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Mark Riedel-Bash
Oregon Department of Environmental Quality
Stormwater, MS4 Phase II Comments, 7th Floor
700 NE Multnomah St., Suite 600
Portland, OR 97232

Sent via email to: MS4PermitComment@deq.state.or.us

RE: DEQ Draft 2018 MS4 Permit

Dear Mr. Riedel-Bash:

Thank you for the opportunity to provide comments on the draft MS4 permit on behalf of the Oregon Home Builders Association (OHBA). The bulk of the technical comments were prepared by the staff at the National Association of Home Builders (NAHB), who reviewed DEQ's draft permit and have extensive expertise both with the requirements of the Clean Water Act and the ways in which the CWA has been interpreted by the courts and EPA and implemented by state and local regulatory bodies across the country.

Before getting to the draft permit at hand, I'd like to restate some of the comments we submitted in August of 2016 on an earlier version, since they are unfortunately still applicable to this one:

- The draft permit's construction standards will increase housing costs. Regardless of best efforts at the local level, there is simply no way that compliance will not be more expensive for the development industry and will increase the time involved in the permitting process...which is an unfortunate and unwelcome outcome, given the unprecedented housing crisis facing Oregon.
- The draft permit will decrease housing production. By requiring more aggressive on-site treatment of stormwater, land that would otherwise be developable would contain stormwater facilities instead of housing.
- The draft permit assumes away significant post-construction issues. For example, responsibility for post-construction maintenance and operation of stormwater facilities, since the developer or builder will have moved on once the project is sold and the home owners – whether or not there is an organized community association – will not have the necessary expertise to keep even the most rudimentary stormwater facility functioning properly.
- The draft permit treats spot lot infill development as though it was a traditional subdivision. This puts developers in a bind between state land use policy (which encourages if not insists upon infill) and the practical realities of complying with state environmental policy.
- The draft permit assumes numerous facts that aren't in evidence. Such as the legal or environmental basis for going dramatically beyond federal requirements. Or the financial and technical capability of the affected local governments. Or the percolation capacity of soils in most of western Oregon.

I. How Stormwater Regulations Affect The Development Community

Because the very nature of home building invariably includes earth moving activities, OHBA's members must comply with federal, state and local stormwater regulations. DEQ's draft permit will directly affect regulations for which builders in Oregon are the ultimate "end users." Specifically, developers will be directly affected by two MS4 permit conditions: EPA's minimum control measures for active construction (minimum measure #4) and post-construction stormwater control (minimum measure #5).

If stormwater regulations are not designed and implemented in a thoughtful way, they can decrease available pollutant-control options, increase costs, delay projects, result in poorly designed or maintained features, or simply occupy valuable space that could be used for housing or other community amenities. Oregon already faces an unprecedented crisis of both housing supply and housing affordability, making the prospect of losing density or increasing development costs or delay in getting housing to market extremely troubling.

On the other hand, approaches such as green infrastructure, if implemented well, can build value and achieve multiple community and environmental benefits.

DEQ's proposal will add numerous new enforceable stormwater milestones and management benchmarks to Oregon's Small MS4 programs, many of which will directly affect land development. The comments below provide feedback on specific proposals we see as problematic to local flexibility and best judgment, representing overreach and overly prescriptive solutions in areas that should be left up to municipal discretion. Many changes in the Construction Site Runoff section, for example, are far above and beyond EPA's 2017 Construction General Permit ("CGP") adopted in last January so there is additional concern that Oregon is departing from federally issued guidelines.

Impacts to Small Business are Real

The vast majority of OHBA's members run small businesses that construct 10 or fewer homes each year; the average subdivision in Oregon consists of around 20 lots. Small businesses are the engine of growth for the U.S. economy. At the same time, they are disproportionately impacted by federal regulations, underscoring the need for and importance of conducting thoughtful analysis to reduce regulatory burden.

As a constricting web of regulatory requirements affects every aspect of the land development and the home building process, it adds substantially to the cost of construction and prevents Oregon families from becoming homeowners. NAHB's estimates show that, on average, regulations imposed by government at all levels account for nearly 25 percent of the final price of a new single-family home built for sale.¹ Costs are reflected in the final price of a new home and have a very practical effect on housing affordability. According to NAHB research, approximately 14 million American households are priced out of the market for a new home by

¹ <http://eyeonhousing.org/2016/05/14-million-households-priced-out-by-government-regulation/>

government regulation each year.²

It is critically important that each existing regulation, whether found at the federal, state, or local level, actually addresses the problem it was created for, avoids duplication with identical or similar regulation, and is designed in a manner to encourage both innovation and better “bang-for-buck” solutions. In this case, we feel it is imperative that the permit allow municipalities flexibility to determine how best to meet water quality goals. Further, because the cumulative burdens associated with layers of regulations can be overwhelming, DEQ is strongly urged to also be cognizant of the challenges that will continue to remain if the cumulative impacts from complying with the Phase II Permit at all levels of government are not considered.

II. **How does EPA’s MS4 Remand Rule affect this Permit?**

EPA published their final [MS4 General Permit Remand Rule](#) on Dec. 9, 2016, satisfying a remand by the U.S. Court of Appeals for the Ninth Circuit (*Environmental Defense Center v. EPA*). Despite heavy lobbying, EPA failed to use this court-mandated rulemaking as a means to “raise the floor” of the MS4 program. However, moving forward, this rule now requires state permit writers to incorporate “clear, specific and measurable” terms into all Phase II permit limits. EPA released a compendium of “approved” example provisions with the final MS4 Remand Rule, available [here](#). Almost all of permits featured in EPA’s guidance highlight numeric limits as key to regulating post construction flow (e.g., “capture and treat first 1” of rainfall”).

Oregon is under no obligation to adopt numeric limits for small MS4s

Despite the rule change, states are still not obligated to adopt numeric limits for Small MS4s. Permit conditions may include a combination of narrative, numeric, or other types of requirements.³ In addition, the revised rule does not clarify or provide further detail on how to implement EPA’s “maximum extent possible” or MEP standard, the applicable effluent limit guideline for EPA’s small MS4 program. In other words, States still have wide discretion to make their own case for how MS4 programs meet the MEP standard.

III. **OHBA Comments on DEQ’s Draft Phase II General Permit**

There are substantial issues with both the active construction portion of this permit (Schedule A, Section 3.d. – *Construction Site Runoff Control*) and post-construction section (Schedule A, Section 3.e. – *Post-Construction Site Runoff for New Development and Redevelopment*), as well as DEQ’s overall approach to implementing Clean Water Act (“CWA”) standards.

²http://www.nahbclassic.org/generic.aspx?sectionID=734&genericContentID=250611&channelID=311&_ga=1.255452874.358516237.1489032231

³ 40 C.F.R. § 122.34

a. BMP Based Approach to Controlling Stormwater

It is important to note that DEQ has substantial discretion to impose non-quantitative permit requirements pursuant to Section 402(a)(1) of the CWA, especially when the use of numeric limits is infeasible.⁴ The use of BMPs allows operators to enhance their controls when discharging into degraded water bodies, and retains much needed flexibility required on construction sites.

Permitting authorities have relied upon BMP-based technology approaches extensively in stormwater permitting.⁵ As far back as 1977, courts have recognized that there are circumstances when numeric effluent limitations are infeasible and have held that EPA may issue permits with conditions (e.g., BMPs) designed to reduce the level of effluent discharges to acceptable levels.⁶ And, as recently as 2006, The U.S. Court of Appeals for the Sixth Circuit has once again held that the CWA does not require the EPA to set numeric limits where such limits are infeasible.^{7 8}

We encourage DEQ to continue to employ a BMP approach throughout the Phase II general permit, as its use to date has demonstrated it is an effective way to reduce pollutants.

b. DEQ Proposed Changes – Authorized Discharges

The Draft Permit correctly states in Schedule A, Section 1.a that, “The permit registrant is authorized to discharge municipal stormwater to waters of the state from its MS4, within the defined Permit Coverage Area.” (Page 8) In addition, the Draft Permit notes that, “If the small MS4 is not located entirely within an UA, only the portion that is within the UA is considered the minimum permit coverage area.”

However, specific terms and provisions later in the permit are made to apply to all construction sites, even those that do not release stormwater into the permitted MS4.

These provisions should be modified to specify that permit terms only apply to new and redevelopment releasing stormwater⁹ into the permitted portion of the MS4.

⁴ See *Natural Resource Defense Council v. E.P.A.*, 822 F.2d 104, 122-24 (D.C. Cir. 1987); see also 40 C.F.R. § 122.44(k)(3).

⁵ 40 C.F.R. § 122.44(k) (specifically authorizing narrative BMPs in lieu of numeric effluent limits for stormwater discharges regulated pursuant to CWA Section 402(p)). BMPs include “schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce . . . pollution.” Id. § 122.2.

⁶ *Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369 (D.C.Cir.1977).

⁷ *Citizens Coal Council v. E.P.A.*, 447 F.3d 879, 895-96 (6th Cir. 2006). The Citizens Coal court cited to *Waterkeeper Alliance, Inc. v. E.P.A.*, 399 F.3d 486, 502 (2nd Cir. 2005), stating “site-specific BMPs are effluent limitations under the CWA.”

⁸ Additionally, the Sixth Circuit cited to *Natural Res. Def. Council, Inc. v. EPA*, 673 F.2d 400, 403 (D.C.Cir.1982) noting that “section 502(11) [of the CWA] defines ‘effluent limitation’ as ‘any restriction’ on the amounts of pollutants discharged, not just a numerical restriction.”

⁹ The term “releasing stormwater” is used to describe stormwater that runs off a construction site (or developed property) into an MS4. The CWA defines the word “discharge” as “any addition of any pollutant to navigable waters from any point source . . .” 33 U.S.C. § 1362(12). It is not appropriate to use the word “discharge” to describe stormwater leaving a construction site and entering an MS4 because an MS4 is not a navigable water. The permit should reflect this change throughout.

c. DEQ Proposed Changes – Water Quality Standards

Maximum Extent Practicable (MEP) is the statutory standard that governs the level to which municipalities are responsible for limiting and reducing pollution in stormwater. This standard is specifically intended to take into account the unique financial and technology limitations facing municipal sources.

Clean Water Act section 1311(b) establishes technology based effluent standards. 33 U.S.C. § 1311(b). Congress, however, did not include the technology standard for municipal stormwater discharges in section 1311. Instead, in the Water Quality Act of 1987, it placed the standard, MEP, in section 1342(p)—the permitting section of the CWA. 33 U.S.C. § 1342(p)(3)(B)(iii). Congress defined MEP to include “management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.”

Furthermore, at the same time Congress developed the municipal requirements it established requirements for industrial discharges. 33 U.S.C. § 1342(p)(3)(A). That section provides “Permits for [discharges](#) associated with industrial activity shall meet all [applicable provisions of this section](#) and [section 1311 of this title](#).” *Ibid.* (emphasis added).

This provides two avenues to include water quality based limits into industrial permits. First, section 1342(a)(1)(A) (which is the “this section” referenced above) allows for such requirements. Second, section 1311(b)(1)(C) allows for the inclusion of water quality limits. Congress, however, used different language for municipal permits in section 1342(p)(3). It did not require compliance with section 1311, or “any other applicable provision” of section 1342. This is further proof that MEP is the sole standard applicable to MS4s.

Any attempt to supersede MEP in favor of water quality based effluent limitations is inappropriate and unlawful. We strongly suggest that the Draft Permit be revised to establish MEP as the applicable standard throughout the permit.

d. DEQ Proposed Changes – Construction Site Runoff Control

Section 3.d.iii Construction Site Runoff Control Specifications

Adopting a 5000 square foot disturbance threshold is extreme. While it may be appropriate for large metropolitan Phase I communities such as D.C. or Portland where rates of redevelopment and population density are both higher than average, this proposal is inappropriate and unworkable for small MS4 communities. This mandate will impose new regulations on numerous small, low-risk sites with little potential for environmental harm.

We recommend removal of this provision.

Section 3.d.iv. Construction Site Plan

We recommend the simple expedient of replacing this entire section with a copy and paste of EPA’s 2014 [Effluent Limit Guidelines](#) (ELG) for construction stormwater. The regulated

community worked over many years with EPA to negotiate this simple, baseline list of best management practices. Adopting ELG language word for word in this permit would increase both clarity and legal defensibility of the permit.

Section 3.d.iv.(D) Construction Site Plan

This section is vague and should be brought in line with existing EPA 2017 permit language. Recommended language change:

3.d.iv.(D) - Require construction site plan be **kept on site, and be made available upon request** ~~made available~~ for review by the permit registrant, DEQ, or other administrating entity.

Section 3.d.v – Construction Site Plan Review

Plan review is not a panacea for protecting water quality, and it is ridiculous to require individual reviews for each single-family home site within a larger subdivision. It will simply cause MS4s to incur high administrative costs for no demonstrable gain and present builders with unnecessary and expensive project delays – likewise with no net gain for water quality. Moreover, DEQ seems to assume that each MS4 has the capacity to conduct these reviews in a timely manner, which is, to be generous, unlikely.

EPA’s 2017 Construction General Permit does not include any such provision for plan review, making DEQ’s inclusion of such a requirement an unnecessary overreach. If any language on plan review is included in the final permit, we recommend including a trigger-stop review time of 30 days, after which builders assume automatic approval of an NOI.

We recommend removal of this provision.

Review of Single Family Sites w/in Subdivisions is Unreasonable

It is particularly troubling to envision single-family home plans being reviewed in the manner suggested by the Draft Permit. U.S. EPA published the [Small Lot SWPPP Template](#) in December 2015 to acknowledge that compliance on small lots could be greatly simplified. The streamlined SWPPP template contains a list of less than 20 BMPs to choose from, followed by pages of pre-populated installation and maintenance specifications and a space for a small, hand-drawn site map.

There is simply no need to require review of homogenous/repetitive data (identical specifications, identical BMPs) for small sites. It does not provide value to either the public or MS4 staff, especially considering the burden to small operators to submit and adjudicate plans

under review. We respectfully suggest that any extra staff time could be better spent on other efforts, such as developer education.

This provision should be deleted.

Requiring Public Comment on Individual SWPPP Plans is Equal to an Individual Permit, and Cannot be Required

Section 3.d.v requires, “opportunity for the public to submit information about whether the site plan under consideration demonstrates compliance with the ordinance or other regulatory mechanism required.” Again, EPA’s 2017 general permit contains no such public notice provisions, and there is no valid policy basis for such a requirement. In fact, it runs directly contrary to Oregon’s housing and land use planning objectives.

Requiring public comment on each individual site plan is equivalent to asking municipalities to administrate an individual permit and must be removed.

*DEQ Must Clarify that Individual Details of Construction Site Pollution Prevention Plans Are **Not** Enforceable*

In their 2017 CGP, EPA acknowledged that individual details of a stormwater pollution prevention plans or SWPPPs are not directly enforceable. If a SWPPP ceases to reflect activity on a site, it must be modified within a certain timeframe. It follows that EPA enforcement by law can only hold site operators accountable for permit requirement violations, not specific details contained within daily compliance plans.¹⁰ Section 7 of EPA’s recently released CGP emphasizes that SWPPPs are intended to serve as a flexible “external tool” to carry out permit responsibilities and that the SWPPP itself does not create new permit terms or conditions. NAHB worked extensively with EPA on the CGP and is satisfied that EPA listened to builders’ concerns, clarifying years of confusion in the field over whether individual specifications in a SWPPP create or equate to permit limits.

DEQ should include a similar clarification in their Phase II permit to improve targeting enforcement of actions towards violations causing real environmental harm.

¹⁰ 43 See *Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 430 F. Supp. 2d 996, 1010 (N.D. Cal. 2006) (“a SWPPP is merely a [d]ocument that contains practices and procedures that are designed in order to reduce or prevent industrial pollutants in storm water discharges. . . . SWPPPs do not explicitly address a permittee’s past discharges of pollutants but rather detail those practices a permittee will use to prevent such discharges.”) (Internal quotations omitted).

Section 3.d.vi. Construction Site Inspections

This section is overly prescriptive and does not allow for MS4s to appropriately focus resources on high-risk construction sites or fly-by-night operators that never file for permit coverage. In addition, procedures should be set in place to instruct inspectors on how to approach sites with visible sediment in their discharge. The Draft Permit states that permit registrants must perform an inspection, “If sediment is visible in stormwater discharge.” The Clean Water Act is not a zero discharge statute, and it is unreasonable to ask MS4s to (during a rain event for example) inspect every construction site exhibiting sediment in a discharge.

e. DEQ Proposed Changes – Post-Construction Site Runoff
Section 3.e.iii. Ordinance and/or Other Regulatory Mechanism

We suggest replacing the proposed 5000 square feet impervious size threshold with disturbance thresholds more common to Phase II permits throughout the United States. Such a small disturbance threshold would capture many low-risk projects that, while important in major metropolitan areas with high redevelopment rates or sensitive coastal areas, are not the priority for small municipalities. See below for a sampling of national Phase II disturbance thresholds.

Table 1: Comparison of State Post-Construction Size Thresholds (2016)

Post-construction size threshold	States
1 acre disturbed area	CT, ME, MA, NH, RI, VT, NJ, NY, PR, PA, VA, WV, AL, GA, KY, MS, NC, SC, TN, IL, IN, MI, MN, OH, WI, AK, LA, NM, OK, TX, IA, KS, MO, NE, CO, MT, ND, SD, UT, WY, AZ, HI, NV, AK, ID, OR
5,000 sf disturbed area	DE, MD, DC (Phase 1)
4,000 sf impervious area	FL
5,000 sf IC (DEQ proposed)	CA
2000 sf of new and/or replaced IC or 7000 sf disturbed area	WA

Source: EPA Summary of State Stormwater Standards (2016)

Note: Statewide size thresholds were derived from Phase II general permit language, state rule or legislation. VA requires 2,500 sf in Chesapeake Bay Preservation Area, NC requires 10,000 sf of IC w/in ½ mile shellfish waters, VT is also triggered by any increase to impervious cover, and NJ is also triggered by increase of IC by ¼ acre.

Section 3.e.v. Post-Construction Stormwater Management Requirements

The design standard proposed in this section is confusing and vague to the point of not being implementable on the ground. Several of the design standard options listed under the “

retention” standard approach are not considered to be forms of retention by environmental engineers (e.g., flow duration matching method, etc.).

Moreover, this section ignores the fact that in most of western Oregon, it will be a practical impossibility to comply with the on-site detention requirement due to the heavy clay soils.

We recommend revising this section to take a clear, simple approach to design standards that will not confuse municipalities and not result in a patchwork of complicated post-construction ordinances across the state.

See below for a sampling of Phase II standards that NAHB believes have had successful implementation across the U.S.:

Table 2: Alternative State Post-Construction Design Standards

Design Standard	States using this approach (2017)
80-85% TSS reduction required, or maximum extent practicable	North Carolina, Kentucky, Wisconsin, Colorado, Nevada
Provide treatment of no less than 95% of the impervious area and no less than 80% of the developed area. Treat 1” times impervious area plus 0.4” times pervious area (flow through standard)	Maine
Ensure to MEP that volume and velocity of pre-construction stormwater runoff not significantly exceeded	Alabama, Michigan,
New development shall not exceed 0.41 lbs P/acre/yr	Virginia

Source: EPA Summary of State Stormwater Standards (2016); NAHB Developer Guide to Post-Construction Stormwater Regulation (2017)

Section 3.e.v.(C),(D) Alternative Compliance & Mitigation Options

We applaud DEQ for mentioning off-site and alternative compliance options in the Draft Permit. These can be important avenues for developers to reduce cost of compliance and strive for better “bang for buck” environmental outcomes in areas with difficult soils, low depth to bedrock, or other limiting conditions, but the options must be workable on the ground to provide a meaningful alternative.

The options in the draft permit, however, are not workable. They are very prescriptive and risk over burdening municipal flexibility to administer programs in a cost-effective manner. Requiring each municipality to maintain an arsenal of “shovel ready” mitigation sites on public property, for example, is unreasonable. In many states regional, rather than municipal entities

are far better suited to coordinate mitigation and alternative compliance options. See below for alternative Phase II permit language from states we feel have launched successful mitigation/off-site compliance programs.

Table 3: Model Off-site Mitigation/Alternative Compliance Language

Phase II Permit Program	State
Ohio EPA may authorize off-site mitigation of post-construction control via its 2014 Phase II permit on a case-by-case basis, provided: (1) a maintenance agreement or policy is established to ensure operation and treatment in perpetuity; (2) the off-site location discharges to the same HUC-14 watershed unit; and (3) the mitigation ratio of the water quality volume is 1.5 to 1 or the water quality volume at the point of retrofit, whichever is greater. Requests for off-site mitigation must be received prior to receipt of the NOI application.	Ohio
Tennessee’s 2016 Phase II permit allows MS4s to propose off-site mitigation and/or payment into a fund for public stormwater projects. Each MS4 must develop and apply criteria for determining the circumstances under which these alternatives will be available. A determination that the standards cannot be met on-site may not be based solely on cost of implementing measures. Examples include “lack of available area to create the necessary infiltrative capacity, or physical conditions that preclude use of these practices.” Mitigation must occur within the same HUC-12 watershed, if practicable, and treat a minimum of 1.5 times the portion water quality treatment volume not treated on site.	Tennessee
Mississippi’s 2016 Phase II permit does not mention off-site compliance, but instead sets three criteria for determining when sites may claim a “waiver” from meeting permit standards.: (1) A potential for introducing pollutants into the groundwater exists unless pre-treatment is provided; (2) Preexisting soil contamination is present in areas subject to contact with infiltrated runoff; or (3) Sinkholes or other karst features are present.	Mississippi
The Virginia Stormwater Management Handbook provides an option for phosphorus offset fees. Fee amounts are typically driven by the market and are based on the difference between the target reduction and the actual site reduction after a designer makes his or her best effort to apply runoff reduction and pollutant removal practices.	Virginia

Source: NAHB Developer Guide to Post-Construction Stormwater Regulation (2017)

In conclusion, we believe that the draft permit is far more likely to result in higher housing costs and lower housing production than it is in cleaner water. **We believe that the draft permit is so flawed that DEQ needs to start over.**

OHBA is committed not only to our legal obligation to comply with state and federal law but also to our responsibility to protect Oregon's waters. While we cannot support or agree with this draft permit, we will commit to working productively with DEQ staff and our local government partners to develop a new permit, should the opportunity to do so be provided.

Very truly yours,



Jon A. Chandler

cc: OHBA executive committee
NAHB