



NORTHWEST ENVIRONMENTAL DEFENSE CENTER

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Stormwater
DEQ Northwest Region Office
2020 SW 4th Ave, Suite 400
Portland, OR 97201-4987

Re: 1200-COLS Permit Application No. 117681, NEDC Comments

Dear DEQ Stormwater Permit Writer:

The Northwest Environmental Defense Center (NEDC) submits these comments regarding the request of Kosta's Scrap Metals, Inc. (hereinafter, Kosta) for coverage under the 1200-COLS Industrial Stormwater General National Pollutant Discharge Elimination System (NPDES) Permit (hereinafter, 1200-COLS Permit) and the information contained in Kosta Permit Application, Number 117681. As the city recently re-routed Kosta's stormwater from a conveyance system that flowed to the Columbia Boulevard sewage treatment plant to a conveyance system that discharges to the Columbia Slough, Kosta's stormwater discharge is a new or increased discharge into the Slough.

NEDC's mission is to preserve and protect the environment and natural resources of the Pacific Northwest. Our membership includes individuals who visit, recreate near, or live in the vicinity of Kosta and the Columbia Slough. NEDC routinely comments on state-issued NPDES permits. As you are likely aware, the Pacific Environmental Advocacy Center (PEAC) submitted extensive comments on behalf of NEDC to DEQ in April 2006, regarding the inadequacies of the 1200-COLS Permit. DEQ did not sufficiently improve its 1200-COLS Permit in response to those comments. NEDC therefore incorporates the April 2006 comments into these site-specific comments and urges DEQ to reevaluate its current approach to regulating industrial storm water discharges into the Columbia Slough. Without an extensive revision to the 1200-COLS Permit, or, at a minimum, significant site-specific improvements to stormwater controls and permit requirements at each industrial facility located along the Columbia Slough, DEQ cannot meet its obligation under the Clean Water Act. Because the 1200-COLS Permit is so flawed and because NEDC has identified many of the flaws with the 1200-COLS Permit in previous comments, these comments will focus specifically on the Kosta Permit Application, Number 117681.

The Permit Application Lacks Essential Information

As noted in the April 2006 comments, DEQ's permit application for industrial stormwater discharges is wholly deficient. The permit application asks for none of the necessary information that DEQ must obtain prior to determining that a particular discharge qualifies for coverage under the 1200-COLS permit.

40 C.F.R. § 122.26(c)(1) requires dischargers of storm water associated with industrial activity to apply for an individual permit or seek coverage under a promulgated storm water general permit. Existing sources must submit an application for an individual or general permit containing *quantitative data* based on samples collected during storm events from all outfalls containing storm water discharge associated with industrial activity. 40 C.F.R. § 122.26(c)(1)(E)(1). New sources must submit estimates for the pollutants or parameters limited in an effluent guideline. 40 C.F.R. § 122.26(c)(1)(G). These regulations apply to all dischargers in Oregon. 40 C.F.R. § 123.25.

EPA's permit application (which is available through DEQ's website, but which DEQ does not use for stormwater discharges) provides an example of what a permit application must contain to satisfy the requirements of 40 C.F.R. § 122.26(c)(1)(E)(1). Items VIII-A, B, C ask the applicant to collect and report on the pollutants discharged for each of the applicant's outfalls. By requiring each applicant to list the pollutants they discharge, EPA not only complies with 40 C.F.R. § 122.26(c)(1)(E)(1), but is also able to obtain an accurate record of the pollutants that applicants will likely discharge into waterbodies. EPA also has very clear instructions concerning how this information must be reported and how the samples must be analyzed. These instructions insure that EPA receives uniform results that it can easily compare to sampling results from other applicants and permittees.

In addition, EPA's Form 2F Item IV-B requires applicants to provide a description of any significant materials that are currently or have been treated, stored or disposed of in the past and that are or have been exposed to storm water. EPA also asks for any existing information regarding the history of significant leaks or spills of toxic or hazardous pollutants at the applicant's facility in the past three years. Form 2F Item VI. This thorough inquiry into current exposures, past exposures, and leaks or spills allows EPA to gain an understanding of what pollutants the general permit needs to include in its monitoring requirements and what BMPs EPA should require in the SWPCP.

Contrary to EPA, DEQ has not required such specificity and as a result, Kosta's permit contains only minimal information. Kosta is a scrap metal facility that receives, stores, processes, and ships scrap. While the permit lists some of the processes and materials involved in its operations, it uses very broad terms such as "other non-ferrous metal" which give little indication as to what materials are actually processed and stored at the site. The permit fails to state how often the processing occurs, the by-products of its processes, how much of each substance or scrap is used, and the effect these process have on the temperature of the water it discharges. From this application, DEQ cannot determine which pollutants Kosta is discharging, the quantities or the impact the discharges will have on the Columbia Slough.

- 1) On what basis did DEQ determine that Kosta would discharge only the three metals (zinc, copper and lead) for which DEQ established benchmark limits in the 1200-COLS Permit?

The Kosta Stormwater Pollution Control Plan is Inadequate

Kosta is located in close proximity to a number of other industrial facilities. This makes it all the more essential for the company to have a comprehensive and protective SWPCP, but its plan is lacking. The inadequacy of the SWPCP may be attributed to the fact that DEQ's 1200-COLS general permit contains no reference to the scientific research and analysis performed by numerous agencies and organizations on creative and proven approaches of limiting stormwater flow intensity and volume. The absence of encouragement in this area represents a significant missed opportunity. Instead, the permit allows Kosta to subjectively and unilaterally choose from an assortment of potential BMPs without consideration of whether the chosen BMP is appropriately tailored for its facility. Such self-regulation is contrary to federal law.

- 2) Did DEQ specifically review and evaluate the adequacy of the Kosta SWPCP? Please provide relevant data or analysis.
- 3) Why is Kosta allowed to subjectively choose its BMPs without further guidance from DEQ?
- 4) In the case Kosta exceeds a benchmark, the 1200-COLS permit requires the submittal of an "Action Plan." Schedule A.2. Will DEQ specifically evaluate the plan in relation to the severity of the exceedences to determine whether the revised plan is sufficient?
- 5) Why did DEQ make BMPs the sole mechanism for controlling the discharge of pollutants when the CWA allows BMPs to supplement, not replace, effluent limitations like BAT? *See* 33 U.S.C. §1314(c)

EPA's proposed MSGP requires scrap metal facilities minimize the chance of accepting materials that could be significant sources of pollutants by conducting inspections of inbound recyclables and waste materials. The MSGP suggests relevant BMP options including: 1) educating scrap waste material providers on draining and properly disposing of residual fluids; and 2) the establishment of procedures for accepting scrap lead-acid batteries. Kosta's SWPCP makes no mention of any such plan, nor of any existing policy on the acceptance of improper scrap materials.

- 6) How can DEQ ensure Kosta does not accept improper waste in the absence of any plan prohibiting such acceptance?

DEQ Is Not Appropriately Regulating All the Pollutants that Kosta Will Likely Discharge

DEQ's one-size-fits-all approach to regulating stormwater pollutant discharges through a general permit is legally defensible only where DEQ sets effluent limitations for all the pollutants that each covered facility will in fact discharge. As the April 2006 comments explain, EPA has established sector-specific requirements within its only industrial stormwater permit to account for the varying pollutants that different industries discharge in their industrial stormwater. EPA also regulates many more pollutants in its stormwater permits than DEQ chooses to regulate. For DEQ to justify its decision to establish benchmark values for only three pollutants, DEQ must demonstrate that only these three pollutants are found in the industrial stormwater discharge.

In its proposed NPDES Stormwater MSGP, EPA planned to establish benchmarks for the following toxic pollutants: Total Aluminum, Total Antimony, Total Arsenic, Total Beryllium, Total Cadmium, Total Chromium, Total Copper, Cyanide, Total Iron, Total Lead, Total Magnesium, Total Mercury, Total Nickel, Total Selenium, Total Phenols, Total Silver, and Total Zinc. EPA also found that arsenic and chromium appeared in stormwater more than 50% of the time, nickel and cadmium appeared in stormwater more than 40% of the time, and cyanides appeared more than 20% of the time. In developing this permit, EPA undertook an analysis of the pollutants discharged from particular industrial categories. This analysis demonstrates that the Kosta facility will likely discharge at least the following pollutants into the Columbia Slough: aluminum, copper, iron, lead, zinc. In addition, Kosta accepts batteries, radiators, and car parts that contain used oil, hydraulic oil, and diesel fuel, as well as propane tanks. Depending on the types of wastes Kosta collects, substances such as antifreeze, mineral spirits, and industrial solvents may also be present at the site. Kosta requires a site-specific permit to account for these potential pollutants. DEQ must establish effluent limitations (or, at a minimum, benchmarks) for all pollutants that this company will discharge through its stormwater.

- 7) On what basis did DEQ decide to set benchmarks only for copper, lead, and zinc?

Kosta's 1200-COLS application states that activities at the site include, *inter alia*, the breaking down and processing of scrap metal and materials handled at the site, which include raw materials and waste products. Process wastewater is defined as any water that "during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, byproduct, or waste product." 40 C.F.R. §122.2. The discharge of process wastewater requires an individual permit.

- 8) What evidence does DEQ have that none of Kosta's discharges are actually process wastewater as opposed to industrial stormwater discharges?

The Kosta Application and 1200-COLS Permit Are Inadequate to Ensure Protection of Water Quality Standards

Section 303 of the Clean Water Act (CWA) creates three specific elements of water quality program for the states. First, a state must designate the "beneficial uses" of its waters.

33 U.S.C. §1313(c)(2)(A). Second, a state must establish “water quality criteria” to protect those beneficial uses. *Id.* Third, a state implements an “antidegradation” policy to prevent any further degradation of water quality. *Id.* at § 1313(d)(4)(B); 40 C.F.R. § 131.22. These three elements of a state water quality program are independent, enforceable requirements of federal law.

Federal regulations state that no new permit may be issued if it’s operation will cause *or contribute* to the violation of water quality standards. 44 C.F.R. §122.4 (emphasis added). While the CWA requires all discharges “meet” water quality standards, 33 U.S.C. §1311(b)(1)(C), and federal regulations state that no permit shall issue where the permit will not ensure “compliance” with all applicable water quality requirements, Kosta’s 1200-COLS permit requires only that it “must not *cause* a violation of instream water quality standards.” However, Oregon’s antidegradation policy stipulates that further degradation of water quality from new and increased discharges of pollution should be prevented in order to “protect, maintain, and enhance existing surface water quality to ensure the full protection of all existing beneficial uses.” OAR 340-041-0004(1).

- 9) Did DEQ determine Kosta would not contribute to any violation of any water quality standard?
 - a. If yes, how was such a determination made?
 - b. If not, why is DEQ proposing to permit this new source, with no conclusive evidence of whether Kosta will violate water quality standards in violation of state and federal law?

- 10) Why doesn’t DEQ require Kosta to “meet” water quality standards, instead of the much more lenient standard of not causing a violation and thus ensure greater compliance with its own regulations?

DEQ presumes Kosta will not cause a violation of WQS unless “[c]oincidental samples of the discharge at upstream & downstream locations in the receiving water body...establish a violation” of water quality standards. Under this approach, Kosta is presumed to be complying with federal law, even if it discharges pollutants into the Columbia Slough, a waterbody already water quality limited. In fact, so long as the waterbody is already degraded by the time it gets to Kosta, under DEQs scheme, Kosta can discharge as many pollutants as it likes, without being deemed as causing or contributing to a violation, in contradiction of section 301 of the CWA. 33 U.S.C. § 1311(b)(1)(C).

The benchmarks in Kosta’s 1200-COLS general permit exceed Oregon’s water quality standards. According to OAR 340-041 Table 20, the listed criterion “is not to be exceeded in waters of the state in order to protect aquatic life and human health.” Beneficial uses of the Columbia Slough include aquatic life and human health. Table 20 states the water quality criteria for copper are 0.018 mg/l (acute criterion for aquatic life) and 0.012 mg/l (chronic criterion for aquatic life), however the benchmark for copper in Kosta’s general permit is 0.036 mg/l. The water quality criteria for lead range from 0.003 mg/l (chronic level for aquatic life) to 0.082 mg/l (acute criterion for aquatic life), and the criterion for the protection of human life is 0.05 mg/l, while benchmark for lead in Kosta’s permit is 0.06 mg/l. The water quality criteria for zinc are

0.120 mg/l for acute levels and 0.110 mg/l for chronic criteria levels, while the benchmark in Kosta's permit is 0.24 mg/l.

- 11)** How can DEQ justify setting benchmark levels that violate water quality standards?

DEQ assumes that Kosta's authorized discharges will comply with instream water quality standards if Kosta "develops, implements, and revises its SWPCP." Schedule A.5(b). However, the SWPCP bears no relationship whatsoever to compliance with water quality standards and nothing in DEQ's records indicates otherwise. This lack of relationship is enhanced by the fact that DEQ set benchmarks that are two to five times higher than the relevant water quality criteria.

In addition, and particularly relevant in regards to Kosta and the Columbia Slough, the CWA requires a state to identify any degraded water bodies and compile a list of waterbodies that do not meet water quality standards—the 303(d) list. 33 U.S.C. § 1313(d). These waterbodies are "water quality-limited" as they fail to attain compliance with either narrative or numeric water quality criteria. 40 C.F.R. § 130.10(b)(2); OAR 340-041-0002(70)(a). DEQ's Water Quality Assessment Database states that the Columbia Slough is water quality-limited for numerous metals including iron and lead. This database also states there is "insufficient data" to determine the water quality status of the Columbia Slough for numerous metals including: copper, nickel, zinc, arsenic, beryllium, cadmium, and silver. Oregon rules also define water quality limited as "a receiving stream for which there is insufficient information to determine whether water quality criteria are being met with higher-than-standard treatment technology or a receiving stream that would not be expected to meet water quality criteria during the entire year or defined season without higher than standard technology." OAR 340-041-0002(70)(c). According to this definition, the Columbia Slough is water quality limited for the aforementioned metals and any other pollutant for which there is insufficient data to determine its status. The same is true for any pollutant that is listed in Oregon's 303(d) database as meeting only some water quality criteria/uses, including alkalinity and ammonia, as presumably these pollutants violate other water quality criteria/uses.

- 12)** As Kosta will likely discharge, iron, lead, manganese, heat, and copper among other pollutants for which the Columbia Slough is water quality limited, won't Kosta contribute further to its degradation and contribute to violations of water quality standards?
- 13)** Please provide a justification for this violation of Oregon's antidegradation policy, which states "water quality limited waters may not be further degraded."

Once a waterbody is designated as water quality-limited, a state must develop and implement a "total maximum daily load" (TMDL) to restore water quality. While a TMDL has been established for lead in the Columbia Slough, there is no TMDL for iron or manganese. The TMDL process involves identifying existing sources of pollution that cause or contribute to the degradation of the water and then establishing waste-load allocations for point sources and load

allocations for non-point sources. 40 C.F.R. §130.2(g), (h). A TMDL defines an impaired waterbody's capacity to tolerate point source, non-point source, and natural background conditions while maintaining water quality standards and as the Ninth Circuit stated, are compiled for the "basic purpose...[of] the eventual attainment of state-defined water quality standards." *Pronsolino v. Nastri*, 291 F. 3d 1123, 1137 (9th Cir. 2002). A new permit should not be issued to a new source such as Kosta, to allow the discharge of pollutants into an impaired waterbody, in the absence of a TMDL for those pollutants. OAR 340-041-0004(9)(a)(D).

- 14) How can DEQ permit a new discharge in absence of TMDLs for the pollutants for which the Columbia Slough is WQL and Kosta will likely discharge?
- 15) How will the Columbia Slough ever attain water quality standards if DEQ allows Kosta to discharge pollutants into this impaired waterbody? How will the Columbia Slough ever attain water quality standards if DEQ continues permitting new sources in this manner?

While the CWA typically prohibits the permitting of new sources that will cause or contribute to the violation of water quality standards, a new source may be allowed to discharge into waterbodies that are water quality-limited if the source can prove: "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).

- 16) Has there been any effort to ensure that all the sources of lead loadings to the Columbia Slough will be eliminated or reduced prior to Kosta's discharges?
 - a. If not, how can DEQ ensure there are "sufficient remaining pollutant load allocations to allow for the discharge?"
- 17) Is every other existing source currently discharging iron and manganese into the Columbia Slough subject to compliance schedules that will bring those sources into compliance with water quality standards?
- 18) Has DEQ conducted any other investigation to determine whether one of the exceptions to its Water Quality Limited Waters Policy applies? If so, please provide relevant documentation.

The Benchmark Compliance Evaluation Will Not Sufficiently Protect Water Quality

In the 1200-COLS Permit, DEQ requires a facility to evaluate the last four samples collected from each outfall monitored and to determine whether the geometric mean of those samples exceeds benchmarks. However, the facility is not required to do this until *June 30th of the 4th year of permit coverage*. Schedule A.9. Four years is an excessive amount of time before an evaluation of overall performance is required of a facility. Under this approach the samples from each outfall may exceed benchmarks for the first 12 monitoring periods, but as long as the last four samples during the four-year period are not, according to the geometric mean, higher

than the benchmarks for the pollutant, the facility faces no new requirements. DEQ should not wait four years before enforcing stronger requirements.

- 19) Why did DEQ decide to employ the Benchmark Compliance Evaluation only after the fourth year of permit coverage?

The Monitoring Waiver of Grab Samples Will Not Sufficiently Protect Water Quality

In the 1200-COLS Permit, DEQ allows a facility to discontinue the collection of grab samples for the remainder of the permit term if four consecutive sampling results meet the specified benchmarks. Schedule B.3(b). This allowance does not take into account the practices that were taking place at Kosta before and after the waiver. For instance, it is possible that Kosta might not perform certain activities during the periods when the stormwater met the benchmarks, but might resume, or begin new practices after the monitoring requirement has been waived. Thus, activities that typically lead to more pollutants in stormwater may be practiced once the monitoring waiver is established and continue unchecked for the remainder of the permit term.

- 20) How did DEQ determine that the monitoring waiver of grab samples would not be abused in the manner described above?

Conclusion

Without more information regarding Kosta's discharges into the Columbia Slough, DEQ cannot reasonably determine that the 1200-COLS permit appropriately applies to Kosta. Nor can DEQ conclude that this facility's discharges will meet either the technology-based requirements of the CWA or applicable water quality standards. DEQ must therefore, at a minimum, require more information before it can grant Kosta coverage under the 1200-COLS permit. If DEQ does grant Kosta coverage, based on the minimal information it currently has about the facility and the likelihood of further degradation of an already water quality-limited waterbody, DEQ's actions will be unlawful under both the CWA and Oregon law. NEDC therefore urges DEQ, as it has for many years now, to revise its entire approach to industrial stormwater permitting.

Sincerely,

Kristen Monsell

/s/ Kristen Monsell

NEDC Law Clerk