



917 SW Oak  
St. Suite 417  
Portland, OR  
97205

Tel:  
503.525.2724

Fax:  
503 296.5454

Web:  
[www.crag.org](http://www.crag.org)

Maura C. Fahey  
*Legal Fellow*  
[maura@crag.org](mailto:maura@crag.org)

January 24, 2014

Debbie Rogge, Mayor  
George Pottle, Council President  
Dan Huff, City Manager  
Marc Howatt, Public Works Director  
City of Molalla  
P.O. Box 248  
Molalla, OR 97038

**VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED**

**Re: Sixty-day Notice of Violation of the Clean Water Act, City of  
Molalla STP NPDES Permit No. 101514**

Dear Mayor Rogge, President Pottle, Mr. Huff, and Mr. Howatt,

Bear Creek Recovery and Susan Hansen (collectively “BCR”) hereby provide notice, pursuant to Section 505 of the Federal Water Pollution Control Act (“Clean Water Act” or “CWA”), 33 U.S.C. § 1365, of the intent to initiate suit against the City of Molalla, an Oregon municipal corporation (the “City of Molalla” or “City”) to enforce the Clean Water Act, 33 U.S.C. §§ 1311, 1342. The City’s wastewater treatment facility, located at 12424 Toliver Road, Molalla, Oregon 97038, is covered under the Oregon Department of Environmental Quality (“DEQ”) issued National Pollutant Discharge Elimination System (“NPDES”) Waste Discharge Permit (“Permit”). The City of Molalla has violated and continues to violate the express terms of the CWA and the NPDES Permit, which sets specific requirements that the City must follow to ensure the protection of Oregon’s waters.

Unless the City takes the steps necessary to remedy ongoing violations of the CWA and the NPDES Permit, BCR intends to file suit against the City of Molalla in the U.S. District Court immediately following the expiration of the required sixty day notice period, seeking injunctive relief and civil penalties in the amount of \$37,500.00 per day per violation enumerated below and for any additional, similar violations that BCR may discover subsequently. If the City has any information suggesting that one or more of the violations outlined in this notice did not occur or is stated incorrectly, please immediately provide that information to BCR, specifying the violation in question.

## **I. Bear Creek Recovery is Committed to Protecting the Bear Creek Watershed and Surrounding Lands in the City of Molalla.**

Bear Creek Recovery is an Oregon non-profit organization formed to advocate for and protect the environment of Bear Creek and the surrounding community. Bear Creek Recovery has members who live, recreate, and work in the Bear Creek watershed, including near fields where the City of Molalla sprays and irrigates fields with recycled wastewater from the Molalla STP facility. Bear Creek Recovery is working to protect the Bear Creek watershed from threats to environmental and public health. Susan Hansen is a Board Member of Bear Creek Recovery and a resident of the Bear Creek watershed.

## **II. Legal Background**

Section 301(a) of the CWA expressly prohibits the “discharge of any pollutant” unless such discharges comply with the terms of any applicable NPDES permit, and sections 301, 302, and 402 of the CWA. 33 U.S.C. §§ 1311(a)(1), 1342. “Discharge of a pollutant” means any “addition of a pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). Pollutant is defined to include “industrial, municipal, and agricultural waste discharges into water.” 33 U.S.C. § 1362(6). A point source is “any discernable, confined and discrete conveyance,” 33 U.S.C. § 1362(14), and navigable waters are broadly defined as “the waters of the United States.” 33 U.S.C. § 1362(7). NPDES permits include both general permits, which are issued under 40 C.F.R. § 122.28 authorizing a category of discharges under the CWA within a geographical area, and individual permits, which are issued to specific facilities.

At a minimum, NPDES permits must include technology-based effluent limitations, any more stringent limitations necessary to meet water quality standards, and monitoring and reporting requirements. See 33 U.S.C. §§ 1342, 1311, 1318. In addition to those requirements, a NPDES permit must include conditions that will ensure compliance with the CWA. 33 U.S.C. § 1342(a)(2).

Although EPA is the primary administrator of the CWA, §402 authorizes EPA to delegate authority to states to implement and administer the CWA. 33 U.S.C. § 1342(b). Pursuant to this provision, Oregon has authority to regulate discharges of pollutants, among other actions, issuing NPDES permits to dischargers. The Oregon Department of Environmental Quality is the agency responsible for issuing NPDES permits.

Once regulated by an NPDES permit, dischargers must strictly comply with all of the terms and conditions of that permit. Violators are subject to enforcement actions initiated by EPA, states and citizens. 33 U.S.C. §§ 1319, 1365(a). Section 505 of the CWA authorizes citizens to bring suit against any person, including a municipality, who is alleged to be in violation of an effluent standard or limitation under the CWA. 33 U.S.C. § 1365(a). Effluent limitation is defined broadly to include “a permit or condition thereof issued under [section 402] of this title,” and “any unlawful act under subsection (a) of [section 301] of this title.” 33 U.S.C. § 1365(f). Section 309 of the CWA, 33 U.S.C. § 1319(d), adjusted by 40 C.F.R. § 19.4, provides

for civil penalties of up to \$37,500 per day per violation. Violations occurring before January 12, 2009 carry penalties of up to \$32,500 per day of violation.

### **III. Violation of NPDES Permit**

The City of Molalla is currently operating its wastewater treatment facility pursuant to DEQ's Waste Discharge NPDES Permit, which took effect on December 11, 2009. The permit authorizes the City to operate its wastewater collection, treatment and disposal system and to discharge adequately treated wastewater from authorized discharge points. During the wet season, November 1 – May 31, the City is authorized to discharge treated wastewater into the Molalla River from a single outfall. Permit, Sch. A.1. During the dry season, June 1 – October 31, and at other times authorized by DEQ, the City is permitted to land apply recycled water.

Section 402 of the CWA provides that pollutants may be discharged only in accordance with the terms of a valid NPDES permit. The City's NPDES Permit establishes specific requirements and conditions the City must follow to ensure compliance with the CWA and the protection of Oregon's waters. First, the Permit establishes specific effluent concentrations and limitations that must be complied with to ensure that discharges will not "cause or contribute to a violation of water quality standards." Permit, Sch. A.1. Second, the Permit requires the City to submit a Recycled Water Use Plan to DEQ for approval prior to land application of recycled water. Permit, Sch. A.2; Sch. D.3. Third, prior to removal of any sewage sludge from lagoons at the City's facility, the City must submit a Biosolids Management Plan to DEQ for approval. Permit, Sch. D.2. Fourth, the Permit requires the City to take "all reasonable steps to minimize or prevent any discharge or sludge use or disposal in violation of this permit that has a reasonable likelihood of adversely affecting human health or the environment." Permit, Sch. F.A.3. Finally, the Permit requires the City to properly maintain and operate its facility and systems of treatment and control in order to achieve compliance with the conditions of the permit. Permit, Sch. F.B.1. Failure to comply with these, or any other permit condition, is a violation of the CWA and is grounds for an enforcement action. Permit, Sch. F.A.1.

Based on the information available to Bear Creek Recovery, it is clear that the City has violated and continues to violate the Waste Discharge NPDES Permit in at least the following ways: continuously or repeatedly applying recycled water to sites not approved in the Recycled Water Use Plan and/or in a manner not authorized by the permit; failing to adequately respond to and report violations of the Recycled Water Use Plan; violating effluent limitations; and failing to maintain the wastewater treatment facility and related systems so as to avoid permit violations.

#### **a. Violation of Recycled Water Use Plan**

In order to distribute recycled and treated wastewater on land the City is required to submit a Recycled Water Use Plan ("RWUP") to DEQ for approval. Permit, Sch. A.2; see also OAR 340-055-0016(2)(a). The RWUP must include a description and identification of the land application site(s). OAR 340-005-0025(2)(a). A DEQ approved RWUP, and the conditions contained therein, are considered enforceable requirements of the NPDES Permit. OAR 340-

005-0025(4). Therefore, a violation of the RWUP is a violation of the NPDES Permit and § 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a).

The City of Molalla's current and most recently approved Recycled Water Use Plan was submitted to DEQ in August 2004. Under an earlier RWUP from May 2000, the City was authorized to apply recycled water to land within the treatment plant property and at the Jorgeson Property, located adjacent to the plant property. *See* 2004 RWUP at 1. The 2004 RWUP included an additional 190 acres of land at the Coleman Ranch property to be used for recycled water irrigation. *Id.* Based on a map included with the RWUP, it appears only the portion of the Coleman Ranch property that lies south of Freyer Park Rd. was authorized for irrigation of recycled water under the 2004 plan. *See* Figure 3, 2004 RWUP.

Based on recycled water reports submitted by the City to DEQ and correspondence between DEQ and the City, it is clear that the City has applied recycled water at unapproved sites in violation of the RWUP and the NPDES Permit on numerous occasions since at least July 2009. In many of the Discharge Monitoring Reports ("DMR") and corresponding reuse reports submitted to DEQ the City reports applying recycled water to several sites that were not approved in the 2004 RWUP including the "Cemetery" site, the "Nursery" site, and the "Stevens" site.<sup>1</sup> According to reports submitted to DEQ the City applied recycled water in violation of the NPDES Permit on at least the following dates:

**Table 1.**

<b>Date(s) of Recycled Water Application</b>	<b>Site of Recycled Water Application</b>
Sept. 2013 (5 days)	N. Coleman
Aug. 2013 (23 days)	Nursery
Aug. 2013 (9 days)	Cemetery
Nov. 2012 (3 days)	Nursery
Oct. 2012 (3 days)	Nursery
Sept. 2012 (1 day)	Nursery
Aug. 2012 (23 days)	Nursery
Aug. 2012 (9 days)	Cemetery
July 2012 (8 days)	Nursery
July 2012 (15 days)	Cemetery
Aug. 2011 (23 days)	Nursery
Aug. 2011 (1 day)	Stevens
Aug. 2011 (18 days)	Cemetery
July 2011 (19 days)	Nursery
July 2011 (11 days)	Stevens

<sup>1</sup> Reuse reports also contain recordings of recycled water application at the Coleman Ranch site. It is unclear from the reports whether irrigation occurred only on the approved acres in the southern portion of the property. Bear Creek Recovery has evidence that the City has applied recycled water to the unapproved northern portion of the Coleman Ranch site (north of Freyer Park Rd.) in violation of the RWUP and NPDES Permit and thus includes those violations in this Notice.

July 2011 (11 days)	Cemetery
Sept. 2010 (5 days)	Nursery
Aug. 2010 (18 days)	Nursery
Aug. 2010 (20 days)	Cemetery
July 2010 (10 days)	Nursery
July 2010 (1 day)	Stevens
July 2010 (6 days)	Cemetery
Aug. 2009 (14 days)	Nursery
July 2009 (18 days)	Nursery
<b>Total Violations: 274</b>	

In addition to the City's chronic misapplication of recycled water to unapproved sites, the City has applied recycled wastewater in such a manner and at such excessive rates so as to create ponding and runoff of recycled water. BCR has reason to believe that the City has been applying recycled waste water in areas that contain natural springs and riparian or wetland features and that over-application of recycled water has increased ponding in fields and resulted in recharge of Bear Creek. The NPDES Permit requires the City to follow sound irrigation practices and to prevent "(1) prolonged ponding of treated recycled water on the ground surface; (2) surface runoff or subsurface drainage through drainage tile...." Permit, Sch. A.2(a).

DEQ sent two separate warning letters to the City detailing these violations. First, on September 23, 2013, DEQ warned the City that recycled water application had occurred at sites not identified in the RWUP and at levels exceeding the ability of the soil to infiltrate. Second, on October 7, 2013, DEQ warned the City that it had become aware of recycled water application at unapproved sites for the past several years. Each instance in which the City allowed recycled water to be applied to an unapproved site or to be applied in excessive quantities so as to create ponding and runoff is a separate violation of the NPDES Permit and the CWA.

#### **b. Failure to Adequately Report and Respond to RWUP Violations**

The City is required by a Special Condition in the NPDES Permit to notify DEQ within 24 hours of any treated effluent being used in a manner not in compliance with the Recycled Water Use Plan and OAR 340-055. Permit, Sch. D.3(b). Based on a review of the DEQ's file for the City of Molalla STP there are few, if any, reports made by the City of the unauthorized application of recycled water through irrigation and spraying on the above listed dates and locations. See Table 1.

The City's NPDES Permit also contains reporting requirements as part of the General Conditions for the operation of its facility. *See* Permit, Sch. F. Specifically, the City is required to give advanced notice to DEQ of any anticipated noncompliance or activity that may result in noncompliance of the permit requirements. Permit, Sch. F.D.2. Review of the available DEQ file for the City shows that no such notice was given prior to recycled water applications listed in Table 1. It is clear from the City's track record of applying recycled water to unapproved sites that the need for this repeated noncompliance could be anticipated and thus should have been

brought to the attention of DEQ prior to the use. Additionally, the City is required to report any noncompliance at the time its monthly monitoring reports are submitted to DEQ. Permit, Sch. F.D.6. Reports of past noncompliance are to include a description of the noncompliance and the cause, the time and date of noncompliance, an estimate of how long the noncompliance will continue and the steps that the City will take to reduce, eliminate, and prevent the reoccurrence of the noncompliance. *Id.*

Furthermore, pursuant to Schedule B.3(b), the City is required to submit to DEQ an “annual report describing the effectiveness of the system to comply with the approved reclaimed water use plan, the rules of this division, and the permit limits and conditions for recycled water.” The annual reclaimed water use report is to be submitted by January 15 of each year. Upon review of DEQ’s files for the facility it appears the City has failed to submit these reports every year since at least 2009, except for a brief one-page report that was submitted in 2010 which fails to include the details required by the permit. Each day these reports are late is a separate violation of the NPDES Permit and the CWA.

Aside from now seeking formal authorization from DEQ to apply recycled water to the unapproved sites, the City has not taken any action to report or prevent the reoccurrence of the years of noncompliance with the RWUP and the NPDES Permit conditions. Each violation of the reporting and notification requirements is a violation of the NPDES Permit and the federal CWA and is subject to enforcement action. Based on the City’s demonstrated inability to comply with the requirements to submit annual reports and other notifications to DEQ, it is more than reasonably likely that these violations will be repeated in the future.

**c. Violations of Effluent Limitations**

The City’s wastewater discharges to the Molalla River have exceeded the established effluent limitations contained in the permit on several occasions. The effluent concentrations and limitations for the City’s discharges are outlined in Schedule A.1. The City discharged pollution at levels that exceeded the permit limitations on at least the following dates:

**Table 2.**

<b>Date</b>	<b>Pollutant</b>	<b>Permit Limitation</b>	<b>Amount of Pollutant in City’s Discharge</b>
Feb. 2013	Residual Chlorine	0.18 mg/L daily maximum	0.22 mg/L daily max.
Feb. 2013	BOD	10 mg/L monthly avg.	10.1 mg/L monthly avg.
April 2012	TSS	160 lbs monthly avg.	175.9 lbs monthly avg.
Nov. 2009	Ammonia (NH <sub>3</sub> )	11.5 mg/L monthly avg.	13.7 mg/L monthly avg.
Jan. 2009	Ammonia	11.5 mg/L monthly avg.	11.7 mg/L monthly avg.

Violations of water quality based effluent limitations, including the limitation on Ammonia concentration is a Class I violation of the NPDES Permit. OAR 340-012-0055(1)(I). Violating a technology based TSS effluent limitation by less than 20% is a Class III violation.

OAR 340-012-0055(3)(b)(A). Class I violations are considered to be the most serious violations; Class III violations are the least serious.

The City also violated the effluent limitation for dilution in September 2013. The Permit states that “[e]ffluent discharge [to the Molalla River] shall not commence until gauged stream flow exceeds 350 cfs. Discharge will cease when the average stream flow for the *previous* seven days is less than 350 cfs.” Permit, Sch.A.1(b) (emphasis added). The City is also prohibited from discharging to the Molalla River during the period between June 1 and October 31 each year. Permit Sch.A.1(a). On September 16, 2013, the City made a request to DEQ for a variance from these permit limitations because its lagoons were at critical levels. DEQ denied the request at that time because the flows in the River had not reached the required levels. DEQ later granted a variance on September 25 when the Molalla River flows reached 350 cfs. *See* Permit Action Letter to Jon Patrick from Tiffany Yelton-Bram, Sept. 25, 2013.

The City then continued to discharge to the Molalla River until October 21<sup>st</sup>. BCR believes this was a violation of the Permit limitation that discharges must cease when the 7-day average stream flow falls below 350 cfs. Counting the days prior to the Sept. 25 discharge date, the 7-day average did not exceed 350 cfs until Sept. 29<sup>th</sup>. Therefore, the City was in violation of the permit each of the four (4) days it continued to discharge during inadequate flows.

#### **d. Failure to Properly Maintain Facility and to Mitigate Violations**

The NPDES Permit contains general conditions that the City must follow in order to ensure the facility is properly maintained and operated in compliance with the Permit and the CWA. Specifically, the City “must take all reasonable steps to minimize or prevent any discharge or sludge use or disposal in violation of this permit that has a reasonable likelihood of adversely affecting human health or the environment.” Permit, Sch. F.A.3. Additionally, the City must “properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) that are installed or used by the [City] to achieve compliance with the conditions of [the] permit.” Permit, Sch. F.B.1.

The City’s failure to comply with these general conditions has resulted in the repeated violations of the Recycled Water Use Plan and the NPDES Permit outlined in Table 1. Over the last 15 years the City has failed to adequately manage the level of biosolids that accumulate in the facility’s lagoon system. According to the City’s renewed 2013 Biosolids Management Plan (“BSMP”) currently under review by DEQ, solids have only been removed from the lagoons once since 1999. Draft BSMP at 3. The BSMP indicates that only 55 tons of dry solids were successfully removed in 2010 and that “[o]ver time the solids have built up and have caused problems for the plant.” *Id.* This is the case despite the fact that the City has had an approved Biosolids Land Application Site available since 1999; the “Jorgenson” Site contains 62.3 spreadable acres. Draft BSMP at 11.

The build-up of solids in the lagoons has resulted in an on-going battle for facility operators in keeping the levels of the lagoons low enough to handle regular inflow and wet weather conditions. *See* Plant Operations Summary Reports, Nov. 2012, Jan. 2013, May 2013,

July 2013, Aug. 2013. This, in combination with the lack of sites approved for irrigation under the RWUP, has created a need for the City to apply recycled water in violation of the NPDES Permit in order to keep the lagoon levels low enough to continue operations at the facility. *See* E-mail from Jon Patrick (City) to Tiffany Yelton-Bram (DEQ) on Sept. 13, 2013 (“We are limited on what we can use [on the South Coleman site] and that is why we are currently unable to irrigate enough to keep up with the influent flows to the plant.”); E-mail from Marc Howatt (City) to Tiffany Yelton-Bram (DEQ) on Sept. 16, 2013 (“[P]onds are full, have to release the effluent, cannot irrigate the way we need to...”).

The difficulty the City has faced in keeping the storage lagoons low has been exacerbated by the City’s failure to submit inflow and infiltration (“I&I”) reports as required by the NPDES Permit.

The permittee shall have in place a program to identify and reduce inflow and infiltration into the sewage collection system. An annual report shall be submitted to the Department by March 1 each year which details sewer collection maintenance activities that reduce inflow and infiltration. The report shall state those activities that have been done in the previous calendar year and those activities planned for the current year.

Permit, Sch. B.3(a).

Based on BCR’s review of DEQ files and correspondence between DEQ and the City, BCR provides notice that the City violated and continues to violate its NPDES permit by failing to submit the I&I reports from 2011 and 2012. Because the City has failed to submit the reports, each day from March 1, 2012 to present is a separate violation.

The City’s failure to submit the I&I reports causes significant harm to water quality and impacts the facility’s operations. Inflow and Infiltration refers to the stormwater, underground springs, and/or groundwater that finds its way into the sewer systems through cracks in pipes or faulty connections. Increases in the volume of influent to the plant caused by inflow and infiltration can create problems for operating plants in meeting the retention times needed at different stages in the process. Clearly, the City is already experiencing difficulty in dealing with the levels of influent at the facility. The Permit Evaluation Report for the City’s renewed 2013 NPDES Permit indicates that an estimated 500,000 gallons per day are entering the system due to inflow and infiltration. 2013 Eval. Report at 6.

As far back as 1997, the City has been aware that the system has a “major I&I problem.” *See* Feb. 18, 1997 I&I Field Monitoring Memo; *see also* Field Monitoring Map from Jan. 30, 1997 monitoring (indicates multiple segments of the system classified as “Very High” or “Extreme” I&I). Similarly, the 1997 Permit Evaluation Report acknowledged that there was concern over the lack of attention the City was giving to the I&I problem. 1997 Eval. Report at 3. However, the City has failed to take any meaningful steps toward resolving I&I issues in the 15 years that have passed.

The City's permit requires it to have a program in place for identifying and repairing areas where I&I is occurring. Failing to submit the annual reports adversely affects the City's ability to manage wastewater and DEQ's ability to assist the City to correct any I&I problems. Without the required reports, DEQ does not know what sewer collection maintenance and improvement activities the city completed each year, if any. Further, the failure to submit I&I reports adversely affects the public's monitoring of the sewage treatment plant.

By allowing solids to build up in the lagoons and failing to monitor and reduce I&I, thereby creating the need for recycled water irrigation in excess of the amount approved under the RWUP and variances for early discharge to the Molalla River, the City has violated and continues to violate its NPDES Permit by failing to properly operate and maintain the systems of treatment and control at the facility in a manner that ensures compliance with the Permit and the CWA. Each day in which the City has "failed to properly operate and maintain all facilities and systems" is a separate violation.

#### **IV. Penalties and Injunctive Relief**

Bear Creek Recovery has evidence that the City of Molalla has previously violated and continues to violate the CWA and its Waste Discharge NPDES Permit at its facility at 12424 Toliver Road, Molalla, Oregon 97038, which discharges into the Molalla River and onto recycled water irrigation fields throughout the City of Molalla. Section 309 of the CWA, 33 U.S.C. § 1319(d), adjusted by 40 C.F.R. § 19.4, provides for penalties of up to \$37,500.00 per day per violation. BCR anticipates filing suit sixty (60) days from the date of this notice in Oregon Federal District Court, requesting penalties and injunctive relief, if the City of Molalla has not yet taken the appropriate remedial action to halt these violations of the Permit.

#### **V. Conclusion**

The above-described violations are based upon information currently available to BCR. The City of Molalla has consistently violated and continues to violate the Clean Water Act and the NPDES Permit. BCR intends to sue for all violations, including those yet to be uncovered and those committed after the date of the Notice of Intent to Sue. Due to the chronic and persistent nature of the City's violations, there is more than a reasonable likelihood of ongoing violations in the future. However, litigation is not Bear Creek Recovery's preferred method of resolving this matter. The purpose of the 60-day notice provision in the CWA is for alleged violators of the law to come into compliance, therefore avoiding the need for litigation. Please contact us if you have any questions or if you would like to discuss this matter.

Sincerely,

Maura Fahey  
Legal Fellow  
Crag Law Center

Clean Water Act 60-Day Notice to City of Molalla on Behalf of Bear Creek Recovery

January 24, 2014

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Maura Fahey

(503) 525-2722

maura@crag.org

Christopher Winter

(503) 525-2725

chris@crag.org

Crag Law Center

917 SW Oak Street, Suite 417

Portland, OR 97205

On behalf of:

Jeff Lewis- Board Chair

Bear Creek Recovery

P.O. Box 50

Molalla, OR 97038

(971) 295-7669

Susan Hansen

P.O. Box 50

Molalla, OR 97038

(503) 789-7179

COPIES TO:

Dick Pederson, Director

Oregon Department of Environmental Quality

811 SW 6<sup>th</sup> Ave.

Portland, OR 97204

Gina McCarthy, Administrator

United States Environmental Protection Agency

401 M Street SW

Washington, D.C. 20460

Dennis McLerran

U.S. EPA Region 10

Regional Administrator's Office, RA-140

1200 Sixth Avenue, Suite 900

Seattle, WA 98101