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January 10, 2008

Via Email

Lionel Klikoff

Department of Ecology

industrialstormwatercomments@ecy.wa.gov

Columbia Riverkeeper Comments on the Draft Industrial Stormwater Permit

Dear Lionel,

Please accept these comments from Columbia Riverkeeper. We are a non-profit organization dedicated to the protection of water quality in the Columbia Basin and the life that depends on it. We appreciate the opportunity to provide comments on this draft permit ("permit").

Columbia Riverkeeper provided comments on the pre-draft industrial stormwater permit and comments on the previous iteration of the permit on April 20, 2007. We hereby incorporate by reference our previous comments into these comments. This draft suffers from many of the same fundamental flaws as the previous draft. Yet, surprisingly, this draft is weaker than even the previous draft. The permit fails to protect water quality and fails to comply with the Clean Water Act. It is disappointing that Ecology would bow to the pressure of the regulated industries and significantly weaken the permit over the last nine months. This draft permit is completely unacceptable for the reasons discussed below.

The permit does not ensure compliance with water quality standards

The fundamental and overarching problem with this permit is the failure to ensure compliance with water quality standards ("WQS"). The Clean Water Act requires that stormwater discharge meet water quality standards. 33 U.S.C. § 402(p)(3)(A). See also 40 C.F.R. § 122.44(d). Washington law also requires compliance with WQS. WAC 173-226-070(3)(a). In addition, RCW 90.48.555(7)(a) requires numeric effluent limitations for discharges to impaired water bodies when there is a reasonable potential to contribute to violation of water quality standards. Despite this clear federal and state law, nothing in this permit satisfies the mandatory duty to ensure compliance with water quality standards.

Ecology has failed to set limits that ensure compliance with WQS. Condition S10(C) states that Ecology will *presume* compliance with WQS when the permittee: (1) complies with permit conditions, and (2) fully implements Best Management Practices ("BMP"). Ecology's presumption is inappropriate and illegal. First, no permit conditions ensure compliance with WQS so the presumption cannot be based on (1) above. Second, Ecology acknowledges that BMPs do not ensure compliance with WQS so the presumption cannot be based on (2) above.

Please provide data demonstrating that compliance with BMPs ensures that a facility does not cause exceedance of WQS.

While Condition S10(A) states that discharges shall not cause a violation to WQS, nothing in the permit implements this empty statement. Columbia Riverkeeper supports the inclusion of Condition S10(A) as a permit requirement, but urges Ecology to provide substantive requirements to actually achieve this statutory mandate.

In addition, Ecology has failed to conduct a Reasonable Potential Analysis, as required by the Clean Water Act, 40 C.F.R § 122.44(d)(1), and RCW 90.48.555(3)(d). There are no exceptions to this clear requirement, and Ecology does not even offer an explanation of why it evades this critical component of the CWA.

Why did Ecology not conduct a Reasonable Potential Analysis?

Is a Reasonable Potential Analysis required by the Clean Water Act and state law for this permit?

From Columbia Riverkeeper's review of discharge data, it is abundantly clear that many facilities are discharging pollutants at levels that contribute to a violation of water quality standards. This is particularly obvious for 303(d)-listed streams. Further, by Ecology's own data, it is abundantly clear that facilities are not implementing AKART, which removes any presumption that the facilities comply with water quality standards. Despite this clear evidence, Ecology refuses to acknowledge or address the serious problem of thousands of facilities violating water quality standards. Instead of strengthening the permit and stepping up enforcement, Ecology has chosen the low road of weakening the permit and making it nearly unenforceable. This is politically disappointing and legally indefensible.

The permit should establish numeric effluent limits

Ecology's reliance on the narrative effluent limitations has completely failed to ensure compliance with water quality standards. Ecology's data shows that 60% of facilities did not have a current and implemented SWPPP and 30% could not identify any BMPs. This is strong evidence that the narrative effluent limitations are not working as designed. Yet, Ecology rarely enforced the narrative limitations. The lack of enforcement may be due to the subjective nature of the narrative effluent limitations. Numeric effluent limitations would provide objective standards that make the permit requirements clear to the permittee, Ecology, and the public.

In addition, Ecology's reliance on "adaptive management" and benchmarks has failed to ensure compliance with WQS. Even if the permittee meets the benchmarks, Ecology cannot ensure that the permittee is in compliance with WQS. The benchmarks are at levels much greater than levels that harm designated uses. Worse, the permit allows the permittee to violate benchmarks for an indefinite amount of time, possibly years, thereby, sanctioning the exceedance of WQS.

Ecology explained its rationale for not including numeric effluent limits in the Fact Sheet. The Fact Sheet states that the existing adaptive management system has not been given enough

time to "demonstrate its efficacy." We are highly skeptical of this rationale. First, Ecology has provided no data to demonstrate that the system is working. Second, without numeric effluent limits and the necessary monitoring, there is no way to ensure that adaptive management actually results in healthy stream conditions. We support adaptive management programs, but these programs must be combined with enforceable numeric effluent limits. If the system is indeed working, then permittees should be able to comply with numeric effluent limits.

How much time is necessary to show the effectiveness of the adaptive management program?

In the last 2.5 years, has there been a trend toward compliance with WQS?

Another reason that Ecology must establish numeric effluent limitations is that the benchmarks fail to ensure compliance with water quality standards. The benchmarks are set far higher than the water quality standards. The benchmark values are based on the median values of monitoring data, which has absolutely nothing to do with meeting water quality standards. In addition, the draft permit does not even require facilities to do anything to meet benchmarks.

Please provide a scientific justification of how basing the benchmarks on the median monitoring data ensures compliance with water quality standards.

Where does the draft permit require a permittee to attain benchmarks?

Ecology should not remove the action levels

Ecology proposes to replace action levels, which are two times the benchmark level, with "threshold levels," which are ten times the benchmark level. This represents another weakening of the permit. While it is difficult to defend action levels or threshold levels because each is completely arbitrary and unrelated to water quality standards, allowing a facility to exceed benchmark by up to ten times without taking any action is absurd. At least action levels require the permittee to do something. Ecology's explained that it needed to replace action levels because actions levels 1) confused permittees, 2) required permittees to do something when they exceeded benchmarks (eloquently stated as "eliminate the endless do-loop"), and 3) caused some facilities to be out of compliance with the permit. Fact Sheet at 71. This explanation is disappointing and points to Ecology's capitulation to industrial interests. First, action levels are not complicated. If a business cannot comply with a simple requirement to implement additional BMPs in an action response, then it should not get a permit. Second, the "endless do-loop" is endless because permittees continue to violate the benchmarks. The permittee simply has to meet benchmarks to break this loop. Ecology should be concerned about the endless non compliance, not concerned about the permittees having to conduct action level responses. Third, ease of compliance with the permit is not the goal of the CWA. The statutory mandate is to maintain and improve water quality. Nowhere does the Act state that ease of compliance is a legitimate reason for weakening a permit. If Ecology's goals are to allow permittees to exceed benchmarks and not do anything about it, this permit certainly accomplishes that goal. However, Ecology's statutory mandate is to improve water quality, not ease permit compliance.

Lack of data does not excuse Ecology's duty under the CWA

The Fact Sheet suggests that it would be difficult to establish numeric effluent limits because Ecology would need data on the chemical and physical characteristics of the discharge and receiving water. We agree with Ecology that this data is necessary, but we fail to see why this precludes numeric limits. We recommend Ecology establish a program, in conjunction with the permittees, to collect this data. This is the very basic data necessary to protect WQS. In other words, Ecology must have this data to do its job. The lack of data does not excuse Ecology from the mandatory CWA requirement to ensure compliance with WQS.

Ecology must establish numeric effluent limits for discharges 303(d) listed streams

At the very least, Ecology must establish numeric effluent limits for those streams that are already water quality limited. The CWA prohibits any additional discharges into these 303(d) listed streams, yet the draft permit uses the same unenforceable benchmarks for all dischargers, regardless of the degraded status of the stream. Therefore, the permit violates the CWA by allowing the discharge of the specified pollutant into the listed stream. We recommend that Ecology establish numeric effluent limits, at the very least, for pollutants discharged into 303(d) listed streams.

Please provide data to show that the permit prohibits discharge of pollutants into 303(d)-listed streams.

Regarding new permits, Ecology cannot issue a permit to facility that discharges into a 303(d)-listed stream unless a TMDL has been created. 40 C.F.R § 122.4(i); See *Friends of Pinto Creek v. EPA*, 504 F.3d 1007 (9th Cir. 2007). Ecology has traditionally violated 40 C.F.R § 122.4(i) by issuing permits to new facilities on 303(d)-listed streams.

Does Ecology intend to continue to permits to new facilities on 303(d)-listed streams, in violation of 40 C.F.R § 122.4?

Ecology must comply with the CWA antidegradation requirements

The CWA requires that states implement an antidegradation program to protect streams that are achieving WQS from degradation. Thus, the antidegradation provision requires Ecology to ensure that streams cleaner than the minimum standards remain clean. Therefore, degrading the cleaner streams down to the minimum protections of the WQS violates antidegradation.

In violation of the CWA, Ecology has performed no antidegradation analysis for the draft permit. In the Fact Sheet at 47, Ecology turns the antidegradation requirement on its head. Ecology states that "complying with standards will typically afford the protection necessary to prevent ongoing degradation of a water body from stormwater discharges." This is incorrect. The very purpose of antidegradation is to require more stringent limits for water bodies that are cleaner than WQS require. Ecology also states that assurance with antidegradation compliance is

provided by on-site investigations. This is an invalid reason because the antidegradation analysis has to be completed before issuance of the permit. For these reasons, Columbia Riverkeeper recommends that Ecology conduct a thorough antidegradation analysis for this permit.

Permit Sections

S1

Ecology previously decided that nurseries and lawn and garden centers needed coverage due to the presence of hazardous herbicides and pesticides. Ecology then changed its mind in the draft permit. Columbia Riverkeeper recommended that Ecology include these facilities in the permit.

Why did Ecology change its mind?

S3

In the previous draft of this permit, Columbia Riverkeeper supported the requirement that the permittee submit the SWPPP to Ecology. We believe this is necessary and appropriate for Ecology to have on file. This gives the public access to the SWPPP when reviewing the file of a discharger. However, Ecology has removed this sensible provision. We request that the permit include the requirement that the permittee submit the SWPPP to Ecology, preferably electronically, which Ecology can then make available to the public.

In addition, the draft permit at S(3)(A)(4)(e) contains conflicting requirements regarding public access to SWPPPs. Subsection (i) requires the permittee to provide the SWPPP to a requester within 14 days, while subsection (iii) requires Bradwood to notify the requester of when they can view it. We recommend that Ecology remove (iii) because it is inappropriate to require reviewers to visit the facilities. Better yet, if Ecology had an electronic copy of the SWPPP, this would facilitate better public review.

In addition, there is no requirement in the permit that a facility implement the SWPPP. We assume this is an oversight. Ecology must make clear that SWPPPs are fully implemented.

S4

Columbia Riverkeeper opposes the change in the sampling frequency of five samples during the rainy season. Ignoring the summer and early fall discharges is problematic because this is when the greatest concentrations and amounts of toxic pollutants occur. In essence, Ecology would be ignoring the most acute harm to aquatic life.

The draft permit does not contain limitations on the timing of samples.

Could a facility collect all 5 samples in one week?

How does Ecology ensure that the samples contain representative data for the stormwater discharges throughout the year?

What prevents a facility from collecting all of its stormwater samples, besides the first one, when the stormwater pollutant load is likely to be low?

Ecology's failure to establish time limitations for sampling (e.g. once per month) is problematic because an evasive facility could simply time its sampling to avoid the greatest or even the average amount of pollutants in its discharge. This is unacceptable because it allows permittees to purposefully sample when the pollutant load is likely to be less, such as at the end of a long rain event or when BMPs are carefully implemented or when industrial activities are low. Ecology should require the sampling to be spread out to avoid this problem.

This is obviously not representative of the overall discharge. We recommend that Ecology require monthly samples in the rainy season, two samples in the summer, and retain the clear first flush requirements.

The draft permit deletes the clear requirement of when to sample the first flush at the beginning of the storm event with the ambiguous requirement to sample "as soon as possible."

Why does Ecology want to add ambiguity into this permit?

What does "as soon as possible" mean?

In addition, Ecology should require sampling of the receiving water. Without this sampling, Ecology just does not know if its permit is effect to ensure compliance with WQS.

Please explain the "auxillary monitoring program" and how this will demonstrate compliance with WQS?

S5

As discussed above, the threshold level of ten times the benchmark is completely arbitrary and far too high to protect water quality standards.

Columbia Riverkeeper supports the addition of copper as a core parameter in the draft permit, but opposes the removal of lead. Lead is a major stormwater pollutant and it is harmful to aquatic life and humans at very low levels.

Why did Ecology remove lead as a core parameter?

We support the inclusion of required analytical methods. This was a long time coming and obviously necessary.

Thank you for the opportunity to comment.

Sincerely,
/s/ Brett VandenHeuvel
Columbia Riverkeeper
Staff Attorney



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April 20, 2007

Via Email

Jim La Spina

Department of Ecology

industrialstormwatercomments@ecy.wa.gov

Columbia Riverkeeper Comments on the Draft Industrial Stormwater Permit

Dear Jim,

Please accept these comments from Columbia Riverkeeper. We are a non-profit organization dedicated to the protection of water quality in the Columbia Basin and the life that depends on it. As you know, stormwater is a major source of Washington's water quality problems. We appreciate the opportunity to provide comments on this draft permit ("permit").

Columbia Riverkeeper provided comments on the pre-draft industrial stormwater permit. Many sections of the pre-draft and the draft permit are the same. Instead of repeating those comments here, we hereby incorporate by reference our comments on the pre-draft permit.

The permit does not ensure compliance with water quality standards

The fundamental and overarching problem with this permit is the failure to ensure compliance with water quality standards ("WQS"). The Clean Water Act requires that stormwater discharge meet water quality standards. 33 U.S.C. § 402(p)(3)(A). See also 40 C.F.R. § 122.44(d). Washington law also requires compliance with WQS. WAC 173-226-070(3)(a). Nothing in this permit satisfies that mandatory duty. Ecology has failed to set limits that ensure compliance with WQS. Condition S10(C) states that Ecology will *presume* compliance with WQS when the permittee: (1) complies with permit conditions, and (2) fully implements Best Management Practices ("BMP"). Ecology's presumption is inappropriate and illegal. First, no permit conditions ensure compliance with WQS so the presumption cannot be based on (1) above. Second, Ecology acknowledges that BMPs do not ensure compliance with WQS so the presumption cannot be based on (2) above. See Fact Sheet at 77.

Please provide data demonstrating that compliance with BMPs ensures that a facility does not cause exceedance of WQS.

While Condition S10(A) states that discharges shall not cause a violation to WQS, nothing in the permit implements this empty statement. Columbia Riverkeeper supports the inclusion of Condition S10(A) as a permit requirement, but urges Ecology to provide substantive requirements to actually achieve this statutory mandate.

The permit should establish numeric effluent limits

Columbia Riverkeeper supports Ecology's pursuit of "adaptive management" and BMPs that successfully control stormwater. We are impressed by the technical expertise of the staff and the dedication to improving the operational controls at industrial facilities. However, Ecology's steadfast reliance on "adaptive management" and benchmarks has failed to ensure compliance with WQS. First, even if the permittee meets the benchmarks, Ecology cannot ensure that the permittee is in compliance with WQS. The benchmarks are at levels much greater than levels that harm designated uses. Worse, the permit allows the permittee to violate benchmarks for an indefinite amount of time, possibly years, thereby, sanctioning the exceedance of WQS.

The Fact Sheet at 47 states, "In most discharge situations, discharges . . . with concentrations at or below a benchmark will not cause a water quality violation in the receiving water." Please explain what "most" means and provide data to support this statement.

Ecology explained its rationale for not including numeric effluent limits in the Fact Sheet. The Fact Sheet states that the existing adaptive management system has not been given enough time to "demonstrate its efficacy." We are highly skeptical of this rationale. First, Ecology has provided no data to demonstrate that the system is working. Second, without numeric effluent limits and the necessary monitoring, there is no way to ensure that adaptive management actually results in healthy stream conditions. We support adaptive management programs, but these programs must be combined with enforceable numeric effluent limits. If the system is indeed working, then permittees should be able to comply with numeric effluent limits.

How much time is necessary to show the effectiveness of the adaptive management program?

In the last 2.5 years, has there been a trend toward compliance with WQS?

Lack of data does not excuse Ecology's duty under the CWA

The Fact Sheet at 39-41 suggests that it would be difficult to establish numeric effluent limits because Ecology would need data on the chemical and physical characteristics of the discharge and receiving water. We agree with Ecology that this data is necessary, but we fail to see why this precludes numeric limits. We recommend Ecology establish a program, in conjunction with the permittees, to collect this data. This is the very basic data necessary to protect WQS. In other words, Ecology must have this data to do its job. The lack of data does not excuse Ecology from the mandatory CWA requirement to ensure compliance with WQS.

Ecology must establish numeric effluent limits for discharges 303(d) listed streams

At the very least, Ecology must establish numeric effluent limits for those streams that are already water quality limited. The CWA prohibits any additional discharges into these 303(d) listed streams, yet the draft permit uses the same unenforceable benchmarks for all dischargers, regardless of the degraded status of the stream. Therefore, the permit violates the CWA by allowing the discharge of the specified pollutant into the listed stream. We recommend

that Ecology establish numeric effluent limits, at the very least, for pollutants discharged into 303(d) listed streams.

Please provide data to show that the permit prohibits discharge of pollutants into 303(d)-listed streams.

Ecology must comply with the CWA antidegradation requirements

The CWA requires that states implement an antidegradation program to protect streams that are achieving WQS from degradation. Thus, the antidegradation provision requires Ecology to ensure that streams cleaner than the minimum standards remain clean. Therefore, degrading the cleaner streams down to the minimum protections of the WQS violates antidegradation.

In violation of the CWA, Ecology has performed no antidegradation analysis for the draft permit. In the Fact Sheet at 43, Ecology turns the antidegradation requirement on its head. Ecology states that "complying with standards will typically afford the protection necessary to prevent ongoing degradation of a water body from stormwater discharges." This is incorrect. The very purpose of antidegradation is to require more stringent limits for water bodies that are cleaner than WQS require. Ecology also states that assurance with antidegradation compliance is provided by on-site investigations. This is an invalid reason because the antidegradation analysis has to be completed before issuance of the permit. For these reasons, Columbia Riverkeeper recommends that Ecology conduct a thorough antidegradation analysis for this permit.

Permit Sections

S1

Ecology previously decided that nurseries and lawn and garden centers needed coverage due to the presence of hazardous herbicides and pesticides. Ecology then changed its mind in the draft permit. Columbia Riverkeeper recommended that Ecology include these facilities in the permit.

Why did Ecology change its mind?

S3

Columbia Riverkeeper supports the draft permit's requirement that the permittee submit the SWPPP to Ecology. We believe this is necessary and appropriate for Ecology to have on file. This gives the public access to the SWPPP when reviewing the file of a discharger. It is inconvenient and inappropriate for the public to have to correspond directly to the discharger to request the SWPPP. The production of the SWPPP may take weeks or months, which frustrates public review and participation. We recommend Ecology change S3A4 to require all permittees to submit updated SWPPPs to Ecology within 14 days after each update. The permittee can easily resubmit the SWPPP to Ecology in an electronic format. We recommend that Ecology require permittees to submit the SWPPP as a pdf in electronic format and make the SWPPP available to the public online. There is no sense in a concerned citizen driving to Olympia or a

regional office when the technology is readily available and inexpensive to make the SWPPPs available online.

S4

Columbia Riverkeeper opposes the change in the sampling times from the current permit (once per quarter) to the draft permit (four times during the rainy season). Ignoring the summer and early fall discharges is problematic because this is when the greatest concentrations and amounts of toxic pollutants occur. In essence, Ecology would be ignoring the most acute harm to aquatic life.

In addition, the draft permit allows the facility to "sample shop" by requiring only sampling any times that are two weeks apart. This is problematic because an evasive facility could simply time its sampling to avoid the greatest or even the average amount of pollutants in its discharge. All sampling could occur in eight weeks. This is obviously not representative of the overall discharge.

Further, the draft permit does not contain the requirement to sample the first flush at the beginning of the storm event. Although recognizing that this is an important time to assess pollutants, Ecology stated that permittees were not complying with the requirement so it decided to drop it. The lack of compliance should encourage Ecology to issue fines, not modify the program to condone noncompliance. We recommend that Ecology require monthly samples in the rainy season, two samples in the summer, and retain the first flush requirements.

Ecology should require sampling of the receiving water. Without this sampling, Ecology just does not know if its permit is effect to ensure compliance with WQS.

Please explain the "auxillary monitoring program" and how this will demonstrate compliance with WQS?

S5

Columbia Riverkeeper objects to the 6415 Report's suggestion to base benchmarks and action levels on the 50th percentile of 11 quarters of DMR data. This method is completely inappropriate and counterproductive. Ecology cannot set benchmarks solely on the average past performance of the permittees. Ecology must set benchmarks to protect WQS. The past performance of the permittees is irrelevant to meeting WQS. All the 6415 method does is maintain the status quo, which is contrary to Ecology's mission and the CWA.

The 6415 report uses statistical analysis of monitoring data to support setting benchmark and action levels for the new permit. The method, called the "simple percentile method," sets benchmark levels using the 50th percentile value and action levels using the 75th percentile value (6415 report at 34). The data used to set these values was gathered over eleven quarters from 2003 through 2005 on DMR reports. There are several flaws with the data, including missing data sets from 1) facilities not submitting DMRs at all (there are over 1,000 permittees, but the data represented 808 facilities (see the 6415 report, pages 1 and 13) and 2) no qualifying

storm events/values not reported/not detected (see 6415 report page 15). Additionally, there are concerns about the quality of the data as there are known instances where monitoring values were reported incorrectly on DMRs. The consulting firm doing the 6415 report left these values in, "pending more a [sic] detailed quality assurance review by Ecology (page 15)." In our review of stormwater permit files, we've seen these problems with the data, including incorrectly entered values on the DMR (zinc reported in mg/L rather than micrograms/L) and finding that the most extreme polluters are those who did not submit DMRs during the time in question. The consulting firm addresses all of these issues by assuming that there was a "sufficient number of values...to accurately evaluate their characteristics (see page 15, 6415 report)." Overall, the data does not appear to be representative.

The 6415 report assumes that facilities under the 50th percentile are implementing BMPs (page 24), and that because they have previously met benchmark levels they are doing the best that they can. Inspection reports show, however, that this generally is not the case. The on-the-ground facility visits, which show widespread BMP violations, are more accurate than the assumptions in the 6415 Report. Therefore, Ecology should be skeptical of the 6415 Report's conclusions and recommendation based on its assumptions that BMPs are being implemented. If facilities were truly implementing BMP's, the benchmark would be much lower.

Columbia Riverkeeper agrees with Ecology's assessment that the 6415 study is flawed because the researchers did not link the discharge data to measures that facilities had taken to reduce pollutants. Overall, however, all of these methodological problems are overshadowed by the simple fact that the 50 percentile of DMRs will not protect beneficial uses and this method has absolutely no relation to WQS. Therefore, it is invalid.

We question the action levels in the draft permit, which are twice the benchmark limits.

What method did Ecology use to determine this "doubling" method?

Columbia Riverkeeper supports the addition of copper as a core parameter in the draft permit, but opposes the removal of lead. Lead is a major stormwater pollutant and it is harmful to aquatic life and humans at very low levels.

Why did Ecology remove lead as a core parameter?

We support the inclusion of required analytical methods. This was a long time coming and obviously necessary.

S8

Columbia Riverkeeper supports the corrective action process in the draft permit over the 6415 Report. The 6415 Report would greatly reduce the reporting requirements. By the time Ecology received the reports, several months will have elapsed. This degrades Ecology's and the public's ability to monitor the facilities and make sure they are complying with their permit. Also, reporting the annual median of the benchmarks is illogical and contrary to the purposes of the CWA. The CWA prohibits *any* violation of WQS. Looking at the median data condones

exceedances of benchmarks if the permittee complied at other times of the year. Ecology certainly wants to know the seasonal variability of a permittee's discharge, not just an overall average summary. Further, Ecology cannot ensure compliance with acute water quality criteria if it allows occasional huge flushes of toxic pollutants.

Thank you for the opportunity to comment.

Sincerely,
/s/ Brett VandenHeuvel
Columbia Riverkeeper
Staff Attorney