

# **Oregon Stormwater Litigation**

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(with thanks to  
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# MS4 Permit Case

## ☐ *Tualatin Riverkeepers et al. v. DEQ and EQC*, Multnomah County Circuit Court No. 0601-00752

- MS4 - Municipal Separate Storm Sewer System permits issued to public entities for the discharge of stormwater through conveyance systems into the Tualatin and Willamette Rivers.
- Intervenor included Clean Water Services, Portland, Fairview, Gresham, Multnomah County, Port of Portland and numerous others.

# **Primary MS4 Litigation Issues**

- 1. Whether MS4 permits had to ensure compliance with water quality standards instead of reducing discharge to the Maximum Extent Practicable**
- 2. Whether Total Maximum Daily Load regulations require DEQ to incorporate waste load allocations into MS4 permit requirements**

# **Clean Water Act Requirement**

**Requires MS4s to reduce  
contribution of pollutants in  
stormwater to Maximum Extent  
Practicable (MEP)**

**33 U.S.C. Section 1342(p)(3)(B)**

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# ORS 468B.020

- (2) In order to carry out the public policy set forth in ORS 468B.015, DEQ shall take such action as is necessary for the prevention of new pollution and the abatement of existing pollution by...
- (b)... requiring the use of all *available and reasonable* methods necessary to achieve the purposes of ORS 468B.015 and to conform to the standards of water quality and purity established under ORS 468B.048.

# ORS 468B.025(1)

■ **EXCEPT** as provided for in ORS 468B.050 (NPDES permitting authority statute), discharges that reduce water quality below water quality standards are prohibited.

- So if a discharger has a permit, the discharge does not have to comply with water quality standards—complies with effluent limits (numeric, narrative, compliance schedules).

# **OAR 340-045-0015(2) and (5)**

- References and incorporates federal regulations that require controls to reduce the discharge of pollutants to the Maximum Extent Practicable**

# **MS4 Permits Comply with Oregon Law...**

**... because they contain effluent limits in the form of MEP criteria:**

**Permittees must control the pollutants in their discharge to the Maximum Extent Practicable**

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# **TMDL Regulation**

- ☐ OAR 340-042-0080(1) and (4) – for sources subject to permit requirements in ORS 468B.050, waste load allocations and other management strategies will be incorporated into permit requirements**

# TMDL Regulation

☐ Does NOT require NPDES permits to include waste load allocations in the form of numeric effluent limits

☐ DOES allow MS4 permits to establish benchmarks for relevant pollutants and develop adaptive management strategies through stormwater management plans to monitor, control and reduce pollutants to the Maximum Extent Practicable.

# **Court's Ruling**

- **April 19, 2007 Court upheld DEQ's issuance of MS4 Permits**
- **DEQ's interpretation of the law not erroneous**
- **Petitioners have appealed Judge Marshall's decision**

# **Land Use Board of Appeals (LUBA)**

*Tualatin Riverkeepers v. DEQ*

**Good News**

**Bad News**

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# **Primary LUBA Issues**

- 1. Technical compliance issues with Oregon Land Use system**
- 2. Goal 6 – Permit must show compliance with Water Quality Standards**

# **NEDC v. EPA, USDC of Oregon, CV 07-1396 BR**

**Declaratory and Injunctive Relief to  
withhold issuance of NPDES permits  
that contain compliance schedules  
until after Section 7 consultation**

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# The Endangered Species Act

Section 7 requires Federal agencies to:

- consult with the Services to insure that
- any action they authorize, fund, or carry out
- is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat
- use the best scientific and commercial data available