



MAYOR'S OFFICE

555 Liberty St SE / Room 220 • Salem, OR 97301-3513 • 503-588-6255 • Fax 503-588-6354

October 2, 2024

Aron Borok
Oregon Department of Environmental Quality
700 NE Multnomah St., Suite 600
Portland, OR 97232
ThreeBasin.Petition2024@deq.oregon.gov

RE: The City of Salem believes amendments to the Three Basin Rule are necessary to protect the residents and the environment of the Three Basins.

Dear Mr. Borok,

I submit these comments on behalf of the City of Salem in support of Marion County's Petition to Amend OAR 340-041-0350 (the Three Basin Rule).

As Mayor of the City of Salem, I have a responsibility to ensure the health and safety of our residents and our environment. Because Salem's drinking water comes from the North Santiam River, the health of the river's ecosystem is of paramount importance. To that end, the City of Salem fully supports the County's petition to amend the Three Basin Rule. Our support is based on three factors: (1) The proposed amendments will align Oregon law with federal law per a recent ruling by the U.S. Supreme Court; (2) The proposed amendments provide the only pathway for Publicly Owned Treatment Works (POTWs) located in one of the three basins to obtain a new or renew an existing discharge permit; and (3) The proposed amendments will result in discharge permits issued under federal law that are more protective of water quality than existing permits, which are issued under state law.

On April 23, 2020, the U.S. Supreme Court held in *County of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165 (2020) (the *Maui* decision) that discharges to groundwater are subject to the Clean Water Act (CWA) and require a federal National Pollutant Discharge Elimination System (NPDES) permit if the discharge is the "functional equivalent of a direct discharge to surface waters." To make that determination, the Court adopted criteria that applies a non-exclusive list of seven factors on a case-by-case basis. (See footnote on page 2).

In Oregon, prior to the *Maui* decision, discharges to groundwater fell exclusively within the jurisdiction of the State and were regulated through Water Pollution Control Facilities (WPCF) permits administered by the Oregon Department of Environmental Quality (DEQ). In contrast, direct discharges to most surface waters are regulated under the federal Clean Water Act through NPDES permits. The *Maui* decision now subjects certain qualifying groundwater discharges to federal jurisdiction under the CWA and requires an NPDES permit.

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Of serious concern is the impact the *Maui* decision will have on POTWs that are subject to the Three Basin Rule. Currently, the Three Basin Rule prohibits new or increased discharges from POTWs to surface waters and prohibits the issuance of new NPDES permits. However, the *Maui* decision ruled that discharges from POTWs will now require NPDES permits if the discharge is determined to be the functional equivalent of a direct discharge. In short, the *Maui* decision and the Three Basin Rule conflict. A POTW that discharges effluent to groundwater may be required to obtain, but is simultaneously prohibited from applying for, an NPDES permit. Upon learning of Marion County's intention to apply to DEQ for a WPCF permit for a new POTW to serve Mill City and Gates, it became evident to us that the groundwater discharges from that facility will easily satisfy the *Maui* test and qualify as being functionally equivalent to a direct discharge, requiring an NPDES permit.¹

Because the Three Basin Rule prohibits the issuance of new NPDES permits and the *Maui* decision requires one, the County is left without any permitting pathway. This situation is remedied by the proposed amendments to the Three Basin Rule. Additionally, as communities grow and infrastructure ages, this issue is expected to reoccur across the Three Basins generally as well as in the communities in the basins whose septic systems were affected or destroyed in the Beachie Creek and Lionshead wildfires in 2020 specifically. Given that the existing Mill City facility is both overstressed and outdated in terms of treatment technology, this inability to permit a new, upgraded facility will adversely impact the quality of the North Santiam River, a result that is contrary to the intent of the Three Basin Rule. In short, if amendments to the Three Basin Rule are not adopted, over time communities will be forced to maintain obsolete and inadequate facilities simply because modern facilities cannot be permitted. In the worst-case scenario, if DEQ makes a functional equivalent determination at the time an existing POTW seeks to renew its WPCF permit, the facility may be forced to cease operations entirely without any pathway to obtaining a new NPDES permit.

The Three Basin Rule was drafted in 1976 and does not allow for DEQ to make exceptions, be it categorical or on a case-by-case basis. Over time and setting aside the unique impetus for Marion County's new treatment plant, all POTWs operating under WPCF permits within the three basins will be required to obtain an NPDES permit if, upon seeking a permit renewal, their discharge to groundwater is found to be a functional equivalent of a direct discharge to surface water. Put simply, the Three Basin Rule as it now stands does not contemplate the possibility that a new groundwater discharger—or an existing groundwater discharger—would need to replace its WPCF permit with an NPDES permit.

Further, Marion County's amendment would serve the purpose of the Three Basin Rule—to preserve or improve the existing high-quality water for municipal water supplies, recreation, and preservation of aquatic life. The only difference the amendment makes to the Three Basin Rule is that POTWs meeting the *Maui* criteria would now be subject to the more stringent requirements of an NPDES permit rather than the less extensive requirements of a WPCF Permit.

¹ Based on the relevant facts, five of the seven named *Maui* factors in the Supreme Court's test weigh heavily in favor of the County's groundwater discharge being treated as the functional equivalent of a direct discharge to surface waters: 1) transit time, 2) distance traveled, 3) extent of dilution, 4) amount entering navigable waters relative to the amount of effluent, and 5) degree to which the pollution maintained its specific identity. The facts with regards to distance and travel time—the two most important factors according to the Supreme Court—are nearly identical between the facility in *Maui* and the proposed Mill City-Gates Facility. Given the two remaining factors are either ambiguous or are unable to be assessed, all relevant considerations lead to the conclusion that an NPDES permit will be required under *Maui*.

Compared to an NPDES permit, a WPCF permit does not have the same level of oversight or the range of remedies, and thus offers less robust protection. The increased toxics monitoring, the broader and more stringent effluent requirements, as well as the increased permit application and renewal requirements of an NPDES permit are necessary to ensure that the new facility does not negatively affect the drinking water supply of over 200,000 people and the uniquely high-quality water in the North Santiam River. It is for these reasons that Salem supports the County's petition but would oppose the issuance of a WPCF permit for a facility whose discharges are the functional equivalent of a direct discharge into the North Santiam River.

Any concerns that the proposed amendments to the Three Basin Rule will adversely impact water quality are misplaced. The amendments would not entail any increased risk of harm to the three basins or to Oregon residents. In fact, the opposite is true because the quality of treated effluent discharged from the Mill City-Gates facility (and any likely future POTW) will have a higher quality of treatment and will be subject to the stricter oversight and reporting requirements of an NPDES permit.

In summary, the proposed amendments to the Three Basin Rule are a win for POTWs, the rivers in the three basins, and Oregon residents. The proposed amendments will enable the state and permittees to comply with federal law as handed down with the *Maui* decision and provide a pathway for POTWs to obtain new and renewed discharge permits, resulting in higher quality discharges even as populations grow and community needs increase.

The City of Salem fully supports the County's petition to amend the Three Basin Rule as obtaining an NPDES permit is the only pathway forward for the Mill City-Gates Facility.

Sincerely,



Chris Hoy
Mayor