

February 20, 2018

Oregon Department of Environmental Quality
Stormwater, MS4 Phase II Comments, 7th Floor
700 NE Multnomah St., Suite 600
Portland, OR 97232
Submitted via email: MS4PermitComment@deq.state.or.us

Re: Comments on Oregon DEQ's Draft NPDES MS4 Phase II General Permit and Re-Issued Permit and Errata Released November 27, 2017

To Whom It May Concern:

The National Association of Clean Water Agencies (NACWA) appreciates this opportunity to comment on the Oregon Department of Environmental Quality's (DEQ) draft *National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System (MS4) Phase II General Permit and Re-Issued Permit and Errata* released on November 27, 2017.

NACWA is the nation's leading advocacy voice for municipal stormwater and clean water utilities. We have over 300 public agency members across the country representing a diverse array of geographical locations and populations. NACWA represents eight public member agencies and MS4s in Oregon that are committed to providing clean water and protecting public health and the environment. NACWA is focused on working collaboratively with regulators and stakeholders to advance robust, innovative stormwater programs, and we coordinate closely with the Oregon Association of Clean Water Agencies (ACWA) on a variety of stormwater and water quality issues impacting the state.

NACWA has long supported and defended the Clean Water Act's (CWA) unique standard afforded by Congress to MS4s. Section 402(p) of the CWA does not require strict compliance by MS4s with water quality standards. Rather, MS4s must reduce the discharge of pollutants to the "maximum extent practicable" (commonly known as the MEP standard). The Congressional intent behind the 1987 CWA amendments that added 402(p) was to allow each MS4 the ability *and flexibility* to determine and implement the best management practices *for their uniquely-situated community* in order to reduce the discharge of pollutants from the MS4 to the MEP.

The U.S. Environmental Protection Agency's NPDES MS4 General Permit Remand Rule — effective January 2017 — provided additional clarity on the development, issuance, and implementation of stormwater permits for Phase II MS4s, but it did not change or impact the underlying MEP standard that applies to these systems. In implementation, however, starting with EPA-issued permits in Region 1, there has been a recent trend toward more restrictive, water quality standards-driven approaches for MS4s, and away from the CWA's traditional MEP standard.

Oregon DEQ's draft *MS4 Phase II General Permit* continues this troubling trend, relying not on MEP, but instead on compliance with water quality standards. If the Oregon DEQ's draft permit is finalized without substantial revisions, NACWA believes that the existing Phase II MS4s and the seven new Phase II MS4 communities will not only experience significant implementation challenges, but they will also face considerable financial burdens—all of which are inconsistent with the MEP standard set by Congress. Oregon's permit would set a dangerous precedent that will have national implications.

Draft Permit Strays from CWA's MEP Standard

Although it is mentioned in the *Redline Draft Permit Evaluation Report*, the proposed Oregon *MS4 Phase II General Permit* fails to specifically mention or include a definition of the MEP standard. Rather, the proposed *MS4 Phase II General Permit* requires that permittees “not cause or contribute to a violation of a water quality standard as established in OAR 340-041.”

It is not feasible for MS4 communities to adhere to strict compliance with water quality standards (WQS) because of the nature of MS4 discharges and the improbability of controlling what pollutants are discharged and at what quantities or concentrations. Oregon Phase II municipalities will need to allocate significant financial resources and pollution control technologies to attempt to meet the “cause or contribute” standard in the draft permit, which will increase compliance costs for communities already facing increasing operational costs and affordability challenges.

Oregon DEQ should base compliance with the permit on the MEP standard and incorporate the flexibility Congress intended for MS4s to account for the unique geographic, hydrologic, and land use requirements that define each community's urban runoff needs.

More Flexibility Needed, Especially for “New Registrants”

Based on the 2010 U.S. Census, U.S. EPA automatically designated 7 municipalities and counties in Oregon as Phase II communities and DEQ recently notified them that they would need to obtain coverage under the *MS4 Phase II General Permit* by September 1, 2018. These communities, referred to as “New Registrants,” are first-time MS4 Phase II permittees and are completely unaccustomed to stormwater permitting requirements as compared to the 19 other, more experienced Phase II communities in Oregon.

These “New Registrants” likely do not have the staff, stormwater expertise, or financial capabilities to even begin developing, let alone implement within a 5-year compliance period, the six minimum measures and best management practices that existing MS4 permittees are more accustomed to. Many of the specific requirements outlined in Oregon's *MS4 Phase II General Permit* go well beyond typical compliance timeframes and the federal MEP standard. This seemingly “one-sized fits all” approach exposes permittees to potential enforcement action and third-party litigation because it does not consider what is practically achievable for each community. Consistent with the intent of the MEP standard, Oregon must provide greater flexibility to recognize the unique challenges facing small communities.

Draft Permit is Unclear, Inconsistent

We understand that Oregon DEQ held numerous stakeholder outreach initiatives in drafting the existing proposed permit. We also acknowledge and appreciate the staff time and effort it takes on the part of Oregon DEQ to draft a MS4 Phase II permit. However, the draft *MS4 Phase II General Permit* and issued errata include a considerable number of errors, inaccuracies, and inconsistencies that substantially impair the understanding and implementation of the permit.

NACWA recommends that Oregon DEQ conduct an internal review and revise the permit so that it is clear and understandable, and then provide for another round of public comment.

Conclusion

NACWA urges Oregon DEQ to make substantial revisions to the proposed draft *MS4 Phase II General Permit* to adhere to the federal MEP standard and grant Oregon communities the necessary regulatory flexibility to determine and implement the stormwater management practices that work best for their respective community.

Additionally, NACWA would like to acknowledge the comprehensive review and public comments submitted by Oregon ACWA. We support and concur with their comments.

Thank you for your consideration of these comments. Please contact me by phone at 202/533-1839 or by email at eremmel@nacwa.org with any questions or concerns.

Sincerely,

A handwritten signature in cursive script, appearing to read "Emily Rimmel".

Emily Rimmel
Director, Regulatory Affairs