



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10

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OFFICE OF
WATER AND
WATERSHEDS

Mr. Gregory Aldrich
Water Quality Programs Administrator
Oregon Department of Environmental Quality
DEQ Headquarters Office
811 SW 6th 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.¹

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.*,

¹ 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.² 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

² 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,

A handwritten signature in blue ink, appearing to read "Daniel D. Opalski".

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