

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

COLUMBIA RIVERKEEPER, a Washington non-profit corporation, NORTHWEST ENVIRONMENTAL DEFENSE CENTER, an Oregon non-profit corporation, and MARK RISKEDAHL, an individual,

Petitioners,

v.

OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY, an agency of the State of Oregon, OREGON ENVIRONMENTAL QUALITY COMMISSION, an agency of the State of Oregon, and RICHARD WHITMAN, in his capacity as Director of Oregon Department of Environmental Quality,

Respondents,

OREGON INDUSTRIAL STORMWATER GROUP,

Intervenors.

Case No. 17CV42254

CONSENT JUDGMENT

ORS 20.140 - State fees deferred at filing

Petitioners Columbia Riverkeeper, Northwest Environmental Defense Center (“NEDC”), and Mark Riskedahl (collectively, “Petitioners”); Respondents Oregon Department of Environmental Quality (“DEQ”), Oregon Environmental Quality Commission (“EQC”), and Richard Whitman (collectively, “Respondents”); and intervenor Oregon Industrial Stormwater Group (“OISG”), wish to resolve this matter without further litigation and have agreed to entry of this Consent Judgment without admission or adjudication of any issue of fact or law. The Parties accordingly hereby agree and stipulate as follows:

1 **A. JURISDICTION AND VENUE**

2 1. The agency action challenged by Petitioners is DEQ’s issuance of National
3 Pollutant Discharge Elimination System Permit No. 1200-Z, dated August 1, 2017. The 1200-Z
4 Permit is a final agency order in “other than contested cases” that is reviewable under ORS
5 183.484.

6 2. This Court has jurisdiction over, and is the appropriate venue for, this Petition for
7 Review pursuant to ORS 183.490 because all of the parties have their principal place of business
8 in or reside in Multnomah County, Oregon, and because the cause of suit, or some part thereof,
9 arose in Multnomah County, Oregon. *See* ORS 14.030; ORS 14.060.

10 3. The obligations set forth herein are consistent with, and in furtherance of, the
11 purposes of the federal Clean Water Act (33 U.S.C. § 1251 *et seq.*) and the Oregon
12 Administrative Procedures Act (ORS § 183.310 *et seq.*).

13 **B. DEFINITIONS**

14 4. Whenever terms listed below are used in this Consent Judgment, the following
15 definitions apply:

- 16 a. “1200-Z Permit” means NPDES Permit No. 1200-Z.
- 17 b. “DEQ” means the Oregon Department of Environmental Quality.
- 18 c. “NPDES” means the National Pollutant Discharge Elimination System.

19 **C. IMMEDIATE REVISIONS TO THE 1200-Z PERMIT**

20 5. By October 31, 2018, DEQ will issue a final revised 1200-Z Permit in accordance
21 with ORS 183.484(4) that affirms or modifies the 1200-Z Permit issued on August 1, 2017.

22 **D. FUTURE REVISIONS TO THE 1200-Z PERMIT**

23 6. By October 30, 2020, DEQ will release for public review and comment a revised
24 draft 1200-Z Permit.

25 7. By March 30, 2021, DEQ will issue a final Revised 1200-Z Permit along with
26 written responses to public comments received on the draft Revised 1200-Z Permit.

1 **E. RELEASE BY PETITIONERS AND RESERVATION OF RIGHTS**

2 8. Upon entry, this Consent Judgment shall constitute a complete and final
3 settlement of Petitioners' Claim for Relief, subject to the express reservations of rights in
4 paragraphs 10 and 11 herein.

5 9. Subject to paragraphs 10 and 11 herein, Petitioners and Intervenor hereby forever
6 release, discharge, and covenant not to assert against DEQ (by way of the commencement of an
7 action, the joinder of DEQ in an existing action, or in any other fashion) any and all claims,
8 causes of action, suits or demands of any kind whatsoever in law or in equity, that Petitioners or
9 Intervenor may have had, or may now or hereafter have, against DEQ based upon DEQ's
10 issuance of General NPDES Permit No. 1200-Z, dated August 1, 2017.

11 10. Nothing in this Consent Judgment shall limit Petitioners' or Intervenor's rights to
12 assert any claim for relief, and make any legal or factual assertions necessary to support a claim,
13 in the event that the Parties are before the Court pursuant to section I ("Dispute Resolution") or
14 section J ("Modifications").

15 11. Nothing in this Consent Judgment shall be deemed to waive or limit Petitioners'
16 or Intervenor's right to challenge in a separate administrative or judicial action the merits of any
17 separate agency action taken by DEQ, including but not limited to:

- 18 a. Any affirmation or modification of the 1200-Z Permit pursuant to paragraph 5
19 of this Consent Judgment;
- 20 b. The Revised 1200-Z Permit pursuant to paragraph 7 of this Consent
21 Judgment; or
- 22 c. Any future issuance, reissuance, or modification of the 1200-Z Permit.

23 **F. PAYMENT OF PETITIONERS' LITIGATION COSTS**

24 12. In full and complete satisfaction of Petitioners' claim for an award of their
25 reasonable attorney's fees and costs pursuant to ORS § 183.497, Respondents agree to pay
26 Petitioners jointly the total sum of \$38,000, and Intervenor OISG agrees to contribute to this

1 amount by paying Petitioners jointly the total sum of \$8,000. The obligation of Intervenor
2 OISG under this paragraph and paragraph 13 of this Consent Judgment shall be void and of no
3 effect if the affirmation or modification of the 1200-Z Permit pursuant to paragraph 5 of this
4 Consent Judgment is materially inconsistent with the revisions specified in Section A of the
5 Settlement Agreement dated August 15, 2018, among the Parties to this Consent Judgment.

6 13. Within one week of entry of the Consent Judgment, Petitioners will provide DEQ
7 and Intervenor OISG with the information necessary to electronically transfer these funds to
8 Petitioners' attorneys, Earthrise Law Center. This electronic transfer shall be made by
9 Respondents within 30 days of the entry of this Consent Judgment and by Intervenor OISG
10 within 10 days after DEQ's issuance of the revised 1200-Z Permit pursuant to paragraph 5 of this
11 Consent Judgment, subject to the qualification stated in paragraph 12 of this Consent Judgment.

12 **G. FORCE MAJEURE**

13 14. The Parties recognize that the obligations included in this Consent Judgment
14 could be delayed by an event of Force Majeure. Such situations include, but are not limited to, a
15 government shut-down or currently unforeseen catastrophic environmental events requiring
16 immediate and/or time-consuming response by DEQ. Should a delay occur due to such
17 circumstances, any resulting failure by DEQ to meet the timelines set forth in this Consent
18 Judgment shall not constitute a failure to comply with the terms of this Consent Judgment. If an
19 event of Force Majeure occurs, the Parties will meet and make a good faith effort to renegotiate
20 the timelines set forth in this Consent Judgment. If the Parties cannot reach agreement, the
21 dissatisfied party may invoke the Dispute Resolution procedure set forth in section I.

22 **H. CONTINUING JURISDICTION**

23 15. This Court shall retain jurisdiction over this matter and allow this action to be
24 reopened for the purpose of enabling the Parties to this Consent Judgment to apply to the Court
25 for any further order that may be necessary to construe, carry out, enforce compliance, or resolve
26 any dispute regarding the terms or conditions of this Consent Judgment, and for granting any

1 further relief as the interests of justice may require, except as provided in paragraph 17.

2 16. Nothing in the terms of this Consent Judgment shall be construed to confer upon
3 this Court jurisdiction to review any decision, either procedural or substantive, to be made by
4 DEQ pursuant to this Consent Judgment, except for the purpose of determining DEQ's
5 compliance with this Consent Judgment, and nothing in this Consent Judgment shall be deemed
6 to alter or affect the standards for judicial review of any final DEQ action.

7 **I. DISPUTE RESOLUTION**

8 17. Any allegation of an act or omission in breach of the Consent Judgment may be
9 raised by any party through the dispute resolution process in this Section.

10 18. In the event that the Parties cannot resolve on their own disputes regarding
11 provisions of this Consent Judgment, the Parties may request that the Court appoint a settlement
12 judge to work with the Parties to reach agreement. In the event that the Parties do not reach a
13 mutually acceptable solution, any Party may move the Court for relief. The non-moving Party
14 shall have the opportunity to respond to such motion, and any Party may seek oral argument
15 before the Court.

16 19. In the event of a disagreement between the Parties concerning the interpretation of
17 any provision of this Consent Judgment or performance thereof, the dissatisfied Party shall
18 provide the other Parties with written notice of the dispute and a request for negotiations. If the
19 Parties cannot resolve such disagreement within thirty days after receipt of the notice by the
20 dissatisfied Party, then any Party may move the Court to resolve the dispute. The non-moving
21 Parties shall have the opportunity to respond to such motion, and any Party may seek oral
22 argument before the Court.

23 20. The Court shall retain jurisdiction to enforce the Consent Judgment, and may
24 impose such remedies as it determines are just, equitable, and authorized by law.

25 **J. MODIFICATIONS**

26 21. Any term set forth in this Consent Judgment may be modified only upon written

1 agreement of the Parties and approval of the Court.

2 22. If any Party seeks to modify the terms of this Consent Judgment, that Party shall
3 provide the other Parties with written notice of the proposed modifications and a request for
4 negotiations. The Parties agree to negotiate in good faith regarding any proposed modification of
5 the Consent Judgment. If the Parties agree to a proposed modification, the Parties shall jointly
6 notify the Court of the modification and request Court approval. If the Parties cannot reach
7 agreement regarding the proposed modification within thirty days after receipt of the notice of
8 the proposed modification by the notifying Party, then any Party may move the Court for such
9 modification. The non-moving Parties shall have the opportunity to respond to such motion, and
10 any Party may seek oral argument before the Court.

11 **K. EFFECTIVE DATE**

12 23. This Consent Judgment shall become effective upon the date of its entry by the
13 Court. If for any reason the Court does not enter this Consent Judgment, the obligations set forth
14 in this Consent Judgment are null and void.

15 **L. TERMINATION OF CONSENT JUDGMENT AND DISMISSAL OF CLAIM**

16 24. This Consent Judgment shall remain in full force and effect until DEQ has (1)
17 issued a final order affirming or modifying the 1200-Z Permit as specified in paragraph 5; (2)
18 issued a final Revised 1200-Z Permit as specified in paragraph 7; and (3) completed payment of
19 Petitioners' reasonable attorney's fees and costs pursuant to paragraph 12. Upon completion of
20 all of those actions, the Parties shall file a joint motion seeking termination of this Consent
21 Judgment and dismissal of the Petition with prejudice.

22 **M. NOTICE AND CORRESPONDENCE**

23 25. Any notice, including correspondence, required or made with respect to this
24 Consent Judgment, shall be in writing and shall be effective upon receipt. For any matter relating
25 to this Consent Judgment, the contact persons are:

26

For Petitioners:

James N. Saul
Earthrise Law Center at Lewis & Clark Law School
10015 SW Terwilliger Blvd.
Portland, OR 97219

Law Office of Karl G. Anuta, P.C.
735 SW First Ave., 2nd Floor
Portland, OR 97204

For Respondents:

Diane Lloyd
Sr. Assistant Attorney General
Oregon Department of Justice
100 SW Market St
Portland, OR 97201

Director
Oregon Department of Environmental Quality
700 Multnomah St., Suite 600
Portland, OR 97232

For OISG:

Michael R. Campbell
Stoel Rives LLP
760 SW Ninth Ave., Suite 3000
Portland, OR 97205

N. MUTUAL DRAFTING AND CONSTRUCTION

26. It is hereby expressly understood and agreed that this Consent Judgment was jointly drafted by the Parties. Accordingly, the Parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Consent Judgment.

O. EFFECT OF CONSENT JUDGMENT

27. This Consent Judgment shall not constitute an admission or evidence of any issue of fact or law, wrongdoing, misconduct, or liability on the part of any Party.

P. SCOPE OF CONSENT JUDGMENT

28. Except as expressly provided in this Consent Judgment, no Party waives or relinquishes any legal rights, claims, or defenses it may have regarding Petitioners' Claim for

1 Relief. Nothing in the terms of this Consent Judgment shall be construed to limit or modify the
2 discretion accorded to DEQ by statute or by general principles of administrative law. Nothing in
3 this Consent Judgment shall be construed to make any other person or entity that is not a Party to
4 this Consent Judgment a third-party beneficiary to this Consent Judgment.

5 **Q. COUNTERPARTS**

6 29. The Parties agree that this Consent Judgment may be executed in one or more
7 counterparts, each of which shall be deemed an original, but all of which shall constitute one and
8 the same original. Signatures exchanged via facsimile or email shall have the same force and
9 effect as the original signatures.

10 **R. ENTIRE AGREEMENT**

11 30. This Consent Judgment represents the entire agreement among the Parties for
12 matters covered herein. All prior conversations, meetings, discussions, drafts, and writings of
13 any kind regarding those matters are specifically superseded by this Consent Judgment.

14 **S. APPLICABLE LAW**

15 31. This Consent Judgment shall be governed by and construed under the laws of
16 Oregon.

17 **T. SEVERABILITY**

18 32. Subsequent to entry of this Consent Judgment by the Court, if any term,
19 condition, or provision of this Consent Judgment, or the application thereof to any person or
20 circumstance, shall to any extent be held by a court of competent jurisdiction or rendered by the
21 adoption of a statute by the State of Oregon or by the United States invalid, void, or
22 unenforceable, the remainder of the terms, covenants, conditions, or provisions of this Consent
23 Judgment, or the application thereof to any person or circumstance, shall remain in full force and
24 effect and shall in no way be affected, impaired, or invalidated thereby.

25 **U. COMPLIANCE WITH OTHER LAWS**

26 33. No provision in this Consent Judgment shall be interpreted as or constitute a

1 commitment or requirement that DEQ take action in contravention of the Oregon Administrative
2 Procedures Act or any other law or regulation, either substantive or procedural.

3 34. No provision of this Consent Judgment shall be interpreted as or constitute a
4 commitment or requirement that DEQ pay funds in contravention of any applicable provision of
5 law.

6 **V. REPRESENTATIVE AUTHORITY**

7 35. Each person signing this Consent Judgment certifies that he or she has been duly
8 authorized to enter into and execute the terms and conditions of this Consent Judgment by the
9 Party on whose behalf it is indicated that the person is signing, and to legally bind such party to
10 this Consent Judgment. By signature below, all of the Parties consent to the entry of this Consent
11 Judgment.

12 **W. FUNDING**

13 36. Nothing in this Agreement will be construed as permitting any violation of Article
14 XI, Section 7 of the Oregon Constitution or any other law regulating liabilities or monetary
15 obligations of the State of Oregon. DEQ will make diligent efforts to obtain necessary funding,
16 appropriations, limitations, allotments, or other expenditure authority.

17 IT IS SO ORDERED this _____th day of _____, 2018.

18

19 _____

20

21

22

23

24

25

26

1 For Petitioners Columbia Riverkeeper, Northwest
2 Environmental Defense Center, and Mark Riskedahl:

3 By: _____ Date: _____

4 James N. Saul
5 Earthrise Law Center at
6 Lewis & Clark School
7 10015 SW Terwilliger Blvd.
8 Portland, OR 97219

8 For Respondents Department of Environmental Quality,
9 Environmental Quality Commission, and Richard Whitman:

10 By: *Zeak H. Feldon* Date: *8/14/18*
11 *Deputy Director, FOV*

12 Richard Whitman
13 Director
14 Oregon Department of Environmental Quality
15 700 Multnomah St., Suite 600
16 Portland, OR 97232

15 For Intervenor Oregon Industrial Stormwater Group:

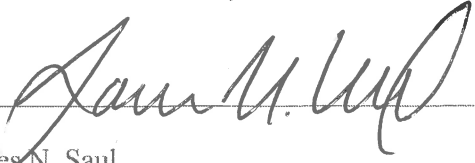
16 By: *Michael R. Campbell* Date: *15 August 2018*
17

18 Michael R. Campbell
19 Stoel Rives LLP
20 760 SW Ninth Ave., Suite 3000
21 Portland, OR 97205

1 For Petitioners Columbia Riverkeeper, Northwest
2 Environmental Defense Center, and Mark Riskedahl:

3 By: _____

Date: _____

4 
5 James N. Saul
6 Earthrise Law Center at
7 Lewis & Clark School
8 10015 SW Terwilliger Blvd.
9 Portland, OR 97219

8/16/18

8 For Respondents Department of Environmental Quality,
9 Environmental Quality Commission, and Richard Whitman:

10 By: _____

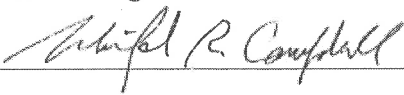
Date: _____

11 Richard Whitman
12 Director
13 Oregon Department of Environmental Quality
14 700 Multnomah St., Suite 600
15 Portland, OR 97232

16 For Intervenor Oregon Industrial Stormwater Group:

17 By: _____

Date: _____

18 
19 Michael R. Campbell
20 Stoel Rives LLP
21 760 SW Ninth Ave., Suite 3000
22 Portland, OR 97205

15 August 2018

1 **CERTIFICATE OF READINESS**

2 This proposed **CONSENT JUDGMENT** is ready for judicial signature because:

3 1. Each party affected by this order or judgment has stipulated to the order or
4 judgment, as shown by each opposing party's signature on the document being submitted.

5 2. Each party affected by this order or judgment has approved the order or judgment,
6 as shown by each party's signature on the document being submitted or by written confirmation
7 of approval sent to me.

8 3. I have served a copy of this order or judgment on each party entitled to service
9 and:

10 a. No objection has been served on me.

11 b. I received objections that I could not resolve with a party despite
12 reasonable efforts to do so. I have filed a copy of the objections I received and indicated which
13 objections remain unresolved.

14 c. After conferring about objections, [role and name of objecting party]
15 agreed to independently file any remaining objection.

16 4. Service is not required pursuant to subsection (3) of this rule, or by statute, rule,
17 or otherwise.

18 5. This is a proposed judgment that includes an award of punitive damages and
19 notice has been served on the Director of the Crime Victims' Assistance Section as required by
20 subsection (5) of this rule.

21 6. Other:_____.

22 DATED this 17th day of August, 2018.

23 s/ Scott Kaplan
24 SCOTT KAPLAN #913350
25 Senior Assistant Attorney General
26 Trial Attorney
scott.kaplan@doj.state.or.us
Attorneys for Respondents

1 **CERTIFICATE OF SERVICE**

2 I certify that on August 17, 2018, I served the foregoing EX PARTE STIPULATED
3 MOTION FOR ENTRY OF CONSENT JUDGMENT and PROPOSED CONSENT
4 JUDGMENT upon the parties hereto by the method indicated below, and addressed to the
5 following:

6 Law Office of Karl G. Anuta, P.C.
7 735 SW First Avenue, 2nd Floor
8 Portland, OR 97204
9 *Attorneys for Petitioners*

HAND DELIVERY
 MAIL DELIVERY
 E-MAIL
 OVERNIGHT MAIL
 SERVED BY E-FILING

10 Earthrise Law Center
11 10015 SW Terwilliger Blvd.
12 Portland, OR 97219
13 *Attorneys for Petitioners*

HAND DELIVERY
 MAIL DELIVERY
 E-MAIL
 OVERNIGHT MAIL
 SERVED BY E-FILING

14
15 *s/ Scott Kaplan*
16 SCOTT KAPLAN #913350
17 FRANK HAMMOND #852239
18 Senior Assistant Attorney General
19 Trial Attorneys
20 Tel (971) 673-1880
21 Fax (971) 673-5000
22 scott.kaplan@doj.state.or.us
23 Of Attorneys for Respondents
24
25
26