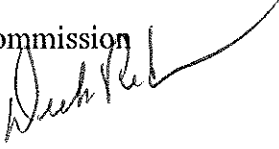


State of Oregon  
Department of Environmental Quality

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.

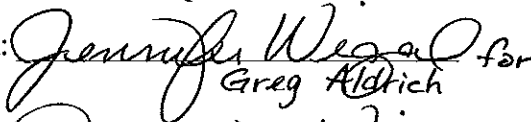
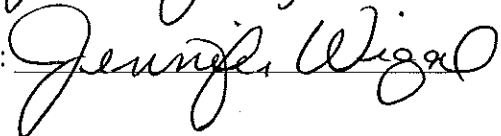
The antidegradation policy (OAR 340-041-0004) describes how the state will protect and maintain water quality by evaluating requests to discharge pollutants to state waters and by allowing new or increased discharges only if certain findings are made. In this action, EPA concluded that Oregon's recurring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

<b>Public outreach</b>	DEQ has informed regulated parties and other stakeholders about EPA's actions and DEQ responses. DEQ staff will continue to communicate with interested stakeholders.
<b>Next steps and commission involvement</b>	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.
<b>Attachments</b>	A. EPA action letter on "recurring activities" rule provision.
<b>Available online</b>	1. DEQ's water quality standards website: <a href="http://www.deq.state.or.us/wq/standards/standards.htm">http://www.deq.state.or.us/wq/standards/standards.htm</a> .

Approved:

Division:  for  
Greg Aldrich  
Section: 

Report prepared by: Debra Sturdevant



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OFFICE OF  
WATER AND  
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Mr. Gregory Aldrich  
Water Quality Programs Administrator  
Oregon Department of Environmental Quality  
DEQ Headquarters Office  
811 SW 6<sup>th</sup> Avenue  
Portland, Oregon 97204-1390

SEP 19 2013

Re: Approval of Oregon's Water Quality Standards Antidegradation Provision located at:  
OAR-340-041-0004(4)

Dear Mr. Aldrich:

Today, the U.S. Environmental Protection Agency is approving the antidegradation provision for "recurring activities" at OAR-340-041-0004(4) of Oregon's water quality standards (WQS) regulations, as it applies to nonpoint source activities:<sup>1</sup>

*OAR-340-041-0004(4): Recurring Activities. Since the baseline for applying the antidegradation policy to an individual source is the water quality resulting from the source's currently authorized discharge, and since regularly-scheduled, recurring activities remain subject to water quality standards and the terms and conditions in any applicable federal and state permits, certifications and licenses, the following activities will not be considered new or increasing discharges and will therefore not trigger an antidegradation review under this rule so long as they do not increase in frequency, intensity, duration or geographical extent:*

- (a) Rotating grazing pastures,*
- (b) Agricultural crop rotations, and*
- (c) Maintenance dredging.*

The EPA's action is being taken pursuant to its authorities under Section 303(c) of the Clean Water Act (CWA) and implementing regulations at 40 C.F.R. Part 131.

Today's action fulfills the EPA's obligation pursuant to an April 10, 2013, court order wherein the U.S. District Court for the District of Oregon (court) instructed the EPA to take a CWA Section 303(c) approval/disapproval action on OAR-340-041-0004(4) within 95 days of the June 2013 Oregon Environmental Quality Commission (EQC) meeting, which was held on June 19-20, 2013 (*Northwest Environmental Advocates v. U.S. EPA, et al.*),

<sup>1</sup> Nonpoint sources are defined herein as any source of water pollution that does not meet the legal definition of "point source" in Section 502(14) of the Clean Water Act. That definition states:

The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharges and return flows from irrigated agriculture.



Civil No. 3:05-cv-1876-AC).

### **Background**

The Oregon Department of Environmental Quality (ODEQ) submitted new and revised WQS, including OAR-340-041-0004(4), to the EPA for review and approval on December 10, 2003. The EPA did not take action on OAR-340-041-0004(4) so far as it applied to nonpoint sources of pollution, but it approved the provision as it applied to point sources (“regulated discharges”) on March 2, 2004. In 2005, Northwest Environmental Advocates (NWEA) filed a lawsuit asserting, among other things, that the EPA should have taken approval/disapproval action on OAR-340-041-0004(4) as it applied to nonpoint sources (“NPS recurring activities”). On February 28, 2012, the court issued an Opinion and Order on the 2005 lawsuit, in which it granted NWEA’s claim for relief with respect to various provisions related to nonpoint sources, including the NPS recurring activities provision. On January 7, 2013, the court issued an order, stipulated to by NWEA and the EPA, requiring the EPA to take action pursuant to CWA Section 303(c) within 95 days of conclusion of the June 2013 Oregon EQC meeting, which was held on June 19-20, 2013.

### **Statutory and Regulatory Background**

Section 303(c)(2)(A) of the CWA requires states and authorized tribes to submit new or revised WQS to the EPA for review. Under Section 303(c) of the CWA and its implementing regulations found at 40 C.F.R. Part 131, the EPA reviews those WQS and either approves or disapproves them.

### **Rationale for the Approval of OAR-340-041-0004(4) as it Applies to Nonpoint Source Activities**

Consistent with the scope of the CWA and the federal water quality standards regulation, antidegradation policies and antidegradation implementation methods are to apply to all waters of the U.S. and are to be implemented for all discharges that are regulated under the CWA (e.g., CWA Section 402 permits, CWA Section 404 permits) and other federal licenses and permits subject to CWA Section 401 certification, such as Federal Energy Regulatory Commission (FERC) licenses.

Congress, in the CWA, consciously distinguished between point source and nonpoint sources of pollution, and only authorized the EPA to regulate the former, leaving it up to the states to determine whether and to what extent to regulate the latter. Thus, states determine if, when, and how they apply antidegradation provisions to nonpoint sources.<sup>2</sup> In accordance with Section 510 of the CWA, states retain their inherent authority to establish water quality standards, including antidegradation provisions, that are more stringent than federal requirements.

The provision in question (OAR OAR-340-041-0004(4)) does not affect the extent to which Oregon’s water quality criteria, designated uses, or antidegradation provisions are applicable to a given waterbody. Rather, its effect is limited to whether antidegradation review is applicable to certain nonpoint source activities that Oregon considers to be “recurring.” For these reasons, the

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<sup>2</sup> See *American Wildlands v. Browner*, 260 F.3d 1192 (10th Cir. 2001)

EPA has determined that, to the extent that OAR-340-041-0004(4) excludes certain nonpoint source activities from antidegradation review, such exclusions are consistent with the CWA and 40 C.F.R. 131.12.

The EPA looks forward to continuing its work with Oregon in its development of WQS that meet the requirements of the CWA and its implementing regulations. Please feel free to contact me at (206) 553-1855 if you have questions concerning this letter, or your staff may contact Rochelle Labiosa, the EPA's Oregon Water Quality Standards Coordinator, at (206) 553-1172.

Sincerely,



Daniel D. Opalski, Director  
Office of Water and Watersheds

cc. Mr. Dick Pedersen, Director, Oregon Department of Environmental Quality  
Ms. Jennifer Wigal, Standards and Assessments Manager, Water Quality Division, Oregon  
Department of Environmental Quality