September 20, 2013

Oregon Department of Environmental Quality
Attn: Jenny Root
811 SW Sixth Ave.
Portland, OR 97204-1390

Submitted via DEQ's e-commenting site and via email to root.jenny@deq.state.or.us

RE: Proposed changes to Oregon's civil penalty rules, OAR Chapter 340 Division 12.

Dear Oregon Department of Environmental Quality,

Columbia Riverkeeper (Riverkeeper) and the Northwest Environmental Defense Center (NEDC) (collectively "Riverkeeper") are pleased to provide comments on Oregon Department of Environmental Quality's (DEQ) proposed revisions to Chapter 340, Division 12, of the Oregon Administrative Rules governing administrative penalties for environmental violations and spills of oil and hazardous materials.

NEDC is dedicated to preserving, protecting, and improving the natural environment in the Pacific Northwest. NEDC, based in Portland, Oregon, has worked since 1969 to protect the environment and natural resources of the Pacific Northwest by providing legal support to individuals and grassroots organizations with environmental concerns, and engaging in litigation independently or in conjunction with other environmental groups. NEDC's membership consists of individuals interested in the shared goal of protecting the environment.

Riverkeeper's mission is to restore and protect the Columbia River and all life connected to it, from the headwaters to the Pacific Ocean. Riverkeeper strives to protect water quality in the Columbia River Basin in order to improve Oregonians' quality of life for purposes including public health, recreation, habitat quality, and subsistence, recreational, and commercial fishing. Riverkeeper participated in DEQ's advisory committee on these proposed rule changes, and we appreciate DEQ's obvious attention to the public input and discussion generated by the advisory committee.

Recent years have seen a multitude of proposals to ship coal, liquefied natural gas, and crude oil on and near the Columbia River. The full environmental and social costs of transporting fossil fuels on Oregon's waterways are still being debated and analyzed. What is clear, however, is that these projects present an unprecedented level of risk of spill. For instance, shipping Panamax tankers full of crude oil—possibly Tar Sand heavy crude—through the fragile Columbia River Estuary will set the stage for an environmental catastrophe on the scale of the Exxon Valdez spill. The Columbia River Estuary faces numerous threats, but few with the potential to quickly and comprehensively devastate this ecosystem like a crude oil or vessel fuel spill. DEQ may not have initiated this rulemaking in response to the newly-proposed fossil fuels projects. Nevertheless, DEQ should keep these massive projects in mind when revising the civil penalty rules so that DEQ will be adequately equipped to deal with these emerging threats to Oregon's waters.

Specific Comments

1. Derelict commercial vessels.

Or. Admin. R. 340-012-0140 defines which actors or activities are covered under each of the three penalty matrices. Riverkeeper generally supports DEQ's proposed rule changes at Or. Admin. R. 340-012-0140(2)(a)(N), (3)(a)(K), and (4)(a)(P) that set forth the penalty matrices applicable to oil and hazardous materials spills based on the activity that the violator was engaging in at the time of the spill. However, Riverkeeper believes that the language of proposed Or. Admin. R. 340-012-0140(3)(a)(K) could present some ambiguity about which penalty matrix applies to spills from derelict vessels.

Proposed Or. Admin. R. 340-012-0140(3)(a)(K), which designates violations subject to the proposed $8,000 penalty matrix, applies to spills "occurring *during* a commercial activity." (emphasis added). Riverkeeper supports DEQ's intent to reach commercial operators, but fears that this language could allow commercial owners of abandoned vessels to argue for a lower penalty matrix on the basis that a spill occurring after the vessel was abandoned did not occur 'during' a commercial activity.

Derelict vessels are serious problem, especially in the Columbia River. The Washington Department of Ecology's recent ordeal with the derelict barge Davy Crocket is a fairly extreme example, but real nonetheless and highlights the issue of spills from abandoned vessels as well as the need for adequate enforcement mechanisms. Riverkeeper requests that DEQ clarify the proposed changes to Or. Admin. R. 340-012-0140 to define the penalties applicable to spills from derelict commercial vessels.

2. Polluters should not be given credit for merely following the law.

Riverkeeper does not oppose reducing civil penalties when a violator substantially exceeds the legal requirements for spill preparedness or response. Riverkeeper does, however, strongly oppose reducing civil penalties simply because a violator complied with certain applicable laws or DEQ orders. Several of DEQ's proposed revisions to Division 12 would substantially reduce penalties for violators who comply with certain rules, or have a history of compliance. Riverkeeper believes that compliance with the DEQ's rules and orders and other

applicable laws is an absolute minimum requirement for Oregon's corporate and private citizens, and that 'rewarding' such behavior gives violators an unearned, undeserved break. Polluters should not be rewarded for merely doing what the law already requires them to do.

Penalty factor "H" (DEQ's mechanism to account for a violator's history of responding to enforcement orders) inappropriately gives credit for merely following DEQ's orders, but provides no corresponding disincentive for ignoring those orders. Proposed rules Or. Admin. R. 340-012-0145(3)(a) and (b) essentially allow DEQ to mitigate the penalty amount for a current violation if the violator had, in the past, followed DEQ orders issued in response to other violations. As noted above, Riverkeeper objects to this approach because it creates a windfall where a violator gets credit for doing something he or she is already legally obligated to do.

Riverkeeper suggests that DEQ's final rules replace the proposed sections Or. Admin. R. 340-012-0145(3)(a) and (b) with language that would allow mitigation of the penalty only where a violator took actions substantially beyond those required in DEQ's past enforcement orders. In the interest of fairness, Riverkeeper suggests that DEQ insert additional language into Or. Admin. R. 340-012-0145(3) that provides for increased penalties where a violator has a history of not responding to DEQ enforcement orders.

Similarly, some parts of the rule governing penalty factor "C" (DEQ's mechanism to account for a violator's response to the current violation) inappropriately give credit for eventually complying with existing legal obligations. DEQ should strike proposed rules Or. Admin. R. 340-012-0145(6)(c), (d), and (e) entirely. These sections essentially give violators credit for doing what they are already required to do: stopping the existing violation and trying to avoid future violations.

Riverkeeper does not oppose the language of proposed rules Or. Admin. R. 340-012-0145(6)(a) and (b), which rewards violators who take "extraordinary" efforts to respond to violations. However, Riverkeeper believes that the amount of mitigation available under those proposed sections is unreasonably high in comparison to other penalty mitigating factors in rules Or. Admin. R. 340-012-0145, and should be reduced by 2 or 3 points.

Finally, DEQ's rules at Or. Admin. R. 340-012-0160(2) (authorizing decreased penalties for self-reporting) are over-broad and give no clear guidance about the appropriate level of penalty reduction. Or. Admin. R. 340-012-0160(2) gives DEQ the authority to reduce a civil penalty by "any amount" if a violator voluntarily self-reports a violation. The first problem with this approach is that state and federal laws already require reporting for many environmental violations. To avoid creating a windfall for merely complying with existing reporting laws, DEQ should change Or. Admin. R. 340-012-0160(2) to apply only where the violator was not required to report the violation. Second, in the interest of fairness, DEQ should change Or. Admin. R. 340-012-0160(2) to allow for increased penalties when a violator fails to report or covers up a violation. Lastly, DEQ's vast authority to decrease any penalty for a self-reported violation by "any amount" is disconcerting. If DEQ wants to reward self-reporting, DEQ should move this section into Or. Admin. R. 340-012-0145 (Calculation of Aggravating and Mitigating Factors) and more clearly explain how self-reporting will factor into the penalty equation.

3. Each day of violation constitutes a separate offense.

DEQ's proposed Or. Admin. R. 340-012-0145(4) impermissibly treats violations occurring on different days as a single violation. Penalty factor "O" (DEQ's mechanism for accounting for reoccurring or ongoing violations) allows DEQ to increase a civil penalty if a violation is repeated or reoccurring. Without conceding the legality of DEQ's approach, Riverkeeper appreciates DEQ's desire to sometimes treat repeated violations occurring on a given day as an aggravating penalty factor instead seeking multiple penalties for each reoccurrence of the violation. However, lumping violations that occurred over multiple days into one violation violates the letter and the spirit of DEQ's authorizing statutes.

The problem with DEQ's proposed rule is that, for the purposes of many or all of the statutes that DEQ's rules for penalty factor "O" purport to implement, there is no such thing as a "violation with a duration of more than one day . . . ." Or. Admin. R. 340-012-0145(4) (*as proposed in DEQ's notice of rulemaking*). Violations occurring on different days are different violations, and must be penalized as different violations. For example, Or. Rev. Stat. § 468.140, governing the applicability of DEQ's proposed penalty calculation to many environmental violations, expressly states that "[e]ach day of violation . . . constitutes a separate offense." Or. Rev. Stat. § 468.140(2). DEQ's proposed Or. Admin. R. 340-012-0145 claims to implement Or. Rev. Stat. § 468.140, but proposed Or. Admin. R. 340-012-0145(4) contravenes the plain language of the statute by allowing DEQ to lump multiple days of violation into one 'violation' or 'offense.'

DEQ should revise its proposed penalty rules to reflect that each day of violation is a separate offense that must be penalized separately. Currently, DEQ's proposed Or. Admin. R. 340-012-0145(4) reads:

> "O" is whether the violation was repeated or ongoing. A violation can be repeated independently on the same day, thus multiple occurrences may occur within one day. Each repeated occurrence of the same violation and each day of a violation with a duration of more than one day is a separate occurrence when determining the "O" factor. Each separate violation is also a separate occurrence when determining the "O" factor . . .

Riverkeeper suggests revising the third sentence and deleting the fourth sentence, so that the final rule reads:

> "O" is whether the violation was repeated or ongoing. A violation can be repeated independently on the same day, thus multiple occurrences may occur within one day. Each repeated occurrence of the same violation on one day is a separate occurrence when determining the "O" factor . . .

Such revisions would reflect each day of violation as a separate offense, thereby maintaining consistency with the governing statute.

Conclusion

Riverkeeper and NEDC thank DEQ for initiating this rule-making to update Oregon's civil penalties for spills and other environmental violations. Overall, we support most of the changes that DEQ proposes and we appreciate the opportunity to participate in this process. We hope that, in finalizing the proposed rules, DEQ will bear in mind the potentially grave environmental impacts of newly-proposed coal and crude oil shipping projects.

Respectfully,

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