

BEFORE THE OREGON ENVIRONMENTAL QUALITY COMMISSION

**Petition to Initiate Rulemaking and Take Other Actions  
to Protect Existing and Designated Uses of Fish and Wildlife  
From Point and Nonpoint Sources of Pesticides**

*Summary of the Petition*

**I. Introduction**

Summarizes the reasons why the Commission should take the actions requested in the petition which include adopting proposed rules, revising a pesticide discharge permit, and asking the Oregon Departments of Agriculture and Logging to take specified actions.

**II. Requested Actions**

**A. Proposed Rulemaking**

Brief summary of the proposed rules and two Clean Water Act requirements that support rulemaking.

**B. Directive to the Department to Amend the 2300A General Permit, Any Authorized Discharges Pursuant to that Permit, and Any Individual NPDES Permits Issued that Authorize the Discharge of Listed Pesticides**

Requests that the Commission direct the DEQ to re-open Oregon's general pesticide discharge permit and any individual pesticide discharge permits that may have been issued in order to incorporate the restrictions set out by the National Marine Fisheries Service in its pesticide biological opinions.

**C. Petitions to the Oregon Department of Agriculture**

**1. Petition to ODA to Adopt Reasonable and Prudent Alternatives in Basin Rules**

Requests that the Commission find that Oregon Department of Agriculture's rules are inadequate to protect water quality from pesticides because they contain no limits on pesticides and that the Commission petition the ODA for changes to its rules to reflect the pesticide biological opinion restrictions.

**2. Petition to ODA to Adopt the Reasonable and Prudent Alternatives by Prohibiting the Sale and/or Use of the Listed Pesticides in Oregon and/or Requiring Additional Regulations at Point of Sale**

Requests that the Commission petition the ODA to obtain changes to the sale and/or labeling of pesticides and to request point of sale notifications, such as brochures and shelf tags similar to those used for the protection of threatened and endangered species in the Pacific Northwest and California.

**D. Petition to the Board of Forestry**

Oregon Department of Forestry rules on pesticides do not require logging operators to comply with DEQ's water quality standards and rules and they are not consistent with the biological

opinions' restrictions. The petition requests that the Commission petition the Board of Forestry for rule changes that would remedy both of these problems.

### **III. The National Marine Fisheries Service Biological Opinions on the Effects of Insecticides, Herbicides and Fungicides on Pacific Northwest Salmon and Steelhead**

The petition describes six biological opinions issued by the National Marine Fisheries Service on pesticides, its determinations of jeopardy and adverse modification of habitat to threatened and endangered salmon and steelhead, and its schedule to complete two additional biological opinions.

### **IV. The U.S. Fish and Wildlife Service Biological Opinion on the Effects of Pesticides on Lost River Sucker, Shortnose Sucker, Modoc Sucker, Warner Sucker, Hutton Tui Chub, and Lahontan Cutthroat Trout**

The petition describes a biological opinion issued by the U.S. Fish and Wildlife Service in 1989 that consulted with EPA on 112 pesticides for five threatened or endangered species in Oregon, its determinations of jeopardy, and its mandatory requirements to avoid jeopardy. It also discusses why the USF&WS believes that its 1989 opinion is out-of-date and likely not adequately protective.

### **V. Effects of Pesticides on Aquatic Life and Limitations of Existing Regulatory Programs to Protect Aquatic and Aquatic-Dependent Species**

A brief summary of some of the effects of pesticides on fish, wildlife, and people.

#### **A. EPA Has Failed to Incorporate Mandatory Reasonable and Prudent Alternatives Into its Pesticide Regulatory Program**

A history of EPA's failure to incorporate the findings and restrictions set out by the U.S. Fish & Wildlife Service and the National Marine Fisheries Service into the pesticide registration and labels pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

#### **B. Limitations of Existing Clean Water Act Programs to Protect Aquatic Life**

A description of how only six current use pesticides are regulated under the Clean Water Act.

#### **C. ESA Consultations on the Effects of Pesticides on Oregon Threatened and Endangered Species Have Not Addressed Plummeting Populations of Amphibians and Reptiles in Oregon**

A compendium of species in Oregon that are not listed as threatened or endangered under the Endangered Species Act but are listed by federal agencies as candidate species, candidate species that would be listed but for higher agency priorities, and "species of concern." In addition, the petition discusses the Oregon Department of Fish and Wildlife designations of species as "sensitive-critical" and "sensitive-vulnerable," including numerous frogs, salamanders, and turtles.

#### **D. EPA Initiation of ESA Consultations on California Frogs and Salamanders**

A description of the litigation in California regarding a threatened salamander and a threatened frog including EPA's effects determinations and interim protections ordered by a federal court to restrict pesticide use affecting those species.

## **VI. The Clean Water Act Requires Oregon Action**

### **A. Applicable Water Quality Standards**

A description of Oregon's water quality standards and EPA requirements for water quality standards, including those not met by Oregon.

### **B. The State is Required to Have Published Methods for the Use of Narrative Criteria for Toxics**

Explains that Oregon is required to have a methodology to apply its narrative water quality criteria for toxics because in September 2011, Oregon issued a Clean Water Act permit to regulate the discharge of pesticides.

#### **1. EPA's Pesticides General Permit**

A description of EPA's Pesticides General Permit that governs discharges of pesticides in Oregon on tribal lands. The petition explains that the consultation done under the Endangered Species Act limits discharges of pesticides under this permit and sets out the restrictions established by the National Marine Fisheries Service in its biological opinion.

#### **2. Oregon's General Permit 2300A**

A description of Oregon's pesticide general permit and how there are no restrictions in it that mirror those required of EPA by the National Marine Fisheries Service for pesticide discharges. The petition also describes how DEQ issues authorizations under its permit to pesticide operators without obtaining information on what effect the pesticides will have on fish and wildlife.

## **VII. Need for Commission Adoption of the Proposed New Rules for Pesticides**

### **A. The State of Oregon Must Adopt Measures to Meet Water Quality Standards, Including Protection of Designated Uses, in Coastal Watersheds Under the Coastal Zone Act Reauthorization Amendments**

#### **1. CZARA Requirements**

A description of the requirements of the Coastal Zone Act Reauthorization Amendments (CZARA).

#### **2. Oregon's CZARA Program**

A description of Oregon's failure to gain approval of its coastal nonpoint program under CZARA and how the EPA and National Oceanic and Atmospheric Administration (NOAA), which co-administer CZARA, decided to rely upon a now almost entirely non-existent court injunction on pesticides to address the fact that Oregon does not adequately control pesticides in coastal watersheds as required by CZARA.

#### **3. Litigation on Oregon's CZARA Program Approval**

A brief explanation of Northwest Environmental Advocates' litigation under CZARA and the deadlines established for a final approval or disapproval action by EPA and the National Oceanic and Atmospheric Administration (NOAA) by dates certain.

**4. Oregon Cannot Rely on EPA Action to Address its CZARA Program Requirements for Pesticides**

Explains why Oregon cannot rely upon EPA for action on pesticides to make up for the state's failure to adequately control pesticide applications that violate water quality standards and affect threatened and endangered species in coastal watersheds.

**B. Use of Pesticides Addressed in Oregon Based on the FIFRA Labels Violates Oregon Water Quality Standards**

The NMFS jeopardy opinions on pesticides are the equivalent of a finding that pesticide use will violate water quality standards.

**1. Violation of Designated Use Support**

Protection of designated uses is a required part of meeting water quality standards of the Clean Water Act and requires, at a minimum, use of the restrictions established by the National Marine Fisheries Service and U.S. Fish and Wildlife Service in their biological opinions.

**2. Violation of Narrative Toxics Criteria**

Oregon's narrative criteria for the protection of fish and wildlife from toxics also requires use of the restrictions set out by the federal fish and wildlife agencies in their biological opinions.

**3. Violation of Tier I of the Antidegradation Policy**

Meeting water quality standards also requires protecting any fish and wildlife uses present at any time since 1975.

**C. Inaction by Oregon Amounts to Authorizing Illegal "Take" Under the Endangered Species Act**

A description of "take" of endangered species under the Endangered Species Act, how federal rules apply that same legal definition to effects on threatened species of salmon and steelhead, what the National Marine Fisheries Service has said about use of pesticides on salmon, and its willingness to assist states, such as Oregon, in avoiding take of threatened and endangered species.

**VIII. Commission Authority**

**A. Commission Action is Authorized by State Statutes**

Rulemaking on water quality standards is authorized by state law.

**B. Commission Action to Regulate Pesticides is Not Precluded by FIFRA**

Federal laws do not restrict Oregon from regulating pesticides.

## **IX. Commission Action Consistent with This Petition Will Support Oregon Policies**

### **A. Granting This Petition Will Support the Agency's Toxics Reduction Strategy**

#### **1. The Draft Toxics Reduction Strategy**

Oregon DEQ has been working on a Toxics Reduction Strategy since 2009, on its list of current use pesticides are 10 that are specifically addressed in the petition, however none of the Strategy's recommendations would limit the impacts of these pesticides on threatened and endangered species.

#### **2. This Petition Supports the Goals of the Strategy**

In contrast to the ineffective recommendations on pesticides included in the Strategy, granting of the petition would have immediate beneficial impacts to species affected by pesticides.

### **B. Oregon Policy on Protection of Sensitive Species Not Yet Listed as Threatened and Endangered**

Granting the petition would support Oregon's stated policy of attempting to prevent species from becoming threatened or endangered.

## **X. The Proposed Rulemaking**

Text of proposed rules to incorporate the restrictions established by the federal fish and wildlife agencies into Oregon's water quality standards.

## **XI. Conclusion**

### *Appendixes*

- A. Point-of-Sale Notifications.
- B. Reasonable and Prudent Alternatives Applicable to Species in Oregon for Which NMFS Found Jeopardy or Adverse Modification in its Biological Opinions for Pesticides.
- C. Reasonable and Prudent Measures, Terms and Conditions, and Conservation Recommendations Applicable to Species in Oregon for Which NMFS Found Jeopardy or Adverse Modification in its Biological Opinions for Pesticides.
- D. Summary of the Jeopardy and Adverse Modification Findings from NMFS BiOps.
- E. EPA Pesticide General Permit Reasonable and Prudent Alternatives, Reasonable and Prudent Measures, Terms and Conditions, and Conservation Recommendations.
- F. Reasonable and Prudent Alternatives Applicable to Species in Oregon for Which the USF&WS Found Jeopardy in its 1998 Biological Opinion for Selected Pesticides.
- G. Amphibians and Reptiles in Oregon: Oregon Spotted Frog, Columbia Spotted Frog, Western Pond Turtle, and Western Painted Turtle.
- H. EPA Pesticide General Permit Excerpts and Appendix I.
- I. NMFS Listed Resources of Concern.
- J. OAR 340-041-0034 Tables A and B.
- K. Other Persons Known to the Petitioner to Be Interested in the Rule