

From: [BACHMAN Jeff](#)
To: [ROOT Jenny](#)
Subject: FW: Div. 12 changes: "failure to implement a stormwater plan"
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Jeff Bachman
Office of Compliance and Enforcement
Oregon Dept. of Environmental Quality
(503) 229-5950

From: BROWN Courtney
Sent: Friday, December 14, 2012 1:25 PM
To: LOBOY Zach; NOMURA Ranei
Cc: FELDON Leah; BACHMAN Jeff
Subject: Div. 12 changes: "failure to implement a stormwater plan"

Zach and Ranei:

I met with Zach last week in Coos Bay and we discussed this proposed revision to Division 12. Through our discussion I think we've arrived at a possible "compromise," of sorts, that would serve our enforcement purposes (and other stormwater purposes) while maintaining some flexibility and discretion with the region when applying the enforcement guidance. Zach wanted me to send you, Ranei, a write up on the "compromise."

The Problem (as I see it):

First, stormwater plans are classified inconsistently under current Div. 12 rules. "Failing to implement an Erosion and Sediment Control Plan (ESCP)" required under the 1200-C permit is a Class I violation while failing to implement any other kind of plan required by a stormwater permit is unclassified - and so is treated as a Class II violation. Violating a single condition of a plan is also unclassified and so is treated as a Class II violation. There is little justification to me why these should be classified differently – especially given the new 1200-Z permit (more on that below).

Secondly, there is a big difference between failing to do one or two or more things required by a stormwater plan (ie. Violating a condition of the plan – a class II violation) and failing – wholesale - to implement that plan. Under the new 1200-Z permit – with its narrative TBELS– the SWPCP takes on heightened importance – the "meat" of our regulatory program is required under the permit to be expressed in the SWPCP.

Additionally, under the new permit, facilities that trigger Tier II corrective actions are required to identify the treatment BMPs in the SWPCP. Implementing that SWPCP is extremely important under either context. Failing to implement it should be treated seriously and making it a Class I under our rules communicates to permittees and the public that the SWPCP is an important document and implementing it very important. Were we to leave Division 12 unchanged on this point – so that failing to implement the SWPCP remains a Class II – I think we'd be sending the wrong message to the permittees and the public.

Another reason for the revision came from the MS4 program that has contemplated enforcement

under some of its NPDES permits in recent months. MS4 permits require development and implementation of various plans. When an MS4 community fails to implement those plans the program would like to have the discretion to refer that violation for formal enforcement – rather than writing 2 or more warning letters as the enforcement guidance recommends. Feel free to call Benjamin Benninghoff to discuss this.

The Solution:

Zach told me that a big concern over the proposed revision is that by making “failure to implement a plan required under a stormwater permit” a Class I violation, the programs could lose the flexibility and discretion to refer only serious violations of that requirement. As I understand it, the regions do not want to be forced to refer every little violation of a SWPCP for formal enforcement.

I think this concern may be addressed by revising the enforcement guidance to say that first time “failures to implement a plan” will get a WL or WL with opportunity to correct unless there was a potential for or actual adverse environmental harm. The discretion as to whether there was that potential lies *squarely with the regions*. Your inspectors may see failures to implement SWCPs that are so egregious there is potential for pollutants to be discharged in a manner or volume or at time and place when there is a risk of or actual harm. They may see failures to implement that do not result in such a risk of harm. It’s up to them to decide where on the continuum the failure to implement the plan lies. This discretion is no different from the same discretion they might exercise when responding to a “causing pollution” complaint or a “discharging without a permit complaint.” OCE does not weigh in on those decisions. I have discussed this proposed compromise with Leah and she’s just fine with it.

Anyway, Zach seemed comfortable with the Class I classification if the guidance were written in a way that would not hamstring the regions into referring every single “failure to implement a SWPCP” into a referral. The proposal above gives the regions the flexibility to refer serious cases while treating less serious violations with a WL or WL with Opp to correct (naturally, I prefer the latter).

Please don’t hesitate to get in touch to discuss this with me. It’s probably easier to discuss this live; I’d actually prefer that. The final, drop dead date for finalizing Div 12 changes is in March – really, just around the corner. I’d like to get something finalized well before then.

Courtney Brown
DEQ Office of Compliance and Enforcement
811 SW 6th Ave.
Portland, OR 97204-1390
ph: 503-229-6839
fax: 503-229-5100