



NORTHWEST ENVIRONMENTAL DEFENSE CENTER

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September 1, 2011

John J. Ruscigno
Department of Environmental Quality
Western Region – Salem Office
750 Front St. NE, Suite 120
Salem, OR 97301-1039

Re: Comments on the proposed modification of the Weyerhaeuser Company North Bend NPDES permit #101499.

Dear Mr. Ruscigno:

These comments are submitted on behalf of the Northwest Environmental Defense Center (NEDC) concerning Weyerhaeuser Company's request for modification of their NPDES permit # 101499 at the permanently closed Weyerhaeuser-Containerboard Division Non-bleach Corrugated Paper Mill in North Bend, OR.

NEDC's mission is to preserve and protect the environment and natural resources of the Pacific Northwest, and our membership includes individuals who visit, recreate near, or live in the vicinity of the closed North Bend Weyerhaeuser facility. NEDC routinely comments on state-issued NPDES permits.

The proposed modification would increase the allowable pH range from 6.0 to 9.0 to 6.0 to 10.0. NEDC urges DEQ to deny the modification because it is contrary to the letter and the intent of the Clean Water Act and would contribute to the continued degradation of Oregon's waterways. NEDC further urges DEQ to modify the permit to bring it into accordance with OAR 340-041-03(1)(b).

Additionally, NEDC would like to note that it would be very helpful to the readers of these types of notices for DEQ to cite the specific state and federal regulations, and their applicable provisions rather than asserting that EPA and federal permit requirements and Oregon Revised Statutes and Oregon Administrative Rules along with the policies and guidelines of DEQ provide the permitting requirements.

Question #1: Specifically, which federal and state regulations, policies, guidelines, and requirements was DEQ referencing as providing the permit requirements for this proposed modification in the permit fact sheet?

Purpose of the Clean Water Act and NPDES Permits

Section 101 of the Clean Water Act set forth a national goal that the discharge of pollutants into the navigable waterways of the United States be completely eliminated by 1985, and an interim goal toward achieving this overall objective was that all waterways be fishable and swimmable by 1983. While federal and state agencies, industry and public interest organizations recognize that these goals were not met, the Department should remember that those goals have never been repealed, replaced or amended. Specifically, NEDC would like to point out that the National Pollutant Discharge Elimination System (NPDES) clearly contains the word "elimination" as consistent with the goals of the Act. Every permit renewal gives the Department the opportunity to look at industrial processes of the applicant's facility, its compliance history, the quality of the water and the beneficial uses, and determine ways in which the Department can require the applicant to reduce or eliminate its pollution through the permitting process. NEDC is concerned that instead of working toward these goals, DEQ continues to use the NPDES permitting process, at best, to perpetuate the status quo of water quality problems in Oregon. Issuing a modification to a current permit that increases the already high allowable pH level of discharged pollutants is contrary to both the intent and the letter of the law. The Clean Water Act's objectives are far from being reached in this state, and the issuance of this permit modification would take the state farther away from, rather than closer to achieving those goals.

pH

The pH limits in the proposed permit are broader than those required by Oregon regulations. The allowed range under OAR 340-041-0305(1)(b) is 7.0 – 8.5, but the current permit sets pH limits at 6.0 to 9.0. No reason is given for not setting limits in accordance with the OARs. It is suggested that water quality will be protected because of mixing with ambient water from the ocean, but the pH levels set for the South Coast Basin were developed specifically for the coastal region and ought to be adhered to. While mixing with ambient water may reduce the risk of degradation, it does not reduce the risk as much as adhering to regulations specifically promulgated to protect the basin's existing and designated beneficial uses.

In contrast to the applicable water quality standard, this permit modification proposes to allow a pH range of 6.0 to 10.0. In sanctioning pH levels that are more acidic or alkaline, this permit is in direct violation of DEQ regulations. The Department must modify the permit to restrict pH ranges from 7.0 to 8.5. NEDC would like to note that effluent with a pH of 10.0 is the pH equivalent of laundry detergent, certainly not a substance the citizens of Oregon want dumped into their waterways.

Question #2: Does DEQ agree that the current permit pH range and the proposed modification are inconsistent with OAR 340-041-03(1)(b)?

Question #3: What are the DEQ's reasons for authorizing a violation of the pH limits set by the OARs?

The Increased pH Range in the Modified permit are in Violation of the EPA’s Anti-Backsliding Regulations.

Federal regulations provide that “effluent limitations, standards or conditions” must be at least as stringent as effluent limitations, standards, or conditions in the previous permit. 40 C.F.R. §122.44(l)(1); *see also* 33 U.S.C. §1342(o). The proposed modification to the current permit stands is in direct violation of this provision.

The proposed permit modification does not meet any of the exceptions to the anti-backsliding provision of the CWA in 40 CFR § 122.62. The proposed permit modification claims the justification for the modification is that efforts to chemically alter the pH have been only marginally successful. Allowing violations of permit parameters merely because a facility will have difficulty meeting the limit is counter-intuitive and a violation of federal and state law.

The Proposed Modification Is Not Lawful Because No Good Cause Exists To Support The Modification.

As discussed above, the modification proposed by the permittee and currently under consideration by DEQ is unlawful and cannot go forward. It is unlawful because it violates the federal anti-backsliding law and also because it perpetuates an already unlawful pH range. Those two grounds are sufficient and independent grounds to deny the proposed modification. A separate independent ground for denial is that there is no good cause to support the modification as required by 40 C.F.R. 122.62(a)(4).

40 C.F.R. 122.62(a)(4) allows the permitting authority to modify a *lawful* compliance schedule if “good cause” exists for the modification. The regulation specifically lists what constitutes good cause: “an act of God, strike, flood, or materials shortage or other events over which the permittee has little or no control and for which there is no reasonably available remedy. 40 C.F.R. 122.62(a)(4).

Question #5: Specifically, what “events over which the permittee has little or no control and for which there is no reasonably available remedy” justify the proposed modification in this case?

Question #6: What specific facts are DEQ relying on to find that “good cause” exists for the proposed modification as that term is defined by 40 C.F.R. 122.62(a)(4)?

Alternative Solutions

NEDC would like to urge DEQ to ensure that all alternative pH lowering mechanisms have been explored before Weyerhaeuser’s permit is modified.

Question #7: Has Weyerhaeuser or DEQ investigated, or even considered non-chemical solutions to the increased pH caused by the algal activity?

Question #8: Did DEQ recommend a specific chemical treatment to lower the pH?

Question #9: Is the significant increase in the upper end of the pH range from pH 9.0 to 10.0 really necessary? Did DEQ consider a smaller increase?

Conclusion

Based on the above comments, DEQ does not have the legal authority to grant the requested modification. In order to comply with the Clean Water Act and EPA regulations that implement the CWA, the only lawful choice available to DEQ is denial of the requested modification. Considering that DEQ has no legal obligation to *grant* the permittee's requested modification¹, NEDC requests that DEQ deny the permittee's requested modification.

NEDC encourages DEQ to reexamine the terms and conditions of this permit to ensure legal compliance with applicable water quality law to maintain the integrity of Oregon's waterways. DEQ should examine additional opportunities for further restricting the pollutants the permit regulates instead of modifying the permit to make it less restrictive.

We specifically request to be immediately notified of the final action taken by DEQ on the proposed permit modification, whether it be issuance of the permit modification, or denial of the proposed modification. We also request DEQ provide answers to the included questions.

Thank you for accepting and considering these comments. We look forward to your response.

Sincerely,

Bethany Cotton
NEDC law clerk

¹ *Texas Municipal Power Agency v. EPA*, 836 F.2d 1482 (5th Cir. 1988) (permitting authority has no obligation to modify a permit at permittee's request; it *may* do so at its discretion so long as the modification is legally permissible).