



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 10
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MAR 27 2007

Reply to
Attn Of: ORC-158

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Re: Petitions Requesting Withdrawal of Oregon's National Pollutant Discharge Elimination System (NPDES) Permit Program

Dear Mr. Anuta, Ms. Williams, and Mr. Brush:

The purpose of this letter is to respond to your petitions to withdraw the State of Oregon's authorization to administer the NPDES permit program in Oregon (collectively, "the Petitions"). Mr. Anuta filed a petition with EPA dated August 1, 1996 on behalf of Northwest Environmental Defense Center (NEDC), Oregon Trout, and Oregon Chapter of the Sierra Club; Ms. Williams sent a letter to EPA dated November 12, 1996 joining Mr. Anuta's request; and Mr. Brush filed a petition with EPA dated February 23, 2001 on behalf of NEDC. The Petitions ask EPA to commence withdrawal proceedings under 40 C.F.R. § 123.64(b)(1) to determine whether Oregon's NPDES program meets the requirements for judicial review set forth in 40 C.F.R. §123.30.

As discussed in more detail in the enclosure, after careful review of the concerns raised in the Petitions, the applicable statutes and regulations, Oregon statutory and case law, and other available information, EPA has concluded that Oregon meets the minimum requirements for judicial review of NPDES permits in 40 C.F.R. § 123.30. EPA therefore is denying the Petitions. EPA will continue to monitor legislative, administrative, and judicial developments in Oregon to ensure that Oregon's NPDES program continues to provide an opportunity for judicial review of NPDES permits in Oregon State Court that is sufficient to provide for, encourage, and assist public participation in the permitting process.

We appreciate your interest in the effective administration of Oregon's NPDES program. Should you have any further questions regarding this matter, you may contact Julie Vergeront, Assistant Regional Counsel, at (206) 553-1497.

Sincerely,



Elin D. Miller
Regional Administrator

Enclosure

cc w/encl: Jas. Jeffrey Adams
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**Denial of Petitions Requesting
Withdrawal of Oregon's National Pollutant Discharge Elimination System
("NPDES") Permit Program**

This document more fully explains the basis for EPA's denial of three petitions seeking withdrawal of the State of Oregon's authorization to administer the NPDES permit program in Oregon (collectively, "the Petitions"). Mr. Anuta filed a petition with EPA dated August 1, 1996 on behalf of Northwest Environmental Defense Center ("NEDC"), Oregon Trout, and Oregon Chapter of the Sierra Club; Ms. Williams sent a letter to EPA dated November 12, 1996 joining Mr. Anuta's request; and Mr. Brush filed a petition with EPA dated February 23, 2001 on behalf of NEDC (collectively, the "Petitioners"). The Petitions ask EPA to commence withdrawal proceedings under 40 C.F.R. § 123.64(b)(1) to determine whether Oregon's NPDES program meets the requirements for judicial review set forth in 40 C.F.R. §123.30. As explained below, EPA is denying the petitions.

Background

In May 1996, EPA promulgated regulations specifying the minimum requirements for federally-authorized NPDES programs with respect to judicial review of permits in State court. See 61 Fed. Reg. 20972 (May 8, 1996). The regulations require that:

All States that administer or seek to administer a program under this part shall provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit (see § 509 of the Clean Water Act). A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permittee may obtain judicial review, if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, or if persons must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review.)

40 C.F.R. § 123.30.

In general, Article III of the United States Constitution requires that a person seeking judicial review in federal court must suffer an actual or threatened injury that is fairly traced to the challenged action and that would be addressed by a favorable decision. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 470-475 (1981). However, an organization that does not suffer actual or threatened injury to itself may obtain judicial review under federal law on behalf of its members when: (1) the members would otherwise have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to its purpose; and (3) neither the claim asserted, nor

the relief requested, requires the participation of individual members in the lawsuit. *See Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 341-345 (1977). This exception to the Article III requirement for actual or threatened injury is known as “representational standing.”

Appeals of NPDES permits in Oregon are governed by the Oregon Administrative Procedures Act, ORS Chapter 183 (“Oregon APA”). Under the Oregon APA, “[a]ny person adversely affected or aggrieved by an order or any party to an agency proceeding is entitled to judicial review of a final order.” ORS 183.480(1). Thus, there are two ways to obtain the right to judicial review of an NPDES permit in Oregon. First, any “party” to an agency proceeding has standing by that fact alone, without the need to show further interest. *Kellas v. Dep’t of Corrections*, 341 Or. 471, 481 (2006). In Oregon, an “agency proceeding” includes a “contested case proceeding,” which in turn includes a challenge to issuance of an NPDES permit initiated by the applicant. Second, any person who is not a party to an agency proceeding can seek judicial review of a final order issued by an agency if that person was “adversely affected or aggrieved” by the order. In such cases, the request for judicial review must “state...the facts showing how the petitioner is adversely affected or aggrieved by the agency order.” ORS 183.484(3).

On July 18, 1996, the Oregon Supreme Court issued a decision interpreting ORS 183.484, which governs judicial review of final agency orders in actions other than contested case proceedings. *See Local 290, Plumbers and Pipefitters v. Oregon Department of Environmental Quality*, 323 Or. 559 (1996). The *Local 290* Court held that ORS 183.484 does not allow for representational standing because the statute makes no mention of representational standing and because the language of the statute requires that the petitioner itself be adversely affected or aggrieved. The Petitions requesting EPA to withdraw Oregon’s NPDES program were filed in response to the *Local 290* decision. The Petitions contend that, because Oregon does not allow for representational standing in challenges to NPDES permits, the Oregon NPDES program no longer meets the criteria for EPA approval. The Petitions therefore request that EPA initiate proceedings for revocation of Oregon’s NPDES program.¹

Informal Investigation

Since receipt of the Petitions, and pursuant to 40 C.F.R. § 123.64(b)(1), EPA has conducted an informal investigation to determine whether cause exists to commence withdrawal proceedings with respect to the right to judicial review of NPDES permits in Oregon State Court.

¹ Petitioners Anuta and Wilson also contended that the Oregon’s Clean Air Act Title V program no longer met the requirements for EPA approval. In contrast to the minimum requirements for NPDES approval, the statute and regulations governing approval of State Title V programs require a State to provide the same opportunity for judicial review of Title V permitting actions as would be available in federal court under Article III of the U.S. Constitution. *See* 42 U.S.C. § 7661a(b)(6); 40 C.F.R. § 70.4(b)(3)(x); *Commonwealth of Virginia v. Browner*, 80 F3d 869 (4th Cir., 1996) (upholding EPA’s interpretation of the Title V program as “both authorized by Congress and reasonable”). Therefore, in a Notice of Deficiency published on November 30, 1998, EPA notified Oregon that the State’s requirements for judicial review no longer met the minimum federal requirements for Title V program approval. *See* 63 Fed. Reg. 65783. In response to the Notice of Deficiency, the Oregon Legislature passed a law in 1999 specifically granting organizations representational standing to challenge Title V permits in State court. *See* ORS 468.067. On June 10, 2002, EPA determined that, with this statutory change, Oregon’s program once again met the requirements of Title V and Part 70 for judicial review and adequately addressed EPA’s Notice of Deficiency. *See* 67 Fed. Reg. 39630.

In May 1999, EPA held informal hearings in Portland regarding representational standing in Oregon and its effect on public participation in NPDES permitting. Individuals and public interest organizations at the hearing described the substantial practical barriers individual citizens face in challenging NPDES permits and emphasized the importance of recognizing the right of organizations to challenge NPDES permits. Commenters testified that most individuals do not have the financial resources or technical expertise to challenge NPDES permitting actions and those individuals are often intimidated by countersuits by permit applicants known as “SLAPP suits” or “strategic litigation designed to prevent public participation.” No one at the hearing opposed amending the Oregon APA to specifically provide for representational standing.

During this time, EPA also sent several letters to Oregon emphasizing the importance of representational standing to public participation in the NPDES permit issuance process. EPA stated that the information gathered at the informal hearing in May 1999 strongly suggested that the lack of representational standing in Oregon rendered Oregon’s NPDES program deficient. EPA also noted that a 2000 trial court decision in Oregon, *NEDC v. Oregon Dept. of Env’tl Quality*, Case No. 9905-05144 (Oct. 19, 2000), had held that an organization challenging an NPDES permit had standing based on direct harm to the organization as a person who represents the public interest in the NPDES permit. EPA advised Oregon in February 2001 that, although a legislative amendment specifically granting the right of representational standing to organizations in Oregon would provide greater certainty, a legal opinion discussing the *NEDC* decision could possibly resolve EPA’s concerns regarding the right of organizations in Oregon to participate in judicial review of NPDES permits.

In a letter dated June 29, 2006, Oregon submitted to EPA legal advice from the Oregon Department of Justice (“ODOJ”) regarding Oregon’s compliance with EPA’s requirements for judicial review of NPDES permits. Discussing the case law in Oregon, including several cases decided after *Local 290*, ODOJ concluded that individuals in Oregon have an opportunity to participate in judicial review of NPDES permit decisions in Oregon that is at least as broad as that available to individuals in federal court. ODOJ also discussed a number of different ways in which organizations can participate in judicial review of NPDES permit decisions, which although not the same as representational standing, ODOJ asserted, do “provide for, encourage, and assist in public participation in the permitting process.”

EPA Determination

After careful review of: the concerns raised in the Petitions; 40 C.F.R. § 123.30, the regulation setting forth the minimum requirements for EPA approval of State NPDES programs with respect to judicial review; the Oregon Administrative Procedures Act; the legal advice from ODOJ regarding standing to seek judicial review of NPDES permits in Oregon; the relevant case law in Oregon; the testimony at EPA’s informal hearings on representational standing in Oregon in May 1999; and other available information, EPA concludes that Oregon meets the minimum requirements for judicial review in 40 C.F.R. § 123.30. EPA therefore denies the Petitions.

With respect to the right of individuals to seek judicial review of NPDES permits in Oregon, it appears that the Oregon APA’s “adversely affected or aggrieved” standard is no more restrictive than the right of judicial review under the “actual or threatened injury” standard of

federal law. Although there is no case law specifically addressing the issue under the Oregon APA, impairment of use and enjoyment of an area for passive recreation has been found sufficient to demonstrate that an agency decision has an “effect” on an individual in cases brought under other statutes. See *Waterwatch of Oregon v. Water Resources Commission*, 199 Or. App. 598, 603 (2005); *Waterwatch of Oregon v. Water Resources Commission*, 193 Or. App. 87 (2004), *vacated and remanded en banc on other grounds* 339 Or. 275 (2005); *Doty v. Coos County*, 185 Or. App. 233, 235 n. 1 (2002), *adhered to on reconsideration*, 186 Or. App. 580 (2003).² This appears to be comparable to federal law, which recognizes as sufficient standing based on harm to an aesthetic, environmental, or recreational interest so long as the party seeking judicial review is among the injured. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-563 (1992); *Sierra Club v. Morton*, 405 U.S. 727, 734-735 (1972). Although Oregon courts have held that an abstract interest in the correct application of law or a philosophical or political disagreement with a decision is not sufficient to establish standing, see *City of West Linn v. LCDC*, 200 Ore. App. 269, 273, 113 P3d 935 (2005), this limitation on standing is consistent with federal law. See *Lujan*, 504 U.S. at 575.

With respect to the right of judicial review for organizations in Oregon, there are a number of ways in which organizations can participate in judicial review of NPDES permit decisions under the Oregon APA. First, an organization seeking judicial review of an NPDES permit in Oregon need not itself have standing to challenge issuance of the permit if at least one other party to the proceeding has standing and is raising the same issues as the organization. *Waterwatch*, 199 Or. App. at 418; *Barton and Friends of Linn County v. City of Lebanon*, 193 Or. App. 114 (2004). Thus, an organization and an individual in Oregon can jointly seek judicial review of an NPDES permit in Oregon and, so long as the individual has been “adversely

²These cases discuss whether the challenged decision had a “practical effect” on the challenger, a standing requirement based on the Oregon Constitution that the Oregon Court of Appeals held must be met in addition to any requirements for standing established by the Oregon Legislature. See *Utsey v. Coos County*, 176 Or. App. 524 (2001). The Oregon Supreme Court overruled *Utsey* in 2006. See *Kellas v. Dep’t of Corrections*, 341 Or. 471, 481 (2006). It is therefore no longer necessary to show that a decision will have a “practical effect” on the challenger in order to have standing. Although the referenced cases discuss requirements for constitutional, not statutory, standing, EPA believes these cases nonetheless show that harm to an environmental or aesthetic interest would be considered by Oregon courts sufficient to meet the “adversely affected or aggrieved” standard under the Oregon APA. In this regard, it is instructive that, in none of these cited decisions, did the court feel it was necessary to consider as a threshold matter whether harm to an environmental or aesthetic interest could establish a sufficient “effect” as a matter of law, but instead simply considered whether the challenger had made such a showing.

Petitioner Williams cites to the Oregon Supreme Court decision in *Local 290* to suggest that Oregon courts do not recognize harm to an environmental or aesthetic interest. In one of the underlying cases in *Local 290*, an individual challenger joined the Local 290 union in seeking judicial review of the permit. In reversing the decision of the Court of Appeals, which decision had only addressed the issue of representational standing under the Oregon APA, the Oregon Supreme Court stated it had reviewed the transcript of the individual challenger, determined that the individual challenger had not shown a direct, personal interest in the outcome of the proceeding, and therefore determined that the individual challenger did not have standing. *Local 290*, 323 Or. at 568. Given that the Oregon Supreme Court did not discuss the factors it considered in reaching this conclusion, EPA does not believe this decision creates adverse precedent with respect to whether environmental or aesthetic interests create a basis for standing under the Oregon APA. As noted elsewhere in this letter, however, judicial decisions, administrative actions, or litigating positions by Oregon agencies under the Oregon APA that call into question the ability to seek judicial review based on injury to aesthetic, environmental, or recreational interests, would cause EPA to reconsider this conclusion.

affected or aggrieved” by issuance of the NPDES permit and is making the same arguments as the organization, the organization does not need to show that it was adversely affected and aggrieved. In addition, according to ODOJ, nothing prevents an organization from providing legal counsel or paying court costs on behalf of a member who has sued in his or her own name.

Second, an organization that is a party to “an agency proceeding” is entitled to judicial review even if the organization has not been adversely affected or aggrieved by the permit decision. As discussed above, an “agency proceeding” under the Oregon APA includes a “contested case proceeding,” which in turn includes a challenge to issuance of an NPDES permit initiated by the applicant. If a contested case hearing is held, any individual or entity may petition for party or limited party status and the agency must provide party status if it determines that the individual or entity has an interest in the outcome of the proceeding or represents a public interest in such result. ORS 183.310(7). Thus, if the applicant for an NPDES permit initiates a challenge to issuance of that permit (a contested case proceeding), an organization could intervene in that action if it has an interest in the outcome of the action or if it represents a public interest in such result. Once the organization is a party to the contested case proceeding, the organization has standing to seek judicial review of the final order from the contested case proceeding without making any further showing, because the organization was a “party to an agency proceeding.”

Finally, although the Oregon Supreme Court has held that organizations cannot seek judicial review of NPDES permits under the Oregon APA by showing only that one or more members of the organization have been adversely affected or aggrieved by the permitting action, an organization in Oregon can seek judicial review if it shows that the organization *itself* would be adversely affected or aggrieved by a permitting decision. Thus, for example, where an organization had expended time, money, and effort in passing the statute authorizing the acquisition of instream public water rights and establishing instream water rights, including instream water rights for Tenmile Creek, the Oregon Court of Appeals held that the organization was affected by issuance of a permit giving the applicant priority over those rights. *Waterwatch of Oregon v. Water Resource Commission*, 193 Or. App. 87, 97 (2004), *vacated and remanded en banc on other grounds* 339 Or. 275 (2005).

In *NEDC v. Oregon Dept. of Env'tl Quality*, Case No. 9905-05144 (Oct. 19, 2000), a trial court held that an organization that represents the public interest in the issuance of NPDES permits in Oregon is adversely affected or aggrieved by the issuance of an NPDES permit because the state and federal statutory scheme evidenced an intent on the part of the Oregon Legislature to make judicial review available to anyone who represents a public interest in the NPDES permitting action. *NEDC v. Oregon Dept. of Env'tl Quality*, Case No. 9905-05144 (Oct. 19, 2000). Although the holding in the *NEDC* case does not yet appear to have been applied elsewhere in Oregon, the case does indicate that there are a number of ways in which organizations can show they are “adversely affected or aggrieved” by issuance of NPDES permits in Oregon and therefore have standing to seek judicial review of NPDES permits in State Court.³

³ According to ODOJ, there is no requirement under the Oregon APA that a person seeking judicial review of an NPDES permit in State court must have commented on the NPDES permit prior to issuance. EPA has stated that States may impose reasonable requirements that interested persons must exhaust administrative remedies, such as

In light of the fact that Oregon provides the right of judicial review to individuals to challenge NPDES permits that is no more restrictive than the right of judicial review under the “actual or threatened injury” standard of federal law and in light of the number of ways in which organizations in Oregon can participate in proceedings for judicial review of NPDES permits, EPA believes that the Oregon NPDES program provides an opportunity for judicial review in State Court of the final approval or denial of permits by the State “that is sufficient to provide for, encourage, and assist public participation in the permitting process.” In other words, EPA can not find, based on a review of the case law, the letter from ODOJ, and other available information, that Oregon law narrowly restricts the class of persons who may challenge the approval or denial of NPDES permits.

In reaching this conclusion, EPA acknowledges the testimony at the informal public hearing in May 1999 regarding the important role organizations play in facilitating public participation in the NPDES permitting process. As discussed above, however, there are a number of ways in which organizations can participate in judicial review of NPDES permitting decisions in Oregon, either on their own behalf or in conjunction with individuals. In addition, organizations can provide financial support and technical expertise in challenges to NPDES permitting actions brought in conjunction with individual challengers. With respect to the concern that organizations are better able to withstand the intimidation of “SLAPP” suits brought by permit applicants in order to discourage public participation in permitting and other governmental decision-making, EPA notes that in 2001, the Oregon Legislature passed “anti-SLAPP” legislation. See ORS 31.150 to 31.155. This legislation allows judges to quickly strike lawsuits aimed at silencing citizens exercising their right to comment and participate in land use and other permitting proceedings.

EPA also acknowledges that it has on several occasions emphasized the importance of representational standing to the effective involvement of citizens in the NPDES process. EPA continues to believe this is the case and urges the Oregon Legislature to specifically grant organizations the right to participate in the NPDES permitting process through representational standing. Based on the information before, EPA, however, including a review of the relevant statutes and case law in Oregon, EPA believes that Oregon’s NPDES program provides an opportunity for judicial review in State court that is sufficient to provide for, encourage, and assist public participation in the NPDES permitting process, as required by 40 C.F.R. § 123.30, and that Oregon’s NPDES program does not narrowly restrict the class of persons who may challenge the approval or denial of permits.

In this regard, EPA notes that there is currently little case law directly interpreting the judicial review provisions of the Oregon APA. EPA will continue to monitor legislative, administrative, and judicial developments in Oregon to ensure that Oregon’s NPDES program continues to provide an opportunity for judicial review of NPDES permits in State Court that is sufficient to provide for, encourage facilitate, and assist public participation in the permitting

commenting on the NPDES permit, in order to preserve the opportunity to challenge final NPDES permitting decisions in State court. 61 Fed. Reg. at 20973. Nonetheless, the absence of an exhaustion requirement in Oregon is a way in which Oregon law imposes fewer barriers to challenging NPDES permits than exists in many other States and under federal law.

process. Judicial decisions, administrative actions, or litigating positions by Oregon agencies under the Oregon APA that call into question, for example, the ability to seek judicial review based on injury to aesthetic, environmental, or recreational interests or the right of organizations to participate in judicial review of permitting actions would seriously call into question whether Oregon's NPDES permitting program continues to meet the requirements of 40 C.F.R. § 123.30.