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March 31, 2015

ANTI-BACKSLIDING AND WATER QUALITY PERMITS

Anti-backsliding, as addressed in this document, refers to federal Clean Water Act provisions prohibiting the renewal, reissuance or modification of an existing National Pollutant Discharge Elimination System permit containing less stringent water quality-based effluent limits than those established in the previous permit.¹ The prohibition is not applicable in all situations, and even when anti-backsliding provisions apply, there are some narrow exceptions to the prohibition.

Clean Water Act Section 402(o) prohibits backsliding from certain existing effluent limitations. Section 402(o) consists of three main parts:

- 1) A prohibition on specific forms of backsliding
- 2) Exceptions to the prohibition
- 3) A safety clause that provides an absolute limitation on backsliding

For re-issued or renewed NPDES permits, if any of the limitations are less stringent than limitations on the same pollutant in the previous NPDES permit, the DEQ permit writer conducts an anti-backsliding analysis and, if necessary, revises the limitations accordingly. The permit writer includes documentation of the anti-backsliding analysis in the permit evaluation report and fact sheet that supports the permit.

Scope of Prohibition on Anti-Backsliding: Anti-backsliding **does not apply** if the revised effluent limit is allowed under CWA Section 303(d)(4). A relaxed water quality-based effluent limit is allowed under 303(d)(4) if DEQ demonstrates one of the following:

- 1) The receiving water is in attainment for the limiting or related pollutant and the less stringent effluent limit is consistent with the anti-degradation policy; or,

¹ Note this summary pertains only when the permit limit proposed for relaxation is a water quality-based effluent limit. If the limit proposed for relaxation is a technology-based effluent Limit, or any other non-WQBEL, please consult DEQ HQ and DOJ.

- 2) The receiving water is not in attainment for the limiting or related pollutant and the effluent limit is based on a Total Maximum Daily Load (commonly known as a TMDL) wasteload allocation.

If either (1) or (2) is true, the anti-backsliding prohibition does not apply with respect to water quality-based effluent limits. However, in order to meet the requirements of the anti-degradation policy, permit writers will need to conduct a Tier I analysis (in all cases) and a Tier II analysis (when there is a proposal to increase a load or create a new load).

Exceptions to the prohibition on backsliding: If neither (1) nor (2) is true, the prohibition on anti-backsliding applies and the permit writer should evaluate whether any of the exceptions is available. CWA Section 402(o)(2) lists exceptions to the anti-backsliding provisions that may provide flexibility in few circumstances due to other subsections limiting their applicability. The “safety clause” prohibits relaxation of effluent limits that would result in a reasonable potential to violate water quality standards under any circumstance.

The scenario most likely to give rise to an exception to the anti-backsliding prohibition is when a material and substantial change to the facility, made after the existing permit was issued, justifies a relaxation of permit limits. Note that in order to use this exception, the permit writer must show the relaxation would still meet water quality standards.

Another situation that may give rise to an exception to the anti-backsliding provisions is when new information² (not available at the time the permit was issued) would have justified a less stringent effluent limit at the time the permit was issued. However, for the exception to apply there must be a net reduction in the total load of the pollutant to the receiving waters.

FREQUENTLY ASKED QUESTIONS ABOUT ANTI-BACKSLIDING

Question: If Oregon revises a water quality criterion to make it less stringent, would this alone allow DEQ to relax an existing water quality-based effluent limit?

Answer: No. The provision allowing backsliding based on new information does not apply to revised rules, guidance or test methods.

Question: What are the most common situations where DEQ may relax WQBELs without violating anti-backsliding provisions?

Answer: A WQBEL may be relaxed in the following situations:

² New statutes, rules, guidance and test methods are not “new information” for purposes of CWA Section 303(d)(4).

- (1) When the new limit is based on a TMDL wasteload allocation, or
- (2) A material and substantial change³ to the facility occurred after the existing permit was issued that justifies a relaxation of permit limits.

³ Consult with DOJ to determine if a change is “material and substantial.”