


State of Oregon
Department of Environmental Quality

Memorandum

Date: Sept. 30, 2013

To: Environmental Quality Commission

From: Dick Pedersen, Director 

Subject: Agenda item N, Informational item: Water Quality Standards Updates
October 16-17, 2013, EQC meeting

Why this is important As a result of litigation, DEQ can no longer develop Total Maximum Daily Loads or wastewater discharge permits based on natural conditions. This update informs the commission about how DEQ proposes to continue improving water temperatures and other EPA actions related to the litigation.

Background In August 2013, DEQ presented information to EQC on the *Northwest Environmental Advocates v. EPA* water quality standards litigation and two EPA actions that occurred in August as a result of that litigation. The actions were:

1. EPA's disapproval of the natural conditions criterion contained in DEQ's temperature standard and disapproval of a general natural conditions provision contained in Oregon's statewide narrative criteria; and
2. EPA's review of DEQ's antidegradation policy implementation methods, contained in an Internal Management Directive.

New and updated information At today's meeting, DEQ will present new and updated information on:

1. The status of follow-up activities related to the August EPA actions, particularly those activities requested by stakeholders.
2. EPA approval of the "recurring activities" provision in Oregon's antidegradation rule as it pertains to nonpoint sources.

Follow-up activities related to EPA disapproval of the natural conditions criteria

DEQ is pursuing several activities as a result of EPA's recent action on Oregon's water quality standards. Some of these include actions requested by stakeholders at the Aug. 21-22, 2013 EQC meeting.

With regard to the development and issuance of wastewater discharge permits, DEQ is continuing to develop and issue WPCF and NPDES permits. To ensure that DEQ's plans for permit development and issuance are transparent, DEQ is developing a permit issuance plan for 2014 and

will post this plan on its website in November 2013. DEQ will assess and report progress toward meeting the plan quarterly on the website, where EQC and the public will be able to track individual permit issuance.

DEQ is implementing a plan to address the water quality permit backlog through process improvements. DEQ is tracking the phases of permit renewal to identify bottlenecks in the process and will develop actions to address and reduce the effects of these bottlenecks in order to accelerate the permitting process. DEQ has also implemented several measures to improve the quality and consistency of individual permits as recommended by the Blue Ribbon Committee in 2004.

DEQ is committed to using compliance schedules, variances and other compliance pathways as appropriate to implement the temperature standard. DEQ is collaborating with the Oregon Association of Clean Water Agencies on a technical workshop to help municipalities assess their ability to meet potential future temperature effluent limits based on their particular circumstances. DEQ considers water quality trading to be an essential compliance tool and staff will identify the measures necessary to clarify and enhance our ability to include trading as a compliance pathway when appropriate.

In addition, DEQ supports the use of natural treatment systems where they are appropriate to achieve temperature and other water quality outcomes. For example, the Roseburg Urban Sanitation Authority now uses natural treatment systems to decrease phosphorus inputs to the South Umpqua River and address decades-old water quality problems.

Regarding the lawsuit filed by NWEA challenging EPA's approval of 14 temperature TMDLs, among other items, DEQ is currently in settlement discussions with NWEA and EPA. The parties have been ordered to file either a joint status report or a proposed briefing schedule to the court by Sept. 27, 2013. If settlement negotiations are not completed by this date, DEQ, EPA and NWEA will need to submit a proposed briefing schedule and subsequently file briefs arguing their respective positions on the dates specified in the schedule.

At the August 2013 EQC meeting, DEQ recommended that it not immediately embark on efforts to revise its water quality standards for temperature. While EPA's disapproval of the natural conditions criterion removes a key aspect of Oregon's regulation, DEQ will be able to more effectively evaluate potential revisions once DEQ has further insight into the direction of the temperature Total Maximum Daily Load litigation and federal Endangered Species Act consultations. Previous biological opinions on the numeric temperature criteria were remanded to the federal fisheries services as a result of the temperature standard lawsuit. In the

interim, the various numeric temperature criteria and related provisions continue to apply.

DEQ's ability to address natural conditions through its Clean Water Act programs is key, but the agency has not yet identified a preferred option for how best to do that. DEQ will evaluate potential approaches and solicit input from stakeholders and direction from EQC when it evaluates how natural conditions should be addressed in water quality standards and related programs. At this time, staff does not anticipate recommending a particular standards revision approach to EQC until after federal consultation decisions are made, which are due in December 2014.

EPA approval of the "recurring activities" provision in Oregon's antidegradation rule

On Sept. 19, 2013, EPA approved the "recurring activities" provision in Oregon's antidegradation policy rule as it applies to nonpoint sources. Nonpoint sources are diffuse sources of pollution, such as runoff from agricultural, forest or urban lands. The provision states that grazing pasture rotation, crop rotations and maintenance dredging do not require an antidegradation review as long as they do not increase in frequency, intensity, duration or geographical extent. In 2004, EPA approved the provision only as it applies to point sources.

Generally, EPA does not approve or disapprove standards implementation provisions for nonpoint sources because the Clean Water Act does not grant EPA the authority to regulate nonpoint sources. As a consequence, DEQ has considered this provision effective since 2004. With EPA's recent approval, the provision remains in effect.

Federal regulation requires that states have an antidegradation policy in their water quality standards and associated implementation methods. Some of Oregon's implementation methods are in the rule and others are contained in an internal management directive. EPA's review of the implementation methods, including the recurring activities rule provision, was to ensure that the implementation methods do not undercut Oregon's antidegradation policy and meet the requirements of federal regulations.

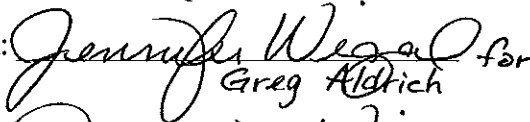
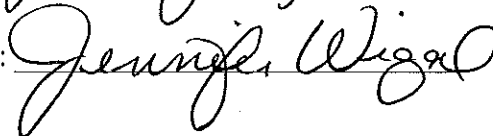
The antidegradation policy (OAR 340-041-0004) describes how the state will protect and maintain water quality by evaluating requests to discharge pollutants to state waters and by allowing new or increased discharges only if certain findings are made. In this action, EPA concluded that Oregon's recurring activities provision as it applies to

nonpoint sources is beyond the minimum requirements of the Clean Water Act because the Act does not give EPA the authority to regulate nonpoint sources and does not require states to apply antidegradation review to nonpoint source activities.

The Clean Water Act and federal regulations address nonpoint source activities in two ways. First, water quality standards apply to water bodies, regardless of the source of pollutants. And second, total maximum daily loads (TMDLs) assign allocations to both point and nonpoint sources of pollution, and account for natural background levels. In order to protect Oregon's waters, DEQ will continue to apply water quality standards, develop TMDLs and work with other state agencies to control and reduce pollution from nonpoint sources such as agriculture, forestry and other land management activities.

Public outreach	DEQ has informed regulated parties and other stakeholders about EPA's actions and DEQ responses. DEQ staff will continue to communicate with interested stakeholders.
Next steps and commission involvement	DEQ will continue to keep the EQC informed about developments related to these water quality standards issues. Commissioners are requested to inform DEQ staff if there are particular topics they would like to discuss further or participate in more actively.
Attachments	A. EPA action letter on "recurring activities" rule provision.
Available online	1. DEQ's water quality standards website: http://www.deq.state.or.us/wq/standards/standards.htm .

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