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VIA CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

December 1, 2009

Mary Verner, Mayor  
City of Spokane  
808 W. Spokane Falls Blvd.  
Spokane, Washington 99201

Dave Mandyke, Division Director  
City of Spokane, Public Works & Utilities  
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Dale Arnold, Director  
Waste Water Management  
City of Spokane  
909 E. Sprague  
Spokane, Washington 99202

**RE: Notice of Violation and Intent to File Suit Under the Federal Clean Water Act**

Dear Notice Recipients:

On behalf of the Spokane Riverkeeper (“Riverkeeper”) of the Center for Justice, I am writing to provide notice of Riverkeeper’s intent to sue for violations of the Federal Water Pollution Control Act (the “Clean Water Act” or “CWA”), 33 U.S.C. §§ 1251 *et seq.*, the Eastern Washington Phase II Municipal Storm Water Permit (the “Phase II Permit”)<sup>1</sup>, and National Pollution Discharge Elimination System (“NPDES”) permit No. WA-002447-3 issued for the City’s Wastewater Treatment Plant (“WWTP”) and Combined Sewer Overflow (“CSO”) System (“WWTP Permit”)<sup>2</sup>, committed by the City of Spokane (the “City”). This letter constitutes a Notice of Violation and Intent to File Suit (“Notice Letter”) against the City pursuant to Section 505 of the Clean Water Act, 33 U.S.C. § 1365.

While Riverkeeper is interested in addressing this problem in a cooperative manner, immediate action is needed to achieve long-term compliance with environmental laws and to improve the water quality of the Spokane River (the “River”). In an effort to resolve this problem cooperatively, the City Attorney was informally made aware of this issue in mid-October during a meeting with Breean Beggs. The City was asked for its input regarding options to address this issue. To date, further discussions with the City on this issue have not been scheduled. However, the Riverkeeper remains interested in an amicable resolution of this matter in a manner that complies with the law and protects the Spokane River.

1 Available at <http://www.ecy.wa.gov/programs/wq/stormwater/municipal/phaseiiEwa/ewph2permit.html>.

2 Available at [http://www.ecy.wa.gov/programs/wq/permits/eastern\\_permits.html#S](http://www.ecy.wa.gov/programs/wq/permits/eastern_permits.html#S).

Based on information currently available to Riverkeeper, the City is not complying with the substantive and procedural requirements of the Clean Water Act, the Phase II Permit, and the WWTP Permit. Specifically, the City is causing and contributing to exceedances of Water Quality Standards (“WQS”) and Objectives in receiving waters by discharging contaminated storm water and urban runoff from the City’s Municipal Separate Storm Sewer System (“MS4”) and CSO System; including the discharge of polychlorinated biphenyls (“PCBs”) into the Spokane River. Any violation of the Phase II Permit and the WWTP Permit constitutes a violation of the CWA, its regulations, and the State of Washington Water Pollution Control Law and is grounds for an enforcement action. *See* 40 C.F.R. § 122.41(a).

Pursuant to Section 505 of the CWA, “any citizen may commence a civil action on his own behalf” against any governmental instrumentality that is “alleged to be in violation of (A) an effluent standard or limitation under [the CWA] or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.” 33 U.S.C. §§ 1365(a) & (a)(1). The CWA gives the Federal Courts the authority to enforce such a standard or limitation, or order with respect to such standard and limitation, and to apply appropriate civil penalties under 33 U.S.C. §§ 1319(d) & 1365(a).

Section 505(b) of the CWA, 33 U.S.C. § 1365(b), requires a citizen to give notice of the alleged violations and his or her intent to sue 60-days prior to the initiation of a civil action under Section 505(a) of the CWA, 33 U.S.C. § 1365(a). You are formally placed on notice that following 60-days from the date of this Notice Letter, Riverkeeper intends to file suit in Federal Court against the City and against any other persons identified by Riverkeeper as being responsible for the violations described in this Notice Letter. Notice must also be given to the Chief Administrative Officer of the water pollution control agency for the State in which the violation is alleged to have occurred, the Administrator of the United States Environmental Protection Agency (“EPA”), and the Regional Administrator of the EPA for the State in which the violations are alleged to have occurred. 40 C.F.R. § 135.2(a).

## **I. FACTUAL BACKGROUND**

### **A. Spokane Riverkeeper**

Riverkeeper is a program of the Center for Justice (“CFJ”). CFJ is a not-for-profit legal organization, which provides legal services to individuals, and public interest organizations in the Inland Northwest. CFJ works to ensure that all individuals and public interest organizations of limited means have access to justice, including a clean and healthy environment.

Riverkeeper conducts surveillance of the River and reaches out to river users who share its commitment to a river that is swimmable, fishable, and properly regulated. To further these goals, Riverkeeper actively seeks Federal and State agency implementation of the Clean Water Act and, when necessary, directly initiates enforcement actions on behalf of itself, its members, and the public.

Riverkeeper serves as the eyes, ears, and public voice of the Spokane River. Riverkeeper members in the Spokane area use and enjoy the River into which the City is illegally discharging pollutants. The River provides recreational opportunities in fishing and whitewater rafting, kayaking, and canoeing. Numerous public parks lie along its banks as well. Additionally, the River is of great cultural significance to the Native American Tribes, who have historically and currently inhabit the area. The discharge of pollutants by the City impairs each of these uses. Thus, Riverkeeper's interests have been, are being, and will continue to be adversely affected by the City's failure to comply with the Phase II Permit, the WWTP Permit, and the Clean Water Act.

The Riverkeeper may be contacted at:

Rick Eichstaedt, Spokane Riverkeeper  
Center for Justice  
35 West Main, Suite 300  
Spokane, Washington 99201  
Phone: (509) 835-5211

## **B. The City of Spokane's Storm Sewer System**

The Federal government has recognized that discharges from municipal sewer systems, such as the City's MS4, are major sources of water contamination, thus it requires regional and local governments to obtain an NPDES permit for those discharges. The State of Washington, pursuant to its permitting authority under the CWA, has authorized the Department of Ecology ("DOE"), to regulate the discharge of pollutants into waters of the United States. On February 16, 2007, DOE adopted the Phase II Permit as the NPDES permit for the discharge of storm water from storm sewer systems in Eastern Washington. The City is a co-permittee under the Phase II Permit. The Phase II Permit covers the entire incorporated area of the City. *See* Phase II Permit § S1.A.1.

The City's MS4 drains storm water and urban runoff in the area. There are over 400 miles of combined sewers<sup>3</sup>, predominantly on the south side of the River, serving approximately 8,000 acres within city limits. Additionally, the City has 290 miles of separated sanitary sewer lines and approximately 130 miles of storm sewer pipes that discharge directly into the River via approximately 140 storm sewer outfalls.

There are 26 combined sewer outfall-monitoring sites in the City. Due to increased amounts of water during snowmelt and heavy precipitation events, CSO events occur, and the City discharges sewage mixed with storm water directly to the River. CSO events occur when water from weather events combines with wastewater from residential and business use, overwhelming the sewage system capacity and forcing some of the water to flow, untreated, directly to the River. Information available to Riverkeeper indicates that every time a wet

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<sup>3</sup> Combined sewers handle a combination of storm water and untreated sewage (e.g., household sewage) and filter to a sewage treatment plant. City of Spokane Wastewater Management, Storm Water Management. *See* <http://www.spokanewastewater.org/strmwtr.asp>.

weather event occurs, producing 0.25 inches or more of precipitation, the City's combined sewer system discharges untreated storm water into the River. Therefore, all pollutants, including PCBs, reach the River ecosystem at full strength. The WWTP Permit issued by DOE on April 1, 2000 regulates the City's CSO System under the CWA.

### **C. City of Spokane Wastewater Treatment Plant**

The City operates a regional wastewater treatment facility serving the City and surrounding areas of the County. The WWTP is located on a 28-acre site in northwest Spokane. The treated wastewater is discharged to the Spokane River about four miles downstream of the City center along with occasional discharges of untreated sewage during significant precipitation induced run-off events from the CSO system. The City's WWTP is regulated under the CWA by the WWTP Permit. The WWTP Permit regulates the effluent discharge from the City's outfall, and regulates the CSO system at each of the 26 CSO outfalls.

### **D. Impacts of Urban Storm Water in the Spokane Area**

Storm water is a significant contributor to water pollution in the River. Storm water carries oil and dirt from vehicles and roads, pollutants from industrial facilities, silt and sediment from construction projects and natural erosion, wild and domestic animal feces, and chemicals from asphalt, concrete, lawns, roofs, buildings and every other object that is out in the rain. These chemicals and other pollutants are washed into the storm drain system, which discharges directly to the Spokane River, and the CSO system, which discharges directly to the River when it rains more than 0.25 inches.

One of the more serious chemical pollution problems caused by storm water discharges is PCB pollution. PCBs are industrial compounds that were manufactured until the late 1970's and were used in heavy industrial machinery. These materials were frequently used as lubricants and insulating oils, and used in paints, caulking and sealant materials. Older buildings and equipment may still contain PCBs. They do not remain fixed and can leak out of machinery such as pumps and transformers and find their way into the environment. PCBs from these products are released in greater quantities in industrial areas where PCBs were frequently used, and in some places, still reside in older equipment.

PCBs are almost insoluble in water. Very low levels of PCBs may be measured as directly dissolved in water, but most of the PCBs attach to sediment and particles that become suspended in water. Eventually these particles are either washed to the River or deposited in slower moving areas, such as behind dams or in backwaters. PCBs in sediment then can be taken up by animals that live in the sediment or animals, such as fish, that take in sediment along with prey. PCBs accumulate in aquatic animals at levels much higher than those found in the water or sediments and with levels increasing in predatory animals. As a result, many fish become contaminated with PCBs at levels that pose a health threat to people (or wildlife) who consume these fish. The process of PCBs contaminating other organisms after attaching to sediment is known as bioconcentration.

Consequently, people who ingest fish may be exposed to PCBs that have bioaccumulated in the fish. The Washington State Department of Health and the Spokane Regional Health District have issued an updated 2009 health advisory for consumption of fish from the River due to elevated PCB levels in fish tissue. Additionally, PCBs have been shown to cause cancer and a number of serious non-cancer health conditions, including effects on the immune, reproductive, nervous, and endocrine systems.<sup>4</sup>

The City is “the largest continuing source of PCBs to the River.”<sup>5</sup> “[The River] contains elevated levels of PCBs in surface water and sediments, and in effluents and storm water discharged to the [R]iver.” *PCB Report* at 1. The City does not have a Clean Water Act permit that authorizes discharges of PCBs to the River.

## II. STATUTORY BACKGROUND

### A. The Clean Water Act

In 1972, Congress amended the Federal Water Pollution Control Act of 1948 to remedy the historically unchecked degradation of the Nation’s waters. Congress set forth the CWA’s primary objective to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a); *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). The introductory sections of the CWA established the ambitious goal of eliminating the discharge of pollutants into navigable waters by 1985, and an interim goal of achieving fishable and swimmable conditions, wherever possible, by 1983. 33 U.S.C. §§ 1251(a)(1-2). Because of the serious threats imposed by storm water runoff, Congress amended the Clean Water Act in 1987 to include storm water permitting regulations. *See* 33 U.S.C. § 1342.

The Clean Water Act specifically prohibits the discharge of any pollutant by any person except in compliance with enumerated sections of the CWA. 33 U.S.C. § 1311(a). As such, discharge of pollutants to waters of the United States is allowed only pursuant to an NPDES permit issued by the EPA or by an EPA-delegated State-permitting authority, such as Washington. *Id.*

Section 402(p) of the CWA establishes a framework for regulating municipal storm water discharges under the NPDES scheme. 33 U.S.C. § 1342(p). NPDES permits issued for discharges from municipal storm sewers “require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator . . . determines appropriate for the control of such pollutants.” *Id.*; *see also* 40 C.F.R. § 122.44(d)(1); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166 (9th Cir. 1999) (“EPA has

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<sup>4</sup> *See* <http://www.epa.gov/epawaste/hazard/tsd/pcbs/pubs/effects.htm>.

<sup>5</sup> DOE, Publ’n No. 07-03-055, Spokane River PCB TMDL Storm Water Loading Analysis Final Technical Report 2 (2007) (hereinafter “*PCB Report*”). The *PCB Report* was prepared for EPA Region 10 and DOE. The *PCB Report* refines a 2004 TMDL assessment for PCB loading estimates to the River from the City’s MS4 and identifies PCB sources for future mitigation. Available at <http://www.ecy.wa.gov/pubs/0703055.pdf>.

the authority to determine that ensuring strict compliance with State WQS is necessary to control pollutants.”)

DOE issued the Phase II and WWTP Permits pursuant to § 402(p) of the CWA and any violation of the Phase II Permit or the WWTP Permit constitutes a violation of the CWA, its regulations, and the State of Washington Water Pollution Control Law. 33 U.S.C. § 1311(a); 33 U.S.C. § 1342(p); 40 C.F.R. § 122.41(a); RCW 90.48; Permit, § G.17.

## **B. Surface Water Criteria**

Section 303(d) of the CWA, 33 U.S.C. § 1313(d), requires the State to identify surface waters that do not meet applicable WQS even after the applications of the technology-based effluent limitations required by Sections 301(b) and 306 of the CWA. All EPA-delegated States, including Washington, are required under CWA § 303(d) and Federal Regulation, 40 C.F.R. § 130.0, to prepare a list of and set priorities for water quality limited segments (also referred to as “impaired water bodies”). Washington’s CWA § 303(d) list of impaired water bodies was last revised in 2008. The 2008 CWA § 303(d) list of impaired water bodies for the State of Washington includes several sections of the Spokane River. The River is listed as impaired for PCBs, total dissolved oxygen, 2,3,7,8-TCDD and lead; pollutants commonly found in storm water runoff.

The Clean Water Act also requires that the delegated State permitting authority ensure compliance with WQS in NPDES permits. *See* 33 U.S.C. § 1313(a). WQS are comprised of the Designated Uses of the water body, e.g., water contact recreation or municipal drinking water, and the State water quality criteria or standards that must be met to maintain the Designated Use. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.3(i). Water quality criteria may be expressed numerically or with narrative descriptions of the required quality of water to support the Designated Use.<sup>6</sup> 40 C.F.R. § 131.3(b). WQS in Washington are established pursuant to RCW 90.48.010-.906.

The Designated Uses of the Spokane River are aquatic, recreational, water supply, wildlife habitat, harvesting, commerce and navigation, boating, and aesthetics. *Id.* The Designated Uses of the River are threatened or impaired by the continued discharge of contaminated storm water from the City’s MS4 and CSO system.

## **C. The Eastern Washington Phase II Municipal Storm Water Permit**

The Phase II Permit authorizes the discharge of storm water to surface waters and to ground waters of the State from municipal sewer systems owned or operated by each Permittee covered under the Phase II Permit. As the owner and operator of a regulated MS4 in Eastern Washington, the City is a designated Permittee. Phase II Permit, § S1.A.1. Section S4.A of the Phase II Permit prohibits the discharge of toxicants to waters for the State that would violate any WQS. Section S4.B of the Phase II Permit does not authorize a discharge from the MS4 that that

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<sup>6</sup> Washington’s Surface Water Criteria is available at <http://www.ecy.wa.gov/programs/wq/swqs/criteria.html>.

would be a violation Washington State surface WQS, ground WQS, sediment management standards, or human health-based criteria in the National Toxics Rule (57 Fed. Reg. 60848-60923).

The Permittee is required to reduce discharges to the maximum extent practicable (“MEP”), and to use “all known, available, and reasonable methods of prevention, control and treatment (“AKART”) to prevent and control pollution to waters of the State of Washington.” Phase II Permit, §§ S4.C & D.

Violations of either Sections S4.A or B require the Permittee to notify DOE in writing within 30 days of becoming aware, based on credible site-specific information, indicating an exceedence of a WQS. Phase II Permit, § S4.F. Following notification, DOE may require specific management practices to address the violation of WQS. *Id.*

Riverkeeper is informed and believes that the City has known since 2004, when it conducted sampling for DOE’s TMDL project that storm water discharges containing PCBs from the MS4 have caused or contributed to violations of WQS. The City’s knowledge of PCB discharge through storm water was certainly no later than 2007 when the *PCB Report* was published. Riverkeeper reviewed the City’s entire MS4 file at the DOE and at no time did the City notify DOE of any violations of a WQS, and the City did not address the PCB problem as required by Section S4.F of the Phase II Permit.

#### **D. The City’s WWTP Permit**

In 1958, the City completed construction of the storm/sanitary sewer interceptor and primary treatment system for the City and surrounding areas. Major upgrades occurred in 1977 to allow for secondary treatment and seasonal phosphorous removal. The WWTP provides wastewater service to the City, Spokane County, Millwood, Airway Heights, and Fairchild Air Force base.

The previous WWTP Permit was issued in April 1992 for a term of 5-years, which included an administrative order; with a compliance schedule that provided time for the City to implement plant modifications to meet new water quality based effluent limits for ammonia, chlorine, silver, and mercury. The permit was administratively extended in 1997.

The current WWTP Permit was issued to the City in April 2000, and has been administratively extended since 2005. The WWTP Permit prohibits discharges from the CSO locations that “cause adverse impacts that threaten characteristic uses of the receiving water as identified in the Water Quality Standards, Chapter 173-201A WAC.” WWTP Permit, Discharge Limitations, § S.13. Further, the Fact Sheet in the WWTP Permit explains that waste discharge permits “shall be conditioned such that the discharge will meet established Surface Water Quality Standards.” WWTP Permit, Fact Sheet, p. 11. The WWTP Permit also contains narrative criteria that limits “toxic, radioactive, or deleterious material concentrations below those which have the potential to adversely affect characteristic uses, cause acute or chronic

toxicity to biota, impair aesthetic values, or adversely affect human health.” WWTP Permit, Fact Sheet, p. 12.

### **III. Violations of the Clean Water Act and Specific Phase II Permit Requirements**

#### **A. Violations of CWA, 33 U.S.C. §§ 1311 & 1342 and Phase II Permit, § S4.A**

Information currently available to Riverkeeper indicates that the City has and continues to violate Phase II Permit, § S4.A, by causing and contributing to exceedances of WQS. Phase II Permit, § S4.A mandates that the City cannot violate any WQS. The City does not comply with this standard.

The City is the largest contributor of PCBs to the River. *PCB Report* at 2. DOE sampled storm water for PCBs in June 2004 as part of the Total Maximum Daily Load (“TMDL”) project. *Id.* at 4. The results from the samples show three out of four stations exceeded the allotted Washington State WQS of 14 nanograms per liter (ng/L) of PCBs. *Id.* at 6. The Avista-Mission Street Sub-basin storm water samples showed a load of 62.4 ng/L total PCBs, and the Washington Street Sub-basin had 19.9 ng/L total PCBs.<sup>7</sup> *Id.*

Storm water samples were also taken from various storm drains around the Spokane area in 2007 as a part of the *PCB Report*. *Id.* at 10. Exceedences of PCB WQS were found in eight samples on May 2, 2007; in one sample on May 21, 2007; and in six samples on June 5, 2007. *Id.*

The attached rain table lists all the days that it has rained in Spokane for the past 5-years, and therefore all days that the City has discharged PCBs in violation of the Phase II Permit. *See* Exhibit A. Therefore, every time there is a wet weather event, the City has, and continues to violate the Washington State WQS and the Phase II Permit.

The City has taken inadequate affirmative steps to eliminate the discharge of PCBs in storm water, in violation of WQS. These violations are ongoing and will continue in the future. Every day that polluted storm water enters the City’s MS4 in violation of the WQS for PCBs is a separate and distinct violation of the CWA § 301, 33 U.S.C. § 1311, and the Phase II Permit. Pursuant to § 309(d) of the Clean Water Act, the City is subject to penalties for all violations of the Phase II Permit and the CWA occurring within the past five years. 33 U.S.C. § 1319 (d).

#### **B. Violations of CWA, 33 U.S.C. §§ 1311 & 1342 and Phase II Permit, § S4.B**

Section S4.B of the Phase II Permit requires a Permittee to comply with Surface WQS (WAC 173-201A), sediment management standards (WAC 173-204) and human health-based criteria in 40 C.F.R. § 131.36(b)(1); 40 C.F.R. § 131.36(d)(14)(ii); WAC 173-201A-240(5) (Human health-based water quality criteria used by the State are contained in 40 C.F.R. §

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<sup>7</sup> The third station sampled that was over the PCB WQS was CSO #34, which will be discussed in Section IV below.

131.36). The City does not comply with these standards and thus is in violation of Phase II Permit, § S4.B.

Surface WQS regulate, among other things, the amount of toxic substances that may be legally discharged into surface waters. The regulation states that “[t]oxic substances shall not be introduced above natural background levels ... which have the potential ... to cause acute or chronic toxicity to the most sensitive biota dependent upon those waters, or adversely affect public health.” WAC 173-201A-240(1). As a toxic substance, PCBs fall under this regulation. Storm water discharges uncontrolled by the City containing abnormally high levels of PCBs have caused acute and/or chronic toxicity to the most sensitive biota dependent upon the River and adversely affected public health. Fish that live in the River have become highly toxic due to PCB exposure. People who consume the fish may be exposed to PCBs that have bioaccumulated in the fish. PCBs have been shown to cause cancer and a number of serious non-cancer health conditions, including effects on the immune, reproductive, nervous, and endocrine systems. By failing to reduce the amount of PCBs discharged into the River, the City is in violation of WAC 173-201A-240 and consequently in violation of Phase II Permit Section S4.B.

The City must also comply with sediment management standards established in WAC 173-204. When managing sediment contamination, the City must “verify whether a discharge has received all known, available, and reasonable methods of prevention, control, and treatment prior to discharge.” WAC 173-204-400(1)(c); *See* WAC 173-204-400(2). As explained more fully in the next section, the City has failed to properly test storm water discharges for PCBs in sediment and total suspended solids (“TSS”). The City is not preventing sediment discharges containing PCB pollutants. Therefore, the storm water discharges containing sediment have not received all reasonable methods of prevention and treatment in violation of WAC 173-204-400(1)(c). Further, without knowing the level of pollutants in the sediment, the City cannot analyze and verify the potential sediment impact as required by WAC 173-204-400(1)(d). Violations of WAC 173-204 constitute violations of the Phase II Permit, § S4.B.

Finally, the City must comply with the human health-based criteria established in the National Toxics Rule. The criteria were issued by EPA to Washington State in 1992. The criteria are designed to minimize the risk of adverse effects occurring to humans from chronic exposure to toxic substances through the ingestion of drinking water and contaminated fish obtained from surface waters. As established by the National Toxics Rule, the acceptable human-health criterion for PCBs is 0.00017 micrograms per liter (ug/L). 40 C.F.R. § 131.36(b)(1); 40 C.F.R. § 131.36(d)(14)(ii); WAC 173-201A-240(5) (Human health-based water quality criteria used by the State are contained in 40 C.F.R. 131.36). In 2005, the *PCBs, PBDEs, and Selected Metals in Spokane River Fish*<sup>8</sup> draft report found fish containing PCB levels from 37 – 234 ug/Kg, which is in excess of the human-health criteria established by the National Toxics Rule. The City has failed to meet the human-health criteria and is in violation of Phase II Permit Section S4.B.

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<sup>8</sup> Available at <http://www.ecy.wa.gov/pubs/0603025.pdf>.

The City has been continuously discharging polluted storm water into the MS4, which directly discharges into the River in violation of Washington State Surface WQS, State sediment management standards, and the National Toxics Rule. The City has taken inadequate affirmative steps to eliminate these violations, thus, these violations are ongoing and will continue in the future. Every day that polluted storm water enters the City's MS4 is a separate and distinct violation of Clean Water Act Section 301, 33 U.S.C. § 1311, and Phase II Permit, § S4.B. These violations will continue each day that discharges of polluted storm water enter the MS4 in violation of the requirements of the CWA and the Phase II Permit. Riverkeeper will include additional violations when additional information becomes available. The City is subject to penalties for all violations of the Clean Water Act occurring in the past five years.

**C. Violations of CWA, 33 U.S.C. §§ 1311 & 1342 and Phase II Permit, §§ S4.C & S4.D**

As a Permittee, the City is required to reduce discharges to the MEP. Phase II Permit, § S4.C. To achieve this requirement the City must use AKART. Phase II Permit, § S4.D. The information available to Riverkeeper indicates that the City is not reducing discharges of PCBs despite multi-million dollar capital projects on the MS4 and is not complying with MEP and AKART standards.

The City's Storm Water Management Plan<sup>9</sup> testing procedures do not account for PCBs in sediment runoff and TSS. PCBs are almost insoluble in water, but attach to sediment and particles that are suspended in waters. PCBs in storm water are more likely to have already absorbed into sediment particles, therefore water quality testing must include studies of PCB concentrations in TSS. The *PCB Report* notes that "the PCBs from storm water are believed to be mainly associated with ... suspended sediment." *PCB Report* at 6. A proper understanding of the elements of storm water in the area would necessitate testing for PCBs in the sediments using standardized testing methods such as those provided by EPA. By failing to test for PCBs in sediment and TSS, the City is not attempting to reduce pollutants to the MEP nor is the City using AKART.

In comparison, other States and cities have employed successful methods to clean up PCBs. The regulatory agencies in Delaware, Pennsylvania, and New Jersey used modern and sophisticated techniques to determine the PCB concentrations in storm water and sediment. The facilities with PCBs discovered in their discharges were required to determine the source and eliminate them. Others tracked the pipe system back to old properties that stored PCBs and then cleaned up, captured, and treated the storm water. This resulted in the removal of nearly all the PCBs. San Francisco is in the process of passing a PCB TMDL plan to reduce and prevent PCBs from entering the San Francisco Bay. The plan includes urban runoff management practices and controls such as vegetative buffers around paved surfaces and street sweeping programs. The

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<sup>9</sup> Brown & Caldwell and URS, City of Spokane Storm Water Management Plan ("SWMP") (2004), available at <http://www.spokanewastewater.org/Spokane%20SW%20Management%20Plan.pdf>. The SWMP was developed for the City to guide its storm water management activities. The City drafted a 2008 outline explaining the requirements of an updated SWMP. The 2008 outline also fails to mention PCBs and testing sediment to determine whether it contains PCBs.

practices that reduce sediment discharges from storm water will likely have the greatest potential to reduce discharges of PCBs.

Because of the City's failure to test the levels of PCBs contained in sediment and TSS, the City is not using MEP and AKART standards to prevent and control pollution in the River as required by the Phase II Permit. Phase II Permit, §§ S4.C & D. Thus, the City is in violation of the Phase II Permit. *Id.*

The City has been continuously discharging polluted storm water into the MS4, and has not used MEP and AKART to prevent these discharges. The City has therefore taken inadequate affirmative steps to eliminate these violations, thus, these violations are ongoing and will continue in the future. Every day that polluted storm water enters the City's MS4 is a separate and distinct violation of Clean Water Act Section 301, 33 U.S.C. § 1311, and the Phase II Permit, §§ S4.C & D. These violations will continue each day that discharges of polluted storm water enters the MS4 in violation of the requirements of the CWA and the Phase II Permit. Pursuant to Section 309(d) of the Clean Water Act, the City is subject to penalties for all violations of the Permit and the CWA occurring within the past five years. 33 U.S.C. § 1319 (d).

**D. Violations of CWA, 33 U.S.C. §§ 1311 & 1342 and Phase II Permit, § S4.F**

The City has not reported its violations to DOE, and consequently is in violation of Section S4.F of the Phase II Permit. The City must notify DOE in writing within 30 days of becoming aware of a violation. Phase II Permit, § S4.F.1. The 2004 CWA § 303(d) report, which identifies waters that are failing to meet WQS, alerted the City to fourteen separate entries for PCBs in the River. Further, the 2004 draft PCB TMDL identified numerous PCB WQS violations. Therefore, the City had credible site-specific information that discharges from the MS4 were causing or contributing to a violation of a WQS. However, the City did not take adequate measures to report and eliminate these discharges and thus was in violation of Phase II Permit, § S4.F.1. In 2007, the City received credible site-specific information that discharges from the MS4 were causing or contributing to violations of WQS when the *PCB Report* indicated that the City was discharging significant levels of PCBs into the River. *See PCB Report* at 15-16. The City did not take adequate measures to report and eliminate these discharges and therefore is in violation of the Phase II Permit, § S4.F.1.

The City is also required to submit to DOE a report describing its current Best Management Practices ("BMPs"), including an assessment of the effectiveness of each BMP; additional BMPs that will or may be implemented in order to prevent or reduce violations; evaluations that will assess the effectiveness of the additional BMPs; and a schedule for implementing the additional BMPs. Phase II Permit, § S4.F.3.a. DOE will then approve the additional BMPs or require the City to modify its report. *Id.* By failing to notify DOE of its violations of the PCB WQS and then failing to implement BMPs to eliminate those violations, the City is in violation of the Phase II Permit, § S4.F.

The City has been continuously discharging polluted storm water into the MS4 and failing to notify DOE of such discharges. The City has taken inadequate affirmative steps to

eliminate these violations, thus, these violations are ongoing and will continue in the future. These violations will continue each day the City fails to notify DOE of the discharges of polluted storm water. The City is subject to penalties for all violations of the Clean Water Act described in this section occurring in the past five years. 33 U.S.C. § 1319 (d).

#### **IV. Violations of the Clean Water Act and Specific WWTP Permit Requirements**

##### **A. Violations of CWA, 33 U.S.C. §§ 1311 & 1342 and WWTP Permit, § S13.A**

Information currently available to Riverkeeper indicates that the City has and continues to violate WWTP Permit, § S13.A, by causing and contributing to exceedances of WQS. WWTP Permit, § S13.A mandates that the City cannot violate any WQS. As explained throughout this Notice Letter, the City is not in compliance with these standards and discharges PCBs into the CSO system when it rains in excess of 0.25 inches.

During testing for the PCB TMDL in June 2004, DOE tested a CSO outfall. *PCB Report* at 4. The results from the samples show CSO #34 samples had 83.4 ng/L total PCBs, or approximately 6 times the PCB WQS. *Id.* When storm water samples were taken from various storm drains around the Spokane area in 2007 as a part of the *PCB Report*, DOE once again sampled CSO #34. *Id.* at 9 & 10. The results from the samples show that on May 2, 2007, CSO #34 discharged 280.43 ng/L total PCBs, or approximately 20 times the WQS for PCBs. On June 5, 2007, DOE's samples indicated discharges of 72.69 ng/L total PCBs, or over 5 times the WQS for PCBs.

The attached rain table lists all the days that it has rained over 0.25 inches in Spokane for the past 5-years, and therefore all days that the City has discharged PCBs in violation of the WWTP Permit. Riverkeeper is informed and believes that every time there is a wet weather event over 0.25 inches, the City has, and continues to violate the Washington State WQS and the WWTP Permit.

The City has taken inadequate affirmative steps to eliminate discharges of PCBs from CSO outfalls during rain events over 0.25 inches, thus, these violations are ongoing and will continue in the future. Every day that polluted storm water is discharged from the City's CSO in violation of WQS is a separate and distinct violation of the CWA § 301, 33 U.S.C. § 1311, and the WWTP Permit. These violations will continue each day that discharges are made from the CSO in violation of the requirements of the CWA and the WWTP Permit. Pursuant to § 309(d) of the Clean Water Act, the City is subject to penalties for all violations of the WWTP Permit and the CWA occurring within the past five years. 33 U.S.C. § 1319 (d).

#### **V. Conclusion**

Riverkeeper believes this Notice Letter sufficiently states grounds for filing suit. Upon expiration of the 60-day notice period, Riverkeeper intends to file a citizen enforcement action in Federal Court pursuant to Section 505(a) of the Clean Water Act for the above violations. In addition to the violations set forth above, this notice covers all violations of the CWA by the City

evidenced by information that becomes available to Riverkeeper after the date of this Notice Letter.

Pursuant to Section 309(d) of the Clean Water Act, 33 U.S.C. § 1319(d), and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.4 (1997), each separate violation of the Clean Water Act subjects the violator to a penalty. These provisions of law authorize civil penalties for each separate violation of the Clean Water Act occurring between March 15, 2004 through January 12, 2009 up to \$32,500 per day per violation, and civil penalties of up to \$37,500 per day per violation for all CWA violations after January 12, 2009. In addition to civil penalties, Riverkeeper will seek preliminary and permanent injunctive relief preventing further violations of the Clean Water Act pursuant to Sections 505(a) and (d), 33 U.S.C. § 1365(a) and (d), and such other relief as is permitted by law. Lastly, Section 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d), permits prevailing parties to recover costs and fees.

As indicated above, during the 60-day notice period, Riverkeeper is interested in discussing effective remedies for the violations described in this Notice Letter. CFJ and Riverkeeper would like to maintain the collegial relationship it established with the City while settling the combined sewer overflow dispute last year. In an effort to do so the Riverkeeper has requested the City Attorney's input regarding this issue prior to filing this Notice Letter. However, informal discussions have not yet occurred. Riverkeeper also acknowledges that DOE's reluctance to work on a PCB TMDL is contributing to the problem. Therefore, Riverkeeper is willing to work with the City to create a plan to protect the River. If you wish to pursue such discussions, we suggest that you initiate those discussions immediately. Riverkeeper does not intend to delay the filing of a complaint in Federal Court if discussions are continuing when the 60-day notice period ends.

Riverkeeper has retained legal counsel to represent it in this matter. Please direct all communications to:

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Sincerely,



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