Oregon Department of Environmental Quality

June 20, 2013
Oregon Environmental Quality Commission meeting
Rulemaking, Action item: I

Corrections and Clarifications to Nonpoint Source Regulations

DEQ recommendation to EQC

DEQ recommends that the Oregon Environmental Quality Commission:

Adopt the proposed PERMANENT rules in Attachment A as part of chapter 340 of the Oregon Administrative Rules.

Overview

Short summary

To meet obligations under a stipulated order and legal agreement, DEQ proposes changes to water quality standards for nonpoint sources. The proposed amendments to water quality standards do not change the way agricultural and forest land management activities are regulated to meet water quality standards, or the statutory relationships between DEQ and the Oregon Departments of Agriculture and Forestry. Proposed amendments would also remain consistent with the original intent of federal and state regulations. DEQ proposes deleting the following provisions that describe how nonpoint sources comply with water quality standards:

1. Statewide Narrative Criteria - OAR 340-041-0007(5)
The proposed amendment would remove the description of how logging and forest management activities are subject to water quality standards and load allocations. The amendment would honor a legal agreement signed Jan. 31, 2013.

2. Temperature Rule - OAR 340-041-0028(12)
Proposed amendments would remove portions of the rule that describe how:

- Nonpoint sources would implement water quality standards for temperature on private, state and federal agricultural lands and forests, and
- Nonpoint sources, except forestry and agriculture that comply with their temperature management plans, are considered in compliance with the temperature rule.

3. Other implementation of water quality criteria - OAR 340-041-0061
The proposed amendments would remove portions of the rule that describe how nonpoint sources would implement water quality standards on private, state and federal agricultural lands and forests.

Brief history

Northwest Environmental Advocates filed a lawsuit challenging the U.S. Environmental Protection Agency's approval of Oregon's water quality standard for temperature. On Feb. 28, 2012, the U.S. District Court issued a decision that requires EPA to review and formally approve or reject certain provisions under Division 41, those pertaining to water quality standards, of Chapter 340 of Oregon's Administrative Rules. This added process would be unique to Oregon and it would cause uncertainty for Oregon stakeholders, including natural resource agencies and the public.

After discussions with EPA and major stakeholders, DEQ agreed to propose deleting portions of Division 41 that describe how nonpoint sources comply with water quality standards in lieu of the EPA review of these standards. The United States District Court for the District of Oregon issued the stipulated order on Nonpoint Source and Endangered Species Act Remedies Jan. 7, 2013. The stipulated order requires DEQ to convene an advisory committee and recommend rule amendments to EQC on or before the June 2013 EQC meeting.

Regulated parties

The regulated parties subject to this rule are private land owners, state and federal land management agencies, operators and businesses engaged in agricultural and forestry activities and nonpoint sources that comply with their temperature management plans.

Statement of need

What problem is DEQ trying to solve?

DEQ is trying to avoid an additional layer of governmental review and uncertainty about water quality nonpoint source regulations. If the commission does not adopt the proposed revisions, the U.S. District Court decision requires EPA to review and approve or reject those provisions that apply to logging and forest management activities, agricultural activities and to other nonpoint sources with temperature management plans as water quality standards. It is not clear what guidelines EPA would use to conduct the review. Oregon would be the only state with this type of requirement.

How would the proposed rule solve the problem?

If adopted, the revisions would allow DEQ to meet the stipulated order requirement without adding a layer of undefined review by EPA. Avoiding the additional review would provide more regulatory certainty to all involved parties and meet legal requirements.

How will DEQ know the problem has been solved?

EQC action to eliminate the provisions would avoid the additional EPA review.

Request for other options

During the public comment period, DEQ requested public comment on whether to consider other options for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

Federal relationship

"It is the policy of this state that agencies shall seek to retain and promote the unique identity of Oregon by considering local conditions when an agency adopts policies and rules. However, since there are many federal laws and regulations that apply to activities that are also regulated by the state, it is also the policy of this state that agencies attempt to adopt rules that correspond with equivalent federal laws and rules..."

Relationship to federal requirements

This rule proposal is "in addition to federal requirements" under ORS 468A.327(1)(a) and OAR 340-011-0029(1)(a). The proposed rules would delete portions of Division 41 rules already under:

- The federal Clean Water Act, and
- Oregon Revised Statutes that guide the Department of Agriculture, Department of Forestry and DEQ on interagency coordination to meet water quality goals.

What alternatives did DEQ consider, if any?

DEQ considered submitting the nonpoint source regulations in Division 41 to EPA for formal review and approval based on the U.S. District Court decision. EPA would then review and approve or reject those portions of the rules that apply to logging and forest management activities, agricultural activities and to other nonpoint sources with temperature management plans as water quality standards. EPA has a longstanding practice of not reviewing and approving state nonpoint sources regulations, so it is not clear what guidelines EPA would use to conduct the review. Oregon would be the only state with this type of requirement.

EPA, major stakeholders and DEQ agreed to remove the following provisions made part of the stipulated order:

- OAR 340-041-0028 (12) subsection (e), (f) and (g) and 340-041-0028 (12)(h)(D),
- OAR 340-041-0061 (10), 340-041-0061 (11) and 340-041-0061 (12) , and
- OAR 340-041-0007 (5)

The primary intent of the existing rules was to recognize programs administered by other agencies; therefore, the rules are not necessary to implement DEQ's water quality program. Subjecting rules to an additional layer of bureaucracy and uncertainty would not serve DEQ, other agencies, stakeholders or the public.

Rules affected, authorities, supporting documents

Lead division	Program or activity
Water Quality Division	Water Quality Standards

Chapter 340 action

Recommendation	Division	Rule	Title	SIP/Land use*
amend	041	0007	Statewide Narrative Criteria	n/a
amend	041	0028	Temperature	n/a
amend	041	0061	Other Implementation of Narrative Criteria	n/a

* SIP – This rule is part of the State Implementation Plan.
* Land use – DEQ State Agency Coordination Program considers this rule, program or activity is a land use program.

Statutory authority

ORS 468.020, 468B.030, 468B.035, 468B.048, 468.065

Other authority

Stipulated Order on Nonpoint Source and Endangered Species Act Remedies (U.S. District Court order)

Statute implemented

ORS 468B.030, 468B.035, 468B.048

Documents relied on for rulemaking - ORS 183.335(2)(b)(C)

Document title	Document location
Stipulated Order on Nonpoint Source and Endangered Species Act Remedies	*Included with attachment B*
Agreement Between Oregon Department of Environmental Quality And Northwest Environmental Advocates Relating to OAR 340-041-0007(5)	*Attachment B*

Statement of fiscal and economic impact ORS 183.335 (2)(b)(E)

Statement of Cost of Compliance

To meet obligations under a stipulated order and an agreement with Northwest Environmental Advocates, DEQ proposes deleting portions of rules that describe how nonpoint sources comply with water quality standards. DEQ does not consider the proposed amendments substantive. The proposal would still align the water quality standards with the original intent of applicable federal and state regulations.

Members of the Fiscal and Economic Advisory Committee, with the exception of the United States Forest Service, did not raise concerns with the fiscal impacts of the proposed rule.

U.S. Forest Service identified the following potential fiscal impacts but could not quantify potential costs.

(1) U.S. Forest Service is not subject to Oregon Department of Agriculture and Oregon Department of Forestry programs that are designed to implement nonpoint source controls. Removing the proposed rules in Division 41 would create uncertainty about what best management practices or other nonpoint source control methods would comply with the Clean Water Act and associated regulations on federal lands.

(2) U.S. Forest Service may need to revise planning documents to provide more evidence that projects comply with the Clean Water Act and associated regulations.

(3) The need to provide more evidence to demonstrate that management activities and projects comply with Clean Water Act and associated regulations could increase U.S. Forest Service's vulnerability to litigation. Costs or delays associated with planning and potential legal defense could have indirect impacts on local governments, small and large business and the general public. U.S. Forest Service provided the following examples to describe potential effects of these delays:

- A grazing permittee would be unable to graze on federal lands.
- Contractors would be unable to implement restoration and silvicultural actions on federal lands.
- U.S. Forest Service would be unable to implement road or trail projects on public lands and the public may have less access to these areas.
- U.S. Forest Service would be unable to implement hazardous fuel projects that could reduce the risk of wild fire damage to local communities.

DEQ does not have information that would allow it to quantify the potential impacts described, although it assumes that the impacts could be significant. DEQ has no information that substantiates the nature, likelihood or significance of the potential indirect impacts that the U.S. Forest Service identified. DEQ notes, and U.S. Forest Service agrees, that the U.S. Forest Service, as a federal agency, must comply with the Clean Water Act and associated regulations and is not regulated by Oregon's proposed administrative rules.

DEQ expects the Bureau of Land Management would experience fiscal impacts similar to U.S. Forest Service because both federal agencies manage large federal land holdings in Oregon.

There are also uncertainties associated with not amending Division 41. Under the stipulated order, EPA would be required to review and either approve or disapprove the provisions that describe how nonpoint sources comply with water quality standards. Oregon would be the only state to have EPA approve these provisions but EPA has no guidance to follow; therefore, the outcome of EPA action is not clear. There is a potential for further litigation regardless of whether EPA approves or disapproves the provisions. If EPA disapproves the provisions, it is not clear what if any replacement rule provisions EPA might specify.

1. Impacts on general public

DEQ does not expect that the general public would incur direct or indirect fiscal or economic impacts as a result of the proposed amendments to the water quality standards for agriculture and forestry on state and private lands. As stated above, there is a potential for some impacts on general public if federal land management agencies need to change their planning processes and face increased litigation.

2. Cost of compliance on small businesses (those with 50 or fewer employees). ORS 183.336

Since the proposed amendments do not change the way nonpoint sources comply with water quality standards on state and private lands, DEQ does not expect that small businesses including farms and ranches to incur direct or indirect fiscal or economic impacts as a result of the proposed amendments to the water quality standards for agriculture and forestry on state and private lands. Similar to impacts on general public, there is a potential for some impacts on small businesses if federal land management agencies need to change their planning processes and face increased litigation.

a) Estimated number of small businesses and types of businesses and industries with small businesses subject to proposed rule.	According to the Oregon Farm Bureau, 97 percent of Oregon farms and ranches are small businesses. Other small businesses that could be affected are nurseries, dairy and beef producers, fruit growers, and other food producers, industrial and small forest land owners.
b) Projected reporting, recordkeeping and other administrative activities, including costs of professional services, required for small businesses to comply with the proposed rule.	No additional activities are required for compliance with the proposed revisions.

c) Projected equipment, supplies, labor and increased administration required for small businesses to comply with the proposed rule.	No additional activities are required for compliance with the proposed revisions.
d) Describe how DEQ involved small businesses in developing this proposed rule.	The Oregon Farm Bureau, Oregon Small Woodlands Association, Oregon Cattlemen's Association, and state and federal agencies that work with small farms and ranches participated on the fiscal advisory committee to advise DEQ on the cost of compliance for this rulemaking for small businesses. The committee workgroup discussed the fiscal impact form and provided input into this analysis Jan. 24, 2013.

3. Impact on large businesses (all businesses that are not small businesses under #2 above)

The proposed amendments do not change the way nonpoint sources comply with water quality standards; therefore, DEQ expects no significant economic impact to large businesses that are considered nonpoint sources on state and private lands. Similarly to the impacts on general public, there is a potential for some impacts on large businesses if federal land management agencies need to change their planning processes and face increased litigation.

4. Impact on local AND federal government other than DEQ

DEQ does not expect local government to incur direct or indirect fiscal or economic impacts as a result of the proposed revisions. Even though some of the local and federal governments are not municipal separate storm sewer systems (MS4s) communities and considered nonpoint sources, the revisions proposed in this rulemaking do not change the way nonpoint sources comply with water quality standards. DEQ expects no economic impact to local governments that are considered nonpoint sources on state and private lands. As stated above, there is a potential for some impacts on local and federal governments if federal land management agencies need to change their planning processes and face increased litigation.

5. Impact on DEQ

Since the revisions proposed in this rulemaking do not change the way nonpoint sources comply with water quality standards, DEQ expects no significant economic impact to DEQ staff and programs from nonpoint sources that are on private and state lands. As stated above, there is a potential for some impacts on local and federal governments if federal land management agencies need to change their planning processes and face increased litigation. Any impact to DEQ staff and programs will be managed by shifting priorities.

Documents relied on for fiscal and economic impact

DEQ relied on verbal and written comments from members of the Fiscal and Economic Advisory Committee for Nonpoint Source Rulemaking.

Advisory committee

DEQ appointed the Fiscal and Economic Advisory Committee for Nonpoint Source Rulemaking and considered the committee's recommendations on this fiscal and economic impact statement. In compliance with ORS 183.333, DEQ asked for the committee's recommendations on:

- Whether the proposed rules would have a fiscal impact,
- The extent of the impact, and
- Whether the proposed rules would have a significant impact on small businesses and compliance with ORS 183.540.

Housing cost

To comply with ORS 183.534, DEQ determined the proposed rules would have no effect on the development cost of a 6,000-square-foot parcel and construction of a 1,200-square-foot detached single-family dwelling on that parcel. The proposed amendments would remove portions of rules that apply to private land owners, state and federal land management agencies, operators and businesses engaged in agricultural and forestry activities.

Fees - not involved

There are no fee changes proposed in this rulemaking

Land use

"It is the Commission's policy to coordinate the Department's programs, rules and actions that affect land use with local acknowledged plans to the fullest degree possible."
ORS 197.180, OAR 660-030

Land-use considerations

To determine whether the proposed rules involve programs or actions that are considered a *land-use action*, DEQ considered:

- Statewide planning goals for specific references. Section III, subsection 2 of the DEQ State Agency Coordination Program document identifies the following statewide goal relating to DEQ's authority:

Goal	Title
5	Open Spaces, Scenic and Historic Areas, and Natural Resources
6	Air, Water and Land Resources Quality
11	Public Facilities and Services
16	Estuarial resources
19	Ocean Resources

- OAR 340-018-0030 for EQC rules on land-use coordination. Division 18 requires DEQ to determine whether proposed rules will significantly affect land use. If yes, how will DEQ:
  - Comply with statewide land-use goals, and

    - Ensure compatibility with acknowledged comprehensive plans, which DEQ most commonly achieves by requiring a Land Use Compatibility Statement.
- DEQ's mandate to protect public health and safety and the environment.
- Whether DEQ is the primary authority that is responsible for land-use programs or actions in the proposed rules.
- Present or future land uses identified in acknowledged comprehensive plans.

Determination

DEQ determined that the proposed rules identified under the 'Chapter 340 Action' section above **do not affect** existing rules, programs or activities that are considered land-use programs and actions in OAR 340-018-0030 or in the DEQ State Agency Coordination Program.

Stakeholder and public involvement

Advisory committee

DEQ convened the Fiscal and Economic Advisory Committee for Nonpoint Source Rulemaking Jan. 24, 2013 to review proposed rules and provide comments on the fiscal analysis and additional information.

The 14-member committee included representatives from federal and state agencies and environmental and other interest groups. The committee understood the need to move forward with rulemaking under the stipulated order and legal agreement.

DEQ met with the U.S. Forest Service and Bureau of Land Management to discuss the issues for federal agencies and attempt to clarify the extent of the potential fiscal impacts.

EQC prior involvement

DEQ shared general rulemaking information with EQC through the annual DEQ Rulemaking Plan review in December 2012. DEQ shared information specific to this rulemaking with some members of the commission at their request.

Public notice

The Notice of Proposed Rulemaking with Hearing for this proposed rulemaking was published in the April 1, 2013, *Oregon Bulletin*. On March 15, 2013, DEQ also:

- Posted notice on DEQ's webpage http://www.deq.state.or.us/regulations/proposedrules.htm
- E-mailed notice to:
    - Interested parties through GovDelivery
    - Members of the advisory committee
    - Key legislators required under ORS 183.335
        - Jackie Dingfelder, Chair, Environment and Natural Resources Committee
        - Jules Bailey, Chair, Energy and Environment Committee
    - Federal delegation on Mar. 15, 2013. Federal delegation included:

    - Suzanne Bonamici, 1st District, House
    - Greg Walden, 2nd District, House
    - Earl Blumenauer, 3rd District, House
    - Peter DeFazio, 4th District, House
    - Kurt Schrader, 5th District, House
    - Jeff Merkley, Senate
    - Ron Wyden, Senate
- Sent notice to EPA

Public hearings and comment

DEQ held one public hearing April 16, 2013. The comment period closed April 23, 2013, at 5 p.m. DEQ received four public comments. The summary of comments and DEQ responses section below addresses each public comment. The commenter section below lists all people who provided comments on this proposal.

Presiding Officers' Record

DEQ held one public hearing. The hearing had zero attendees, and the presiding officer adjourned the hearing 45 minutes after the time convened.

The following table lists public hearing location and participation:

Public Hearings			
Hearing Date	Time Convened	Location	Hearings Officer
April 16, 2013	5 p.m.	Oregon Department of Environmental Quality, 811 SW 6th Ave., Portland, OR, 97204	Koto Kishida

Close of public comment period

The comment period closed April 23, 2013, at 5 p.m.

Summary of comments and DEQ responses

Four sets of public comments were received by the close of the public comment period. The following table includes comments and DEQ's response to comments. Original comments are on file with DEQ.

Commenter Name	Comment	Response to Comment	Support
Nina Bell	Supports the proposed rule	DEQ will log this comment.	Supportive

Nina Bell	DEQ did not accurately convey the substance of the proposed rule to the public	The description of the substance of the proposed rule is based on DEQ's understanding of the proposed rule. DEQ acknowledges that some disagree with its perspective.	
Nina Bell	Not clear if there was a public notice for the Fiscal and Economic Advisory Committee meeting.	There was no public notice for the Fiscal and Economic Advisory Committee meeting. DEQ has posted committee meeting notes on DEQ website: http://www.deq.state.or.us/wq/standards/docs/NPSrulemakingMinutes.pdf	
Janet Gillaspie	Supports the proposed rule	DEQ will log this comment.	Supportive
Heath A. Curtiss	Supports the proposed rule	DEQ will log this comment.	Supportive
Heath A. Curtiss	Disagree with the US Forest Service that there will be fiscal impact as a result of proposed rules	U.S. Forest Service provided information for the statement of fiscal and economic impact. DEQ acknowledges that some disagree with the US Forest Service's analysis of the proposed rule and its potential fiscal impact.	
Doug Heiken	Supports the proposed rule	DEQ will log this comment.	Supportive
Doug Heiken	Urge DEQ and EQC to start regulating nonpoint sources in a more meaningful way	DEQ will log this comment.	

Commenters

Comments received by close of public comment period

The table below lists four people and organizations that submitted comments on the proposed rules by the deadline for submitting public comment. Original comments are on file with DEQ.

Commenter	Affiliation	Submittal Method
Nina Bell	Northwest Environmental Advocates	Email
Janet Gillaspie	Oregon Association of Clean Water Agencies	Email
Heath A. Curtiss	Oregon Forest Industries Council	Email
Doug Heiken	Oregon Wild	Email

Implementation

Notification

If adopted by the commission, the proposed rules would become effective June 21, 2013. DEQ will notify affected parties by completing the following:

- Post notice on DEQ's webpage http://www.deq.state.or.us/regulations/rulemaking.htm
- E-mail notice to:
  - Interested parties through GovDelivery
  - Members of the advisory committee
  - Key legislators
    - Jackie Dingfelder, Chair, Environment and Natural Resources Committee
    - Jules Bailey, Chair, Energy and Environment Committee
  - Federal delegation
    - Suzanne Bonamici, 1st District, House
    - Greg Walden, 2nd District, House
    - Earl Blumenauer, 3rd District, House
    - Peter DeFazio, 4th District, House
    - Kurt Schrader, 5th District, House
    - Jeff Merkley, Senate
    - Ron Widen, Senate
  - Environmental Protection Agency

Compliance and enforcement

- There are no changes needed for affected parties nor DEQ staff

Measuring, sampling, monitoring and reporting

- There are no changes needed for affected parties nor DEQ staff

Systems

- Website – Notice will be posted on DEQ's webpage http://www.deq.state.or.us/wq/standards/standards.htm
- There are no changes needed for DEQ's databases or invoicing systems

Training

- There is no training needed for affected parties nor DEQ staff

Five-year review

Requirement ORS 183.405

The state Administrative Procedures Act requires DEQ to review **new** rules within five years of the date EQC adopts the proposed rules. Though the review will align with any changes to the law in the intervening years, DEQ based its analysis on current law.

Exemption

This proposed rule amendment is exempt from the five-year review requirement. The following Aministrative Procedures Act exemptions apply to all of the proposed rules:

- Amendments or repeal of a rule. ORS 183.405 (4)

Proposed Rule Revisions

Corrections and Clarifications to Nonpoint Source Regulations Rulemaking

340-041-0007 Statewide Narrative Criteria

(1) Notwithstanding the water quality standards contained in this Division, the highest and best practicable treatment and/or control of wastes, activities, and flows must in every case be provided so as to maintain dissolved oxygen and overall water quality at the highest possible levels and water temperatures, coliform bacteria concentrations, dissolved chemical substances, toxic materials, radioactivity, turbidities, color, odor, and other deleterious factors at the lowest possible levels.

(2) Where a less stringent natural condition of a water of the State exceeds the numeric criteria set out in this Division, the natural condition supersedes the numeric criteria and becomes the standard for that water body. However, there are special restrictions, described in OAR 340-041-0004(9)(a)(D)(iii), that may apply to discharges that affect dissolved oxygen.

(3) For any new waste sources, alternatives that utilize reuse or disposal with no discharge to public waters must be given highest priority for use wherever practicable. New source discharges may be approved subject to the criteria in OAR 340-041-0004(9).

(4) No discharges of wastes to lakes or reservoirs may be allowed except as provided in section OAR 340-041-0004(9).

~~(5) Logging and forest management activities must be conducted in accordance with the rules established by the Environmental Quality Commission and must not cause violation of water quality standards. Nonpoint sources of pollution from forest operations on state and private forest lands are subject to best management practices and other control measures established by the Oregon Board of Forestry as provided in ORS 527.765 and 527.770. Forest operations conducted in good faith compliance with best management practices and control measures established under the Forest Practice Act are generally deemed not to cause violations of water quality standards as provided in ORS 527.770. Forest operations are subject to load allocations established under ORS 468B.110 and OAR Division 340-042 to the extent needed to implement the federal Clean Water Act.~~

(~~6~~5) Log handling in public waters must conform to current Commission policies and guidelines.

(~~7~~6) Sand and gravel removal operations must be conducted pursuant to a permit from the Division of State Lands and separated from the active flowing stream by a watertight berm wherever physically practicable. Recirculation and reuse of process water must be required wherever practicable. Discharges or seepage or leakage losses to public waters may not cause a violation of water quality standards or adversely affect legitimate beneficial uses.

(~~8~~7) Road building and maintenance activities must be conducted in a manner so as to keep waste materials out of public waters and minimize erosion of cut banks, fills, and road surfaces.

(~~9~~8) In order to improve controls over nonpoint sources of pollution, federal, State, and local resource management agencies will be encouraged and assisted to coordinate planning and implementation of programs to regulate or control runoff, erosion, turbidity, stream temperature, stream flow, and the withdrawal and use of irrigation water on a basin-wide approach so as to protect the quality and beneficial uses of water and related resources. Such programs may include, but not be limited to, the following:

(a) Development of projects for storage and release of suitable quality waters to augment low stream flow;

(b) Urban runoff control to reduce erosion;

(c) Possible modification of irrigation practices to reduce or minimize adverse impacts from irrigation return flows;

(d) Stream bank erosion reduction projects; and

(e) Federal water quality restoration plans.

(~~10~~9) The development of fungi or other growths having a deleterious effect on stream bottoms, fish or other aquatic life, or that are injurious to health, recreation, or industry may not be allowed;

(~~11~~10) The creation of tastes or odors or toxic or other conditions that are deleterious to fish or other aquatic life or affect the potability of drinking water or the palatability of fish or shellfish may not be allowed;

(~~12~~11) The formation of appreciable bottom or sludge deposits or the formation of any organic or inorganic deposits deleterious to fish or other aquatic life or injurious to public health, recreation, or industry may not be allowed;

(~~13~~12) Objectionable discoloration, scum, oily sheens, or floating solids, or coating of aquatic life with oil films may not be allowed;

(~~14~~13) Aesthetic conditions offensive to the human senses of sight, taste, smell, or touch may not be allowed;

(~~15~~14) Radioisotope concentrations may not exceed maximum permissible concentrations (MPC's) in drinking water, edible fishes or shellfishes, wildlife, irrigated crops, livestock and dairy products, or pose an external radiation hazard;

(~~16~~15) Minimum Design Criteria for Treatment and Control of Wastes. Except as provided in OAR 340-041-0101 through 340-041-0350, and subject to the implementation requirements set forth in OAR 340-041-0061, prior to discharge of any wastes from any new or modified facility to any waters of the State, such wastes must be treated and controlled in facilities designed in accordance with the following minimum criteria.

(a) In designing treatment facilities, average conditions and a normal range of variability are generally used in establishing design criteria. A facility once completed and placed in operation should operate at or near the design limit most of the time but may operate below the design criteria limit at times due to variables which are unpredictable or uncontrollable. This is particularly true for biological treatment facilities. The actual operating limits are intended to be established by permit pursuant to ORS 468.740 and recognize that the actual performance level may at times be less than the design criteria.

(A) Sewage wastes:

(i) Effluent BOD concentrations in mg/l, divided by the dilution factor (ratio of receiving stream flow to effluent flow) may not exceed one unless otherwise approved by the Commission;

(ii) Sewage wastes must be disinfected, after treatment, equivalent to thorough mixing with sufficient chlorine to provide a residual of at least 1 part per million after 60 minutes of contact time unless otherwise specifically authorized by permit;

(iii) Positive protection must be provided to prevent bypassing raw or inadequately treated sewage to public waters unless otherwise approved by the Department where elimination of inflow and infiltration would be necessary but not presently practicable; and

(iv) More stringent waste treatment and control requirements may be imposed where special conditions make such action appropriate.

(B) Industrial wastes:

(i) After maximum practicable in-plant control, a minimum of secondary treatment or equivalent control (reduction of suspended solids and organic material where present in significant quantities, effective disinfection where bacterial organisms of public health significance are present, and control of toxic or other deleterious substances);

(ii) Specific industrial waste treatment requirements may be determined on an individual basis in accordance with the provisions of this plan, applicable federal requirements, and the following:

(I) The uses that are or may likely be made of the receiving stream;

(II) The size and nature of flow of the receiving stream;

(III) The quantity and quality of wastes to be treated; and

(IV) The presence or absence of other sources of pollution on the same watershed.

(iii) Where industrial, commercial, or agricultural effluents contain significant quantities of potentially toxic elements, treatment requirements may be determined utilizing appropriate bioassays;

(iv) Industrial cooling waters containing significant heat loads must be subjected to off-stream cooling or heat recovery prior to discharge to public waters;

(v) Positive protection must be provided to prevent bypassing of raw or inadequately treated industrial wastes to any public waters;

(vi) Facilities must be provided to prevent and contain spills of potentially toxic or hazardous materials.

Stat. Auth.: ORS 468.020, 468B.030, 468B.035, 468B.048
Stats. Implemented: ORS 468B.030, 468B.035, 468B.048
Hist.: DEQ 17-2003, f. & cert. ef. 12-9-03; DEQ 2-2007, f. & cert. ef. 3-15-07; DEQ 10-2011, f. & cert. ef. 7-13-11

340-041-0028 Temperature

(1) Background. Water temperatures affect the biological cycles of aquatic species and are a critical factor in maintaining and restoring healthy salmonid populations throughout the State. Water temperatures are influenced by solar radiation, stream shade, ambient air temperatures, channel morphology, groundwater inflows, and stream velocity, volume, and flow. Surface water temperatures may also be warmed by anthropogenic activities such as discharging heated water, changing stream width or depth, reducing stream shading, and water withdrawals.

(2) Policy. It is the policy of the Commission to protect aquatic ecosystems from adverse warming and cooling caused by anthropogenic activities. The Commission intends to minimize the risk to cold-water aquatic ecosystems from anthropogenic warming, to encourage the restoration and protection of critical aquatic habitat, and to control extremes in temperature fluctuations due to anthropogenic activities. The Commission recognizes that some of the State's waters will, in their natural condition, not provide optimal thermal conditions at all places and at all times that salmonid use occurs. Therefore, it is especially important to minimize additional warming due to anthropogenic sources. In addition, the Commission acknowledges that control technologies, best management practices and other measures to reduce anthropogenic warming are evolving and that the implementation to meet these criteria will be an iterative process. Finally, the Commission notes that it will reconsider beneficial use designations in the event that man-made obstructions or barriers to anadromous fish passage are removed and may justify a change to the beneficial use for that water body.

(3) Purpose. The purpose of the temperature criteria in this rule is to protect designated temperature-sensitive, beneficial uses, including specific salmonid life cycle stages in waters of the State.

(4) Biologically Based Numeric Criteria. Unless superseded by the natural conditions criteria described in section (8) of this rule, or by subsequently adopted site-specific criteria approved by EPA, the temperature criteria for State waters supporting salmonid fishes are as follows:

(a) The seven-day-average maximum temperature of a stream identified as having salmon and steelhead spawning use on subbasin maps and tables set out in OAR 340-041-0101 to 340-041-0340: Tables 101B, and 121B, and Figures 130B, 151B, 160B, 170B, 220B, 230B, 271B, 286B, 300B, 310B, 320B, and 340B, may not exceed 13.0 degrees Celsius (55.4 degrees Fahrenheit) at the times indicated on these maps and tables;

(b) The seven-day-average maximum temperature of a stream identified as having core cold water habitat use on subbasin maps set out in OAR 340-041-101 to 340-041-340: Figures 130A, 151A, 160A, 170A, 180A, 201A, 220A, 230A, 271A, 286A, 300A, 310A, 320A, and 340A, may not exceed 16.0 degrees Celsius (60.8 degrees Fahrenheit);

(c) The seven-day-average maximum temperature of a stream identified as having salmon and trout rearing and migration use on subbasin maps set out at OAR 340-041-0101 to 340-041-0340: Figures

130A, 151A, 160A, 170A, 220A, 230A, 271A, 286A, 300A, 310A, 320A, and 340A, may not exceed 18.0 degrees Celsius (64.4 degrees Fahrenheit);

(d) The seven-day-average maximum temperature of a stream identified as having a migration corridor use on subbasin maps and tables OAR 340-041-0101 to 340-041-0340: Tables 101B, and 121B, and Figures 151A, 170A, 300A, and 340A, may not exceed 20.0 degrees Celsius (68.0 degrees Fahrenheit). In addition, these water bodies must have coldwater refugia that are sufficiently distributed so as to allow salmon and steelhead migration without significant adverse effects from higher water temperatures elsewhere in the water body. Finally, the seasonal thermal pattern in Columbia and Snake Rivers must reflect the natural seasonal thermal pattern;

(e) The seven-day-average maximum temperature of a stream identified as having Lahontan cutthroat trout or redband trout use on subbasin maps and tables set out in OAR 340-041-0101 to 340-041-0340: Tables 121B, 140B, 190B, and 250B, and Figures 180A, 201A, 260A and 310A may not exceed 20.0 degrees Celsius (68.0 degrees Fahrenheit);

(f) The seven-day-average maximum temperature of a stream identified as having bull trout spawning and juvenile rearing use on subbasin maps set out at OAR 340-041-0101 to 340-041-0340: Figures 130B, 151B, 160B, 170B, 180A, 201A, 260A, 310B, and 340B, may not exceed 12.0 degrees Celsius (53.6 degrees Fahrenheit). From August 15 through May 15, in bull trout spawning waters below Clear Creek and Mehlhorn reservoirs on Upper Clear Creek (Pine Subbasin), below Laurance Lake on the Middle Fork Hood River, and below Carmen reservoir on the Upper McKenzie River, there may be no more than a 0.3 degrees Celsius (0.5 Fahrenheit) increase between the water temperature immediately upstream of the reservoir and the water temperature immediately downstream of the spillway when the ambient seven-day-average maximum stream temperature is 9.0 degrees Celsius (48 degrees Fahrenheit) or greater, and no more than a 1.0 degree Celsius (1.8 degrees Fahrenheit) increase when the seven-day-average stream temperature is less than 9 degrees Celsius.

(5) Unidentified Tributaries. For waters that are not identified on the “Fish Use Designations” maps referenced in section (4) of this rule, the applicable criteria for these waters are the same criteria as is applicable to the nearest downstream water body depicted on the applicable map. This section (5) does not apply to the “Salmon and Steelhead Spawning Use Designations” maps.

(6) Natural Lakes. Natural lakes may not be warmed by more than 0.3 degrees Celsius (0.5 degrees Fahrenheit) above the natural condition unless a greater increase would not reasonably be expected to adversely affect fish or other aquatic life. Absent a discharge or human modification that would reasonably be expected to increase temperature, DEQ will presume that the ambient temperature of a natural lake is the same as its natural thermal condition.

(7) Oceans and Bays. Except for the Columbia River above river mile 7, ocean and bay waters may not be warmed by more than 0.3 degrees Celsius (0.5 degrees Fahrenheit) above the natural condition unless a greater increase would not reasonably be expected to adversely affect fish or other aquatic life. Absent a discharge or human modification that would reasonably be expected to increase temperature, DEQ will presume that the ambient temperature of the ocean or bay is the same as its natural thermal condition.

(8) Natural Conditions Criteria. Where the department determines that the natural thermal potential of all or a portion of a water body exceeds the biologically-based criteria in section (4) of this rule, the natural thermal potential temperatures supersede the biologically-based criteria, and are deemed to be the applicable temperature criteria for that water body.

(9) Cool Water Species.

(a) No increase in temperature is allowed that would reasonably be expected to impair cool water species. Waters of the State that support cool water species are identified on subbasin tables and figures set out in OAR 340-041-0101 to 340-041-0340; Tables 140B, 190B and 250B, and Figures 180A, 201A and 340A.

(b) See OAR 340-041-0185 for a basin specific criterion for the Klamath River.

(10) Borax Lake Chub. State waters in the Malheur Lake Basin supporting the Borax Lake chub may not be cooled more than 0.3 degrees Celsius (0.5 degrees Fahrenheit) below the natural condition.

(11) Protecting Cold Water.

(a) Except as described in subsection (c) of this rule, waters of the State that have summer seven-day-average maximum ambient temperatures that are colder than the biologically based criteria in section (4) of this rule, may not be warmed by more than 0.3 degrees Celsius (0.5 degrees Fahrenheit) above the colder water ambient temperature. This provision applies to all sources taken together at the point of maximum impact where salmon, steelhead or bull trout are present.

(b) A point source that discharges into or above salmon & steelhead spawning waters that are colder than the spawning criterion, may not cause the water temperature in the spawning reach where the physical habitat for spawning exists during the time spawning through emergence use occurs, to increase more than the following amounts after complete mixing of the effluent with the river:

(A) If the rolling 60 day average maximum ambient water temperature, between the dates of spawning use as designated under subsection (4)(a) of this rule, is 10 to 12.8 degrees Celsius, the allowable increase is 0.5 Celsius above the 60 day average; or

(B) If the rolling 60 day average maximum ambient water temperature, between the dates of spawning use as designated under subsection (4)(a) of this rule, is less than 10 degrees Celsius, the allowable increase is 1.0 Celsius above the 60 day average, unless the source provides analysis showing that a greater increase will not significantly impact the survival of salmon or steelhead eggs or the timing of salmon or steelhead fry emergence from the gravels in downstream spawning reach.

(c) The cold water protection narrative criteria in subsection (a) do not apply if:

(A) There are no threatened or endangered salmonids currently inhabiting the water body;

(B) The water body has not been designated as critical habitat; and

(C) The colder water is not necessary to ensure that downstream temperatures achieve and maintain compliance with the applicable temperature criteria.

(12) Implementation of the Temperature Criteria.

(a) Minimum Duties. There is no duty for anthropogenic sources to reduce heating of the waters of the State below their natural condition. Similarly, each anthropogenic point and nonpoint source is responsible only for controlling the thermal effects of its own discharge or activity in accordance with its

overall heat contribution. In no case may a source cause more warming than that allowed by the human use allowance provided in subsection (b) of this rule.

(b) Human Use Allowance. Insignificant additions of heat are authorized in waters that exceed the applicable temperature criteria as follows:

(A) Prior to the completion of a temperature TMDL or other cumulative effects analysis, no single NPDES point source that discharges into a temperature water quality limited water may cause the temperature of the water body to increase more than 0.3 degrees Celsius (0.5 Fahrenheit) above the applicable criteria after mixing with either twenty five (25) percent of the stream flow, or the temperature mixing zone, whichever is more restrictive; or

(B) Following a temperature TMDL or other cumulative effects analysis, waste load and load allocations will restrict all NPDES point sources and nonpoint sources to a cumulative increase of no greater than 0.3 degrees Celsius (0.5 Fahrenheit) above the applicable criteria after complete mixing in the water body, and at the point of maximum impact.

(C) Point sources must be in compliance with the additional mixing zone requirements set out in OAR 340-041-0053(2)(d).

(D) A point source in compliance with the temperature conditions of its NPDES permit is deemed in compliance with the applicable criteria.

(c) Air Temperature Exclusion. A water body that only exceeds the criteria set out in this rule when the exceedance is attributed to daily maximum air temperatures that exceed the 90th percentile value of annual maximum seven-day average maximum air temperatures calculated using at least 10 years of air temperature data, will not be listed on the section 303(d) list of impaired waters and sources will not be considered in violation of this rule.

(d) Low Flow Conditions. An exceedance of the biologically-based numeric criteria in section (4) of this rule, or an exceedance of the natural condition criteria in section (8) of this rule will not be considered a permit violation during stream flows that are less than the 7Q10 low flow condition for that water body.

~~(e) 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 rule. DEQ will work with the Oregon Department of Forestry to revise the Forest Practices program to attain water quality standards.~~

~~(f) Agriculture on State and Private Lands. For farming or ranching operations on State or private lands, water quality standards are intended to be attained and are implemented through the Agricultural Water Quality Management Act (ORS 568.900 to 568.933) and rules thereunder, administered by the Oregon Department of Agriculture. Therefore, farming and ranching operations that are in compliance with the Agricultural Water Quality Management Act requirements will not be subject to DEQ enforcement under this rule. DEQ will work with the Oregon Department of Agriculture to revise the Agricultural Water Quality Management program to attain water quality standards.~~

~~(g) Agriculture and Forestry on Federal Lands. Agriculture and forestry activities conducted on federal land must meet the requirements of this rule and are subject to the department's jurisdiction. Pursuant to Memoranda of Agreement with the U.S. Forest Service and the Bureau of Land Management, water quality standards are expected to be met through the development and implementation of water quality restoration plans, best management practices and aquatic conservation strategies. Where a Federal Agency is a Designated Management Agency by the Department, implementation of these plans, practices and strategies is deemed compliance with this rule.~~

(~~h~~e) Other Nonpoint Sources. The department may, on a case-by-case basis, require nonpoint sources (other than forestry and agriculture), including private hydropower facilities regulated by a 401 water quality certification, that may contribute to warming of State waters beyond 0.3 degrees Celsius (0.5 degrees Fahrenheit), and are therefore designated as water-quality limited, to develop and implement a temperature management plan to achieve compliance with applicable temperature criteria or an applicable load allocation in a TMDL pursuant to OAR 340-042-0080.

(A) Each plan must ensure that the nonpoint source controls its heat load contribution to water temperatures such that the water body experiences no more than a 0.3 degrees Celsius (0.5 degree Fahrenheit) increase above the applicable criteria from all sources taken together at the maximum point of impact.

(B) Each plan must include a description of best management practices, measures, effluent trading, and control technologies (including eliminating the heat impact on the stream) that the nonpoint source intends to use to reduce its temperature effect, a monitoring plan, and a compliance schedule for undertaking each measure.

(C) The Department may periodically require a nonpoint source to revise its temperature management plan to ensure that all practical steps have been taken to mitigate or eliminate the temperature effect of the source on the water body.

~~(D) Once approved, a nonpoint source complying with its temperature management plan is deemed in compliance with this rule.~~

(~~i~~f) Compliance Methods. Anthropogenic sources may engage in thermal water quality trading in whole or in part to offset its temperature discharge, so long as the trade results in at least a net thermal loading decrease in anthropogenic warming of the water body, and does not adversely affect a threatened or endangered species. Sources may also achieve compliance, in whole or in part, by flow augmentation, hyporheic exchange flows, outfall relocation, or other measures that reduce the temperature increase caused by the discharge.

(~~j~~g) Release of Stored Water. Stored cold water may be released from reservoirs to cool downstream waters in order to achieve compliance with the applicable numeric criteria. However, there can be no significant adverse impact to downstream designated beneficial uses as a result of the releases of this cold water, and the release may not contribute to violations of other water quality criteria. Where the Department determines that the release of cold water is resulting in a significant adverse impact, the Department may require the elimination or mitigation of the adverse impact.

(13) Site-Specific Criteria. The Department may establish, by separate rulemaking, alternative site-specific criteria for all or a portion of a water body that fully protects the designated use.

(a) These site-specific criteria may be set on a seasonal basis as appropriate.

(b) The Department may use, but is not limited by the following considerations when calculating site-specific criteria:

(A) Stream flow;

(B) Riparian vegetation potential;

(C) Channel morphology modifications;

(D) Cold water tributaries and groundwater;

(E) Natural physical features and geology influencing stream temperatures; and

(F) Other relevant technical data.

(c) DEQ may consider the thermal benefit of increased flow when calculating the site-specific criteria.

(d) Once established and approved by EPA, the site-specific criteria will be the applicable criteria for the water bodies affected.

[ED. NOTE: Tables referenced are available from the agency.]

Stat. Auth.: ORS 468.020, 468B.030, 468B.035 & 468B.048
Stats. Implemented: ORS 468B.030, 468B.035 & 468B.048
Hist.: DEQ 17-2003, f. & cert. ef. 12-9-03; DEQ 1-2007, f. & cert. ef. 3-14-07; DEQ 2-2007, f. & cert. ef. 3-15-07

340-041-0061 Other Implementation of Water Quality Criteria

(1) A waste treatment and disposal facility may not be constructed or operated and wastes may not be discharged to public waters without a permit from the department in accordance with ORS 468B.050.

(2) Plans for all sewage and industrial waste treatment, control, and disposal facilities must be submitted to the department for review and approval prior to construction as required by ORS 468B.055.

(3) Minimum design criteria for waste treatment and control facilities prescribed under this plan and other waste treatment and controls deemed necessary to ensure compliance with the water quality standards contained in this plan must be provided in accordance with specific permit conditions for those sources or activities for which permits are required and the following implementation program.

(a) For new or expanded waste loads or activities, fully approved treatment or control facilities, or both, must be provided prior to discharge of any wastes from the new or expanded facilities or conduct of the new or expanded activity.

(b) For existing waste loads or activities, additional treatment or control facilities necessary to correct specific unacceptable water quality conditions must be provided in accordance with a specific program and timetable incorporated into the waste discharge permit for the individual discharger or activity. In developing treatment requirements and implementation schedules for existing installations or activities,

consideration will be given to the impact upon the overall environmental quality, including air, water, land use, and aesthetics.

(c) Wherever minimum design criteria for waste treatment and control facilities set forth in this plan are more stringent than applicable federal standards and treatment levels currently being provided, upgrading to the more stringent requirements will be deferred until it is necessary to expand or otherwise modify or replace the existing treatment facilities. Such deferral will be acknowledged in the permit for the source.

(d) Where planning, design, or construction of new or modified waste treatment and controls to meet prior applicable state or federal requirements is underway at the time this plan is adopted, such plans, design, or construction may be completed under the requirements in effect when the project was initiated. Upgrading to meet more stringent future requirements will be timed in accordance with section (3) of this rule.

(4) Confined animal feeding operations (CAFOs) are regulated under OAR 340-051-0005 through 340-051-0080 to minimize potential adverse effect on water quality (see also OAR 603-074-0005 through 603-074-0070).

(5) Programs for control of pollution from nonpoint sources when developed by the department or by other agencies pursuant to section 208 of the federal Clean Water Act and approved by the department will be incorporated into this plan by amendment via the same process used to adopt the plan unless other procedures are established by law.

(6) Where minimum requirements of federal law or enforceable regulations are more stringent than specific provisions of this plan, the federal requirements will prevail.

(7) Within the framework of statewide priorities and available resources, the department will monitor water quality within the basin for the purposes of evaluating conformance with the plan and developing information for additions or updates.

(8) The commission recognizes that the potential exists for conflicts between water quality management plans and the land use plans and resource management plans that local governments and other agencies are required to develop. If conflicts develop, the department will meet with the local governments or responsible agencies to resolve the conflicts. Revisions will be presented for adoption via the same process used to adopt the plan unless other specific procedures are established by law.

(9) The department will calculate and include effluent limits specified in pounds per day, which will be the mass load limits for biochemical oxygen demand or carbonaceous biochemical oxygen demand and total suspended solids in National Pollutant Discharge Elimination System permits issued to all sewage treatment facilities. These limits must be calculated as follows.

(a) Except as noted in paragraph (H) of this subsection, the following requirements apply to existing facilities and to facilities receiving departmental approval for engineering plans and specifications for new treatment facilities or treatment facilities expanding the average dry weather treatment capacity before June 30, 1992:

(A) During periods of low stream flows (approximately May 1 through October 31), the monthly average mass load expressed as pounds per day may not exceed the applicable monthly concentration effluent limit times the design average dry weather flow expressed in million gallons per day times 8.34. The weekly average mass load expressed as pounds per day may not exceed the monthly average mass load

times 1.5. The daily mass load expressed in pounds per day may not exceed the monthly average mass load times 2.0.

(B) During the period of high stream flows (approximately November 1 through April 30), the monthly average mass load expressed as pounds per day may not exceed the monthly concentration effluent limit times the design average wet weather flow expressed in million gallons per day times 8.34. The weekly average mass load expressed as pounds per day may not exceed the monthly average mass load times 1.5. The daily mass load expressed in pounds per day may not exceed the monthly average mass load times 2.0.

(C) On any day that the daily flow to a sewage treatment facility exceeds the lesser hydraulic capacity of the secondary treatment portion of the facility or twice the design average dry weather flow, the daily mass load limit does not apply. The permittee must operate the treatment facility at highest and best practicable treatment and control.

(D) The design average wet weather flow used in calculating mass loads must be approved by the department in accordance with prudent engineering practice and must be based on a facility plan approved by the department, engineering plans and specifications approved by the department, or an engineering evaluation. The permittee must submit documentation describing and supporting the design average wet weather flow with the permit application, application for permit renewal, or modification request or upon request by the department. The design average wet weather flow is defined as the average flow between November 1 and April 30 when the sewage treatment facility is projected to be at design capacity for that portion of the year.

(E) Mass loads assigned as described in paragraphs (B) and (C) of this subsection will not be subject to OAR 340-041-0004(9);

(F) Mass loads as described in this rule will be included in permits upon renewal or upon a request for permit modification.

(G) Within 180 days after permit renewal or modification, a permittee receiving higher mass loads under this rule and having a separate sanitary sewer system must submit to the department for review and approval a proposed program and time schedule for identifying and reducing inflow. The program must include the following:

(i) Identification of all overflow points and verification that sewer system overflows are not occurring up to a 24-hour, five-year storm event or equivalent;

(ii) Monitoring of all pump station overflow points;

(iii) A program for identifying and removing all inflow sources into the permit holder's sewer system over which the permit holder has legal control; and

(iv) For those permit holders not having the necessary legal authority for all portions of the sewer system discharging into the permit holder's sewer system or treatment facility, a program and schedule for gaining legal authority to require inflow reduction and a program and schedule for removing inflow sources.

(H) Within one year after the department's approval of the program, the permit holder must begin implementation of the program.

(I) Paragraphs (A) through (G) of this subsection do not apply to the cities of Athena, Elgin, Adair Village, Halsey, Harrisburg, Independence, Carlton, and Sweet Home. Mass load limits have been individually assigned to these facilities.

(b) For new sewage treatment facilities or treatment facilities expanding the average dry weather treatment capacity and receiving engineering plans and specifications approval from the department after June 30, 1992, the mass load limits must be calculated by the department based on the proposed treatment facility capabilities and the highest and best practicable treatment to minimize the discharge of pollutants.

(c) Mass load limits as defined in this rule may be replaced by more stringent limits if required by waste load allocations established in accordance with a TMDL for treatment facilities discharging to water quality limited streams or if required to prevent or eliminate violations of water quality standards.

(d) If the design average wet weather flow or the hydraulic secondary treatment capacity is not known or has not been approved by the department at the time of permit issuance, the permit must include as interim mass load limits the mass load limits in the previous permit issued to the permit holder for the treatment facility. The permit must also include a requirement that the permit holder submit to the department the design average wet weather flow and hydraulic secondary treatment capacity within 12 months after permit issuance. Upon review and approval of the design flow information, the department will modify the permit and include mass load limits as described in subsection (a) of this section.

(e) Each permit holder with existing sewage treatment facilities otherwise subject to subsection (a) of this section may choose mass load limits calculated as follows:

(A) The monthly average mass load expressed as pounds per day may not exceed the applicable monthly concentration effluent limit times the design average dry weather flow expressed in million gallons per day times 8.34 pounds per gallon.

(B) The weekly average mass load expressed as pounds per day may not exceed the monthly average mass load times 1.5.

(C) The daily mass load expressed in pounds per day may not exceed the monthly average mass load times 2.0. If existing mass load limits are retained by the permit holder, the terms and requirements of subsection (a) of this section do not apply.

(f) The commission may grant exceptions to subsection (a) of this section. In allowing increased discharged loads, the commission must make the findings specified in OAR 340-041-0004(9)(a) for waste loads and the following findings:

(A) Mass loads calculated in subsection (a) of this section cannot be achieved with the existing treatment facilities operated at maximum efficiency at projected design flows; and

(B) There are no practicable alternatives to achieving the mass loads as calculated in subsection (a) of this section.

~~(10) Forestry on state and private lands. Nonpoint sources of pollution from forest operations on state or private lands are subject to best management practices and other control measures established by the Oregon Department of Forestry under the Forest Practices Act (ORS 527.610 to 527.992). Such forest operations when conducted in good faith compliance with the Forest Practices Act requirements are generally deemed not to cause violations of water quality standards as provided in ORS 527.770. Forest~~

~~operations on state and private lands are subject to load allocations under ORS 468.110 and OAR 340, Division 42, to the extent necessary to implement the federal Clean Water Act.~~

~~(11) In areas subject to the Agricultural Water Quality Management Act, the Oregon Department of Agriculture (ODA) under ORS 568.900 to 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 ODA with comments on what would be sufficient to meet WQS or TMDL load allocations. If a resolution cannot be agreed upon, the department will request the Environmental Quality Commission (EQC) to petition ODA for a review of part or all of water quality management area plan 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 further evaluation and potential requirements.~~

~~(12) Agriculture and forestry on federal lands. Agriculture and forestry activities conducted on federal land must meet the requirements of this division and are subject to the department's jurisdiction. Pursuant to Memoranda of Agreement with the U.S. Forest Service and the Bureau of Land Management, water quality standards are expected to be met through the development and implementation of water quality restoration plans, best management practices, and aquatic conservation strategies. Where the department designates a federal agency as a designated management agency, implementation of these plans, practices, and strategies is deemed compliance with this division.~~

(~~13~~12) Testing methods. The analytical testing methods for determining compliance with the water quality standards in this rule must comply with 40 CFR Part 136 or, if Part 136 does not prescribe a method, with the most recent edition of Standard Methods for the Examination of Water and Waste Water published jointly by the American Public Health Association, American Water Works Association, and Water Pollution Control Federation; if the department has published an applicable superseding method, testing must comply with the superseding method. Testing in accordance with an alternative method must comply with this rule if the department has published the method or has approved the method in writing.

(~~14~~13) Reservoirs or managed lakes are deemed in compliance with water quality criteria for temperature, pH, or dissolved oxygen (DO) if all of the following circumstances exist.

(a) The water body has thermally stratified naturally or due to the presence of an impoundment.

(b) The water body has three observable layers, defined as the epilimnion, metalimnion, and hypolimnion.

(c) A layer exists in the reservoir or managed lake in which temperature, pH, and DO criteria are all met, and the layer is sufficient to support beneficial uses.

(d) All practicable measures have been taken by the entities responsible for management of the reservoir or managed lake to maximize the layers meeting the temperature, pH, and DO criteria.

(e) One of the following conditions is met:

(A) The streams or river segments immediately downstream of the water body meet applicable criteria for temperature, pH, and DO.

(B) All practicable measures have been taken to maximize downstream water quality potential and fish passage.

(C) If the applicable criteria are not met in the stream or river segment immediately upstream of the water body, then no further measurable downstream degradation of water quality has taken place due to stratification of the reservoir or managed lake.

(~~15~~14) Compliance schedules. In a permit issued under OAR 340, division 045 or in a water quality certification under OAR 340, division 48, the department may include compliance schedules for the implementation of effluent limits derived from water quality criteria in this division. A compliance schedule in an NPDES permit is allowed only for water quality based effluent limits that are newly applicable to the permit and must comply with provisions in 40 CFR ¦122.47 (including the requirement that water quality criteria must be achieved as soon as possible).

Stat. Auth.: ORS 468.020, 468B.030, 468B.035 & 468B.048
Stats. Implemented: ORS 468B.030, 468B.035 & 468B.048
Hist.: DEQ 17-2003, f. & cert. ef. 12-9-03; DEQ 3-2004, f. & cert. ef. 5-28-04; DEQ 10-2011, f. & cert. ef. 7-13-11

Agreement Between
Oregon Department of Environmental Quality
And
Northwest Environmental Advocates
Relating to
OAR 340-041-0007(5)

Recitals

Northwest Environmental Advocates (NWEA), the U.S. Environmental Protection Agency (EPA), and the Oregon Department of Environmental Quality (DEQ) have entered into an agreement relating to certain issues in the proposed remedy order for the case of *NWEA v. EPA*, Civil No. 05-1876-AC. That remedy agreement is incorporated by reference as Attachment A to this agreement.

In Part A of the remedy agreement, DEQ commits to proposing rule amendments that would remove certain provisions in OAR 340-041-0028 and 340-041-0061 relating to nonpoint source implementation of water quality standards. DEQ also commits to presenting the rulemaking proposal to the Oregon Environmental Quality Commission for rule adoption at its meeting in June of 2013.

OAR 340-041-0007(5) contains provisions that are similar to the provisions in OAR 340-041-0028 and 340-041-0061 that DEQ has agreed to address in the proposed rulemaking. The provisions in OAR 340-041-0007(5) were adopted after the filing of the amended complaint in *NWEA v. EPA* and were not a part of that lawsuit. NWEA has indicated, however, that it intends to challenge EPA's failure to review and approve or disapprove of the provision.

Agreement

1. DEQ agrees to include the removal of section (5) of OAR 340-041-0007 in the rulemaking process described in Part A 2 and 3 of the remedy agreement.

2. NWEA agrees to refrain from filing suit against EPA with respect to EPA's failure to review the provisions in section (5) of OAR 340-041-0007 until after the EQC's June 2013 meeting.

Dated this 31st day of January, 2013.

Nina Bell
Executive Director
Northwest Environmental Advocates

Dick Pedersen
Director
Oregon Department of
Environmental Quality

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

NORTHWEST ENVIRONMENTAL ADVOCATES, a non-profit corporation,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, a United States Government Agency, NATIONAL MARINE FISHERIES SERVICE, a part of the National Oceanic and Atmospheric Administration, a part of the United States Department of Commerce, and UNITED STATES FISH AND WILDLIFE SERVICE, a part of the United States Department of the Interior,

Defendants, and

THE STATE OF OREGON, and NORTHWEST PULP AND PAPER ASSOCIATION,

Intervenor-Defendants.

Case No: 3:05-cv-1876-AC

STIPULATED ORDER ON NONPOINT SOURCE AND ENDANGERED SPECIES ACT REMEDIES

ACOSTA, Magistrate Judge:

On February 28, 2012, this Court issued an Opinion and Order granting in part and denying in part the parties' cross motions for summary judgment. Docket No. 290. The Court also ordered the parties to confer regarding the appropriate remedies in this case. The parties have reached agreement on the remedies for certain claims on which

Plaintiff Northwest Environmental Advocates ("NWEA") prevailed. *Id.* The Court enters the following Order adopting the parties' agreement, as set forth below:

A. Nonpoint Source Provisions

1. The United States Environmental Protection Agency's ("EPA's") obligation to review Oregon's water quality standards provisions pertaining to nonpoint sources is stayed, except as provided in Paragraphs 4 and 5 below.
2. The Oregon Department of Environmental Quality ("DEQ") shall convene an advisory committee and request that it recommend that the Environmental Quality Commission ("EQC") amend its regulations on or before the EQC's June 2013 meeting, in the following manner:
    a. Amend OAR 340-041-0028 to remove subsections (e), (f), and (g) of section 12 of the rule.
    b. Amend OAR 340-041-0028 to remove paragraph (D) of subsection (h) of section 12 of the rule.
    c. Amend OAR 340-041-0061 to remove sections (10), (11), and (12) of the rule.
3. Regardless of whether the advisory committee recommends amending the regulations in accordance with Paragraph 2, DEQ shall draft proposed regulations, for presentation to the EQC in sufficient time for the EQC's June 2013 meeting, which reflect the amendments set forth in Paragraph 2.
4. If the EQC decides not to amend its regulations in accordance with Paragraph 2, then the stay on EPA's obligation to review the nonpoint source provisions terminates. DEQ shall notify all parties as soon as practicable, and in no event

later than five working days after the EQC's June 2013 meeting, if the EQC decides not to amend its regulations in accordance with Paragraph 2. Within 90 days of such notification, EPA shall take final action under the Clean Water Act approving and/or disapproving the provisions that EQC decides not to amend, as described in Paragraph 2, and such review and final action shall be pursuant to the requirements in 33 U.S.C. § 1313(c), EPA's implementing regulations, the February 28, ~~2102~~ 2012 Opinion and Order (Dkt 290) and the Order on the United States' Motion for Clarification (Dkt 314).

5. Finally, EPA will review and approve or disapprove OAR 340-041-0004(4) in accordance with the schedule, and pursuant to the requirements, set forth in Paragraph 4 (and accordingly, in no event later than 95 days after the conclusion of the EQC's June 2013 meeting).

B. Endangered Species Act Claims

1. The National Marine Fisheries Service ("NMFS") and the U.S. Fish and Wildlife Service ("FWS") 2004 Biological Opinions and accompanying Incidental Take Statements on the effects of EPA's approval of Oregon's temperature water quality standards are set aside and remanded for further consideration consistent with the Court's February 28, 2012 Opinion and Order.
2. EPA shall complete and submit to NMFS and FWS an amended Biological Evaluation regarding its approval of Oregon's temperature water quality standards within nine months of the entry of this Order.
3. NMFS shall complete consultation on the impacts of EPA's approval of Oregon's temperature water quality standards on listed species and designated critical

habitat, including the 14 Evolutionarily Significant Units ("ESUs") of salmonids at issue in this case, and issue a Biological Opinion, within 14 months of receiving a Biological Evaluation from EPA.[1]

4. FWS shall complete consultation on the impacts of EPA's approval of Oregon's temperature water quality standards on listed species and designated critical habitat, including the two Distinct Population Segments ("DPSs") of Bull Trout at issue in this case, and issue a Biological Opinion, within 12 months of receiving a Biological Evaluation from EPA.

5. EPA shall take any final actions necessary on the water quality standards subject to the consultations pursuant to the following schedule: If the Biological Opinions find EPA's approval of the water quality standards does not jeopardize any of the listed species or result in adverse modification of any listed species' critical habitat, EPA will act (if necessary) within 60 days of receiving the second of the two Biological Opinions. If either or both Biological Opinions find that EPA's approval of the water quality standards jeopardizes any of the listed species or results in adverse modification of any listed species' critical habitat, EPA will act (if necessary) within 120 days of receiving the second of the two Biological Opinions.

6. EPA, NMFS, and FWS have submitted to the Court work plans setting forth the agencies' current estimates of the steps that must be taken to complete consultation, and the approximate allocation of time for each step. The work

[1] EPA and the Services must engage in formal consultation, resulting in a biological opinion, only where they determine that the action is likely to adversely affect a listed species or critical habitat. *See* 50 C.F.R. § 402.13 (informal consultation) and 50 C.F.R. § 402.14 (formal consultation).

plans are attached as Exhibits A, B, and C to this Order. Federal Defendants currently anticipate taking the steps set forth in the attached work plans on the schedules set forth therein. However, Federal Defendants' work plans and schedules may change during the course of the consultation. Accordingly, only the final deadlines for completion of EPA's Biological Evaluation and NMFS's and FWS's Biological Opinions shall be enforceable.

7. NMFS and FWS will provide written reports to NWEA, seven and six months after receiving the EPA Biological Evaluation, respectively, describing the status of the consultations, including information regarding the agencies' progress with respect to the individual work items and schedules set forth in their work plans and the deadlines for completion of the consultations provided for in this Order.

C. Preclusion

Nothing in this order shall preclude NWEA's challenging any final agency actions taken pursuant to this Order. Should NWEA choose to challenge any final agency actions taken pursuant to this Order, it shall file any such challenges in a separate action.

D. Extensions of Time

Federal Defendants and the Oregon DEQ have stipulated to the deadlines in this Order based on their current assessment of the agency resources needed and available to meet the deadlines, and for Federal Defendants, based also on their intent to take the steps set forth in the attached work plans on the schedules set forth therein. Therefore, the Federal Defendants and the Oregon DEQ shall make good-faith efforts to comply with the deadlines set forth in this Order. If, however, due to unforeseen circumstances,

such as a change in EPA's action on which it seeks consultation, Federal Defendants or DEQ are unable to meet the deadlines, they may seek reasonable modifications of the deadlines. In such a case, Federal Defendants or DEQ shall notify all other parties of the requested modification and the reasons therefor. The parties will meet and confer (in-person not required) at the earliest possible time in a good-faith effort to resolve the request before pursuing relief from the Court. In the event a resolution is reached, the parties shall jointly move the Court to modify this Order. If the parties are unable to agree, Federal Defendants or DEQ may file a motion with this Court.

E. Final Agreement, Scope and Effect of Order, and Subsequent Remedies

1. This Stipulated Order constitutes the final, complete, and exclusive agreement and understanding among the parties regarding the settlement embodied in this Order.

2. Except as expressly provided in this Stipulated Order, none of the parties waives or relinquishes any legal rights, claims, or defenses it may have. Nothing in the terms of this Consent Decree shall be construed to limit or modify the discretion accorded EPA, FWS, NMFS, or Oregon DEQ under the Clean Water Act or Endangered Species Act, or by general principles of administrative law.

3. No provision in this Stipulated Order shall be interpreted as or constitute a commitment or requirement that EPA, NMFS or FWS take action in contravention of the Administrative Procedure Act, 5 U.S.C. §§ 5541-551, 701-706, the Clean Water Act, 33 U.S.C. § 1251-1387 or any other law or regulation, either substantive or procedural. No provision of this Order shall be interpreted to constitute a commitment or requirement that EPA obligate or pay funds in

contravention of the Anti-Deficiency Act, 33 U.S.C. § 1341, or any other applicable law or regulation.

4. No provision in this Stipulated Order shall be interpreted as or constitute a commitment or requirement that Oregon DEQ take action in contravention of the Oregon Administrative Procedure Act (ORS 183.310 *et seq.*) or any other state or federal law or regulation, either substantive or procedural. No provision of this Order shall be interpreted to constitute a commitment or requirement that Oregon DEQ pay funds exceeding an amount appropriated by the legislature and available to Oregon DEQ.

5. In the event that EPA, FWS, NMFS or Oregon DEQ fail to meet a deadline set forth in section A or B above, Plaintiffs' first remedy shall be a motion to enforce the terms of this Agreement. This Agreement shall not, in the first instance, be enforceable through a proceeding for contempt of court.

IT IS SO ORDERED.

DATED this 7th day of January, 2013.

John V. Acosta
United States Magistrate Judge

EPA Workplan for Completion of Amended BE for EPA's approval of Oregon's 2003 Temperature Water Quality Standards

Task 1 - Identify and assign staff to accomplish specific tasks tor revising the BE. Because EPA staff resources are very limited, staff must be assigned to work on revising the BE after the final order is entered. The first task after entry of the order will be to identify work related to other projects, such as permits and water quality standards, that will be delayed in order to re-assign work to the BE. This process typically takes a month or two because work on other discrete projects often needs to be finished before staff can be re-assigned.

Task 2 - Define the scope of the action. EPA will clarify (in cooperation with the Services) the scope of the proposed action for ESA review.

Task 3 - Identify and evaluate new scientific studies and scientific rationales developed after 2004 related to the proposed action. For example, EPA will need to review new research on temperature effects to salmonids and new research on cold water refugia. EPA also will need to review new temperature data in Oregon. EPA will synthesize this information in a revised effects analysis for the various elements of the proposed action.

Task 4 - Evaluate the science and make effects determinations for newly listed species or critical habitat. EPA will need to evaluate the temperature studies related to newly listed species, such as green sturgeon and smelt, and write up an effects analysis for these species.

Task 5 – Develop any conservation measures. This task will involve coordination with the Services.

Task 6 - Internal review and briefing. The various elements of the amended BE will need to be assembled, reviewed, and edited by an EPA review team. Management will be briefed on the final draft.

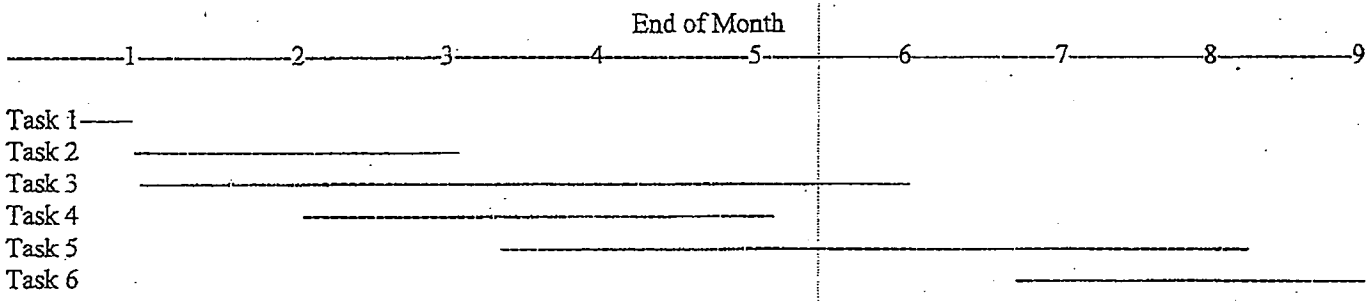

EXHIBIT A

NMFS Revised Schedule and Work Plan

Estimated Timeline for Biological Opinion on EPA's Approval of Revised Oregon Water Quality Standards for Temperature and Dissolved Oxygen (On Remand)

Cumulative Time After Start Date	Task Completed by End of Period
Pre-Consultation/Information Gathering (with Action Agency)	
02.00 months	Compile, review, and synthesize scientific literature and data on status of new species and critical habitat (eulachon, green sturgeon, and critical habitat for ten salmonid species); update status information for species and critical habitat considered in 2004 BiOp (Snake River fall chinook + critical habitat; Snake River spring/summer chinook + critical habitat; Snake River sockeye + critical habitat; Snake River steelhead; Lower Columbia River chinook; Upper Columbia River spring chinook; Upper Willamette River chinook; Columbia River chum; Southern Oregon/Northern California Coasts coho + critical habitat; Oregon Coast coho; Mid Columbia River steelhead; Lower Columbia River steelhead; Upper Willamette River steelhead; Upper Columbia River steelhead).
02.50 months	Compile data and develop GIS products as needed; may include NPDES discharge maps with fish population overlays, 303(d) maps for all relevant Oregon water bodies.
03.50 months	Compile, review and synthesize scientific literature on temperature and dissolved oxygen effects on salmon, steelhead, eulachon, and green sturgeon.
04.00 months	Compile and synthesize data related to assumptions about seasonal thermal patterns of all relevant Oregon water bodies.
04.00 months	**Total time for pre-consultation/information gathering**
Formal Consultation/Biological Opinion	
00.25 months	Develop section on consultation history and description of proposed action.
00.50 months	Develop section describing action area, with maps as needed.
01.00 months	Develop section on status of the species range-wide and critical habitat at the scale of the designation. May include species maps by population, abundance data, etc.
01.25 months	Develop section on conceptual approach to the analysis of effects.
01.75 months	Develop section on status of environmental baseline, including status of environment, species and critical habitat in the action area.
02.75 months	Analyze effects on the environment of narrative and numeric criteria, antidegradation provisions, and beneficial use designations.
04.50 months	Develop analysis of effects on individual fish of each ESA-listed species from changes to the environment, which may include behavior, physiology, growth, disease incidence, distribution, and abundance, as applicable.
05.50 months	Develop analysis of effects on critical habitat.
06.00 months	Develop analysis of cumulative effects.
06.75 months	Develop integration and synthesis of effects, including effect on populations and likelihood of jeopardy and adverse modification of critical habitat.
07.25 months	Develop conclusions for each species and its critical habitat, where designated
08.25 months	Develop reasonable and prudent alternative(s) and discuss with action agency if needed.
08.75 months	Develop amount or extent of take.
09.25 months	Develop reasonable and prudent measures and terms and conditions.
09.50 months	Develop literature cited section, finalize internal draft biological opinion; begin internal review process, including NW Fisheries Science Center review.
10.25 months	First level of internal review and Science Center review complete; begin revisions of draft

EXHIBIT B

	biological opinion based on comments.
10.75 months	Complete initial revisions; begin second level of internal review (QA/QC).
11.25 months	Second level of internal review complete; begin revisions of draft biological opinion based on comments.
11.75 months	Complete revisions based on second level review; begin legal review process.
12.25 months	Legal review complete; begin revisions of draft biological opinion based on comments.
12.75 months	Complete revisions of draft biological opinion based on legal review and provide to EPA for review.
13.00 months	EPA comments received; begin revisions to document as appropriate.
13.25 months	Complete revisions based on EPA comments; begin final internal and legal reviews.
14.00 months	Issue final document.
14.00 months	**Total time for formal consultation/writing biological opinion**

USFWS Schedule and Work Plan

Estimated Timeline for Biological Opinion on EPA's Approval of Revised Oregon Water Quality Standards for Temperature and Dissolved Oxygen (On Remand)

Cumulative Time After Start Date	Task Completed by End of Period
Pre-Consultation/Information Gathering (with EPA)	
04.00 months	Assist EPA with development of their biological evaluation (BE), in particular relevant information since completion of the 2004 opinion that would inform the *status of the species, environmental baseline* and *effects* sections of the new BE (e.g., new listings or changes to listing status', new critical habitat designations).
04.00 months	**Total time for assisting EPA in BE development**
Formal Consultation/Biological Opinion	
00.25 months	Gather all relevant information that has become available since 2004 including, but not limited to, 5-year reviews, changes to listing status' and new critical habitat designations for listed aquatic species in Oregon.
00.50 months	Develop section on consultation history and description of proposed action.
00.75 months	Develop section describing action area, with maps as needed.
01.25 months	Develop section on status of the species range-wide and critical habitat at the scale of the designation. May include species maps by population, abundance data, etc.
01.75 months	Develop section on conceptual approach to the analysis of effects (consultation framework)
02.75 months	Develop section on status of environmental baseline, including status of environment, species and critical habitat in the action area.
03.75 months	Develop analysis of effects on the seven federally listed fish species in Oregon under the jurisdiction of the FWS. For bull trout analyze separately the effect of the temperature standard on two different DPS's of bull trout in Oregon (Columbia River and Klamath) to comply with the preamble of the 1998 bull trout listing rule in which the FWS stated that it would continue to treat the five populations of bull trout as distinct population segments for purposes of consultation and recovery.
04.00 months	Develop analysis of effects on critical habitat.
04.50 months	Develop analysis of cumulative effects.
05.00 months	Develop integration and synthesis of effects, including effect on populations and likelihood of jeopardy and adverse modification of critical habitat.
05.25 months	Develop conclusions for each species and its critical habitat, where designated
06.25 months	Develop reasonable and prudent alternative(s) or reasonable and prudent measure(s) and associated terms and conditions.
07.00 months	Develop amount or extent of take.
07.50 months	Develop literature cited section, finalize internal draft biological opinion; begin internal review process.
08.25 months	First level of internal review complete; begin revisions of draft biological opinion based on comments.
08.75 months	Complete initial revisions; begin second level of internal review.
09.25 months	Second level of internal review complete; begin revisions of draft biological opinion based on comments.

EXHIBIT C

09.75 months	Complete revisions based on second level review; begin legal review process.
10.25 months	Legal review complete; begin revisions of draft biological opinion based on comments.
10.50 months	Complete revisions of draft biological opinion based on legal review and provide to EPA for review.
11.00 months	EPA comments received; begin revisions to document as appropriate.
11.25 months	Complete revisions based on EPA comments; begin final internal and legal reviews.
12.00 months	Issue final document.
12.00 months	**Total time for formal consultation/writing biological opinion**

EXHIBIT C