

# E – OUTLOOK

ENVIRONMENTAL HOT TOPICS AND LEGAL UPDATES

Year 2010

Environmental & Natural Resources Law Section

Issue 2

OREGON STATE BAR

---

*Editor's Note:* In this issue, Carla Scott of Cable Huston Benedict Haagenen & Lloyd, LLP summarizes *Tualatin Riverkeepers v. ODEQ*, a recent decision by the Oregon Court of Appeals involving a challenge to DEQ's issuance of municipal storm water permits.. We have reproduced the entire article below. For those who prefer to view it in PDF format, a copy will be posted on the Section's website: <http://www.osbenviro.homestead.com/>.

E-Outlook Editor

Patrick Rowe

[prowe@sussmanshank.com](mailto:prowe@sussmanshank.com)

## *Tualatin Riverkeepers v. ODEQ*

In *Tualatin Riverkeepers, et al. v. Oregon Department of Environmental Quality and Oregon Environmental Quality Commission*, (Or. App. April 28, 2010), several environmental groups sought review of National Pollutant Discharge Elimination System ("NPDES") storm water permits issued by DEQ to various municipal permittees (the "Municipal Stormwater Permits"). Petitioners contended that by not including numeric limits on discharges authorized by the permits, DEQ acted inconsistently with the requirements of ORS 468B.025(1)(b) and OAR 340-045-0015(5)(c), as well as ORS 468B.050 and OAR 340-042-0080. The Oregon Court of Appeals disagreed and held that DEQ acted within its discretion in accordance with all applicable state law.

### Clean Water Act Background

The opinion recognized that Oregon's legislature charged the Environmental Quality Commission ("EQC") and DEQ with interpreting and implementing Oregon's environmental legislation. Under the authority delegated to it, EQC promulgated rules requiring DEQ to implement 1987 amendments to the federal Clean Water Act ("CWA"). The federal amendments included a new requirement that municipal stormwater systems obtain permits to discharge stormwater and that such permits require the permittees to reduce pollution in discharges to the maximum extent practicable. Prior to those amendments permits were not required for stormwater discharges.

Following the 1987 amendments to the CWA, DEQ imposed the federal standard in municipal stormwater permits requiring reduction of pollution in stormwater discharges to the maximum extent practicable using best management practices.

### Compliance With State Water Quality Standards

Petitioners argued first that Oregon law required DEQ to go beyond the federal standard and include a condition in the Municipal Stormwater Permits that discharges may not cause or contribute to violations of in-stream water quality standards. According to Petitioners, Oregon law required DEQ to apply “more stringent” effluent limits on discharges of municipal stormwater than the federal maximum extent practicable standard.

The court concluded that there is no provision in Oregon law requiring regulation in addition to the federal standard. Read together, the court said that Oregon “statutes prohibit any person from discharging wastes into the waters of the state *if* those discharges would reduce the quality of that water below the state's water quality standards *unless* the person has a permit from DEQ specifically authorizing the discharge at issue.” Oregon statutes provide that DEQ “shall specify applicable effluent limitation” in a given permit.

The court held that DEQ was within its discretion in designating the federal standard requiring reduction of pollution to the maximum extent practicable using best management practices as the applicable effluent limits for the Municipal Stormwater Permits.

The court also rejected Petitioners argument that the statutory context required that any permit issued by DEQ must ensure compliance with state water quality standards. In doing so, the court explained that rather than imposing any specific limitation on DEQ’s authority to issue permits, the legislature by way of ORS 468B.020 “delegated broad discretion” for DEQ to apply in furthering Oregon’s policy set out in ORS 468B.015 of protecting state waters. Consistent with the federal standard, ORS 468B.020 requires DEQ to use “all *available and reasonable* methods necessary” to further Oregon’s policy and conform to water quality standards.

In short, pursuant to federal and state statutes, permits for the discharge of municipal storm water, unlike *other* NPDES permits, need not incorporate provisions requiring compliance with state water quality standards. In the context of municipal storm water, DEQ need not require permittees to do anything other than implement best management practices to reduce the discharge of pollutants in storm water to the maximum extent practicable.

### Compliance With TMDLs

Petitioners also argued that the Municipal Stormwater Permits violated OAR 340-042-0080. That rule that is part of a set of rules relating to Total Maximum Daily Loads (“TMDL”). A TMDL is

a written quantitative plan and analysis for attaining and maintaining water quality standards and includes the elements described in OAR 340-042-0040. These elements include a calculation of the maximum amount of a pollutant that a waterbody can receive and still meet state water quality standards, allocations of portions of that amount to the pollutant sources or sectors, and a Water Quality Management Plan to achieve water quality standards.

OAR 340-042-0030(15). TMDLs are established for pollutants in waters of the state that are identified, pursuant to 33 USC section 1313(d), as being water quality impaired. OAR 340-042-0040(1); 33 USC § 1313(d). Among other things TMDLs must include loading capacities (the amount of a pollutant that a waterbody can receive and still meet water quality standards), wasteload allocations (the portions of the receiving water's loading capacity allocated to particular point sources), and a water quality management plan (a framework of management strategies to attain and maintain water quality standards, including proposed strategies to meet wasteload allocations in the TMDL). OAR 340-042-0040(4).

Petitioners contended that the waste load allocations assigned by applicable TMDLs require DEQ to assign *numeric* effluent limits in the Municipal Stormwater Permits, rather than using Best Management Practices and appropriate benchmarks.

As part of the implementation of TMDLs, Oregon rules provide that "[f]or sources subject to permit requirements in ORS 468B.050, wasteload allocations and other management strategies will be incorporated into permit requirements." OAR 340-042-0080(4). In relation to TMDLs, the term "wasteload allocation" is defined to mean "the portion of [the] receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. [Wasteload allocations] constitute a type of water quality-based effluent limitation." OAR 340-041-0002(67). However, the rule does not specifically provide the manner in which those wasteload allocations must be implemented.

The opinion reasons that DEQ properly incorporated wasteload allocations into the Municipal Stormwater Permits. The applicable TMDLs set forth specific wasteload allocations for municipal storm water. The Municipal Stormwater Permits indicate the bodies of water for which TMDLs and wasteload allocations have been established and reference the specific TMDL for those bodies of water. The permits provide in the "adaptive management" section that, "[w]here TMDL wasteload allocations have been established for pollutant parameters associated with the permittee's [municipal separate storm sewer system] discharges, the permittee must use the estimated pollutant load reductions (benchmarks) established in the [storm water management plan] to guide the adaptive management process."

The permittees must evaluate progress toward reducing pollutant loads "through the use of performance measures and pollutant load reduction benchmarks developed and listed in the [storm water management plan]." The storm water management plan describes a program, including best management practices, designed to achieve reductions in TMDL pollutants. Failure to meet an approved benchmark is not, itself, a violation of permit conditions. However, such a failure gives rise to an obligation on the part of the permittee to follow the adaptive management process to improve the storm water management plan. Failure to engage in that process would be a violation of the permits.

E-Outlook May 2010

---

If you would like to contribute or have comments, please contact the E-Outlook Editor, Patrick Rowe, at [prowe@sussmanshank.com](mailto:prowe@sussmanshank.com) or (503) 241-1651.