

## Division 41 Proposed Rule Changes

### Overview

The Environmental Quality Commission (EQC) issued a directive to Department of Environmental Quality (DEQ) to develop rules or other implementation strategies to reduce toxic pollution from sources not regulated under permits under the federal Clean Water Act. Many ideas have been generated by the workgroup and DEQ staff to address this directive.

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

#### 340-041-0002 Definitions

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

#### 340-041-0007 Statewide Narrative Criteria, and

#### 340-041-0061 Other Implementation of Water Quality Criteria

#3 Clarify 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

### 340-041-0002 Definitions

#### *Clarify nonpoint sources that are not covered under the Oregon Forest Practices Act (Stakeholder Proposal #7)*

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. Oregon Department of Forestry and Oregon Department of Agriculture are currently in discussion to determine how to regulate activities that are associated with both agriculture and forestry.

Some activities currently exempt from the FPA specified in ORS 527 include

- Noncommercial harvest (harvesting firewood for personal use, for example)
- Legacy forest roads (abandoned logging roads, not used in current commercial harvests)

- Christmas trees, hybrid cottonwood, agricultural tree crops, and others specifically exempted in FPA
- Activities associated with forestland conversions that go beyond forest activities (i.e. roads for housing developments, stump removal)

DEQ will consider revising Division 41 to clarify which nonpoint sources are regulated under DEQ authority.

### **Current Language in Division 41**

340-41-0002 Definitions

None

### **Potential Language**

340-41-0002 Definitions

“Agricultural Practices’ include any tree growing operations statutorily or administratively excluded from coverage under the Oregon Forest Practices Act including but not limited to Christmas trees, hardwood plantations, actively managed orchards, nurseries, voluntary or mandatory forested riparian buffers, and abandoned logging roads.”

“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.

### **340-041-0007 Statewide Narrative Criteria and 340-041-0061 Other Implementation of Water Quality Criteria**

*Clarify the statutory requirement that logging practices must conform with Water Quality Standards (Stakeholder Proposal #3)*

*Clarify in Division 41 that nonpoint sources are required to comply with TMDL load allocations (Stakeholder Proposal #4)*

Language in Division 41 Water Quality Standards 340-041-0007 (5), 340-041-0061(e) (B) (11) as well as (12) 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. The language in Division 41 will be further clarified by explicitly stating that nonpoint sources need to comply with TMDL load allocations.

### **Current Language**

#### 340-041-0007 Statewide Narrative Criteria

(5) Logging and forest management activities must be conducted in accordance with the Oregon Forest Practices Act to minimize adverse effects on water quality.

#### 340-41-0061 Other Implementation of Water Quality Criteria

(11) Forestry on state and private lands. For forest operations on state or private lands, water quality standards are intended to be attained and are implemented through best management practices and other control mechanisms established under the Forest Practices Act (ORS 527.610 to 527.992) and rules thereunder, administered by the Oregon Department of Forestry. Therefore, forest operations that are in compliance with the Forest Practices Act requirements are (except for the limits set out in ORS 527.770) deemed in compliance with this division. DEQ will work with the Oregon Department of Forestry to revise the Forest Practices program to attain water quality standards.

(12) Agricultural water quality management plans to reduce agricultural nonpoint source pollution are developed and implemented by the Oregon Department of Agriculture (ODA) through a cooperative agreement with the department to implement applicable provisions of ORS 568.900 to 568.933 and 561.191. If the department has reason to believe that agricultural discharges or activities are contributing to water quality problems resulting in water quality standards violations, the department may consult with the ODA. If water quality impacts are likely from agricultural sources and the department determines that a water quality management plan is necessary, the director may write a letter to the director of the ODA requesting that such a management plan be prepared and implemented to reduce pollutant loads and achieve the water quality criteria.

### **Potential Language**

#### 340-041-0007 Statewide Narrative Criteria

(5) Logging and forest management activities must meet Oregon Water Quality Standards and TMDL Load Allocations. Logging and forest management activities are regulated by the Oregon Forest Practices Act (FPA). Therefore, forest practices rules adopted by the Board of Forestry under FPA must conform to Water Quality Standards and TMDLs issued by DEQ.

#### 340-041-0061 Other Implementation of Water Quality Criteria

(11) Forestry on state and private lands. For forest operations on state or private lands, water quality standards are intended to be attained and are implemented through best management practices and other control mechanisms established under the Forest Practices Act (ORS

527.610 to 527.992) and rules thereunder, administered by the Oregon Department of Forestry. Therefore, forest operations that are in compliance with the Forest Practices Act requirements are (except for the limits set out in ORS 527.770) not subject to enforcement by DEQ while the “BMP shield” is in place. If DEQ has evidence that forest activities are contributing to water quality problems resulting in violations of water quality standards or TMDL load allocations, DEQ must work with the Oregon Department of Forestry to revise the Forest Practices rules to attain water quality standards and TMDL load allocations.

(12) Agricultural water quality management plans to reduce agricultural nonpoint source pollution are developed and implemented by the Oregon Department of Agriculture (ODA) through a cooperative agreement with the Department of Environmental Quality (DEQ) to implement applicable provisions of ORS 568.900 to 568.933 and 561.191. If DEQ has evidence that agricultural discharges or activities are contributing to water quality problems resulting in violations of water quality standards or TMDL load allocations, the department must work with the ODA to revise applicable Agricultural Water Quality Management Area Plans and Rules to attain water quality standards and TMDL load allocations.

## Related Statutes

### *Clarify nonpoint sources that are not covered under the Oregon Forest Practices Act (Stakeholder Proposal #7)*

#### Forestry

##### **OAR 629-600-0100 Definitions**

(11) "Commercial" means of or pertaining to the exchange or buying and selling of commodities or services. This includes any activity undertaken with the intent of generating income or profit; any activity in which a landowner, operator or timber owner receives payment from a purchaser of forest products; any activity in which an operator or timber owner receives payment or barter from a landowner for services that require notification under OAR 629-605-0140; or any activity in which the landowner, operator, or timber owner barter or exchanges forest products for goods or services. This does not include firewood cutting or timber milling for personal use.

(47) "Operation" means any commercial activity relating to the establishment, management or harvest of forest tree species except as provided by the following:

(a) The establishment, management or harvest of Christmas trees, as defined in ORS 571.505, on land used solely for the production of Christmas trees.

(b) The establishment, management or harvest of hardwood timber, including but not limited to hybrid cottonwood that is:

(A) Grown on land that has been prepared by intensive cultivation methods and that is cleared of competing vegetation for at least three years after tree planting;

(B) Of a species marketable as fiber for inclusion in the furnish for manufacturing paper products;

(C) Harvested on a rotation cycle that is 12 or fewer years after planting; and

(D) Subject to intensive agricultural practices such as fertilization, cultivation, irrigation, insect control and disease control.

(c) The establishment, management or harvest of trees actively farmed or cultured for the production of agricultural tree crops, including nuts, fruits, seeds and nursery stock.

(d) The establishment, management or harvest of ornamental, street or park trees within an urbanized area, as that term is defined in ORS 221.010.

(e) The management or harvest of juniper species conducted in a unit of less than 120 contiguous acres within a single ownership.

(f) The establishment or management of trees intended to mitigate the effects of agricultural practices on the environment or fish and wildlife resources, such as trees that are established or managed for windbreaks, riparian filters or shade strips immediately adjacent to actively farmed lands.

(g) The development of an approved land use change after timber harvest activities have been completed and land use conversion activities have commenced.

##### **ORS Chapter 527 — Insect and Disease Control; Forest Practices**

##### **527.620 Definitions for ORS 527.610 to 527.770.**

(5) "Forest practice" means any operation conducted on or pertaining to forestland, including but not limited to:

(a) Reforestation of forestland;

(b) Road construction and maintenance;

- (c) Harvesting of forest tree species;
- (d) Application of chemicals; and
- (e) Disposal of slash.

(12) "Operation" means any commercial activity relating to the establishment, management or harvest of forest tree species except as provided by the following:

(a) The establishment, management or harvest of Christmas trees, as defined in ORS 571.505, on land used solely for the production of Christmas trees.

(b) The establishment, management or harvest of hardwood timber, including but not limited to hybrid cottonwood, that is:

(A) Grown on land that has been prepared by intensive cultivation methods and that is cleared of competing vegetation for at least three years after tree planting;

(B) Of a species marketable as fiber for inclusion in the furnish for manufacturing paper products;

(C) Harvested on a rotation cycle that is 12 or fewer years after planting; and

(D) Subject to intensive agricultural practices such as fertilization, cultivation, irrigation, insect control and disease control.

(c) The establishment, management or harvest of trees actively farmed or cultured for the production of agricultural tree crops, including nuts, fruits, seeds and nursery stock.

(d) The establishment, management or harvest of ornamental, street or park trees within an urbanized area, as that term is defined in ORS 221.010.

(e) The management or harvest of juniper species conducted in a unit of less than 120 contiguous acres within a single ownership.

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(g) The development of an approved land use change after timber harvest activities have been completed and land use conversion activities have commenced.

*Clarify the statutory requirement that logging practices must conform with Water Quality Standards (Stakeholder Proposal #3)*

*Clarify in Division 41 that nonpoint sources are required to comply with TMDL load allocations (Stakeholder Proposal #4)*

## **Forestry**

### **527.765 Best management practices to maintain water quality; rules.**

(1) The State Board of Forestry shall establish best management practices and other rules applying to forest practices as necessary to insure that to the maximum extent practicable nonpoint source discharges of pollutants resulting from forest operations on forestlands do not impair the achievement and maintenance of water quality standards established by the Environmental Quality Commission for the waters of the state. Such best management practices shall consist of forest practices rules adopted to prevent or reduce pollution of waters of the state. Factors to be considered by the board in establishing best management practices shall include, where applicable, but not be limited to:

- (a) Beneficial uses of waters potentially impacted;
- (b) The effects of past forest practices on beneficial uses of water;
- (c) Appropriate practices employed by other forest managers;

(d) Technical, economic and institutional feasibility; and

(e) Natural variations in geomorphology and hydrology.

(2) The board shall consult with the Environmental Quality Commission in adoption and review of best management practices and other rules to address nonpoint source discharges of pollutants resulting from forest operations on forestlands.

(3)(a) Notwithstanding ORS 183.310 (8), upon written petition for rulemaking under ORS 183.390 of any interested person or agency, the board shall review the best management practices adopted pursuant to this section. In addition to all other requirements of law, the petition must allege with reasonable specificity that nonpoint source discharges of pollutants resulting from forest operations being conducted in accordance with the best management practices are a significant contributor to violations of such standards.

(b) Except as provided in paragraph (c) of this subsection, if the board determines that forest operations being conducted in accordance with the best management practices are neither significantly responsible for particular water quality standards not being met nor are a significant contributor to violations of such standards, the board shall issue an order dismissing the petition.

(c) If the petition for review of best management practices is made by the Environmental Quality Commission, the board shall not terminate the review without the concurrence of the commission, unless the board commences rulemaking in accordance with paragraph (e) of this subsection.

(d) If a petition for review is dismissed, upon conclusion of the review, the board shall issue an order that includes findings regarding specific allegations in the petition and shall state the board's reasons for any conclusions to the contrary.

(e) If, pursuant to review, the board determines that best management practices should be reviewed, the board shall commence rulemaking proceedings for that purpose. Rules specifying the revised best management practices must be adopted not later than two years from the filing date of the petition for review unless the board, with concurrence of the Environmental Quality Commission, finds that special circumstances require additional time.

(f) Notwithstanding the time limitation established in paragraph (e) of this subsection, at the request of the Environmental Quality Commission, the board shall take action as quickly as practicable to prevent significant damage to beneficial uses identified by the commission while the board is revising its best management practices and rules as provided for in this section.

[1991 c.919 §20; 2003 c.75 §95; 2003 c.749 §11]

**527.770 Good faith compliance with best management practices not violation of water quality standards; subsequent enforcement of standards. A forest operator conducting, or in good faith proposing to conduct, operations in accordance with best management practices currently in effect shall not be considered in violation of any water quality standards.** When the State Board of Forestry adopts new best management practices and other rules applying to forest operations, such rules shall apply to all current or proposed forest operations upon their effective dates. However, nothing in this section prevents enforcement of water quality standards against a forest operator conducting operations after the time provided in ORS 527.765 (3)(e) for adoption of revised best management practices if the board either has not

adopted revised management practices or has not made a finding that such revised best management practices are not required. [1991 c.919 §21; 2003 c.749 §12]

## Agriculture

### **ORS Chapter 568 — Soil and Water Conservation; Water Quality Management**

#### **568.930 Agricultural activities subject to plan requirements; consultation with Environmental Quality Commission; review and revision of plans.**

(1) Landowners shall conduct all agricultural activities on agricultural lands within the boundaries of an area subject to a water quality management plan in full compliance with the rules implementing the plan and with all the rules and standards of the Environmental Quality Commission relating to water pollution control. In addition to any other remedy provided by law, any violation of those rules or standards shall be subject to all remedies and sanctions available to the Department of Environmental Quality or the Environmental Quality Commission.

(2) The State Department of Agriculture and the State Board of Agriculture shall consult with the Department of Environmental Quality or the Environmental Quality Commission in the adoption and review of water quality management plans and in the adoption of rules to implement the plans.

(3)(a) The Environmental Quality Commission may petition the State Department of Agriculture for a review of part or all of any water quality management plan and rules implementing the plan. The petition must allege with reasonable specificity that the plan or the rules are not adequate to achieve compliance with applicable state and federal water quality standards.

(b) The State Department of Agriculture, in consultation with the State Board of Agriculture, shall complete its review of a petition submitted under paragraph (a) of this subsection within 90 days of the date of the filing of the petition for review. The State Department of Agriculture may not terminate the review without the concurrence of the Environmental Quality Commission unless the department initiates revisions to the rules implementing the water quality management plan that address the issues raised by the Environmental Quality Commission. If the State Department of Agriculture adopts any revisions in response to a petition by the Environmental Quality Commission, the department shall adopt the revisions not later than two years from the date the Environmental Quality Commission submits the petition, unless the department, with the concurrence of the Environmental Quality Commission, finds that special circumstances require additional time.

(4) A water quality management plan and rules implementing the plan that pertain to a ground water management area shall be subject to the coordination requirements of ORS 468B.162.

[1993 c.263 §13; 1999 c.59 §179; 2001 c.594 §6]

#### **561.191 Program and rules relating to water quality.**

(1) The State Department of Agriculture shall develop and implement any program or rules that directly regulate farming practices, as defined in ORS 30.930, that are for the purpose of protecting water quality and that are applicable to areas of the state designated as exclusive farm use zones under ORS 215.203 or other agricultural lands in Oregon, including but not limited to rules related to:

(a) Protection of the quality of surface or ground water;

- (b) Wellhead protection areas;
  - (c) Coastal zone management areas;
  - (d) Areas of ground water concern; and
  - (e) Ground water management areas.
- (2) Any program or rules adopted by the State Department of Agriculture under subsection (1) of this section shall be designed to assure achievement and maintenance of water quality standards adopted by the Environmental Quality Commission.
- (3) If two or more state agencies are required to adopt rules under ORS 468B.150 to 468B.190, the agencies:
- (a) Shall consult with one another and coordinate the rules; and
  - (b) May consolidate the rulemaking proceedings.
- (4) Nothing in this section is intended to change or reduce the authority of the Water Resources Commission or the Water Resources Department under ORS chapters 536 to 543. [1995 c.690 §6a]