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June 14, 2019

Via Express Mail and Email

Cindy Huwe
Permit Coordinator
Washington Department of Ecology
Central Regional Office
1250 West Adler Street
Union Gap, WA 98903

Re: Comments to Draft Fact Sheet and Permit for Permit No. WA0021938 for the City of Cle Elum – Upper Kittitas County Regional Wastewater Treatment Facility

Dear Ms. Huwe:

The City of Cle Elum (the “**City**”) and Veolia Water North America-West, LLC (“**Veolia**”) are in receipt of the preliminary draft copy of the proposed Fact Sheet and Permit relating to the renewal of the above-referenced permit (the “**Permit**”). This letter is intended to serve as the City’s and Veolia’s joint response to the proposed Fact Sheet and changes to the Permit that the Department of Ecology (“**Ecology**”) has proposed.

In particular, the City and Veolia strongly object to and oppose Ecology’s proposal to name Veolia as a co-permittee on the Permit. The draft Fact Sheet lists no reasons for this change beyond a general statement of the Water Quality Program’s “standard procedures,” and the City and Veolia note that this decision is contrary to applicable federal guidance and the factors outlined in Ecology’s own Permit Writer’s Manual.

Including Veolia as Co-Permittee Does Not Comport with Federal Guidance

In addressing the co-permittee issue, the United States EPA’s interpretation of 40 C.F.R. §122(b) (and, by analogy, Washington state law) states that the term “operator” means the parties who “exercise primary management and operational decision-making authority,” stating “most parties conducting contract activities for POTWs do not exert such control over POTWs,” and concluding that “the municipality or sewage authority should be the sole permittee” in situations, like here, where professional service providers enter into public-private partnership agreements with municipalities to operate the municipalities’ treatment works. *See* Memorandum, James R. Elder, Dir., EPA Office of Water Enforcement & Permits, to Region I-X Water Management Div. Directors, Ms. Susan Lepow, Office of General Counsel, and Ms. Kathy Summerlee, Office of Enforcement & Compliance Monitoring (Oct. 28, 1988), which can be provided upon request. Indeed, the Hartsne Opinion, on which Ecology’s co-permittee policy is based, addressed this guidance and concluded that “the EPA memos are less than dispositive of the question before us, and are primarily directed to discussion of the situation where a private entity, not another

public body, has operational responsibility for a facility.” Order on Summary Judgment, PCHB No. 09-152, WSUD and Hartstene Pointe WSD v. Ecology, page 4 [emphasis added]. The Hartsne Opinion addressed a situation where one public entity operated sewer facilities on behalf of another public entity – it explicitly did not address a situation where a private entity operates and maintains a facility through a contractual relationship with a public entity owner, which is the case with Veolia and the City. Here, the EPA’s guidance squarely suggests that Veolia should not be listed as a co-permittee.

Ecology’s Own Guidance Suggests that Veolia Should Not Be the Co-Permittee

Ecology’s Permit Writer’s Manual (revised July 2018) outlines five factors that Ecology staff and managers should consider when identifying a contract operator as a co-permittee, all of which suggest that Veolia should not be named as a co-permittee.

1. Consider the extent of the operator’s control over the treatment system, as described in the service agreement

The City ultimately controls the facilities and treatment system. Veolia, as an independent contractor, is responsible solely for the operation and physical conduct of maintenance relating to the City’s wastewater treatment assets within the property lines of the City’s Water Treatment Plant (the “Assets”), provided any such responsibility is limited to operations being within the approved design parameters enacted by the City and influent streams that comply with applicable law and local ordinances. The City is responsible for: funding all maintenance (Veolia works off of an annual maintenance budget that the City controls), capital upgrades, and all other funding relating to the Assets (including but not limited to any funding required to meet changes in permit requirements, modifications, and replacement of equipment); funding, arranging, and conducting all studies; defining specific parameters Veolia must comply with when operating the Assets; all planning, engineering, and responsibilities typically associated with ownership of the Assets; and all claims or damages arising out of the discharge, dispersal, release, or escape from any of the Assets (including effluent from the treatment works) into or upon the land, atmosphere, or any water course or body of water, except those resulting from Veolia’s negligence.

The City sets rates and fees to finance capital, operations, and maintenance activities that are sufficient to maintain optimal operation of the facilities. Veolia has no control over the establishment of rates and fees.

Veolia is a contractor for the City, merely providing a service, and it does not control the City’s facilities. This reality was recognized by the EPA in its guidance and should be recognized here.

2. Consider the experience and record of the operator at other facilities.

Veolia is one of the world’s premier wastewater treatment operators, serving more than 150 municipal clients in North America and over 2,800 customers around the world. Veolia’s reputation is built on its commitment to safety and compliance, and its safety record is exemplary. This is reflected in the manner in which Veolia has operated the facilities on behalf of the City, with no notices of violation issued since 2004 and only one notice of violation issued since Veolia began operations in 2002 (which was connected to the start-up of the facility).

Washington Department of Ecology
June 14, 2019

Ecology has consistently recognized Veolia's operational excellence by awarding the Cle Elum facility "Outstanding Treatment Plant" for each of the last 15 years.

Co-permittee status has not been necessary to maintain this long record of partnership between the City and Veolia or the excellent operations of the treatment facilities. There is nothing in the record to suggest that a change is required now, and indeed such a change would only upset the City and Veolia's outstanding working relationship.

3. Consider the performance and enforcement provisions in the service agreement between the owner and the operator.

The agreement between the City and Veolia provides that Veolia is responsible for fines or penalties resulting from violations of water quality standards or requirements that are a result of Veolia's negligence, and the City shall be responsible for those fines or penalties resulting from violations of water quality standards or requirements that are not a result of Veolia's negligence. Moreover, Veolia's overall liability for negligence is capped under the contract. Adding Veolia as a co-permittee would profoundly alter the risk balance negotiated between the City and Veolia and require the City and Veolia to re-negotiate their relationship. This would likely result in additional costs to the City that should not be borne by the City and its ratepayers.

4. Review the recommendations or comments from the Attorney General's office.

As Ecology did not provide any reasoning or commentary for its decision to include Veolia as a co-permittee, the City and Veolia have to conclude that the Attorney General's office was not consulted and did not provide recommendations or comments.

5. Make a reasoned decision based on the facts, Ecology guidance, and the manner in which the entities' service agreement defines the responsibilities each will have (see the Hartstene Opinion, pages 8 and 9).

Ecology provided no reasoning at all for its decision to include Veolia as co-permittee. In the absence of any stated reason, the City and Veolia are unable to make any determination about whether Ecology made a "reasoned decision based on the facts."

The City and Veolia note page 59 of the Ecology Permit Writer's Manual, which states "it is critical that permit writers note the contractor's responsibilities in the fact sheet (using the service agreement as a reference) and document the decision to identify (or not) the operator as co-permittee." The City and Veolia would welcome any documentation on Ecology's decision so that we may better understand the reasoning behind the decision and also address Ecology's concerns.

The Permit Writer's Manual also notes that there are facilities where Ecology staff and managers may consider issuing the permit to the owner only, including facilities where:

1. Listing the contractor as a co-permittee would create a disproportionate burden for a small community to attract an operator, due to location or other factor; or
2. The service agreement is for a limited duration; for example, to provide temporary service until the owner can hire a permanent contractor, or to train staff; or

Washington Department of Ecology
June 14, 2019

3. The need for enforcement has been or is expected to be low; for example, at larger facilities where owner resources and planning have historically addressed capacity or operational problems before they arise; or
4. The operator has a superior record of compliance at the facility or other facilities; and the service agreement allows the owner to enforce on permit requirements as a matter of service agreement compliance.

Here, the City is a small community, and the likely burden of attracting an operator willing to become a co-permittee would be significant. In the roughly 17 years that the City has contracted with Veolia, the need for enforcement has been extremely low, and Veolia has a long track record of addressing problems before they arise. Moreover, Veolia has a superior record of compliance at this facility and at other facilities in Washington and around the world, and the City will be able to enforce permit requirements through its service agreement with Veolia.

The City and Veolia ask that Ecology recognize the ramifications of this decision, which are spelled out in Ecology's own Permit Writer's Manual at page 59. This decision will lead Veolia to face greater risk and costs, which will likely be passed along to the City and its ratepayers. Eventually, the City could face difficulties finding contract operators willing to take on this additional risk and liability. Ecology puts it well when it notes "co-permittee status complicates the owner-contractor relationship."

One final comment, unrelated to the co-permittee issue, is with respect to the "First Submittal Dates" listed on the "Summary of Permit Report Submittals" in the Permit. The City and Veolia hereby request that Ecology review these dates and consider revising them to take into account the timing of the issuance of the Permit, especially the date for the "Application for Permit Renewal," which the City and Veolia submit should be within one year of the expiration date.

The City and Veolia hereby request a meeting with Ecology staff and management to discuss the concerns raised in this letter and consider alternatives. We look forward to discussing our concerns in person. Please do not hesitate to contact us with any questions or concerns.

Sincerely,



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