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April 1, 2010

VIA CERTIFIED MAIL

Paula Hammond, Secretary of Transportation
Washington State Department of Transportation
310 Maple Park Avenue SE
P.O. Box 47300
Olympia, WA 98504-7300

Ron Graham, Chairman
Graham Construction and Management, Inc.
10840 27th Street SE
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Jeremy Carroll, President
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331 North Fancher Road
Spokane Valley, WA 99212-0831

Frank Scarsella, President
Scarsella Bros, Inc.
PO Box 68697

Re: Notice of Violations and Intent to File Suit under the Federal Water Pollution Control Act

Dear Notice Recipients:

We are writing this letter on behalf of the Spokane Riverkeeper (“Riverkeeper”) whose members are aggrieved by the below listed matters. Riverkeeper requested that we contact you regarding Washington State Department of Transportation’s, Graham Construction and Management Inc.’s, and Scarsella Bros Inc.’s (collectively “WSDOT”) violations of the Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* (“CWA” or the “Clean Water Act”) and the Washington State Department of Ecology’s (“Ecology”) Construction Stormwater General Permit (“Construction Permit”) as regulated under the National Pollutant Discharge Elimination System (“NPDES”) program. The violations at issue are occurring at the US 395 North Spokane Corridor Project (“Road Project”).

This Notice Letter is being sent to you as the owner, developer, and/or operator of the Road Project. The purpose of this letter is to provide notice of WSDOT’s violations and to give notice that, after the expiration of sixty (60) days from the date of this letter, Riverkeeper intends to file a complaint to include the violations of the Clean Water Act and the Construction Permit that are occurring at the Road Project.

Riverkeeper conducted investigations at the Road Project and, as described more fully below, Riverkeeper’s investigations indicate an ongoing and consistent pattern by WSDOT of failing to comply with the requirements of the Clean Water Act and the Construction Permit at the Road Project.

Section 505(b) of the CWA, 33 U.S.C. § 1365(b), requires that sixty (60) days prior to the initiation of a civil action against any alleged violator under Section 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a), a citizen must give notice of its intent to sue to the discharger, the Administrator of the United States Environmental Protection Agency, the Regional Administrator of the EPA for the Region in which such violation is alleged to have occurred, and the Chief Administrative Officer for the water pollution control agency for the State in which the violation is alleged to have occurred. *See also* 40 C.F.R. § 135.2(a)(1). This letter addresses WSDOT’s violations of the Construction Permit and Section 301 of the Clean Water Act. 33 U.S.C. § 1311.

- **BACKGROUND**

- **Affected Parties**

- **The 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 Spokane River and its tributaries 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 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 Deadman (Peone) Creek (“Deadman Creek”) and the Little Spokane River into

which WSDOT is illegally discharging pollutants. As recognized in WSDOT's Final Supplemental Environmental Impact Statement ("FSEIS"), Deadman Creek is itself a navigable waterway and a tributary of the Little Spokane River, which is a tributary of the Spokane River. The discharge of pollutants by WSDOT impairs Riverkeeper's members' use of these water bodies.

Because of this impairment, individual members of Riverkeeper specifically asked that we send you this notice letter after they were aggrieved by the sustained opaqueness, discoloration, and severe diminishment in the water quality of Deadman Creek. One member stated that she saw the river turn solid brown three times during the summer of 2009, an event that she had never seen before. When this member called WSDOT she was told that a mud slide had caused untreated sediment to discharge into the river. On another occasion, members saw the river turn a bright green, a color one said "that I've never seen even in a new car." Another member stated she saw dark brown water in Deadman Creek on January 7, 2010. These members are justifiably concerned about the continuing violations causing pollution to discharge into the creek. They've expressed their concerns that Deadman Creek and/or the Little Spokane River still have yet to recover from these discharges. Pollution carried downstream has deposited a considerable amount of residue on the streambed, and this has adversely impacted the quality, clarity, and general aesthetic value of Deadman Creek and/or the Little Spokane River. As such, Riverkeeper's members' interests have been, are being, and will continue to be adversely affected by the WSDOT's failure to comply with the Construction 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
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- **Road Project Background**

At least two areas of concern have been identified by Riverkeeper along the 10-mile Road Project. The first area of concern is at the North Spokane Corridor/US 2 Lowering and Bridges section ("US 2 Section") of the Road Project near the newly constructed culvert at Deadman Creek. The second area of concern is North Spokane Corridor/US 2 to Wandermere-Lanes and Bridges section ("Wandermere Section") of the Road Project where Wandermere Estates Golf Course abuts the Little Spokane.

Inadequate stormwater and pollution prevention measures at the US 2 Section have allowed untreated stormwater to discharge directly into Deadman Creek, a tributary of the Little Spokane River. Deadman Creek drains an area of approximately 245.3 square kilometers (94.7 square miles) at the US 2 crossing. An approximately 4.5 hectare (10 acre), Category II wetland is associated with Deadman Creek where US 2 crosses at mile post ("MP") 296.5. The Little Spokane River drains into the Spokane River at its confluence near Riverside State Park. *See* WSDOT FSEIS, Waterways and Hydrological Systems Map, Figure 3.3. The Spokane River provides drinking water, recreational opportunities in fishing and whitewater rafting, kayaking, and canoeing. Numerous public parks lie along its banks as well.

Similarly, inadequate stormwater and pollution prevention measures at the Wandermere Section have allowed for untreated stormwater to discharge directly into the Little Spokane River. This section of the Road Project features significant grading on a steep de-vegetated slope. The steep topography and absence of BMPs allows

for untreated stormwater to flow downhill and discharge directly into the Little Spokane River. The Little Spokane River is a navigable river which feeds directly into the Spokane River.

The Road Project area is located in the northeast quadrant of Spokane County and the City of Spokane, and spans an area of over 10 miles. The Road Project is being conducted by WSDOT. In April 1997, the NSC Final Environmental Impact Statement (“FEIS”) was approved by the Federal Highway Administration (“FHWA”). In September 2000, a FSEIS was approved for the Spokane River north to US 395 at Wandermere section.

Ground disturbing activities began in August 2001, when construction commenced on the Road Project. It is anticipated that the US 2 Wandermere & US 2 Lowering (between the Farwell and Wandermere Interchanges) will be open to traffic by late summer 2011.

- **Responsible Parties**

The Clean Water Act provides that the owner, developer and/or operator of the site discharging polluted stormwater are responsible for compliance with the provisions of the CWA. Information available to Riverkeeper indicates that WSDOT is the developer and operator of the Road Project. Such information includes the FSEIS submitted by Jerry Alb, WSDOT’s Director of Environmental Services, which indicates that WSDOT is the lead agency on the Road Project. Further evidence that WSDOT is the developer and operator of the Road Project includes the required Notice of Intent to Comply with the Construction Permit (“NOI”) letter filed with Ecology listing WSDOT as the agency responsible for the Road Project. Finally, WSDOT’s own webpage details WSDOT’s activities at the Road Project and names Larry Larson as the Project Engineer.

Additionally, information available to Riverkeeper indicates that Graham Construction Inc. is the contractor responsible for construction of the Wandermere Section and the US 2 Section of the Road Project. Such information includes WSDOT’s webpage which indicates that Graham Construction Inc. was awarded several “Nickel” contracts to construct these sections of the Road Project. Additionally, Riverkeeper investigators conducted site inspections at the Road Project and observed Graham Construction Inc. equipment and personnel throughout the site. Graham Construction Inc. is a family of companies offering general contracting, project management, design-build and construction services from offices across Canada and the Central and Pacific Northwestern United States, with its corporate headquarters in Calgary, Alberta.

Lastly, information available to Riverkeeper indicates that Scarsella Bros. Inc is also responsible for construction of the Wandermere Section and the US 2 Section of the Road Project. Such information includes WSDOT’s webpage which indicates that Scarsella Bros Inc. was rewarded a “Nickel” contract for the BNSF Railroad Tunnel. While construction on the tunnel has completed, Riverkeeper investigators observed Scarsella Brothers Inc. equipment and personnel throughout the site actively engaged in construction activity. Scarsella Brothers, Inc. specializes in clearing and grading, excavation and drainage, and underground pipe and utilities. Scarsella Brothers Inc. operates in 10 Western states with its corporate headquarters located in Kent, Washington.

Therefore, Riverkeeper hereby directs this Notice Letter to WSDOT as the developer and operator of the Road Project and as the responsible party under the Clean Water Act.

- **Stormwater Pollution**

The purpose of the Clean Water Act is to attain “water quality which provides for the protection and propagation of fish...and wildlife, and provides for recreation in and on the water.” 33 U.S.C. § 1251(a)(2). In general, violations of the requirements of a NPDES permit constitute violations of the CWA. *See generally*

Envtl. Prot. Agency v. Cal. ex rel. State Water Res., 426 U.S. 200, 205 (1976).

EPA has identified construction as a serious contributor to the general stormwater pollution problem. Construction sites have been identified as significant dischargers of polluted stormwater, including stormwater containing high concentrations of silt and turbidity, as well as oil and grease, trash, sewage, and other chemicals used in construction activities and equipment maintenance. Thus, such sites have the potential to cause an array of chemical, biological, and physical water quality impacts.

It is generally acknowledged that erosion rates from construction sites are much greater than from almost any other land use activity. (Novotny, V. & H. Olem. *Water Quality: Prevention, Identification, and Management of Diffuse Pollution* (1994). A primary focus and intent of the Construction Permit, therefore, is the prevention of stormwater pollution in the form of soil erosion and water body sedimentation caused by earth-moving activities at construction sites. Once natural vegetation and groundcover are disturbed by grading and the operation of trucks and other heavy construction equipment, the disturbed land becomes vulnerable to erosion. As a result of this vulnerability, any significant rainfall event has the potential to cause large amounts of sediment and other pollutants associated with construction activities to wash down hillsides and into bays, oceans rivers, and their tributaries. The discharge of these pollutants results in the deterioration of water quality and harm to aquatic species and their habitats. In issuing its final regulations in 1990, EPA noted “[e]ven a small amount of construction may have a significant negative impact on water quality in localized areas. Over a short period of time, construction sites can contribute more sediment to streams than previously deposited over several decades.” 55 Fed. Reg. 47990 (Nov. 16, 1990). Discharges of sediment are of concern because sediment clogs stream channels, reduces stream depth, and destroys aquatic habitat.

In addition to sediment, construction sites also generate other types of pollutants including trash, concrete materials, sanitary wastes, oil and grease, fuel, debris, and other materials associated with onsite activities.

- **DESCRIPTION OF PROJECT ACTIVITIES AND FAILURES TO ACT AT THE ROAD PROJECT**

This Road Project spans nearly 10 miles from Northeastern Spokane to I-90. Construction activities at the Road Project include the following: heavy grading, cutting and filling, clearing of vegetation; landscaping, construction and/or re-pavement of roadways, operation of heavy equipment and dirt trucks; the loading and unloading of heavy equipment and other vehicles, the on-site storage of heavy equipment, and the storage and use of dirt and debris stockpiles, and construction materials. As set forth in this Notice Letter, observations made by Riverkeeper indicate that WSDOT is and continues to be in violation of the Construction Permit and the Clean Water Act at the Road Project. Generally, the Road Project lacks essential structural and non-structural stormwater controls to prevent rainfall and stormwater flows from coming into contact with sources of contaminants and to prevent the discharge of such contaminated stormwater from flowing off the construction site and into Deadman Creek and/or the Little Spokane River. Specifically, Riverkeeper observed insufficient Best Management Practices (“BMPs”) as required by the Construction Permit, including but not limited to damaged and/or inadequate BMPs surrounding the construction site allowing for the discharge of sediment and other pollutants into Deadman Creek and/or the Little Spokane River. (See photos A & B.)

WSDOT has failed to implement and/or maintain measures to control erosion at the Road Project. For example, WSDOT has not utilized adequate berming, covering, silt fencing, and binding to prevent the erosion of soil. WSDOT’s own monitoring results indicate that on at least one occasion, an earth berm broke, sending untreated stormwater underneath a silt fence directly into Deadman Creek and resulting in a turbidity reading of

1883 NTUs (nearly 75 times the permissible benchmark of 25 NTUs). WSDOT has also not implemented adequate measures on finished or unfinished slopes, cuts, roadways, unearthed soil, and inactive areas of the Road Project to prevent erosion from wind and stormwater. See Photo A for an example of inadequate erosion control measures where plastic tarping is not sufficiently covering exposed soils. Each of these failures has enabled storm runoff and/or wind to erode soil and to move pollutants and sediment into Deadman Creek and/or the Little Spokane River in violation of the Clean Water Act.

Further, WSDOT has not implemented and maintained sufficient pollution prevention measures at ingress and egress points to prevent tracking of sediment, mud, and soil from construction areas. Section 9.D.2 of the Construction Permit requires that WSDOT minimize off-site vehicle tracking of sediments onto paved surfaces and the generation of dust. Streets at the Road Project are frequently covered in mud and debris with no BMPs in place to prevent off-site tracking of sediment. Nearby roads are still in operation and heavily used by public vehicles. Overall, WSDOT has failed to employ the necessary BMPs to ensure that stormwater is prevented from coming into contact with, and moving pollutants in stormwater flows from, these various pollution sources.

Photo A: Exposed earth lacking plastic covering apparently allowing unfiltered sediment to discharge into Deadman Creek

Photo B: Broken hose/pipe appears to be channeling sediment-laden water into Deadman Creek

Photo C: Plastic tubing appears to be channeling water to river

In addition, WSDOT has failed to take adequate steps to effectively filter sediments and other pollutants from sediment and pollutant-laden stormwater discharges or to prevent their discharge from the Road Project. WSDOT has not installed and maintained adequate sediment basins or at a minimum, silt fences, vegetative buffer strips, or equivalent sediment controls for all down slope boundaries. Where minimal structural controls, such as straw bales and earth berms, have been put in place to prevent the discharge of contaminated waters, they have frequently been incapacitated and/or ineffective. See photo B for an example of a blown out sediment filtration BMP and photos C for an example of ineffective sediment filtration systems. As a matter of fact, on August 17, 2009, WSDOT's own water quality monitoring results indicated that, with only a miniscule amount of rainfall, an earth berm broke, sending unfiltered water under a silt fence and into Deadman Creek. These failures are manifested in turbidity levels far beyond the permissible benchmark of 25 NTUs. (See Ex. B.) According to records available to Riverkeeper, one of every six turbidity samples taken by WSDOT indicates a level higher than 25 NTUs. Of the 12 times the samples indicated greater NTU readings in excess of the permissible limit, the average reading is 832 NTUs- over 33 times the benchmark contained in the Construction Permit. Examples of samples which grossly exceed the benchmark include a level of 1883 NTUs on August 17, 2009; 5588 NTUs on October 26, 2009; and 1600 NTUs on November 30, 2009.

Because of WSDOT's failures to implement the necessary controls and BMPs at the Road Project, stormwater associated with construction activity, and stormwater contaminated with pollutants, has been and is being discharged from the Road Project into Deadman Creek and/or the Little Spokane River. These discharges are detrimental to water quality and are harming the many plants and animals that occupy or use these waterways. These discharges are in violation of water quality standards ("WQS") and harm the designated uses of these waterways. Further, these discharges harm Riverkeeper members' use and enjoyment Deadman Creek and/or

the Little Spokane River.

Violations of law by WSDOT associated with the above-described activities and failures to act at the Road Project are discussed throughout this Notice Letter and specifically below in Section C.

- **ONGOING VIOLATIONS OF THE CONSTRUCTION PERMIT AND THE CLEAN WATER ACT AT THE ROAD PROJECT**

In Washington, the Department of Ecology regulates stormwater generated by construction activities via the Construction Permit. Among other requirements, the Construction Permit prohibits discharges that cause or contribute to a violation of surface WQS (WAC 173-201A), ground WQS (WAC 173-200), sediment management standards (WAC 173-204), and human health-based criteria in the National Toxics Rule (40 CFR 131.36). (Section 3.A).

Additionally, the Construction Permit requires control measures (e.g. BMPs) to minimize pollutants in stormwater discharges and to ensure compliance with applicable standards. (Section 3.B and Section 9.C). To implement these requirements, the Construction Permit requires that dischargers prepare and implement a Stormwater Pollution Prevention Plan (“SWPPP”) before submitting a NOI for permit coverage. (Section 9). The SWPPP must include a narrative and drawings; all BMPs shall be clearly referenced in the narrative and marked on the drawings. (Section 9.B.1). The SWPPP must be maintained, updated, and implemented in accordance with Sections 3, 4, and 9. (Section D.12.c). Finally, all BMPs shall be inspected, maintained, and repaired (in accordance with Section 4 Monitoring Requirements) as needed to ensure continued performance of their intended function (Section 9.D.12). Any results from inspections are to be summarized in an inspection report or checklist that is entered into or attached to the Site Log Book. (Section 9.B.5). Among other requirements, the inspection report must contain: the locations of BMPs that need to be maintained or that failed to operate as designed; locations where additional BMPs are needed; and a description of stormwater discharged from the site. (Section 9.B.5).

Riverkeeper hereby puts you on notice that, upon the expiration of sixty (60) days after the date of this Notice Letter, Riverkeeper intends to file suit for violations of the Construction Permit and the Clean Water Act at the Road Project. Riverkeeper has observed and photographed serious violations of the Construction Permit at the Road Project. Those violations are set out in further detail below.

- **Discharges of Contaminated Stormwater in Violation of Construction Permit Conditions and the CWA, 33 U.S.C. §§ 1311, 1342**

The Clean Water Act provides that “the discharge of any pollutant by any person shall be unlawful” unless the discharger is in compliance with the terms of an NPDES permit. 33 U.S.C. § 1311(a). As described above, WSDOT discharges stormwater contaminated with sediment and pollutants from the Road Project into Deadman Creek and/or the Little Spokane River. WSDOT is not in compliance with the terms of the Construction Permit and is therefore violating the Clean Water Act each time it has discharged and continues to discharge stormwater contaminated with sediment and pollutants from the Road Project.

Section 9.D.12 of the Construction Permit requires all BMPs to be inspected, maintained, and repaired (in accordance with Section 4) as needed to ensure continued performance of their intended function. Section 4.B.1 of the Construction Permit requires that dischargers conduct site inspections to, among other things, evaluate the effectiveness of BMPs and determine if it is necessary to install, maintain, or repair BMPs to improve the quality of stormwater discharges. Riverkeeper investigators have observed and photographed inadequate BMPs and non-compliance at the Road Project.

BMPs have not been put in place on downward slopes along the Road Project to provide proper

sediment control. The slopes are either completely uncovered, or inadequately covered, and therefore during storm events water easily flows down the slopes carrying sediment and discharges into Deadman Creek and/or the Little Spokane River. Additionally, vegetation has been removed from the slopes without any alternative sediment control measures put in place. (See Photo A.)

Section 3.A. of the Construction Permit prohibits discharges that cause or contribute to a violation of WQS. Information available to Riverkeeper indicates that stormwater discharges from the Road Project are causing and contributing to violations of WQS, and that the Road Project has the reasonable potential to continue cause or contribute violations of WQS.

General Condition 26.B of the Construction Permit requires a duty to mitigate any discharge in violation of the Construction Permit where there is a reasonable likelihood of adversely affecting human health or the environment. Because the Road Project exhibits inadequate pollution control measures, WSDOT has discharged and continues to discharge contaminated stormwater during every significant rain event (defined by EPA as a rainfall event generating 0.1 inches or more of rain) from the Road Project. These discharges of contaminated stormwater are adversely affecting or threatening to adversely affect human health and/or the environment in violation of General Condition 26.B of the Construction Permit.

From the day operations commenced or soil-disturbing activities began through the present at the Road Project, WSDOT has discharged and will continue to discharge stormwater containing pollutants from the Road Project into Deadman Creek and/or the Little Spokane River during every significant rain event. A copy of rain data reflecting the dates on which significant rain events occurred at the Road Project from March 29, 2005, through the present as well as a brief summary of known violations is attached hereto as Exhibit A & B. Riverkeeper will update the dates of violations when additional information becomes available. Riverkeeper hereby puts WSDOT on notice that WSDOT has committed, and will continue to commit, violations of the Clean Water Act for their contaminated discharges of stormwater on each and every date which rainfall meets or exceeds 0.1 inches, whether or not such dates are listed on the attached table.

Information available to Riverkeeper indicates that these unlawful stormwater discharges have occurred on a continuous basis each day that a rain event meets or exceeds 0.1 inches since the date soil-disturbing operations commenced at the Road Project. These unlawful discharges are ongoing. WSDOT will continue to be in violation of the CWA and the Construction Permit on each occasion that they discharge contaminated stormwater from the Road Project. Every discharge of contaminated storm water since soil-disturbing operations commenced at the Road Project is a separate and distinct violation of Section 301(a) of the Clean Water Act. 33 U.S.C. § 1311(a). When additional rain data evidencing discharges of contaminated stormwater from the Road Project becomes available, Riverkeeper will include those violations in its action. Pursuant to Section 309(d) of the Clean Water Act, WSDOT is subject to penalties for all violations of the Construction Permit and the Clean Water Act occurring within the past five (5) years. 33 U.S.C. § 1319 (d).

- **Failure to Develop and/or Implement an Adequate Stormwater Pollution Prevention Plan in Violation of the Construction Permit and the CWA, 33 U. S. C. §§ 1311, 1342**

Section 9 of the Construction Permit requires that from the day of initial soil disturbance until final stabilization, dischargers of stormwater associated with construction activity must develop and implement an adequate SWPPP that satisfies certain requirements of the Construction Permit. The SWPPP is intended (1) to implement BMPs to prevent erosion and sedimentation, and to identify, reduce, eliminate or prevent stormwater contamination and water pollution from construction activity; (2) to prevent violations of surface water quality, ground water quality, or sediment management standards; and (3) to control peak volumetric flow rates and

velocities of stormwater discharges. (Section 9.A.1-3).

Among other things, the SWPPP is required to include a narrative and drawings; with BMPs clearly referenced in the narrative and marked on the drawings. (Section 9.B). The SWPPP narrative must include documentation to explain and justify the pollution prevention decisions made for the project. Such documentation must include: (a) information about existing site conditions (topography, drainage, soils, vegetation, etc.); (b) potential erosion problem areas; (c) the 12 elements of a SWPPP in Section 9.D.1-12, including BMPs used to address each element; (d) construction phasing/sequence and general BMP implementation schedule; (e) the actions to be taken if BMP performance goals are not achieved; (f) engineering calculations for ponds and any other designated structures. (Section 9.B.1.a-f).

The SWPPP map must be sufficiently detailed to identify the location of the construction site and receiving waters within one mile of the site and must include the following features: (1) The direction of north, property lines, and existing structures and roads; (2) Cut and fill slopes indicating the top and bottom of slope catch lines; (3) Approximate slopes, contours, and direction of stormwater flow before and after major grading activities; (4) Areas of soil disturbance and areas that will not be disturbed; (5) Locations of structural and nonstructural controls (BMPs) identified in the SWPPP; (6) Locations of off-site material, stockpiles, waste storage, borrow areas, and vehicle/equipment storage areas; (7) Locations of all surface water bodies, including wetlands; (8) Locations where storm water or non-stormwater discharges off-site and/or to a surface water body, including wetlands; (9) Location of water quality sampling station(s), if sampling is required by state or local permitting authority; and (10) Areas where final stabilization has been accomplished and no further construction-phase permit requirements apply. (Section 9.E.1-10).

Section 9.B.2. of the Construction Permit requires that the discharger shall modify the SWPPP if, during inspections or investigations, it is determined that the SWPPP is, or would be, ineffective in eliminating or significantly minimizing pollutants in stormwater discharges from the site. All BMPs are required to be consistent with the Stormwater Management Manual for Eastern Washington, on file with Ecology, or other stormwater management guidance documents or manuals which provide an equivalent level of pollution prevention and are approved by Ecology. (Section 9.C.2-3).

As set forth in Section B of this Notice Letter, Riverkeeper's investigation of the conditions at the Road Project demonstrates that WSDOT has not developed and implemented an adequate SWPPP for the Road Project. Specifically, in violation of the SWPPP requirements, WSDOT has not developed or implemented BMPs that adequately prevent or reduce pollutants in stormwater discharges, that adequately protect Deadman Creek and/or the Little Spokane River from pollutant discharges associated with construction activities, that minimize the exposure of stormwater to pollutants associated with construction activities, that adequately prevents erosion of the construction site, and that control and minimize discharges from sources of pollutants. This is manifested in the water quality monitoring data collected by WSDOT which indicates turbidity levels far beyond the permissible benchmark of 25 NTUs (as high as 5588 NTUs on at least one occasion.) WSDOT has not developed or implemented a SWPPP at the Road Project that prevents discharges from violating permit prohibitions, or that achieves the required inspections and maintenance.

As a result of WSDOT's failure to adequately develop and/or implement a SWPPP for the Road Project, WSDOT has been in daily and continuous violation of the Construction Permit requirements and the CWA on each day since the day operations commenced or when soil-disturbing activities began at the Road Project through the present. These violations are ongoing. WSDOT will continue to be in violation every day that it fails to develop and/or implement an adequate SWPPP for the Road Project. Every day since the date that operations commenced or soil-disturbing activities began at the Road Project through the present that WSDOT has operated with an inadequately developed and/or implemented SWPPP for the Road Project is a separate

and distinct violation of Section 301(a) of the Clean Water Act. 33 U.S.C. § 1311(a). Pursuant to Section 309(d) of the Clean Water Act, WSDOT is subject to penalties for all violations of the Construction Permit and the CWA occurring within the past five (5) years. 33 U.S.C. § 1319(d).

- **Failure to Develop and/or Implement an Adequate Monitoring and Reporting Program in Violation of Construction Permit Conditions and the CWA, 33 U.S.C. §§ 1311, 1342**

Section 4 of the Construction Permit requires all dischargers to develop and implement a monitoring plan. Section 5.C requires that dischargers retain records of all monitoring information (site log book, sampling results, inspection reports/checklists etc.), the SWPPP, and any other documentation of compliance with permit requirements for at least three years following the expiration of permit coverage. The inspection requirements mandate a schedule of site inspections at least once every calendar week and within 24 hours of any discharge from the site. (Section 4.B.2). Inspections must include all areas of the site disturbed by construction activity. During the inspection, a qualified site inspector must assess the site conditions and construction activities that could impact the quality of stormwater, as well as the effectiveness of erosion and sediment control measures used to control the quality of stormwater discharges. (Section 4.B.3).

For construction sites one acre or larger, site inspections must be conducted by a Certified Erosion Control and Sediment Control Lead (“CSEL”) that is present on-site or on-call at all times. The CSEL must create an inspection report which, among other things, identifies whether the site is either in compliance or out of compliance with the SWPPP and the Construction Permit. (Section 4.B.5.h). If the site inspection indicates that the site is out of compliance, then the inspection report shall include a summary of remedial actions required to bring the site back into compliance, as well as a schedule of implementation. (Section 4.B.5.i). Finally, the discharger must immediately notify Ecology of any instances of noncompliance that may pose a threat to human health or the environment. (Section 5.F). A written submission must be submitted to Ecology within five (5) days after becoming aware of the violation.

As set forth in Section B of this Notice Letter, Riverkeeper’s investigation of the conditions at the Road Project demonstrates that WSDOT has failed to adequately develop and/or implement an inspection plan in compliance with Section 4 of the Construction Permit at the Road Project. WSDOT has failed to monitor, identify, and report illegal discharges, including contaminated stormwater, or to evaluate in a meaningful way, and then correct the serious inadequacies of its BMPs and its SWPPP development and implementation at the Road Project. Ineffective BMPs have remained in place despite the requirement of an inspection plan which is supposed to monitor and then correct ineffective BMPs. Furthermore, since the excess sediment discharges may adversely affect the environment WSDOT should have notified Ecology of the potential endangerment.

As a result of WSDOT’s failure to adequately develop and/or implement an inspection plan for the Road Project, WSDOT has been in daily and continuous violation of the Construction Permit requirements and the CWA and each and every date since operations commenced or when soil-disturbing activities began at the Road Project through the present. These violations are ongoing. WSDOT will continue to be in violation every day that it fails to develop and/or implement an adequate inspection plan for the Road Project. Every day since the day operations commenced or when soil disturbing activities began at the Road Project through the present day, WSDOT has operated with an inadequately developed and/or implemented an inspection plan for the Road Project is a separate and distinct violation of Section 301(a) of the Clean Water Act. 33 U.S.C. § 1311(a). WSDOT is subject to penalties for all violations of the Construction Permit and the Clean Water Act occurring within the past five (5) years. 33 U.S.C. § 1319(d).

In addition to the violations set forth above, this Notice covers all violations of the Clean Water Act and the Construction Permit by WSDOT as 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.

Riverkeeper has retained legal counsel to represent them in this matter. The Gonzaga University Environmental Law Clinic (“Clinic”) represents Riverkeeper in this matter. Clinic is part of Gonzaga Law School’s University Legal Assistance, a not-for-profit clinical law program.

Please direct all correspondence to:

Michael Chappell Gonzaga University Environmental Law Clinic P.O. Box 3528 Spokane, WA 99220 (509) 313-5791

Riverkeeper believes this Notice Letter sufficiently states grounds for filing suit. We intend, at the close of the 60-day notice period or shortly thereafter to file a citizen suit under Section 505(a) of the Clean Water Act against each of the notice recipients.

During the 60-day notice period, we would be willing to discuss effective remedies for the violations noted in this letter. However, 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.

Sincerely,

Michael Chappell
Attorney
Gonzaga University Legal Assistance
Environmental Law Clinic
cc: see attached service list

Service List

Eric H. Holder, Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Lisa P. Jackson, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Michelle Pirzadeh, Acting Regional Administrator
U.S. Environmental Protection Agency, Region 10
Regional Administrator's Office, RA-140
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101

Larry Larson, Project Engineer
WSDOT Project Office
2714 N. Mayfair
Spokane, WA 99207

Tedd Sturdevant, Director of Washington Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

SC & B Services, Inc., Registered Agent of Graham Construction, Inc.
999 Third Avenue, Suite 3000
Seattle, WA 98104-4088

Frank Scarsella, Registered Agent of Graham Construction, Inc. 20004 Third Place, SW Normandy Park, WA 98166
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Exhibit A

Year	month	day	Prep
2005	3	29	0.16
2005	4	4	0.35
2005	5	3	0.11
2005	5	6	0.12
2005	5	9	0.88
2005	5	10	0.19
2005	5	14	0.24
2005	5	15	0.21

2005		5		18	0.51
2005		5		20	0.61
2005		5		21	0.26
2005		5		22	0.2
2005		6		1	0.22
2005		6		5	0.28
2005		6		14	0.1
2005		6		27	0.31
2005		6		28	0.33
2005		7		8	0.16
2005		7		9	0.72
2005		7		16	0.16
2005		8		17	0.45
2005		9		29	0.15
2005		9		30	0.59
2005		10		1	0.26
2005		10		26	0.11
2005		10		28	0.18
2005		10		31	0.23
2005		11		1	0.34
2005		11		3	0.36
2005		11		4	0.16
2005		11		5	0.17
2005		11		7	0.16
2005		11		13	0.14
2005		11		25	0.19
2005		11		29	0.37
2005		12		1	0.15
2005		12		21	0.4
2005		12		22	0.53
2005		12		26	0.1
2005		12		27	0.25
2005		12		28	0.5
2005		12		30	0.42
2005		12		31	0.39
2006		1		2	0.14
2006		1		3	0.15
2006		1		6	0.25
2006		1		7	0.39
2006		1		9	0.51
2006		1		10	0.94
2006		1		12	0.11
2006		1		13	0.34
2006		1		14	0.36
2006		1		16	0.22

2006		1		17	0.35
2006		1		20	0.11
2006		1		28	0.11
2006		1		29	0.23
2006		2		2	0.26
2006		2		13	0.1
2006		2		27	0.28
2006		2		28	0.4
2006		3		6	0.11
2006		3		8	0.18
2006		3		14	0.13
2006		3		17	0.16
2006		3		24	0.13
2006		3		25	0.19
2006		3		31	0.17
2006		4		4	0.12
2006		4		5	0.13
2006		4		8	0.24
2006		4		9	0.16
2006		4		14	0.12
2006		4		15	0.29
2006		4		30	0.35
2006		5		19	0.12
2006		5		20	0.32
2006		5		22	0.21
2006		5		28	0.27
2006		6		4	0.89
2006		6		7	0.18
2006		6		8	0.28
2006		6		9	0.21
2006		6		10	0.83
2006		6		13	0.34
2006		6		14	0.29
2006		8		30	0.24
2006		9		20	0.16
2006		10		15	0.48
2006		10		16	0.38
2006		11		2	0.18
2006		11		3	0.12
2006		11		4	0.34
2006		11		5	0.2
2006		11		6	0.22
2006		11		7	0.25
2006		11		9	0.28
2006		11		10	0.47

2006		11		13	0.29
2006		11		19	0.25
2006		11		20	0.21
2006		11		22	0.72
2006		11		23	0.2
2006		11		26	0.23
2006		11		30	0.15
2006		12		12	0.16
2006		12		13	0.48
2006		12		14	0.41
2006		12		23	0.19
2006		12		25	0.23
2006		12		26	0.49
2006		12		27	0.12
2007		1		3	0.13
2007		1		20	0.14
2007		2		3	0.12
2007		2		9	0.11
2007		2		11	0.29
2007		2		14	0.31
2007		2		22	0.13
2007		2		24	0.31
2007		2		25	0.14
2007		3		16	0.12
2007		3		19	0.2
2007		3		24	0.13
2007		3		25	0.14
2007		3		27	0.18
2007		4		9	0.17
2007		4		14	0.18
2007		5		2	0.22
2007		5		21	1.11
2007		5		28	0.13
2007		6		5	0.34
2007		6		29	0.14
2007		7		19	0.28
2007		8		19	0.38
2007		8		31	0.17
2007		9		30	0.27
2007		10		2	0.33
2007		10		4	0.26
2007		10		19	0.21
2007		11		7	0.22
2007		11		10	0.18
2007		11		12	0.26

2007		11		17	0.33
2007		11		26	0.12
2007		12		1	0.11
2007		12		2	0.34
2007		12		3	1.18
2007		12		4	0.14
2007		12		15	0.12
2007		12		17	0.12
2007		12		18	0.23
2007		12		19	0.24
2007		12		20	0.18
2007		12		22	0.1
2007		12		23	0.36
2007		12		25	0.11
2008		1		4	0.12
2008		1		6	0.15
2008		1		7	0.11
2008		1		8	0.44
2008		1		9	0.13
2008		1		19	0.12
2008		1		26	0.58
2008		1		27	0.54
2008		1		29	0.13
2008		1		31	0.46
2008		2		5	0.12
2008		2		6	0.35
2008		2		7	0.17
2008		2		15	0.11
2008		3		11	0.2
2008		3		14	0.23
2008		3		19	0.13
2008		3		21	0.11
2008		3		23	0.11
2008		3		27	0.12
2008		3		28	0.17
2008		3		29	0.19
2008		3		30	0.22
2008		4		4	0.1
2008		4		6	0.18
2008		4		14	0.3
2008		4		23	0.23
2008		4		30	0.12
2008		5		20	0.49
2008		5		22	0.1
2008		6		3	0.2

2008		6		7	0.14
2008		6		11	0.14
2008		6		21	0.24
2008		8		20	0.2
2008		8		27	0.16
2008		9		21	0.4
2008		10		7	0.12
2008		11		4	0.19
2008		11		7	0.54
2008		11		8	0.15
2008		11		11	0.21
2008		11		12	0.2
2008		11		28	0.14
2008		12		2	0.14
2008		12		12	0.23
2008		12		17	0.74
2008		12		18	0.61
2008		12		21	0.24
2008		12		22	0.27
2008		12		24	0.29
2008		12		27	0.22
2008		12		28	0.13
2008		12		29	0.59
2009		1		1	0.17
2009		1		2	0.34
2009		1		5	0.27
2009		1		6	0.22
2009		2		5	0.16
2009		2		6	0.19
2009		2		22	0.12
2009		2		23	0.48
2009		3		1	0.29
2009		3		2	0.36
2009		3		3	0.34
2009		3		9	0.17
2009		3		15	0.22
2009		3		21	0.12
2009		3		22	0.25
2009		3		24	0.11
2009		3		28	0.1
2009		3		29	0.12
2009		3		31	0.1
2009		4		2	0.25
2009		4		3	0.52
2009		4		12	0.27

2009		5		4	0.18
2009		5		6	0.14
2009		5		13	0.21
2009		5		14	0.23
2009		6		15	0.24
2009		6		17	0.18
2009		6		19	0.55
2009		6		21	0.11
2009		7		6	0.16
2009		7		12	0.11
2009		7		13	0.14
2009		8		6	0.24
2009		8		12	0.2
2009		8		15	0.18
2009		9		6	0.1
2009		9		17	0.38
2009		10		12	0.2
2009		10		17	0.2
2009		10		23	0.63
2009	10		26		0.7
2009	11		6		0.1
2009	11		13		1.50*
2009	11		19		0.26*
2009	11		22		3.47*
2009	11		26		0.15
2009	11		27		0.32
2009	12		15		3.91*
2009	12		21		0.52
2009	12		29		0.41*
2009	12		30		0.32*
2009	12		31		2.01*
2010	1		4		0.54*
2010	2		4		0.15
2010	2		11		0.1
2010	2		14		0.27
2010	3		11		0.16
2010	3		12		0.2
2010	3		21		0.2
2010	3		28		0.25
2010	3		29		0.55

Monitoring Information		
Total Rain Days between 3/29/05 and 3/29/10 = 273 days of 0.10 and above		
2/16/07 to 05/31/09 data from NCDC station location at Spokane Int'l Airport		

6/01/09 to 3/29/10 from Weather Underground location at Spokane Int'l Airport
*combined snow & rain

Exhibit B

**VIOLATIONS TABLE
US 2 Lowering WQM Data – Deadman Creek**

SampleDate	SampleType	SampleOutfall	Rainfall
17-Aug-09	Turbidity	1883	0
02-Oct-09	Turbidity	136	0.01
23-Oct-09	Turbidity	93	0.63
23-Oct-09	Turbidity	154	0.6
26-Oct-09	Turbidity	5588	0.7
29-Oct-09	Turbidity	36	0.1
03-Nov-09	Turbidity	56	0
19-Nov-09	Turbidity	67	0
25-Nov-09	Turbidity	247	0
25-Nov-09	Turbidity	66	0
30-Nov-09	Turbidity	58	0
30-Nov-09	Turbidity	1600	0