

SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS

This SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS ("Agreement") is entered by Northwest Environmental Defense Center, Mark Riskedahl, and Columbia Riverkeeper, and the Oregon Department of Environmental Quality ("DEQ"), the Oregon Environmental Quality Commission ("EQC") and Dick Pedersen, jointly referred to as the "Parties."

RECITALS

A. On August 10, 2006, the Environmental Quality Commission adopted new 1200-COLS and 1200-Z general permits. The 1200-COLS general permit became effective on September 1, 2006, and it expires on August 31, 2011. The 1200-Z general permit became effective on July 1, 2007, and it expires on June 30, 2012. Both permits are issued by the Department of Environmental Quality under the Section 402 of the federal Clean Water Act and they authorize registrants to discharge industrial stormwater to surface waters of the State of Oregon and waters of the United States.

B. On March 26, 2007, Northwest Environmental Defense Center, Columbia Riverkeeper, and Mark Riskedahl filed an amended Petition for Review in Multnomah County Circuit Court (Case No. 0703-03342) directly challenging the registration of three facilities under the 1200-COLS permit and indirectly challenging the validity of the permit itself.

C. On January 17, 2008, Northwest Environmental Defense Center, Columbia Riverkeeper, and Mark Riskedahl filed an amended Petition for Review in Multnomah County Circuit Court (Case No. 0801-00974) directly challenging the registration of three facilities under the 1200-Z permit and indirectly challenging the validity of the permit itself.

D. On March 10, 2008, the Circuit Court for Multnomah County consolidated the two petitions for review.

E. In September of 2008, the Environmental Protection Agency issued a general permit for industrial stormwater, known as the multi-sector general permit or MSGP. This permit replaced an earlier general permit that was issued in 2000 and expired in 2005. Issuance of the permit was delayed by litigation and extensions of opportunities for public comment.

F. The MSGP is not applicable in Oregon, except on certain tribal lands. The parties to this settlement agree, however, that the EPA MSGP is a desirable platform for one or more general permits that would replace the existing 1200-Z and 1200-COLS permits.

G. The parties wish to resolve this litigation through settlement in order to allow DEQ to reconsider and revise the 1200-Z and 1200-COLS general permits.

AGREEMENT

1. Petitioners agree to dismiss *Northwest Environmental Defense Center, et al. v. Oregon Department of Environmental Quality, et al.*, Multnomah County Circuit Court Case No. 0801-00974 and *Northwest Environmental Defense Center, et al. v. Oregon Department of Environmental Quality, et al.*, Multnomah County Circuit Court Case 0703-03342 without prejudice.

2. Petitioners agree not to challenge the validity of the existing 1200-Z or 1200-COLS permits in future cases that challenge registration under, or administration of, these two permits, so long as DEQ complies with terms of this settlement.

3. DEQ agrees to modify the permits or to adopt a new or renewed permits within 16 months of the finalization of this Agreement. DEQ also commits to convening an Advisory Committee to assist in revising the 1200-Z and 1200-COLS permits. DEQ will provide Petitioners with status reports every other month, detailing the progress of DEQ and the Advisory Committee.

4. DEQ will issue the permits based on the EPA 2008 MSGP revised for Oregon and with the following differences:

a. DEQ will not include EPA-specific requirements that are not applicable to states under 40 CFR 123.25 or other laws.

b. DEQ will retain current public notice and comment provisions that go beyond MSGP requirements.

c. DEQ will continue to review and approve stormwater pollution control plans (SWPCPs) as a condition of registration.

d. DEQ will conduct a study on the validity of anti-degradation findings and adjust the permit terms accordingly.

e. DEQ will re-evaluate the consequences of not meeting benchmarks established in the permit to determine if they are most appropriate.

5. DEQ will agree to promptly reopen the new MSGP-based permits if the United States Court of Appeals invalidates the MSGP or any significant portion of the permit, unless DEQ's permits already address the deficiency in a way that is consistent with the court's decision.

6. The revised permits will be based on the following Principles governing the adoption of storm water permits based on EPA's 2008 Multi-Sector General Permit (MSGP):

a. Under the Clean Water Act (CWA) and applicable regulations implementing the CWA, a permit must include water quality based effluent limits more stringent than the applicable technology based limits when such additional limits are necessary to achieve water quality standards adopted under CWA Section 303. These limitations must control all pollutants or pollutant parameters that may be discharged at a level that will cause or will have the reasonable potential to cause or contribute to an excursion above water quality standards. For stormwater discharges, EPA's regulations generally allow narrative limits or controls rather than numeric effluent limits.

b. To comply with the requirement described above, the MSGP includes, among other things, a narrative water quality based effluent limit that requires a registrant to control its discharges as necessary to comply with applicable Water Quality Standards. DEQ will propose permit language that makes it a permit violation to fail to comply with this provision of the permit.

c. The MSGP includes specific provisions for stormwater discharges into a water segment that does not meet applicable water quality standards or is not expected to meet those standards even after the application of the effluent limits required by sections 301(b)(1)(A) and 301(b)(1)(B) of CWA, and for which an EPA-issued or approved TMDL exists. These requirements are set out in Section 2.2.2.1 of the permit and explained at page 58 of the fact sheet. DEQ will propose permit language that is fully consistent with these provisions. In addition, DEQ will propose additional language that clarifies how these permit provisions will be implemented when there is a TMDL for a relevant pollutant parameter and the TMDL does not include a specific waste load allocation for stormwater discharges or indicate that such discharges are not a significant source and need no limit.

d. Notwithstanding provisions in the MSGP, DEQ will propose a permit that requires DEQ approval prior to allowing a registrant to discontinue monitoring an outfall or discharge point based on a determination by the registrant that the discharge from the outfall or discharge point is substantially similar to the discharge of another outfall or discharge point that is being monitored. However, DEQ may delegate this approval function to a city or county that is DEQ's agent for purposes of permit administration. This determination also may be incorporated into the approval of the stormwater pollution control plan (SWPCP) or an amendment to the plan, but it must be based on evidence maintained in the permit file.

e. Notwithstanding the absence of specific provisions in the MSGP, DEQ will propose a permit that clearly requires a registrant to keep its SWPCP up-to-date and that makes failure to do so a permit violation. DEQ also will clarify what is required to keep the plan up-to-date.

f. Notwithstanding provisions in the MSGP, DEQ intends to propose a permit that requires a registrant to comply with all mandatory provisions in its SWPCP and that makes failure to do so a permit violation.

7. DEQ will present the following issues to the Advisory Committee that will be convened as part of the 1200-COLS and 1200-Z permit reconsideration process:

a. DEQ will ask its Advisory Committee to consider whether the minimum monitoring provisions in the MSGP should be increased, and specifically whether monitoring for benchmark and impairment pollutants should be required at least once each year unless there is adequate evidence that a facility does not discharge the pollutant. DEQ recognizes that the adequacy of monitoring is an important consideration with respect to evaluating the effectiveness of BMPs and ensuring that registrants control discharges as necessary to meet applicable water quality standards.

b. DEQ will ask its Advisory Committee to consider additional requirements for registrants that repeatedly fail to meet benchmarks. The Committee's consideration will include a discussion of when such failures should lead to additional regulatory action and what the action might be. These additional requirements could include consideration of additional monitoring requirements, narrative effluent limits, or loss of coverage under the permit. DEQ recognizes that heightened scrutiny of registrants that routinely fail to meet benchmarks may be necessary to protect water quality and ensure that the coverage actually provided by the permit is consistent with the assumptions underlying the permit.

c. DEQ will request that its Advisory Committee consider whether the minimum provisions in the permit for initial characterization of discharges be increased, including consideration of whether all applicants should be required to analyze discharges for any impairment pollutant. DEQ recognizes that this additional information might prove useful for determining whether potential registrants under a new general permit issued pursuant to this agreement are likely to be able to control discharges as necessary to meet applicable water quality standards or should be placed on an individual permit. The information also might be useful to DEQ in future years when DEQ is renewing or reissuing industrial stormwater permits.

8. The parties recognize that circumstances outside the reasonable control of the Parties could delay compliance with the obligations imposed by this Agreement. This includes insufficient funds being appropriated or appropriated funds not being available for expenditure by DEQ. It also includes catastrophic environmental events requiring an immediate or time-consuming response from DEQ. The obligations assumed by DEQ under this agreement are expressly subject to change if alteration in the underlying law would make fulfillment of any Party's obligation unlawful.

9. In the event that DEQ is unable to meet any obligation(s) or deadline(s) set forth in this Agreement because insufficient funds are legally available, DEQ shall so notify Petitioners in writing as expeditiously as practicable after so determining. The notice shall show good cause, by written explanation with supporting documentation,

justifying DEQ's position. If DEQ so notifies Petitioners, the Parties agree to negotiate in good faith regarding any proposed modification to this Agreement. If the Parties are unable to reach an agreement thirty (30) days after DEQ notified Petitioners of insufficient funds, DEQ is excused from complying with its obligations under this Agreement. In such a case, Petitioners may recommence a suit to challenge the validity of the 1200-COLS and 1200-Z permits.

10. In the event that DEQ is unable to meet any obligation(s) or deadline(s) set forth in this Agreement for any reason other than those provided in Paragraph 9, DEQ shall so notify Petitioners in writing as expeditiously as practicable after so determining. The notice shall show good cause, by written explanation with supporting documentation, justifying DEQ's position. If DEQ so notifies Petitioners, the Parties agree to negotiate in good faith regarding any proposed modification to this Agreement. Petitioners agree to wait for at least thirty (30) days after receiving DEQ's notice, before seeking to enforce the terms of this Agreement, pursuant to paragraph 11 of this Agreement, or recommence their challenge to the current 1200-Z or 1200-COLS permits.

11. Dispute Resolution. In the event that any of the Parties believe that another Party has not complied with the terms of this Agreement, the Party who believes that a breach has occurred shall give all other Parties written Notice of the breach. The parties agree that they will attempt to resolve, through good faith negotiation, any issues identified in the Notice. If, however, the Parties cannot resolve the issues identified in the Notice within thirty (30) days of the date that the Notice was sent, the complaining Party may file an action in Multnomah County Circuit Court to enforce the terms of this Agreement. The Parties to this Agreement stipulate that the Multnomah County Circuit Court shall have jurisdiction over the Parties and over any action seeking to enforce the terms of this Agreement, and that such an action is not subject to or limited in any way by the provisions of ORS 183.480 *et seq.*

12. If DEQ fails to meet the timeline established in Paragraph 3 of this Agreement, nothing in this agreement will limit the authority of the Petitioners to refile the cases described in Paragraph 1 of this Agreement or to file new challenges to registrations under the 1200 Cols or 1200-Z permits.

13. Attorney Fees. DEQ Agrees to pay petitioners \$19,250 in attorney fees.

14. Waiver. The waiver by a party of any breach of any provision of this Agreement by the breaching party, or the failure of the non-breaching party to insist upon strict performance of any provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach by the breaching party.

15. Counterparts. The parties agree that this Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same original. Signatures exchanged via facsimile or e-mail shall have the same force and effect as the original signatures.

16. Enforceability. In the event any portion, award, clause, phrase, sentence, or paragraph of this Agreement is declared void or otherwise unenforceable, the parties agree that such portions shall be considered severable and separable from the remainder, and the validity of the remainder of this Agreement shall remain unaffected.

17. Entire Agreement. This Agreement represents the entire agreement among the Parties and may be modified or waived only by a writing signed by all Parties.

18. Consultation. The Parties to this Agreement have had the opportunity to confer with counsel regarding this release. Each party's counsel has had the opportunity to prepare and cooperate in drafting this Agreement.

Respondents **DICK PEDERSEN, OREGON
DEPARTMENT OF ENVIRONMENTAL
QUALITY, and OREGON
ENVIRONMENTAL QUALITY
COMMISSION**

By: Dick Pedersen
Name: DICK PEDERSEN
Title: DIRECTOR
Date: 30 June, 2009

Petitioners **NORTHWEST ENVIRONMENTAL
DEFENSE CENTER, COLUMBIA
RIVERKEEPER, and MARK RISKEDAH**

By: Mark Riskedahl
Name: Mark Riskedahl
Title: Executive Director
Date: 30 June, 2009