

# DEQ Response to Comments

## NPDES Permit Oregon Department of Transportation

Permit number: 101822

Aug. 11, 2020



### Water Quality Permitting

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## Overview

The public comment period for the proposed permit was from February 4, 2020 to March 20, 2020.

A public hearing for this proposed permit was held on March 11, 2020 in Salem, Oregon. There were no attendees at the public hearing.

The following individuals or entities submitted written comments during the public comment period:

<b>List of Commenters</b>		
<b>#</b>	<b>Commenter</b>	<b>Affiliation</b>
1	Ashley Short	Tualatin Riverkeepers (TRK)
2	Susan Poulsom	U.S. Environmental Protection Agency (EPA)
3	Jonah Sandford	Northwest Environmental Defense Center (NEDC)
4	Kingsly McConnell	Columbia Riverkeeper
5	Stacey Detwiler	Rogue Riverkeeper
6	Elisabeth Holmes	Willamette Riverkeeper
7	Erin Saylor	Columbia Riverkeeper
8	Susan Smith	Oregon Association of Clean Water Agencies (ACWA)

Similar comments are categorized below with DEQ's response following the comment. Original comments are on file with DEQ.

## Oregon Department of Transportation (ODOT) Phase I Permit Public Comment Categories:

### Maximum Extent Practicable

#### **Comment from NEDC et al. (Columbia Riverkeeper, Rogue Riverkeeper, Willamette Riverkeeper, and the Northwest Environmental Defense Center)**

1. We encourage DEQ to establish clear, specific, and measurable permit requirements to implement the minimum control measures required by stormwater permits. To this end, we specifically encourage the adoption of numeric effluent limitations; specific, clear, measurable, and enforceable conditions directing practices necessary to ensure MEP; and routine sampling, monitoring, and reporting measures. The Maximum Extent Practicable Standard Section 402(p) of the Clean Water Act and EPA's attendant regulations provides that MS4 permittees "reduce the discharge of pollutants to the maximum extent practicable" ("MEP"). 33 U.S.C. § 1342(p)(3)(B)(iii); 40 C.F.R. § 122.26(d)(2)(iv); see also 40 C.F.R. § 122.26(d)(iv), 40 C.F.R. § 122.34(a), (b). As a municipal stormwater discharger subject to its current MS4 permit, ODOT must use stormwater management controls. These controls include "management practices, control techniques and system, design and engineering methods" to reduce the discharge of pollutants to the MEP standard. 33 U.S.C. § 1342(p)(3)(A). The MEP standard requires permittees to identify and implement

best management practices (“BMP”) to reduce the discharge of pollutants. The preferred route to reduce the discharge of pollutants is numeric water technology-based or water quality-based effluent limits, as effluent limits provide certainty that receiving waters will be adequately protected. Despite decades of experience with issuing stormwater discharge permits, stormwater discharges remain a significant cause of water quality impairment in Oregon. This highlights a continuing need for meaningful Waste Load Allocations (“WLAs”) and more clear, specific, and measurable permit conditions. The EPA has encouraged permitting authorities to adopt numeric effluent based permitting systems where feasible. Indeed, where the NPDES authority determines that stormwater discharges have a reasonable potential to cause or contribute to a water quality standard excursion, the EPA urges permitting authorities to adopt clear, specific, and measurable permit requirements, and numeric effluent limitations as necessary to ensure water quality standards are met. When establishing what is MEP, DEQ is required to look at what other permittees have accomplished. The Second Circuit confirmed this principle in *Natural Res. Def. Council v. EPA*, 808 F.3d 556, 570 (2d Cir. 2015). In that case, the EPA could not determine that a proposed NPDES general permit’s terms were based on the “best available technology economically achievable” where the agency did not “adequately explain[] why standards higher than the[standard in the permit] should not be used given available technology.” The court found that the “EPA should have first considered what ‘available’ technology was capable of achieving, and then created standards based on that capability,” and faulted the EPA for overlooking evidence of “a number of technologies that can achieve standards higher than [the standard in the permit].” The EPA has also determined that “in establishing what constitutes maximum extent practicable, EPA must look at a variety of factors, including . . . current best practices employed by other MS4s.” As such, DEQ must critically review other MS4 permits to determine what measures are MEP. DEQ cannot establish MS4 permit terms under the MEP standard without first considering the terms of other MS4 permits and determining whether such permit terms are more effective at reducing pollution and if they are also practicable. In this case, California and Washington State have both adopted more stringent permit requirements for their Departments of Transportation, and DEQ has failed to adequately explain why these higher permit standards should not also be used in Oregon given the available technology.

With this permit, DEQ has the opportunity to take a meaningful step forward in reducing the substantial impact for stormwater runoff on Oregon’s streams and rivers. Reducing this pollutant load is essential to meeting the long awaited goal of the CWA to once again have safe, fishable and swimmable rivers throughout Oregon. Ensuring that the facilities regulated under this permit will meet the required pollutant reductions to help achieve these goals will only occur if DEQ adopts specific, clear, measurable, and enforceable terms and conditions directing the practices necessary to meet MEP, the imposition of water quality based effluent limitations, and routine sampling measures.

### **DEQ Response:**

Phase I MS4s are required by CWA Section 33U.S.C.1342(p)(3)(B)(iii) to reduce pollutants discharged from their conveyance systems to the maximum extent practicable (MEP). ODOT’s initial MS4 Phase I permit was issued on June 9, 2000 and expired on May 31, 2005. The permit had been administratively extended since that time. As stated on page 90 of the Phase I regulations<sup>1</sup> “EPA anticipates that storm water

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<sup>1</sup> *National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges* (55 FR 47990, November 16, 1990), page 90

management programs will evolve and mature over time.” As this is the second MS4 permit for ODOT, DEQ has determined that this transportation-specific MS4 permit has appropriate MS4 Phase I permit requirements for stormwater discharges from ODOT’s facilities during the 5-year permit term. ODOT’s existing facilities and programs differ from those in neighboring states and therefore comparison with neighboring state programs is not appropriate. Additionally, the case cited in the comment, *Natural Res. Def. Council v. EPA*, 808 F.3d 556, 570 (2d Cir. 2015), deals with EPA’s Vessel General Permit and TBELs and does not support the assertion that comparison with neighboring states in the MS4 context is required.

This Phase I MS4 permit requires the ODOT to control pollutants discharged through its MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the applicable water quality requirements of the Clean Water Act. This MEP permit standard language has been added to Schedule A of the permit for clarity. As such, the permit requires ODOT to implement a comprehensive stormwater management program as the primary mechanism to achieve the maximum extent practicable standard required to reduce pollutants in its MS4 discharges. ODOT’s stormwater requirements have both agency-wide activities and project specific considerations. On a project basis, ODOT evaluates and develops stormwater treatment plans and systems that are appropriate based on site conditions and current technology. In some cases, existing stormwater controls are retrofitted to meet current requirements and technology and in other cases, new stormwater facilities are required. Collectively, the project specific determinations and the agency requirements in this permit meet the MEP standard. More specific information on requirements imposed by the permit are provided in DEQ’s response to comments below.

## **Clear, Specific, Measurable, and Enforceable**

### **Comment from NEDC et al.:**

1. We encourage DEQ to adopt additional specific, clear, measurable, and enforceable terms to ensure compliance with the MEP standard. The draft permit does not utilize technology-based or water quality-based effluent limits, and it fails to include specific and detailed BMP. DEQ has failed to demonstrate how its draft permit will address the MEP standard or ensure that each of the minimum measures meets the MEP standard. Specifically, we support the adoption of numeric requirements that maintain pre-development runoff conditions for Post-Construction Site Runoff Control; coordination with local municipalities for stormwater management; more detailed fiscal and budget analysis requirements; support for agricultural dischargers that enter ODOT’s MS4; additional education program requirements that train all ODOT personnel, consultants, and contractors in stormwater facility design; binding funding provisions for ODOT’s Stormwater Retrofit Strategy; and additional BMPs that recognize the unique impacts of climate change on stormwater pollution. We ask that the final permit rectify these concerns.

### **DEQ Response:**

ODOT’s MS4 Phase I permit has clear specific and measurable requirements that meets the MEP standard required for MS4 permits. MEP is the permitting standard for MS4 permits. Numeric limits are not required by the Clean Water Act, nor are they incorporated into other MS4 permits. DEQ’s focus as always remains on reducing pollution in stormwater and DEQ will continue to monitor national developments regarding MS4 permitting.

The MEP standard is predominantly met by implementation of a stormwater management program that imposes the six minimum measure requirements, as well as specifics regarding ODOT’s winter maintenance

program, retrofit strategy, compilation of twenty years of monitoring data and implementation of a statewide TMDL implementation plan. These measures are:

1. Public Education and Outreach
2. Public Involvement and Participation
3. Illicit Discharge Detection and Elimination
4. Construction Site Runoff Control
5. Post-Construction Site Runoff Control
6. Pollution Prevention and Good Housekeeping

For each measure and topic listed above, there are specific, measurable requirements, deadlines for developing and implementing the measures and monitoring requirements to ensure the measures are effective. Please see sections Schedule A.3, Schedule B and Schedule D for the details regarding each requirement as well as the specifics regarding the details for ODOT's stormwater management program. In addition, each requirement has an implementation schedule that requires ODOT to track and assess implementation of each of the requirements and report on in each annual report.

## Cover Page

### **Comment from Oregon Association of Clean Water Agencies (ACWA):**

1. Sources Covered by this Permit: It is not clear on the cover page of the permit that this permit applies statewide. The PER (top of page 2) states that this permit applies to ODOT statewide, however, this applicability should also be made explicit in the permit.

### **DEQ Response:**

The cover page of the permit states "This permit authorizes the municipal separate storm sewer system associated with ODOT owned and/or operated roads, water quality facilities, maintenance yards, rest areas, and other facilities located in ODOT highway right-of-way to discharge stormwater to surface waters of the state, in accordance with the requirements, limitations and conditions set forth." As ODOT is a state agency and owns property statewide, the permit necessarily applies statewide. The permit also references Attachment 1, which lists all of the applicable TMDLs.

## TMDL Point Source / Nonpoint Source

### **Comment from NEDC et al.:**

1. In addition, NPDES permits must contain requirements "consistent with the assumptions and requirements of any available wasteload allocation." 40 C.F.R. § 122.44(d)(1)(vii). A TMDL represents the maximum amount of a pollutant that a waterbody can receive each day and meet water quality standards. 33 U.S.C. § 1313. Wasteload allocations ("WLAs") and load allocations ("LAs") are developed as part of a total maximum daily load ("TMDL") for an impaired water body. Point sources discharging to a water body with a TMDL are assigned WLAs and nonpoint sources are given LAs, which are the maximum amount of pollutant that each source can discharge into an impaired water per day. 40 C.F.R. § 130.2(h). Once a source, such as an MS4, is assigned a LA or WLA, that allocation must be implemented through an NPDES permit. EPA guidance states that "[w]here the TMDL includes WLAs for stormwater sources that provide numeric pollutant loads, the WLA should, where feasible, be translated into effective, measurable WQBELs that will achieve this

objective.” The draft permit is not consistent with TMDLs that have been developed for Oregon’s waters. DEQ’s monitoring approach—which is tracking actions to comply with the MEP standard—is insufficient to comply with the TMDLs. The draft permit does not properly consider wasteload allocation, nor does it establish specific, measurable water quality-based effluent limitations to protect water quality.

### **DEQ Response:**

This permit is a transportation-specific MS4 permit that addresses ODOT’s stormwater discharges throughout Oregon. Stormwater runoff from ODOT’s MS4 discharges into waterbodies throughout the state, many of which have established TMDLs listed in Attachment 1 of the permit. ODOT implements a TMDL plan currently. The permit requires ODOT to develop and submit a new TMDL Implementation Plan to DEQ by June 1, 2023, which will address associated waste load allocations (WLAs) for urban stormwater and load allocations (LAs) statewide.

### **Comment from Oregon Association of Clean Water Agencies:**

1. The permit is confusing with respect to the distinction between point and non-point sources. NPDES permits address point sources and the cover pages for the other Phase I MS4 NPDES permits include Waste Load Allocations as appropriate. The cover page for this draft ODOT permit refers to both Waste Load Allocations and Load Allocations and references Attachment 1, which lists both. Load Allocations address nonpoint sources, which are not covered by permits. The term Load Allocations, and references to Load Allocations, should be removed from the cover page and Attachment 1 as it is not appropriate to address nonpoint sources in a point source permit.

Page 7, section 2.1.1 of the draft PER is somewhat clearer on this point as it only references Waste Load Allocations. However, the PER also references the permittee’s Total Maximum Daily Load Implementation Plan which is confusing and should not be included in the context of this permit. If ODOT’s discharges are covered by this permit, then they are classified as point sources and a TMDL Implementation Plan (TIP) would not apply. The permit and PER need to be revised to clarify this point and to remove references to nonpoint source requirements to be consistent with regulatory requirements.

### **DEQ Response:**

As noted above, this is a transportation-specific MS4 permit that addresses ODOT’s stormwater discharges throughout Oregon. As such, the stormwater runoff from ODOT’s MS4 discharges into waterbodies throughout Oregon, many of which have established TMDLs and 303(d) designations. As listed in Attachment 1 of the permit, ODOT is currently identified in 57 TMDLs and associated water quality management plans throughout Oregon as having waste load allocations, load allocations and designated management agency responsibilities.

DEQ has authority to include all TMDL requirements for ODOT in their MS4 permit as noted in this EPA memo from 2014 <sup>2</sup>:

*In addition to the stormwater discharges specifically identified as needing an NPDES permit, the CWA and the NPDES regulations allow for EPA and NPDES authorized States to designate additional stormwater discharges for regulation. See: 40 CFR §§122.26 (a)(9)(i)(C), (a)(9)(i)(D), (b)(4)(iii), (b)(7)(iii), (b)(15)(ii) and 122.32(a)(2). Accordingly, EPA encourages permitting*

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<sup>2</sup> Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on LAs" (November 26, 2014).  
[https://www3.epa.gov/npdes/pubs/EPA\\_SW\\_TMDL\\_Memo.pdf](https://www3.epa.gov/npdes/pubs/EPA_SW_TMDL_Memo.pdf)

*authorities to consider designation of stormwater sources in situations where coverage under NPDES permits would, in the reasonable judgment of the permitting authority and, considering the facts and circumstances in the waterbody, provide the most appropriate mechanism for implementing the pollution controls needed within a watershed to attain and maintain applicable water quality standards.*

DEQ and ODOT have determined that including all TMDL wasteload allocations and load allocations into the permit is the most effective and efficient way to track and manage TMDL responsibilities and implementation for ODOT throughout Oregon.

## **Schedule A.1.b Water Quality Standards**

### **Comments from ACWA:**

1. Schedule A(1)(b): Water Quality Standards. This section of the permit says corrective actions must be taken if it is determined that the MS4 has caused or contributed to an exceedance of any water quality standard as established in OAR 340, Division 41. Some corrective actions such as the construction of a stormwater treatment system with advanced technology to treat stormwater (ultraviolet light to control pathogens, for example) are very expensive and may still not achieve the standard. We believe stormwater discharges from upland pollution sources conveyed through the MS4s do, from time to time, contribute to, and cause exceedances of surface water quality standards (E. coli, for example), and we suspect this is also true for ODOT's MS4. If ODOT's MS4 is ever found in the future to have caused or contributed to an exceedance, the Permit Evaluation Report's (PER) page #8 says the permittee must submit a written report "...to ensure that the discharge does not continue to cause an exceedance of water quality standards in the future." To ensure is to make certain of obtaining or providing. So, with no margin for error in these instances, at least some of ODOT's corrective actions will be very costly but still not provide assurance of full compliance, putting the permittee at risk for third-party lawsuit despite all practicable efforts. Taking extreme and costly measures would allocate stormwater program dollars in a manner that would fail to achieve optimal environmental benefits and would likely exceed the maximum extent practicable (MEP) threshold that has been used in MS4 permits in Oregon since the mid-1990s.

A better approach, when a water quality standard is exceeded, is for the Permittee to report the excursion to DEQ and then work with the Department to consider the specific nature of the exceedance and the appropriate practicable response. A proper response may be to simply consider the effectiveness of existing plans and modify them if necessary. For instance, if a Stormwater Management Plan (SWMP) element is in place to address the problem, consider whether to continue implementing the element or modify the element to correct the problem. If a TMDL is in place and includes a Waste Load Allocation for the pollutant, the corrective action would be to continue to implement strategies to make progress towards achieving the wasteload allocations. If there is no existing plan, then the Permittee would develop a Corrective Action Plan for DEQ's review and approval, implement and continuously improve the plan through adaptive management with DEQ oversight, and ultimately achieve the water quality standard.

### **DEQ Response:**

Permit condition A(1)(b) in the ODOT Phase I permit outlines the requirements if a pollutant in ODOT's discharge is causing or contributing to an exceedance of an applicable water quality standard.

If ODOT or DEQ determines through investigation that stormwater discharges through ODOT facilities are causing or contributing to a water quality exceedance, DEQ expects ODOT to evaluate the effectiveness of the current stormwater management program as well as BMP effectiveness and address the issue(s) identified.

DEQ acknowledges that exceedances of water quality standards can be the result of activities outside of ODOT's authority. In situations where ODOT does not have authority regarding an exceedance of water quality standards, DEQ expects ODOT to share all available information so DEQ can follow-up as appropriate.

2. Schedule A(1)(b): Water Quality Standards. The last paragraph of this section includes the use of the word "violation." The word "excursion" is a more appropriate word as used frequently in all of the other text of this section.

**DEQ Response:**

The word violation has been changed to exceedance.

**Comment from EPA:**

1. Regarding Schedule A.1.b.iii, the contents of the ODOT's potential corrective action notification to ODEQ should be revised to add an explicit statement that, when identifying the location of the WQ exceedance, ODOT must name the receiving water body, include latitude and longitude of the specific location, and indicate the impairment status for the water body location.

**DEQ Response:**

DEQ has added the following language to the permit as noted in italics: "Within 60 days of becoming aware of or being notified of the exceedance, ODOT must submit a report to DEQ that documents the following: *the location of the exceedance including the receiving waterbody.*" DEQ has not required ODOT to include the impairment status for the water body to be required with the reporting as it is not necessary for that information to come from ODOT and the timeliness of sending the information to DEQ is most important.

**Comments from NEDC et al.:**

1. The final permit must ensure compliance with federal and state water quality standards. As is, the draft permit fails to ensure compliance with water quality standards because DEQ has not performed the necessary four-factor analysis to ensure that the discharge of pollutants will comply with all effluent standards. The final permit must include effluent limitations based on control technology, as well as a reasonable analysis to ensure compliance with water quality standards and Oregon's antidegradation rules, to confirm adherence with water quality standards and the CWA's attendant regulations. To begin, the MS4 permit must satisfy the water quality standards of the Clean Water Act. 40 C.F.R. § 122.4(a). Permits authorizing the discharge of pollutants must "ensure that every discharge of pollutants will comply with all applicable effluent limitations and standards." *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486, 489 (2d Cir. 2005) (emphasis in original); see also 33 U.S.C. §§ 1311(b)(1)(C), 1342(a)(2); 40 C.F.R. §§ 122.4(d), 122.44(d). All MS4 permits must contain effluent limitations for pollutants in point source discharges. 33 U.S.C. § 1342(a). Permit conditions must include effluent limitations based on control technology, in addition to more stringent limitations that are necessary to meet water quality standards. 33 U.S.C. § 1311(b)(1). The technology-based standard for MS4 permits is the MEP standard. 40 C.F.R. § 122.26(d)(iv); 122.34(a), (b). As with all NPDES permits, MS4 permits must contain water quality-based effluent limitations to ensure compliance with water quality standards. 40 C.F.R. § 122.44(d)(1)(i). Schedule A of the draft permit states that it is presumed "that ODOT is not causing or contributing to an excursion of the applicable water quality standards" if the agency complies with all terms and conditions of the permit. Sch. A.1.b. This presumption has no foundation and is legally inadequate. DEQ must perform a reasonable potential analysis to ensure compliance with water quality standards. DEQ must at least consider four factors to determine potential exceedances of water quality

standards, including “existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing . . . , and, where appropriate, the dilution of the effluent in the receiving water.” 40 C.F.R. § 122.44(d)(1)(ii). DEQ has failed to demonstrate that it has performed this analysis, and has failed to notify the public of ODOT’s history of complying (or not complying) with water quality standards. DEQ must conduct further analysis of whether the permit’s authorized discharges will comply with Oregon’s antidegradation rules. OAR 340-041-0004; 40 C.F.R. § 131.12. DEQ has not demonstrated that the permit will comply with the state’s antidegradation principle. The permit’s presumption of compliance is inadequate to meet the protective standards of the CWA and Oregon regulations. As DEQ admits, it may impose additional control measures “if information indicates that [ ] discharges [are] causing or contributing to a violation of water quality standards and ODOT is responsible for the source of the pollution.” Sch. A.1.b. However, DEQ should not wait until unauthorized or illicit discharges are discovered to establish more specific, clear, measurable, and enforceable permit terms. For example, other agency permits, such as WSDOT’s most recent MS4 permit, include monitoring studies to evaluate the effectiveness of individual BMPs and other elements of stormwater programs. WSDOT’s permit also requires planned status and trends monitoring studies in the Puget Sound basin; a similar requirement is practicable and should be adopted for ODOT with regards to the state’s most water-quality limited basins. We encourage DEQ to be more proactive and adopt stringent control measures in the final permit to ensure compliance with the antidegradation principle and maintenance of Oregon’s water quality standards.

### **DEQ Response:**

As stated previously, MEP is the permitting standard for MS4 permits. ODOT’s MS4 permit meets the MEP standard, as identified in DEQ’s response above. Compliance with the permit means that ODOT is not causing or contributing to an exceedance of water quality standards as established by OAR-340-041.

ODOT has been collecting monitoring data for 20 years but the data is not in a format that can currently be reviewed and analyzed by DEQ to make any determinations. Additionally, ODOT has assigned waste load allocations and load allocations in TMDLs across Oregon. Accordingly, DEQ has required ODOT complete a TMDL Implementation Plan to ensure stormwater discharges into waterways with established TMDLs are managed according to TMDL requirements.

In addition, the permit has new requirements for ODOT including the collection and reporting of data that was not required in the past iteration of the permit. The data collection and reporting requirements will be used by DEQ to determine future permit requirements as well as in future reasonable potential analyses determinations, if necessary. In regards to the antidegradation requirements, as noted in the PER, the stormwater discharges authorized by this permit have been ongoing since the federal regulations requiring an NPDES permit were adopted. This permit is expected to reduce the current level of pollution discharged from ODOT’s stormwater-related facilities at a level greater than projections for growth impacts. Therefore, the issuance of this permit will protect and improve existing water quality and therefore is consistent with DEQ’s antidegradation policy.

2. The draft permit is inadequate to protect Oregon’s impaired waters, as it fails to ensure that ODOT will not cause or contribute to water quality standard excursions. Given that one of the leading causes of water quality impairment across the United States is stormwater pollution, the final permit should adopt additional obligations to protect waters through mandatory permitting restrictions. By failing to establish these requirements, DEQ will authorize new discharges to water quality limited waters in contravention of the CWA’s implementing regulations. 40 C.F.R. § 122.4(i). DEQ cannot authorize a discharge that will cause or contribute to violations of water quality standards. See *Friends of Pinto Creek v. EPA*, 2007 U.S. App. LEXIS 23251, 65 ERC (BNA) 1289 (9th Cir. 2007) (“[N]o permit may be issued to a new discharger if the discharge will contribute to the violation of water quality standards. This corresponds to

the stated objectives of the Clean Water Act ‘to restore and maintain the chemical, physical, and biological integrity of the nation’s waters.’”). In this case, DEQ has effectively admitted that these discharges will cause or contribute to further violations of water quality. This is because numerous water quality limited streams and rivers will receive polluted stormwater under this permit, yet the permit fails to include measures specifically targeted at prevention of further stormwater discharges to Oregon’s impaired waterbodies.

### **DEQ Response:**

Once again, TMDLs are developed where waters are impaired for a specific pollutant. ODOT has wasteload and load allocations for certain impaired waters and this permit requires ODOT to submit a TMDL implantation plan by June 1, 2023. In addition if ODOT or DEQ determines that there is an exceedance of water quality standards ODOT is required to follow the requirements of A.1.b in the MS4 permit. In addition, as the commenter notes, page 5 of the permit states: “DEQ may impose additional control measures, if information indicates that the discharge is causing or contributing to a violation of water quality standards and ODOT is responsible for the source of the pollution, either in the receiving waterbody or in a downstream waterbody.” ODOT is not a new discharger.

3. DEQ should establish additional requirements to ensure long-term water quality improvements in the final permit. For instance, Washington State’s Department of Transportation’s (“WSDOT”) MS4 permit requires written notification within 30 days of WSDOT becoming aware that a discharge from WSDOT is causing or contributing to violations of water quality standards. In contrast, ODOT’s draft permit requires notification within 60 days. Further, after providing such notification, WSDOT’s permit requires that the agency submit a report on its adaptive management response with significantly more detail and information than is required under ODOT’s draft permit. We encourage DEQ to follow Washington’s approach and adopt more specific, timely management response measures to discharges that cause or contribute to violations of water quality standards. Specifically, the final permit should require ODOT to submit a report to DEQ that includes the following information: (a) a description of BMPs currently being implemented to prevent or reduce pollutants that are causing or contributing to water quality impairment and the effectiveness of each BMP; (b) a description of potential additional operational and structural BMPs that will or may be implemented in order to apply All Known, Available, & Reasonable Treatment (“AKART”) or reduce any pollutants causing or contributing to water quality impairment; (c) a description of potential monitoring or other assessment and evaluation efforts that will be implemented to evaluate the effectiveness of the additional BMPs; and (d) a schedule for implementing the additional BMPs, including, as appropriate, funding, training, purchasing, construction, monitoring and other assessment and evaluation components of implementation. Finally, NPDES permits generally must ensure compliance with water quality standards and WLAs upon issuance or coverage. However, if compliance cannot be achieved immediately, the permit may establish a schedule of compliance. 40 C.F.R. § 122.47(a). A schedule of compliance is “a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.” 33 U.S.C. § 1362(17). Because the permit fails to ensure immediate compliance and does not include a lawful compliance schedule, we encourage DEQ to adopt in the final permit a detailed schedule leading to compliance with the CWA and its implementing regulations. 40C.F.R. § 122.47(a).

### **DEQ Response:**

As noted above, DEQ determined that this permit meets the MS4 permit standard, thus, if the permit is implemented as required, ODOT will be in compliance with all appropriate water quality regulations regarding their stormwater discharges.

Schedule A.1.b.ii of the permit requires ODOT to notify DEQ in writing within 30 days of becoming aware of an exceedance, which is the same timeline that NEDC et. al referenced above for WSDOT. Then, within 60 days of becoming aware of or being notified of the exceedance, ODOT must submit a report to DEQ that documents the following: The results of the investigation, including the date the excursion was discovered; a brief description of the conditions that triggered the excursion or the cause; and corrective actions taken or planned, including the date corrective action was completed or is expected to be completed or referral of the information to DEQ if ODOT's activities are not the source of the pollution discharge. As noted above, DEQ has the authority to require ODOT to implement additional control measures if needed.

A compliance schedule is not necessary in this permit because the permit ensures compliance with the MEP standard. ODOT has been implementing a MS4 Phase I permit since 2000. The reissued permit does contain an implementation schedule for permit measures that ODOT is required to meet.

## **Permit must require timely compliance**

### **Comment from NEDC et al.:**

1. The draft permit is legally inadequate because it does not provide for compliance as expeditiously as practicable. 33 U.S.C. § 1342(p)(4)(A) provides that “[a]ny permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.” Three years is typically considered the “outside” limit for permit compliance and implementation. NRDC v. EPA , 966 F.2d 1292, 1300-01 (9th Cir. 1992). Although the proposed permit grants ODOT a year to implement most of the permit provisions, DEQ must provide for compliance as expeditiously as practicable. For example, the draft permit provides that ODOT’s Stormwater Management Plan be submitted by June 1, 2021. Pollution prevention and good housekeeping BMPs are similarly not due until June 1, 2021. In this case, ODOT can reasonably establish a shorter timeline for compliance because the agency has been given advance notice of its legal requirements. Since the permit has been administratively extended since issuance, ODOT has been given fair and advanced notice of its duty to establish BMPs that reduce stormwater pollution to the MEP standard. Acknowledging the seriousness of stormwater pollution and the exacerbating effects of climate change, our organizations encourage DEQ to expedite the compliance timeline significantly.

### **DEQ Response:**

As noted above, ODOT is currently implementing a stormwater management program that reduces stormwater pollution to MEP and has been since permit issuance in 2000. The renewed permit has new requirements including improved data collection and management as well as the prioritization of relevant projects. The permit includes what have been determined to be the appropriate timeframes for ODOT to meet these new requirements. Some considerations in development of these time frames are that many of the permit conditions require ODOT to develop and/or update agency-wide processes and training materials to ensure compliance. In addition, over 500 ODOT employees will need training on various aspects of the permit. The timeframes in the permit take the work associated with each permit condition into consideration to ensure the permit can be implemented appropriately.

## **Schedule A.1.d Allowable Non-Stormwater Discharges**

### **Comments from ACWA:**

1. Schedule A(1)(d): Allowable Non-Stormwater Discharges. The other Phase I MS4 Permits in Oregon are authorized to allow “dechlorinated swimming pool discharges” to be discharged into their MS4. We recommend that a similar authorization be extended to ODOT, but we encourage the DEQ to expand the

wording as follows: “discharges from swimming pools, hot tubs, and spas provided that no disinfectant (i.e. chlorine) is present, and for hot tubs and spas, the discharged water is not too warm or hot.” Since other disinfectants are now being used more commonly, we recommend not relying solely on the word “chlorine” in the final MS4 permit. These are relevant for ODOT routes that are also urban streets.

2. Schedule A(1)(d): Allowable Non-Stormwater Discharges. The other Phase I MS4 Permits in Oregon are authorized to allow “individual residential car washing” and “charity car washing” wastewaters to be discharged into their MS4. We recommend that similar authorizations be extended to ODOT. These are relevant for ODOT routes that are also urban streets.

### **DEQ Response:**

DEQ understands that many of ODOTs roads and right of ways are in the urban interface and has updated the permit to include the additional allowable non-stormwater discharges recommended. The allowable non-stormwater discharge for pools now reads: “Dechlorinated swimming pool discharges including hot tubs (heated water must be cooled for at least 12 hours prior to discharge).” DEQ has not included ACWA’s language for additional disinfectants. DEQ understands that some pool and hot tub owners are utilizing alternative disinfectants (ie. bromine, salt, and chloramine) to sanitize their water. DEQ recommends that pool and hot tub owners utilizing alternative disinfectants contact their local jurisdiction to request guidance on disposal as all pool disinfectants may degrade water quality if discharged through the MS4 into local waterbodies. DEQ also included the discharges related to car washing that were recommended.

## **Stormwater Management Program Document**

### **Comment from ACWA:**

1. Schedule A(2)(c): Stormwater Management Program Document. Please clarify in the permit or PER whether DEQ will be reviewing and approving of the SMPD that is required for submission by June 2, 2021. And, please clarify what the approval process will include. In addition, please provide information regarding the ODOT SMPD that is dated April 2020 and posted on the DEQ web site. Is this a draft document, and if so, what was, is, or will be the DEQ approval process for this document?

### **DEQ Response:**

DEQ reviewed the draft ODOT stormwater management program document and it was shared during the public comment period. Per the permit, ODOT is required to submit the final stormwater management program document by June 1, 2021. When DEQ determines that the stormwater management program document submitted by June 1, 2021 meets all of the permit requirements, DEQ will approve it.

## **Schedule A.3.c Illicit Discharge Detection and Elimination**

### **Comment from ACWA:**

1. Schedule A(3)(c): Illicit Discharge Detection and Elimination. Page 12 of the Permit Evaluation Report (PER) regarding this section of the permit states that “Discharges of runoff from material storage areas, which contain chemicals, fuels...” is an illicit discharge. Stormwater runoff is not an illicit discharge. We do understand that in this example, stormwater runoff is mixed with and conveys an illicit discharge, but that

circumstance (stormwater runoff mixed with an illicit discharge) can occur with any imaginable illicit discharge. The word “runoff” should be removed from this example.

**DEQ Response:**

DEQ removed the word runoff from the sentence.

**Comment from Tualatin Riverkeepers:**

2. In Schedule A. 3.c.iv.(B), ODOT must respond to complaints or reports within an average of 2 working days. This seems to suggest that a particular compliant can sit for a week or more as long as on average ODOT responds within 2 working days. TRK would suggest putting a qualifier on this section, for example adding language like “average of 2 working days but in no circumstances longer than 5 working days.” Adding a qualifier still allows ODOT some flexibility but sets an outside limit on what is an acceptable length of time to respond to a report of an illicit discharge. The same sort of qualifier should also be added to the inspection requirement which says an investigation must be started within an average of 5 working days. Again, this language, without a qualifier, allows ODOT on a particular occasion to take as long as they would like, for example two weeks, as long as, on average, they start an investigation within 5 working days.

**DEQ Response:**

DEQ has included the qualifier “in no circumstances longer than 5 working days” to the section. In addition, DEQ updated the investigation requirement to “An initial investigation or evaluation must occur within five working days or ODOT must refer the complaint to the appropriate agency.”

## **Schedule A.3.e Post-Construction**

**Comment from ACWA:**

1. Schedule A(3)(e): The permit says “...control stormwater runoff from project sites in its coverage area.” Please clarify in the permit or in the PER whether the requirements in this section of the permit only apply to ODOT-funded projects on ODOT-owned land or funded by ODOT, versus development on private lands which drains into ODOT’s MS4, or both. Page 14 of the PER should also include text to clarify this issue. Section 4.3.5 should say that this section of the permit does not apply to the control of runoff from privately owned property that discharges into ODOT’s MS4 if this is indeed the case. It is our understanding that this section of the permit only applies to post-construction site runoff controls for runoff from ODOT-owned lands.

**DEQ Response:**

The MS4 Phase I permit for ODOT applies to ODOT owned and/or operated roads, water quality facilities, maintenance yards, rest areas, and other facilities located in ODOT highway right-of-way that discharge stormwater to surface waters of the state. ODOT is unique among Oregon MS4 permittees in that it has no regulatory authority to impose or enforce stormwater management requirements or technical standards on private property owners. Any illicit stormwater discharge that originates outside of ODOT’s coverage area

but which runs on to ODOT's property would fall under the illicit discharge permit condition which states "If the illicit discharge originates, or discharges to, areas out of ODOT's jurisdictional authority, ODOT must notify the proper jurisdictional authority as soon as practicable, and at least within five working days of becoming aware of the illicit discharge."

2. Schedule A(3)(e): Post-Construction Site Runoff Control. Section A.3.e.iii should be titled "Reduce Barriers to Low Impact Development." The section does not include anything about prioritizing low impact development (LID) as the title implies.

**DEQ Response:**

DEQ changed the title to "Reduce Barriers to Low Impact Development" as recommended.

3. Schedule A(3)(e): Post-Construction Site Runoff Control. MS4 NPDES permits are issued according to a standard to reduce pollutants to the MEP. This public review draft permit requires ODOT to have a flow control standard. A flow control standard should only be required to the extent that it meets the objective of reducing pollutants. Permit requirement A.3.e.iv(A) should be reworded to say something like "Flow Control Standard to address hydromodification impacts." This would ensure that the term "Flow Control" is not misconstrued to mean flow control for the purposes of addressing capacity and/or flood control issues, which is outside the purview of this permit.

**DEQ Response:**

Under the permit heading for Post-Construction Site Runoff Control the permit specifically states that "ODOT must continue to implement its post-construction site runoff program to reduce discharges of pollutants and control stormwater runoff from project sites in its coverage area." ODOT's permit is a transportation specific MS4 permit and as ACWA stated in the comment, flood control is "outside the purview of this permit." DEQ has also added "(to address hydromodification impacts)" to A.3.e.iv(A) as suggested by ACWA to help clarify what is meant by "Flow Control Standard."

4. ODOT has been a leader in its early adoption of design standards for ODOT construction projects that utilize both a water quality treatment and flow control approach. ODOT was one of the first agencies in Oregon to begin using a flow duration matching approach to control the duration and volume of runoff to address hydromodification impacts. DEQ recognizes the effectiveness of this program in the permit PER on page 14 and states, "ODOT currently implements post-construction stormwater management under many different regulatory mechanisms, which DEQ, and other regulatory agencies, have deemed sufficient and effective in retaining and/or treating stormwater." ACWA commends the State for its approach to managing post-construction runoff. Many local agencies currently utilize or propose utilizing the same water quality treatment and flow control approach in their own post-construction programs, which offers great benefits to coordinating programs, plan reviews, system designs, and overall watershed management.

**DEQ Response:**

DEQ appreciates the comment and has shared the input with ODOT.

**Comment from NEDC et al.:**

1. First, we request DEQ to adopt numeric requirements that maintain pre-development runoff conditions for post-construction stormwater management. 40 CFR § 122.34(b)(5). More than half of permitting authorities have already established retention performance standards for newly developed sites, and the EPA encourages adoption of such numeric requirements. For example, North Carolina's 2015 MS4 permit for the North

Carolina Department of Transportation (“NCDOT”) requires the agency to develop a BMP Toolbox for its Post-Construction Stormwater Program. The toolbox aids in the siting, design, and construction of stormwater quality BMPs, and NCDOT must maintain and update the BMP Toolbox as necessary with new technologies. DEQ should adopt more comprehensive requirements in the final permit that requires ODOT to establish and maintain a similar BMP Toolbox. This will ensure that ODOT is indeed using measures to reduce stormwater pollution and ensure compliance with the MEP standard.

### **DEQ Response:**

As previously stated, the MS4 permitting standard is the basis for this permit and DEQ has determined that this permit for ODOT meets the MEP standard. For all new projects, ODOT implements post-construction stormwater requirements from multiple regulatory authorities including, but not limited to DEQ, the Federal Highway Administration, National Marine Fisheries Service, US Fish and Wildlife Service, and US Army Corps. The post-construction stormwater requirements are based on site-specific and project specific details that include the details regarding the waterway the stormwater is discharged into. For this permit, DEQ determined continuing this framework for managing post-construction runoff is appropriate to ensure clarity. DEQ will evaluate what is appropriate for future permits based on the details submitted in the annual reports for this permit term.

It is our understanding ODOT currently implements a “BMP toolbox”, as there are multiple documents ODOT refers to and must be consistent with that include post-construction stormwater BMPs. These include the Federal Aid Highway Programmatic (FAHP), Endangered Species Act Biological Opinions, 401 water quality certifications, 404 permits, ODOT’s Hydraulics Reports, Blue Book, Environmental Management System, Operation and Maintenance Program, Water Quality Facility Program. ODOT describes their FAHP program as:<sup>3</sup>

*The Federal Aid Highway Programmatic (more completely, the “Endangered Species Act Programmatic Biological Opinion and Magnuson-Stevens Act Essential Fish Habitat Response for the Federal-Aid Highway Program in the State of Oregon”) is a pair of ESA biological opinions (Opinions), which we collectively refer to as “the FAHP.” These Opinions were issued by National Marine Fisheries Service and US Fish and Wildlife Service to authorize take to species and habitat within their respective jurisdictions by projects wholly or partially funded by the Federal Highway Administration (FHWA). Other than maintenance projects, the great majority of ODOT projects are funded in this manner. These authorizations are limited and conditioned upon FHWA (through ODOT) implementing certain best management practices and design criteria for all covered activities that effect ESA-listed fish and their critical habitat.*

## **Schedule A.3.f. Pollution Prevention and Good Housekeeping**

### **Comment from NEDC et al.:**

1. Additional BMPs should be added to the draft permit’s education program requirements. Other transportation departments, such as WSDOT, mandate road operation and maintenance training, as well as highway runoff training for all personnel, consultants, and contractors involved in stormwater facility design. DEQ should adopt similar education provisions in the final permit.

### **DEQ Response:**

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<sup>3</sup> See webpage at <https://www.oregon.gov/odot/GeoEnvironmental/Pages/ESA.aspx>.

In the permit, ODOT has training requirements listed for ODOT personnel and contractors included in the following permit conditions: Public Education, Illicit Discharge Detection and Elimination, Construction Site Runoff Control, Post-Construction Site Runoff Control, Pollution Prevention and Good Housekeeping, and Winter Maintenance Strategy. The Post-Construction Site Runoff Control measure in the permit specifically says that “ODOT must ensure that the ODOT employees or contractors responsible for performing post-construction runoff site plan reviews, administrating the alternative compliance program, or performing O&M practices, or evaluating compliance with long-term O&M requirements are trained at least once during the permit term to conduct such activities.”

## **Schedule A.3.h. Stormwater Retrofit Strategy**

### **Comment from NEDC et al.:**

1. The final permit should also include more specific and binding mandates for ODOT’s Stormwater Retrofit Strategy. WSDOT, for example, has adopted more stringent retrofitting and funding requirements that ensure stormwater pollution is reduced to the MEP standard. WSDOT’s permit requires the agency to provide 20% of the cost obligation of retrofitting a project site if it is within the Puget Sound Basin. Alternatively, WSDOT can retrofit the existing impervious surface that equates to 20% of the cost, or simply transfer 20% of the cost obligation to fund stand-alone stormwater retrofit projects. DEQ should adopt similar terms for ODOT’s final permit, which can include specific funding provisions for the Klamath Basin or Malheur Basin, which are amongst the most water quality limited basins in the state. These specific, clear, measurable, and enforceable terms will not only ensure compliance with the MEP standard, but also protect Oregon’s most impaired waters.

### **DEQ Response:**

This permit requires a retrofit strategy as listed in Schedule A.1.h. As noted on page 16 in the PER, ODOT has had a retrofit strategy. The permit requires ODOT to develop and submit a stormwater retrofit strategy to DEQ by June 1, 2024. The strategy must include a number of items, including identification of high priority retrofit areas, stormwater control measures or approaches, estimated timelines and costs. DEQ will use the information in the retrofit strategy, as well as the monitoring data ODOT will submit to DEQ to determine basin-specific retrofit needs for ODOT facilities in future permit terms.

### **Comment from Tualatin Riverkeepers:**

1. RK has particular concerns regarding the Stormwater Retrofit Strategy, Schedule A.3.h. As currently written, the permit does not require ODOT to implement any specific number of projects and does not require any particular elements be included in the plan. Instead the permit gives a list of suggested inclusions in the retrofit document. Essentially this section of the permit does not ensure any real progress will be made retrofitting stormwater facilities by the end of the permit term. For DEQ’s sake, and for ODOT’s sake, the permit should spell out what compliance with the Stormwater Retrofit Strategy would look like on-the-ground. For example, requiring at least 5 separate retrofit projects be completed within the permit term would provide needed measurable requirements. Without some minimum amount of projects or tangible actions required by ODOT, the permit provides no guidance on what successful implementation of the Stormwater Retrofit Strategy would actually look like. Additionally, without specific requirements like a number of projects to be completed or even a specific number of projects identified and/or scheduled for retrofit, DEQ will be unable to do meaningful review and enforcement of the Stormwater Retrofit Strategy. Without these

clarifications, this section of the permit essentially allows ODOT to create a strategy document without any enforceable requirements.

### **DEQ Response:**

There are many ODOT projects slated for implementation during the permit term that will include stormwater retrofits through the Statewide Transportation Improvement Program. As noted in the PER, the permit requirements direct ODOT to develop a Stormwater Retrofit Strategy Document to summarize current efforts and costs and evaluate new stormwater control measures. ODOT is also required to begin identifying high priority retrofit areas, preferred stormwater control measures or approaches, and provide an estimated timeline and cost if the retrofit strategy were to be implemented. This is an important step to ensure there is a comprehensive plan that is developed to ensure clarity regarding the highest priorities. DEQ will use this information to determine future permit requirements that are implementable.

## **Schedule B Monitoring and Reporting Requirements**

### **Comment from ACWA:**

1. Monitoring is a key element of Phase I MS4 NPDES permits in Oregon. Phase I MS4 communities conduct stormwater monitoring for several parameters at multiple locations in their service area. Additionally, the permit requires in-stream monitoring for several parameters at multiple locations in their watersheds. ODOT's Phase I MS4 permit does not include any monitoring requirements. DEQ should provide an explanation as to why the monitoring requirements in the ODOT permit are significantly different than for the other Phase I MS4 permits.

### **DEQ Response:**

ODOT has been conducting stormwater focused research projects and monitoring stormwater from their facilities (roads, bridges) throughout Oregon since MS4 permit issuance in 2000. DEQ added the following clarifying language to the permit: "ODOT must continue conducting stormwater monitoring." In addition, DEQ also added to schedule B.2 the following language: "ODOT must submit a monitoring plan by January 15, 2021." Some of the pollutants that are monitored include: dissolved metals, nutrients, total suspended solids, E.coli, and PCBs. ODOT will continue to conduct stormwater focused research and monitoring throughout Oregon for this permit. The ODOT MS4 permit requires all monitoring data be compiled and submitted to DEQ so it can be analyzed and used for future permit decisions.

ODOT has contributed stormwater monitoring data going back to 2007 to the Highway Run-off Database developed by the United States Geological Survey (USGS) in cooperation with the Federal Highway Administration (FHWA). The data can be located at: <https://www.sciencebase.gov/catalog/item/5ba54b65e4b08583a5c9d524>. The goal of this research project<sup>4</sup> is "to provide planning-level information for decision makers, planners, and highway engineers to assess and mitigate possible adverse effects of highway runoff on the Nation's receiving waters." The sampling data included in the database includes pollutant parameters such as metals (lead, copper, zinc), organic compounds like 1,2-Dichlorobenzene, and many others. Another example of extensive statewide stormwater characterization sampling by ODOT was conducted from 2011-2017. This sampling was conducted at five sites throughout Oregon and involved sampling stormwater for dissolved metals, bacteria, nutrients, as well as organic chemicals.

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<sup>4</sup> See webpage at <https://www.sciencebase.gov/catalog/item/5ba54b65e4b08583a5c9d524>.

2. Schedule B(2): Applicable Monitoring Requirements. This section references “the most recent TMDL Implementation Plan.” This point source permit should only address related Waste Load Allocations and should not include references to compliance with a TMDL Implementation Plan as it is confusing and not consistent with regulatory requirements. The reference in the draft permit should be removed.

**DEQ Response:**

See DEQ response to ACWA comment #1 in TMDL Point Source / Nonpoint Source category above.

**Comment from EPA:**

1. Regarding Schedule B.2, we recommend adding the bold/italic text below, particularly to identify when ODOT must submit such data. In addition, ODEQ should clarify in Schedule B.2 how this provision interrelates to the requirements in Schedule D.2:

*ODOT must comply with any applicable monitoring requirements **contained in the most recent TMDL Implementation Plan. If ODOT performs stormwater monitoring at outfall locations, and/or in the receiving waterbody, all monitoring data must be submitted to DEQ **annually as part of the corresponding Annual Report.** If new monitoring efforts are conducted during the permit term, ODOT will **must** submit data using the electronic template developed **provided** by DEQ.***

**DEQ Response:**

The recommended language has been added to Schedule B.2. Regarding how Schedule B.2 interrelates to the requirements in Schedule D.2, DEQ has added the following italicized language to B.2: “ODOT must comply with any applicable monitoring requirements in the most recent TMDL Implementation Plan *as well as all monitoring related provisions contained within Schedule D.2.*”

**Comment from NEDC et al.:**

1. DEQ failed to establish specific and measurable requirements to ensure that each minimum permit measure can be tracked. There are no monitoring requirements apart from those already established by the TMDL Implementation Plan; this is inadequate to assure that water quality standards are being met. We implore DEQ to require specific measurable requirements for stormwater sampling, monitoring, and reporting in the final permit. This should include continuous, flow-weighted sampling requirements. A fundamental element of any MS4 permit — which is aimed at meeting the MEP standard — is the ability and requirement to evaluate the effectiveness of the best management practices chosen to reduce the discharge of pollutants. For example, when a permit has not reduced effluent limits to numeric loads, monitoring and reporting requirements must be tailored to actually capture the actions the permittee takes to be in compliance with the permit. Permittees are required to record and report on compliance with specific tasks identified in their permit and to monitor and report on the effectiveness of these tasks. 40 C.F.R. § 122.34(g). The permit must establish monitoring and reporting requirements based on measurable requirements identified in the permit. Where the permit includes measurable requirements stated in terms of pollutant load limits or compliance with ambient water quality standards, it should require such monitoring as is necessary to enable evaluation of compliance with those specific permit terms, as well as the effectiveness of the permittees’ stormwater management program at reducing the discharge of pollutants to the maximum extent practicable, protecting water quality, and satisfying the appropriate water quality requirements of the Clean Water Act. Furthermore, the permittee’s self-evaluation and reporting, 40 C.F.R. § 122.34(d)(1) and (d)(3), should address compliance with the specific permit terms and the effectiveness of the permittees’ stormwater management program.

In this case, Schedule A of the draft permit provides that it is presumed “that ODOT is not causing or contributing to an excursion of the applicable water quality standards” if the agency complies with all terms and conditions of the permit. Sch. A.1.b. This is an inadequate standard, and DEQ must establish specific monitoring requirements in the final permit to avoid impermissible self-regulation. DEQ failed to establish specific and measurable requirements for the permittee to ensure that each minimum measure can be tracked. Besides those established by the most recent TMDL Implementation Plan, there are no monitoring requirements. Beyond those associated with the minimum control measures, we encourage DEQ to adopt measurable water quality-based effluent limitations. The final permit should also include monitoring as is necessary to enable evaluation of compliance with the permit terms. Ideally, continuous, flow-weighted sampling methods should replace the traditional collection of stormwater data using grab samples. Grab samples are subject to greater uncertainty due to infrequent collection, and the National Research Council suggests that grab sampling should “be abandoned as a credible stormwater sampling approach for virtually all applications.” Flow-weighted sampling methods are more accurate due to their frequent, continuous sampling methods. Due to the scientific data on the ineffectiveness of grab samples, we recommend that DEQ adopt monitoring requirements, and specifically flow-weighted sampling requirements, in the final permit. In addition, DEQ must include more stringent evaluating and reporting requirements to determine the effectiveness of ODOT’s BMPs. Along with its annual report, ODOT should be required to submit an annual overall program effectiveness evaluation. This approach has been adopted by other transportation agency permits, such as CDOT in 2016, and proven practicable. The effectiveness evaluation should include, but not be limited to, the following components: (a) assessment of program effectiveness in permit requirements and measurable objectives; (b) assessment of program effectiveness in protecting and restoring water quality and beneficial uses; (c) identification of quantifiable effectiveness measurements for each BMP, including measurements that link BMP implementation with improvement of water quality and beneficial use conditions; and (d) identification of how ODOT will propose revisions to the Stormwater Management Plan to optimize BMP effectiveness when effectiveness assessments identify BMPs or programs that are ineffective or need improvement. Furthermore, CDOT is required to increase the scope of its evaluation every year in response to the environmental monitoring data the agency collects. We ask DEQ to adopt an overall program effectiveness evaluation in line with these terms. These additional mandates will not only ensure maintenance of water quality, but force ODOT to consider restoration and improvement of water quality in its role as a discharger.

### **DEQ Response:**

As noted previously, the MS4 permitting standard is to control pollutants discharged through its MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the applicable water quality requirements of the Clean Water Act. As identified above, the permit states that ODOT must continue conducting stormwater monitoring. In addition, ODOT is required to compile all available monitoring data from over 20 years of sampling so it can be analyzed and used for future permit decisions. ODOT is also required to submit a TMDL implementation plan during this permit term. DEQ requires submission of an Annual Report to track progress of stormwater management program measures. The stormwater management program document will be available on the ODOT website as required by the permit. This permit is part of an iterative process and is planned to be renewed every five years to continue water quality improvements.

### **Comment from Tualatin Riverkeepers:**

Schedule A.1.d. of the permit lists allowable non-stormwater discharges and then mentions that, if any of the allowable types of discharges becomes a significant source of pollution, then ODOT must either prohibit the discharge of that type of pollutant or create BMPs. However, the permit does not seem to require ODOT to regularly monitor to determine whether any of these discharges becomes a significant source of pollution. Without a mechanism requiring ODOT to regularly monitor sources of stormwater, ODOT would most likely never determine that a particular source of allowable discharges is a significant source of pollution. Given the

way the permit is written, identifying the source as significant is a required first step before BMPs can be developed and implemented. Therefore, we urge DEQ to add language requiring regular monitoring and investigation to determine whether any of these allowable discharges becomes a significant source of pollution warranting action.

### **DEQ Response:**

As noted above, ODOT has been monitoring stormwater regularly throughout the state since initial phase I permit issuance in 2000 and continues to do so. ODOT must continue conducting stormwater monitoring. Page 9 of the PER explains: “ODOT is responsible for the quality of the discharge from its MS4, and therefore has an interest in locating and discontinuing any uncontrolled non-stormwater discharges into its MS4.” In addition, ODOT conducts frequent road patrols where they have the opportunity to discover and identify allowable and illicit non-stormwater discharges and respond appropriately. Responses to illicit discharges may include utilizing pollutant parameter action levels to monitor and characterize the discharge. Page 13 of the PER further explains road patrol capability:

*DEQ maintains that ongoing field screening activities play an important role in a comprehensive illicit discharge detection and elimination program. ODOT currently instructs its crews to conduct road patrols, in order to regularly observe stormwater-related facilities. Road patrols are conducted more frequently in areas of high traffic or of resource concern. Issues are addressed immediately or scheduled appropriately. Allowing ODOT to be more efficient with time, these screenings will occur through routine maintenance inspections, and general observations and road patrols. These screenings will allow appropriately trained staff to quickly determine whether an illicit discharge is present at a given site.*

## **Schedule D Special Conditions**

### **Comments from ACWA:**

1. Schedule D(1): In the PER related to Schedule D(1)(page 18), it states that the data compilation exercise “will also aid in identifying data needs for the Stormwater Retrofit Strategy and future TMDL Implementation Plan updates.” Again, it is not appropriate to reference TMDL Implementation Plan updates in a permit for point sources. TMDL Implementation Plans apply to nonpoint sources. Please remove this reference to TMDL Implementation Plans from the PER to be consistent with regulatory requirements. This language in the PER should be changed to: “will also aid in identifying data needs for the Stormwater Retrofit Strategy and future SMPD updates.”

### **DEQ Response:**

As explained in the response to ACWA’s question #1 in TMDL Point Source / Nonpoint Source category above, ODOT’s TMDL implementation Plan will be used to address both WLAs and LAs associated with ODOT associated stormwater discharges into TMDL and 303(d) listed waterbodies. The terminology associated with the TMDL is appropriately included in this transportation MS4 permit.

2. Schedule D(2): The term TMDL Implementation Plan is used again in this section. Since TMDL Implementation Plans apply only to nonpoint sources of water pollution, and this permit applies to point sources, a different name should be used for this required document to eliminate confusion. The following phrase is also present in this section: “...where ODOT is defined as a DMA.” Since DMA (designated management agency) is a phrase used in TMDLs for organizations who generate or are responsible for nonpoint sources of water pollution, DMA should not be used in this MS4 permit for point sources.

### **DEQ Response:**

As explained in the response to ACWA's question #1 in TMDL Point Source / Nonpoint Source category above, ODOT's TMDL implementation Plan will be used to address both WLAs and LAs associated with ODOT stormwater discharges into TMDL and 303(d) listed waterbodies. The terminology associated with the TMDL is appropriately included in the permit.

3. Schedule D(2)iii: This section states that "compliance with the permit's terms and conditions is presumed to be in compliance with applicable TMDL allocations issued before the effective date of the permit." The other Phase I MS4 permits in Oregon require an assessment of pollutant loads to determine whether TMDL WLAs are being met. If the TMDL WLAs are not being met, the permit requires the establishment of benchmarks to meet the TMDL WLAs. The TMDL WLA attainment analysis and establishment of benchmarks is a significant component of the Phase I MS4 permits. The ODOT MS4 permit specifies the TMDL WLAs but notes that compliance with the permit terms is deemed to meet the TMDL WLAs. The permit does not require a TMDL WLA attainment analysis or establishment of benchmarks where necessary to meet the TMDL WLAs. DEQ should provide an explanation as to why the ODOT Phase I NPDES permit takes a significantly different approach to implementing TMDL WLAs.

### **DEQ Response:**

As EPA has acknowledged<sup>5</sup>, transportation MS4s are different than municipal MS4s. As such, the ODOT MS4 permit is based on ODOT-specific information and activities. ODOT is currently revising their statewide TMDL Implementation Plan, which needs approval by DEQ. This is a different requirement than for other MS4 permittees and is intentional considering this is a transportation MS4 permit. DEQ will use information submitted under this permit to determine future permit requirements.

4. 303(d) listings: The other Phase I MS4 permits in Oregon require an evaluation of 303(d) listed pollutants to determine whether stormwater discharges have a reasonable likelihood to cause or contribute to the water quality degradation. The permit requires an evaluation of the effectiveness of existing management practices in reducing pollutants and if necessary, identification of additional management practices to reduce pollutants to the maximum extent practicable. The ODOT MS4 permit does not include an evaluation of 303(d) listed pollutants. Again, DEQ should provide an explanation as to why the ODOT Phase I NPDES permit takes a significantly different approach than other MS4 Phase I permits with 303(d) listed pollutants.

### **DEQ Response:**

See response to question above. As ODOT facilities and right of ways are located statewide, this is a statewide permit and ODOT discharges to the majority of waterways throughout the state. Future analyses may be required or conducted, but the first step as identified in this permit, is to ensure the monitoring data from ODOT facilities is compiled in a format that can analyzed for future permit decisions.

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<sup>5</sup> EPA Transportation Stormwater Permit Compendium. A compendium of excerpted permit language from municipal separate storm sewer system (MS4) permits and other resources that can be used and/or tailored for transportation-specific MS4 permits. August 2018.

## Comments from EPA:

1. Regarding Schedule D.2, this section states that a draft updated TMDL Implementation Plan must be submitted to ODEQ by June 1, 2023. The EPA has no knowledge of an existing TMDL Implementation Plan that ODOT is currently implementing, and we therefore recommend that a draft submittal date of June 1, 2021, is appropriate for an updated TMDL Implementation Plan from ODOT.

### DEQ Response:

ODOT has had and has implemented a TMDL Implementation plan. Changing the due date for the TMDL implementation plan required to be submitted in this permit is not an option given the Covid-19 pandemic and uncertainty of ODOT's budget. ODOT currently has significant budget shortfalls. The timeframe required in the permit will allow ODOT to develop a TMDL implementation plan that is appropriate and implementable as well as explore opportunities to partner with local and regional agencies where appropriate to maximize the resources used to improve water quality.

2. Regarding Schedule D.2, this section broadly describes requirements for ODOT MS4 discharges to impaired waterbodies across the state; however, this section fails to prioritize any specific watershed. The Permit Attachment 1 list of existing TMDLs where ODOT is a designated management agency (DMA) is extensive. The EPA notes that the overall effectiveness of ODOT's stormwater program cannot be properly evaluated without monitoring/reporting requirements, and comparisons to water quality objectives included in these TMDLs and the ODEQ's Integrated Report/303(d) list. We strongly recommend that ODEQ prioritize ODOT's monitoring and assessment activities over the next permit term, specifically to direct their work in the Lower Willamette River and Columbia Slough where Wasteload Allocations (WLAs) for urban stormwater have been identified.

To provide clear, measurable, and specific direction to ODOT, ODEQ should revise Schedule D.2 to distinguish ODOT's attention between summary reporting of ODOT's work to date in the Permit Attachment 1 watersheds, and ODOT's priority on-the-ground work to be conducted during this permit term in Willamette River and Columbia Slough where WLAs for urban stormwater assign ODOT the commensurate DMA responsibilities.

### DEQ Response:

As noted above, the priority regarding monitoring for this permit term is for ODOT to compile all of the existing monitoring data from ODOT facilities in a format that DEQ can use for future permit decisions. DEQ needs the data to prioritize specific watershed work which could include monitoring. DEQ will prioritize future work after the TMDL Implementation plan is reviewed and approved.

## Definitions

### Comments from ACWA:

1. Best Management Practices (BMPs) - This definition includes some terminology that is related to wastewater and not stormwater. Please reword this definition to remove wastewater terminology and maintain a focus on stormwater.

### DEQ Response:

This is the definition taken directly from 40CFR122.2. While not all of the definition may be applicable to ODOT, it is the accepted legal definition of best management practices (BMPs).

2. Discharge of a pollutant – It is unclear why this definition includes a reference to the addition of pollutants to the waters of the “contiguous zone.” Please define the “contiguous zone.” Later in this definition, it refers to the addition of pollutants into waters of the state. It is confusing and unclear to have both references. In addition, we do not understand why the definition of discharges includes discharges “leading into privately owned treatment works.” Is this intended to refer to “privately owned stormwater treatment or flow management facilities”?

**DEQ Response:**

This is the definition taken directly from 40CFR122.2. While not all of the definition may be applicable to ODOT, it is the accepted legal definition of discharge of a pollutant.

3. Green Infrastructure – Please add the term “filtration” such that this definition reads: “systems designed to mimic nature by reducing and/or storing stormwater through infiltration, filtration, evapotranspiration, and transpiration.” As an example, MS4s implement and allow the implementation of lined rain gardens or planters; these are effective measures in reducing pollutant loading to surface water.

**DEQ Response:**

DEQ’s definition for green infrastructure takes key components of the EPA’s definition for green infrastructure found in the 2007 Memo<sup>6</sup> “Using Green Infrastructure to Protect Water Quality in Stormwater, CSO, Nonpoint Source and other Water Programs” which states: “Green infrastructure approaches essentially infiltrate, evapotranspire or reuse stormwater, with significant utilization of soils and vegetation rather than traditional hardscape collection, conveyance and storage structures.” While filtration certainly is a component of infiltration, it is a secondary benefit of the green infrastructure. DEQ retained the draft permit language.

4. Illicit Discharge – This definition is inaccurate as written. A suggested re-wording could be: “Illicit Discharge is any discharge to a municipal separate storm sewer system that is not: (1) composed entirely of stormwater except discharges authorized under Section A.4.a.xii; (2) permitted by a NPDES permit or other state or federal permit; or (3) otherwise authorized by DEQ.

**DEQ Response:**

DEQ corrected the location of the word “not” so the definition now matches ACWA’s provided definition for Illicit Discharge.

5. Impervious Surface – As described in this definition, it includes development activities that result in more runoff than in the undeveloped conditions. Lawns could result in more runoff than a forested condition but should not be classified as impervious. This should be corrected.

**DEQ Response:**

This is the definition DEQ used in the MS4 Phase II general permit. DEQ clarifies what it considers to be impervious surfaces further on in the definition: “Common impervious surfaces include building roofs, traditional concrete or asphalt paving on walkways, driveways, parking lots, gravel lots and roads, and packed earthen materials.”

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<sup>6</sup> EPA Using Green Infrastructure to Protect Water Quality in Stormwater, CSO, Nonpoint Source and other Water Programs, March 5, 2007.

6. Low Impact Development (LID) – As with the definition for Green Infrastructure, please include the term “filtration” such that it reads: “...stormwater management practices that promote the use of natural systems for infiltration, filtration, evapotranspiration, and reuse of rainwater...”

**DEQ Response:**

As stated above in the green infrastructure definition, while filtration certainly is a component of infiltration, it is a secondary benefit of the low impact development. DEQ retained the definition for low impact development as originally drafted.

7. Municipality – Terminology that is related to wastewater and not stormwater such as “disposal of sewage, industrial wastes or other wastes...” should be removed.

**DEQ Response:**

This is the definition taken directly from 40 CFR 122.2. While not all of the definition may be applicable to ODOT, it is the accepted legal definition of municipality.

8. National Pollutant Discharge Elimination System (NPDES) – Language related to enforcing pretreatment requirements as that applies to wastewater and not stormwater should be removed.

**DEQ Response:**

This is the definition taken directly from 40 CFR 122.2. While not all of the definition may be applicable to ODOT, it is the accepted legal definition of National Pollutant Discharge Elimination System (NPDES).

9. Non-engineered Best Management Practices or BMPs – The term “filtration” should be added, such that it reads “...by minimizing impervious surfaces and by using soil infiltration, filtration, evaporation, and transpiration.”

**DEQ Response:**

As listed above in both the green infrastructure and low impact development definitions, while filtration certainly is a component of infiltration, it is a secondary benefit of the BMP. DEQ retained the definition for Non-Engineered Best Management Practices or BMPs as originally drafted.

10. Point source – Terms not associated with municipal stormwater point source discharges such as confined animal feeding operation, vessel or other floating craft, or leachate collection system should be removed.

**DEQ Response:**

This is the definition based on 40 CFR 122.2. While not all of the definition may be applicable to ODOT, it is the accepted legal definition of point source.

## Attachment 1

**Comment from ACWA:**

1. Only TMDLs with Waste Load Allocations should be included in this table. Load Allocations apply to nonpoint sources. This permit only covers point sources.

**DEQ Response:**

See response to ACWA question #1 in TMDL Point Source / Nonpoint Source category above.

## Coordination with other agencies

### Comment from NEDC et al.:

1. Next, we urge DEQ to establish requirements in the final permit for coordination with local municipalities. DEQ should require ODOT to establish a Municipal Coordination Plan, in line with established MEP technologies from other agencies, similar to the one developed by the California Department of Transportation (“CDOT”). The plan should include specific steps ODOT can take to establish communication, coordination, cooperation, and collaboration with other MS4 stormwater management agencies. Each annual report should include a report on the status and progress of interagency coordinations. This will ensure the effectiveness of interagency Stormwater Management Plans. This provision is all the more important in light of several large population municipalities that are currently suing the DEQ, trying to avoid responsibility for their own MS4 permits. For DEQ to not consider these lawsuits, and to not require ODOT to adhere to a municipal coordination plan, means DEQ is essentially washing its hands of its own duties to enforce MS4 requirements across the State.

### DEQ Response:

ODOT is responsible for compliance with the permit to ensure discharges of pollutants from its MS4 are reduced to the MEP, protect water quality and satisfy the appropriate water quality requirements of the Clean Water Act. Schedule A.2.a of the permit states that: “ODOT is responsible for permit compliance related to ODOT’s permit coverage area, or where this permit requires ODOT to take an action.” Furthermore, “ODOT may elect to work with or delegate implementation of one or more SMP control measures to another regulated MS4 or entity.” ODOT has established methods in place for coordinating and communicating with local jurisdictions. ODOT remains responsible for compliance with any permit conditions that another permittee or entity fails to implement. Since the permit is clear that ODOT is responsible for the permit conditions in its permit, how ODOT coordinates and works with other agencies does not need to be directed by DEQ. DEQ retains the ultimate authority to enforce this permit whenever permit conditions are violated.

## Fiscal and Budget Analysis

### Comment from NEDC et al.:

1. DEQ should also consider adopting a more stringent fiscal and budget analysis in the final permit. The fiscal analysis should include the allocation of funds toward compliance with the permit, the funding of each program element, and a comparison of actual past year expenditures with current year expenditures and next year’s proposed expenditures. CDOT’s 2016 MS4 permit requires even more specific information on how funding has or will meet the goals specified in the Stormwater Management Plan. We encourage DEQ to adopt more specific and detailed fiscal reporting requirements in alignment with CDOT and other established MS4 permit programs. These requirements can ensure that the Stormwater Management Plan is appropriately reducing stormwater pollution.

### DEQ Response:

As noted on page 10 of the PER, The permit does not specify staffing or funding levels, thus providing flexibility and incentive for ODOT to adopt the most efficient methods to comply with the permit

requirements. DEQ encourages ODOT to establish stable funding sources to support ongoing stormwater program implementation, and enter into cooperative working relationships with other MS4s.

In addition, DEQ anticipates that the information required to be submitted during this permit term will result in future permit decisions regarding priority of work. Future permit requirements may result in additional funding needs. If that is the case, DEQ will ensure both agencies are clear and coordinated in articulating water quality actions that need legislative approval. Once again, DEQ retains the ultimate authority to enforce this permit whenever permit conditions are violated.

## Agriculture

### Comment from NEDC et al.:

1. In addition, the draft permit does not include any requirements that ODOT provide support to agricultural dischargers. The final permit should require reasonable support to the monitoring activities of agricultural dischargers whose runoff enters ODOT's MS4. Reasonable support includes facilitating monitoring activities, providing necessary access to monitoring sites, and cooperating with monitoring efforts as necessary to reduce stormwater pollution.

### DEQ Response:

DEQ will share the recommendation with ODOT and the Oregon Department of Agriculture (ODA), which is the primary agency responsible for water quality regulation for agricultural nonpoint source dischargers.

Furthermore, exceptions to the NPDES permit regulations in 40CFR122.3 include:

*Any introduction of pollutants from nonpoint source agricultural and silvicultural activities, including stormwater runoff from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from concentrated animal feeding operations as defined in § 122.23, discharges from concentrated aquatic animal production facilities as defined in § 122.24, discharges to aquaculture projects as defined in § 122.25, and discharges from silvicultural point sources as defined in § 122.27.*

Therefore, agricultural discharges are nonpoint source discharges and are not subject to NPDES regulation. In addition, ODOT does not have authority to spend highway gas tax dollars supporting adjacent property owner's compliance.

## Climate Change

### Comment from NEDC et al.:

1. A significant, yet overlooked, element of stormwater pollution—which is erroneously not mentioned from the draft permit—is the impact of climate change on implementation of the MS4 permit and compliance with water quality standards. It is well established that climate change can increase stormwater runoff, which exacerbates pollution. Recently, Oregon Governor Kate Brown issued an executive order declaring climate change to have significant detrimental effects on public health, Oregon's economic vitality, natural resources, and environment. The executive order provides specific mandates for Oregon agencies, including ODOT, to reduce greenhouse gas emissions. ODOT is required to comply with this most recent executive order, and the final permit must reflect the seriousness of climate change on stormwater pollutants and impaired waters in

Oregon. For example, DEQ can require public outreach and education on climate change's impact on clean water.

### **DEQ Response:**

DEQ's mission is to protect and enhance Oregon's environment. Governor Brown's Executive Order 20-04, issued on March 10, 2020, requires the Environmental Quality Commission and DEQ to begin developing rules and policies that will require declines in greenhouse gas emissions. DEQ's implementation of this plan is set for 2022. While this permit will be issued before DEQ's implementation of the Order, Executive Order 20-04 details general directives in paragraph 3, as well as specific directives in paragraphs 9 and 10, that require ODOT to conduct activities related to climate change and greenhouse gas reduction. DEQ recognizes that climate change is critical to the State of Oregon and that stormwater management plays an important role protecting our state resources. As Governor Brown's Executive Order is implemented in the coming years, stormwater permitting will adapt as necessary to conform to the Order.

## **Typos**

### **Comment from Tualatin Riverkeepers:**

1. Finally, TRK noted some typos in Schedule A.1.b. The permit states "[i]f ODOT or DEQ determines that a pollutant is ODOT's MS4 discharge is causing or contributing to an excursion of applicable water quality standards . . ." This section most likely means exceedance instead of excursion. The section goes on to use the word excursion incorrectly in b.i, b.ii, b.iii, b.iii(A) and b.iii(B).

### **DEQ Response:**

DEQ initially used the excursion language in the MS4 Phase II general permit which became on effective March 2019. The language is based on 40 CFR 122.44(d)(1)(i). which states "Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality." While the citation is applicable to stormwater discharges in the State of Oregon, the term exceedance has been historically used in NPDES permits and is referenced in OAR 340-041. DEQ has changed the term excursion to exceedance to reflect the term that is referenced in OAR 340-041.