EARTHJUSTICE

June 16, 2022

VIA CERTIFIED U.S. MAIL
RETURN RECEIPT REQUESTED
AND VIA EMAIL (jmarine@mukilteowa.gov; mnienhuis@mukilteowa.gov)

Mayor Joe Marine
City of Mukilteo
11930 Cyrus Way
Mukilteo, WA 98275

Matt Nienhuis, Director
Mukilteo Public Utilities
11930 Cyrus Way
Mukilteo, WA 98275

RE: Notice of Intent to Sue For Failure to Comply With Municipal Stormwater General National Pollutant Discharge Elimination Permit, Section S4

Dear Mayor Marine and Mr. Nienhuis:

This is a 60-day Notice under the Clean Water Act, 33 U.S.C. § 1365(a)(2), on behalf of Puget Soundkeeper Alliance ("Soundkeeper"). The City of Mukilteo ("City") has failed to comply with Section S.4 of the Washington Phase II Municipal Stormwater National Pollutant Discharge Elimination System Permit ("Permit") by causing or contributing to violations of water quality standards in Big Gulch, by failing to control discharges of stormwater to Big Gulch to the Maximum Extent Practicable and with All Known, Available, and Reasonable Technology, and by failing to report to the Washington State Department of Ecology ("Ecology") stormwater discharges to Big Gulch that are causing or contributing to the violation of water quality standards.

I. BACKGROUND

Puget Sound streams are suffering from Urban Runoff Mortality Syndrome in salmon caused by stormwater discharges. Coho salmon, in particular, are affected. Research and monitoring dating back a decade or more have conclusively demonstrated that coho salmon are dying upon entering Puget Sound area streams, including Big Gulch in Mukilteo, and that they are dying before they are able to spawn. That same or related research further demonstrated that stormwater discharge is the cause. More recently, research has isolated a chemical used in car

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tires, N-(1,3-Dimethylbutyl)-N′-phenyl-p-phenylenediamine-quinone, also known as 6PPD quinone ("6-PPDQ") as the toxin in stormwater discharges that is killing salmon. Additional research, again from 10 or more years ago, has also conclusively demonstrated that filtering stormwater through bioinfiltration systems (plants and soil) captures and removes the salmon-killing pollutants in stormwater. Ecology's Fact Sheet has made permittees such as the City of Mukilteo further aware of this information. *See* https://fortress.wa.gov/ecy/ezshare/wq/permits/MunicipalPermitsFactSheet2018.pdf at pages 15 and 20.

Big Gulch receives stormwater discharges from the City of Mukilteo. Big Gulch is a salmon stream and the City of Mukilteo has received multiple years of documented Urban Runoff Mortality Syndrome in coho salmon in Big Gulch from Professor Thomas Murphy and his researchers at various public presentations. Mukilteo was also aware of the problem as seen in the city council's review and approval of interlocal agreements relevant to this work on an annual basis from at least 2011 through 2018. Discharge of stormwater to Big Gulch is causing or contributing to the violation of narrative water quality standards for fish.

Information received from Ecology indicates that the City of Mukilteo has failed to notify Ecology, under Section S4 of the Permit, of the potential for the City's stormwater discharges into Big Gulch to cause or contribute to Urban Runoff Mortality in coho salmon and thereby to cause or contribute to the violation of water quality standards.

II. LEGAL FRAMEWORK

The Clean Water Act prohibits the discharge of any pollutant into State waters absent authorization in and compliance with a National Pollutant Discharge Elimination System Permit (NPDES). 33 U.S.C. §§ 1311(a) and 1342.

Section S4 of the Permit provides, in relevant part, as follows:

> **A.** In accordance with RCW 90.48.520, the discharge of toxicants to waters of the State of Washington which would violate any water quality standard, including toxicant standards, sediment criteria, and dilution zone criteria is prohibited. The required response to such discharges is defined in Section S4.F, below.
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> **B.** This Permit does not authorize a discharge which would be a violation of Washington State Surface Water Quality Standards (Chapter 173-201A WAC), Groundwater Quality Standards (Chapter 173-200 WAC), Sediment Management Standards (Chapter 173-204 WAC), or human health-based criteria in the National Toxics Rule (40 CFR 131.45). The required response to such discharges is defined in Section S4.F, below.
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> **C.** The Permittee shall reduce the discharge of pollutants to the Maximum Extent Practicable (MEP).

> **D.** The Permittee shall use All Known, Available, and Reasonable methods of prevention, control and Treatment (AKART) to prevent and control pollution of waters of the State of Washington . . .
>
> **F.** A Permittee remains in compliance with S4 despite any discharges prohibited by S4.A or S4.B, when the Permittee undertakes the following response toward long-term water quality improvement:
>
> > **1.** A Permittee shall notify Ecology in writing within 30 days of becoming aware, based on credible site-specific information that a discharge from the MS4 owned or operated by the Permittee is causing or contributing to a known or likely violation of water quality standards in the receiving water. Written notification provided under this subsection shall, at a minimum, identify the source of the site-specific information, describe the nature and extent of the known or likely violation in the receiving water, and explain the reasons why the MS4 discharge is believed to be causing or contributing to the problem. For ongoing or continuing violations, a single written notification to Ecology will fulfill this requirement.

Washington water quality standards, as required by the Clean Water Act 33 U.S.C. § 1313(c), protect aquatic life designated uses, including salmon spawning, rearing, and migration. WAC 173-201A-200(1)(a). General criteria for the protection of these designated uses provide:

> **Toxics and aesthetics criteria.** The following narrative criteria apply to all existing and designated uses for fresh and marine water: . . . Toxic, radioactive, or deleterious material concentrations must be below those which have the potential, either singularly or cumulatively, to adversely affect characteristic water uses, cause acute or chronic conditions to the most sensitive biota dependent upon those waters, or adversely affect public health.

WAC 173-201A-260(2).

> Upstream actions must be conducted in manners that meet downstream water body criteria. Except where and to the extent described otherwise in this chapter, the criteria associated with the most upstream uses designated for a water body are to be applied to headwaters to protect nonfish aquatic species and the designated downstream uses.

WAC 173-201A-260(3)(b).

> Where multiple criteria for the same water quality parameter are assigned to a water body to protect different uses, the most stringent criterion for each parameter is to be applied. WAC 173-201A-260(3)(c).

The Clean Water Act authorizes suit by any citizen, defined to include groups such as Soundkeeper, against any government instrumentality or agency that is alleged to be in violation of an effluent limitation or standard in an NPDES permit. 33 U.S.C. § 1365(a)(1).

III. CITY OF MUKILTEO'S VIOLATIONS

Mukilteo is in violation of Section S4.A. and B. of the Permit for discharging stormwater pollutants and/or toxicants into Big Gulch in violation of water quality standards.

Mukilteo is in violation of Section S4.C. and D. of the Permit for failure to treat stormwater discharges to MEP and AKART which here, is the implementation of bioinfiltration to treat stormwater prior to discharge into Big Gulch.

Mukilteo is in violation of Section S4.F.1. of the Permit for failure notify Ecology of the potential for Mukilteo stormwater discharges to Big Gulch to cause or contribute to violations of water quality standards.

IV. IDENTITY AND ADDRESSES OF SOUNDKEEPER

Sean Dixon
Executive Director
Puget Soundkeeper Alliance
130 Nickerson St., Suite 107
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Janette Brimmer
Counsel for Soundkeeper
Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104

V. CONCLUSION

The City of Mukilteo is in continuing violation of Section S4 of the Phase II Municipal Stormwater Permit and this letter constitutes a 60-day notice of intent to file a citizen suit against the City of Mukilteo pursuant to the Clean Water Act, 33 U.S.C. § 1365(a)(2) and applicable implementing regulations, 40 C.F.R. § 135.1(a) and 135.3(b). Unless this violation is cured within sixty days, we reserve the right to take appropriate legal action to compel the City of Mukilteo to comply with the Permit and Clean Water Act to protect Big Gulch from stormwater pollutant discharges that are harming salmon.

Sincerely,

Janette K. Brimmer

cc (via First Class Mail and email where available):

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