean Water Act (unless specifically otherwise stipulated), and subsequent failure to remedy such deficiencies within the specified time periods constitutes an independent, additional violation of the Permit and Clean Water Act. Therefore, any time periods specified for remedying noncompliance do not absolve parties of the initial underlying noncompliance.

2006 MSGP, Part 1.3 (emphasis added). By including a provision stating that a failure to implement a part of the SWPPP is a violation of the permit, the Department will make it clear to the permittee that the SWPPP is an integral component of Clean Water Act compliance.

C. Certain permit provisions are unnecessarily vague and may not be enforceable.

Some portions of the “coal yard BMPs and inspections” are vague, and will not give the operator or the public a clear indication of which BMPs are required, and which are merely advisory. This leads to additional confusion as to the enforceability of certain terms of the permit. For instance, the draft permit states that several of the BMPs are to be performed “as needed,” including:

- sweeping of the coal handling area, adjacent parking lots and sidewalks
- cleaning of the coal yard
- cleaning of storm sewer inlet filters and sumps
- cleaning of roof areas

Draft Permit, section 1.3.4. Other vague provisions are found in this section, identified by language such as “rectify and correct as soon as possible” or “with a goal of cleaning up all affected areas within 48 hours.” *Id.* These permit terms make it challenging for permittees to know when they are obeying the law, and for the public to assess CWA compliance. The language in these sections should be amended so that the terms are clear and enforceable.

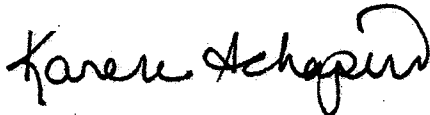
D. Sampling requirements for TSS should continue monthly for the period April 1 through October 31 beyond 2008.

Section 1.2.3.1 states that monitoring at outfall 003 shall continue “annually” after October 2008. Given the considerable difficulty the CSHP may face in meeting the TSS and other limitations, sampling should continue monthly during the period April 1 through October 31 at least until compliance with the 50 mg/L TSS limit has been demonstrated.

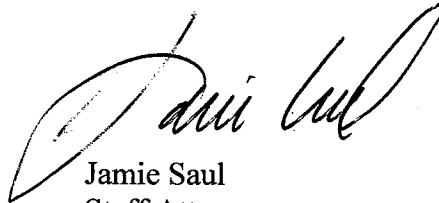
E. Conclusion

Again, we thank you for the opportunity to review the draft permit prior to its release for public comment. With the changes noted in this letter, our client, the Sierra Club, will have more confidence that the permit will be a satisfactory tool to bring the CSHP into compliance with the Clean Water Act.

Sincerely,



Karen Schapiro
Executive Director



Jamie Saul
Staff Attorney

cc: Bruce Nilles, Sierra Club
David Bender, Garvey McNeil & McGillivray

