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Submitted via email to nwr-stormwater@deq.state.or.us

Ian Garner
DEQ Northwest Region
2020 SW 4th Ave, Suite 400
Portland, OR 97201

Re: Comments on Cascade Kelly Holding's application for a new 1200-C permit

To Mr. Garner:

The Northwest Environmental Defense Center (NEDC) submits these comments on the application from Cascade Kelly Holdings, LLC dba Columbia Pacific Bio-Refinery (hereafter Cascade) for a new National Pollutant Discharge Elimination System (NPDES) 1200-C construction stormwater permit from Oregon Department of Environmental Quality (DEQ). Cascade is proposing to construct for an expansion project at its crude oil terminal located at 81200 Kallunki Road in Clatskanie, Oregon.

NEDC has members and supporters who live, recreate, and enjoy the areas surrounding the proposed construction site. NEDC has submitted comments on Cascade's application for an air quality permit for the resulting expanded terminal. NEDC has significant concerns about the adverse stormwater impacts that will result from the proposed expansion project. For the reasons that follow, DEQ must deny coverage for Cascade under the 1200-C permit.

1. Cascade's application contains insufficient information.

DEQ lacks critical information, and should not permit Cascade's construction expansion proposal. The following highlights several examples where critical information is missing. First, Cascade has failed to list the specific measures it will use to ensure compliance with discharge and water quality requirements, as required by the 1200-C permit. The ESCP states that some, but not all of the best management practices (BMPs) listed on the first page were actually not chosen to be implemented for this project. Without knowing which BMPs have been chosen or where they will be placed it is impossible to meaningfully evaluate whether those measures will be sufficient.

Second, the location of the discharge point for stormwater discharges to the Columbia River also does not appear on the ESCP drawings.

Third, Cascade's project appears to be inconsistent with land use requirements. The 1200-C requires a Land Use Compatibility Statement (LUCS) signed by a local land use authority indicating that the activity is compatible with the local acknowledged comprehensive plan and land use regulations. The LUCS form attached to Cascade's application, however, is incomplete. It states that the activity or use is allowed outright but fails to provide the local ordinance. This leaves the public without the ability to review and understand whether the proposed activities are consistent with local land use plans. The LUCS form also contains several express contingencies. One is the requirement to submit an engineered stormwater and erosion control plan to Columbia County. Although Cascade submitted an ESCP to DEQ as part of this application, the plan is incomplete and thus this contingency has yet to be fulfilled.

The LUCS form also states that the "[a]pplicant will need to update their existing JEC[?] plan approved in 2006" and that "[t]his update will need to verify these new changes can be incorporated into existing facilities without any adverse impacts on adjoining properties." It is unclear to NEDC what plan this statement is referring to. Even so, this is an outstanding requirement that renders the LUCS incomplete. DEQ must require Cascade to resolve this contingency from the local land use authority, and resubmit a complete application with a complete LUCS.

Fourth, given that the proposed construction site is located on loamy sand flood plains directly bordering the Columbia River, it is likely there are some wetlands present at the site or in the vicinity. It does not appear that Cascade has provided DEQ with a full delineation of these wetlands despite the potential severe consequences to those wetlands from the proposed activities. Because this site is so close the Columbia River, DEQ must insist on being provided all wetland information before any decision on this 1200-C permit application is made.

Finally, Cascade's application contains virtually no information about the receiving water body and the species that inhabit it. The site is adjacent to the Columbia River at approximately river mile 53. The Columbia River and estuary is one of the most important rivers in the world from a salmon recovery standpoint. The Columbia River Chum, Lower Columbia River Coho, Lower Columbia River Chinook, and Lower Columbia River Steelhead are all species listed as threatened under the Endangered Species Act with federally designated critical habitat in the region of this proposed project. Designated uses of the Columbia River range from resident fish and aquatic life to anadromous fish passage, shellfish growing, and drinking water.

Continuing to process Cascade's application materials without sufficient information ignores the burden of proof that Cascade carries as the applicant for a permit. *See, e.g., Harris v. SAIF*, 292 Or 683, 690, 642 P2d 1187 (1982) ("The general rule is that the burden of proof is upon the proponent of a fact or position, the party who would be unsuccessful if no evidence were produced on either side."). The "burden of proof" means both the burden of presenting evidence to justify permit issuance and the burden of persuading DEQ that a permit should issue under these particular facts. *See, e.g., Cameron Logging v. Jones*, 109 Or App 391, 394, 820 P2d 8 (1991) (discussing dual burden, but in another context); *Teledyne Wah Chang v. Energy Fac. Siting Council*, 298 Or 240, 248, 692 P2d 86 (1984).

The 1200-C permit states public review will not begin if the application form or Erosion and Sediment Control Plan (ESCP) are incomplete. Sch. A.1.c. Because this ESCP is lacking critical information, DEQ should never have posted the application materials for public review. Instead, DEQ must request that Cascade provide a complete application with all necessary information, and then re-issue the proposal for public notice and comment. Moving ahead at this stage precludes meaningful public comment, and ignores Cascade's burden to show its proposed expansion activity is not going to cause further pollution.

2. Cascade's Stormwater Erosion and Sediment Control Plan is inadequate.

DEQ must deny the permit because Cascade's Erosion Sediment Control Plan (ESCP) is wholly inadequate. As the 1200-C permit is a general NPDES permit, it is essential for Cascade to specifically explain the best management practices (BMPs) it intends to implement to ensure protection of water quality in the Columbia River during its construction activities. Yet the ESCP narrative and drawings provided in Cascade's application are incomplete and inadequate to provide those assurances.

For example, the "existing contour" lines (delineating 2 and 10 foot buffers) do not stretch the entire northern boundary of the property. It is common understanding that water flows towards a drainage basin, not away. Here, however, the ESCP shows stormwater running away from the Columbia River (even over some of the existing contours) towards the south end of the property. This is illogical, and likely does not accurately reflect the stormwater flows at the site. DEQ must do a site visit during a rain event to verify the accuracy of these depictions.

It is unclear which BMPs Cascade intends to put in place and where, given that no discharge point is identified for discharges to the Columbia River. Cascade also completely failed to provide information on the known fishery resource issues. No staging area for the construction equipment and materials is indicated on the ESCP map.

As for monitoring and reporting, Cascade proposes to conduct only one inspection before construction begins to ensure the ESCP measures are in place, and daily inspections only if there is stormwater runoff. There should be daily inspections when the site is active during any rain event. The ESCP states that Cascade will conduct inspections daily if practical at an accessible discharge point or downstream location when the site is inaccessible due to inclement weather. Yet as noted above, there is no discharge point indicated on the ESCP.

3. The proposed expansion will have unacceptable impacts on receiving waters and aquatic life.

Cascade's expansion project will take place over 43.62 acres, directly disturbing 7 acres. The expansion includes an addition of 5-acre secondary containment tank farm to house six storage tanks that will add 2.7 acres of new impervious surface on the north side of the site, relocation of 14,000 square foot warehouse that will add 0.70 acres of new impervious surface on south side of site, a new pump containment vault in rail unload area, and new pipeline from rail unload area to the tank farm.

Cascade proposes stormwater discharges from demolition and clearing, grading, concrete work, paving, infrastructure development, and increased impervious surface area. The site sits at a very low elevation of only 10 to 35 feet, directly bordering the Columbia River. Based on the site configuration and failure to identify sufficient BMPs to divert construction stormwater (addressed above), these activities for the development and creation of new surfaces will adversely impact flood plains, wetlands, the Columbia River, and aquatic life that depends on those resources.

Stormwater runoff generally threatens salmonids by increasing water temperature, contributing toxic contaminants such as heavy metals and copper, increasing sediment loads, and increasing nutrient inputs. Runoff from impervious surfaces causes erosion. Stormwater runoff from the built environment is one of the greatest challenges of water pollution control, as this source of contamination is a principal contributor to water quality impairment of water bodies nationwide. *Urban Stormwater Management in the United States*, National Research Council (Oct. 15, 2008). Not only does stormwater entrain chemical and microbial contaminants as it runs over roads, rooftops, and compacted land, stormwater discharges pose a physical hazard to aquatic habitats and stream function. *Id.*

Ignoring the likely impacts from its proposed construction stormwater discharges, Cascade has proposed construction activities throughout the entire year between 2015 and 2016. DEQ must require Cascade to observe and work within only designated in-water work windows, or at least provide greater assurances that construction stormwater discharges will be completely diverted away from the north side of the property along the Columbia River.

DEQ must also evaluate whether there are designated and/or existing uses downstream of this site that are already affected by the pollutants that would be in Cascade's construction stormwater discharge. This would include turbidity, copper, and other metals.

Ultimately, the proposed permit lacks the measures necessary to protect the water quality in the Columbia River and estuary, and the aquatic life that depends on those resources. DEQ must carefully scrutinize the impacts this proposed construction will have in light of these comments and require revisions to the ESCP to ensure the permit is consistent with federal and state laws protecting Oregon's waters.

4. DEQ must not authorize a new discharge to a water quality limited water body that lacks a total maximum daily load.

The Columbia River is listed under Section 303(d) of the Clean Water Act as water quality limited for temperature. *See* DEQ, 2010 Integrated Report Database, available at <http://www.deq.state.or.us/wq/assessment/rpt2010/results.asp> (last accessed March 3, 2015) (noting that the Columbia River is limited for temperature year round for river miles 0 to 306.1, and a total maximum daily load (TMDL) is needed). Cascade's terminal is located at approximately river mile 53. DEQ's report states that high temperatures impact salmon and steelhead migration corridors. *Id.* Until DEQ completed the TMDL process, DEQ may not act on this application for a new 1200-C permit.

The Columbia River is water quality limited in the fall, winter and spring for pH between river miles 121.8 and 319.3, and a TMDL is needed. *See* DEQ, 2010 Integrated Report Database, available at <http://www.deq.state.or.us/wq/assessment/rpt2010/results.asp> (last accessed March 3, 2015). DEQ has insufficient data to determine the River's status for pH in the summer between river miles 35.2 and 98. *Id.* Other pollutants of concern for the Columbia River that may be present in Cascade's construction stormwater discharges include copper, iron, total dissolved gas, zinc, and dissolved oxygen. DEQ must analyze the pollutants in Cascade's discharge to before authorizing a new discharge from this site.

5. DEQ may not authorize the permit because it will violate Oregon's antidegradation policy.

ORS 468B.015 and OAR 340-41-0004 contain an explicit antidegradation water quality standard applicable to all projects in Oregon. The purpose of this antidegradation standard is to ". . . guide decisions that affect water quality such that unnecessary further degradation from new or increased point and nonpoint sources of pollution is prevented, and to protect, maintain, and enhance existing surface water quality to ensure the full protection of all existing beneficial uses." OAR 340-41-0004(1)(emphasis added). It is unclear how adding sediment, temperature, turbidity, heavy metals, and likely other residual contaminants will in any way "protect, maintain, and enhance" existing water quality, or "ensure the full protection of all existing beneficial uses." In any event, this key water quality standard is not even mentioned in any of the materials that Cascade has submitted in its permit application. Unless or until Cascade demonstrates that its expansion project will comply with this antidegradation water quality standard, DEQ must deny the 1200-C permit.

For Water Quality Limited waters, such as those at issue in this instance, the standard prohibits **any** further degradation, unless explicitly authorized in certain limited circumstances **and** after detailed findings have been made. *See*, OAR 340-41-0004. The applicant here has not provided **any** discussion of, much less an analysis of, this standard or how it is or is not met.

Conclusion

NEDC urges DEQ to deny the 1200-C permit and require Cascade to apply instead for an individual NPDES permit for these construction stormwater discharges. In the alternative, DEQ must decline to authorize the 1200-C permit until Cascade provides the information necessary to resolve the issues identified above, as required by DEQ's own 1200-C permit.

Sincerely,

Marla Nelson
Staff Attorney