



# Oregon

Theodore R. Kulongoski, Governor

## Department of Environmental Quality

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December 17, 2008

Mike Gearheard  
Director  
Office of Water and Watersheds  
US Environmental Protection Agency  
Region 10  
1200 Sixth Avenue, OWW-135  
Seattle, WA 98101

Re: EPA Vessel General Permit

Dear Mike:

Based on our conversation this afternoon it is clear that vessels calling on ports in Oregon will be at risk of violating the federal Clean Water Act (CWA) unless the Oregon Department of Environmental Quality (ODEQ) rescinds its proposal to deny certification without prejudice, rescinds its request for an extension, and waives certification under CWA Section 401 for the EPA Vessel General Permit (VGP). Obviously, Oregon cannot tolerate such an interruption of interstate and international commerce and the resulting hardship on the population. Accordingly, by this letter I am advising EPA that ODEQ rescinds the position stated in its letter of November 21, 2008, rescinds its request for an extension, and waives its right to certify under Section 401.

ODEQ takes this action most reluctantly, however, because it believes that EPA's actions with respect to the VGP have been contrary to Sections 401 and 402 of the CWA in several respects, as summarized below. Additionally, ODEQ believes EPA has run roughshod over the rights of Oregon and other states, rather than being a partner in implementing the CWA.

First and foremost, it is ODEQ's position that, subject to certain well-recognized exceptions not at issue here, EPA does not have authority to issue an NPDES permit for discharges in a state (exclusive of certain tribal lands) that has received approval to operate the NPDES program under CWA section 402. Rather, EPA should issue the permit only for states that do not operate the NPDES program and it should develop effluent limit guidelines for the many states that operate their own program. Moreover, it is ODEQ's intention to issue its own NPDES permit under the CWA in the near future and to coordinate this effort with the west coast states to best serve the region. We

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believe the waiver we are now offering is legally acceptable to Oregon in large part because we believe that EPA has overstepped the law in the first place by seeking such certification.

ODEQ also maintains that EPA failed in several respects to properly apply for certification. It appears that few efforts were made to comply with ODEQ's procedural rules governing applications for Section 401 certifications. EPA, like all other federal agencies, is required by the CWA to comply with these procedural requirements. Moreover, it is these procedures that allow for proper review.

EPA's failure to comply with ODEQ's procedural requirements and its efforts to force states to rush issuance or waiver of certification has another serious consequence. As you know, CWA section 101 directs EPA and the states to provide adequate public participation in programs including the Section 401 program. Given the timelines imposed by EPA and the changing nature of the proposed permit, we believe the public has been seriously shortchanged in this regard. We recognize that EPA is operating under court-imposed deadlines. However, we note that EPA waited until very late in the game to involve states and we believe it is likely the courts would have provided additional extensions to implement Section 401 if EPA had requested such relief. To be blunt, we understand the time problem, but we believe it is largely a time problem of EPA's own creation.

It is unfortunate that this is happening as we strive to build a strong EPA/ODEQ partnership for addressing water quality issues. I trust that we can look to better cooperation in the future on the many difficult issues that face ODEQ and EPA.

Sincerely,



Neil Mullane, Administrator  
Water Quality Division

C:

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