




DEPARTMENT OF JUSTICE  
GENERAL COUNSEL DIVISION

MEMORANDUM

DATE: July 24, 2009

TO: Commissioner Ken Williamson, Industrial Stormwater Advisory Committee  
Jenine Camilleri, Department of Environmental Quality

FROM: Larry Knudsen, Assistant Attorney General   
Natural Resources Section

SUBJECT: Advice to Stormwater Advisory Committee

Role of MSGP in Advisory Committee Deliberations

In the settlement agreement between DEQ and the NEDC and CRK, the parties recognized that EPA's Multi-Sector General Permit (MSGP) is a "desirable platform" for the new permits being developed to replace the existing 1200-Z and 1200-COLS. (Recital F.) Specifically, DEQ committed to issue "permits based on the EPA 2008 MSGP." (Agreement at section 4.) The settlement agreement notes, however, that the new permits will not be identical to the MSGP because:

- There are provisions in the MSGP that are not applicable to state programs,
- DEQ committed to keeping certain provisions in current Oregon permits that go beyond the provisions in the MSGP,
- DEQ committed to certain clarifying provisions where EPA's stated regulatory intent is not clearly expressed in the MSGP, and
- DEQ committed to having the advisory committee consider and advise the Department on a number of issues not addressed in the MSGP.

In keeping with the settlement agreement, DEQ should ask the Advisory Committee to consider permit terms based on the MSGP as tailored to Oregon and consistent with the other express provisions in the Settlement Agreement. However, the Committee is free to discuss other permitting options and may recommend provisions to DEQ that differ from the MSGP, even provisions that are less stringent than those in the MSGP.

The Committee should keep in mind, that DEQ has substantial incentives not to issue new permits that are significantly less protective than the MSGP. There are at least four reasons for this:

- If the permits issued by DEQ substantially differ from the MSGP on key provisions, DEQ may be found to have failed to comply with the Settlement Agreement. This, in turn, would lead to adverse legal consequences for the Department.
- To the extent that permitting issues involve the interpretation of the Clean Water Act or EPA's regulations interpreting the Act, the provisions in the MSGP are entitled to substantial deference by the courts. The same is not true of any DEQ interpretation that might be different from or inconsistent with the EPA interpretation. To the extent that there are significant legal risks associated with any particular interpretation, DEQ has a substantial incentive to follow EPA's lead.
- DEQ's permitting action must be based on substantial evidence. Some provisions in the MSGP are based on significant research and analysis. DEQ may not have resources to undertake similar research and analysis for alternative provisions.
- DEQ has recognized that there may be benefits in a permitting approach that will be adopted by a number of other jurisdictions. A larger pool of technical assistance, guidance and judicial and administrative case law will be available to the Department and permit registrants for a permit that follows the approach in the MSGP.

#### Role of EPA in Reviewing and Approving a New Industrial Stormwater Permit

EPA has the authority to review all permits issued by DEQ and, typically, EPA closely reviews important permits such as general permits for industrial stormwater dischargers. EPA may object to the permits based on any of nine grounds specified in 40 CFR 123.44. An objection is most likely if EPA determines that DEQ has misinterpreted or failed to comply with any provision of the Clean Water Act or its implementing regulations. An EPA objection could be based failure to include provisions in the permit or the inclusion of provisions that EPA determines to be not sufficiently stringent or otherwise inconsistent with its regulations. Given that most provisions of the MSGP are intended to implement provisions of the federal regulations, DEQ generally will need to adopt similar provisions or explain why an alternative approach also complies with the law.