SUMMARY

This agenda item provides a review of the Board’s duties and powers for rules and required consultation with other agencies (ORS 527.710); the types of rules, procedure, necessary findings, and rule analysis (ORS 527.714); the relationship between rules for maintaining water quality (ORS 527.765) and rule analysis (ORS 527.714); and implications for good faith compliance with best management practices or “BMP shield” (ORS 527.770). This item also requests the Board’s decision to move forward with rule analysis on two topics: riparian protection standards for small and medium fish streams and waiver of written plans for operations near riparian management areas.

CONTEXT

The Board’s 2011 Forestry Program for Oregon states that the Board supports an effective, science-based, and adaptive Oregon Forest Practices Act as a cornerstone of forest resource protection on private lands in Oregon (Objective A.2). The discussion of Goal A recognizes that the FPA includes a set of best management practices to ensure that forest operations are conducted to meet state water quality standards adopted under the federal Clean Water Act. The Board’s guiding principles and philosophies includes a commitment to continuous learning, evaluating and appropriately adjusting forest management policies and programs based upon ongoing monitoring, assessment, and research (Value Statement 11).

The Board’s 2011 Forestry Program for Oregon also recognizes the dynamic nature of Oregon’s forests, which are diverse, dynamic, and resilient ecosystems at a landscape scale (Value Statement 2). The Board supports actively managing these forests to maintain forest health, to conserve native plant and animal species, and to produce the products and benefits people value (Value Statement 4).

With the adoption of the 1994 Water Protection Rules, the Board of Forestry and the Department of Forestry adopted a formal commitment to resource monitoring. Monitoring and evaluation of the water protection rules are necessary because of the innovative approach taken in the rules. Pursuant to OAR 629-635-0110(3)(d), the
Department makes annual reports to the Board about current monitoring efforts, and, if applicable, presents findings and recommendations for changes to forest practices.

At their November 2010 meeting, the Board directed the department to make water quality policy a high priority for the Private Forests work plan. At their January 2011 meeting, the Board directed the department to add a focus on water quality to the Private Forests work plan, using an integrated approach including, but not limited to, RipStream research, paired watershed studies, road sediment issues, and toxics. The Department completed the revision of the Private Forests work plan, which was approved in March 2011.

BACKGROUND

Riparian Protection Standards for Small and Medium Fish Streams

At their November 2011 meeting, the Board decided to consider the implication of the Riparian Function and Stream Temperature Project (RipStream) results and the potential need to revise the riparian protection standards to increase the maintenance and promotion of shade on small and medium fish streams. The Board also directed staff to prepare this agenda topic to review the Board’s rule making process and its relationship to maintaining water quality water.

Waiver of Written Plans for Operations near Riparian Management Areas

At their March 2010 meeting, the Board reviewed legislative concepts and provided guidance to staff in preparing concepts for submission to DAS. This work led to proposed revisions to the Forest Practices Act to improve the efficiency of administering the Act. The resulting legislation, House Bill 2165, sought to eliminate unnecessary paperwork requirements under the Oregon Forest Practices Act. HB 2165 passed unanimously in both the House and Senate and was signed into law. In general, the bill allows the Board of Forestry to adopt rules allowing the department to waive the requirement for written plans for forest operations within 100 feet of fish-bearing, domestic-use streams, and significant wetlands, if the operations would not directly affect the protected areas along those waters.

Board of Forestry Rule Making Authority and Rule Making Process

Both the potential need to revise the riparian protection standards on small and medium fish streams and the waiver of written plans for riparian areas require the Board to consider rule revision under the process spelled out in the Forest Practices Act (FPA). Most of the current Board members have not participated in an FPA rule revision, prompting the direction to prepare this topic to review the Board’s rule making authority and rule making process.

In September 2005, the Board conducted a workshop on decision making process considerations regarding best management practices for water quality under the FPA. At
their January 2006 meeting, the Board approved recommendations resulting from the workshop (attachment 1) and the proceedings from that workshop (attachment 2). This agenda items uses those decisions and proceedings to inform the Board regarding the rule analysis process and how it applies to the potential revision of riparian protection standards and rules to allow waiver of written plans.

**Board of Forestry’s Responsibility, Authority, and Accountability Regarding Water Quality.**

At their January 2011 meeting, the Board developed their water quality topic for the Private Forests work plan. At this meeting the board reviewed a water quality issue paper, which included a discussion of the Board’s responsibility, authority, and accountability regarding water quality and the relationship between the Board of Forestry and the Environmental Quality Commission (EQC). This section of the issue paper (attachment 3) was based on a briefing paper on the regulation of water quality and forest practices (attachment 4), which was also used in the 2005 workshop, referenced above.

**Board’s Duties and Powers for Rules and Required Consultation with Other Agencies (ORS 527.710)**

The Board is charged with responsibility to “supervise all matters of forest policy and management under the jurisdiction of the state …” ORS 526.016. Under the FPA, the Board is given exclusive authority to adopt and enforce rules governing forest practices. The FPA also specifies the duties and powers of the Board and requires the Board to adopt rules to establish standards for forest practices to carry out the purposes of the FPA (ORS 527.710; included for reference in attachment 5). This section of the FPA also states that the rules must ensure the continuous growing and harvesting of forest tree species and provide for the overall maintenance of air quality; water resources, including but not limited to sources of domestic drinking water; soil productivity; and fish and wildlife. Before adopting rules under this section, the Board must consult with other state agencies that have functions with respect to the purposes of the FPA or have programs affected by forest operations. In the case of water quality, the Board must consult with the Department of Environmental Quality (DEQ). The Department has consistently consulted with DEQ on all aspects of the RipStream results and their policy implication.

**The Types of Rules, Procedure, Necessary Findings, and Rule Analysis (ORS 527.714)**

ORS 527.714 identifies the types of rule for which the Board has authority, defines a set of findings that must be met if the rule directly affects forest practice standards, and specifies the content of comprehensive analysis of the economic impact of a proposed rule. This section creates a process and framework for developing new forest practices rules (see attachment 5 for full ORS 527.714 language).

Rules which implement the FPA’s resource-protection objectives and which would “provide new or increased standards for forest practices” must meet evidentiary criteria
specified by ORS 527.714 (5). The board may adopt such a rule only after determining that the following facts exist and standards are met:

- There is monitoring or research evidence that documents that degradation of resources ORS 527.714(5)(a)
- Proposed rule reflects available scientific information (5)(b)-(c)
- Objectives of the proposed rule are clearly defined and restrictions on practices directly relate to, and substantially advance the objective (5)(d)
- Rules must undergo an alternatives analysis, non-regulatory approaches must be considered, and the “least burdensome” alternative must be chosen (5)(e)
- Resource benefits achieved by the rule must be proportional to the harm cause by forest practices (5)(f)

Nothing in the text or context of the ORS 527.714 requires that the findings be made as a package. The Board has the discretion to address the required findings sequentially. There is also nothing in the text or context of the statute that would require the Board to address the required findings in the order in which they are listed in the statute. The Board has the discretion to address those findings in the order that it prefers, in any given case. A sequential decision making process using the requirements of ORS 527.714 as a work plan template would allow the Board to manage the overall available decision-space in adopting rules in a step-by-step manner – thus narrowing the scope of each decision at each step. This approach would allow the Board to be more knowledgeable about the legal on-ramps, off-ramps and safety nets that define their decision space at each step in ORS 527.714.

**The Relationship between Rules for Maintaining Water Quality (ORS 527.765) and Rule Analysis (ORS 527.714)**

At the 2005 workshop, Jas Adams presented a legal analysis of ORS statutes 527.714 and 527.765 to help the Board develop a clear understanding of the legal relationship between the two provisions (see attachment 2, pages 6-8). His presentation was based upon two legal memoranda: Legal Relationship Between ORS 527.765 and ORS 527.714 in Deciding Whether to Adopt BMPs Under the Oregon Forest Practice Act dated August 23, 2005 (attachment 6) and Regulation of Water Quality and Forest Practices dated September 7, 2004 (attachment 4). Explaining judicial review standards, Mr. Adams noted that courts would seek to interpret the two statutes harmoniously.

As described above, ORS 527.714 creates a framework of evidentiary criteria that must be met before new forest practices rules can be adopted by the Board.

ORS 527.765 directs the Board of Forestry to adopt Best Management Practices (BMPs) that insure forest practices – to the maximum extent practicable (MEP) – “do not impair the achievement and maintenance of water quality standards established by the Oregon Environmental Quality Commission.” Factors that must be considered in adopting BMPs include (but are not 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.

“Maximum extent practicable” can be viewed as a “term of art” derived from the federal Clean Water Act. No specific definition of the term is provided by statute or in case law. As such, the phrase would most likely be interpreted by an Oregon court based on a simple dictionary definition, with the most important term being “practicable,” which is defined as “possible to practice or perform: capable of being put into practice”.

Under ORS 527.765, any water quality BMP must meet the MEP standard. Additionally, there may be more than one alternative to the proposed BMP that meets the MEP standard. For the BMP that is selected, however, the Board must make the finding under ORS 527.714(5)(e) that the BMP is the least burdensome to landowners that still meets water quality standards established by the EQC.

The resource at issue in this context is listed in ORS 527.710(2) as “water resources.” A court would likely construe that term to include water quantity and quality. ORS 527.714 and 527.765 appear to share the commonality that degradation of water quality would allow the Board of Forestry to proceed with the rule adoption process related to a BMP for water quality. Water quality is measured by the water quality criteria, numeric or narrative, established by the EQC to protect a beneficial use. Hence, the term “water resources” includes the beneficial uses of water, in addition to the numeric or narrative criteria used to measure water quality. Degradation of either a beneficial use of water or violation of numeric or narrative water quality criteria would likely constitute a sufficient finding of degradation of water resources for purposes of ORS 527.714(5)(a).

The on-ramps for initiating the BMP adoption process thus include, under ORS 527.765, a petition from a third party or the EQC for the Board of Forestry to adopt a BMP for water quality because the WQSs are not being met, or, under ORS 527.714, the Board of Forestry could proceed with rulemaking on its own motion or on the petition of a party under the Oregon APA (ORS 183.390) to adopt a new rule (i.e., a BMP) upon finding that the existing rules (existing BMPs) are likely to degrade a resource, in this context, water quality.

After the 2005 workshop, the Board decided not to develop specific rules and/or formal guidance on procedures for fulfilling statutory requirements under ORS 527.714 and ORS 527.765, including developing a definition for “maximum extent practicable.” In response to an examination of a “sequential approach” to conducting ORS 527.714 findings, the Board confirmed that the Department should develop an informal “checklist” as part of any future ORS 527.714 analyses to ensure that all the required components of the analyses are completed and their relationship to fulfilling responsibilities under ORS 527.765 are noted.
At the 2005 workshop the Board also identified and discussed alternative approaches and provisions in deciding whether to adopt BMPs. The alternative approaches included:

- Sequential rulemaking process where decisions on findings are made at each step of ORS 527.714 and ORS 527.765 rather than made as a packaged decision toward the end of the rulemaking process.

- Adoption of water protection rules with re-openers (e.g., rule outcomes conditioned on what subsequently is learned from monitoring), caps (e.g., limits on the amount of resource protection or mitigation required or sunset (e.g., rule expiration) provisions.

- Examining the Forest Practices Act existing approach to resource protection by incorporating dynamic ecosystems concepts into future rules.

- Encourage use of the existing provisions in the forest practices rules of applying for an “alternative practice” that provide landowners and operators more flexibility and incentive to meet the intent and purpose of the water protection rules.

ANALYSIS

Rule Concepts Under Consideration

The Board has initiated consideration of two rule concepts. In November 2011 the Board decided to consider the implication of the RipStream temperature results and the potential need to revise the riparian protection standards to increase the maintenance and promotion of shade on small and medium fish streams. Through the legislative process, the Board gained the authority to adopt rules allowing the department to waive the requirement for written plans for operations that are near, but would not affect, riparian areas.

When considering the adoption of a rule, the Board shall determine which type of rule described in subsection (1) of ORS 527.714 is being considered. There are three types of rules:

(a) Rules adopted to implement administration, procedures or enforcement of ORS 527.610 to 527.770 that support but do not directly regulate standards of forest practices.

(b) Rules adopted to provide definitions or procedures for forest practices where the standards are set in statute.

(c) Rules adopted to implement the provisions of ORS 527.710 (2), (3), (6), (8), (9), and (10) that grant broad discretion to the board and that set standards for forest practices not specifically addressed in statute.

Waiving requirement for written plans

The adopting of rules allowing the department to waive the requirement for written plans for operations affect statutory written plans described in ORS 527.670. Adopting rules in this case would not change the standards for forest practices or establish procedures to
implement standards. This rule implements the administration and procedures for ORS 527.670 that support but do not directly regulate standards of forest practices. This type of rule, 1(a), does not have to meet the evidentiary standards described in ORS 527.714 (5) and does not require the economic impact analysis described in ORS 527.714 (7) before being adopted by the Board.

However this rule process will require the development of criteria to determine when written plans will be waived. This decision will affect the clarity or ease with which the intent of the rule can be understood by the regulated parties. The rule deals with administrative matters that are important to operators and landowners. In these cases, the Board has specified that the regional forest practice committees will be requested to review the proposed rules (OAR 629-676-0100). The board could also use the regional committees as a vehicle for public involvement.

**Riparian protection standards on small and medium fish streams**

The revising of the riparian protection standards to increase the maintenance and promotion of shade on small and medium fish streams would implement provisions of ORS 527.710 (2) that grant broad discretion to the board and set standards for forest practices not specifically addressed in statute. Any revision would likely provide new or increased standards for forest practices. This type of rule, 1(c), must meet the evidentiary standards described in ORS 527.714 (5) and does require the economic impact analysis described in ORS 527.714 (7) before being adopted by the Board.

Following the sequential rulemaking process where decisions on findings are made at each step of ORS 527.714 and ORS 527.765, the Board must decide if an on-ramp for initiating the BMP adoption process exists. The Board of Forestry could proceed with rulemaking on its own motion upon finding that the existing rules are likely to degrade a resource, in this case, water quality – specifically the Protecting Cold Water standard.

As discussed at the November 2011 Board meeting, the results from the RipStream analyses describe the magnitude and expected frequency of the two year post-harvest temperature change. These findings indicate that FPA riparian protection measures for small and medium fish streams do not maintain stream temperatures similar to control conditions, and are inadequate to insure forest operations meet the state water quality standard for protecting cold water. As discussed above violation of numeric or narrative water quality criteria would likely constitute a sufficient finding of degradation of water resources for purposes of ORS 527.714(5)(a).

The revision process would involve development of alternatives, including nonregulatory approaches, based on available scientific information, the results of relevant monitoring and, as appropriate, adequate field evaluation at representative locations in Oregon.
RECOMMENDATION

Waiving requirement for written plans

The department recommends that the Board direct the department to begin the development of rules allowing the department to waive the requirement for written plans for operations that are near, but would not affect, riparian areas, pursuant to House Bill 2165.

The department recommends that the Board direct the department to work with the regional forest practice committees to develop the criteria to determine when written plans will be waived, ensure rule clarity, and provide a vehicle for public involvement.

Riparian protection standards on small and medium fish streams

The department recommends that the Board determine that there is monitoring or research evidence that documents that degradation of resources maintained (i.e., that there is evidence that forest practices conducted under existing regulations do not insure forest operations meet the state water quality standard for protecting cold water on small and medium fish streams) and direct the department to begin the rule analysis process that could lead to revision of the riparian protection standards to increase the maintenance and promotion of shade on small and medium fish streams.

The department recommends that the Board further direct the department to work with stakeholders to develop a plan for developing alternatives, including nonregulatory approaches, based on available scientific information, that considers the following:

- Adoption of water protection rules with re-openers (e.g., rule outcomes conditioned on what subsequently is learned from monitoring), caps (e.g., limits on the amount of resource protection or mitigation required or sunset (e.g., rule expiration) provisions.
- Encourage use of the existing provisions in the forest practices rules of applying for an “alternative practice” that provide landowners and operators more flexibility and incentive to meet the intent and purpose of the water protection rules.

NEXT STEPS

In accordance with Board decision and guidance, staff will work with stakeholders to design a plan for developing alternatives, including nonregulatory approaches, based on available scientific information. This plan would be presented at the April 2012 Board meeting and would include a decision timeline on findings (the “informal checklist”) to be made at each step of the process to provide the Board clear information about the legal on-ramps, off-ramps and safety nets that define their decision space at each step.
ATTACHMENTS


(5) Selected Sections of the Forest Practices Act.

(6) Legal Relationship Between ORS 527.765 and ORS 527.714 in Deciding Whether to Adopt BMPs Under the Oregon Forest Practice Act. Jas. Jeffrey Adams, Assistant Attorney-In-Charge, Natural Resources Section. August 23, 2005