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Via Email & U.S. Mail

RE: Public Comment from Columbia Riverkeeper, Sierra Club (Oregon Chapter), Willamette Riverkeeper, Rogue Riverkeeper, the Northwest Environmental Defense Center, and the Center for Environmental Law & Policy on Revisions to the Human Health Criteria for Toxics Rulemaking Package

Dear Oregon DEQ and EQC:

On behalf of Columbia Riverkeeper, Sierra Club (Oregon Chapter), Willamette Riverkeeper, Rogue Riverkeeper, the Northwest Environmental Defense Center, and the Center for Environmental Law & Policy (collectively "Columbia Riverkeeper and the Sierra Club") please accept the following comments on Oregon's draft water quality standards revisions and rulemaking package. Oregon is poised to adopt the most protective water quality standards in the nation. The reason: we eat a lot of fish. Accurate toxic standards to protect human health are long overdue. Toxic pollution threatens public health and jeopardizes the public's right to eat fish from Oregon's iconic rivers, including the Columbia. We urge the Department of Environmental Quality ("DEQ") and the Environmental Quality Commission ("EQC") to adopt Oregon's draft human health criteria for toxics based on the accurate fish consumption rate of 175 grams per day.

Reducing toxics in Oregon's fish is a matter of values, public health, environmental justice, and science. It is unfortunate that, in the year 2011, our state still fails to protect individuals and families who regularly eat fish. However, if the proposed toxics standards are adopted, Oregon would be the first state with water quality standards

that protect the vast majority of people who enjoy eating fish and shellfish from Oregon's waterways. This historic step comes after years of hard work by tribes, particularly the Confederated Tribes of the Umatilla Indian Reservation ("CTUIR"), to demonstrate that Oregon's toxic pollution standards fail to protect tribal people and many others.

Adopting new toxic standards is long overdue. Columbia Riverkeeper[1] and the Sierra Club submit the following comments and urge the Environmental Quality Commission ("EQC") to promptly move forward with adopting toxics standards based on the accurate fish consumption rate of 175 grams per day.

I. EXECUTIVE SUMMARY.

Oregon's current human health criteria for toxics ("toxic standards" or "human health criteria") fail to protect many Oregonians, particularly tribal members. The majority of Oregon's current standards are designed to protect people who eat 6.5 grams of fish per day—less than a cracker sized piece of fish. In October 2008, the EQC directed DEQ to revise the human health criteria for toxics based on a fish consumption rate of 175 grams per day. This rate is the product of overwhelming evidence demonstrating that many Oregonians, particularly tribal members, eat significantly more fish than the current toxics standards assume.

Columbia Riverkeeper and the Sierra Club submit the following comments, which are summarized below:

1. **Adopting accurate toxics standards is a moral imperative.** Eating fish from Oregon's rivers, lakes, and streams is a way of life for tribal members and many Oregonians throughout the state. Turning a blind eye to the fact that Oregon's water quality laws fail to protect people who regularly eat fish is simply unacceptable.

2. **The overwhelming weight of evidence supports adopting standards based on a fish consumption rate of 175 grams per day.** Riverkeeper and the Sierra Club support the joint recommendation of the U.S. Environmental Protection Agency ("EPA"), CTUIR, and DEQ to adopt toxics standards based on the accurate fish consumption rate of 175 grams per day. Studies on fish consumption in Oregon support this rate, which protects the majority of fish consumers.

3. **DEQ's analysis and the state's process for issuing pollution discharge permits does not support opponents' claims that the proposed standards are unworkable in NPDES permits.** For over two years, DEQ, EPA,

[1]For nearly three years, Columbia Riverkeeper invested substantial time in the process to revise Oregon's toxic standards. Columbia Riverkeeper served on both the NPDES Workgroup and the Nonpoint Sources Workgroup.

CTUIR, and representatives of industry, municipalities, and NGOs worked in a collaborative process to develop implementation tools for the new toxics standards. DEQ's analysis of the new standards demonstrates that the rulemaking package offers a workable process for issuing NPDES permits.

4. **DEQ should not make variances easier to obtain for water quality standards that are *not* becoming more stringent.** DEQ's new variance rule, which allows the agency to issue variances without EQC approval, should only apply to standards that are becoming more stringent: the toxics standards for human health. Other standards, including Oregon's temperature and bacteria standards, will not change as a result of this rulemaking. In turn, the EQC should not make variances easier to obtain for standards that are not becoming more stringent.

5. **The proposed "Background Pollutant Concentration Allowance" does not square with the Clean Water Act.** If adopted, Oregon would be the first state with a Background Pollutant Concentration Allowance for toxics. As EPA explained during the October NPDES rulemaking workgroup meeting, this rule is not consistent with the Clean Water Act. Moreover, the rule is unnecessary given DEQ's proposed revisions to the variance rule.

6. **The EQC should not delay adopting the proposed toxics standards. However, the EQC should *again* direct DEQ to pursue rulemaking to reduce toxic pollution from nonpoint sources.** Protecting people who regularly eat fish from Oregon's rivers is long overdue. DEQ had many years to adopt accurate human health criteria. Oregon undertook a careful, lengthy rulemaking process. The time is now to adopt new standards. Unfortunately, DEQ's rulemaking package does not go far enough in reducing toxic inputs from nonpoint sources. Moving forward, the EQC should again direct DEQ to improve nonpoint source regulation.

7. **Oregon's commitment to reducing toxics is compromised by DEQ's decision to exempt stormwater permits from complying with the new standards.** According to EPA, stormwater discharges from cities, industrial areas, and construction sites as one of the leading causes of degraded water quality. Despite the overwhelming evidence on toxic inputs from stormwater, DEQ is not proposing to implement the new toxics standards in its NPDES permits for stormwater discharges. The EQC should: (1) request a briefing on DEQ's stormwater program and whether the new standards will, in any respect, result in less toxic discharges from the state's largest NPDES sector; and (2) direct DEQ to account for the new standards and require more stringent stormwater permits.

Oregon is at a historic crossroads: adopt standards that protect people who eat fish for sustenance, tradition, and religious reasons, or maintain rules that are indifferent to the health of many tribal members and Oregonians. The answer is clear. Riverkeeper and the Sierra Club urge the EQC to: (1) promptly move forward with the toxics rulemaking package, and (2) commit to overseeing the effective implementation of the new toxics standards.

II. ADOPTING NEW TOXICS STANDARDS IS A MORAL IMPERATIVE GROUNDED IN SCIENCE.

Since the last Triennial Review, EPA released an in-depth report on toxic pollution in the Columbia, the *Columbia River Basin: State of River Report for Toxics*.[2] The report highlights the widespread problem of toxic pollution in the Columbia's fish, wildlife, sediment, and water. The *State of the River Report* describes the serious problem of toxic pollution in the Columbia River Basin. As the report explains, "[i]n 1992, an EPA national survey of contaminants in fish in the United States alerted EPA and others to a potential health threat to tribal and other people who eat fish from the Columbia River Basin." This survey prompted further study on the contaminate fish and the potential impacts on tribal members.

In particular, EPA funded four Columbia River tribes, through the Columbia River Intertribal Fish Commission ("CRITFC"), to study contaminant levels in fish caught at traditional fishing sites.[3] The study demonstrated the presence of 92 contaminants in fish consumed by tribal members. Contaminants found in these fish include PCBs, dioxins, furans, arsenic, mercury, and DDE, a toxic breakdown product of DDT.[4] For some pollutants, the study found contaminant levels exceeding water quality standards for aquatic life and human health. Notably, the human health standards are only designed to protect people who eat less than a cracker-sized amount of fish per day.

The CRITFC study is not alone is demonstrating the serious problem of toxic contamination in our state's waterbodies. From 1989 to 1995, the Lower Columbia River Bi-State Water Quality Program ("Bi-State Program"), the predecessor to the Lower Columbia River Estuary Partnership ("LCREP"), generated substantial evidence

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[2] *Columbia River Basin State of River Report for Toxics*, Environmental Protection Agency, Region 10 (January 2009), available online at: http://yosemite.epa.gov/r10/ecocomm.nsf/Columbia/SoRR/.

[3] *State of the River Report* at 4.

[4] EPA's report *State of the River Report* explains the primary source of DDT, which was banned in the U.S. in 1972:

> The primary source of DDT to the Columbia River Basin is the considerable acreage of agricultural soils in which DDT accumulated over three decades of intensive use (1940s to early 1970s). DDT reaches the River when the soils are eroded by wind and water. Some irrigation practices increase soil erosion on agricultural lands.

State of the River Report at 19.

demonstrating that water and sediment in the Lower Columbia River and its tributaries have levels of toxic contaminants that are harmful to fish and wildlife.[5] "Contaminants of concern include dioxins and furans, heavy metals, polychlorinated biphenyls (PCBs), and organochlorine pesticides such as DDT."[6]

The findings of the Bi-State Program are sobering. The Bi-State Program concluded that:

- Dioxins and furans, metals, PCBs, PAHs, and pesticides impair the water sediment, and fish and wildlife;
- Arsenic, a human carcinogen, exceeded both EPA ambient water criteria for protection of human health and the EPA human health advisories for drinking water;
- Sediment contamination was highest near urban and industrial areas, with contamination in excess of levels of concern for DDE, PCBs, dioxins and furans, and PAHs;
- Beneficial uses such as fishing, shellfishing, wildlife, and water sports are impaired;
- Many toxic contaminants are moving up the food chain and accumulating in the bodies of animals and humans that eat fish;
- People who eat fish from the lower Columbia over a long period of time are exposed to health risks from arsenic, PCBs, dioxins and furans, and DDT and its breakdown products.[7]

Other studies have confirmed and added to the existing scientific evidence on toxic contamination in the Columbia.[8] Clearly, the status quo approach to regulating toxic pollution is not working.

Toxic pollution in Oregon's waterbodies is not limited to the mainstem Columbia River. People who eat fish from the Willamette River are also impacted by toxic contamination and fish advisories. As DEQ's website explains:

> During the 1990s, the Legislature provided resources for the Department of Environmental Quality (DEQ) to work with others to study the health of the Willamette River. The studies included a number of key findings, including a high incidence of deformities in the skeletons of certain fish, as well as the presence of toxic chemicals in fish tissues at levels that make the fish unsafe to eat. The studies also found that the majority of water pollution came from urban and rural runoff.

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[5]Lower Columbia River Estuary Partnership. 2007. *Lower Columbia River and Estuary Ecosystem Monitoring: Water Quality and Salmon Sampling Report* at 1.
[6]*Id.*
[7]*Id.* at 5 - 6.
[8]*Id.* at 6 (citing studies by USGS, the U.S. Army Corps of Engineers, DEQ, and others).

DEQ TMDL Website, http://www.deq.state.or.us/WQ/willamette/problem.htm. The laundry list of fish advisories across Oregon speaks volumes for the impacts of toxic pollution. A handful of the Oregon Department of Health's Fish Advisories are excerpted in Table 1.[9]

Table 1. Examples of Fish Advisories in Oregon.

Waterbody	Contaminant	Examples of Guidelines
Antelope Reservoir and Jordan Creek (SE Oregon, Malheur County)	Very high levels of Mercury	• Women ages 18-45, children under 6, pregnant and/or nursing women, and people with liver and kidney problems should **avoid eating fish** from these waters. • Healthy women beyond childbearing age (>45 years) and healthy adult males should **eat no more than one meal per month** of fish caught in these waters.
Bonneville Dam (on the Columbia River, from the dam, upstream to Ruckel Creek)	PCB and Mercury Levels	• **All persons should limit consumption of smallmouth bass to one meal per month**
Lower Columbia River	PCB Levels	• All persons, especially women who are pregnant, nursing or between the ages of 18-45, should **avoid eating the fatty parts of fish** caught on the Lower Columbia River
Columbia Slough	PCB Levels	• Pregnant women, nursing women, children, and women ages 18 - 45 should limit consumption of carp, black crappie, bluegill, largemouth bass, and sunfish to **no more than two meals per month** • **All persons** should avoid eating the fatty parts of fish caught on these waters
Columbia Slough	High Mercury Levels	• Children under 6 should eat no more than one meal every two months • Women ages 18 – 45 should eat no more than one meal every month • Healthy women beyond childbearing age and healthy adult males should eat no more than one meal every two weeks

As Oregon's fish advisories demonstrate, the impact of toxic pollution on Oregon's fish and people is not a theoretical problem. Our state is currently experiencing the ramifications of under-regulated toxic discharges.

[9]Oregon Department of Health, http://www.oregon.gov/DHS/ph/envtox/fishconsumption.shtml.

Unfortunately, DEQ did not quantify the economic benefits of adopting accurate, protective toxics standards.[10] DEQ's Fiscal and Economic Impacts Statement explains:

> DEQ did not have the financial resources to conduct a quantitative analysis of the direct and indirect potential benefits associated with an increased fish consumption rate, however, the FIIAC [Fiscal Impact and Implementation Advisory Committee] committee members along with representatives from the Oregon Environmental Council and CTUIR agreed that while economic benefits can be difficult to analyze, it is important to describe potential benefits, at the very least, in a qualitative manner. A key outcome of revised water quality standards based on a higher fish consumption rate would not only benefit consumers of fish, but also achieve more stringent water quality criteria by reducing toxic contamination in waterways. The level of benefits achieved will depend on the degree to which pollution reduction is accomplished.

A qualitative description of the rulemaking's benefits is excerpted from DEQ's *Statement of Need and Fiscal and Economic Impact* in Table 2 below:

Table 2. Potential Benefits of Raising the Fish Consumption Rate and Meeting the Standards

Benefit Examples
Human Health -safe drinking water; -avoided costs from environmentally attributable diseases; -reduced risk for those who do eat fish; -recreational – reduced risk from water contact
Environmental -water reuse opportunities from cleaner effluent; -business—cleaner intake water for downstream industries; -ecosystem health; - tourism; -amenity/aesthetic/property values; -avoided costs to industries and utilities; -fewer contaminants; -fishing – tribal, commercial, recreational and subsistence; -improve other species in the food chain: birds, etc.; -higher quality water supply
Cultural

[10] *Statement of Need and Fiscal and Economic Impact*, Revised Water Quality Standards for Human Health Toxic Pollutants and Revised Water Quality Standards Implementation Policies
Fiscal and Economic Impacts.
http://www.deq.state.or.us/wq/standards/docs/toxics/humanhealth/rulemaking/StmtNeedFiscalImpact.pdf

-enable religious/ceremonial activities;
-children;
-healthy fish
-icon of the Northwest
-local, and sustainable food options

Given the existing contamination in Oregon's fish and the high levels of fish consumption, DEQ and the EQC have ample evidence to adopt new human health standards. As DEQ acknowledges, water quality standards are not a panacea to address the serious problem of toxic pollution in the Columbia and other waterbodies in Oregon. However, water quality standards are the starting point for determining what level of protectiveness Oregon will strive to meet.

III. SPECIFIC COMMENTS ON THE DRAFT RULEMAKING PACKAGE.

Riverkeeper and the Sierra Club urge the EQC to adopt the proposed toxics standards and rulemaking package in June 2011. As this comment letter explains, some of DEQ's proposed "implementation tools" fail to comply with the Clean Water Act and must be abandoned. However, the majority of DEQ's rulemaking package reflects years of effort to: (1) develop rules that protect human health, (2) comply with federal and state law, and (3) offer workable standards for Oregon's currently outdated and under-protective pollution discharge permit program. Riverkeeper and the Sierra Club strongly support DEQ's decision to adopt the draft rulemaking package.

DEQ will certainly hear that the new standards and centerpiece implementation tool, the variance rule, are unworkable and more delay is necessary. Riverkeeper and the Sierra Club respectfully disagree. As EPA's recent disapproval of the majority of Oregon's 2004 toxics standards acknowledges, Oregon is not protecting people who eat fish from Oregon's rivers and streams. Oregon must act promptly to address this void in public health protection.

Moreover, Oregon has skirted its duty under the Clean Water Act for a number of years by conveniently issuing pollution discharge permits without water quality based effluent limitations ("WQBELs"), a fact that was repeatedly raised and acknowledged during the workgroup process. What does this mean in practical terms? For many cities, industrial facilities, and other discharges, Oregon issued pollution permits without factoring in the impacts of toxic pollution on human health. The economic windfall of this "oversight" was not disclosed in any fiscal analysis.

When it comes to applying the human health criteria, more delay is simply unacceptable.

A. Toxic Background Concentration Allowance.

As drafted, the proposed Background Concentration Allowance rule, OAR 340-041-0033(6), does not comply with the federal Clean Water Act. The rule would allow sources that take pollutants in their intake water and concentrate those pollutants, without adding any additional mass loading, to discharge a more highly concentrated effluent without being considered in violation of Oregon water quality standards.

During rulemaking workgroup meetings, EPA expressed its concerns with the lawfulness of the proposed Background Concentration Allowance rule. Nonetheless, DEQ decided to include it in the rulemaking package. DEQ should not compromise the integrity of the Clean Water Act in an effort to find a solution for regulating multiple pass through cooling water.

The Background Concentration Rule suffers from a series of flaws, including:

- authorizing facilities to concentrate intake water pollutants, even if the sources of the pollution is upstream human activity;
- allowing increased health risks of pollution as a *de minimis* increase;
- establishing water quality standards for a wide range of toxic pollutants without meeting the Clean Water Act's requirements from establishing standards, protecting beneficial uses, complying with Antidegradation review, and the public process and EPA action required for water quality standard development;
- authorizing mixing zones and increased pollution discharges in impaired waters.

In the NPDES Issue Paper, DEQ highlights the disadvantages of adopting a Background Concentration Allowance rule, stating:

- There is no precedence among other states for explicitly adopting this approach as a standards provision that DEQ is aware of, so it is uncertain whether EPA will approve this provision as a water quality standard.
- The provision is limited to human health criteria for carcinogens, so dischargers would not be able to use this provision if the pollutant of concern was a non-carcinogen.
- If the background pollutant concentration exceeds a 10-4 risk level value, or a 3% increase would cause the downstream concentration to

> exceed a 10-4 risk level, this provision may not be used. In these cases, the discharger may need to request a variance. Alternatively, if a drinking water use or other use is not attainable, DEQ would evaluate whether the use should be removed as a designated use for the water body or a portion of the water body.

Riverkeeper and the Sierra Club agree that Oregon cannot rely on any precedence for adopting the Background Concentration Allowance. However, Riverkeeper and the Sierra Club disagree that the rule's inapplicability to non-carcinogens is a "disadvantage" from the perspective of protecting human health.

Furthermore, Riverkeeper and the Sierra Club find DEQ's rationale for why the background concentration rule does not present an increased human health risk deeply troubling. The NPDES Issue Paper states:

> DEQ concludes that a 3% or less increase in concentration where there is no increase in the mass load of the pollutant in the water body would not be reasonably likely to increase human health risk. The human health criteria for fish consumption are based on eating 175 grams per day of fish. People who eat that quantity of fish are obtaining them from multiple water bodies, often including marine waters. Only a very small portion of the fish eaten, if any, would be affected by the 3% allowed increase in concentration in a spatially limited portion of the waters of the state. For carcinogens, the risk is based on exposure over a life time (70 years) and for the majority of non-carcinogens, the cumulative exposure is based on a daily level of exposure over a life time. Therefore, DEQ would not expect the 3% incremental increase allowed through this provision in a limited number of stream reaches to measurably change the exposure to the pollutant received by people eating fish.

Under DEQ's rationale, many toxic discharges could qualify as *de minimis* and not warrant Clean Water Act regulation. Moreover, DEQ's rationale views discharges authorized under the Background Concentration in a vacuum. For example, DEQ fails to account for toxic discharges from other point and nonpoint sources, and the cumulative impact of authorizing increased toxic pollutant concentrations.

Riverkeeper and the Sierra Club urge DEQ to address the challenges of multiple pass cooling discharges and the toxics criteria *within* the limits imposed by the Clean Water Act. The Clean Water Act is not an unworkable statute; however, developing rules that effectively amend the Act creates an unworkable system. Riverkeeper and the Sierra Club urge DEQ to work with EPA and develop an alternative approach to implementing the new criteria for multiple pass through cooling water.

> **Question:** Could DEQ apply the Background Concentration Allowance rule to new or expanded discharges? What is the rationale behind this decision?

B. Variances to Compliance with Water Quality Standards.

The goal of the Clean Water Act is to eliminate discharges of pollution to our nation's rivers, lakes, and streams. 33 U.S.C. § 1251(a)(1) (CWA § 101(a)(1)). To accomplish this goal, the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") program is designed to incrementally ratchet back pollution over time. 33 U.S.C. § 1342 (CWA § 402). NPDES permits reduce pollution through: (a) technology based effluent limitations,[11] and (b) water quality based effluent limitations, which are limits on how much pollution a permit holder can be lawfully discharge into a waterway.[12]

Although not mentioned in the Clean Water Act, EPA began authorizing "variances," or waivers from compliance with water quality standards in 1976.[13] Today, states can adopt variance rules, so long as they comply with the minimum requirements of 40 C.F.R. §§ 131.13 and 131.10(g). Oregon currently has an EPA-approved variance rule, OAR 340-041-0061(2). EPA's rules do not expressly limit how long a permittee can have a variance, or how many times a variance can be renewed.

In response to the new toxic standards, DEQ is proposing revisions to the variance rule to improve the likelihood that NPDES permittees can obtain a waiver from compliance with the new, more stringent toxic standards. The proposed variance rule is different from the current variance rule in the following respects:

- Under the new rule, DEQ can issue variances to current permit holders without the EQC's approval. DEQ is proposing to make this significant change for water quality standards that are becoming more stringent (*i.e.,* the human health criteria for toxics) *and* water quality standards that will remain the same (*i.e.,* the aquatic life criteria for toxics and water quality standards for conventional pollutants, such as temperature and turbidity). Under the current variance rule, only the EQC could issue a variance.

- DEQ's current variance rule caps variances at three (3) years, but allows an unlimited number of renewals. Under the proposed rule, variances have no time

[11]Section 402 requires the permitting agency to insure that each permit complies with Section 301. 33 U.S.C. §1342(a)(1). Section 301, in turn, requires all discharges to achieve, at a minimum, technology-based effluent limitations for their discharges. 33 U.S.C. §§1311(b).

[12]Each point source discharge must achieve "anymore stringent limitation… necessary to meet water quality standards." 33 U.S.C. §1311(b)(1)(C). In contrast to technology-based standards that focus on the type of discharger, water quality standards focus on the quality of the receiving water. Section 303 of the 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.

[13]Decision of the General Counsel No. 58 (June 22, 1976).

limit because they can remain in effect as long as an NPDES permit, which can be administratively extended for an indefinite amount of time. The new rule also allows unlimited renewals.

- Under the new rule, if a permittee obtains a variance, it must also develop and implement a pollutant reduction plan. The current variance rule includes a less detailed section similar to the pollutant reduction plan requirement.

- The new rule acknowledges that DEQ must, pursuant to EPA rules, provide public notice when it proposes to issue a variance.

- Under the new rule, DEQ will publish a list of active variances.

Riverkeeper and the Sierra Club submit the following specific comments on the draft variance rule, OAR 340-041-0059.

1. DEQ should *not* make variances easier to obtain for water quality standards that are not becoming more stringent.

DEQ's new variance rule would apply to *all water quality standards,* even though this rulemaking only makes the human health criteria for toxics more protective. In other words, DEQ is not limiting the variance rule changes to the rulemaking's purpose: adopting more stringent human health criteria. Instead, DEQ is proposing to increase the administrative ease, and decrease the associated expense, of obtaining a variance for standards that will *not* become more protective. Examples of standards that will not become more protective under this rulemaking include standards for temperature, turbidity, biocriteria, and the aquatic life criteria for toxics. Riverkeeper and the Sierra Club strongly oppose using the Fish Consumption Rulemaking as a vehicle to weaken other water quality standards.

2. DEQ should only issue variances if they have an expiration date.

DEQ has a problem with backlogged NPDES permits. Under the Clean Water Act, DEQ is supposed to review and reissue NPDES permits at least every five years. As noted above, this review process gets to the heart of the Act: over time, pollution permits should become more protective of designated uses, such as swimming, fishing, and drinking water. In Oregon, DEQ is not able to meet the Clean Water Act's goal of revising NPDES permits at least every five years. In fact, some permits remain in effect for over a decade. EPA critiqued Oregon's permit backlog in its last audit of DEQ's NPDES program.[14]

[14]In 2001, Oregon's backlog of expired pollution discharge permits was the highest in the nation, with about 60 percent of major NPDES individual permits awaiting renewal. *See* Oregon DEQ and Region 10

Waiving compliance with water quality standards is an extreme measure. This explains why states infrequently grant variances and why Oregon has never approved a variance. Oregon's current variance rule is similar to many states and limits how long a variance can stay in effect.[15] This is a commonsense approach to variances. In particular, issuing a variance with an end-date ensures that it will be timely reviewed, removed, or, if necessary, reissued. Because suspending water quality standards for any amount of time is an extreme measure, at the very least, the EQC must ensure that these waivers cannot self-perpetuate indefinitely.[16]

C. Intake Credit Rule.

One of DEQ's "implementation tools" is the intake credit rule, OAR 340-045-0105. DEQ's draft rule adopts rule language from the Great Lakes Initiative ("GLI"), a comprehensive water quality standards rule package for Great Lakes states. The intake credit rule accounts for pollutants in facilities' intake water, and allows facilities to discharge pollution at levels that exceed the water quality standard so long as the facility does not concentrate the pollutant or increase the mass of the pollutant. Under OAR 340-045-0105(1), the intake credit rule only applies if a TMDL is not in place.

Since EPA approved the GLI, the Ninth Circuit Court of Appeals issued its landmark *Friends of Pinto Creek v. U.S. EPA*, 504 F.3d 1007, 1012 (9th Cir. 2007). As clarified and explained by the Ninth Circuit, 40 C.F.R. § 122.4(i) "is very clear that no permit may be issued to a new discharger if the discharge will contribute to the violation of water quality standards [that resulted in the inclusion of the receiving waters on the 303(d) list]," unless both requirements of § 122.44(i)(1) and (2) are satisfied. *Friends of Pinto Creek v. U.S. EPA*, 504 F.3d 1007, 1012 (9th Cir. 2007).

When a new discharge would add a pollutant of concern to a 303(d) listed waterbody, it is proper to presume that the addition would contribute to the violation of water quality standards. As the Washington Pollution Control Hearings Board has held in an appeal of a previous version of Washington's Construction Stormwater General Permit, in the context of 40 C.F.R. § 122.4:

> The § 303(d) listing process, by definition, identifies bodies of water that currently fail to meet applicable water quality standards for specified pollutants. It follows that allowing new or additional discharges of an

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EPA Performance Partnership Agreement (2010 – 2012) at C-1, http://www.epa.gov/region10/pdf/ppa/oregon_2010-2012.pdf.

[15]OAR 340-041-0061(2)(d)(C) currently states that "[a] variance may not exceed three years or the term of the NPDES permit, whichever is less."

[16]While Riverkeeper is pleased that DEQ chose to prioritize NPDES permits with variances, this does not go far enough to ensure that they will not remain in effect well beyond the three year review cycle for water quality standards and the five year NPDES permit cycle.

> identified pollutant to an impaired water body would necessarily cause or contribute to the existing violation of water quality standards. Such an action is contrary to state and federal law and would cause harm to the receiving water that is not easily repaired.

Puget Soundkeeper Alliance, et al. v. Ecology, PCHB No. 00-173, Order Granting Partial Stay (August 29, 2001); *see also, Associated General Contractors, et al. v. Ecology*, PCHB Nos. 05-157 through 05-159, Findings of Fact, Conclusions of Law, and Order (June 4, 2007) at 51 – 52.

Question: How does the draft intake credit rule protect impaired waters and square with *Pinto Creek*? Please explain

Question: What is the rationale behind OAR 340-045-0105(3)(b), which allows discharger to add mass of the pollutant if it removes the pollutant from its intake water? Please explain.

D. Revisions to Statewide Narrative Criteria, OAR 340-042-0007.

Protecting people who regularly eat fish in Oregon requires reducing toxics from all sources that contribute to the problem. Recognizing this reality, the EQC directed DEQ to "[p]ropose rule language or develop other implementation strategies to reduce the adverse impacts of toxic substances in Oregon's waters that are the result of non-point source (not via a pipe) discharges or other sources not subject to section 402 of the Clean Water Act."[17] The EQC's directive reflects a practical approach to making Oregon's fish safe to eat. Reducing toxic discharges from NPDES permit holders alone will not fix the serious problem of fish contamination in Oregon's rivers and streams.

Unfortunately, the draft rulemaking package does little to effectively change how DEQ currently approaches nonpoint source pollution. Although Riverkeeper and the Sierra Club believe that, given the lengthy delay in adopting accurate toxics standards, the rulemaking package should move forward, we urge the EQC to direct DEQ to propose additional alternatives for reducing toxic loads from nonpoint source pollution. For example, the NPDES Workgroup's Mixed Media Subcommittee developed a detailed memo describing alternatives for reducing toxic pollution from nonpoint sources.[18] The EQC should direct DEQ to build upon its efforts during 2009 – 2010.

For example, DEQ's rulemaking package includes proposed revisions to OAR 340-041-007(5). These revisions came in response to the EQC's directive to address nonpoint source pollution as part of the toxics rulemaking package. While Riverkeeper and the Sierra Club support DEQ's decision to affirm the duty to comply with water

[17]EQC Directive No. 3 (Oct. 2008).
[18]Mixed Media Subcommittee, "Controlling Non-Point Source Runoff of Toxic Contaminants," (Oct. 21, 2009).

quality standards,[19] we are deeply disappointed that DEQ did not take additional, recommended steps to reduce toxic discharges from nonpoint sources.

> **Question:** How does DEQ intend to apply the new narrative criteria in practice to reduce toxic pollution? Please explain.

E. Proposed Revisions to Divisions 41 & 23 to Address Nonpoint Sources.

1. DEQ should move forward with "Implementation Ready TMDLs" in both an Internal Management Directive and rulemaking.

DEQ is proposing to develop an Internal Management Directive ("IMD") that will assist the agency in issuing more effective Total Maximum Daily Loads ("TMDLs"). DEQ's Issue Paper on TMDLs explains that the agency will "develop[] Total Maximum Daily Loads (TMDLs) with other partners that more specifically identify the sources of pollutants and make the TMDLs more useful by recommending specific reduction measures."[20] DEQ refers to its more detailed approach to TMDLs as "Implementation-Ready TMDLs." Unfortunately, DEQ is proposing minimal changes to Division 42, which regulates TMDL develop and oversight. *See infra*.

Riverkeeper and the Sierra Club support DEQ's proposal to issue more effective TMDLs. However, the extent to which this proposal results in actual reductions in toxics from nonpoint sources will hinge on: (1) the as-yet-to-be-determined details of this IMD; (2) DEQ's ability to maintain adequate staffing in the TMDL program; and (3) DEQ's willingness and ability to monitor the effectiveness of these TMDLs and issue enforcement orders where appropriate.

DEQ's TMDL Issue Paper highlights the need for more effective TMDLs to reduce toxics in impaired waterbodies. As the Issue Paper explains:

> The main criticism about the current TMDL approach is that TMDLs usually do not provide enough detailed information about sources of the pollutant for the DMAs and local partners to take specific management actions. The current TMDL approach can be improved to address toxic pollutant reductions more effectively and efficiently in Oregon's waters with better source assessment information to guide implementation planning.

The Issue Paper goes on to acknowledge the serious shortfalls in recent TMDLs:

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[19]Riverkeeper supports DEQ's decision to expressly state that "[l]ogging and forest activities must be conducted in accordance with water quality standards and implementing rules established by the Environmental Quality Commission." Riverkeeper also supports the rule's acknowledgment that forest operations may be subject to load allocations established under ORS 468B.110 and OAR division 340-042.
[20]TMDL Issue Paper at 2.

1. Lack of detail in analyses due to spatial scale and available data.
2. Insufficient source analyses.
3. Lack of clear policy to include air source analyses.
4. Lack of timelines and measurable milestones.
5. Insufficient reasonable assurance for meeting goals.
6. Unclear goals and priorities for nonpoint sources – Agriculture, Forestry, and Urban DMAs [Designated Management Agencies].
7. Unclear goals and priorities for point sources – Urban DMAs.
8. Lack of process to resolve disagreements between agencies
9. Lack of process to ensure that actions taken to implement the TMDL load allocations are effective.[21]

Riverkeeper and the Sierra Club appreciate DEQ's candor in acknowledging the current shortfalls in TMDLs. However, an IMD is simply not enough to address these serious problems. In particular, an IMD is advisory and the agency is not under any legal duty to comply with it. In addition, unlike rulemaking, an IMD is not approved by the EQC. Thus DEQ's oversight board is cutoff from its important role of reviewing, approving, or disapproving DEQ's ultimate proposal. Aside from EQC oversight, the public's ability to weigh-in on a draft IMD is not guaranteed by law; whereas a rulemaking ensures the opportunity for public notice and participation, DEQ is under no duty to open the IMD process to the public. Riverkeeper and the Sierra Club are very concerned that the serious shortfalls identified in the agency's Issue Paper will not be adequately addressed without formal rulemaking.

In sum, Riverkeeper and the Sierra Club urge the EQC to move forward with the proposed human health criteria rulemaking package. However, given DEQ's failure to adequately respond to the EQC's October 2008 Directive on nonpoint source pollution, the EQC should direct DEQ to develop rulemaking proposals to reduce toxic pollution from nonpoint sources.

2. DEQ failed to follow through with meaningful rulemaking proposals on nonpoint source toxic pollution.

DEQ is proposing revisions to Divisions 41 and 42 that clarify the agency's authority to regulate nonpoint source pollution from agriculture and forestry. *See* Draft OAR 340-041-0061(10), (11); OAR 340-042-0080(2), (3); *see also* Water Quality Standards and TMDL Issue Paper at 2 ("The intent of revising rules in Divisions 41 and 42 for nonpoint sources is to clarify the department's regulatory authority and the department's interaction with Oregon Departments of Agriculture and Forestry to control nonpoint sources of pollution.").

[21]TMDL Issue Paper at 4 -5.

The rule revisions are an improvement on DEQ's existing water quality standard and TMDL rules. As a practical matter, the revisions will not result in less toxic pollution unless DEQ works with Department of Forestry, Department of Agriculture, and their respective constituents to reduce the use of toxic chemicals, improve land management practices that decrease erosion, which is a common pathway for legacy toxics entering waterways, and takes enforcement action when agriculture and forestry sources are causing or contributing to violations of water quality standards.

IV. THE DEVIL IS IN THE DETAILS: ENSURING LESS TOXIC DISCHARGES WHEN THE STANDARDS ARE IMPLEMENTED IN NPDES PERMITS.

A. Because Nearly Half of the New Standards will be Below Quantitation Limits, the EQC Should Adopt Rule Language on the Process for Selecting Analytic Methods for QLs and the Frequency of Revisions.

According to DEQ, nearly half of the new human health criteria will be below quantitation limits ("QLs"). "Quantitation limits" represent the lowest level at which a pollutant is detectible and quantifiable, using currently accepted analytical methodologies. Unfortunately the quantitation limit for a given pollutant is not set in stone. Instead, quantitation limits may vary depending on the test methods and type of equipment employed. In turn, how DEQ selects QLs—and how often DEQ revisits QLs—will have a major impact on the EQC's commitment to reducing toxics in Oregon's rivers and streams.

In practice, DEQ plans to treat the QL as the point of compliance when it issues pollution discharge permits. What does this mean for water quality? The QL will effectively become the water quality standard for 48 percent of the new criteria, making the process of how DEQ determines the QLs—and how often it revises the QLs—extremely important.

Interestingly, the quantitation limit for any given pollutant is not black and white. In fact, over a year ago DEQ began developing an Internal Management Directive on how DEQ would select and revise QLs. It is not clear when DEQ intends to finalize this IMD.

DEQ's Toxics Criteria Issue Paper provides helpful background for understanding why QLs are important to the ultimate goal of reducing toxics:

> Approximately 48 percent of the proposed human health criteria have Quantitation Limits (QLs) that are higher than criteria. For this reason, pollutants may occur in Oregon's waterbodies at concentrations greater than the proposed criteria that cannot be measured given limitations in analytical methods. As a point of reference, approximately 40 percent of the currently effective criteria

have QLs higher than criteria. For permitting purposes, the QL becomes the compliance point for dischargers. Consequently, if the criterion for a particular chemical becomes more stringent, but the QL remains higher than the criterion, there would be no effective change in the point of compliance until and unless analytical methods improve. Historically, the pace of change in laboratory methods has not been rapid. However, when methods do improve, there will likely be additional toxic pollutant impairment listings and more stringent water quality based effluent limits (WQBELs) for permit holders.

Given the fact that nearly half of the new toxics criteria will effectively be the QLs for permitting purposes, Riverkeeper and the Sierra Club urge the EQC to direct DEQ to develop a proposed rule stating: (1) the process in which QLs will be selected to further Oregon's commitment to reduce toxics and protect human health; and (2) the frequency with which DEQ will revise the QLs for Oregon's toxics criteria. Given Clean any rule should require DEQ to revise QLs at least every three years.

To be clear, Columbia Riverkeeper is not recommending that the EQC delay action on the proposed human health criteria until QL rulemaking is finalized. Instead, the EQC should act on the new toxics criteria and direct DEQ to develop rulemaking on QLs.

B. The EQC Should Direct DEQ to Develop Implementation Rule Language on How the New Criteria will be Applied to Impaired Waterbody Listings.

How DEQ selects and revises quantitation limits will also have a major impact on impaired waterbody listings, referred to as 303(d) waterbodies. Like the impact of QLs on pollution discharge permits, how QLs are selected, and how often they are revised,[22] impacts impaired waterbody listings. In practical terms, the Quantitation Limits DEQ uses will have a major impact on whether waterbodies are considered "impaired" (*i.e.*, violate water quality standards for a toxic pollutant) and, in turn, whether DEQ develops a plan to decrease the amount of toxic pollution.

Under section 303(d) of the Clean Water Act, DEQ is required to identify waterbodies that fail to meet water quality standards. DEQ develops the procedures for how it will determine if a waterbody is "impaired" for purposes of the 303(d) list. After DEQ develops the 303(d) list, it is subject to EPA approval. Once a waterbody is listed as impaired, DEQ must develop a plan to bring the waterbody back into compliance with state standards. The recovery plan is referred to as a Total Maximum Daily Load ("TMDL").

[22]DEQ's NPDES Issue Paper asserts that "[h]istorically, the pace of change in laboratory methods has not been rapid." The agency cites no evidence in support of this statement, and fails to describe what it considers "rapid."

The following example illustrates how quantitation limits can impact whether DEQ considers a waterbody "impaired" and subject to a TMDL:

> The new human health criterion for Toxic Pollutant X is 1 mg/L. DEQ determines that the QL for Toxic Pollutant X is 100 mg/L. Because the QL is higher than the new standard, a waterbody will not qualify as "impaired" unless sampling results exceed 100 mg/L for Toxic Pollutant X.
>
> If monitoring results from the waterbody showed repeated sampling results greater than 100 mg/L, the waterbody should be listed as "impaired" and subject to a TMDL. However, the waterbody could contain Toxic Pollutant X at levels between 1 mg/L and 100 mg/L—which is above the water quality standard of 1mg/L—but DEQ would never be alerted to this fact and, in turn, the waterbody: (1) would not be listed as impaired, and (2) the waterbody would never be subject to a TMDL.

This example illustrates the critical role of QLs when it comes to identifying and recovering impaired waterbodies.

To recap, 48 percent of the new human health criteria will be *below* DEQ's currently accepted Quantitation Limits. In turn, DEQ will treat the quantitation limit as the human health criteria for 48 percent of the new standards. In practice, this means that, for 48 percent of the new human health criteria: (1) facilities can discharge pollution at levels *above* the human health criteria, both inside and outside of mixing zones; and (2) if a waterbody violates a new human health criteria, but the level of pollution is below the QL, DEQ would not consider the waterbody "impaired" and develop a recovery plan (*i.e.*, TMDL).

In short, how DEQ determines QLs and how often DEQ revises QLs will have a major impact on how much toxic pollution is tolerated in Oregon's waterbodies. Given this situation, the EQC should direct DEQ to develop a rule to identify: (1) the process for establishing QLs, and (2) deadlines for making minor and major revisions to QLs. Riverkeeper and the Sierra Club agree that an IMD is necessary to refine details establish in a rule. However, the fact that QLs are effectively "the standard" for nearly half of the toxics criteria warrants the EQC's oversight and the public participation guaranteed by a rulemaking process.

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V. OREGON'S COMMITMENT TO REDUCING TOXICS IS COMPROMISED BY DEQ'S DECISION TO EXEMPT STORMWATER PERMITS FROM COMPLYING WITH THE NEW STANDARDS.

When rain sends runoff across city streets, construction projects, and industrial facilities, the water picks up contaminants, including fecal matter, heavy metals (e.g. mercury, lead, copper, and zinc), oil and grease, pesticides, lawn fertilizer, and a wide variety of other contaminants. This polluted stormwater eventually drains into rivers, lakes, and streams. Over time, toxics from stormwater pollution accumulate in local fish, wildlife, and birds. According to the National Research Council, "[s]tormwater runoff from the built environment remains one of the great challenges of water pollution control, as this source of contamination is a principal contributor to water quality impairment of waterbodies nationwide."[23]

Pursuant to the Clean Water Act, Oregon currently regulates stormwater discharges from many municipalities, industrial facilities, and construction sites through the NPDES permit program. The vast majority of stormwater permits are regulated through one-size-fits all "general permits." Due to the abundance of stormwater outfalls in Oregon, stormwater permits account for the majority of the NPDES permits issued.

None of DEQ's stormwater permits include "water quality based effluent limits" (WQBELs), which are numeric limits on how much pollution a source can discharge. For municipal stormwater, DEQ requires municipalities to reduce pollution to the "maximum extent practicable," 33 U.S.C. § 1342(p) (CWA 402(p)), through a series of "best management practices." For DEQ's Industrial Stormwater General Permit, DEQ sets "benchmark levels" for discharges of three heavy metals: lead, copper, and zinc.[24] These benchmarks are set at multiple times the water quality standard for aquatic life. For example, if an industrial facility regularly discharges stormwater containing lead at levels that exceed the water quality standard, DEQ does not consider these discharges a violation of the permit and the Clean Water Act. DEQ's new Construction Stormwater General Permit does not include any benchmarks.

Simply put, stormwater permits must reflect Oregon's commitment to reducing toxics in fish and protecting human health. Stormwater from cities and industrial sites contribute serious levels of toxics to Oregon's waterways. Unfortunately, DEQ proposes to ignore the new human health criteria when it issues stormwater permits, including stormwater permits from industrial facilities. This means that Oregon's stormwater

[23] *Urban Stormwater Management in the United States*, National Research Council (Oct. 15, 2008),http://www.epa.gov/npdes/pubs/nrc_stormwaterreport.pdf.

[24] DEQ's Industrial Stormwater General Permit does not contain any limits for other toxic criteria. Under Section 402(p), the CWA differentiates industrial and municipal discharges. Section 402(p)(3)(A) states that industrial discharges must meet applicable water quality standards. *See* 33 U.S.C.§ 1342(p)(3)(A) ("Permits for discharges associated with industrial activity shall meet all applicable provisions of section 1311 [301] of this title.").

permits will not become more stringent as a result of the Fish Consumption rulemaking process.

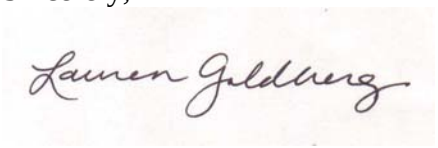
Riverkeeper and the Sierra Club urge DEQ to reconsider its policy of not accounting for the human health criteria when it issues stormwater pollution permits. Riverkeeper and the Sierra Club also request the EQC's involvement in ensuring that Oregon's new standards ultimately result in less toxic contamination in Oregon's fish. Working with DEQ to improve toxics discharges from regulated stormwater sources is critical opportunity to exercise this oversight role.

VI. CONCLUSION.

Oregon is poised to adopt the most protective water quality standards in the nation. The importance of protecting Oregonians from the serious health threats posed by toxic pollution cannot be overstated. The core of this rulemaking is summarized in the following question: Will we compromise the health of tribal members, who have eaten fish from Oregon's iconic rivers for time immemorial? The answer is clear: absolutely not. We urge DEQ and the EQC to approve the new standards and commit to ensuring toxic reduction when implementing the new standards.

We appreciate the countless hours that staff from DEQ, EPA, CTUIR, Northwest Environmental Advocates, and many others devoted to this critical rulemaking process. We also appreciate the high level of engagement and commitment from the EQC. Thank you in advance for considering these comments.

Sincerely,



Lauren Goldberg
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On behalf of Columbia Riverkeeper, the Oregon Chapter of the Sierra Club, Willamette Riverkeeper, Rogue Riverkeeper, the Northwest Environmental Defense Center, and the Center for Environmental Law & Policy