

# DEQ Response to Comments

NPDES Permit MS4 Phase II General Permit Modification  
March 12, 2021



## **Water Quality Permitting**

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## Overview

The public comment period for the proposed permit modification was from January 6, 2021 to February 9, 2021.

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

List of Commenters		
#	Commenter	Affiliation
1	Susan Smith	Oregon Association of Clean Water Agencies (ACWA)
2	Tom Hubbard	City of Corvallis
3	Janelle Booth	City of Millersburg
4	M. Therese Walch	City of Eugene
5	Jonah Sandford	Northwest Environmental Defense Center
6	James Saul	Earthrise Law Center
7	Jonah Sandford/James Saul	Columbia Riverkeeper
8	Ryan Largura	City of Troutdale
9	Matt Stouder	City of Springfield
10	David Sawyer	City of Turner
11	Elisabeth Holmes	Willamette Riverkeeper
12	Chris Bailey	City of Albany

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

## Oregon DEQ MS4 Phase II Permit Modification Public Comment Categories:

### Antibacksliding

#### Comment from Willamette Riverkeeper:

The Permit does not contain a clear anti-backsliding provision, which is required by 33 U.S.C. § 1342(o) (setting the floor). The Permit Evaluation Report (§ 1.8) explains that the DEQ’s decision to identify the “controls necessary to reduce the discharge of pollutants from the MS4 to the MEP” within the Permit itself constitutes a demonstration that anti-backsliding requirements are satisfied, and the provisions are simply “expressed differently.” Id. But, DEQ is not even requiring a SWMP for several years after the Permit goes into effect. And as pointed out above, DEQ’s statement that other plans and actions somehow will satisfy the 6 minimum control measures requirement is conclusory. Under 40 C.F.R. § 122.34(6) it is the Permit that “must include requirements that ensure the permittee implements, or continues to implement, the minimum control measures.” In the proposed Permit, DEQ is proposing to eliminate provisions including: DEQ’s authority to impose additional water quality based limitations or permit coverage if a discharges causes or contributes to a violation of a water quality standard; the requirement that a Permit registrant provide “adequate” finances to implement the control measures and other Permit requirements; dramatically changing the construction and post-construction thresholds; and not referencing the antidegradation policy. Willamette Riverkeeper is unclear how the Permit satisfies 33 U.S.C. § 1342(o).

## DEQ Response:

The permit conditions in this permit modification are, in all cases, at least as stringent as those established in the previous iteration of this permit as required by 33 U.S.C. § 1342(o). The permit modification does not substantively change the requirements of the MS4 Phase II permit nor do they change the requirement of the MS4s to meet the permit standard which is to reduce the discharge of the pollutants to the maximum extent practicable, to protect water quality and to satisfy the appropriate water quality requirements of the Clean Water Act. The MS4s must “reduce pollutants in discharges to the maximum extent practicable, including management practices, control techniques, and system, design and engineering methods...” as required by section 402(p)(3)(B)(iii) of the CWA. To meet this requirement permit registrants are required to implement best management practices (BMPs) based on the permit measures as allowed by 40 CFR 122.44(k). The stormwater management program document (SWMP) is what MS4s use to document the BMPs each permit registrant implements to meet the permit conditions. While existing permit registrants are implementing the BMPs required by prior permits, this permit requires the new SWMP to be submitted to DEQ by November 1, 2021. The permit includes an implementation schedule that allows the MS4s appropriate timeframes for permit registrants to develop their programs to meet the permit conditions. The permit modification includes different compliance timeframes for some communities as appropriate, including the due date for the SWMP based on a settlement agreement

The permit standard is predominantly met by implementation of a stormwater management program that imposes the six minimum measure requirements. 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

The construction and post-construction thresholds in the MS4 Phase II modification have not changed from the thresholds as listed in the phase II general permit that became effective on March 1, 2019.

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 each registrant’s stormwater management program. In addition, each permit condition has an implementation schedule that requires the registrant to track and assess implementation of each of the requirements and report on in each annual report.

While the permit does not reference DEQ’s antidegradation policy, the Permit Evaluation Report (PER) does, as appropriate, on page 12:

*DEQ determined that existing water quality will not be degraded by the issuance of this permit. 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*

*small MS4s. DEQ expects the pollution reduction measures implemented by permitted small MS4s to offset any expansion of stormwater conveyance systems and outfalls. These permit requirements to implement a broad range of pollution reduction measures, including measures to address impacts from new development and significant redevelopment are expected to reduce the amount of pollution discharged. The permit does not set numeric discharge limits. The law recognizes that stormwater discharges are highly variable in nature and difficult to control due to topography, land use and weather differences (e.g., intensity and duration of storms). The goal of the permit is a net reduction in pollutant loading over the five-year permit term. Over the five-year permit term, the permit registrant will implement and/or enhance an identified range of stormwater management control programs to minimize stormwater pollution discharges from existing residential, commercial, and industrial developments. Therefore, the issuance of this permit will protect and improve existing water quality and is consistent with DEQ's antidegradation policy.*

As noted on page 21 of the PER, the permit does not specify staffing or funding levels, thus providing flexibility and incentive for permit registrants to adopt methods appropriate to each jurisdiction to comply with the permit requirements. DEQ encourages registrants to establish stable funding sources to support ongoing stormwater program implementation, and enter into cooperative working relationships with other MS4s. The word “adequate” does not change the permit requirements as each permit registrant is responsible for complying with all permit conditions, regardless of the resources each permit registrant uses to comply.

## **Permit Renewal**

### **Comment from Willamette Riverkeeper:**

Willamette Riverkeeper objects to some language changes in the modified permit. For example, renewal application approval or denial must be provided in writing to the permit registrant. If DEQ were to eliminate this requirement, it will easily create a whole host of challenges for DEQ, the permit registrant, and the public regarding whether a permit was or was not approved for renewal and whether a municipality was operating under a valid permit or not.

### **DEQ Response:**

DEQ maintains records of all permit registrants including initial and renewal permit applications. DEQ is in the process of upgrading and streamlining the way we accept, process and share information at DEQ with a new environmental data management system called Your DEQ Online. This system will allow DEQ, regulated entities and the public to view records online, thus the term “in writing” no longer applies in the same way since all regulatory interactions will be conducted electronically through Your DEQ Online.

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

### **Comments from NEDC, Earthrise Law Center and Columbia Riverkeeper:**

However, DEQ has proposed one significant change to the Phase II Permit—related to registrants' compliance with water quality standards—that Environmental Commenters do not support. DEQ proposes modifying Schedule A.1.b to state “Compliance with all permit requirements is deemed compliance with applicable water quality standards as established in OAR 340-041.” We believe DEQ lacks legal or factual justification for that permit language, and it should be removed. The terms and conditions of the Draft Permits bear little relationship to water quality standards compliance, and to our knowledge none of the technical work to establish such a relationship has been undertaken by DEQ or anyone else in Oregon. As such, this language is not supported by substantial evidence. The effect of the proposed language in Schedule A.1.b would be to tie the Maximum Extent Practicable (MEP) standard to Oregon's water quality standards—a connection that is entirely unsupported. The MEP standard in the Phase II Permit is established through implementation of a Stormwater Management Plan that is developed without consideration of water quality

standards, and then approved by DEQ without consideration of water quality standard compliance. Under these circumstances, there is simply no legal or factual basis to state that compliance with the Storm Water Management Plan (SWMP) (along with other permit conditions) and the MEP standard has any bearing at all on compliance with water quality standards. And certainly, without more stringent monitoring, DEQ cannot make such a broad statement.

Although the Ninth Circuit has held that states implementing NPDES programs under the Clean Water Act have “the authority to determine that ensuring strict compliance with state water quality standards is necessary to control pollutants[.]” *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166 (9th Cir.), DEQ has not used that authority in this Phase II Permit, and the permit does not expressly require compliance with Oregon’s water quality standards. Thus, a permit condition effectively equating “compliance with all permit requirements” to “compliance with applicable water quality standards” is unnecessary and confusing.

Further, the language in Schedule A.1.b may pose a barrier to DEQ including water quality based effluent limits in future iterations of the Phase II Permit, if and when it becomes evident that compliance with MEP-based permit conditions alone is insufficient to ensure compliance with water quality standards. EPA has made it abundantly clear that MS4 permitting—for both Phase I and Phase II municipalities—must be an iterative process with the ultimate goal being attainment of water quality standards. See, e.g., *National Pollutant Discharge Elimination System—Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges; Final Rule* (Dec. 8, 1999), 64 Fed. Reg. at 68,753 (“If the program is inadequate to protect water quality, including water quality standards, then the permit will need to be modified to include any more stringent limitations necessary to protect water quality.”); EPA Region 3, *Supplemental Comments on Charles County Phase I Municipal Separate Storm Sewer (MS4) Permit*, Sept. 23, 2014 (“Where the NPDES permitting authority determines that MS4 discharges have the reasonable potential to cause or contribute to a water quality standard excursion . . . EPA recommends that the NPDES permitting authority exercise its discretion to include appropriate narrative and/or numeric water quality based effluent limitations (WQBELs) as necessary to meet water quality standards.”).

DEQ is thus required to impose additional limitations as needed to protect water quality, and should maintain maximum discretion to impose such limitations. But the proposed language in Schedule A.1.b, which effectively equates compliance with broadly applicable, narrative, BMP based general permit conditions designed to meet the MEP standard with compliance with site specific water quality standards, would bring the contemplated iterative process to a halt. Such language would undercut DEQ’s obligation to ensure reasonable further progress towards attainment of water quality standards.

Environmental Commenters believe the language in the Phase II Permit’s current Schedule A.1.b is entirely reasonable, and should remain in the modified Permit. The original Schedule A.1.b states: “If the permit registrant complies with all the terms and conditions of this permit, it is presumed that the permit registrant is not causing or contributing to an excursion of the applicable water quality standards as established in OAR 340-041.” We believe this language is sensible: it creates a presumption that registrants are complying with water quality standards, which presumption can then be rebutted with subsequent site-specific evidence of water quality exceedances. When such a finding occurs, then the registrant can begin the iterative corrective action process outlined in Schedule A.1.b., with an eye toward ensuring its contributions to standards exceedances are eliminated.

In sum, there is no legal or factual justification for DEQ’s proposed language codifying a relationship between permit compliance and water quality standards compliance. Further, there is no sensible reason to include it in this permit, as doing so is unnecessary and could make it more difficult for DEQ to protect water quality in the future—when evidence demonstrates additional water quality-based limitations are needed. The current language in Permit Schedule A.1.b should remain in the final Phase II Permit. By “presuming” that standards will be met when a registrant complies with the Permit, rather than “deeming” this to be so, the current language avoids the unnecessary and unjustified codification of a relationship between the MEP standard and water quality standards compliance.

## **DEQ Response:**

DEQ disagrees with the assertions in this comment. DEQ modified the language that is the subject of this comment in order to more directly track the language and intent of the “Effect of a Permit: Purpose” rule at OAR 340-045-0080(1): A permittee in compliance with a National Pollution Discharge Elimination System (NPDES) permit during its term is considered to be in compliance for purposes of enforcement, with Sections 301, 302, 306, 307, 318, 403 and 405(a)-(b) of the federal Clean Water Act (CWA) and ORS 468B.030, 468B.035 and 468B.048, and implementing rules, applicable to effluent limitations, including effluent limitations based on water quality basin standards, and treatment systems operations requirements....” Rather than making an unsupported factual determination as suggested, the updated language makes a conclusion consistent with the relevant rule that compliance with the permit is deemed to be compliance with the listed requirements of state and federal law.

Additionally, the updated permit evaluation report makes clear that this version of the permit does not require compliance with water quality standards. However the permit does take important steps toward ensuring that water quality standards are addressed by requiring that if at any time a permit registrant becomes aware of a water quality standards exceedance, the permit registrant must follow specific requirements for managing and reporting the situation.

In addition, DEQ disagrees that any condition in Oregon’s current MS4 Phase II general permit would impact any future decisions. Each permit renewal or permit issue process is conducted independently based on the facts and information available at the time the permit renewal or development work is being conducted. DEQ expects each permit iteration to be different, but to provide equal or greater environmental protection than the last, and this permit does not limit future decision making.

## **Comments from ACWA, Troutdale and Eugene:**

ACWA agrees that the Stormwater Management Program (SWMP) and its implementation are required to reduce pollutants from the MS4 to the Maximum Extent Practicable (MEP). ACWA stormwater agencies also strive to protect water quality as a fundamental mission-critical priority. The legal and practical question that ACWA and DEQ have been discussing for some time is whether federal stormwater regulations and the laws of the State of Oregon require stormwater discharges to meet stricter Water Quality Criteria (WQC). DEQ’s proposed modifications to the permit make it clear that the standard that must be met is the MEP standard, demonstrated through implementation of MS4s’ Stormwater Management Programs (SWMPs) in compliance with the MS4 Phase II General Permit.

ACWA supports the modifications DEQ proposes to the permit in this section that make it clear that: *“Compliance with all permit requirements is deemed (in) compliance with all applicable water quality standards as established in OAR 340-041.”* ACWA appreciates and supports DEQ’s further clarification, provided in the PER, which now states that: *“...This permit does not require compliance with water quality standards.”* ACWA also supports the modifications to the remainder of Schedule A, Section 1.b. that provide improved clarity related to the expectations for identifying, investigating, reporting and corrective action plans, with the following requested changes in italics below. The recommended changes are consistent with the comments ACWA submitted on the draft MS4 phase I permits in December 2020.

ACWA understands that the investigation of the cause of an exceedance to be initiated within 48 hours is not expected to be a full and in-depth investigation but is just the first step in beginning to look at the issue. *We request that DEQ include language in the PER to clarify its intent.*

### **1) DEQ Response:**

Further explanation in the PER is not necessary as the term “begin” means “start” thus the permit language is sufficiently clear that the requirement in the first 48 hours is to begin the investigation.



ACWA understands that the corrective actions taken or planned may, depending on the nature of the instream WQC exceedance, be a site-specific, time-limited, targeted set of actions, or may be a longer-term iterative process. *ACWA requests that DEQ clarify this in the PER.*

## **2) DEQ Response:**

DEQ agrees that any corrective actions taken or planned will be based on the specifics of each situation that caused the exceedance and has added that to the Permit Evaluation Report. As such, DEQ added the following sentence to the PER: “The actions implemented by the permit registrant will be based on the specifics of each situation that causes the exceedance.”

*ACWA recommends that DEQ modify the statement “DEQ may include the corrective action plan in a compliance schedule.”* A compliance schedule is a defined term in NPDES permits and may be a very different thing from what the permittee will be developing in the 60 days that it has to submit its corrective action plan. Also, based on the term’s definition, a compliance schedule indicates that the permittee is in violation of the permit. It is ACWA’s understanding that if the permittee is meeting all provisions of their NPDES MS4 permit, then they are complying with the permit and applicable water quality standards. (Schedule A.1.B.). DEQ has an Internal Management Directive (IMD) for Compliance Schedules in NPDES permits and the proposed process does not comply with that IMD. ACWA wonders if DEQ is simply attempting to make it clear that a schedule of the planned corrective actions is necessary. In that case, ACWA’s comment is to modify the language in 1.b.iii as follows:

*DEQ will review the report submitted and either approve it or require modifications, **and may include a timeline in the permit for completion of the corrective action plan.** “DEQ may include the corrective action plan in a compliance schedule...”*

It should be noted that DEQ already has recourse if the DEQ-approved corrective action plan is not implemented. It is ACWA’s understanding that failure to follow the plan would be a permit violation unless the permittee requested, and DEQ approved, changes to the plan.

## **3) DEQ Response:**

Thank you for the suggestion. DEQ modified the language to read: “DEQ may require a timeline and enforceable milestones for completion of the corrective action plan.”

## **Permit must require timely compliance**

### **Comment from Willamette Riverkeeper:**

Under the MS4 program, permit registrants are required to develop, implement, and enforce a stormwater management program (SWMP) designed to reduce pollutants from the MS4. The SWMP is the primary mechanism in the MS4 Phase II permit scheme to control pollution. Permit Evaluation Report § 1.8. Willamette Riverkeeper appreciates DEQ generally identifying management practices, control techniques and system, and design and engineering methods as necessary strategies to meet the discharge of pollutant requirement in the Permit. The Permit proposes a deadline for the submission of the SWMP which is very late; for most municipalities it is 2 years but for three municipalities it is 3 years “after permit coverage assignment.” Proposed Permit Schedule A(2)(c), n.2. The event that is “permit coverage assignment” is unclear; is it the date a municipality becomes covered under the Permit? Willamette Riverkeeper believes that since these municipalities have known for years that they would be subject to the Permit requirements which have – for decades – included a SWMP, the deadlines under the proposed permit are unjustifiably generous to municipalities to the detriment of the Willamette River. Moreover, since the SWMP is such a core component of the Permit, delaying the SWMP for so long dramatically weakens the effectiveness of the Permit in reducing stormwater pollution.

### **DEQ Response:**

The MS4 Phase II general permit has been in effect since March 1, 2019. Yes, the term “permit coverage assignment” is consistent with the date the permit is effective for the permit registrants. Existing registrants and many new registrants are currently implementing stormwater management programs that reduce stormwater pollution. The modified permit does not change the SWMP implementation deadlines for registrants that have had coverage under the Phase II permit since March 1, 2019. Registrants that are assigned coverage under the modified permit will have additional time to draft the SWMP and meet the permit requirements. Some considerations in development of these timeframes are that many of the permit conditions require registrants to develop and/or update ordinances, community-wide processes and training materials to ensure compliance. The timeframes in the permit are appropriate to ensure the work associated with each permit condition can be done and the permit can be implemented appropriately.

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

### **Comments from Willamette Riverkeeper:**

The dissolved oxygen TMDL for Lane County references green infrastructure. Permit Evaluation Report § 7.1.3.7. While DEQ raises this just in the context of the TMDL, green infrastructure is an action other municipalities should be encouraged to pursue under their MS4 Phase II Permit six minimum requirements.

#### **1) DEQ Response:**

DEQ requires Phase II MS4s to prioritize low impact development and green infrastructure when structural stormwater controls are necessary to address stormwater volume.

A.3.e.iii. of the phase II general permit requires:

*The permit registrant must identify, minimize or eliminate ordinance, code and/or development standard barriers within their legal authority that inhibit design and implementation techniques, such as Low Impact Development and Green Infrastructure, intended to minimize impervious surfaces and reduce stormwater runoff. Consideration of such modifications to ordinance, or codes are only required to the extent the modifications are permitted under federal and state laws.*

Furthermore, Page 35 of the PER states:

*This condition requires permit registrants to use a Low Impact Development approach to stormwater management prioritizing non-structural stormwater controls to minimize the creation of impervious surfaces and minimize stormwater volume. This condition requires registrants to prioritize green infrastructure when structural stormwater controls are needed to remove pollutants from stormwater or to further reduce stormwater volume prior to discharging.*

The proposed permit more than doubles the 5,000 square foot threshold for small communities and increases it by 40% for large communities. DEQ’s basis for allowing this large increase is unclear. And, in allowing this increase, DEQ does not double-check how this increase may interface with the Willamette Basin TMDL for mercury. The Permit Evaluation Report estimates mercury-containing soils erosion’s relative contribution load is 47.8%. Permit Evaluation Report § 7.1.3.6. With such large increase in construction and post-construction site size, the Permit authorizes significant additional mercury loading to the Willamette River Basin. The DEQ quantifies this as 44.4 kg/year. Id. This number does not appear in the Willamette Basin Water Quality Management Plan, so we are not clear on the basis for DEQ’s assumption. The DEQ really should find concrete ways – like water sampling - to ensure the TMDL will not be violated. And, as the U.S. EPA issued on February 4, 2021 the Final TMDL for mercury in the Willamette Basin, there is no reason it should not be incorporated into the MS4 Phase II Permit (especially since the municipalities have so long before they have to submit their SWMPs).

## 2) DEQ Response:

The MS4 Phase II permit modification maintains the same construction and post-construction thresholds as the Phase II general permit issued on November 30, 2018. DEQ determined these are the appropriate thresholds necessary to minimize the discharge of pollutants to waters of the state from MS4 Phase II communities. As noted in the Willamette Mercury TMDL documents, once mercury is deposited on the landscape, the major pathways to streams in Oregon are erosion of sediment-bound mercury and surface runoff. As such, implementing management strategies to reduce mercury primarily through control of erosion and sediment runoff is key. The construction and post-construction permit requirements in the Phase II general permit is how the Phase II permit registrants will directly reduce the amount mercury in urban stormwater.

### **Comment from ACWA, Troutdale and Eugene:**

The October 2020 public review draft of the Phase I MS4 NPDES permits includes a retention standard as well as an allowance for “alternative site performance standards” (Schedule A.3.e.iii.(B)) in the post-construction requirements. Some Phase I jurisdictions implement stormwater standards that optimize retention, but the standards would not be strictly considered numerical stormwater retention requirements as outlined in this draft phase II permit. The draft Phase I permit allows for a jurisdiction to implement an alternative post construction performance standard as long as *“such local requirements and thresholds shall provide equal or similar protection of receiving waters and equal or similar levels of treatment as the NSRR approach.”*

*ACWA requests that this allowance for the “alternative site performance standard” be included in the Phase II permit as allowed in the Phase I permit.* This will allow Phase II communities the same flexibility as allowed for the Phase I communities in their approaches to addressing retention requirements. In addition, it will allow these smaller Phase II communities to adopt the approaches of larger Phase I communities that may be in proximity, therefore providing regional consistency.

### **DEQ Response:**

MS4 Phase I jurisdictions in Oregon have been implementing MS4 programs since the mid-1990s. Their programs have gone through multiple permit iterations and are covered by individual permits specifically tailored to each jurisdiction. DEQ understands that many of the Phase I programs have developed and already implement specific ways to address stormwater retention that are equivalent to the NSRR. These jurisdictions have invested significant resources into these programs and have existing ordinances to implement them.

The MS4 Phase II general permit is set up to maximize the resources Phase II communities have available, which is generally different than the Phase I communities. In addition, many Phase II permit registrants have been working on their post-construction programs since the permit was effective on March 1, 2019 to ensure the timelines in the permit are met. As such, it is not appropriate to change the post-construction stormwater framework so far into this permit term.

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

### **Comment from Troutdale:**

In addition to ACWA’s comments, the City would like to thank DEQ for the added language about deadline extension of annual reports in the event of extraordinary circumstances. This added flexibility is a welcome addition to the permit reporting requirements for MS4 permit registrants.

### **DEQ Response:**

DEQ appreciates the input.

## **Comments from Willamette Riverkeeper:**

The Willamette River is water quality impaired and is designated critical habitat for threatened salmonids. More stringent water quality and pollution discharge standards should be established by DEQ for MS4 Phase II permittees on the Willamette River. The Willamette Basin Water Quality Management Plan Part 2 pp. 14-21 (and the Permit Evaluation Report) note that “stormwater discharges can be a significant source of bacteria, mercury, other 303(d) listed, and nonlisted pollutants found in surface waters.” See Permit Evaluation Report § 7.1.3.8 (emphasis added). Ensuring compliance with narrative and numeric water quality standards and limitations and TMDLs can only be accomplished with robust monitoring, sampling, and reporting requirements.

The Permit Evaluation Report says effluent monitoring is “one method an MS4 can use to evaluate its SWMP and determine progress in achieving measurable goals” and that “if” an MS4 chooses to pursue this method of program evaluation certain minimum requirements apply. Permit Evaluation Report § 5.2. DEQ proposes to allow performance measure actions in lieu of effluent monitoring, but without hard data from effluent monitoring, how can DEQ, the municipality, and the public know whether performance measures actually work? And without information from the municipalities’ SWMPs, how does DEQ assure the public that unspecified, and at best dated, “actions” will work? See, e.g., Permit Evaluation Report § 7.1.3.4 (Springfield and Lane County “may use their actions to comply with this Permit” to address the Willamette River bacteria load allocation). And what about the other municipalities on the Willamette River? What information does DEQ have to presume their compliance with the Willamette Basin bacteria TMDL?

The monitoring requirements of the proposed permit Schedules B and D are insufficient, especially if DEQ expects permit compliance to equate water quality standard compliance. Schedule A(1)(b). For the first 2-3 years before municipalities have a SWMP, how are they to demonstrate compliance with stormwater standards for DEQ to evaluate? The Permit Evaluation Report refers to certain measures in connection with other obligations or reports (e.g., the Willamette Basin Water Quality Management Plan, the 2010 Integrated Report Assessment Database and 303(d) list), but makes no assurances to the public that municipalities are following these, to what degree they are being followed, or any convincing argument that they are consistent with the six minimum measures other than a conclusory statement to this effect. Some discrepancies are unclear. For example, the standard Schedule A dry weather screening program requires new registrants to screen at least 25% of the MS4 outfalls and then 20% each year thereafter. DEQ has required Corvallis, Springfield and Turner to conduct more screening (40%) and Albany and Millersburg 25%. Also, the Permit inexplicably gives these municipalities more than 2 years to conduct this screening.

### **1) DEQ Response:**

Phase II 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). Specifically, operators of regulated small MS4s must implement a comprehensive stormwater management program to reduce the discharge of pollutants from the MS4 to the maximum extent practicable, protect water quality and to satisfy the appropriate water quality requirements of the Clean Water Act. As referenced in condition B.3 of the PER: “...federal regulations governing the NPDES permit program for small MS4s do not require monitoring of effluent from stormwater outfalls or ambient water quality monitoring of receiving streams.” The CWA also clarifies that each state may choose how to appropriately manage the discharge of pollutants to MEP including: “..... and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants<sup>1</sup>.” DEQ has chosen to manage the registrant’s discharge of pollutants by

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<sup>1</sup> CWA section 402(p)(3)(B)(iii).

defining clear, specific, and measurable NPDES permit requirements in this MS4 Phase II general permit to ensure that all MS4 Phase II communities have the same standards.

In Schedule D.2, the permit requires Wood Village to provide a summary of their evaluation of control strategies established for the Lower Columbia Slough Phosphate, Lead, and Bacteria TMDLs. This is the only permit registrant identified in the permit as having a monitoring requirement and that is because the Waste Load Allocation for the TMDL and associated Water Quality Management Plan outline the requirement. Additionally as stated in the permit: “If the permit registrant discharges to a water body for which a TMDL has been approved or is listed on the 303(d) list, the permit registrant must comply with all monitoring requirements under Schedule D.2.”

Page 11 of PER elaborates on the additional requirements for MS4s discharging into impaired waters of the state:

*A permit registrant’s implementation of the SWMP control measures in Schedule A.3 constitutes progress towards reducing or eliminating the pollutants in MS4 discharges that contribute to water quality standards exceedances. However, the control measures in Schedule A.3 alone may be insufficient to fully eliminate the MS4 operator’s contribution to the specific water quality impairment. As a result, in the MS4 Phase II General Permit, where the MS4 discharges into waters of the state that are “impaired” (i.e., not meeting applicable water quality standards), the permit registrant must meet the MS4 Permit Standard by complying with all MS4 Phase II General Permit requirements, including applicable water quality based requirements as directed in Schedule D.*

Regarding the different timelines given to MS4s for dry weather screening, DEQ developed inspection schedules and deadlines based on appropriate timeframes for registrants to meet the requirements. Existing registrants that have had permit coverage since March 1, 2019 currently discharging under the permit have until February 28, 2022 to inspect 40% of their outfalls as they have been registered the longest. Corvallis, Springfield, and Turner must conduct dry weather screening of at least 40 percent of their MS4 outfalls no later than February 28, 2024. While Corvallis, Springfield, and Turner are already regulated MS4s, they are currently on administratively extended individual permits with different dry weather inspection requirements. The extended deadline will allow them time to update their programs and increase inspection frequency as required by the Phase II general permit. As new registrants and currently unregulated MS4s, Albany and Millersburg were given a longer deadline that requires them to conduct dry weather screening of at least 25 percent of their MS4 outfalls no later than February 28, 2024 to ensure time to develop and implement their programs as required by the Phase II general permit.

The Permit ignores an opportunity to monitor for critical pollutants that are harmful to public health and the environment, such as PFAS chemicals and 6PPD. By failing to control, or even address, these harmful pollutants, DEQ fails to reduce the discharge of pollutants from the MS4 to the maximum extent practicable, protect water quality, and satisfy the water quality requirements of the Clean Water Act.

## **2) DEQ Response:**

There are not currently local, state or federal regulations regarding the use of 6PPD-quinone or PFAS. DEQ has been tracking the Puget Sound stormwater investigations and will be evaluating how to integrate this new finding into the agency’s work and priorities, including toxics reduction programs and safer chemical collaborations with other West Coast states. In the meantime, stormwater treatment measures (e.g., bioswales, settling ponds) are the most effective approaches to reducing potential stormwater impacts on water quality. Prioritizing green infrastructure is a requirement of the post-construction site runoff control measure and is currently the most effective way to address stormwater pollutants in order to keep them from directly discharging into waters of the state.

DEQ references the “long term” goal of achieving water quality standards and acknowledges the “chronic” problem of illicit discharges to 303(d)/TMDL waters. Permit Evaluation Report § 7.1.2. But the public has waited long enough for this goal to be reached. Collection of monitoring data is critical to DEQ’s ability to manage water quality by evaluating discharges and activities. OAR 340-041-0001(2); Permit Evaluation

Report § 7.1.1. Willamette Riverkeeper believes that not collecting effluent sampling data is turning a blind eye to stormwater system problems. Without this data, DEQ's presumption that a municipality is complying with the permit and the Clean Water Act is unfounded.

### **3) DEQ Response:**

In the PER, DEQ does not acknowledge a "'chronic' problem of illicit discharges to 303(d)/TMDL waters." In Section 7.1.2 of the permit evaluation report (PER), DEQ acknowledges the importance of locating and eliminating chronic or long-term illicit discharges. Flows from outfalls that are observed during dry weather screening activities, required by schedule A.3.c.vi of the permit, can lead to identification and the subsequent elimination of chronic illicit discharges. MS4s are required to develop pollutant parameter action levels to assist them with proper characterization of the illicit discharge. Schedule A.3.c.vi.G requires:

*If general observations and field screening indicate an illicit discharge and the presence of a suspected illicit discharge cannot be identified through other investigatory methods, permittee must collect a water quality sample for laboratory analyses for ongoing discharges. The water quality sample must be analyzed for pollutant parameters or identifiers that will aid in the determination of the source of the illicit discharge. The types of pollutant parameters or identifiers may include, but are not limited to genetic markers, industry-specific toxic pollutants, or other pollutant parameters that may be specifically associated with a source type.*

If the permit registrant or DEQ determines that an MS4 discharge is causing or contributing to an exceedance of water quality standards, the MS4 must follow the requirements of schedule A.1.b. This requirement includes notifying DEQ of the water quality exceedance submitting a report with all relevant information to DEQ.

## **Definitions**

### **Comment from Willamette Riverkeeper:**

In Schedule D, for the terms "redevelopment" and "maintenance activities", Willamette Riverkeeper is concerned that DEQ has not provided any meaningful parameters, which could allow a permittee to conduct activities that should require additional stormwater protections or review of the existing permit without DEQ oversight. The term "control measure" really must focus on controlling the "discharge", which is prohibited; not just the "amount" of the discharge.

### **DEQ Response:**

DEQ updated the definitions for "redevelopment" and "maintenance activities" to provide clarity for MS4 registrants engaged in those activities.

By its very nature, the MS4 permit allows the registrant to discharge stormwater from the MS4 to waters of the state. As stated on page 2 of the permit under "Permitted Activities":

*Until this permit expires or is modified or revoked, the permit registrant is authorized to discharge municipal stormwater to surface waters of the state only in conformance with the requirements, limitations and conditions set forth in the following schedules. Where conflict exists between specific conditions (found in Schedules A-D) and general conditions (Schedule F), the specific conditions supersede the general conditions.*

The MS4 is required to control or minimize the amount of pollutants discharged to waters of the state via "control measures" as defined in the permit.

## **General Comments**

### **Comment from ACWA, Troutdale and Eugene:**

The modifications DEQ proposes throughout the Phase II permit improve the readability and clarity of numerous permit provisions, which will improve consistency of interpretations and implementation b the Phase II permittees. Clearer definitions proposed in the permit, along with the modifications proposed in the PER, provided better clarity of DEQ’s intent and expectations. These changes will provide an improved foundations for permittees to be confident in the actions needed to achieve and maintain compliance with Clean Water Act requirements. The modifications also rectify highly problematic permit language that made compliance with parts of the permit infeasible. However, there are some inconsistencies between the revised draft permit and the PER where DEQ modified the permit language but did not make parallel modifications to applicable parts of the PER. We request that DEQ align the PER with the proposed modifications in the permit. Additionally, we request that DEQ number the pages on the permit document.

### **DEQ Response:**

DEQ appreciates the input. Changes have been made to the Permit Evaluation Report section of the response to comments below. DEQ has also added page numbers to the permit as requested.

## **Permit Evaluation Report**

### **Comments from Cities of Corvallis, Millersburg, Springfield and Turner:**

Page 12 of the PER – Section 1.9.1 – Protection of Existing and Designated Uses. This section’s first sentence states, “The stormwater controls required in the MS4 Phase II general permit are expected to result in discharges that will comply with Oregon’s water quality standards.” This sentence is inconsistent with language in the Permit (“Compliance with all permit requirements is deemed compliance with applicable water quality standards...”) and later in the PER at Section 4.1.2 (“This permit does not require compliance with water quality standards.”). The City believes that the sentence in the PER should be changed to “The stormwater controls required in the MS4 Phase II general permit are expected to result in discharges that will comply with Oregon’s water quality standards over time” to be consistent with DEQ’s intent that water quality standards will gradually be met over several permit cycles.

#### **1) DEQ Response:**

While DEQ appreciates the feedback, the language is not inconsistent, thus DEQ has not made the suggested change. As stated in the permit, compliance with all permit requirements is deemed compliance with applicable water quality standards as established in OAR 340-041. DEQ would not issue an NPDES MS4 permit that anticipated otherwise.

Page 24 of the PER – Section 4.3.1.4 – Tracking and Assessment. The section of the Permit cited in the PER section header should reference A.3.a.v and vi (not sections iv and v). The Permit requires the registrant to “assess their progress toward implementation of the program” and the PER requires the submitted annual report to “document whether the desired changes in targeted behavior occurred due to the education and outreach programs...” The City believes the Modified Phase II Permit reflects the appropriate mechanism for this measuring compliance with this requirement and the language in the PER should be changed to be consistent with the Modified Permit.

#### **2) DEQ Response:**

The PER has been updated to reflect the correct numbering.

Additional clarity regarding the comment about tracking and assessment of public education and outreach is included in the PER:

*...the Annual Report form outlines an assessment section to determine whether the desired changes in targeted behaviors has occurred due to the education and outreach programs, and provide information that can be incorporated in the permit registrant’s future events. Further, DEQ acknowledges that conducting an evaluation may be difficult, particularly when identifying and isolating factors that may influence the*

*effectiveness of an education and outreach program are considered. The intent of this measurable goal is to document and evaluate the success of the program, by both the permit registrant and by DEQ, to better focus future education and outreach in subsequent permits.*

An important component of MS4 education programs is the self-assessment of the MS4's stormwater management program effectiveness. DEQ recognizes that each MS4 has a unique audience and education can often be a difficult task to accomplish as well as assess. MS4s know their audience best. To complement the MS4's self-assessment, DEQ's annual report review process as well as the inspection program will both contribute to the assessment of the MS4s public education program. Question 37 on the current annual report template requires self-assessment of one education and outreach activity:

*Identify and describe the assessment/evaluation of, at least, one education and outreach activity that occurred during this reporting year. Include the assessment process or metric for evaluation, and why this activity was considered successful. Schedule A.3.a.vi*

DEQ appreciates the efforts that MS4s put into the public education and outreach permit measures as well as the associated program assessments. DEQ also understands that the evaluation will contain some subjectivity. Self-evaluation is important for program growth. The PER has not been updated as requested.

Page 35 of the PER – Section 4.3.5 – Post-Construction Runoff Control. The paragraph just prior to the italicized ones in the middle of page 35 says, “This condition requires permit registrants to use a Low Impact Development approach to stormwater management. . .” (emphasis added). The Modified Phase II Permit does not require registrants to use a Low Impact Development (LID) approach for runoff control and instead requires them to conduct a review of development standards and, as appropriate, remove barriers to LID. In addition, Section 4.3.5.3 notes that registrants should “prioritize” LID using non-structural stormwater controls. The City believes PER Section 4.3.5 should be changed to reflect the Permit's language regarding LID.

### **3) DEQ Response:**

The permit requires registrants to prioritize green infrastructure when structural stormwater controls are necessary. Schedule A.3.e.iv.B of the permit also states that registrants “must give priority to implementing green infrastructure before considering hardscaped structural stormwater controls for stormwater treatment.”

In addition, page 35 of the PER states:

*This condition requires permit registrants to use a Low Impact Development approach to stormwater management prioritizing non-structural stormwater controls to minimize the creation of impervious surfaces and minimize stormwater volume. This condition requires registrants to prioritize green infrastructure when structural stormwater controls are needed to remove pollutants from stormwater or to further reduce stormwater volume prior to discharging.*

As such, DEQ has not made the suggested change to the PER.

Page 37 of the PER – Section 4.3.5.2 – Ordinance and/or Other Regulatory Mechanism. The Permit contains a revision from the word “control” to “address,” but the PER still uses the word “control.” The City believes the PER should be changed to reflect the Permit's revised language.

### **4) DEQ Response:**

DEQ has made the suggested change to the PER.

Pages 40 and 41 of the PER – Section 4.3.5.4.2 – Treatment Standard. The Modified Phase II Permit contains a change from “must” to “should” in the sentence that talks about targeting predevelopment hydrologic function. The PER does not currently reflect this change and the City believes it should be changed to reflect the Permit language.

### **5) DEQ Response:**



DEQ has made the suggested change to the PER.

Page 45 of the PER – Section 4.3.5.6 – Long-term Operation and Maintenance. The Modified Phase II Permit contains significant changes to this section that are not reflected in this section of the PER. The City requests that the PER be revised to better explain the changes to the Permit in this section.

#### **6) DEQ Response:**

DEQ adjusted the language in 4.3.5.6 to account for the updated language in the permit as requested. PER section 4.3.5.6 now reads:

*Permit registrants must ensure the long-term operation and maintenance of structural stormwater controls installed in compliance with this permit. In addition, permit registrants must implement a strategy that includes documented efforts to obtain legal authority allowing the permit registrant to inspect and require effective operation and maintenance of privately owned and operated structural stormwater controls that discharge to the MS4, to the extent allowable under state and federal law. The permit requires the permit registrant to use a database type inventory to track and manage the operational condition of structural stormwater controls within its coverage area. This can take the form of a computerized maintenance management system or asset management system that allows for the electronic logging of O&M tasks. Ongoing maintenance is necessary to ensure that the BMPs will perform as designed over time. Inadequate maintenance of existing structural stormwater controls is the primary shortcoming for most local stormwater management programs across the country. As with any infrastructure, deferred maintenance can increase costs and negatively affect receiving waters. Unmaintained BMPs will ultimately fail to perform their design functions, and can become a nuisance and/or pose safety problems. The permit registrant must track those permanent structural stormwater controls installed in compliance with this permit, beginning no later than the permit effective date.*