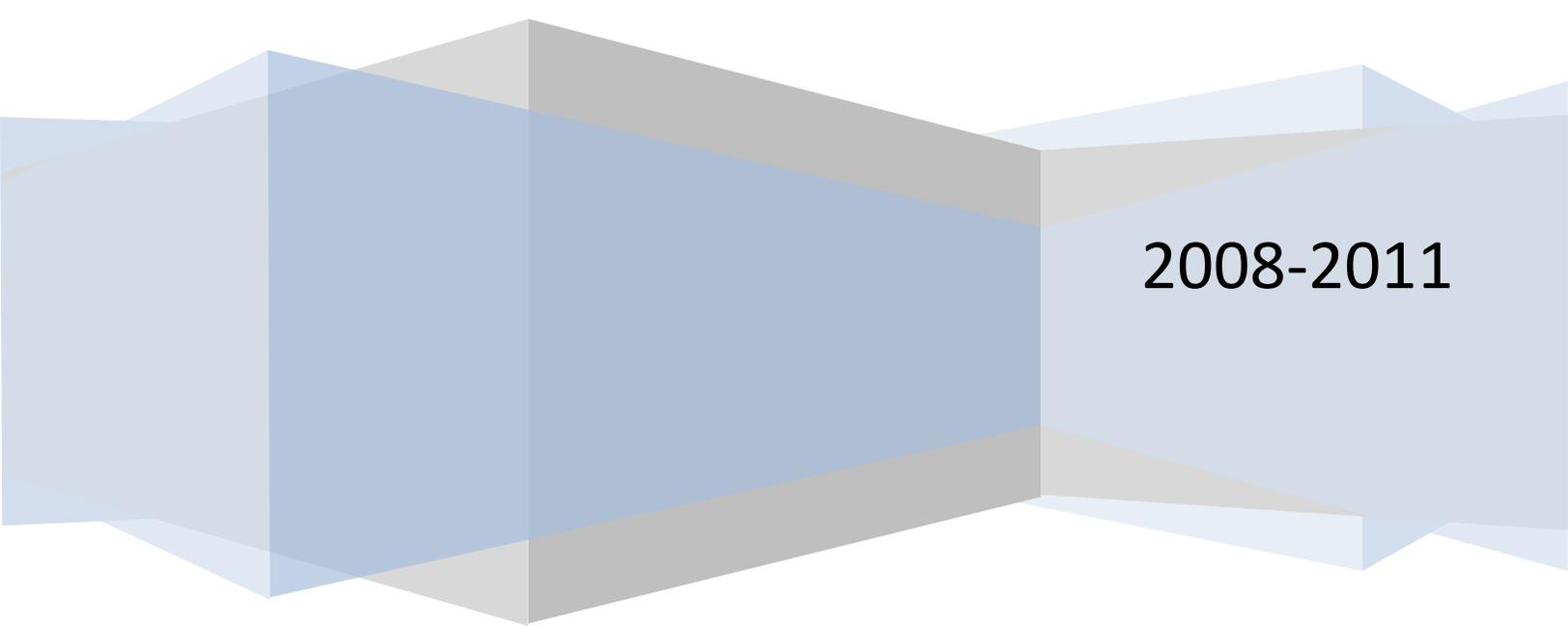


State of Oregon Department of Environmental Quality

**Issue Paper: Revisions to the Water
Quality Standards and TMDL Rules
(Divisions 41 and 42)
Clarifications on How Nonpoint Sources Meet
Water Quality Standards**

Human Health Toxics Rulemaking

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I. Introduction

A. Context

The Environmental Quality Commission (EQC) directed the Department of Environmental Quality (the department) to review existing rules and programs to identify gaps and propose strategies including rule changes that would reduce toxic chemicals in Oregon waters that come from nonpoint sources and other sources not regulated by permits under section 402 of the federal Clean Water Act.

The department considered a number of items for inclusion in the toxics standards rulemaking package, including revisions to the Oregon Administrative Rules (OAR) related to regulating forestry and agricultural land management in the Water Quality Standards (Divisions 41) and Total Maximum Daily Loads Rules (Division 42). The intent of revising rules in Divisions 41 and 42 for nonpoint sources was to clarify the department's regulatory authority and the department's interaction with Oregon Departments of Agriculture and Forestry to control nonpoint sources of pollution.

B. Purpose, Why we are doing this now

The purpose for considering revisions to the Divisions 41 and 42 rules is to determine whether changes would further the goal of reducing and preventing toxic pollutants from non-NPDES sources in waters of the state. As part of the review of Oregon's human health toxics criteria, the department worked with a non-NPDES stakeholder group (See attached list) to determine if additional language was needed to reduce or prevent the release of toxic pollutants from non-NPDES sources to waters of the state.

The department believes that rules in divisions 41 and 42 should reflect the intent of related statutes. The department therefore proposes to revise rules in Divisions 41 and 42 during the toxics rulemaking process to capture the intent of related statutes as to how nonpoint sources are expected to meet water quality standards and TMDL load allocations.

II. Background

A. History

Under the Clean Water Act (CFR 130.7) and State Statute (ORS 468B), the department is authorized to develop, implement, and enforce Water Quality Standards and TMDLs. Under several rules in Divisions 41 and 42, there are sections that describe how rules are expected to be implemented for urban, agricultural and forestry nonpoint sources. The rules in Division 41 for agricultural and forestry nonpoint sources were either added or significantly revised in 2004

when the department revised its temperature standards. Oregon's TMDL rules were adopted by the EQC in 2002.

B. Problem Description

In Oregon, there are toxic chemicals on the 303(d) list for certain segments of waterbodies due to water quality standards exceedances. In addition, concerns about the level and variety of toxic chemicals in Oregon waters have been highlighted in various studies by governmental agencies, such as USGS and the department. Some toxics cannot be measured at the level at which they pose a danger to aquatic life or human health, resulting in uncertainty about hazardous levels in Oregon's waters. These concerns have also been raised by citizens, environmental groups, as well as the EQC. Toxic pollutants come from various point sources and nonpoint sources. Toxic pollutants from nonpoint sources could include both current use and legacy sources. Examples of these nonpoint sources include urban stormwater, agriculture, forestry, and others. Some toxic chemicals may be applied intentionally, like pesticides, while other could unintentionally enter waterbodies via air deposition. In either case, the toxic chemicals are transported to water bodies from nonpoint sources in runoff or air deposition. There are many partners that have been actively working on pollution control associated with agricultural and forestry activities. These partners include individual land owners, Departments of Agriculture, Forestry, and State Lands, various Soil and Water Conservation Districts, cities, counties, federal land management agencies, and the Natural Resource Conservation Service. Despite the efforts made by the department and their partners to reduce the amount of toxic chemicals entering waterbodies, some waterbodies are still not meeting water quality standards for toxic pollutants.

Some workgroup members shared their view that the CWA does not require the state to explicitly assign pollutant load allocations to individual nonpoint sources, therefore it is beyond the authority of the department. The department provided an AG's opinion that explains the state's authority to assign load allocations to nonpoint sources (REFERENCE). In Oregon, the State legislature intended to protect and enhance water quality by integrating nonpoint source concerns into State and Federal programs. Oregon Revised Statutes such as ORS 527 and 568 describe some of the mechanisms for forestry and agricultural nonpoint sources to meet applicable water quality standards. In addition, the Department retains backup authority over forestry and agricultural nonpoint sources. The current rules under Division 41 related to agriculture and forestry do not, however, did not explicitly state that nonpoint sources must not cause violation of water quality standards. The current OAR sections related to agriculture and forestry under Division 42 do not explain the department's authority for agricultural and forestry activities and how the department should work with other agencies responsible for nonpoint sources of pollutants. As a result, resources that are meant to implement various

pollution control programs are often used to determine how and by whom certain nonpoint sources of pollution should be regulated.

Further, it should be noted that insufficient resources allocated to state agencies have resulted in the department and other state agencies to only partially implement the programs and authorities that are meant to control nonpoint sources of pollution. There has been many occasions where the agency staff are unable to respond to local water quality issues and provide technical assistance.

C. Oregon's Water Quality rules for Agricultural and Forestry nonpoint sources

The department is authorized under the ORS 468B to implement and enforce the federal Clean Water Act within Oregon. The state legislature also gave authority to other state agencies to address nonpoint sources of pollution from agricultural and forest lands. See Authorities related to Nonpoint Source Pollution Prevention and Control Memo (DEQ, 2010)

D. Federal Regulation and Guidance for Agricultural and Forestry nonpoint sources

National policy on nonpoint source pollution was added to the Clean Water Act in 1987 in order for the goal of the Act to be met through control of both point and nonpoint sources of pollution. This revision mainly addressed urban stormwater.

In addition, EPA provides a number of sector specific guidance documents and watershed planning for implementation. (Available at: <http://www.epa.gov/owow/nps/>) It should be noted that guidance documents do not carry the same authority as the CWA or the Department's water quality standards or rules.)

E. Stakeholder Participation

A Non-NPDES workgroup consisting of private interest groups and agencies was formed to review and comment on the agency's toxics standards rulemaking package that would affect Non-NPDES sources and address pollutants from nonpoint sources. The workgroup was charged to review and provide advice, but not necessarily to reach a consensus amongst group members. In general, the workgroup had varying concerns and points of view regarding the department's recommendations. Some work group members believed that the department did not identify gaps nor propose strategies to reduce toxics from non-NPDES sources, while others believed that the department went beyond its regulatory authority. Perspectives of the workgroup members on specific agency recommendations are included for each department recommendation.

In addition, DEQ held a public comment period from January through March 2011, and held nine public hearings in eight locations in February and March, 2011 to provide opportunity for the public to provide oral and written comments on the proposed rule revisions. As part of the toxics standards rulemaking package, the department prepared a document with the

department's response to public comments. See *Response to Comments: Toxics Rulemaking* (DEQ, 2011) for further detail.

III. DEQ Recommendations for Clarifying Regulation for Nonpoint Sources of Pollution

Summary

The department reviewed approaches to revise rules in Divisions 41 and 42 to clarify the department's regulatory authority to control nonpoint sources of pollution.

The following rules under Divisions 41 and 42 are proposed to be amended.

- A. 340-041-0007 Statewide Narrative Criteria
- B. 340-041-0061 Other Implementation of Water Quality Criteria
- C. 340-42-0040 Establishing Total Maximum Daily Load
- D. 340-042-0080 Implementing a Total Maximum Daily Load

The department considered adding a definition of forest activities that are not covered under the Forest Practices Act in Division 41. (340-42-0002 Definitions) Due to the complexity of the regulations and exceptions, the department determined that the best approach to clarify forest activities that are not applicable to Forest Practices Act is through a memo or a fact sheet rather than in rule. This item was not included in the rule package.

A. 340-041-0007 Statewide Narrative Criteria

The statewide narrative criteria of the water quality standards describes pollutants for which the department has not developed numeric criteria. Oregon's narrative criteria rule includes a section on logging and forest activities to explain the Environmental Quality Commissions (the commission's) expectation for those sources and the intent of related statutes.

In order to clarify the expectation for logging and forest management activities, it has been proposed that section (5) of Statewide Narrative Criteria rule be revised. Proposed language recognizes that all forest management activities, including those that occur on federal forest lands, are subject to Oregon water quality standards. Language following that broader statement is narrowly tailored to the existing statutes related to state and private forestlands.

Applicability/Scope

The revision would apply to all forest management activities statewide that would include federal, state, and private forest lands.

DEQ Recommendation

Current Language

340-041-0007

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

Rule Proposed for Public Comment

(5) Logging and forest management activities must be conducted in accordance with the Oregon Forest Practices Act to minimize adverse effects on water quality. 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 ORS527.770. Forest operations may be subject to load allocations established under ORS 468B.110 and OAR Division 340-042, however, to the extent needed to implement the federal Clean Water Act.

Final Rule Recommended by DEQ

(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 ORS527.770. Forest operations **may be are** subject to load allocations established under ORS 468B.110 and OAR Division 340-042, **however,** to the extent needed to implement the federal Clean Water Act.

Policy objective

The objective of this section of the narrative criteria is to explain the commission's policy and the intent of related statutes and federal law as to how logging and forest activities should be regulated to meet the narrative criteria rule.

*Policy evaluation**Advantages and disadvantages*

The new language is applicable to both federal and non-federal forest activities, and clarifies that forest management activities need to meet water quality standards.

Summary of RWG discussion and views

The rulemaking workgroup has discussed revisions to this rule at several meetings and the department met with individual members for additional discussions as requested.

- Some of the workgroup members have questioned the department's authority to regulate forest operations under ORS468B.110 and OAR 340-042. Those workgroup members shared their view that the CWA does not explicitly require the State to assign load allocations to individual sources and, therefore, assigning pollutant load allocations is beyond the authority of the department. The department has developed its positions on these issues in consultation with the Department of Justice and is comfortable that it has the necessary legal authority.
- Some of the stakeholders also expressed discomfort with the language and said that the tone of the language would not encourage voluntary actions by landowners. The department reiterated that the purpose for revising the rule is to clarify its backup authority and not to discourage voluntary actions and existing collaborative relationships between agencies.
- While some workgroup members suggested changes to proposed language, others did not provide specific suggestions because they disagree with the interpretation of the statutes expressed in the proposed language.
- Some work group members believe that the proposed language is an improvement over the existing language. However, these members do not believe that the proposed changes are sufficient to meet the Commission's directive to identify and resolve gaps in Oregon's water quality standards to reduce the contributions of nonpoint sources to Oregon's water quality problems, specifically toxics.
- Some workgroup members do not believe it is effective for the department to copy the statutes into its water quality standards and rules.
- Some work group members do not believe that stating the Department's legal authority, as this rule has been revised to do, is sufficient to meet the Commission's directive to look for ways to increase the likelihood of controlling toxic inputs from nonpoint sources. Instead of just focusing on these rules, the Department could use its antidegradation policy to clarify how nonpoint sources should avoid violation of water quality standards.
- Some workgroup members were concerned that the use of the word "discharges" to refer to nonpoint sources of pollution to be misleading and

inappropriate. The department made changes to the draft rule language with the understanding that the use of the word “discharges” is not necessary to retain its authorities for control of nonpoint sources as allowed under ORSs 468, 527, and 568.

Summary of public comment

- In general, comments received during public review were consistent with the views and concerns of the work group members.

Proposed rule language was further revised to change “may” to “will” in order to make the intent of the rule less ambiguous.

See *Response to Comments: Toxics Rulemaking (DEQ, 2011)* for further detail.

Authority and precedence

This is an existing section under the statewide narrative criteria rule. EQC has authority under ORS 468B 110.

B. 340-041-0061 Other Implementation of Water Quality Criteria

This portion of the water quality standards describes EQC’s expectation for how water quality criteria are implemented, and includes sections on agriculture and forestry.

DEQ proposes to revise sections (11) and (12) of this rule to clarify DEQ’s authority for nonpoint source regulation and to describe how water quality standards are generally implemented on agricultural and forest lands. Proposed rule language reflects DEQ’s further consideration to communicate the intent of related statutes and rules.

Applicability/Scope

These sections of the Other Implementation of Water Quality Criteria are applicable statewide for all waters of the state.

DEQ Recommendation

Forestry

Current Language

340-041-0061

(11) Forestry on state and private lands. For forest operations on state or private lands, water quality standards are intended to be attained and are implemented through best management practices and other control mechanisms established under the Forest Practices Act (ORS 527.610 to 527.992) and rules thereunder, administered by the Oregon Department of Forestry.

Therefore, forest operations that are in compliance with the Forest Practices Act requirements are (except for the limits set out in ORS 527.770) deemed in compliance with this division. DEQ will work with the Oregon Department of Forestry to revise the Forest Practices program to attain water quality standards.

Rule Proposed for Public Comment

(11) Forestry on state and private lands. Nonpoint sources of pollution from ~~For~~ forest operations on state or private lands are subject to, water quality standards are intended to be attained and are implemented through best management practices and other control measures mechanisms established by the Oregon Department of Forestry under the Forest Practices Act (ORS 527.610 to 527.992) and must not cause violation of water quality standards, and rules thereunder, administered by the Oregon Department of Forestry. Therefore, Such forest operations, when conducted in good faith that are in compliance with the Forest Practices Act requirements are generally deemed not to cause violations of water quality standards as provided in (except for the limits set out in ORS 527.770). Forest operations on state and private lands may be subject to load allocations under ORS 468.110 and OAR 340, Division 42, to the extent necessary to implement the federal Clean Water Act. ~~deemed in compliance with this division. DEQ will work with the Oregon Department of Forestry to revise the Forest Practices program to attain water quality standards.~~

Final Rule Recommended by DEQ

(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) **and must not cause violation of water quality standards.** 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 **may be 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.

Agriculture

Current Language

340-041-0061

(12) Agricultural water quality management plans to reduce agricultural nonpoint source pollution are developed and implemented by the Oregon Department of Agriculture (ODA) through a cooperative agreement with the department to implement applicable provisions of ORS 568.900 to 568.933 and 561.191. If the department has reason to believe that agricultural discharges or activities are contributing to water quality problems resulting in water quality standards violations, the department may consult with the ODA. If water quality impacts are

likely from agricultural sources and the department determines that a water quality management plan is necessary, the director may write a letter to the director of the ODA requesting that such a management plan be prepared and implemented to reduce pollutant loads and achieve the water quality criteria.

Rule Proposed for Public Comment

~~(12) In areas subject to the Agricultural Water Quality Management Act plans to reduce agricultural nonpoint source pollution are developed and implemented by the Oregon Department of Agriculture (ODA) through a cooperative agreement with the department to implement applicable provisions of 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 has reason to believe determines that the area plan and rules are not adequate to agricultural discharges or activities are contributing to water quality problems resulting in 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. In addition, the department may request the Environmental Quality Commission (EQC) to petition violations, the department may consult with the ODA for a review of part or all of .If water quality impacts are likely from agricultural sources and the department determines that a 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. The department may also require remedies of a person causing pollution or contributing to water quality standards violation if ODA does not take action. is necessary, the director may write a letter to the director of the ODA requesting that such a management plan be prepared and implemented to reduce pollutant loads and achieve the water quality criteria.~~

Final Rule Recommended by DEQ

(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. **In addition, 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. ~~The department may also require remedies of a person causing pollution or contributing to water quality standards violation if ODA does not take action.~~

Rule objective

The objective of these sections of the rule is to describe EQC's expectation for how water quality criteria are implemented on forest and agricultural lands.

Rule evaluation

Advantages and disadvantages

Revising these sections of the rule will clarify how relevant statutes, rules, and federal law are used to control pollutants from non-NPDES sources on agricultural and forest lands.

Summary of RWG discussion and views

The rulemaking workgroup discussed revisions to this rule at several meetings.

- For the proposed rule language for forestry, the stakeholders expressed their support and concerns that were similar to those for 340-041-0007. While some workgroup members suggested specific language, those who disagree with the interpretation of the statutes expressed in the proposed language chose not to provide alternative language.
- Some workgroup members disagreed on whether the department should retain its authority under statutes for taking enforcement actions on agricultural activities instead of ODA taking the lead. The department explained that currently ODA does take the lead when dealing with compliance issues. The department further explained that, except for some isolated cases, the department did not expect the arrangement to change as a result of the proposed rule change.
- Some of the workgroup members have questioned the department's authority to regulate forest operations and activities on agricultural and rural lands under ORS468B.110 and OAR 340-042. While some thought that it was important to include the department's authority in rule, others did not think it was appropriate. The department has developed its positions on these issues in consultation with the Department of Justice and is comfortable that it has the necessary legal authority.
- Some workgroup members believe that these rule changes advance the purpose very little other than establishing that forestry and agricultural practices, rules,

and plans are supposed to meet water quality standards. It is not clear that these rule changes will alter the status quo in any regard whatsoever.

- Some work group members believe that the department should not use its rules to reiterate the statute or to talk in broad terms about how the department defers to other agencies in the interpretation, implementation, and enforcement of its own water quality standards.
- Some work group members believe that to the extent that the Department has asserted its authority to interpret, implement, or enforce its water quality standards, the proposed language is an improvement.
- Some work group members believe that although this is a good first step, the only way the Department can really revise its rules and standards such that they result in reduced nonpoint source contributions is by making those rules explicit and detailed in their expectations about those sources. The failure to do that renders these rule proposals superficial and unlikely to result in changes, particularly to the extent they do not alter the Department's legal authority.
- Some work group members requested that the department prepare a flow chart in order to explain potential compliance scenarios for agriculture. DEQ provided the flow chart and revised it based on comments received. Some work group members believe that the flow charts proposed by the department illustrate that it intends to do absolutely nothing different from the way in which it has failed to control nonpoint sources in the past.
- Some workgroup members were concerned that the use of the word "discharges" to refer to nonpoint sources of pollution to be misleading and inappropriate. The department made changes to the draft rule language with the understanding that the use of the word "discharges" is not necessary to retain its authorities for control of nonpoint sources as allowed under ORSs 468, 527, and 568.

Summary of public comment

- Comments received during public review were similar to the views and concerns of the work group members.
- Although proposed changes do not transfer authority from ODA and ODF to DEQ, many expressed their opposition to establishing new authorities for DEQ.

Proposed rule language was further revised to be consistent with applicable statutes, and to clarify existing interagency practices.

See *Response to Comments: Toxics Rulemaking (DEQ, 2011)* for further detail.

Authority and precedence

Sections on agricultural water quality management area plans and forest lands are included under existing rule.

C. 340-42-0040 Establishing Total Maximum Daily Load

This rule explains the steps that need to be taken to establish TMDLs and lists what elements are required in a TMDL. Although the department has authority to do so already, its ability to identify significant air and land sources and assign Waste Load Allocations (WLAs) for point sources and Load Allocations (LA) for non-NPDES sources is not explicit in the Division 42 TMDL rule. The department proposes to revise this rule to clarify DEQ's authority to assign an individual load allocation to air and land sources in TMDLs.

It should be noted that the department made a policy decision to limit the scope of the toxics water quality standards rulemaking to the water quality rules. The actual regulatory mechanism for addressing TMDL allocations through other media programs still needs to be defined and described in the administrative rules affecting air quality and land quality programs. The approach described below is one potential strategy that the department will consider during Toxics Reduction Strategy development. (<http://www.deq.state.or.us/toxics/#Reduction>)

Applicability/Scope

This rule is applicable statewide.

DEQ Recommendation

Current Language

340-042-0040

(h) Load allocations. This element determines the portions of the receiving water's loading capacity that are allocated to existing nonpoint sources, or to background sources. Load allocations are best estimates of loading, and may range from reasonably accurate estimates to gross allotments depending on the availability of data and appropriate techniques for predicting loading. Whenever reasonably feasible, natural background and anthropogenic nonpoint source loads will be distinguished from each other.

Final Rule Recommended by DEQ (No changes were made to proposed language for public review)

(h) Load allocations. This element determines the portions of the receiving water's loading capacity that are allocated to existing nonpoint sources, including runoff, deposition, soil contamination and groundwater discharges, or to background sources. Load allocations are best

estimates of loading, and may range from reasonably accurate estimates to gross allotments depending on the availability of data and appropriate techniques for predicting loading. Whenever reasonably feasible, natural background, long-range transport and anthropogenic nonpoint source loads will be distinguished from each other.

Policy objective

The rule on Establishing a TMDL explains the steps that need to be taken to establish TMDLs and what elements are required in a TMDL. The revision is intended to clarify what sources could be given load allocations in a TMDL.

Policy evaluation

Advantages and disadvantages

This revision clarifies the EQC's intent on addressing sources of pollution by assigning load allocations as needed.

Summary of RWG discussion and views

The rulemaking workgroup discussed this issue at several meetings.

- The workgroup members have expressed the importance of addressing air sources and their support for being explicit about the department's authority to regulate air sources through TMDLs. Some work group members believe that the department has made no changes in its rules because it already had the authority to make load allocations to air and other sources and the proposed rule language maintains that discretion. According to some group members, the Department should not have refused to make load allocations to significant non-NPDES sources mandatory, and as a result, this rule has no impact.
- Some work group members commented that a TMDL that gives a specific load allocation to a non-NPDES sources such as an air deposition source does not require any regulatory action by the department until such time as it has the resources to change its air quality rules and carry out additional controls.
- Some work group members believe that the department should not allow air sources to deposit their toxic contaminants on private and public lands and in the waters without bearing the costs of doing so. To allow this to continue is to place the costs of such air pollution on other private and public entities in order to maintain private profits. Other members have expressed their concerns about lack of detail as to how air sources will be regulated to meet load allocations. The department provided the following summary as a potential approach to respond to a TMDL.

If in the course of the TMDL process deposition of a pollutant of concern from the air is identified as a contributor to the water quality violation, the air program will be notified and provided with a load allocation for air sources. The air program will approach this situation much as it would for a violation of an ambient air quality standard. An inventory of sources within the physical boundaries of the study area that are emitting that pollutant will be determined. An air quality dispersion model will use that inventory, along with appropriate meteorology, physical and chemical characteristics of the pollutant, and other factors to quantify deposition within the study area. The contribution of each air permitted source, as well as non-permitted stationary and mobile sources, to the total deposition will be estimated. Regional and global contributions will be estimated as well. The air program will then work with the water program to identify emissions reduction strategies to meet the load allocation.

- Some members of the workgroup raised the possibility that if air sources are identified as a source in TMDLs, the air sources may be forced to fund air modeling associated with TMDLs to differentiate nearby depositions and long range transport.

Summary of public comment

- In general, comments received during public review were consistent with concerns and support of the work group members.

DEQ did not revise the proposed language as a result of public comments.

See *Response to Comments: Toxics Rulemaking*(DEQ, 2011) for further detail.

Authority and precedence

Under current Division 42 TMDL rules the department has the authority to assign load allocations to air sources.

D. 340-042-0080 Implementing a Total Maximum Daily Load

This rule describes the EQC's expectations for how TMDLs are implemented in various ways including through permits and other programs.

The department proposes to provide expectations under this rule for agricultural and forestry nonpoint sources for meeting TMDL load allocations. The revised rule language will provide

added assurance that water quality will improve. (See TMDL issue paper for more details) The proposed rule change is focused around agriculture and forestry since authority under the TMDL rule for urban sources is clearer.

Applicability/Scope

This section of the rule applies statewide.

DEQ Recommendation

Current Language

340-042-0080

(2) The Oregon Department of Forestry will develop and enforce implementation plans addressing state and private forestry sources as authorized by ORS 527.610 through 527.992 and according to OAR chapter 629, divisions 600 through 665. The Oregon Department of Agriculture will develop implementation plans for agricultural activities and soil erosion and enforce associated rules as authorized by ORS 568.900 through 568.933 and according to OAR chapter 603, divisions 90 and 95.

Rule Proposed for Public Comment

(2) Nonpoint sources of pollution from forest operations on state or private lands are subject to best management practices and other control measures established by tThe Oregon Department of Forestry under will develop and enforce implementation plans addressing state and private forestry sources as authorized by ORS 527.610 through 527.992 and according to OAR chapter 629, divisions 600 through 665. 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. The department may also assign sector or source specific load allocations needed for nonpoint sources of pollution on state and private forestlands to implement the load allocations. In areas where a TMDL has been approved, site specific rules under the Forest Practices Act rules may need to be revised to meet the TMDL load allocations. If the department determines that the generally applicable Forest Practices Act rules are not adequate to implement the load allocation, the department may request the Environmental Quality Commission to petition the Board of Forestry for a review of part or all of Forest Practices Act rules implementing the TMDL.

(3) In areas subject to the Agricultural Water Quality Management Act tThe Oregon Department of Agriculture (ODA) will develop implementation plans for agricultural activities and soil erosion and enforce associated rules as authorized by under ORS 568.900 through 568.933 and according to OAR chapter 603, divisions 90 and 95 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. The department may also assign sector or source specific load allocations needed for agricultural or rural residential

nonpoint sources to implement the load allocations. In areas where a TMDL has been approved, agricultural water quality management area plans and rules must be sufficient to meet the load allocations. If the department determines that plans and rules are not adequate to implement the load allocations, the department may request the Environmental Quality Commission to petition ODA for a review of part or all of water quality management area plan and rules implementing the TMDL.

Final Rule Recommended by DEQ

(2) Nonpoint source discharges of pollutants 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 ORS 527.610 to 527.992 and according to OAR chapter 629, divisions 600 through 665. 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. Where the department determines that there are adequate resources and data available, tThe department will may also assign sector or source specific load allocations needed for nonpoint sources of pollution on state and private forestlands to implement the load allocations. In areas where a TMDL has been approved, site specific rules under the Forest Practices Act rules will may need to be revised if the department determines that the generally applicable Forest Practices Act rules are not adequate to implement to meet the TMDL load allocations. If the department determines that the generally applicable Forest Practices Act rules are not adequate to implement the load allocationa resolution cannot be achieved, the department will may request the Environmental Quality Commission to petition the Board of Forestry for a review of part or all of Forest Practices Act rules implementing the TMDL.

(3) 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 and according to OAR chapter 603, divisions 90 and 95 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. Where the department determines that there are adequate resources and data available, tThe department will may also assign sector or source specific load allocations needed for agricultural or rural residential nonpoint sources to implement the load allocations. In areas where a TMDL has been approved, agricultural water quality management area plans and rules must be sufficient to meet the TMDL load allocations. If the department determines that the plan and rules are not adequate to implement the load allocation, the department will provide ODA with comments on what would be sufficient to meet TMDL load allocations. If a resolution cannot be achieved, the department will may request the Environmental Quality Commission to petition ODA for a review of part or all of water quality management area plan and rules implementing the TMDL.

Policy objective

This rule describes the EQC's expectations for how TMDLs are implemented through the Forest Practices Act and the Agricultural Water Quality Management Act to meet TMDL load allocations for reducing pollutants from these nonpoint sources where and when needed as described in the TMDL.

Policy evaluation

Advantages and disadvantages

Explaining how the department may provide more specificity when assigning load allocations would clarify the EQC policy for addressing pollutants from nonpoint sources.

Summary of RWG discussion and views

The rulemaking workgroup has discussed revisions to this rule at several meetings.

- Some thought that it was important to include the department's authority in this rule, and others did not think it was appropriate.
- Some of the workgroup members questioned the department's authority to assign source specific load allocations. Those workgroup members shared their view that the CWA does not require the state explicitly to assign load allocations to an individual source, therefore it is beyond the authority of the department. The department has developed its positions on these issues in consultation with the Department of Justice and is comfortable that it has the necessary legal authority.
- Others expressed concern that the department may require specific measures for forest operations and activities on agricultural and rural lands under ORS468B.110 and OAR 340-042. The department emphasized its desire to work with ODA and local stakeholders during the TMDL process and explained the need to clarify its authority to use surrogate measures.
- Some work group members believe that writing rules in which the Department "may" do something, and therefore may not, are pointless, should be avoided, and are intended to make the department look as if it is doing something when it is actually doing nothing.
- Some work group members object to the use of the word "may" with regard to whether the department assigns sector or source specific load allocations. Since specificity of load allocations is key to ensuring that TMDLs are clear mandates for nonpoint sources to improve practices and the load allocations are the only

regulatory mechanism the Department has specifically with regard to forestry, the Department should not make this discretionary.

- These rules should reflect the Department's commitments as set out in Exhibit F to the settlement in *Northwest Environmental Advocates v. Locke, et al., Civil No. 09-0017-PK*. Specifically, the rules should establish that, at least with regard to forestry nonpoint sources in coastal basins, the Department will identify the best management practices that could be used to meet load allocations to forestry, specifically identify significant nonpoint sources including significant forestry sources, to establishing enforceable load allocations for all significant nonpoint sources including significant forestry sources, developing so-called safe harbor best management practices for the load allocations for significant nonpoint sources, and issuing the load allocations to significant nonpoint sources as an implementation order.
- An addition, some work group members think that the rules should reflect this approach for all basins, not just coastal basins, and for all nonpoint sources, not just forestry. Some members think that one of the most important aspects of the above commitments include the department's identification of nonpoint source controls that are necessary to meet load allocations. The rationale for this is to avoid other agencies interpreting what it means to meet the department's water quality standards.
- Some work group members object to the strong implication of these rules that the only action that may come out of TMDLs that have been approved is the possibility that forest practices or agricultural plans and rules may be revised by their respective agencies. These members believe this only maintains the status quo which the Commission has already deemed insufficient to ensure the control of toxic pollution from nonpoint sources.
- Some work group members object to the strong implication of these rules that the department's only recourse or only likely recourse would be a petition to the Board of Forestry or the Department of Agriculture in the event that the department determines the rules, practices, and plans of the respective agencies are insufficient to meet load allocations in approved TMDLs.
- Some work group members expressed their concern that the use of the word "discharge" is not appropriate to associate with nonpoint sources. The department explained that "discharge" language comes from ORS 527.765.

Summary of public comment

- Comments received during public review reflected views of the work group members.
- Although proposed changes do not transfer authority from ODA and ODF to DEQ, many expressed their opposition to establishing new authorities for DEQ.

Proposed rule language was further revised to be consistent with applicable statutes, and to clarify existing interagency practices.

See *Response to Comments: Toxics Rulemaking (DEQ, 2011)* for further detail.

Authority and precedence

Under the current rule language in Division 42, the department already has authority to do what is currently proposed.

Relevant Statutes and Administrative Rules

Forestry

527.765 Best management practices to maintain water quality; rules.

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

- (a) Beneficial uses of waters potentially impacted;
- (b) The effects of past forest practices on beneficial uses of water;
- (c) Appropriate practices employed by other forest managers;
- (d) Technical, economic and institutional feasibility; and
- (e) Natural variations in geomorphology and hydrology.

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

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

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

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

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

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

(f) Notwithstanding the time limitation established in paragraph (e) of this subsection, at the request of the Environmental Quality Commission, the board shall take action as quickly as practicable to prevent significant damage to beneficial uses identified by the commission while the board is revising its best management practices and rules as provided for in this section. [1991 c.919 §20; 2003 c.75 §95; 2003 c.749 §11]

527.770 Good faith compliance with best management practices not violation of water quality standards; subsequent enforcement of standards. A forest operator conducting, or in good faith proposing to conduct, operations in accordance with best management practices currently in effect shall not be considered in violation of any water quality standards. When the State Board of Forestry adopts new best management practices and other rules applying to forest operations, such rules shall apply to all current or proposed forest operations upon their effective dates. However, nothing in this section prevents enforcement of water quality standards against a forest operator conducting operations after the time provided in ORS 527.765 (3)(e) for adoption of revised best management practices if the board either has not adopted revised management practices or has not made a finding that such revised best management practices are not required. [1991 c.919 §21; 2003 c.749 §12]

Agriculture

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

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

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

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

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

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

(4) A water quality management plan and rules implementing the plan that pertain to a ground water management area shall be subject to the coordination requirements of ORS 468B.162. [1993 c.263 §13; 1999 c.59 §179; 2001 c.594 §6]

561.191 Program and rules relating to water quality.

(1) The State Department of Agriculture shall develop and implement any program or rules that directly regulate farming practices, as defined in ORS 30.930, that are for the purpose of protecting water

quality and that are applicable to areas of the state designated as exclusive farm use zones under ORS 215.203 or other agricultural lands in Oregon, including but not limited to rules related to:

- (a) Protection of the quality of surface or ground water;
- (b) Wellhead protection areas;
- (c) Coastal zone management areas;
- (d) Areas of ground water concern; and
- (e) Ground water management areas.

(2) Any program or rules adopted by the State Department of Agriculture under subsection (1) of this section shall be designed to assure achievement and maintenance of water quality standards adopted by the Environmental Quality Commission.

(3) If two or more state agencies are required to adopt rules under ORS 468B.150 to 468B.190, the agencies:

- (a) Shall consult with one another and coordinate the rules; and
- (b) May consolidate the rulemaking proceedings.

(4) Nothing in this section is intended to change or reduce the authority of the Water Resources Commission or the Water Resources Department under ORS chapters 536 to 543. [1995 c.690 §6a]

Draft Flow Chart

For EMT Review

**DEQ Initiated Compliance Scenario
for Agricultural Lands**

