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Oregon Environmental Quality Commission
c/o Debra Sturdevant
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Submitted Via Email to: waterqualitystandards@deq.state.or.us

RE: Northwest Environmental Advocates' petition to Environmental Quality Commission to initiate rulemaking regarding pesticides.

Environmental Quality Commission:

Columbia Riverkeeper (Riverkeeper) submits these comments in support of Northwest Environmental Advocates' (NWEA) petition to the Oregon Environmental Quality Commission (EQC) for rulemaking and other actions regarding the regulation of pesticides. Our organization is deeply invested in clean water, strong salmon runs, and healthy communities. Riverkeeper represents over 3,000 members in Oregon and Washington and regularly comments on federal, state, and local decisions that impact the Columbia. We submit the following comments on NWEA's petition based on the critical importance of protecting Oregon's iconic salmon runs and other species threatened by pesticide pollution.

Multiple Endangered Species Act (ESA) listings in Oregon underscore why the EQC must enact stronger controls on pesticide pollutants. Thirteen stocks of salmon and steelhead, green sturgeon, and eulachon are listed as threatened or endangered under the ESA. Numerous amphibian species—which are particularly vulnerable to pesticides—are listed, 'warrant' listing, or are in serious decline. Oregon's failure to sufficiently regulate pesticides that kill and harm listed species exposes Oregon and NPDES permittees to liability under ESA Section 9.

The EQC has tremendous authority to improve the health of Oregon's waterways. In turn, Riverkeeper urges the EQC to act on NWEA's petition and update Oregon's water quality standards, NPDES permits, and agency protocols to reflect current scientific understanding of the threats that pesticides pose to ESA-listed species.

I. Oregon's current pesticide regulations jeopardize the survival of listed salmonids.

The National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (FWS) are federal agencies charged with implementing the ESA and ensuring the continued

survival and recovery of listed species. Between September 1989 and July 2012, NMFS and FWS (collectively “the Services”) prepared seven Biological Opinions (BiOps) exploring the effects of numerous pesticides on various listed fish species.¹ The Services determined that under-regulated pesticide use jeopardizes the survival of several listed species and adversely modifies their critical habitat.² As part of the BiOps, the Services proposed Reasonable and Prudent Alternatives (RPAs)³—essentially, protocols for pesticide use and application that will help protect listed species and their critical habitat. The RPAs are the *absolute minimum* measures necessary to keep listed species from slipping closer to extinction, as determined by expert scientific agencies with vast experience in species preservation.

II. The EQC should incorporate the RPAs into Oregon law.

A. *The EQC should revise Oregon’s Water Quality Standards to reflect the RPAs.*

The narrative criteria in Oregon’s water quality standards are too vague to meaningfully regulate pesticide discharges. States must designate beneficial uses of waterways and adopt narrative and numeric criteria to protect those uses.⁴ Oregon has designated “Fish & Aquatic Life” and “Fishing” as beneficial uses in most waterways.⁵ Unfortunately, there are few numeric criteria to protect these uses from pesticides, and Oregon’s narrative criteria are unintelligibly vague. Oregon’s narrative criteria pertaining to pesticide discharges essentially say: “don’t discharge toxic pollutants in toxic concentrations,”⁶ and “use the ‘best practicable treatment and/or control’ when discharging toxics.”⁷ These are nice goals, but they provide no practical guidance for ensuring that pesticides will not impair the beneficial uses of Oregon’s waterways.

Riverkeeper urges the EQC to initiate rulemaking to adopt the RPAs as required practices to implement Oregon’s narrative criteria for toxics. Federal law requires that when a state adopts narrative criteria, the state must explain how it will regulate point source discharges of toxics in water quality limited segments based on the narrative criteria.⁸ Under the NPDES 2300A pesticides general permit, Oregon regulates point source discharges of toxic pesticides. However, Oregon has not explained how its narrative toxics criteria should be applied to regulate pesticide discharges as required by 40 C.F.R. § 131.11(a)(2). Granting NWEA’s petition and

¹ NWEA Petition, Appendix D (summarizing NMFS’ BiOps).

² *Id.*

³ NWEA Petition, Appendices B and F.

⁴ 33 U.S.C. §§ 1313(c)(2), 1313(d)(4)(B); 40 C.F.R. §§ 131.10, 131.11.

⁵ Or. Admin. R. Chapter 340, Division 41, Tables 101A-340A.

⁶ Or. Admin. R. 340-041-0033(2).

⁷ Or. Admin. R. 340-041-0007(1).

⁸ 40 C.F.R. § 131.11(a)(2).

adopting the RPAs will help Oregon comply with federal law and clarify the responsibilities of regulators and permittees in future NPDES permits.

B. The EQC should incorporate the RPAs into Oregon's NPDES permits and agricultural and forestry regulations.

Oregon should re-open and revise the NPDES 2300A pesticides general permit, and any other individual NPDES permits regulating pesticides that use similar language. The 2300A permit fails to include clear limits on pesticide discharges. The only 'restriction' in the 2300A permit is that discharges "must not cause or contribute to the violation of water quality standards." In practice, DEQ is hard pressed to determine what this 'limit' actually means or when it is being exceeded. Pursuant to 40 C.F.R. § 131.11(a)(2), Oregon should revise the 2300A permit (and any other NPDES permits like it) to clearly explain the approved procedures for applying and discharging pesticides. Incorporating the RPAs' procedures into the revised 2300A permit will protect aquatic life and give meaningful guidance to permittees.

To deal comprehensively with the threats that pesticides pose to listed species, Oregon agencies including the Oregon Department of Agriculture (ODA) and Oregon Department of Forestry (ODF) must also revise their regulations and practices. Riverkeeper supports NWEA's petition, which asks the EQC to petition ODA and ODF to incorporate the RPAs into these agencies' rules. Specifically, the EQC should request that ODA adopt the RPAs by incorporating them into ODA's Agricultural Water Quality Management Area Rules and by prohibiting the sale or use of certain pesticides as directed by the RPAs. The EQC should also petition ODF to adopt the changes recommended by NWEA to ODF's rule OAR 629-620-0000. Oregon's agricultural and forestry industries use massive quantities of pesticides; to protect species on the brink of extinction, DEQ must work with ODF and ODA to revise pesticide regulations.

III. Oregon's current pesticide regulations expose ODEQ, ODA, and ODF to ESA Section 9 liability.

By sanctioning pesticides and pesticide application methods that cause the take of threatened⁹ and endangered species, Oregon agencies are liable for taking listed species in violation of ESA Section 9. Take, under the ESA, "means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."¹⁰ "Harm" in the definition of 'take' means "significant habitat modification or degradation [which] actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."¹¹ It is unquestionable that pesticide exposure can directly cause

⁹ The ESA does not automatically prohibit the take of threatened species. 16 U.S.C. § 1538(a)(1)(B). However, NMFS has promulgated a rule prohibiting taking threatened anadromous salmonids. 16 U.S.C. § 1533(d); 73 Fed. Reg. 7,816, 7,829-30 (Feb. 11, 2008).

¹⁰ 16 U.S.C. § 1532(19).

take by killing and sickening listed aquatic organisms.¹² Because many pesticides are endocrine disrupters which severely impact the reproductive development of listed species, pesticides harm—and therefore take—listed species by significantly impairing an essential behavioral pattern, breeding. Oregon has no meaningful or intelligible restriction on the use of most pesticides. Consequently, Oregon is authorizing private parties to use pesticides in ways that cause take. When a state agency’s regulations allow private parties to cause take, the state agency is liable for taking listed species in violation of ESA Section 9.¹³ To avoid Section 9 liability, Oregon must place clear and protective restriction—like those found in the RPAs—on the use of pesticides.

Conclusion

For the reasons described above, and for the reasons explained in NWEA’s petition, Riverkeeper urges the EQC to grant the petition and ensure that pesticide use will not damage Oregon’s renowned waterways and aquatic life.

Sincerely,

Miles Johnson
Clean Water Attorney, Columbia Riverkeeper¹⁴

¹¹ See 50 C.F.R. § 17.3 and 50 C.F.R. § 222.102; *see also* *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 697, 700 n.13 (1995).

¹² The FWS notes that acute effects are both easily measured and severe: “[s]ignificant fish and bird kills have resulted from the legal application of pesticides, with millions of fish and birds estimated to die from pesticide exposure each year.” USF&WS, *Pesticides and Wildlife, Environmental Contaminants Program*, (available online at: <http://www.fws.gov/contaminants/Issues/Pesticides.cfm>).

¹³ *See* *Loggerhead Turtle v. County Council of Volusia County, Fla.*, 148 F.3d 1231, 1247–55 (11th Cir. 1998); *see also* *Strahan v. Coxe*, 127 F.3d 155, 158, 163 (1st Cir. 1997).

¹⁴ Oregon State Bar results pending.