

MEMO

Date: May 13, 2010

To: Non-NPDES Elements of Water Quality Toxics Rulemaking Workgroup

From: DEQ Water Quality Division

Re: Scoping Evaluation for Non-NPDES Elements of Water Quality Toxics Rulemaking

This memo presents DEQ's staff analysis and final decisions for Non-NPDES elements of the water quality toxics rulemaking. Specifically, it identifies those items recommended by both DEQ and stakeholders to be included in the rule-making package. DEQ appreciates the hard work the Non-NPDES Elements of Water Quality Toxics Rulemaking Workgroup has provided.

Introduction

The EQC issued a directive to DEQ to develop rules or other implementation strategies to reduce toxic pollution from sources not regulated by permits under the federal Clean Water Act. Many ideas have been generated by the workgroup and DEQ staff to address this directive. In order for DEQ to adhere to our rulemaking timeline, DEQ made a final decision on the scope of the water quality rulemaking package at the beginning of May 2010. Items that are not included in this rulemaking package will be considered under the agency's cross-media Toxics Reduction Strategy.

In addition, the Workgroup can choose to continue to meet to develop recommendations to DEQ or to the EQC about further actions following completion of the rule development work by the Workgroup estimated to be completed by September 2010. Further actions could include additional rulemakings, working with partner agencies, voluntary or incentive-based programs, etc. DEQ will reserve time at the end of our series of meetings focused on the rulemaking package to provide an opportunity for the Rulemaking Workgroup to discuss and decide if they wish to pursue development of any additional recommendations.

DEQ has evaluated the actions and policies identified by stakeholders and determined whether they will be included in the scope of the current rulemaking effort. The five questions listed below have been used to evaluate each suggested priority idea:

1. Is the proposed item one that the EQC has the authority to adopt or is there a statutory impediment to EQC adoption?
2. Does DEQ, ODA, or ODF already have authority in rule or statute for the proposed item? If yes, is implementation of the proposed item required or discretionary by the OAR or ORS?

3. Is the proposed action or policy something that is appropriate to adopt as an administrative rule? Does it need to be adopted as a rule, or could it be implemented through guidance (IMD), initiative or other project or program?
4. If the proposed action or policy is appropriate to adopt as an administrative rule, should it be included in the current rulemaking package? In order to answer this question, DEQ will consider the following:
 - The timeline of this project.
 - Probability that scope and issues can be addressed in timeframe of this rule.
 - Is it appropriately a water quality program rule?
 - Would the proposed action significantly reduce toxics in the environment?
 - Are the affected stakeholders involved in the current process?
 - Would it require significant new funding/resources to implement?
5. Is critical information about the proposed action or rule available so that timely evaluation and action by DEQ is feasible?

Staff Analysis and Conclusions

Items Determined to be Included in the Rule Package

Summary

Based on the staff analysis, DEQ determined that the following items should be considered for this rulemaking.

A. ANTIDegradation. Control toxic pollutants by clarifying Antidegradation policy for nonpoint sources.

Existing statute gives the EQC authority to control toxic pollutants from nonpoint sources through the state's antidegradation policy in Division 41. However, there is no implementation guidance as to how the policy applies to nonpoint sources. To achieve the goal of clarifying the policy, rulemaking is not necessary but could be beneficial. Alternatively, it could be achieved by expanding the current DEQ Internal Management Directive to include nonpoint sources.

The following stakeholder proposal will be further evaluated through this item:

#5 Clarify the relationship between the numeric toxics criteria and the antidegradation requirements for nonpoint sources.

B. SEDIMENTATION AND TOXIC POLLUTANTS. Control toxic pollutants by regulating erosion.

Existing statute and narrative criteria in Division 41 gives DEQ authority to control toxic pollutants. Total Suspended Solids (TSS) and turbidity have been used in the TMDL program

as a surrogate for some toxic pollutants. However, implementation guidance for controlling erosion to prevent or restore impaired streams from toxic pollution has not been developed.

DEQ will continue to solicit input from Non-NPDES Workgroup members on the appropriateness of the following approaches to address sedimentation and toxic pollutants:

- Address by Implementation Ready TMDLs;
- IMD development;
- Policy direction from the EQC; or
- Division 41 rule language change.

The following stakeholder proposals will be further evaluated through this item

#1 Add narrative prohibition on controllable erosion in Division 41.

#9 Require in Division 41 the use of an enhanced USLE to calculate and limit controllable erosion rates in Water Quality rules.

C. “IMPLEMENTATION READY” TMDLS. *Control toxic pollutants by requiring specific management measures in TMDL basins.*

DEQ has authority to require specific management measures under current TMDL rule (Division 42) and there is specific language in the rule for agriculture and forestry. DEQ could develop similar language for stormwater. Revision of the TMDL rule to address stormwater management could stay within the timeframe of the Toxics Rulemaking; however, participation of additional stakeholders may be beneficial.

DEQ has authority to develop “Implementation ready” TMDLs under existing statute and rules for traditional nonpoint sources. Therefore, rulemaking is not needed. There are, however, potential benefits to inserting explicit language in rule to clarify EQC’s intent. An Internal Management Directive should also be considered in order to clarify DEQ expectations with the stakeholders.

The following stakeholder proposals will be further evaluated through this item:

#8 Require that surrogate measures be clear and easily applied as to how to meet TMDL load allocations

#11 Develop design specifications for riparian buffer strips and require in Water Quality rules

#12 Add that agricultural land owners must implement specific practices to be in compliance with Water Quality Standards

#15 Change the TMDL rules to require an individual load allocation be given to significant air deposition and land sources of pollutants subject to TMDLs

D. Division 41 Rule Changes (STAKEHOLDER PROPOSALS that will be addressed together)

A few of the stakeholder proposals attempted to correct the concern that the language in Division 41 around nonpoint source pollution regulation was not consistent with the intent of associated statutes. DEQ will revise the Division 41 language to be consistent with associated ORS for the following items:

#3 Clarify the statutory requirement that logging practices must conform with Water Quality Standards

Language in Division 41 Water Quality Standards 340-041-0007 Statewide Narrative Criteria and 340-041-0061 (11) and (12) Other Implementation of Water Quality Criteria could be interpreted differently than specified in related statutes. In order to clarify the intent of the statutes, sections of Division 41 will be revised to bring consistency between Division 41 and statutory requirements under ORS527.765 and 770 by clarifying the statutory requirement that logging practices must conform with Water Quality Standards.

#4 Clarify in Division 41 that nonpoint sources are required to comply with TMDL load allocations

The language in Division 41 will be further clarified by explicitly stating that nonpoint sources need to comply with TMDL load allocations.

#7 Clarify nonpoint sources that are not covered under the Oregon Forest Practices Act

Forest Practices Act (FPA) regulates nonpoint sources of pollution related to commercial forest activities. Many activities are not regulated under FPA but are subject to Agricultural Water Quality Management Program, Water Quality Standards, and other regulations. DEQ will consider revising Division 41 to clarify which nonpoint sources are regulated under DEQ authority.

E. STAKEHOLDER PROPOSALS. that will be addressed as a stand-alone item

#14 Establish options for going beyond pretreatment for industrial and commercial facilities where treatment/management may not otherwise be required

A small Non NPDES workgroup has formed and met to discuss this topic on April 30, 2010. The small workgroup generated ideas for expanding the concept of pretreatment. As a starting point, the group worked through the ideas presented in the November 11, 2009 version of the Mixed Media Subcommittees' memo on Pretreatment. The extent of the overall proposal is still to be determined. As the group discussed ideas, it became apparent that some would become proposals for the rulemaking as rules or recommendations. Other ideas, such as those that would have FTE/Fiscal impacts for the agency, did not meet the evaluation criteria for this rulemaking and will need to be addressed separately.

Items Determined Not to be Included in the Rule Package

Summary

Based on the staff analysis, DEQ determined that the following items should not be considered for this rulemaking. These items are part of the inventory being considered by the Toxics Reduction Strategy, and will be further evaluated as part of that process.

#2 Remove shields in rule for individual landowners for nonpoint source pollution in Water Quality Standards

Under ORS 527.770, forest operators conducting or proposing to conduct according to the Forest practices act (FPA) in good faith are considered in compliance with Water Quality Standards. It therefore requires a statutory change to remove existing shields for forestry. For agriculture, EQC made a policy decision to include a similar provision to producers and land owners who comply with Agricultural Water Quality Management Area rules for temperature. DEQ will not revise the rule language in OAR 340-041-0028 at this time.

#10 Require that fertilizers be restricted to agronomic rates in Division 41

Under Division 50 (Biosolids) "Agronomic Application Rate" is defined as a rate of biosolids or domestic septage application which matches nutrient requirements for a specific crop on an annual basis. Application at the rate may or may not result in excess runoff or contamination of groundwater. DEQ will be taking a comprehensive look at issues related to nutrients during the upcoming nutrient standards rulemaking and plans to look at agronomic rates at that time.

#21 Establish standards for metals and other "non-nutritive" toxics in fertilizers in Water Quality rules

Department of Agriculture has authority to regulate the level of metals in fertilizers and standards for metals in fertilizers are set under ORS 561.190 and 633, and Division 59, Fertilizers, Agricultural Minerals, Limes rule. In order for DEQ to set standards for fertilizers, statutory change is needed.

#23 Limit homeowner applications for some pesticides in Water Quality rules

ODA has authority under the Federal Insecticide, Fungicide, and Rodenticide Act. EQC does not have authority to regulate home pesticide uses. However, DEQ has participated and funded education of the public and shares information regarding pesticides and water quality.

#29 Substitute pesticides and practices to reduce use of listed pesticides in highway and road maintenance, as well as at vector control districts

ODA has authority under Federal Insecticide, Fungicide, and Rodenticide Act. EQC does not have authority to regulate pesticide uses; however, DEQ has worked with road departments and vector control districts occasionally to address water quality issues related to pesticide use.

#54 Accelerate historic abandoned mine clean up

DEQ has authority over mine clean up under its orphan site program and in coordination with EPA under the cleanup program. State funding for these programs, however, has been cut in recent legislative sessions.

Scoping Evaluation for Non-NPDES Elements of Water Quality Toxics Rulemaking

Staff Analysis and Conclusions Summary Table

ITEM #	ITEM DESCRIPTION	1 - ORS GIVES AUTHORITY TO EQC	2A - RULES ALREADY IN PLACE FOR DEQ WQ	2B - IS IMPLEMENTATION REQUIRED?	3 - IS RULEMAKING NEEDED?	4 – WITHIN SCOPE OF HH FCR WQS RULE PACKAGE?
	Antidegradation - control toxic pollutants by clarifying antidegradation policy for nonpoint sources	Yes ORS 468B	Division 41 Antidegradation Policy	Required	Yes for some strategies	Yes
	Sedimentation and Toxics - control toxic pollutants by regulating erosion	Yes ORS 468B	Division 41 Toxic Narrative criteria	Discretionary	Yes for some strategies	Yes
	“Implementation ready” TMDLs - control toxic pollutants by requiring specific management measures	Yes ORS 468B	Division 42	Discretionary	Yes for some strategies	Yes
#1	Add narrative prohibition on controllable erosion in Division 41	Yes ORS 468B	Div 41-0007 could be applicable.	Discretionary	Yes	Yes, consider under Toxics/Sediment
#2	Remove shields in Division 41 for individual land owners for nonpoint source pollution	Yes ORS 468B	Div 41-0028 not consistent for Ag Div 41-0061 not clear	Discretionary	Yes	Yes for 41-0061, but not 41-0028 (ask Neil)
#3	Clarify in Division 41 the statutory requirements that logging practices must conform with Water Quality Standards	Yes ORS 468B	Div 41-0007(5) not clear	Required	Yes	Yes
#4	Require that nonpoint sources comply with TMDL load allocations in Division 41	Yes ORS 468B	Div 41 not clear	Required	Yes	Yes
#5	Clarify the relationship between the numeric toxics criteria and the antidegradation requirements	Yes ORS 468B	Div 41 not clear	Discretionary	Yes	Yes, consider under Antidegradation proposal

#7	Clarify what nonpoint sources that are not covered under the Oregon Forest Practices Act	Yes ORS 468B	Div 41 not clear	Discretionary	Yes	Yes, should address w/ #3 and #4
ITEM #	ITEM DESCRIPTION	1 - ORS GIVES AUTHORITY TO EQC	2A - RULES ALREADY IN PLACE FOR DEQ WQ	2B - IS IMPLEMENTATION REQUIRED?	3 - IS RULEMAKING NEEDED?	4 – WITHIN SCOPE OF HH FCR WQS RULE PACKAGE?
#8	Require in Division 41 that surrogate measures be clear and easily applied as to how to meet TMDL load allocations	Yes ORS 468B	Not Div 41 but authority under Division 42	Discretionary	Yes for Div 41	Yes, consider under “Implementation-Ready” TMDLs
#9	Require in Div 41 the use of an enhanced USLE to calculate and limit controllable erosion rates	Yes ORS 468B	No	Discretionary	Yes for Div 41	Yes, consider under Toxics/Sediment (or TMDL?)
#10	Require that fertilizers be restricted to agronomic rates in Division 41	Yes ORS 468B	No	Discretionary	Yes	No - Wait until DEQ works on Nutrients Std.
#11	Develop design specifications for riparian buffer strips and require in Water Quality rules	Yes ORS 468B	Not Div 41 but authority under Division 42	Discretionary	Yes, unless done under TMDLs	Yes, consider under “Implementation-Ready” TMDLs
#12	Add that agricultural land owners must implement specific practices to be in compliance with Water Quality Standards	Yes ORS 468B	Not Div 41 but authority under Division 42	Discretionary	Yes, unless done under TMDLs	Yes, consider under “Implementation-Ready” TMDLs
#14	Establish options for going beyond pretreatment for industrial and commercial facilities where treatment/management may not otherwise be required	Yes ORS 468B	Yes	Depends	Yes for some strategies	Yes
#15	Change the TMDL rules to require an individual load allocation be given to significant air deposition sources of a pollutant that is the subject of the TMDL	Yes ORS 468B	Division 42	Discretionary	No, but could clarify the intent through revision	Yes, consider under “Implementation-Ready” TMDLs
#21	Establish standards for metals and other “non-nutritive” toxics in fertilizers in Water Quality rules	No	No	N/A	No - Statutory change is needed	No – No authority

#23	Limit homeowner application for some pesticides in Water Quality rules	No	No	N/A	No - Statutory change is needed	No – No authority
ITEM #	ITEM DESCRIPTION	1 - ORS GIVES AUTHORITY TO EQC	2A - RULES ALREADY IN PLACE FOR DEQ WQ	2B - IS IMPLEMENTATION REQUIRED?	3 - IS RULEMAKING NEEDED?	4 – WITHIN SCOPE OF HH FCR WQS RULE PACKAGE?
#29	Substitute pesticides and practices to reduce use of listed pesticides in highway and road maintenance, as well as at vector control districts	No	No	N/A	No - Statutory change is needed	No – No authority
#54	Accelerate historic abandoned mine clean up	Yes ORS 468B	No	N/A	No	No – No funding