



## Can DEQ Waive Its Deadline for VPDES Permit Renewal?

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Regulations of the State Water Control Board require that a party must file a renewal application for a water discharge permit at least 180 days before the permit expires. What happens if you miss the deadline? To begin with, DEQ personnel might not be able to issue a new permit before the old one expires, and there is nothing in the regulations that says you may continue to operate under the old permit until they do. But what if DEQ cuts you a break? Can DEQ allow the old permit to remain in effect beyond its expiration date if you've missed the application deadline?

At least one court has answered that question under those circumstances in another state. The case concerned Columbia Plywood, a company operating in Oregon. As in Virginia, EPA had authorized Oregon DEQ to administer its own NPDES program. Similarly, Oregon's regulations required that an application for renewal of a NPDES permit must be submitted at least 180 days before the current permit expires.

Columbia Plywood missed the deadline. It did not submit its application until 99 days before the permit was to expire. Nevertheless, Oregon DEQ told Columbia that if DEQ did not take action on the renewal application by the time the old permit expired, then the old permit would remain in effect until a new permit was issued. Columbia continued to discharge pollutants into the Klamath River under the old permit. For some reason, Oregon DEQ never got around to issuing a new permit.

You know what happened next. Two citizen groups filed suit in federal court to enjoin Columbia from discharging into the river. They alleged that Columbia's permit had expired, that Columbia had not timely filed for renewal, and that Oregon DEQ had not renewed the permit. They also argued that DEQ had no authority to waive the 180-day filing requirement for permit applications, and that its decision to do so was invalid.

The federal trial court considering the case ruled that the 180-day requirement was a procedural rule designed to benefit DEQ, and that DEQ could waive the requirement. The citizen groups then appealed to the United States Circuit Court for the Ninth Circuit which, in turn, certified the question to the Oregon

Supreme Court. That court held that the 180-day rule exists for the convenience of DEQ, and that "nothing in the text of the rule requires DEQ to reject a renewal application that is not filed timely." The court held it was perfectly acceptable for DEQ to waive the requirement if it wanted to do so.

**Comment:**

Talk about lucky. Columbia Plywood escaped what could have been substantial penalties by the skin of its teeth. Although the circumstances as to why this happened are not clear, it operated for almost *eight years* on an expired permit that DEQ never reissued. That a permit holder could avoid liability even under these extreme circumstances should provide comfort to those that fail to meet the deadline but receive assurances from DEQ that their old permit will remain in effect until final action is taken.

An easy way to avoid all of this, though, is to watch the calendar. Why subject yourself to the possibility of (i) DEQ saying no, and (ii) even if they cut you a break, litigation when all you have to do is be on time?

**ONRC Action v. Columbia Plywood Inc., 26 P.3d 142 (Oregon 2001).**

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