



Oregon DEQ
Water Quality Division
811 SW 6th Ave.
Portland, OR 97204

DEQ

MAR 27 2011

Water Quality

March 15, 2011

RE: Revised Water Quality Standards and Implementation Policies

Gentlemen:

Please consider this a comment on the aforementioned proposed rules.

Although much could be said about the imprecise means used by the DEQ in determining that people in Oregon consume 175 grams/day of fish, our comments focus on three points: Severe and widespread economic hardship; the lack of an appropriate variance structure; and, most importantly, the attempt to change the basis of nonpoint source regulation from a practicable standard to a numeric standard.

1. **Severe economic hardship.** The DEQ's draft memorandum, dated Oct. 6, 2008, on page 5, states as follows:

"Therefore, a significant policy issue and component of this rulemaking is to develop implementation tools that DEQ can use to ensure that toxic pollutant control and reduction efforts occur in the most environmentally meaningful, cost effective, and equitable manner possible, without causing *severe or widespread economic hardship*." (emphasis added).

This comment, contained in the Oct. 6, 2008 draft memorandum, clearly indicates that the DEQ understands the danger to the economy these draft rules constitute. In attachment A to the Oct. 23, 2008, EQC meeting, the DEQ states:

"Ideally, for the three governments to develop feasible implementation options, the economic effects (both costs and benefits) of each option need to be understood."

To achieve this necessary goal (understanding the economic effects), the DEQ retained Science Applications International Corporation to perform a "cost of compliance with water quality criteria or toxic pollutants for Oregon waters" analysis. Under ORS 183.335 (2)(b)(E) the agency is to provide:

"A statement of fiscal impact identifying State agencies, units of local government, and the public which may be economically affected by the adoption, amendment, or repeal of the rule, and an estimate of that economic impact on State agencies, units of local government, and the public. In considering the economic effect of the proposed action on the public, the agency shall utilize available information to project any significant economic effect of that action on businesses which shall include a cost of compliance effect on small businesses..."

The SAIC report does not meet the standard required by ORS 183.335. Specifically, as to “point source costs” the report states: “Thus it is not possible to estimate pre-treatment or P2 costs to indirect discharges for pollutants other than mercury without specific information on the types of industrial discharges in each service area.”

For nonpoint source and storm water costs, the report states: “Thus, the additional controls needed for compliance or the baseline could not be estimated. There are, however, indications that baseline compliance costs for nonpoint sources and storm water discharges could be substantial.”

At the end of the Executive Summary, on page 7 under paragraph ES.8, “Uncertainties in the Analysis,” the report is rendered moot by virtue of the lack of data and other criteria.

It is apparent that the DEQ is “proceeding blind” and has no idea of what the costs of implementation might be. When Oregon is struggling to emerge from a damaging recession, why would one of its own agencies develop rules and standards which, if left unchanged, could impose huge and unavoidable costs upon its businesses, cities, and farms?

2. How will point source operators obtain a variance?

The proposed OAR 340-041-0059 fails to clearly state that the State of Oregon will employ the “Use Attainability Analysis” in developing variances. The rule does not mention “Use Attainability Analysis,” nor does it state that the Department will cooperate in all respects, including bearing a part of the cost, in developing a “Use Attainability Analysis.” The failure to provide this methodology for effected point source dischargers creates a barrier to compliance that will be extraordinarily expensive, if not impossible, to overcome.

3. Change in nonpoint source regulation.

The applicable regulatory standard of nonpoint sources of pollution is currently a “practicable” standard. This can mean different things depending on the type of land involved, but essentially, the operator is obligated to comply with practicable measures to reduce nonpoint source pollutants migrating into waters.

The proposed rule changes this “practicable” standard to a “numeric” standard. The language that effects this change is found on page 16, under the following heading “340-041-0061 (1)(11)”, which reads:

“In areas subject to the Agricultural Water Quality Management Act, the Oregon Dept. of Agriculture (ODA) under ORS 568.900-568.933 and 561.191 develops and implements agricultural water quality management area plans and rules to prevent and control water pollution from agricultural activities and soil erosion on agricultural and rural lands. Area plans and rules must be designed to achieve and maintain water quality standards. If the Department determines that the area plan and rules are not adequate to achieve and maintain water quality standards, the Department will provide the ODA with comments on what would be sufficient to meet WQS or TMDL load allocations. In addition, the Department may request the Environmental Quality

Commission (EQC) to petition for a review of part or all of water quality management area plans and rules. If a person subject to an ODA area plan and implementing rules causes or contributes to water quality standards violations, the Department will refer the activity to ODA for the evaluation and potential requirements. The Department may also require remedies of a person causing pollution or contributing to water quality standards violation if ODA does not take action.”

This rule changes the current “practicable” standard to a “numeric” standard by reference to “Water Quality Standards violations” and to “WQS or TMDL load allocation”.

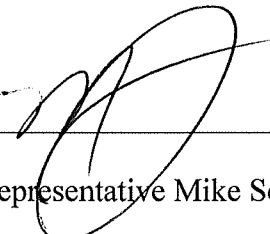
In the “Revised Proposed Rulemaking Announcement,” page 1, left hand column, last paragraph, the notice states:

“Further, revisions to the water quality standards and Total Maximum Daily Load (TMDL) rules are intended to make DEQ’s rules consistent with State statutes affecting *nonpoint sources* of pollution and for DEQ to assign pollution load allocations to significant land and air sources in TMDLs.” (emphasis added).


This is a major and unnecessary change, and, further, incorrectly states that these rules “make DEQ’s rules consistent with State statutes affecting nonpoint sources of pollution.”

The statutes concerning nonpoint source pollution are ORS 468B.010 to 110. Nowhere do these statutes suggest that the state can regulate nonpoint sources to numeric standards. Such use of Oregon statutes contravenes the clear intent of the Clean Water Act.

These issues demand the DEQ and the EQC’s immediate attention. We ask that the rule be modified so that it is consistent with Oregon and Federal law.



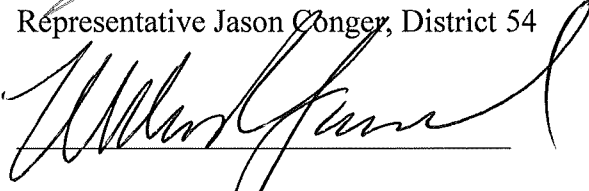
Representative Mike Schaufler, District 48




Representative Jason Conger, District 54



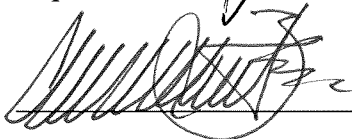
Representative Mike McLane, District 55



Representative Bill Garrard, District 56



Representative Bob Jenson, District 58



Representative Cliff Bentz, District 60

