

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 TUALATIN RIVERKEEPERS, *et al.*,  
5 *Petitioners*,

6  
7 vs.

8  
9 OREGON DEPARTMENT OF  
10 ENVIRONMENTAL QUALITY,  
11 *Respondent*.

12  
13 LUBA Nos. 2004-050, 2004-051, 2004-054 and 2004-057

14 ORDER ON RECORD OBJECTIONS

15 The challenged decisions are decisions to renew four Phase I National Pollution  
16 Discharge Elimination System Municipal Separate Storm Sewer System Discharge permits  
17 (hereafter MS4 permits) for four municipalities in the Portland metropolitan region.  
18 Pursuant to a stipulation with respondent Department of Environmental Quality (DEQ),  
19 petitioners and intervenor-petitioner (petitioners) filed objections to the record on January  
20 13, 2006. The record objection lists 47 documents that petitioners believe were improperly  
21 omitted from the record. On January 17, 2006, petitioners filed an “addendum” that objects  
22 to the omission of an indeterminate number of a described class of documents. DEQ and  
23 several intervenors-respondent (intervenors) filed responses, agreeing to some of petitioners’  
24 objections but disputing others. We now resolve these objections.<sup>1</sup>

25 **A. Resolved Objections (Items 1, 3, 5-7, 14, 24-25, 43 and 46)**

26 As far as we can tell, DEQ has agreed to include and no party has objected to  
27 inclusion of items 3, 5-7, 14, 24-25, 43 and 46. DEQ shall submit these items in a  
28 supplemental record. In addition, we understand petitioners to withdraw the objection to  
29 item 1, based on DEQ’s stipulation that the document does not exist.

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<sup>1</sup> Petitioners request a telephone conference or oral argument to resolve the outstanding objections. We deny the request as unnecessary.

1           **B.       Disputed Objections**

2           For the remaining objections, with respect to some documents (items 15, 22-23, 31-  
3 39 and 42) DEQ agreed in discussions with petitioners to include the disputed item, under the  
4 belief that the items had been “placed before” the final decision maker within the meaning of  
5 OAR 661-010-0025(1)(b).<sup>2</sup> However, DEQ subsequently came to a contrary belief, and  
6 refused to include the disputed items that it had agreed to include. With respect to a second  
7 class of documents (items 2, 4, 19) DEQ continues to agree to include the disputed item, but  
8 one or more intervenor objects, typically on the ground that the item was not “placed before”  
9 the final decision maker. Finally, with respect to a third class of documents (8-13, 16-18, 20-  
10 21, 26-30, 40-41, 44, and 47) DEQ did not agree to include the disputed item, and either  
11 DEQ or one or more of the intervenors object to inclusion on one or more grounds.

12           Petitioners argue first that DEQ is bound by its initial agreement to include items 15,  
13 23-23, 31-39 and 42. With respect to the remaining disputed items, petitioners argue that  
14 DEQ incorporated these items into the decision or record, or that they were incorporated as a  
15 matter of law.

16                           **1.       Items 15, 22-23, 31-39 and 42**

17           According to petitioners, these items are storm water management manuals  
18 (SWMMs), adopted by the various municipal jurisdictions under slightly different names,  
19 that prescribe construction and development methods and practices to reduce the discharge of

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<sup>2</sup> OAR 661-010-0025(1) provides:

“Contents of Record: Unless the Board otherwise orders, or the parties otherwise agree in writing, the record shall include at least the following:

“(a)     The final decision including any findings of fact and conclusions of law;

“(b)     All written testimony and all exhibits, maps, documents or other written materials specifically incorporated into the record or placed before, and not rejected by, the final decision maker, during the course of the proceedings before the final decision maker.”

1 pollutants in storm water. Petitioners argued to DEQ that the DEQ section manager who  
2 issued each permit must have reviewed the SWMMs, because Table C-1 to each of the MS4  
3 permits references and imposes various requirements with respect to the SWMMs. For  
4 example, with respect to item 36, the table attached to one of the MS4 permits requires the  
5 City of Oregon City to update its SWMM “to allow innovative approaches that reduce  
6 pollutant loads” by September 2006. Record 54:24.<sup>3</sup> We understand petitioners to argue  
7 that because the permits require the SWMMs to be amended or updated in various ways, the  
8 DEQ manager that issued the renewed MS4 permits must have reviewed the SWMMs in  
9 order to determine whether and how the manuals should be updated. As noted, DEQ initially  
10 agreed to include the SWMMs, but later declined to do so, explaining in a footnote to its  
11 response that it has “since learned that the documents identified in objections nos. 15, 22, 23,  
12 and 31-39 were not placed before DEQ.” DEQ Response 5, n 5.

13 Even if the SWMMs were not before the decision maker, petitioners advance several  
14 alternative theories based on DEQ’s initial agreement to include the SWMMs, and federal  
15 regulations that petitioners argue had the effect of incorporating the SWMMs into the  
16 permits as a matter of law.

17 We need not address petitioners’ alternative theories, because we agree that  
18 petitioners have sufficiently demonstrated that the SWMMs were before the final decision  
19 maker. While we have consistently held that mere reference to documents in testimony  
20 before the decision maker is an insufficient basis to conclude that the referenced documents  
21 are incorporated into the record, where the decision itself refers to a document in a manner  
22 that suggests that the document was considered by the decision maker, absent some reason to  
23 conclude otherwise the document is part of the record. *Wiper v. City of Eugene*, 43 Or

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<sup>3</sup> There are four separate records in this consolidated appeal, one for each of the MS4 permits. We follow petitioners in citing to each record by the last two digits of the LUBA case number, followed by the page number. For example, page 24 in the record LUBA No. 2004-054 is cited as 54:24.

1 LUBA 649, 655 (2002); *Abadi v. Washington County*, 34 Or LUBA 753, 754 (1998). DEQ  
2 cites to *McKay Creek Valley Assoc. v. Washington County*, 19 Or LUBA 500, 505 (1990),  
3 for the proposition that a reference to documents in the findings does not make those  
4 documents part of the record. While *McKay Creek Valley Assoc.* indeed states that  
5 proposition, we do not understand that statement to be as categorical as DEQ asserts. In our  
6 view, the nature of the reference or other relevant circumstances may suggest that the  
7 document was or was not before the decision maker, a point *McKay Creek Valley Assoc.*  
8 illustrates. In that case, the staff report summarized raw data from two documents, and the  
9 final decision referenced the data and documents as a basis for its conclusion. It was  
10 undisputed that neither the raw data nor the documents were placed before the decision  
11 maker, and that the decision maker instead relied on the staff report summary. Under those  
12 circumstances, we concluded that reference to the documents in the decision did not make  
13 those documents part of the record.

14 Here, while we do not pretend to understand the purpose of the tables attached to the  
15 MS4 permits, the tables can be read to suggest that the decision maker reviewed the local  
16 jurisdiction's existing SWMM in determining whether to renew the MS4 permit for each  
17 jurisdiction, and as a result of that review imposed various requirements to update each  
18 individual SWMMs as part of permit implementation. While that suggestion is not  
19 compelling, it suffices to oblige DEQ or other parties to come forward with some basis to  
20 conclude that the decision maker did not in fact review the SWMMs. As noted, DEQ simply  
21 asserts without any explanation that the SWMMs "were not placed before DEQ." We do not  
22 wish to foreclose DEQ from coming forward with something to substantiate that assertion.  
23 However, as the pleadings now stand, we conclude that petitioners have met their burden of  
24 demonstrating that the SWMMs are part of the record. Petitioners' objections to the  
25 omission of items 15, 22-23, 31-39 and 42 are sustained.

1                   **2.       Items 2, 4 and 19**

2           These items involve documents that DEQ has agreed to submit but that one or more  
3 intervenors objects to, arguing that petitioners have not demonstrated that the documents  
4 were “placed before” the decision maker.

5           Item 2 is a document entitled Tryon Creek Baseline Assessment, which petitioners  
6 allege was submitted as an enclosure to a letter at Record 57:53. The letter identifies the  
7 document, states that it is “[e]nclosed” and that it is “meant for inclusion in the public record  
8 of this comment period.” *Id.* The City of Portland disputes that the document was placed  
9 before DEQ but does not explain the basis for that dispute. Petitioners have adequately  
10 demonstrated that the item 2 was submitted into the record.

11           Item 4 is a report that petitioners assert was submitted at the public hearing, as  
12 indicated at Record 57:103. The City of Portland states that it does not object to inclusion of  
13 the report, “provided that Petitioners can demonstrate that Tualatin Riverkeepers actually  
14 submitted it.” City of Portland’s Response to Record Objection 5. We agree with petitioners  
15 and DEQ that the record adequately demonstrates that item 4 was submitted and is part of the  
16 record.

17           Item 19 is the Multnomah County Storm Water Management Plan. Clean Water  
18 Services objects that petitioners have not demonstrated that the plan is part of the record.  
19 Petitioners explain that DEQ agreed to include each of the pertinent jurisdiction’s Storm  
20 Water Management Plans (SWMPs), because the MS4 permits expressly incorporate those  
21 plans as part of the decision. Petitioners appear to be correct. *See e.g.*, Record 51:2 (the  
22 SWMP and Associated Monitoring Program is hereby incorporated into the permit by  
23 reference”). Petitioners’ objections to the omission of items 2, 4 and 19 are sustained.

24                   **3.       Items 8-13, 16-18, 20-21, 26-30, 40-41, 44, and 47**

25           These items involve a variety of documents that either DEQ or one of the intervenors  
26 argue was not placed before the decision maker or incorporated into the evidentiary record.

1 For most of these items, petitioners merely note that documents in the record reference the  
2 items, without any explanation for why that reference supports a conclusion that the item is  
3 part of the record. As noted above, mere reference to documents in testimony or in other  
4 documents submitted into the record does not suffice to demonstrate that the disputed  
5 documents are part of the record. *Homebuilders Assoc. v. Metro*, 41 Or LUBA 616, 617  
6 (2002); *Downtown Community Assoc. v. City of Portland*, 31 Or LUBA 574 (1996).

7 With respect to items 10-11, 17-18, 28-29, 30, 44-45 and 47, we understand  
8 petitioners to argue that these documents were incorporated into the SWMPs, and thus into  
9 the MS4 permits. Petitioners note that Schedule A to each permit states that the SWMPs and  
10 associated monitoring program include “best management practices.” *E.g.* Record 57:02.  
11 Petitioners then cite to federal regulations that describe certain “best management practices,”  
12 and argue that items 10-11, 17-18, 28-30, 44-45 and 47 fall within that description.  
13 Therefore, we understand petitioners to argue, the disputed items were incorporated into the  
14 SWMPs and hence into the MS4 permits, either by DEQ or by operation of federal law.

15 We disagree. A decision maker may incorporate another document by reference into  
16 the decision only if the decision maker clearly indicates its intent to do so and adequately  
17 identifies the document incorporated. *See Gonzalez v. Lane County*, 24 Or LUBA 251, 259  
18 (1992) (describing how documents may be incorporated as findings to support a decision).  
19 The portions of the challenged decisions cited to us fall far short of that mark. Nor do we see  
20 that the federal regulations cited to us have the effect of incorporating items 10-11, 17-18,  
21 28-30, 44-45 and 47 into the SWMPs or MS4 permits as a matter of law.

22 Petitioners’ objections to omission of items 8-13, 16-18, 20-21, 26-30, 40-41, 44, and  
23 47 are denied.

#### 24 **4. Addendum to the January 13, 2006 Record Objection**

25 In discussions with DEQ, petitioners apparently made an open-ended request that the  
26 record include “correspondences, paper and e-mail, between DEQ, the permittees and the

1 public regarding the MS4 permits at issue.” Addendum to Petitioners’ Record Objection 2.  
2 However, petitioners failed to state that objection in the January 13, 2006 record objection,  
3 within the stipulated deadline for filing record objections. Four days after that deadline  
4 expired, petitioners submitted an addendum objecting to omission of the requested  
5 documents. Attached to the addendum are three examples of the kinds of correspondence  
6 and e-mails that petitioners believe fall within the scope of the request.

7 DEQ and intervenors object to the addendum, arguing that it is untimely and in any  
8 case fails to adequately identify the documents that were allegedly omitted. DEQ also argues  
9 that none of the three example documents are properly part of the record, in one case because  
10 the document predates the permit applications and in the other two cases because the  
11 documents relate to the general administration of the permit program, not to particular  
12 permits.

13 We agree with DEQ that petitioners have not established, based on the three  
14 examples, that DEQ erred in omitting a class of documents from the record. As far as we  
15 can tell, none of the three examples directly relate to the MS4 permits at issue. We  
16 understand DEQ to take the position that it has included in the record all correspondence  
17 relating to the MS4 permits that was placed before the decision maker. Without some  
18 assistance from petitioners in identifying omitted documents and an explanation as to why  
19 petitioners believe the omitted items were placed before the decision maker, we have no  
20 basis to sustain this record objection. Petitioners’ objections based on the addendum are  
21 denied.

22 **C. Conclusion**

23 DEQ shall submit one or more supplemental records in accordance with the  
24 objections sustained above.

25 Dated this 15th day of March, 2006.  
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Tod A. Bassham  
Board Member