BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TUALATIN RIVERKEEPERS, ELIZABETH CALLISON and CYNTHIA C. EARDLEY,
Petitioners,

vs.

OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY,
Respondent,

and

CLEAN WATER SERVICES, OREGON ASSOCIATION OF CLEAN WATER AGENCIES and WASHINGTON COUNTY,
Intervenors-Respondent.

LUBA No. 2004-050

JAMES J. NICITA,
Petitioner,

and

WILLAMETTE RIVERKEEPERS,
Intervenor-Petitioner,

vs.

OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY,
Respondent,

and

CLEAN WATER SERVICES, OREGON ASSOCIATION OF CLEAN WATER AGENCIES, CITY OF GRESHAM, MULTNOMAH COUNTY and CITY OF FAIRVIEW,
Intervenors-Respondent.

LUBA No. 2004-051

BARBARA KEMPER
and ELIZABETH CALLISON,
Petitioners,

vs.

OREGON DEPARTMENT OF
ENVIRONMENTAL QUALITY,
Respondent,

and

CLEAN WATER SERVICES, OREGON
ASSOCIATION OF CLEAN WATER AGENCIES,
CLACKAMAS COUNTY SERVICE DISTRICT NO. 1,
OAK LODGE SANITARY DISTRICT, SURFACE WATER
MANAGEMENT AGENCY OF CLACKAMAS COUNTY,
CITY OF LAKE OSWEGO, CITY OF WILSONVILLE,
CITY OF MILWAUKIE, CLACKAMAS COUNTY,
CITY OF GLADSTONE, CITY OF HAPPY VALLEY,
CITY OF OREGON CITY,
Intervenors-Respondent.

LUBA No. 2004-054

ELIZABETH CALLISON,
Petitioner,

and

WILLAMETTE RIVERKEEPERS,
Intervenor-Petitioner,

vs.

OREGON DEPARTMENT OF
ENVIRONMENTAL QUALITY,
Respondent,

and

CLEAN WATER SERVICES, OREGON
ASSOCIATION OF CLEAN WATER AGENCIES,
MULTNOMAH COUNTY, CITY OF PORTLAND
and PORT OF PORTLAND,
Intervenors-Respondent.

LUBA No. 2004-057

FINAL OPINION
AND ORDER

Appeal from Oregon Department of Environmental Quality.

James J. Nicita, Oregon City, represented petitioners and intervenor-petitioner.

Larry Knudsen, Assistant Attorney General and Lynne Perry, Assistant Attorney General, Portland, represented respondent.

Roger A. Alfred, Portland, represented Oregon Association of Clean Water Agencies. Peter Livingston, Portland, represented Clean Water Services. Christopher A. Gilmore, County Counsel, Hillsboro, represented Washington County. G. Frank Hammond, Portland, represented Clackamas County Service District No. 1, Oak Lodge Sanitary District and Surface Water Management Agency of Clackamas County. Evan P. Boone, Assistant City Attorney, Lake Oswego, represented City of Lake Oswego. David R. Ris, Senior Assistant City Attorney, Gresham, represented City of Gresham. Sandra N. Duffy, Assistant County Counsel, Portland, represented Multnomah County. David F. Doughman, Portland, represented City of Fairview, City of Gladstone and City of Happy Valley. Paul A. Lee, Assistant City Attorney, represented City of Wilsonville. Timothy V. Ramis, Portland, represented City of Milwaukie. Michael E. Judd, Assistant County Counsel, represented Clackamas County. William K. Kabeiseman, Portland, represented City of Oregon City. Kathryn A. Beaumont, Senior Deputy City Attorney, Portland, represented City of Portland. Steven W. Abel, Portland, represented Port of Portland.

BASSHAM, Board Member; HOLSTUN, Board Chair; RYAN, Board Member, participated in the decision.

DISMISSED 01/15/2008

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal four decisions by the Department of Environmental Quality (DEQ) to renew four National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer (MS4) permits (hereafter, MS4 permits) that allow a number of cities, counties and special districts to discharge storm water into waters in and around the City of Portland.

MOTION TO FILE REPLY BRIEF

Petitioners request permission to file a reply brief to address several alleged "new matters" raised in the response briefs. In addition, petitioners request permission to file an eight-page reply brief that exceeds the five-page limit imposed under OAR 661-010-0039.[1]

DEQ opposes the reply brief, arguing that it is not confined to "new matters" raised in the response briefs. According to DEQ, the reply brief instead embellishes or adds to arguments in the petition for review.

Petitioners respond that the reply brief responds to arguments in the response brief that (1) challenge LUBA's jurisdiction over the challenged decisions, (2) contend that some of petitioners' assignments of error are impermissible collateral attacks on decisions not challenged, (3) contend that some of petitioners' assignments of error are barred by issue preclusion.

We agree with petitioners that a reply brief is warranted to respond to such arguments when presented in the response briefs. *Boom v. Columbia County*, 31 Or LUBA 318, 319

[1] OAR 661-010-0039 provides, in relevant part:

> "A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies as soon as possible after respondent's brief is filed. A reply brief shall be confined solely to new matters raised in the respondent's brief. A reply brief shall not exceed five pages, exclusive of appendices, unless permission for a longer reply brief is given by the Board. * * *"

(1996) (jurisdictional challenge); *Broken Top Community Association v. Deschutes County*, 54 Or LUBA 84 (2007) (collateral attack). In our view, an argument that an assignment of error should be denied on the basis of issue preclusion is also a "new matter" that warrants a reply brief to respond to that argument. While some of the argument in the reply brief could fairly be described as an embellishment of arguments made in the petition for review, we believe that the majority of the reply brief appropriately responds to "new matters" raised in the response briefs. DEQ does not specifically oppose the request for an over-length reply brief. Accordingly, the eight-page reply brief is allowed.

MOTION TO TAKE OFFICIAL NOTICE

DEQ requests that the Board take official notice of three documents attached to the respondents' brief: (1) a general judgment in Multnomah County Circuit Court Case No. 0601-00752, (2) an order on summary judgment in that case, and (3) an excerpt of a pleading filed in that case. DEQ explains that the circuit court action involved a challenge filed by some of the petitioners in this appeal against the same MS4 permits at issue in this appeal.

There is no opposition to the request to take official notice, and it is granted.

JURISDICTION

DEQ and intervenors-respondent (intervenors) argue that the challenged permit renewals are not "land use decisions" and for that reason are not subject to LUBA's jurisdiction.[2]

As relevant here, LUBA's jurisdiction is limited to "land use decisions." ORS 197.015(11)(a)(B) defines "land use decision" to include "[a] final decision or determination of a state agency * * * with respect to which the agency is required to apply" the statewide planning goals. ORS 197.180(1) requires that state agencies take actions with

[2] The respondents' jurisdictional challenges were not raised until the filing of their response briefs. On receipt of the response briefs, LUBA suspended the next event in our review proceeding, oral argument, to allow the Board to resolve the respondents' motions to dismiss.

respect to programs affecting land use "[i]n compliance with" the statewide planning goals and "[i]n a manner compatible with" acknowledged comprehensive plans. Many state agencies, including DEQ, have adopted a state agency coordination (SAC) program that governs the process and standards by which the state agency complies with ORS 197.180(1).

OAR chapter 660, division 030 is a Land Conservation and Development Commission (LCDC) rule that governs "Review and Approval of State Agency Coordination Programs." OAR chapter 660, division 031 is an LCDC rule clarifying state agency responsibilities to apply the statewide planning goals and local government comprehensive plans during state permit reviews. DEQ has adopted a SAC program, at OAR chapter 340, division 018. LCDC has certified that program.

An NPDES permit issued by DEQ is listed as a "Class B" permit. OAR 660-031-0012(2)(b)(B).[3] Under OAR 660-031-0026(2), the state agency coordination program review process for a Class B permit must assure that the agency either (1) determines that the proposed activity is in compliance with statewide planning goals and compatible with the applicable acknowledged comprehensive plan, or (2) informs the applicant that the state permit decision does not constitute a finding of compliance with the goals, and require the applicant to obtain land use approval from the affected local government that includes a determination of compliance with the goals or compatibility with the acknowledged comprehensive plan.[4]

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[3] Petitioners argue that an NPDES permit issued to approve an MS4 system is in fact a "Class A" permit, requiring a hearing and subject to somewhat different standards and findings obligations than Class B permits. DEQ and intervenors-respondent dispute that position, but also argue that it makes no difference in these appeals whether an NPDES/MS4 permit is a Class A or B permit. We agree with respondents that, as far as we can tell, whether an NPDES/MS4 permit is a Class A or B permit has no bearing on the question of whether LUBA has jurisdiction over the permits challenged in these appeals. As explained below, that is because the challenged decisions *renew* existing permits, and the process and standards for renewing existing permits under the applicable administrative rules do not distinguish between Class A and B permits.

[4] OAR 660-031-0026(2) provides:

> "Class B Permits: In accordance with OAR 660-031-0020 and 660-031-0035(2), the review process shall assure either:

OAR 660-031-0035(2) provides that, with respect to a Class B permit, the state agency may rely on the affected local government's determination of consistency with the goals and comprehensive plan when the local government makes written findings demonstrating compliance with the goals or compliance with the acknowledged comprehensive plan, in accordance with OAR 660-031-0026(2)(b)(B).

Significantly, OAR 660-031-0040 provides that:

> "A determination of compliance with the Statewide Planning Goals or compatibility with Acknowledged Comprehensive Plan is not required if the proposed permit is a *renewal* of an existing permit *except when the proposed permit would allow a substantial modification or intensification of the permitted activity*. Substantial modifications or intensification shall be defined in an agencies' State Agency Coordination Agreement under ORS 197.180." (Emphasis added.)

As noted, DEQ's acknowledged SAC program is set out at OAR chapter 340, division 018. OAR 340-018-0040(1) and (2) provide generally that DEQ shall achieve goal compliance for department land use actions, including issuance of NPDES permits, by assuring that such actions are compatible with applicable acknowledged comprehensive

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> "(a) That prior to permit issuance, the agency determines that the proposed activity and use are in compliance with Statewide Planning Goals and compatible with the applicable Acknowledged Comprehensive Plan; or
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> "(b) That the applicant is informed that:
>
> "(A) Issuance of the permit is not a finding of compliance with the Statewide Planning Goals and compatibility with the Acknowledged Comprehensive Plan, and
>
> "(B) The applicant must receive a land use approval from the affected local government. The affected local government must include a determination of compliance with the Statewide Planning Goals or compatibility with the Acknowledged Comprehensive Plan which must be supported by written findings as required in ORS 215.416(6) or 227.173(2). Findings for an activity or use addressed by the acknowledged comprehensive plan in accordance with OAR 660-031-0020, may simply reference the specific plan policies, criteria, or standards which were relied upon in rendering the decision and state why the decision is justified based on the plan policies, criteria or standards."

plans.[5] OAR 660-018-0050(2) provides that compatibility with an acknowledged comprehensive plan may be determined in one of several ways, including submission of a land use compatibility statement (LUCS) to DEQ, in which the affected local government determines whether or not the activity is consistent with the acknowledged comprehensive plan.[6]

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[5] OAR 340-018-0040 provides:

> "(1) The Department shall to the extent required by law, achieve goal compliance for land use programs and actions identified in OAR 340-018-0030 by assuring compatibility with acknowledged comprehensive plans, except as provided in section (3) of this rule.
>
> "(2) The Department shall consider a land use action to be in compliance with the goals when the action is determined compatible with the comprehensive plan.
>
> "(3) The Department shall assure statewide goal compliance when necessary through the adoption of findings pursuant to OAR 660-030-0065(3) through the following process:
>
> "(a) The identification of applicable goals;
>
> "(b) Request for advice from DLCD or the Attorney General's office when necessary;
>
> "(c) Consultation with the affected local government; and
>
> "(d) The adoption of necessary findings."

[6] OAR 340-018-0050(2) provides, in relevant part:

> "The Department shall rely on the compatibility procedures described in * * * the SAC Program document to assure compatibility with an acknowledged comprehensive plan, which include but may not be limited to the procedures described below:
>
> "(a) An applicant's submittal of a LUCS which provides the affected local government's determination of compatibility:
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> "(A) A LUCS shall be submitted with a Department application or required submittal information;
>
> "(B) The Department shall rely on an affirmative LUCS as a determination of compatibility with the acknowledged comprehensive plan unless otherwise obligated by statute;
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> "(C) If the Department concludes a local government LUCS review and determination may not be legally sufficient, the Department may deny the

OAR 340-018-0050(2)(b) implements OAR 660-031-0040 in providing that a LUCS is required for the *renewal* or *modification* of a permit if DEQ "determines the permit involves a substantial modification or intensification of the permitted activity."[7] OAR 340-018-0050(2)(b)(A) provides that "renewal permits" require a LUCS if the permit renewal involves a "modification" that would require a LUCS. OAR 340-018-0050(2)(b)(B) sets out three relevant circumstances in which "[m]odification permits" require a LUCS: where the activity (1) relates to use of additional property or a physical expansion on the existing property, (2) involves a significant increase in discharge to state waters or into the ground, or (3) involves the relocation of an outfall outside of the source property.

In the present case, DEQ issued renewals of the four MS4 permits in 2004. Following petitioners' appeal of those permits to LUBA, DEQ withdrew the permits for reconsideration pursuant to OAR 661-010-0021, and conducted a lengthy public input process. During that process, DEQ requested and obtained LUCSs from each of the affected

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> permit application and provide notice to the applicant. In the alternative, when the applicant and local government express a willingness to reconsider the land use determination, the Department may hold the permit application in abeyance until the reconsideration is made[.]"

[7] OAR 340-018-0050(2)(b) provides, in relevant part:

> "An applicant's submittal of a LUCS is required for the renewal or modification of the permits identified in OAR 340-018-0030 if the Department determines the permit involves a substantial modification or intensification of the permitted activity:
>
> "(A) Renewal permits require a LUCS if a permit renewal involves a modification that requires a LUCS under paragraph (B) of this subsection;
>
> "(B) Modification permits require a LUCS if:
>
> "(i) The permitted source or activity relates to the use of additional property or a physical expansion on the existing property. The LUCS applies to physical changes on the property not to existing permit conditions;
>
> "(ii) The permitted source or activity involves a significant increase in discharge to state waters or into the ground;
>
> "(iii) The permitted source or activity involves the relocation of an outfall outside of the source property[.]"

local governments, certifying that the activity authorized by the renewed permit is consistent with the local acknowledged comprehensive plan. Ultimately, DEQ again renewed the MS4 permits, adopting findings with respect to each permit that the activity authorized by the renewed permits does not involve a "substantial modification or intensification of the permitted activity." Specifically, DEQ found that the authorized activity does not (1) relate to use of additional property or a physical expansion on the existing property, (2) involve a significant increase in discharge to state waters or into the ground, or (3) involve the relocation of an outfall outside of the source property. Accordingly, DEQ concluded that it was not required to consider a LUCS, or make any determination whether the renewed permit complies with the goals or is compatible with applicable comprehensive plans.[8]

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[8] We quote the following representative findings from the decision appealed in LUBA No. 2004-051, which appeals the City of Gresham MS4 permit:

> "The NPDES permit program has been designated as a program affecting land use for purposes of ORS 197.180; OAR 340-018-0030(5); OAR 660-031-0012(2)(b)(D). Accordingly, [DEQ] will not issue a new NPDES permit unless it has received a land use compatibility statement (LUCS), or otherwise made a determination that the permit compiles with the statewide land use goals and is consistent with local comprehensive plans and land use regulations.
>
> "The permit at issue is a renewal permit, however, and DEQ generally is not required to obtain LUCS or make an independent land use determination for renewal permits. OAR 340-018-0050(2)(b); OAR 660-030-0090; and OAR 660-031-0040.
>
> "The renewal permit exception to the LUCS requirement does not apply if the renewal permit involves a substantial modification or intensification of the permitted activity. *Id.* Under the applicable rules, a substantial modification or intensification of the activity exists when:
>
> "(i) The permitted source or activity relates to the use of additional property or a physical expansion on the existing property;
>
> "(ii) The permitted source or activity involves a significant increase in discharge to state waters or into the ground; or
>
> "(iii) The permitted source or activity involves the relocation of an outfall outside of the source property.
>
> "The co-permittees have documented and the Department finds that the permitted activities under the prior and the renewal permits are virtually identical. Both the prior and renewal permits are issued on a system-wide basis, require measures that effectively prohibit non-

In the alternative, DEQ found that if consideration of a LUCS is required, it has considered the relevant LUCSs, which adequately demonstrate that the affected local governments "have acknowledged comprehensive plan provisions and land use regulations that are applicable to the renewal permit and that the renewal permit is consistent with those provisions and regulations." Record 157 (LUBA No. 2004-051).[9]

Under the third assignment of error, and to a lesser extent elsewhere in the petition for review, petitioners advance several bases to challenge DEQ's conclusion that the challenged renewal permits are exempt from the requirement to determine goal compliance and compatibility with local comprehensive plans under OAR 660-031-0040 and OAR 340-018-0050(2)(b). Petitioners also challenge DEQ's alternative conclusion that, if DEQ was required to determine goal compliance and compatibility with local comprehensive plans, DEQ may rely on the LUCS submitted by each of the affected local governments. Because we affirm DEQ's primary conclusion that the exemption in OAR 660-031-0040 and

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> stormwater discharges and require controls to the maximum extent practicable. Both permits include adaptive management measures designed to improve the management practices and thus reduce waste discharges. As part of the anti-degradation review, the Department determined that the renewal permit will not allow a significant increase in discharges. And, since the prior permit covered all existing and future discharges from the system, the renewal permit does not allow the use of additional property, a physical expansion, or a relocation of an outfall as those terms are used in the rule.
>
> "The rules addressing permit renewals are necessarily general in nature, however, and the application to the present situation has been questioned in some comments submitted on the draft renewal permit. Accordingly, DEQ requested and received LUCSs from the local governments with land use jurisdiction in the areas covered by the renewal permit. Should [LUBA] or a reviewing court determined that a land use determination is required for the renewal permit, the incorporated LUCSs demonstrate that the jurisdictions have acknowledged comprehensive plan provisions and land use regulations that are applicable to the renewal permit and that the renewal permit is consistent with those provisions and regulations." Record 156-57 (LUBA No. 2004-051 (Gresham MS4)).

[9] Petitioners did not appeal those LUCSs to LUBA, notwithstanding that they almost certainly are "land use decisions" that are subject to appeal to LUBA. Respondents argue that petitioners' failure to appeal the LUCSs to LUBA means that those decisions are not subject to collateral attack in the present appeals. Our disposition of the motions to dismiss makes it unnecessary to consider the consequences of petitioners' choice not to appeal the LUCSs that DEQ relied upon, in the alternative, to conclude that the renewed permits comply with OAR 340-018-0050(2)(b).

OAR 340-018-0050(2)(b) applies to the disputed MS4 permits, we do not address petitioners' challenges to the alternative conclusion based on review of the LUCSs.

A. Application of OAR 340-018-0050(2)(b)

Petitioners first argue that the OAR 340-018-0050(2)(b) exemption for renewed permits applies only in circumstances where a LUCS may be used to determine goal compliance and compatibility with comprehensive plans. According to petitioners, in the present circumstance DEQ is required to make direct goal compliance findings or require that the local government make direct goal compliance findings, and therefore OAR 340-018-0050(2)(b) has no application.

However, petitioners have not demonstrated, at least in any way we understand, that the present circumstances are ones that require DEQ to make direct goal compliance findings or require the local government to make such findings. Petitioners cross-reference arguments under the third sub-assignment of the second assignment of error, in which petitioners cite a number of general rule provisions that govern the initial issuance of permits. However, under the state agency coordination rules *renewed* permits are treated differently than initial permits. OAR 660-031-0040 plainly states that when renewing an existing permit a determination of compliance with the statewide planning goals is *not* required, except when the proposed permit would allow a substantial modification or intensification of the permitted activity. DEQ implemented that rule in OAR 340-018-0050(2)(b).

Petitioners appear to suggest that DEQ failed to completely implement OAR 660-031-0040. We understand petitioners to argue that although OAR 340-018-0050(2)(b) eliminates the option of requiring a LUCS when renewing permits that do not substantially modify or intensify the permitted activity, OAR 340-018-0050(2)(b) does not relieve DEQ of the independent obligation of determining whether such renewal permits comply with the goals. If we correctly understand petitioners' argument, we reject it. Under DEQ's

acknowledged SAC rule, requiring a LUCS is the primary vehicle DEQ has chosen to ensure that permits are consistent with the statewide planning goals. OAR 340-18-0040(1) and (2). Read in context, it is reasonably clear that DEQ did not intend OAR 340-018-0050(2)(b) to eliminate only the obligation of determining compatibility with local comprehensive plans, when renewing permits that do not substantially modify or intensify the permitted activity. DEQ intended, consistent with OAR 660-031-0040 and related rules, also to eliminate the related obligation of determining whether the renewed permit complies with applicable goals.

In sum, read in the context of DEQ's rules and LCDC's state agency coordination rules, it is clear that OAR 340-018-0050(2)(b) applies and governs the challenged renewed permits. If DEQ correctly concluded, based on substantial evidence, that the renewed permits do not substantially modify or intensify the permitted activity, as defined in DEQ's rules, then under OAR chapter 340, division 018 and other applicable rules and statutes the renewal permits were *not* decisions "with respect to which the agency is required to apply the goals." ORS 197.015(11)(a)(B). In that event, it follows that the DEQ renewal decisions are not land use decisions subject to LUBA's jurisdiction. Accordingly, we turn to petitioners' challenges to DEQ's findings under OAR 340-018-0050(2)(b).

B. Substantial Modification or Intensification of the Permitted Activity

Petitioners argue that DEQ's finding that the renewed permits do not substantially modify or intensify the permitted activity is not supported by substantial evidence.

As noted above, under OAR 340-018-0050(2)(b)(B), a renewal permit requires a LUCS only if the activity (1) relates to use of additional property or a physical expansion on the existing property, (2) involves a significant increase in discharge to state waters or into the ground, or (3) involves the relocation of an outfall outside of the source property.

DEQ found that the activities allowed under the existing and renewed permits were "virtually identical," and the renewed permit will not cause a significant increase in discharges to state waters:

> "* * * Both the prior and renewal permits are issued on a system-wide basis, require measures that effectively prohibit non-stormwater discharges and require controls to the maximum extent practicable. Both permits include adaptive management measures designed to improve the management practices and thus reduce waste discharges. As part of the anti-degradation review, the Department determined that the renewal permit will not allow a significant increase in discharges. * * *" Record 157 (LUBA No. 2004-051).

Petitioners dispute the last sentence of the above finding, arguing that the DEQ antidegradation policy at OAR 340-041-0004(2) provides it is the state's policy that "growth and development be accommodated by increased efficiency and effectiveness of waste treatment and control such that *measurable* future discharged waste loads from existing sources do not exceed presently allowed discharged loads * * *" (emphasis added). According to petitioners, DEQ's antidegradation analysis provides no "quantifiable measurements" of future discharge waste loads. Petition for Review 59.

DEQ responds that the record supports its finding that improvements in management practices since the original permits were issued have reduced the level of discharges allowed under the original permits, and therefore the renewed permits, which incorporate those improved practices, will not cause a significant increase in discharges. Record 34, 49, 152-88 (LUBA No. 2004-051). We agree. We note, first, OAR 340-041-0004(2) does not require that DEQ provide "quantifiable measurements" of all future discharged waste loads, as petitioners suggest; the policy simply states that *measurable* future discharged waste loads from existing sources not exceed presently allowed discharged loads. Second, DEQ relied on an engineer's report that assessed the change in discharge loads associated with MS4 discharges since the original permits were issued, which directly supports its conclusion that the renewed permits will not significantly increase discharges. Record 167-88 (LUBA No. 2004-051). Petitioners have cited no countervailing evidence.

Next, petitioners argue that there is no evidence regarding whether additional property will be used, existing sites physically expanded, or outfalls relocated under the renewed permits. DEQ found, in relevant part, that because "the prior permit covered all existing and future discharges from the system, the renewal permit does not allow the use of additional property, a physical expansion, or a relocation of an outfall as those terms are used in the rule." Record 157. Petitioners do not challenge that finding, or explain why it is erroneous. DEQ argues, and we generally agree, that for purposes of OAR 340-018-0050(2)(b), it is not required to re-evaluate activities allowed under the *existing* permit; as relevant here it is only required to determine whether the renewed permit involves a substantial modification or intensification of the permitted activity, as defined in DEQ's rule. Petitioners cite nothing in the challenged decisions that purports to authorize the use of additional property, or a physical expansion of existing property, or a relocated outfall, beyond that authorized in the existing permits.

C. Failure to Evaluate Goal or Plan Compliance in Issuing the 1995 Permits

Petitioners next contend that the record does not demonstrate that DEQ in fact determined whether the initial 1995 permits comply with the goals, or required affected local governments to submit LUCS with respect to those initial permits demonstrating compatibility with local comprehensive plans. Petitioners argue that OAR 340-018-0050(2)(b) presumes that the original permits were issued after a determination of compliance with the goals and compatibility with applicable comprehensive plans. If that determination did not take place, petitioners argue, then OAR 340-018-0050(2)(b) does not apply, and therefore DEQ must determine whether the renewed permit complies with the goals and applicable comprehensive plans. Any other result would violate ORS 197.180, petitioners argue, because there would never be a determination of goal or plan compliance.

DEQ does not assert that in approving the challenged permits in 1995 it made determinations regarding goal compliance, or required affected local governments to submit

a LUCS addressing consistency with either the goals or applicable comprehensive plans. However, DEQ argues that any failure in that regard is legally irrelevant. According to DEQ, it began issuing NPDES permits in 1974. LCDC was presumably aware when it adopted OAR 660-031-0040 in 1984 and when it certified DEQ's coordination program in 1990 that many existing permits had never been reviewed under any state agency coordination program, or for compliance with the goals. Nonetheless, DEQ argues, LCDC included no provisions requiring that in renewing such permits state agencies must make goal or plan compliance determinations, other than in the circumstance described in OAR 660-031-0040, where the proposed permit would allow a substantial modification or intensification of the permitted activity. DEQ contends that it would be inappropriate to infer into the rule an "exception to the exception" that would make OAR 660-031-0040 and OAR 340-018-0050(2)(b) inapplicable where there is an allegation that the existing permit was issued without goal and plan compliance determinations.

We agree with DEQ. OAR 660-031-0040 and OAR 340-018-0050(2)(b) provide only one exception to the exemption to the requirement to make goal and plan compliance determinations, for renewal permits that substantially modify or intensify the permitted activity. Nothing in the rules or elsewhere cited to us suggests that LCDC or DEQ intended a implicit second exception, for renewal of permits for which no goal or plan determinations were made at the time of the original permits. While there may be good policy reasons for LCDC to require an explicit exception to that effect, we are not at liberty to read such an exception into the rules.

D. Determination versus Compliance

Next, petitioners argue that OAR 660-031-0040 relieves DEQ only of the obligation to make a *determination* of compliance with the goals, in renewing an existing permit. Petitioners contend that the rule does not relieve DEQ of the obligation of renewing permits

that in fact comply with the goals.[10] In other words, petitioners argue, OAR 660-031-0040 does not shield the permits from a challenge that the renewed permits do not comply with applicable goals.

We agree with respondents that petitioners' understanding of the rule is not the most reasonable reading of it. Fairly read, the text and context of OAR 660-031-0040 make it clear that in providing that a determination of goal compliance "is not required" when renewing permits, absent circumstances not present here, LCDC intended that such renewed permits are not subject to challenge with respect to goal compliance.[11]

E. Waiver

As noted, in response to comments during the proceedings on reconsideration DEQ requested that the affected local governments submit LUCS to demonstrate compliance with the applicable comprehensive plans (and through them, the goals). Petitioners argue that, by requesting and considering LUCSs, DEQ "waived" the right to invoke the exception under OAR 660-031-0040 and OAR 340-018-0050(2)(b).

Respondents argue, and we agree, that DEQ considered the LUCSs only as an alternative to its primary conclusion, that the renewed permits do not modify or intensify the permitted activities and thus no LUCS or other consideration of compliance with goals or comprehensive plans was required. In doing so, DEQ did not waive the right to reach that

[10] The petition for review actually cites OAR 340-018-0040. However, the language quoted following that cite is from OAR 660-031-0040. We assume petitioners meant to cite the latter rule.

[11] Petitioners advise us that they filed a petition for review in circuit court under ORS Chapter 183 challenging the same MS4 permits at issue in these appeals, apparently on the grounds of noncompliance with DEQ's administrative rules on water quality. The circuit court granted summary judgment to DEQ, and that judgment is currently on appeal at the Court of Appeals. *Tualatin Riverkeepers, et al. v. Oregon Department of Environmental Quality, et al.*, Court of Appeals No. A136050. No party argues to us that these circuit court proceedings under ORS chapter 183 affect LUBA's jurisdiction over the challenged permits and, given our conclusion that we do not have jurisdiction for other reasons, there is no need to consider that question on our own.

primary conclusion or invoke the exception under OAR 660-031-0040 and OAR 340-018-0050(2)(b).

F. Intensification of Regulatory Activities

Finally, petitioners argue that DEQ's conclusion that the renewed permits do not involve a "substantial modification or intensification" of the permitted activity fails to recognize that DEQ has applied a more intensive *regulatory* scheme to the MS4 permits since 1995, such as implementation of new total maximum daily load (TMDL) allocations for various waters. OAR 340-018-0050(2)(b). Due to application of that more intensive regulatory scheme, petitioners argue that DEQ erred in concluding that there is no substantial modification or intensification.

Respondents argue, and we agree, that both OAR 340-018-0050(2)(b) and OAR 660-031-0040 refer to substantial intensification of the *permitted activity*, in the present case, discharges into state waters, not an intensification of the regulatory scheme or programmatic activities in response to new regulatory requirements designed to reduce discharges or the impacts of discharges.[12]

G. Conclusion

In sum, the challenged permits are renewed NPDES permits, and thus subject to the OAR 340-018-0050(2)(b) and OAR 660-031-0040 exception to the requirement to demonstrate compliance with the statewide planning goals. DEQ adopted findings, supported by substantial evidence, that the renewed permits do not involve a substantial modification or intensification of the permitted activity, and thus no LUCS or other demonstration of compatibility with acknowledged comprehensive plans (and indirectly,

[12] Petitioners argue here and elsewhere that the current regulatory scheme for NPDES/MS4 permits is a "new or amended * * * program" for purposes of OAR 660-030-0075 and OAR 340-018-0070, which generally require that DEQ provide notice of new or amended rules and programs and submit them to DLCD for review. That may be, but petitioners do not explain why a *permit* issued under the current regulatory scheme for NPDES/MS4 permits is itself a "new or amended * * * program." OAR 660-030-0005(2) defines the term "Rules and Programs Affecting Land Use" in a manner that does not appear to include permits.

compliance with the goals) was required. We have rejected petitioners' challenges to DEQ's findings in that regard. It follows that DEQ was not "required to apply the goals" in adopting the challenged decisions, within the meaning of ORS 197.015(11)(a)(B). Accordingly, the decisions are not land use decisions subject to our jurisdiction.

These appeals are dismissed.