

## Scoping Evaluation for non-NPDES Elements of Water Quality Toxics Rulemaking

Many ideas have been generated to address the EQC directive to develop rules or other implementation strategies to reduce toxic pollution from sources not permitted under the Clean Water Act. In order for DEQ to adhere to our rulemaking timeline, we must decide on the scope of the water quality rulemaking package by April 30, 2010. Items that are not included in this rulemaking package will be considered under the agency's cross-media Toxics Reduction Strategy. In addition, once the critical work of the Rulemaking Workgroup on the rule development is completed, the Workgroup could make recommendations to DEQ or to the EQC about further actions, such as future additional rulemakings, working with partner agencies, voluntary or incentive-based programs, etc.

The Department has evaluated the actions and policies identified by stakeholders as high priority to help us determine whether they will be included in the scope of the current rulemaking effort. The staff analysis and conclusions are provided below. Four questions were 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, 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, consider the following:
  - The timeline of this project
  - How controversial the proposal will be (which may indicate additional time would be needed)
  - 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?

4. Is critical information about the proposed action or rule unavailable, making it difficult for DEQ to evaluate it or to proceed?

## The 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 included in the rule package: Three items DEQ has proposed, as well as item #3 in the Stakeholder proposal.

- Antidegradation
- Sedimentation and Toxics
- “Implementation-ready” TMDLs

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

Additional seven items in the Stakeholder proposal will also be considered as along with the three items DEQ has proposed to be in the rule package.

Further, there are two more items in the Stakeholder proposal that are still being evaluated.

**#2** Remove existing shields for individual land owners for nonpoint source pollution in Water Quality Standards.

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

#### *Antidegradation: Control toxic pollutants by clarifying Antidegradation policy for nonpoint sources (DEQ Proposal)*

Existing statute gives EQC authority and there is 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 of the Internal Management Directive to include nonpoint sources.

Stakeholder proposal addressed through this item

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

***Sedimentation and Toxic Pollutants: Control toxic pollutants by regulating erosion (DEQ Proposal)***

Existing statute and narrative criteria in Division 41 give DEQ authority to control toxic pollutants, and 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 wants input from the Work Group 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; Division 41 rule language change.

Stakeholder proposal addressed through this item

- #1 Add narrative prohibition on controllable erosion in Water Quality rules
- #9 Require the use of an enhanced USLE to calculate and limit controllable erosion rates in Water Quality rules

***“Implementation ready” TMDLs: Control toxic pollutants by requiring specific management measures in TMDL basins (DEQ Proposal)***

DEQ has authority to require specific management measures under current TMDL rule (Division 42) and there is specific language 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 needed.

DEQ has authority to develop “Implementation ready” TMDLs under existing statute and rules for traditional nonpoint sources, therefore rulemaking is not needed. An Internal Management Directive should be developed in order to clarify DEQ expectations with the stakeholders.

Stakeholder proposal addressed through this item

- #4 Require that nonpoint sources comply with TMDL load allocations
- #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

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

Language in Division 41 Water Quality Standards 340-041-0028(12)(e) and 340-041-0061(10)(e)(B)(11) could be interpreted differently than specified in related statutes. In order to clarify the statutory requirement, Division 41 should be revised.

**Items determined not to be included in the Rule Package**

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

Under current TMDL rule DEQ has authority to assign waste load and load allocations to air deposition and land sources. However, rulemaking maybe needed in DEQ air and land rules to address TMDL waste load and load allocations. These rule changes should be separate from the current water quality rule package since they are not water quality program rules.

*Establish standards for metals and other “non-nutritive” toxics in fertilizers in Water Quality rules (Stakeholder Proposal #21)*

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 also Division 59, Fertilizers, Agricultural Minerals, Limes rule. In order for DEQ to set standards for fertilizers, statutory change is needed.

*Limit homeowner application for some pesticides in Water Quality rules (Stakeholder Proposal #23)*

ODA has authority under 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.

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

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.

*Accelerate historic abandoned mine clean up (Stakeholder Proposal #54)*

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

## Items still being evaluated for Rulemaking Package

### *Remove existing shields for individual land owners for nonpoint source pollution in Water Quality Standards (Stakeholder Proposal # 2)*

Under ORS 527.770, forest operators conducting or proposing to conduct according to the 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 has made a policy decision to provide a similar shield for producers and land owners who are in compliance with Agricultural Water Quality Management Area rules.

### *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. There are many activities that are not regulated under FPA but are subject to Agricultural Water Quality Management Program, Water Quality Standards, and other regulations. DEQ rules could be revised to clarify which nonpoint sources are regulated under DEQ authority.

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

A small workgroup has formed and will meet to discuss this topic on April 30<sup>th</sup>. The small workgroup will generate ideas for expanding the concept of pretreatment. As a starting point, the group will work through the ideas presented in the November 11, 2009, version of the Mixed Media Subcommittees' memo on Pretreatment. As the group discusses ideas, some will likely be proposed for the rulemaking as rules or recommendations. Other ideas, such as those that would have FTE/Fiscal impacts for the agency, may not meet the evaluation criteria for this rulemaking and will need to be addressed separately.

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Staff Analysis and Conclusions Summary Table

Item		1 - ORS gives authority to EQC	2A - Rules already in place for DEQ	2B - Is Implementation required or discretionary?	3 - Is rulemaking needed?	4 - Should it be in the HH FCR WQS rule package?
	Antidegradation - control toxic pollutants by clarifying antidegradation policy for nonpoint sources	Yes ORS 468B	Yes	Proposal would require implementation	No, enhancements may be beneficial, but clarification could occur through IMD	<b>Not as proposed by MM memo, possibly a variation</b>
	Sedimentation and Toxics - control toxic pollutants by regulating erosion	Yes ORS 468B	Division 41 Toxic Substances Narrative criteria	Discretionary	Maybe - Need clarification of narrative criteria	<b>Yes</b>
	Implementation ready TMDLs - control toxic pollutants by requiring specific management measures	Yes ORS 468B	Division 42	Discretionary	Yes - Need for stormwater	<b>Yes</b>
1	Add narrative prohibition on controllable erosion in WQ Rules	Yes ORS 468B	Division 41 -0007 (not specific to erosion)	Discretionary	Maybe - Need clarification/ details	<b>Include in Toxics/Sediment</b>
2	2. Remove existing shields for individual land owners for nonpoint source pollution in Water Quality Standards	Yes ORS 468B (for Ag)	Div 41 not consistent w/ Statute	Discretionary	Maybe - for consistency with ORS	<b>?</b>
3	3. Clarify the statutory requirements that logging practices must conform with Water Quality Standards	Yes ORS 468B	Div 41 not clear	Required	Maybe - Need clarification of narrative criteria	<b>Yes</b>
4	Require that nonpoint sources comply with TMDL load allocations	Yes ORS 468B	Div 42 not clear	Required	Maybe - Need clarification of TMDL rule	<b>Include in Implementation-Ready TMDLs</b>
5	Clarify the relationship between the numeric toxics criteria and the antidegradation requirements	Included in antideg item above				<b>Include in Antidegradation proposal</b>

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7	Clarify nonpoint sources that are not covered under the Oregon Forest Practices Act	No	No	ODF - NPSs Not Excluded	No - Statutory change is needed	?
8	Require that surrogate measures be clear and easily applied as to how to meet TMDL load allocations	Yes ORS 468B	Division 41 and 42	Discretionary	Yes - Need for stormwater	<b>Include in Implementation-Ready TMDLs</b>
9	Require the use of an enhanced USLE to calculate and limit controllable erosion rates in Water Quality rules	Yes ORS 468B	No	Discretionary	Yes	<b>Include in Toxics/Sediment</b>
10	Require that fertilizers be restricted to agronomic rates in Water Quality rules	Yes ORS 468B	No	Discretionary	Yes	<b>No Wait until DEQ works on Nutrients Std.</b>
11	Develop design specifications for riparian buffer strips and require in Water Quality rules	Yes ORS 468B	No	Discretionary	Yes, unless done under TMDLs	<b>Include in Implementation-Ready TMDLs</b>
12	Add that agricultural land owners must implement specific practices to be in compliance with Water Quality Standards	Yes ORS 468B	No	Discretionary	Yes, unless done under TMDLs	<b>Include in Implementation-Ready TMDLs</b>
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	Maybe?	?
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	Yes but may need clarification in air rule	Discretionary	No but may need clarification in air rule	<b>No (air rule)</b>
21	Establish standards for metals and other "non-nutritive" toxics in fertilizers in Water Quality rules	No	N/A (see 1A)	Discretionary for DEQ	No - Statutory change is needed	<b>No</b>
23	Limit homeowner application for some pesticides in Water Quality rules	No	N/A (see 1A)	Discretionary for DEQ	No - Statutory change is needed	<b>No</b>

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29	Substitute pesticides and practices to reduce use of listed pesticides in highway and road maintenance, as well as at vector control districts	No				
54	Accelerate historic abandoned mine clean up	Yes ORS 468B				<b>No</b>