Compilation of Non-NPDES Workgroup Comments Received by DEQ

*Via e-mail*

**1. ACWA—Dave Kliewer**

Gene (Koto and Deb):

Thank you for the additional opportunity to comment on the materials and discussion from the last Non-NPDES meeting. I represent ACWA, but since I have had little time since the meeting to develop these comments much less shop them with others at ACWA, please take these in a spirit similar to verbal comments I might provide at the meeting itself. I'm sure others will chime in with corrections or comments if I stray too far from the broader ACWA intent.

Following the outline of your email request below, Gene, my comments are:

Implementation Ready TMDLs

* Many of the recommendations rely on the development of an IMD for their implementation. As we move forward with any sort of policy or rule development it is critical to have the kind of details contained in an IMD to know what the implications of those policies and rules might be. Compiled together into that one IMD should be at least a finer scale of detail, specific timelines for implementation, and the other elements contained in several of the recommendations referencing the use of an IMD. Those IMD discussions should begin now to be useful in the context of these discussions.
* Recommendation #2 on Page 2 relating to Div 42 language changes to include air and land sources should be kept in this package for rule adoption. On Page 5 under "advantages/disadvantages",  "...may subsequently..." is used in reference to modification of air rules to implement the load allocations: That process should begin now so it will comport with the adoption of the Div 42 rules.

Division 41 Rule Changes

The suggestions are primarily clarifying in nature, better describing the existing nature of the current roles of DEQ, ODF and ODA in managing water quality programs. However, what is needed is a fundamental shift in the way those interaction occur and the level of accountability for non-NPDES sources meeting water quality standards. The proposed changes do not accomplish that goal.

Antidegradation Related to Non-NPDES Sources

The draft DEQ recommendation proposes modification of the antidegradation IMD to describe how the antidegradation policy will be implemented for nonpoint sources, but does not go as far as to recommend policy or rule changes for that issue.  The revision of the IMD is a good first step, but does not go far enough, have sufficient strength, nor is it's continuance assured since it is administratively issued. So I do not support the DEQ recommendation, and prefer moving this forward as a rule.

As for comments on the paper:

* The questions considered in evaluating antidegradation proposals (bottom of Page 3, top of Page 4): The first bullet: Will the same criteria "cost-effective" be applied in the administration of the point source program? The last bullet refers to availability of resources as a criteria for acceptance. Any process of selection like this is a matter of prioritization. Limiting options to available resources would make this a first come, first served process. Make decisions based on goals and needs first, then decide among all prior and new activities to decide what should be done within available resources.
* Recommendation #1 on Page 4: This will provide additional clarification and should be done. However, this will provide none of the additional authorities needed to assure implementation and will only better describe the status quo.
* Recommendation #2 on Page 5: As noted above, an IMD will provide necessary information about implementation and responsibility. "Reasonable and cost-effective" is not purely a technical question as the text seems to imply. What sort of public process will happen to determine the criteria for such determinations? IMDs are usually not the platform for such discussions, so policy or rule adoption may need to occur in tandem with IMD development.
* Comment regarding the "..not recommended by DEQ." section starting on Page 7: I'm not sure how antidegradation would apply to "existing" nonpoint sources. Wouldn't any "existing" source that changes type, volume or location be considered "new" by definition? If an existing source doesn't change in one of those ways, how would it potentially degrade waterways?
* Page 10, "DEQ recommendation " in the middle of that page: "DEQ finds that the scope of this policy is large and a fundamental change for Oregon and the relationship between DEQ, ODA and ODF that was established by state legislation." Although that statement was directed at a specific Mixed Media suggestion, a fundamental change is exactly what is needed to effectively manage statewide toxics in general. Although large in scope, the extent of the problem is also large. DEQ should start now to instigate and champion those changes for all potential sources of toxics, either in this process or through the Statewide Toxics Reduction Strategy and it's implementation.

Dave Kliewer

ACWA

**2. Oregon Small Woodlands Association--David A. Ford**

**TO:**           DEQ Staff  
  
**FROM:**      David Ford, OSWA Executive Director  
  
**SUBJECT:**  OSWA Comments on DEQ WQS Process and Documents   
  
Please consider the comments below on behalf of the Oregon Small Woodlands Association.

First, I apologize for not participating in the recent work group meetings held by DEQ due to internal organizational demands.   I want to assure you that OSWA and its members are keenly interested in the DEQ WQS process and outcomes.  We plan to participate in future meetings and provide ongoing comments to insure our views are part of the record.

In light of the June 1 letter from EPA to Oregon DEQ, describing EPA's disapproval of region's 2004 toxics criteria for protection of human health - based on the fact that these criteria do not provide protection for high fish consumers in Oregon, we urge you to:

        Focus your immediate efforts on explaining the June 1, 2010, EPA action to family woodland owners, other regulated entities and the public; and

         Inform us, other regulated entities and the public about any policy and regulatory implications for DEQ’s currently contemplated rulemaking on Toxic WQS based on EPA’s approval action.

Further, we believe that DEQ should refocus its work on the point source aspects and implementation measures for the Human Health Toxics WQS.  OSWA believes that DEQ's expansion into non-point source issues related to forestland is not warranted at this time.

OSWA fully supports the comments submitted by Chris Jarmer of OFIC as stated below:  
   
“Some general comments first, followed by a few comments specific to a document provided in the meeting materials.  
   
· I’m probably overly sensitive to this, but nobody in forestry believes we have a “BMP shield” as it is referred to in many of the documents.  We have a different way of complying with the law.  A shield infers protection from something which I believe is fundamentally incorrect.  
  
· There is a pervasive feeling to the documents that nothing is being done on NPS pollution. Case in point:  “TMDLs have been the main tool to address nonpoint sources…”  That is incorrect for forestland.  We have been operating under the FPA for nearly 4 decades.  I think you heard from me and others yesterday that little or no credit is given in this whole process to the hard work and good things being done.  That hurts.  And it makes one much less likely to want to either continue doing what they are doing, or more likely, be asked to do even more.  
  
· I have said this before, and I’ll say it again here.  Water quality in Oregon is generally improving as we learn more and more and implement effective preventative strategies. Changing the location of the goalposts doesn’t make the problem worse, it makes it look different. That’s how I see changing the fish consumption rate and the resultant changes to numeric criteria.  We have x amount of mercury in the system now, and once the EQC acts on the rule package we are likely to still have the same amount.  But the problem will look much worse and many will wring their hands about this huge new problem.  But that won’t change the fact that we are all trying our hardest right now from keeping that amount from growing.  Redefining the problem isn’t likely going to make any new inroads into solving it.  And while we are on mercury, to answer Commissioner Williamson’s challenge, I don’t believe the numbers.  OFIC challenged (and lost) many technical pieces of the Willamette TMDL, both on mercury and temperature.  We still don’t feel the problem is properly characterized and therefore struggle with finding efficient and appropriate ways to solve it.   
  
· This process has been a challenge for you I know, and I appreciate the constraints you are under.  But having active litigants in the room on the topics of conversation, along with agency representatives of the federal government who are actively trying to force changes in the FPA via another process is not appropriate in my mind.    
  
· I found it unfortunate how much conversation there was, and reference to in the documents, the end game of the EQC petitioning either the Director (Ag) or the Board of Forestry.  That signals that the process has broken down.  If it has truly broken down, that means the staffs have exhausted their abilities to find a solution.  That means in my mind that nobody agrees with the other guy, so if the EQC petitions the Board, the Board is likely going to be forced to petition the EQC to change its water quality standard.  The escalation of hostility would be almost immediate and totally unproductive for environmental protection.  So instead of the orderly way in which it was discussed, that process is something to be avoided, not pursued.  
  
· I am generally confused by the Antidegradation document.  The suggestions do not look particularly threatening, but I also do not understand what they will accomplish.  Plus, I am of the opinion that for NP this is fundamentally a round peg/square hole issue.  If water quality is OK where NP source activity is going on, doesn’t that equate with activities achieving standards?  And therefore we need to do something additional?  I can see adding point source loading being different, but we generally don’t add acres to NP source activity.  
  
Division 41 Document  
· Page 3, changes to -007:  Disagree completely.  They will be inconsistent with ORS 527.  You are trying, by rule, to force the Board of Forestry to do something inconsistent with their statutory authority.  I warned that this was a likely outcome in previous meetings.  
  
· Page 4, changes to -0061:  Disagree completely.  See bullet point above and reference to “BMP Shield” above.  Also, the language referencing violations describes the process in place now.  
  
Implementation Ready Document  
· Page 2, second bullet above applies here.  
  
· Page 4, recommendation 2 is a bit confusing.  But if we can give transportation and the Chinese power plants a mercury load allocation, I am all for it.  
  
· Page 6, B1.  I disagree.  I think for forestry we’ve had a robust method for evaluating adequacy for years.  Perhaps not explicitly for TMDL load allocations, but for overall adequacy there are many things in place.  I think the confusing part is the round peg/square hole that NP sources are that confounds us.  Where do we measure?  What?  When?  All of those things matter whether we are trying to determine compliance for a standard or TMDL.”

Thank you for the opportunity for the Oregon Small Woodlands Association to participate and to provide comments in this process.

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David A. Ford  
Executive Director  
Oregon Small Woodlands Association  
  
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**3. Michael R. Campbell**

Thank you for the opportunity to comment on DEQ’s draft Implementation Ready TMDL Issue Paper and DEQ’s draft OAR 340-041 rule language.  I have only a few, brief comments:

Implementation Ready TMDL Issue Paper

1.  I share DEQ’s concerns about the additional resources needed to prepare implementation-ready TMDLs.  DEQ’s TMDL resources must first be devoted to meeting its statutory TMDL obligations.  Only then can it devote any remaining resources to developing the substantial additional information and analyses that implementation-ready TMDLs would require.

2.  Proposed rule language for air deposition and land sources.  The proposed rule revision would append the phrase “as well as air deposition and land sources” to OAR 340-042-0040(4)(g).  Subsection (4)(g) applies to “wasteload allocations.”  Subsection (4)(h) applies to “load allocations.”  Wasteload allocations are for “point sources” under the Clean Water Act NPDES permit program; “load allocations” are for nonpoint and other sources under the Clean Water Act.  Although air deposition sources may be “point sources” in a generic sense, they are nonpoint sources for purposes of the Clean Water Act.  (“Point sources” under the Clean Water Act, for example, must, with very limited exceptions, obtain NPDES permits.)  To avoid confusion on this score, any reference to air deposition and land sources should be included in subsection (4)(h), not (4)(g).  (If the concern is that DEQ wishes to assign allocations to individual air and land sources, DEQ can and does assign load allocations under subsection (4)(h) to individual nonpoint sources (*e.g.*, to hydroelectric projects).)

3.  I agree that substantial additional thought needs to be given to which air deposition and land sources would be considered “significant,” to how the contributions of these sources to water quality impairments would be determined, and to how load allocations to these sources would be implemented.

OAR 340-041 Rule Language

4.  Proposed OAR 340-041-0007(5) would require logging and forest management activities to meet Oregon water quality standards and TMDL load allocations, rather than, as now, the requirements of the Forest Practices Act.  The proposed revision exceeds DEQ’s authority and is inconsistent with ORS 527.765(1), which provides that the Board of Forestry is to establish forest practice rules “to insure that *to the maximum extent practicable* nonpoint source discharges of pollutants . . . do not impair the achievement and maintenance of water quality standards.”  DEQ cannot directly regulate forest practices, and forest practice rules set by the Board of Forestry require compliance with water quality standards only to the maximum extent practicable.

Thank you again for the opportunity to comment on these proposals.

**Michael R. Campbell**

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Debra:

I support DEQ’s recommendation not to propose revisions to the antidegradation rule at this time.

In addition, I would only note that ORS 527.765(1) requires nonpoint forest operations to meet water quality standards only through rules promulgated by the Board of Forestry and only to the “maximum extent practicable.”

Thanks.

--Michael

**Michael R. Campbell**

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**5. Northwest Pulp & Paper—Kathryn VanNatta**



June 3, 2010  
  
**TO:**           DEQ Staff  
  
**FROM:**      Kathryn VanNatta  
  
**SUBJECT:**  NWPPA Comments on DEQ WQS Process and Documents   
  
Please consider the comments below on behalf of participants Kathryn VanNatta and Rich Garber.  
  
Overarching Comments

1. DEQ must concentrate all current agency work on disseminating and explaining June 1, 2010, EPA action on the 2004 Toxics Water Quality Standards to regulated entities and the public.
2. DEQ should immediately address and disseminate any policy and regulatory implications for DEQ’s currently contemplated rulemaking on Toxic WQS based on EPA’s approval action.
3. DEQ then should concentrate all agency work on the point source aspects and implementation measures for the Human Health Toxics WQS.  NWPPA believes the policy advisory process and it expansion to nonpoint source issues has become a large, cumbersome and time consuming process for the amount of available DEQ resources.  The recent EPA action has only added additional items to DEQ’s workload.

TMDLs

* TMDL language relating to air source contributions needs to define “significant” air sources as they relate to air transport within the local and regional air sheds and international deposition  from outside the air shed.  Merely saying a source is ‘significant’ is not a standard of review for a modeling exercise including local air sources.

Antidegradation

* Antidegradation rule changes should not be part of the January 2011 rulemaking package and should be delayed.

[Comments received from NWPPA on variances are included on the RWG response compilation document]

Thank you for the opportunity to provide comment.  I can be contacted at 503-844-9540 to answer any questions.

**6. Oregon Environmental Council--Teresa Huntsinger**

**From:** HUNTSINGER Teresa   
**Sent:** Thursday, June 03, 2010 1:44 PM  
**To:** KISHIDA Koto  
**Subject:** RE: Misl updates/reminders for human health toxics rulemaking workgroup members

Hi Koto,

Allison and I were both out of town for the May 20 toxics workgroup meetings. I took a look at the issue papers, and there was one thing that jumped out at me regarding the Implementation-Ready TMDLs issue paper. Section #3 under TMDL implementation describes evaluating the effectiveness of BMPs for TMDL compliance, and it specifically mentions developing design criteria for buffer strips. I would like to note that there is also a need for design criteria for stormwater management facilities. Many small cities that fall outside of the NPDES permit requirements and need to improve their stormwater management to comply with TMDLs lack technical knowledge. In the “Stormwater Solutions” workshops we provide around the state, public works staff often ask how they are supposed to decide how to size facilities and which design guidelines to use, because DEQ does not provide any guidance. Many simple copy Portland’s guidelines, even though they may need to be modified for smaller communities in other parts of the state. There is a need for DEQ to develop model design specifications for stormwater facilities, including LID/green infrastructure facilities. This would benefit TMDL implementation as well as phase II stormwater permits. Many other states have statewide stormwater design guidelines, but Oregon does not.

Thank you for the opportunity to comment. We expect that one or both of us will be able to attend the next meeting. Allison will be back from Africa by then.

Best,

Teresa

Teresa Huntsinger | Program Director

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**7. ODF—Peter Daugherty**

Andrea,

I am unsure whether ODF will have staff available to attend the May 20 Non-NPDES meeting.  The person covering this topic is not available, and the Private Forests Program is holding a statewide conference.  I have briefly reviewed the documents and noticed an problem in your definition of activities not covered under the FPA (in Div41 Potential Amendment 05202010.doc).

The document proposes the definition:

“’Forest Operations not applicable to Forest Practices Act’ are “Operation” defined under OAR 629-600-0100(47) that are not “Commercial” as defined under 629-600-0100(11).” These operations are excluded from coverage under Oregon Forest Practices Act, and are subject to OAR 340-041.

However OAR 629-600-0100(47) states: ‘ “Operation” means any commercial activity …’; putting that definition into the proposed definition for Div 41, results in:

“’Forest Operations not applicable to Forest Practices Act’ are any commercial activity that are not “Commercial” as defined under 629-600-0100(11).” These operations are excluded from coverage under Oregon Forest Practices Act, and are subject to OAR 340-041.

All operations are covered by the Forest Practices Act because a ‘“Forest Practice” means any operation conducted on or pertaining to forestland’ [ORS 527.620(5)].  So it might work better to try to define “activities” not covered by the Forest Practices Act.   Note: that “Operation” is also defined in statute [ORS527.620(12)]; it is same definition as rule.

Thanks, Peter

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**8. OR Forest Industries Council—Chris Jarmer**

Everyone

Some general comments first, followed by a few comments specific to a document provided in the meeting materials.

* I’m probably overly sensitive to this, but nobody in forestry believes we have a “BMP shield” as it is referred to in many of the documents.  We have a different way of complying with the law.  A shield infers protection from something which I believe is fundamentally incorrect.
* There is a pervasive feeling to the documents that nothing is being done on NPS pollution.  Case in point:  “TMDLs have been the main tool to address nonpoint sources…”  That is incorrect for forestland.  We have been operating under the FPA for nearly 4 decades.  I think you heard from me and others yesterday that little or no credit is given in this whole process to the hard work and good things being done.  That hurts.  And it makes one much less likely to want to either continue doing what they are doing, or more likely, be asked to do even more.
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* This process has been a challenge for you I know, and I appreciate the constraints you are under.  But having active litigants in the room on the topics of conversation, along with agency representatives of the federal government who are actively trying to force changes in the FPA via another process is not appropriate in my mind.
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Division 41 Document

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Implementation Ready Document

* Page 2, second bullet above applies here.
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