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Dear Don:

These comments are submitted on behalf of the Northwest Environmental Defense Center and Columbia Riverkeeper (jointly "NEDC"), and we would appreciate responses to the issues and questions outlined below. The Oregon Department of Environmental Quality (DEQ) has yet again missed a significant opportunity to establish a general NPDES permitting regime that would markedly improve the environmental harms associated with a particular activity state-wide: in this case, construction stormwater run-off. Amongst other flaws, the draft 1200-C permit unlawfully fails to insure that permittees comply with water quality standards for turbidity, phosphorus and pH; unlawfully includes optional rather than requisite monitoring for turbidity, and even then, only does so in 303(d) listed waterbodies; establishes a scientifically unsupportable discretionary turbidity benchmark of 160 NTUs; disregards basin-specific requirements such as the Three Basin Rule; fails to allow for adequate public notice; and establishes an impermissible self-regulatory scheme.

These substantial inadequacies are highlighted in side-by-side comparison with the regulatory framework set forth by the Washington Department of Ecology in that state's draft construction stormwater general permit. Oregon DEQ could stand to learn from the process leading up to the new draft Washington permit. The provisions of that draft permit were arrived at only after considerable time, energy and finite state resources were expended defending poor agency decisions in administrative and legal proceedings when concerned citizens challenged a prior iteration of that permit. The Clean Water Act and applicable federal regulations set forth basic legal tenets that must be adhered to by any and all delegated states in the development of NPDES permits, regardless of the category of discharge. As discussed further below, Oregon DEQ has failed to meet those basic legal requirements and appears doomed to squander tax-payer dollars attempting, for political reasons, to defend legally untenable decisions.

For purely political reasons, Oregon DEQ has dedicated limited agency resources towards renewing the 1200-C permit at the expense of renewing the 1200-Z, 1200-COLS, 1200-A or 1300-J permits, despite the legal obligation to send these latter four permits out for public comment by May 2, 2005 and to the EQC for consideration on or before October 21, 2005. See attached *NEDC vs. Hallock* Settlement Agreement. In doing so, the agency has breached the settlement agreement and exposed the state to further legal liability.

Although Kevin Masterson and Don Yon have been outstanding resources throughout this process, in public meetings and even in written materials Oregon DEQ has misleadingly stated that this draft permit comports with the provisions of the *NEDC vs. Hallock* settlement agreement. The 1200-C construction stormwater permit fails to do so in at least the following ways: 1) It fails to provide for a 35 day public comment period on permit applications; 2) the turbidity benchmark and associated monitoring is merely optional; and 3) it fails to require at least four samples per season.

That Oregon DEQ has blatantly disregarded its legal obligations under the *NEDC vs. Hallock* settlement agreement in order to focus its efforts on the deeply flawed 1200-C permit, filled with glaring legal inadequacies of its own, provides further evidence that the agency continues to slip from its mandate to protect environmental health down the slippery slope of regulatory captivity. With this permitting action, the Department has acted arbitrarily and contrary to law in at least the following ways:

I. The Proposed 1200-C Permit must include effluent limitations and monitoring provisions that require compliance with water quality standards

A NPDES permit is required for point source discharges into waters of the United States. 33 U.S.C. § 1342(a)(1). Because DEQ is delegated the responsibility for issuing NPDES permits for discharges into Oregon's waters, DEQ has the important role of determining how a permit should be written so that it complies with the CWA. Specifically, a NPDES permit may be issued only if the conditions spelled out in the permit ensure compliance with the CWA and with water quality standards. *Id*., 40 C.F.R. §§ 122.4, 122.44, OAR 340-045-0035. Therefore, DEQ must ensure that NPDES permit conditions are thoughtfully and thoroughly written so that the permit does not allow for continued degradation of the state's waters.

When drafting a new or renewed permit, Oregon DEQ is required to consider whether the activity authorized under the new or renewed permit has the reasonable potential to violate state water quality standards. There is no indication from the August 22, 2005 Evaluation Report for Issuance of NPDES General Permit 1200-C ("Evaluation Report") that the requisite reasonable potential analysis was performed for parameters readily associated with construction including turbidity, phosphorus and pH.

DEQ water quality standards allow for no more than a ten percent increase in turbidity above background levels measured upstream from the discharge. OAR 340-041-0036. The only exceptions to this standard are for emergencies or for essential dredging, construction or other legitimate activities. *Id*. Additionally, the "construction or legitimate activities" exception that DEQ attempts to rely on with this permitting action is allowed *only if* all practicable turbidity control devices have been employed *and* either a 401 certification or 404 permit have been obtained for the activity. The history and plain language of these requirements makes clear that the "construction or other legitimate activities" exception was intended to apply only to exceptional in-stream activities, not every single construction project across the entire state over the life of this permit.

In considering the impacts that elevated turbidity levels may have on designated beneficial uses (such as the use of affected waterbodies by sensitive aquatic species and human recreational uses including aesthetic enjoyment) DEQ should have considered its own draft

"Draft Technical Basis for Revising Turbidity Criteria" by Tom Rosetta, Water Quality Division (2004). Additionally, a literature review by DEQ staffer Dennis Jurries provides useful background info. on some of these points as well. See *Flocculation of Construction Site Runoff in Oregon*. The Permit Evaluation fails to include reference to these documents, and also markedly fails in assessing designated and existing beneficial uses across the state that may be adversely affected by elevated turbidity from construction activity.

The Permit Evaluation also fails to present the findings of a reasonable potential analysis for construction-related turbidity, assuming one was done. Although the Department has failed to ever require construction sites to submit turbidity data in the past, and has also apparently never bothered to perform any basic field studies on construction-related turbidity, such studies have been performed by more diligent agencies (including, for example, the attached recent report: Stormwater Quality Survey of Western Washington Construction Sites 2003-2005, performed by the Washington Department of Ecology) and reference to them should have been made in the Evaluation Report. These studies uniformly show that construction-related activity has the reasonable potential to cause or contribute to state turbidity water quality standards.

Unfortunately, the permit evaluation report simply disregards the 10% above background limitation in the Department's turbidity standard entirely, and purports to grant blanket authorization for "limited duration exceedances" of the 10% turbidity criteria to any and all permit registrants. Evaluation Report at p. 8. As discussed above, DEQ is under a mandate to authorize only NPDES permits that comply with the CWA and water quality standards, and such blanket exemption from water quality standard compliance is unlawful. 33 U.S.C. §1342(a)(1), 40 C.F.R. §§ 122.4 and 122.44.

The Department's disregard for turbidity-related concerns is further exacerbated by its unsupportable inclusion of a discretionary 160 NTU benchmark in the permit. This benchmark is wholly underprotective for numerous reasons: it only applies in waterways that are already water-quality limited for sediment or turbidity; even then, it only applies if the permittee unilaterally chooses to monitor turbidity; and finally, it relies on an unlawfully liberal dilution factor of 5. On this final point, contrast Washington Department of Ecology's benchmark of 25 NTUs in its draft construction stormwater permit. Oregon DEQ arrives at a similar starting point of 30 NTUs, which it deems "protective of aquatic life and water quality". Permit Evaluation at p. 9. Scientific literature may well support that determination, were the 30 NTU benchmark not subsequently inflated by an arbitrary multiple of 5 in this permit.

The draft permit is also conspicuously silent on pH. The Washington Department of Ecology expressly addresses this issue in its draft construction stormwater permit by recognizing that "[c]onstruction stormwater may become contaminated from alkaline construction materials resulting in high pH. Alkaline construction materials include concrete, mortar, lime, cement kiln dust, Portland cement treated base, fly ash, recycled concrete and masonry work. See attached Washington Department of Ecology Fact Sheet for Construction Stormwater General Permit at p. 7. It further states that "[a]ll of these activities, if exposed to rainwater, have the potential to significantly alter the pH in runoff, and potentially in the receiving water." See p. 31.

The Washington Department of Ecology permit also addresses phosphorus, and the fact sheet notes, "[p]hosphorus is a potential constitutent of construction stormwater because it occurs naturally in soils. If erosion and sediment control measures are inadequate to prevent the discharge of suspended sediment, phosphorus is likely to contaminate the stormwater." See p. 8.

Oregon DEQ's permit is inadequate in its failing to recognize that construction-related stormwater has a reasonable potential to violate water-quality standards, including basic specific standards such as the Clear Lake maximum annual phosphorus loading restriction set forth in the Mid Coast Basin standards at OAR 340-041-0225.

Although the new generic catch-all permit condition prohibiting permittees from causing or contributing to a violation of instream water quality standards is a step in the right direction, it does not go far enough. Permits, irrespective of whether or not the receiving stream is already water-quality limited, *must* contain monitoring provisions adequate to demonstrate compliance with permit conditions. 40 C.F.R. § 122.44(i). Allowing for optional monitoring, and even then, only in sediment or turbidity-limited waterbodies, simply fails to comport with federal requirements.

Question 1: Do any of the waterbodies on the 303(d) list for sediment or turbidity have flows inadequate to support a dilution factor of 5?

Question 2: What is the justification for using the dilution factor of 5, other than simply because it has been used in other Oregon DEQ-issued general permits in the past?

Question 3: Did the Department perform a reasonable potential analysis for pH?

Question 4: Does the Department disagree with Washington Department of Ecology's finding that construction-related activities "have the potential to significantly alter the pH in runoff, and potentially in the receiving water"?

Question 5: If a developer strips a 100 acre sloped site bare, exposing that site to precipitation that is drained by a single drainage channel into an adjacent creek, can that developer avoid the permit's optional turbidity monitoring provision by putting a compost sock across that channel?

Question 6: Did the Department review any data or perform any analysis related to the phosphorus impacts associated with construction activity?

Question 7: How does this permit incorporate the phosphorus requirements that apply to any new land development within the Tualatin River and Oswego Lake subbasins at OAR 340-041-0345?

Question 8: What unique restrictions, if any, does this permit place on construction-related runoff in Clackamas, McKenzie and North Santiam subbasins?

Question 9: Although the Department retains the discretion to permit existing construction-related discharges in the Three Basins, why aren't new discharges prohibited in those watersheds?

Question 10: Could developers apply for and obtain coverage under this permit to develop every single square acre of undeveloped land in the Three Basins?

II. The Proposed 1200-C Permit must undergo an antidegradation analysis

The antidegradation policy is an integral component of the CWA. In its most simple form, antidegradation is a policy incorporated into the CWA that seeks to ensure that current water quality is maintained and protected. As the term "antidegradation" indicates, no degradation of water quality is meant to be the norm, and lowering of water quality is meant to be the exception. Without an antidegradation policy to keep a check on new and increased discharges, any improvement brought about through the individual permitting programs of the CWA could be lost in the blink of an eye to the next new permitted discharge.

Section 303(d)(4)(B) of the CWA provides that any permitting activity involving waters with water quality equal to or in excess of what is necessary to protect designated uses must be consistent with an antidegradation policy. The broad language of section 303(d)(4)(B) brings a large number of waters under its protection. The language indicates that all waters with water quality equal to or better than what is needed to support designated uses should not be degraded through any CWA permitting authority without comporting with an antidegradation policy aimed at preventing the lowering of water quality. 33 U.S.C. § 1313(d)(4).

EPA regulations that implement the CWA require states to incorporate into their water quality standards an antidegradation policy "consistent with" the federal antidegradation policy at 40 C.F.R. § 131.12. 40 C.F.R. §131.6(d) (2003). Section 131.12 further requires that states "develop and adopt" an antidegradation policy. Thus, the federal antidegradation policy at section 131.12 sets the minimum requirements that states must adopt.

Oregon has adopted an antidegradation policy and has written guidance describing how the policy should be applied. Oregon's antidegradation rule establishes three different tiers of waterbodies. First, the antidegradation rule establishes High Quality Waters, where existing water quality is good enough to support beneficial uses, which may be degraded only after the EQC balances socioeconomic considerations. OAR 340-041-0004(6) Second, the antidegradation rule establishes Outstanding Resource Waters, which are waterbodies that hopefully the EQC will someday determine have special significance, and which will then be protected from any further degradation. OAR 340-041-0004(8). Last, the antidegradation rule establishes water quality limited waterbodies (WQLWs), where streams are degraded in one or more ways, and which may not receive any new or increased loading of pollutants which are related to the parameters causing the violation of water quality standards. OAR 340-041-0004(7), (9)(a)(D). An antidegradation analysis is triggered when a permit is presented to DEQ for a new or increased discharge into a waterbody. Depending on the tier to which a waterbody belongs, DEQ must apply the correlating analysis to determine if the discharge will be allowed.

Under DEQ's own Antidegradation Policy Implementation Directive, "[a]ny activity that proposes to discharge a new or increased load (beyond that presently allowed in an existing permit) or any other activity that will lower water quality is subject to an antidegradation review. DEQ, State of Oregon Antidegradation Policy Implementation Internal Management Directive for NPDES Permits and Section 404 Water Quality Certifications at 14 (2001). The Proposed 1200-C Permit authorizes both new and increased discharges and must undergo a full antidegradation analysis. Although the meaning of the term "new" may appear to be straightforward, the CWA does not limit the term "new" to only those permits that have never been issued previously. Here, an unlimited number of new future dischargers will be allowed to sign up for coverage under the new 1200-C permit. The issuance of this new permit should trigger the antidegradation review mandated in OAR 340-041-0004.

In 1998, Judge Snouffer of the Circuit Court of Oregon required DEQ to complete an antidegradation review of the suction dredge mining 700-J general NPDES permit which failed to consider the impacts of the permitted activity on waterbodies limited for temperature. *National Wildlife Federation v. Oregon DEQ*, CV 9706-04970 (Or. Circ. Ct., 4th Dist., Sept. 18, 1998). This ruling reinforces the necessity that DEQ apply the substantive antidegradation rule to the issuance of all general permits, including the 1200-C permit.

Question 11: During the 5 year life of the new 1200-C permit, will new permittees that were not previously covered under the soon-to-be-expired 1200-C permit be able to receive authorization to conduct construction activities that may result in new discharge loads to waterbodies across the state?

Question 12: Did the Department consider whether construction statewide, and particularly in areas such as the outlying areas of cities such as Portland or Bend, is likely to increase for Measure 37-related reasons or otherwise?

Question 13: If those new construction projects result in new discharges of sediment, for example, what are those discharges if they are not new discharge loads?

Question 14: Has DEQ ever undertaken an in-depth antidegradation review concerning construction activity in Oregon?

Question 15: If a developer obtained permit coverage under the new 1200-C permit, decided to put in a large new housing development adjacent to the Wallowa River at some point between river mile 0-50 (on the 303(d) list for sedimentation), and started generating heavy loadings of sediment directly to the river, would those new loadings be considered new discharge loads?

Question 16: If that same developer also decided to put in a large new housing development adjacent to the South Umpqua River at some point between river mile 0-15.9 (on the 303(d) list for phosphorus), applied large quantities of granular fertilizer during the construction project that were carried away from the site of the housing development and deposited directly into the river, would those new phosphorus loadings be considered new discharge loads?

III. Additional Concerns

1. The 14-day public comment period is unlawfully short.
2. Failure to provide the public with the opportunity for a hearing should one be requested is unlawful.
3. The permit does not require the "highest and best practicable treatment and/or control of wastes" in contravention of OAR 340-001-007(1).
4. This permit does not adequately prevent against detrimental changes in resident biological communities affected by construction-related stormwater runoff.
5. DEQ has established a self-regulatory permitting scheme similar to, and in fact even less objective than, the scheme that the Ninth Circuit found impermissible under the CWA. *Envtl. Def. Ctr., Inc. v. U.S. Envtl. Protection Agency*, 344 F.3d 832, 855 (9th Cir. 2003).

Question 17: Might future permit registrants be authorized under this permit to engage in construction-related activities that result in levels of turbidity greater than the lowest possible levels?

Question 18: Would it be impossible for a developer implementing the bare minimum BMPs authorized under this permit to implement BMPs that result in a greater degree of treatment or control of the run-off associated with the activity?

Question 19: Does this permit limit construction-related turbidity to the lowest possible levels?

Question 20: Is it possible that this permit will authorize turbid discharges that will be aesthetically displeasing to the human sense of sight?

Question 21: Why did the Department include such an unreasonably short public notice timeline in the permit?

Question 22: Given the relative simplicity of requiring that permit-related documents and data such as Erosion Sediment Control Plans and monitoring data be submitted electronically, thereby saving considerable resources, why is the Department not requiring that with this draft permit?

Sincerely,

Mark Riskedahl
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NEDC