Northwest Environmental Advocates • Northwest Environmental Defense Center • Columbia Riverkeeper

November 18, 2016

Via Electronic Mail

Jane O'Keeffe, Chair
Oregon Environmental Quality Commission
c/o Richard Whitman, Director
Department of Environmental Quality
700 N.E. Multnomah St., Suite 600
Portland, OR 97203

Re: National Pollutant Discharge Elimination System Permitting Program

Dear Ms. O'Keeffe:

As you know, the Department of Environmental Quality (DEQ) has contracted with the MWH/Stantec consulting firm to review its National Pollutant Discharge Elimination Program (NPDES) discharge permitting program. The impetus for this review is Oregon's having the nation's worst permit backlog of individual NPDES permits. The result of this backlog is that DEQ has administratively extended the vast majority of its individual NPDES permits well past the permits' statute-mandated five-year term.

Our organizations have long argued that Oregon's systemic failure to renew permits in a timely manner is not only unlawful, but undoubtedly puts Oregon's waters and citizens at risk. As a result, we support the Department's current effort to understand the causes of the backlog and to correct it. However, we write today because we believe that DEQ has failed to recognize or accept the most fundamental failure of its NPDES permit program—namely its consistent failure to write NPDES permits that comply with the Clean Water Act, state law, and the federal and state implementing regulations. We believe that until the Department acknowledges both its shortcomings and the very real challenges it faces on this front, and until it takes steps to ensure Oregon's permits fully and properly implement federal and state law, any process to improve the NPDES program will simply end in failure.

We are writing to you as the consultants are bringing to a close a nearly year-long, $250,000 review of Oregon's NPDES permit program. While that review has accurately uncovered many, interrelated causes of the current permit backlog, we believe that the process has failed to adequately acknowledge, address, or recommend changes for the Department's systematic failure to write lawful permits. Indeed, at every step of the process, the idea of what constitutes a "quality permit" was raised, but in no case was it ever fully addressed or resolved. Instead, the Department, the consultants, or both have identified and largely focused on three troubling narratives: (1) the potential for new, and potentially more restrictive, permit

conditions is disruptive to an efficient permitting program; (2) inadequate staffing and staff multi-tasking are largely responsible for the current dysfunction in the permitting program; and (3) the backlog requires finding alternatives to strict compliance with new and revised permit conditions.

From our perspective, these assumptions both miss and obscure the true fundamental failure that has undermined the Department's permitting program for decades. First, the issuance of lawful NPDES permits is central to the effective implementation of the Clean Water Act and state law. As courts have made clear, under the Clean Water Act's regulatory scheme, the rubber hits the road with the development and imposition of technology-based and water quality-based effluent limits in NPDES permits that seek to limit or prohibit pollution and to control the discharge of pollutants that would otherwise harm the designated uses of the receiving waters. Thus, it is critical that the Department not only issue permits in a timely manner, but that those permits meet minimum legal requirements. Currently, neither is happening.

Second, simply changing the resources and/or structure of the Department will not fix these problems. With that said, we do agree with several of the points the consultants have raised regarding the roles currently played by the staff assigned to write permits and some of the structural problems at DEQ. For example, we agree that some of the problems seen in the NPDES permit program stem from the Department's "customer service" approach to permitting, wherein it appears to have forgotten how to behave as a regulator. Expecting agency staff to both work with and to regulate permittees has placed them in an untenable situation.

Similarly, we agree that the Department's inability to understand the connection between water quality standards, assessment, and planning—namely the provisions of Clean Water Act sections 303(c), (d), and (e)—and the permit have likely contributed to many of the failures we have seen in the NPDES permit program. However, we strongly disagree with the consultants' proposals to address these problems. In particular, the consultants' recommendation that standards should be written with permittee compliance in mind and that the Department should commit significant recourses to modifying or relaxing standards, in advance of issuing permits, where compliance will not be easy. Not only are both of these approaches antithetical to the fundamental structure of federal and state law, they will produce precisely the opposite of what Oregonians expect from their government: a weak structure with even weaker pollution controls. And, the proposed emphasis on attempting to evade the Clean Water Act will result in greater EPA oversight, more permit delays, and continued regulatory uncertainty for dischargers.

Finally, the Department's failure to comply with Clean Water Act and state law has resulted in the issuance of discharge permits that fail to protect human health and the environment. This unacceptable state of affairs would only be exacerbated if the Department were to follow the consultants' recommendations to prioritize the use of mechanisms to weaken or eliminate any water quality standards that may result in new or revised effluent limits for permittees. Predicating the issuance of NPDES permits on a re-examination of designated uses and the applicable criteria contained in Oregon's water quality standards, as the consultants have recommended as the centerpiece of their plan, will guarantee not only the continued, but the worsening, gridlock on permit issuance in this state. Thus, following the

consultants' proposed path will only lead the Department further from fulfilling its statutory obligation to protect and restore the quality of our waters, thereby protecting human health, fish, and wildlife.

Regrettably, the consultants have made clear their assumption that the few permits DEQ has managed to issue in recent years complied with the law. History, however, tells a very different story. Simply put, the Department is not writing lawful permits. We believe the following factors have created a culture at DEQ that has lost understanding that the principle intent and purpose of NPDES permits is to reduce and eliminate the discharge of pollutants to the nation's waters:

1. A failure to integrate permitting requirements with water quality standards, total maximum daily loads (TMDLs), the absence of TMDLs, Oregon's chronically inadequate list of impaired waters (the "303(d) list"), and a continuing paucity of data on receiving stream and effluent quality on which to base permits;

2. A reluctance to use NPDES permits to actually restrict pollution; and

3. A Department focus on the development of regulatory tools that ostensibly allow permittees to avoid compliance with the Clean Water Act at the expense of using resources to resolve difficulties in meeting requirements.

In practice, we have seen these most fundamental of failures result in the Department proposing to issue permits that do not comply with the law, some of which are stopped in their tracks and never issued. Examples of these errors include DEQ's failing to:

- establish effluent limits to comply with all water quality standards, including narrative criteria;
- incorporate new or revised water quality standards;
- establish all required effluent limits where a source discharges to an impaired waterbody;
- properly apply the anti-backsliding requirements;
- address stale, outdated, or incorrect TMDLs or the relationship between new water quality standards and old TMDLs; and
- comply with the state's environmental justice statute.

As the Department attempts to identify and confront the institutional failures that have produced Oregon's NPDES permit backlog, it is essential that it also fully comprehend these past failures. Otherwise, it will continue to make the same mistakes and in so doing, both fail to eliminate the permit backlog and meet the expectations of the state's citizens.

Following so closely on the heels of DEQ's well-documented failure to properly regulate toxic air emissions in Portland, it is disappointing that the Department has not used this expensive review to ensure that its water pollution permit program complies with the law. However, in our view, it is not too late for the Department to salvage the process and to grapple with the systematic and structural failures of its NPDES program.

We sincerely hope that the Commission can help the Department understand the shortcomings of the permit program. Oregon's NPDES permit backlog is only the canary in the coal mine. Failing to address the program's flaws will lead to Department changes that will amount to little more than replacing the canary.

As organization's committed to protecting people that rely on clean water, strong salmon runs, and a healthy environment, we stand ready to help the Department improve its permitting program so that it can meet the goals of federal and state law, and serve to protect the state's waters and all Oregonians.

Sincerely,

Nina Bell, Executive Director
Northwest Environmental Advocates

Andrew Hawley, Staff Attorney
Northwest Environmental Defense Center

Lauren Goldberg, Staff Attorney
Columbia Riverkeeper