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Via Certified Mail - Return Receipt Requested

Managing Agent
Diversified Marine, Inc.
1801 N. Marine Drive
Portland, OR 97217

Kurt Redd
President and Secretary
Diversified Marine, Inc.
P.O. Box 83723
Portland, OR 97283

Carla Shown
Registered Agent
Diversified Marine, Inc.
P.O. Box 83723
Portland, OR 97283

**Re: NOTICE OF INTENT TO SUE UNDER THE CLEAN WATER ACT AND
THE RESOURCE CONSERVATION AND RECOVERY ACT**

Dear Managing Agent(s):

I write to inform you of the intent of the Northwest Environmental Defense Center and Columbia Riverkeeper (collectively "NEDC") to file a citizen suit against Diversified Marine, Inc. ("Diversified" or "the facility") in accordance with Section 505(a) of the Federal Water Pollution Control Act ("Clean Water Act" or "CWA"), 33 U.S.C. § 1365(a). NEDC hereby gives notice, pursuant to Section 505(b) of the CWA, 33 U.S.C. § 1365(b), that Diversified has violated and continues to violate Sections 301 and 402 of the Clean Water Act, 33 U.S.C. §§ 1311(a) & 1342, by discharging pollutants from the industrial property located at 1801 N.

Marine Drive in Portland, Oregon without the appropriate CWA permit, and by discharging pollutants in violation of the express terms of its National Pollutant Discharge Elimination System (“NPDES”) 1200-Z permit #17242.

I also write to inform you of NEDC’s intent to file a citizen suit pursuant to Section 7002 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972, (“RCRA”). NEDC hereby gives notice, pursuant to Section 7002 of RCRA, that Diversified Marine’s waste generation, handling, and disposal practices have violated, and continue to violate, RCRA. Specifically, Diversified Marine has and continues to violate RCRA Subtitle C requirements governing generators and disposers of hazardous waste. 42 U.S.C. §§ 6921–6939. Diversified Marine has also violated and is in violation of the prohibition against open dumping of solid waste contained in RCRA § 4005. 42 U.S.C. §§ 6945; 6972(a)(1)(A).

Each violation of the Clean Water Act subjects Diversified to penalties of up to \$37,500 per violation per day. 40 C.F.R. § 122.41, modified by 40 C.F.R. § 19.4. Any falsification of reports subjects Diversified to penalties up to \$100,000 per violation. Or. Rev. Stat. § 468.953 (2009). Each violation of RCRA is punishable by penalties for violations up to \$37,500 per day per violation. RCRA § 3008(g); 42 U.S.C. § 6928(g) (adjusted by 40 C.F.R. § 19.4). If you have any information demonstrating that one or more of the violations outlined in this notice is incorrectly stated, please immediately provide that information to us and specify the violation to which you claim the information relates. This letter serves as notice of NEDC’s intent to file suit in U.S. District Court pursuant to the CWA on or about the sixtieth (60th) day following the delivery of this letter. Additionally, this letter serves as notice of NEDC’s intent to file suit in U.S. District Court on or about the sixtieth (60th) day following the delivery of this letter for violation of applicable permits, standards, regulations, conditions, requirements, prohibitions, or orders under RCRA pursuant to RCRA § 7002(a)(1)(A).

I. NEDC and Columbia Riverkeeper’s Commitment to Improving Water Quality in the Columbia River.

Both NEDC and Columbia Riverkeeper have members and supporters who live, recreate, and work throughout the Columbia River basin, including near and downstream of Diversified’s facility. NEDC is an independent, non-profit organization working to protect the environment and natural resources of the Pacific Northwest. Columbia Riverkeeper’s mission is to restore and protect the water quality of the Columbia River and all life connected to it, from the headwaters to the Pacific Ocean.

Threats facing the Columbia River are severe by any measure. *See 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/>. 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.” *Urban Stormwater Management in the United States*, National Research Council (Oct. 15, 2008), available online at: http://www.epa.gov/npdes/pubs/nrc_stormwaterreport.pdf (emphasis added). To address this leading cause of water quality impairment, NEDC and Riverkeeper invest significant time and

resources in reducing pollutant loads from process wastewater and stormwater sources. When rain sends runoff across city streets, construction projects, and industrial facilities, the water picks up contaminants that are drained into waterways such as the Columbia River and its tributaries. These toxics accumulate in local fish, wildlife, and birds. Simply put, stormwater pollution is a public health issue with particular impacts on low income residents that regularly use the Columbia and other local waterbodies as a food source for their families.

Similarly, hazardous wastes generated by industrial activities present significant threats to the Columbia River Basin. Such wastes can enter the environment and remain for long periods of time, contaminating drinking water supplies, public beaches, private lands, and critical habitat for fish and wildlife, as well as expose people to serious health risks. These risks are especially pronounced in the Portland Harbor area, where there has been long term and pervasive industrial pollution, the water table is close to the surface, many people live and recreate in the area, and many endangered species reside. Hazardous materials and wastes involved in the ship building industry are of particular concern, as they present substantial toxicity to humans and the environment. Many of these wastes generated by the ship building industry enter the environment during blasting or painting actions that occur near or on waterbodies. These operations can often spread hazardous waste over a significant area, threatening a wide range of human and ecological communities.

NEDC and Columbia Riverkeeper are committed to improving water, land, and air quality through various program areas including public education, volunteer water quality monitoring, advocating for strong environmental protection laws, and pollution permit enforcement. This Notice of Intent to Sue Diversified Marine is part of the public interest organizations' effort to improve quality of life in the Columbia River Basin for purposes including human health, recreation, habitat quality, and subsistence, recreational, and commercial fishing.

II. Discharge of Pollutants Without a Clean Water Act Permit.

Section 301(a) of the CWA prohibits the "discharge of any pollutant" except as in conformance with several other sections of the Act, including section 402. 33 U.S.C. § 1311(a). "Pollutant" is defined as "dredged spoil, solid waste, incinerator residue . . . chemical wastes . . . wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste." 40 C.F.R. § 122.2.

Upon information and belief, Diversified has discharged and continues to discharge process wastewater without a NPDES permit. "Process wastewater" is defined as "[a]ny water which, during manufacturing or processing, comes into direct contact with, or results from the production or use of any raw material, intermediate product, finished product, byproduct, or waste product." 40 C.F.R. § 122.22. The discharge of process wastewater is not authorized by Diversified's 1200-Z Permit.

In public documents submitted by Diversified to the Oregon Department of Environmental Quality ("DEQ"), Diversified admits to discharging process wastewater. On March 31, 2008, DEQ received a letter from Diversified which, among other things, attempted to

explain why sampling results at the dry dock contained zinc levels greater than the Permit's benchmark levels. The letter states:

We occasionally *water wash vessels* requiring new paint in order to prepare the surface. We also build vessels from steel that has been coated with a zinc-type product . . . We believe these items to be the source of the slightly elevated Zinc in the Drydock.

(emphasis added). As the water used to wash and prepare vessels is used in an industrial process, it is "process waste water," and thus its discharge to the Columbia River without a NPDES permit violates the CWA.

Diversified also discharges pollutants and process wastewater during the course of construction, maintenance, pressure washing, and painting projects conducted on the dry dock. Upon information and belief, Diversified discharges sand grit, spent sand grit, paint, and associated pollutants directly into the Columbia River as a result of blasting, painting and related ship repair and building activities without coverings that would otherwise completely contain these pollutants. Sand is explicitly listed as a pollutant under the CWA, and paint constitutes a pollutant as either a solid waste or chemical waste. Diversified does not have a permit for such discharges. These violations occur on at least each date that Diversified discharged process wastewater from pressure washing, blasting, and painting operations, or any other practices that result in the unpermitted discharge of pollutants into the river. Diversified is in the best position to know the exact dates that the boat projects and associated process wastewater discharges occurred. Upon information and belief, Diversified continues to discharge process wastewater without a NPDES permit.

Additionally, Diversified discharges pollutants to the Columbia River without a permit when it submerges the dry dock without removing spent sand grit, paint, and other associated pollutants from the dock. This constitutes the unpermitted discharge of pollutants into the waters of the United States, and thus Diversified violates the Clean Water Act each time it submerges the dry dock and discharges pollutants associated with industrial activities at the facility. These violations occur on at least each date that Diversified submerges the dry dock before removing pollutants associated with Diversified's industrial operations. Diversified is in the best position to know the exact dates that it submerged the dry dock and discharged pollutants. Upon information and belief, Diversified continues to discharge pollutants each and every time it submerges the dry dock prior to cleaning.

Diversified also discharges process wastewater to the Columbia River when rain and stormwater transport industrial materials to the river, including raw materials and waste products, during manufacturing or processing. When rainwater comes into contact with materials that are being used in or generated by industrial activities at the facility, such as sand, paint, or solvents, it becomes process wastewater, not just "industrial stormwater." As a result, the discharge of this process wastewater is not authorized by Diversified's 1200-Z Permit. Because Diversified does not properly clean or cover the dry dock and other areas used in industrial processes during construction, maintenance, washing or painting activities, pollutants generated during these industrial activities are picked up by rainfall, and discharged directly into the river. Diversified not only sandblasts and pressure-washes, it also performs "[w]elding, woodworking, painting,

electrical system and engine repair” at the facility. Stormwater Pollution Control Plan (SWPCP) 2.3.7. Additionally, both the large and small dry dock “are not covered and are open to the rain.” *Id.* As a result, Diversified has and continues to violate the CWA each day it discharges process wastewater, via rain and stormwater, to the Columbia River. Attachment A contains precipitation data for Portland, Oregon from July 22, 2005 to June 3, 2010. NEDC alleges that Diversified has discharged and continues to discharge process wastewater on each date of operation in which there was more than a trace amount of precipitation.

In sum, Diversified has violated and continues to violate the CWA every day it discharges pollutants and process wastewater into the Columbia River without a permit.

III. Violations of 1200-Z NPDES Permit

a. Specific Conditions

The Oregon Department of Environmental Quality (“DEQ”) issued Diversified an Industrial Stormwater General NPDES Permit (“Permit”) on October 7, 2002, permit #17242, and renewed on November 21, 2007.¹ Upon information and belief, Diversified has violated and is violating the following Specific Conditions contained in its General NPDES Permit:

i. Unpermitted discharges

Section 402 of the CWA provides that pollutants may be discharged only in accordance with the terms of a NPDES permit issued pursuant to that Section. Diversified’s Permit authorizes the facility to discharge stormwater into the Columbia River but prohibits the discharge of all other wastewater discharge or disposal, including process wastewater and stormwater mixed with wastewater. *See* 2007 Permit, Sch. A.4(a) and (c). An individual NPDES permit is required for the direct or indirect discharge of any other pollutant into waters of the state. *See* NPDES 1200-Z General Permit issued to Diversified Marine, Inc., October 7, 2002, renewed November 21, 2007.

As detailed above, in Section II, Diversified discharges process wastewater and stormwater mixed with process wastewater to the Columbia River. This not only violates the CWA’s prohibition against discharges without a permit, it violates the terms of Diversified’s 1200-Z general permit.

ii. Failure to Implement Best Management Practices

Diversified also is violating its permit by failing to properly control its industrial stormwater. The Permit requires Diversified to implement and maintain controls to “eliminate or minimize the exposure of pollutants to stormwater or to remove pollutants from stormwater

¹The DEQ issued the 1200-Z NPDES Permit in 2002 (“2002 Permit”) and reissued in 2007 (“2007 Permit”). Relevant conditions of the 2002 and 2007 1200-Z permits are substantially the same. All references to violations of permit conditions should be interpreted to mean the permit conditions applicable at the time of the violation.

before it discharges to surface waters.” 2007 Permit, Sch. A.3(c). The SWPCP states there is “containment” around the edges of the dry dock to catch spills or releases. *See* SWPCP 6.1.8. The term “containment” comes directly from the 1200-Z permit requirements for Best Management Practices (“BMPs”). Diversified, however, has failed and continues to fail to specify the particular containment methods implemented on the dry dock. The same paragraph of the SWPCP states that any rainwater that falls on the dry dock when it is empty or during typical construction activities is not contained; rather it is filtered through hay bales or filters as it exits the dry dock. *See* SWPCP 6.1.8. These statements constitute an admission that there is a discharge off the dry dock, and that BMPs are not being adequately implemented.

Permit registrants must recycle or properly dispose of wastes in a manner that eliminates or minimizes exposure of pollutants to stormwater. *See* 2007 Permit, Sch. A.3(c)(i)(3). The SWPCP states that water that accumulates during sandblasting or pressure washing is pumped out of the containment area and sent off site. *See* SWPCP 6.1.8. Notes from a permit site inspection state that “when work [is] done or prior to sinking[,] [the] dry dock is swept and washed.” *See* Event Log from Portland Bureau of Environmental Services (“BES”) file (Apr. 8, 2010). However, section 5.9.1 of the SWPCP states “the dock floor is not washed with water.” *See* SWPCP 5.9.1. Instead, Diversified uses a mechanical sweeper and portable tools to partially remove pollutants. *Id.* Runoff from low pressure water cleaning is filtered through straw bales or filter materials before being discharged, and “in some cases” it is contained and removed for offsite disposal. *See* SWPCP 5.9.3. Because water is not used to clean the dry dock, any remaining pollutants are discharged into the Columbia River each time Diversified applies the low pressure cleaning water or the dry dock is lowered. NEDC alleges Diversified has violated and continues to violate its NPDES permit when it applies low pressure cleaning water and each time the dry dock is lowered following sandblasting or other construction activities.

Even fewer BMPs are conducted on the small dry dock. Although no differences in implementation are mentioned in the SWPCP, notes from a permit site inspection by BES suggest Diversified fails to apply BMPs to the small dry dock. BES’s inspection notes, dated April 8, 2010, state the “little dock is rarely used, so water [is] discharged as SW.” *See* Event Log from BES file (Apr. 8, 2010). Diversified violates its NPDES permit by failing to implement and maintain controls that “eliminate or minimize the exposure of pollutants to stormwater” before it discharges stormwater from the small dry dock.

The Stormwater Best Management Practices in Schedule A.3(c)(i)(7) require permit registrants to cover activities with permanent or temporary structures such as tarps to prevent exposure of stormwater to potential pollutants. Notes from a permit inspection by the Bureau of Environmental Services state that all fueling, manufacturing, disposal, and storage areas are not covered. *See* Permit Inspection Form, April 8, 2010, at page 3. This failure violates the permit. Additionally, upon information and belief, Diversified has failed and continues to fail to cover industrial activities during pressure washing and painting on the dry dock. As a result, pollutants have been and are being discharged directly into the Columbia River whenever Diversified conducts pressure washing or painting activities on the dry dock. Diversified is in the best position to know what dates it failed to cover industrial activities during pressure washing and painting on the dry dock. Attachment A contains precipitation data for Portland, Oregon from July 22, 2005 to June 3, 2010. NEDC alleges that Diversified has violated and continues to

violation Schedule A.3(c)(i)(7) on each date of operation in which there was more than a trace amount of precipitation.

iii. Failure to Modify SWPCP

Schedule A.2 requires Diversified to describe any revisions to its SWPCP as a result of changes in operations at the facility in an Action Plan, submitted to DEQ or an agent for approval. The SWPCP states discharges from sandblasting and painting are contained and removed for offsite disposal. *See* SWPCP 5.9.2. It further states that shroud material is used during sandblasting and painting to prevent blast material from entering the water, and that abrasives are captured in a vacuum system. *Id.* The discharge of process wastewater into the Columbia River and failure to implement covering techniques detailed in the SWPCP are changes in its operations, but Diversified has not made the requisite changes to its SWPCP. NEDC alleges Diversified has violated and continues to violate the terms of its NPDES Permit by failing to amend its SWPCP in light of changes at the facility. These violations are ongoing and occur on each day that Diversified conducts its industrial activities in a manner different from that described in its SWPCP without amending its SWPCP.

iv. Benchmark Exceedances

The benchmark guideline concentrations for stormwater discharges are outlined in Schedule A.8.² *See* Permit at 13 (stating that benchmarks “are designed to assist the permit registrant in determining whether their SWPCP is effectively reducing pollutant concentrations in stormwater discharged from the site.”). Schedule A.9. requires Diversified to complete and implement an Action Plan if the facility discharges pollution which exceeds the benchmark levels. Diversified discharged pollution at levels which exceeded the Permit benchmarks on at least the following self-monitoring dates:

Table 1.

Date of Discharge	Outfall	Pollutant	Permit Benchmark	Amount of Pollutant in Diversified's Discharge
May 17, 2005	Outfall No. 2	Zinc	0.6 mg/l	1.22 mg/l
Dec. 3, 2007	Outfall No. 2	Copper	0.1 mg/l	0.126 mg/l
Dec. 27, 2007	Dry Dock	pH	5.5 to 9.0 SU	5.16 SU
Dec. 27, 2007	Dry Dock	Copper	0.1 mg/l	0.187 mg/l
Dec. 27, 2007	Dry Dock	Zinc	0.6 mg/l	0.782 mg/l
Mar. 26, 2008	Outfall No. 2	Copper	0.1 mg/l	0.196 mg/l
June 3, 2008	Outfall No. 2	Zinc	0.6 mg/l	0.914
Dec. 12, 2008	Dry Dock	Copper	0.1 mg/l	0.166 mg/l
Dec. 12, 2008	Dry Dock	Zinc	0.6 mg/l	1.42 mg/l
Apr. 28, 2009	Dry Dock	Copper	0.1 mg/l	0.11 mg/l

² Benchmark guidelines in the 2002 and 2007 1200-Z Permits are identical.

Apr. 28, 2009	Dry Dock	pH	5.5 to 9.0 SU	9.6 SU
May 13, 2009	Outfall No. 6	pH	5.5 to 9.0 SU	9.2 SU
Nov. 13, 2009	Outfall No. 2	pH	5.5 to 9.0 SU	5.4 SU
Nov. 13, 2009	Parking	pH	5.5 to 9.0 SU	5.0 SU
May 26, 2010	Drydock	Copper	0.1 mg/l	0.139 mg/l
June 10, 2010	Drydock	Zinc	0.6 mg/l	1.18 mg/l
June 10, 2010	Outfall No. 2	Zinc	0.6 mg/l	1.29 mg/l

Based on these benchmark exceedances, it is apparent that the measures outlined in Diversified's SWPCP are either not effectively reducing pollutant concentrations in stormwater discharged from the site, or are not effectively implemented.

v. Failure to Respond to Benchmark Exceedances

Diversified violated and continues to violate the Permit requirements by failing to submit an Action Plan after each benchmark exceedance. Schedule A.9(a) of the 2007 Permit states:

If a stormwater sampling result exceeds any of the benchmark values, the permit registrant must, within 30 calendar days of receiving the sampling results, investigate the cause of the elevated pollutant levels, review the SWPCP and submit an Action Plan for department or agent approval.³

Schedule A.9(b) explains that the purpose of reviewing the SWPCP and submitting an Action Plan is to review and determine if:

- i) The SWPCP is being followed;
- ii) There are alternative methods for implementing the existing site controls identified in the SWPCP;
- iii) The benchmark exceedance resulted from background or natural conditions not associated with industrial activities at the site; and
- iv) Additional effective site controls are needed to address the parameters of concern.

An Action Plan must include the results of a SWPCP review, any corrective actions the permit registrant plans to take, and a schedule for implementing those actions. *See* 2007 Permit, schedule A.9(c)(i–iii).

Diversified failed to submit an Action Plan within thirty (30) calendar days of receiving the sampling results for each benchmark exceedance listed above.⁴ Each failure to submit an

³The 2002 1200-Z Permit requires an updated SWPCP within 60 days of receiving sampling results, and does not refer to "Action Plans." *See* 2002 Permit, schedule A.9.

⁴Diversified submitted an Action Plan on July 15, 2008 for the benchmark exceedance on March 26, 2008, which is more than thirty days after receiving the sampling result. Diversified submitted an Action Plan July 31, 2009 for the benchmark exceedances on December 12, 2008, April 28, 2009, and May 13, 2009. This Action Plan was inadequate because it was not within the 30-day requirement for at least the first two benchmark exceedances

Action Plan as defined under A.9(a) – (c), constitutes a separate violation of the permit. These violations: (1) began on the thirty-first (31) after Diversified exceeded a benchmark level and failed to submit the required Action Plan; and (2) continue each day thereafter that Diversified failed to submit an Action Plan that meets the requirements of A.9.c. These violations are ongoing.

To the extent Diversified submitted Action Plans, these Action Plans fail to comply with the Permit's requirements. For example, the August 21, 2009 Action Plan stated that increased levels of copper and zinc may have been due to a "significant increase in [] work load in 2008/2009," and that Diversified will install "stormwater systems" at both dry docks. The Action Plan's vague outline to investigate and install "stormwater systems" failed to explain how a new stormwater system would address the high levels of copper and zinc, or specifically how the system would be implemented.

Diversified asserted the pH exceedances April 28, 2009 and May 13, 2009 may have been due to background conditions. A permit registrant is required to propose a sampling plan and methodology for demonstrating the elevated pollutant levels are due to background natural conditions. *See* 2007 Permit, Schedule A.9(d). Diversified's Action Plan merely stated that although it suspects the high levels may be due to background, it "is investigating treatment media to bring pH within benchmarks." *See* August 14, 2009 Action Plan. Again, the vague outline in the Action Plan failed to address how "treatment media" would address the increased levels of copper and zinc or the specifics of implementation. Because the revised Action Plan is also inadequate, Diversified has violated and continues to violate the requirements in Schedule A.9 of the 2007 1200-Z permit.

vi. Failure to Conduct Appropriate Monitoring Procedures

Diversified violated the Permit by failing to monitor pollution according to the Permit's requirements. Schedule B.2(c) requires samples to be taken "before the stormwater joins or is diluted by any other wastestream, body of water or other substance" unless approved by the agency or department. Upon information and belief, Diversified collected samples directly from the Columbia River rather than at the designated Outfall locations in the SWPCP on at least one occasion. These samples were diluted by the river water and were thus not taken pursuant to the permit requirements. Diversified is in the best position to know when it so failed to conduct monitoring procedures correctly.

b. Violations of NPDES General Conditions for Industrial Facilities

Diversified has violated and continues to violate the following General Conditions contained in its 2007 1200-Z Permit:

i. Duty to Mitigate

Diversified has violated and continues to violate the terms of its NPDES permit by failing to take all reasonable steps to minimize or prevent any discharge that has a reasonable likelihood of adversely affecting human health or the environment. *See* Sch. F, section A.3. Diversified

routinely works on vessels which have toxic “anti-fouling” heavy metals in their hull coatings. When Diversified pressure washes, sandblasts, or otherwise prepares surfaces for repair, these heavy metals can accumulate in water. The discharge of these pollutants in the water has a reasonable likelihood to adversely affect the environment, however, Diversified has taken no steps to minimize or prevent this discharge.

ii. Operation and Maintenance of Pollution Controls

Diversified has violated and continues to violate the terms of its NPDES Permit by failing to properly operate and maintain its pollution control technology. Schedule F, section B.1 requires Diversified to “properly operate and maintain all facilities and systems of treatment and control . . . installed or used by the permit registrant to achieve compliance with the conditions of [its] permit.” Moreover, the provision requires Diversified to operate “back-up or auxiliary facilities or similar systems” when the operation of such systems is “necessary to achieve compliance with the conditions of the permit.” Diversified does not properly implement Best Management Practices as evidenced by the failure to cover activities on the dry docks and the benchmark exceedances noted in Table 1. Diversified has violated and continues to violate the Permit because it fails to operate and maintain pollution control technology.

iii. Duty to Halt or Reduce Activity

Diversified has violated and is violating the terms of its NPDES Permit by failing to halt or reduce activity in absence of the proper functioning of its pollution control technology. Schedule F, section B.2, mandates that “upon reduction, loss, or failure of the treatment facility, the permit registrant must, to the extent necessary to maintain compliance with its permit, control production or all discharges or both until the facility is restored or an alternative method of treatment is provided.” This provision explicitly states that it is not a defense that Diversified would have had to stop or reduce its activities in order to comply. Diversified continues to operate despite the fact that it does not implement best management practices.

iv. Representative Sampling

Diversified violated the 1200-Z permit provisions by failing to take representative samples. Schedule F, section C.1, mandates samples and measurements must be “representative of the volume and nature of the monitored discharge” and samples must be taken before the effluent joins or is diluted by another body of water. Upon information and belief, Diversified took samples from the Columbia River, which violated the permit requirements because the effluent had joined and been diluted by another body of water. Furthermore, upon information and belief, Diversified pressure-washed the outfall areas on the dry docks prior to sampling. Both sampling measures fail to meet the 1200-Z permit requirements because they were not “representative of the volume and nature of the monitored discharge.” Diversified is in the best position to know when it so violated its 1200-Z permit.

v. Tampering and Falsification

Diversified violated the 1200-Z permit provisions by falsifying sampling methods. Schedule F, section C.4, states “any person who falsifies, tampers with, or knowingly renders inaccurate, any monitoring device or method required to be maintained under this permit” will be punished upon conviction. Upon information and belief, NEDC alleges Diversified knowingly altered the monitoring method required by the 1200-Z permit and outlined in its own SWPCP by collecting samples from the Columbia River, rather than from designated outfalls, and by pressure-washing the outfall areas prior to sampling. Resulting data submitted to DEQ on the Discharge Monitoring Report is thus inaccurate because the monitoring methods were tampered with.

IV. Violations of the Resource Conservation and Recovery Act Hazardous Waste Generation, Handling, and Disposal Requirements

RCRA and its implementing regulations establish strict requirements on generators of hazardous waste. *See* 42 U.S.C §6922; 40 C.F.R. Part 262. For example, *any* person who generates solid waste must determine if the waste is hazardous. 40 C.F.R. § 262.11. A “solid waste” is defined as “any discarded material,” or material that is “abandoned” or is “inherently waste-like.” 42 U.S.C. § 6903(27); 40 C.F.R. § 261.2(a). A solid waste is hazardous if it meets the criteria set out in 40 C.F.R. Part 261. If the waste is hazardous, its generator must comply with a broad range of requirements. *See* 40 C.F.R. §§ 262.10–262.44.

Diversified Marine generates solid waste in many of its practices. This includes, but is not limited, to the following activities: sand blasting/paint removal, surface preparation, painting, welding and metal working, cleaning, surface finishing, and general ship maintenance work. Diversified also generates solid waste in many other practices at the facility. Many of the solid wastes Diversified generates are hazardous wastes. For example, spent sand and grit used for removing paint is, itself, hazardous. And, the paint that is blasted from ships is also hazardous waste, generally containing heavy metals and other hazardous materials. Solvents used in surface preparation and cleaning are also hazardous. Similarly, paint Diversified applies to boats and barges contains hazardous materials.

Generators of hazardous wastes must comply with a host of limitations and requirements. 40 C.F.R. §§ 262.10–262.44. Pursuant to 40 C.F.R. § 262.10, a person or facility that “generates a hazardous waste...is subject to the compliance requirements and penalties of the Act.” These requirements include: determining the hazardous nature of the waste; assessing whether the waste is a listed hazardous waste; obtaining an identification number; using only licensed transporting entities; transporting only to licensed treatment, storage, and disposal facilities; preparing a manifest for transportations of hazardous wastes off-site; abiding by specific packaging and labeling requirements; limiting accumulations of hazardous waste in accordance with its generator status; keeping records of waste analyses, manifests, and test results for three years; and preparing and submitting biennial reports to the Environmental Protection Agency (EPA). *Id.*

Even if Diversified is a conditionally exempt small quantity generator (CESQG), it must still abide by most of RCRA’s strict requirements. A CESQG must comply with RCRA’s testing, transportation, disposal, and recordkeeping requirements. 40 C.F.R. § 261.5.

Diversified has failed to perform the required testing of the solid waste it generates, it has failed to ensure that the waste is properly transported and disposed of, and it has failed to keep or report the required records of waste generation, testing, transportation, and disposal. As a result, Diversified is in violation of RCRA's requirements for generators, even if it is a CESQG. *Id.*

It is likely, however, that Diversified is not properly a CESQG, and thus it is also in violation of every requirement applicable to generators of hazardous waste, including complying with RCRA's manifest system requirements. To be a CESQG, Diversified cannot generate more than 100 kilograms of hazardous waste per month or over 1 kilogram of acute hazardous waste. Pentachlorophenol and other chlorinated solvents are acute hazardous wastes under RCRA. DEQ believes both acute hazardous wastes to be present at Diversified's site. Upon information and belief, NEDC alleges that Diversified exceeds at least one of these quantity limitations. As a result, Diversified is not properly a CESQG, and thus must comply with all requirements for generators of hazardous waste. As it has failed to follow these requirements, including but not limited to testing its waste, obtaining an identification number, using only licensed transporters and disposers, properly labeling its wastes, limiting accumulation, properly handling the waste onsite, keeping records, and preparing biennial reports to EPA, it is in violation of any "permit, standard, regulation, condition, requirement, prohibition, or order" issued under RCRA.

V. Violation of Prohibition Against Open Dumping

RCRA § 4005(a) prohibits "any solid waste management practice or disposal of solid waste or hazardous waste which constitutes open dumping of solid waste or hazardous waste[.]" 42 U.S.C. § 6945(a). RCRA § 1004(27) defines "solid waste" to include "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations[.]" 42 U.S.C. § 6903(27). RCRA § 1004(14) defines "open dump" as "any facility or site where solid waste is disposed of which is not a sanitary landfill which meets the criteria promulgated under section 4004 [42 U.S.C. § 6944] of this title and which is not a facility for disposal of hazardous waste." 42 U.S.C. § 6903(14). Regulations state that facilities failing to satisfy either the criteria in 40 C.F.R. §§ 257.1-4 or 40 C.F.R. §§ 257.5-30 are open dumps. 40 C.F.R. §§ 257.1(a)(1). Failure to satisfy any individual criterion itself violates the Act.

Upon information and belief, Diversified has been and continues to be in violation of the following regulations:

1. "Facilities or practices shall not cause or contribute to the taking of any endangered or threatened species of plants, fish, or wildlife." 40 C.F.R. § 257.3-2(a). The damage Diversified is causing to the Columbia River and surrounding habitat constitutes destruction or adverse modification of critical habitat for any number of species listed as endangered or threatened under the Endangered Species Act (ESA). RCRA defines "take" to include "harassing, harming, pursuing, hunting, wounding, killing, trapping, capturing, or collecting or attempting to engage in such conduct." 40 C.F.R. § 257.3-2(c)(3). The following listed species have been observed in the area of Diversified Marine's facility: Peregrine Falcon, Snake River Sockeye Salmon, Upper

Columbia River Spring Chinook Salmon, Upper Columbia River Steelhead Trout, Lower Columbia River Coho Salmon, Snake River Spring and Summer Chinook Salmon, Snake River Fall Chinook Salmon, Snake River Steelhead Trout, Columbia River Chum Salmon, Middle Columbia River Steelhead Trout, Lower Columbia River Chinook Salmon, and Lower Columbia River Steelhead Trout. Without a catchment system, solid or hazardous wastes (including, but not limited to, waste paint, blast grit, solvents, batteries, vessels and portions thereof, oil and gas, as well as tools and implements used in regular operations on dry docks and over the water) tend to fall in the water, accumulating there and causing contamination of the surrounding environment. Contamination of the waters of the Lower Columbia River by Diversified's operations is causing or contributing to the taking of endangered or threatened species. As such, Diversified is engaging in a prohibited waste disposal practice under RCRA. 40 C.F.R. § 257.3-2.

2. A “facility shall not cause a discharge of pollutants into waters of the United States that is in violation of the requirements of the National Pollutant Discharge Elimination System (NPDES) under section 402 of the Clean Water Act, as amended. (b) For purposes of section 4004(a) of the Act, a facility shall not cause a discharge of dredged material or fill material to waters of the United States that is in violation of the requirements under section 404 of the Clean Water Act, as amended. (c) A facility or practice shall not cause non-point source pollution of waters of the United States that violates applicable legal requirements implementing an areawide or Statewide water quality management plan that has been approved by the Administrator under section 208 of the Clean Water Act, as amended.” 40 C.F.R. §§ 257.3-3. As discussed above, Diversified is discharging wastes into the Columbia River in violation of its NPDES permit, and thus is also an open dump. Similarly, some of the wastes that Diversified has dumped into the Columbia River likely constitute fill material under section 404 of the CWA. As such, Diversified is an open dump. Finally, if any of the discharges of pollutants from Diversified to the Columbia River are determined to be “non-point sources,” these discharges are illegal under RCRA, and thus these discharges would make Diversified an open dump.

VI. Penalties and Injunctive Relief

As outlined above, NEDC has evidence that Diversified has violated and continues to violate the CWA by discharging pollutants without a permit and violating the terms of its 1200-Z NPDES Permit. Section 309 of the CWA, 33 U.S.C. § 1319(d) adjusted by 40 C.F.R. § 19.4, provides for penalties of up to \$37,500 per day per violation. Under Schedule F, section D.9 of the 1200-Z permit and ORS § 468.953, “any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports” may be punished by a fine of up to \$100,000 per violation. NEDC anticipates filing suit against Diversified sixty days from the date of this notice in Oregon Federal District Court, to seek penalties and injunctive relief.

Additionally, as detailed above, NEDC has evidence that Diversified has violated and continues to violate RCRA by its improper generation, transportation, and disposal of solid and hazardous wastes, as well as its illegal operation of an open dump. Section 3008 of RCRA, 42 U.S.C. § 6928, adjusted by 40 C.F.R. § 19.4 provides for penalties of up to \$37,500 per day per violation. NEDC anticipates filing suit against Diversified sixty days from the date of this notice

for permit, standard, and regulation violations under RCRA. Such suit will be filed in Oregon Federal District Court, where NEDC will seek penalties and injunctive relief.

VII. Persons Giving Notice

The full names, addresses, and telephone numbers of the parties providing this notice are:

Northwest Environmental Defense Center
10015 SW Terwilliger Blvd.
Portland, OR 97219
(503) 768-6673

Columbia Riverkeeper
724 Oak Street
Hood River, OR 97031
(541) 387-3030

The attorneys representing NEDC and Columbia Riverkeeper in this matter are:

Dan Mensher
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10015 SW Terwilliger Blvd.
Portland, OR 97219
(503) 768-6926

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VIII. CONCLUSION

The above-described violations are based upon information currently available to NEDC. Diversified has consistently violated and continues to violate the Clean Water Act and the Resource Conservation and Recovery Act. NEDC intends to sue for all violations, including those yet to be uncovered and those committed after the date of this Notice of Intent to Sue. Due to the chronic and persistent nature of the facility's violations, there is more than a reasonable likelihood of ongoing violations in the future. *See Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 494 U.S. 49, 57 (1987).

During the 60-day notice period, NEDC is available to discuss effective remedies for the violations in this letter and settlement terms. If you wish to discuss any aspect of this notice or to discuss settlement of this matter prior to commencement of suit, please contact the undersigned. We suggest that you initiate those discussions within 10 days of receiving this notice so that a meeting can be arranged and so that negotiations may be completed before the end of the 60-day notice period. We do not intend to delay the filing of a complaint if discussions are continuing when the notice period ends.

Sincerely,

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Lewis & Clark Law School
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