

# **“Oregon Industrial Stormwater Permits”**

## **Stormwater Permitting Fundamentals Session 2A**

Presented by:  
Joan P. Snyder, Esq.  
Portland, OR  
December 6, 2016  
[joan.snyder@stoel.com](mailto:joan.snyder@stoel.com)

# OREGON INDUSTRIAL STORMWATER PERMITS

- AUTHORITY: Clean Water Act
- **GOAL: to prevent exceedance of**
  - in-stream
  - risk based criteria established for protection of
  - human health and ecological receptors

# NPDES PERMIT REQUIREMENT FOR STORMWATER DISCHARGES

- Unless statutorily exempt, **point source** discharges of **pollutants to waters of the United States** require an NPDES permit
- Stormwater discharges are exempt, except:
  - Most municipal separate storm sewer systems (**MS4s**)
  - Discharges “associated with **industrial** activity”
    - Defined by EPA’s regulations; includes construction activity
  - Discharges that EPA or the state determines contribute to a **violation of water quality standards** or are a **significant contributor** of pollutants

# OREGON'S NPDES INDUSTRIAL STORMWATER PERMITS

- General NPDES permits
  - **1200-A** (nonmetallic minerals) (expires Dec. 2017)
  - **1200-C, 1200-CN** (construction activities) (expire Dec. 2020)
  - **1200-COLS** (Columbia Slough) (expires Sept. 2016)
  - **1200-Z** (other industrial sources) (expires June 2017)
- Individual NPDES permits
  - Wood preserving facilities, which are categorically excluded from coverage under the 1200-COLS and 1200-Z permits
  - Facilities that voluntarily apply for an individual permit or that are required by DEQ to apply for an individual permit

# PROCESS FOR RENEWING THE 1200-COLS AND 1200-Z INDUSTRIAL PERMITS

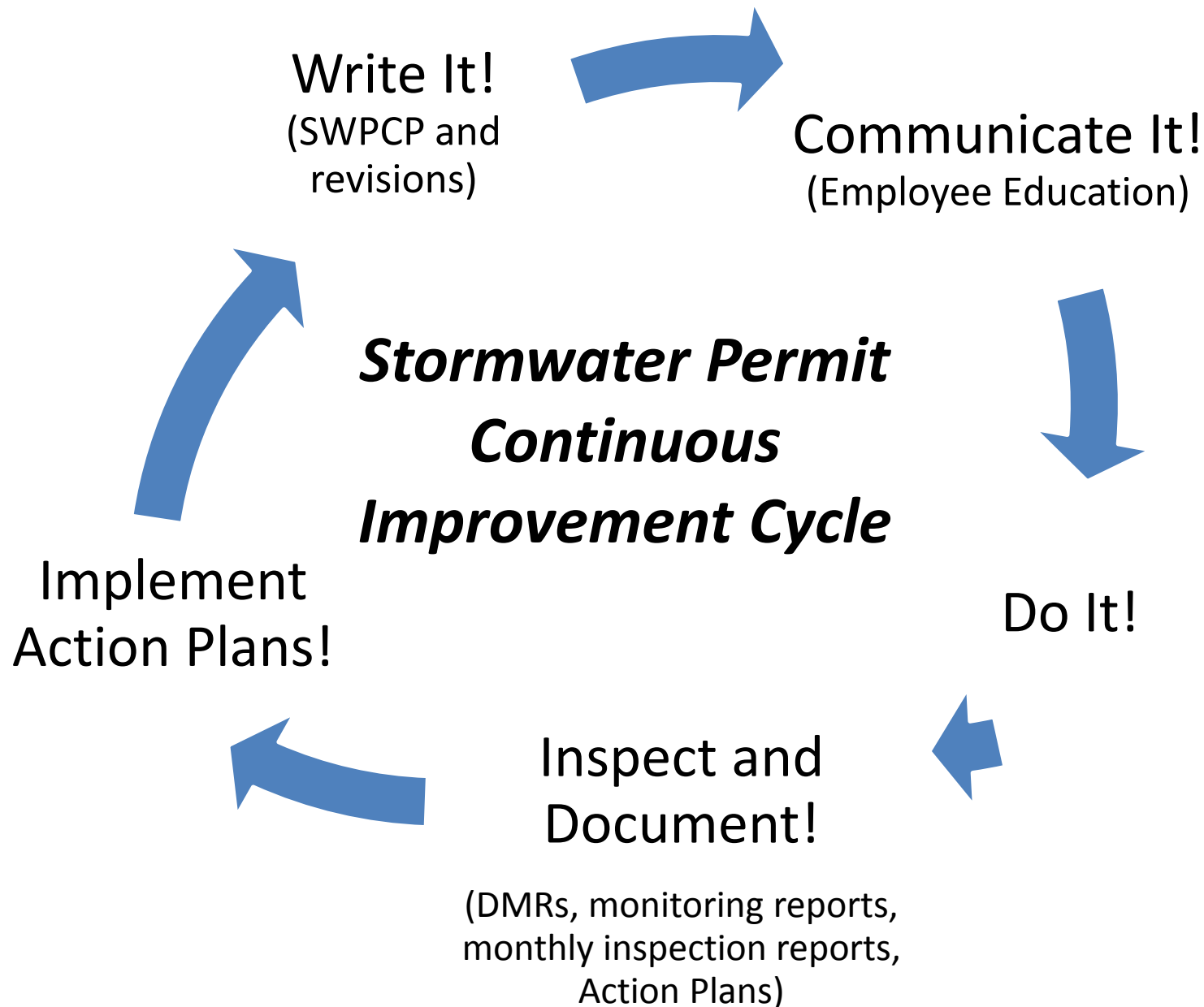
- Expiration dates
  - 1200-COLS: **Sept. 30, 2016**
  - 1200-Z: **June 30, 2017**
- General permit may be adopted by DEQ as an order or by the EQC as a rule (DEQ will renew 1200-COLS, 1200-Z as an order)
- General Permit Renewal Process
  - DEQ will prepare a proposed general permit
  - At least a 35-day public comment period on the proposal (early 2017)
  - DEQ will issue the general permit with a response to comments

# OBTAINING COVERAGE UNDER THE GENERAL PERMITS

- The general permit itself must specify how coverage is obtained; the renewed permit could modify these requirements
- Currently, the 1200-COLS and 1200-Z permits require:
  - An application for coverage
  - Public notice and a 30-day opportunity for written comment
  - Following the comment period, written DEQ approval of coverage
- Current requirements for renewing coverage
  - Submit a renewal application **before the permit expires (practice tip: watch for notice!)**
    - 1200-COLS: Due **August 1, 2016**
    - 1200-Z: Due **January 3, 2017** (may be later in NW Region)
  - If the renewal application is timely, coverage continues past the expiration date

# TENTATIVE DEQ PROPOSALS FOR RENEWING 1200-COLS AND 1200-Z

- Consolidate the 1200-COLS and 1200-Z into a single permit (1200-Z will be issued with basin-specific conditions, e.g Columbia Slough, Portland Harbor)
- Issue the new consolidated permit approximately when the 1200-Z permit expires (June 2017)
- Issue a “bridge” general permit for **new** 1200-COLS applicants between the permit expiration (Sept. 2016) and issuance of the consolidated renewal permit (June 2017)
- Use public meetings rather than an advisory committee to develop a proposed permit for public comment (both meetings already held)
- Want more details on the proposed permit?
  - NWECA, Dec. 6, 2:00 pm, “Lessons from the New Industrial Stormwater Standards”





# STORMWATER SOURCE CONTROL TIPS— WRITE IT!

- **SWPCP or ESCP**

- *should* address and meet every significant applicable term of stormwater permit
- *should not* include non-permit-required activities or even more ambitious schedules (use separate documentation):
  - “Failure to implement any of the control measures or practices described in the SWPCP is a violation of the permit.”
- Retain on site, and submit to DEQ or agent in limited circumstances

# STORMWATER SOURCE CONTROL TIPS-- COMMUNICATE IT!

- Train
  - Employees
    - All employees in areas where industrial materials exposed to stormwater and employees responsible for implementing SWPCP
    - Within 30 days of hire (or rotation into assignment)
    - Annually thereafter
    - **Document Training!! (who, what, where, when)**
  - Train Up (management, impacted operations )
    - Particularly penalties and cost consequences

# STORMWATER SOURCE CONTROL TIPS-- Do It!

- All of it
  - SWPCP *should not* include activities not required by permit that you may not do

# STORMWATER SOURCE CONTROL TIPS— INSPECT AND DOCUMENT!!

- Monitoring
  - Evaluate permit options to make best choices for your facility (use cost/benefit analysis for decision)
    - Grab or composite
    - Monitoring representative outfalls
  - Monitoring Variances for missed samples
    - If rainfall <20% of average, or no discharge due to retention, etc.
    - VERY important to have documentary record of this
      - Submit with DMR
      - Consider previewing with Agent

# STORMWATER SOURCE CONTROL TIPS— INSPECT AND DOCUMENT!! (CON.)

- Monitoring Waivers
  - Establish that geo mean of four consecutive sampling events < benchmark, then submit request to DEQ
  - Important, given cost
    - Approx. cost now for 3 metals (\$45), O&G (\$50), TSS (\$15)=\$105 per outfall
      - » Assume 2 outfalls and \$700 to pay for sampling = \$910 per event
      - » 4 sampling events a year = \$3640
    - E.g. with permit discharging to Lower Willamette
      - » Same from above = \$3640
      - » Add 303(d) impaired list twice a year –two more metals (\$20, more if need low DL), Pesticides (to get aldrin, dieldrin, DDX) (\$225), PCBs (\$170), pentachlorophenol (\$90), PAHs (\$300) = \$805 per outfall extra x 2 outfalls x 2 samples per year = \$3220 extra
      - » Add cadmium, chromium and nickel, 4 x a year for 2 years = \$240
      - » Total \$7100 in storm water monitoring direct costs

# STORMWATER SOURCE CONTROL TIPS— INSPECT AND DOCUMENT!! (CONT.)

- Monthly Inspections
  - Follow documentation requirements of permit, need to be able to show that BMPs applied
  - Keep for three years
- Reporting noncompliance which may endanger health or the environment
  - Within 24 hours
  - Written explanation within 5 days (or 4 days for upset or bypass)
- Reporting Any Other Noncompliance
  - At the time monitoring reports are submitted

# STORMWATER SOURCE CONTROL TIPS— INSPECT AND DOCUMENT! (CONT.)

- When you have a benchmark exceedance:
  - The benchmark exceedance is *not* a permit violation
  - These *are* permit violations if you have a benchmark exceedance:
    - Failure to investigate and determine if corrective action is required or if SWPCP revisions are required
    - Failure to prepare an *Action Plan/Tier I or II reports*
    - Failure to implement the corrective action
    - **DOCUMENT EACH STEP!**

# AVOIDING CITIZEN SUITS . . . BASIS FOR SUIT

- Clean Water Act (CWA), 33 USC 1365(a)(1), allows citizen suits for
  - Violation of effluent standard or limitation under CWA; or
  - Permit issued by state under CWA
- Can be filed by any citizen with “injury in fact”
- *IF* EPA or State not already “diligently prosecuting” the same violation
- And *IF* violations are not wholly past but are ongoing
- Requires 60-day notice of intent to sue
- Statutory penalties up to \$37,500 per day
- Successful plaintiffs recover their attorney fees, 33 USC 1365(d)



# AVOIDING CITIZEN SUITS . . . PERMIT SHIELD

- Both the CWA and DEQ's rules include a permit shield. The CWA provides:
- **Compliance with a permit issued pursuant to this section** [CWA § 402, which provides for National Pollutant Discharge Elimination System (NPDES) permits] **shall be deemed compliance, for purposes of sections 1319 and 1365 of this title** [CWA §§ 309, 505, which provide for agency and citizen suit enforcement, respectively, of NPDES permit conditions], **with sections 1311, 1312, 1316, 1317, and 1343 of this title** [CWA §§ 301, 302, 306, 307, and 403, which require compliance with technology-based effluent limits and water quality standards], **except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health** [CWA § 307, which EPA has implemented by promulgating the toxic pollutant effluent limits set forth in 40 C.F.R. part 129].

33 U.S.C. § 1342(k) (emphasis added).

# AVOIDING CITIZEN SUITS . . . PERMIT SHIELD

- DEQ's rules provide:

A permittee in compliance with [an] . . . (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 . . . (CWA) and ORS 468B.030, 468B.035, and 468B.048, and implementing rules, applicable to effluent limitations, including effluent limitations based upon water quality basin standards, and treatment systems operation requirements. This section does not apply to:

- (a) Toxic effluent standards and prohibitions imposed under Section 307 of the CWA, and OAR 340, division 41;
- (b) Standards for sewage sludge use or disposal under Section 405(d) of the CWA; or
- (c) Groundwater quality protection requirements as specified in OAR 340, division 40.

OAR 340-045-0080(1).

# AVOIDING CITIZEN SUITS . . . PERMIT SHIELD

- The policy underlying the permit shield is that, once these judgments have been embodied in an NPDES permit, a permittee should be responsible only for complying with the permit and should not be subject to an enforcement action if EPA, the state permitting agency, or a citizen later decides that different or additional control measures are required. In that event, the proper course is to modify the permit, not to punish the permittee who complied in good faith with the terms of its permit.

# AVOIDING CITIZEN SUITS . . . COMPLY WITH PERMIT!

- Proactive –Comply with the permit! (the 95% solution):
  - Suits must be based on (i) unlawful, unpermitted discharge; or (ii) violation of the permit.
  - Compliance with permit is key
    - Assume BMP commitments in SWPCP will be treated as “narrative effluent criteria”
  - Make sure agency record shows that compliance is also key
- Reactive:
  - Respond promptly if you receive a 60-day notice of intent to sue

# AVOIDING CITIZEN SUITS . . . ISSUE OF BENCHMARKS

- Benchmarks ARE NOT permit effluent limits, so exceedance of a benchmark itself is not a basis for a citizen suit
  - Citizen suits have alleged exceedance of benchmark indicates failure of BMP, and BMP=narrative effluent criteria

# Questions?



**Joan P. Snyder**  
**Stoel Rives LLP**

**[Joan.snyder@stoel.com](mailto:Joan.snyder@stoel.com)**

**503-294-9657**

- Joan has been an environmental lawyer at the Stoel Rives law firm for over 25 years. Joan's practice covers the full range of environmental law, including state and federal remediation projects, natural resource damages claims, compliance, permitting, enforcement, environmental aspects of business transactions, and health and safety law. She also helps clients avail themselves of coverage under historic insurance policies to pay the costs of responding to environmental claims. Joan is a former industrial chemist.