HARDY MYERS
Attorney General

PETER D. SHEPHERD
Deputy Attorney General

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM

DATE: August 23, 2005

TO: Oregon Board of Forestry

FROM: Jas. Jeffrey Adams, Assistant Attorney-In-Charge
Natural Resources Section

SUBJECT: Legal Relationship Between ORS 527.765 and ORS 527.714 in Deciding Whether to Adopt BMPs under the Oregon Forest Practices Act

A. INTRODUCTION

This white paper[1] builds upon the briefing document authored by Ian Whitlock and Larry Knudsen of the Oregon Department of Justice, entitled "Regulation of Water Quality and Forest Practices" (September 7, 2004), which was prepared for a joint meeting of the Environmental Quality Commission and the Oregon Board of Forestry (BOF) held on October 21, 2004. Because that joint briefing document provides essential background and also bears on legal "on-ramps" and "off-ramps" in the process for adopting best management practices (BMPs), a copy of the joint briefing document is attached to this paper and incorporated by reference.

As the joint briefing document explains, the statutes contemplate a partnership between the Oregon Department of Environmental Quality and the Oregon Department of Forestry in protecting water quality on forests. The statutes that establish that partnership divide the respective jurisdictions of the two agencies, such that the EQC is responsible for adopting water quality standards (WQSs), and the Board of Forestry is responsible for adopting best management practices on Oregon's forests. Each partner can seek to modify the other's rules.

In its board meeting held on July 29, 2005, the Board of Forestry authorized a workshop scheduled for September 8, 2005, focusing on process considerations in

[1] A "white paper" is defined as "a government report on any subject" or "a detailed or authoritative report." Merriam-Webster's Third International Dictionary (Unabridged) (1993 ed).

1162 Court Street NE, Salem, OR 97301-4096 Telephone: (503) 947-4500 Fax: (503) 378-3802 TTY: (503) 378-5938

decision-making regarding best management practices for water quality under the Oregon Forest Practices Act.

One of the objectives of the workshop is to help the Board of Forestry develop a clear understanding of the legal relationship between ORS 527.765 and ORS 527.714 in deciding whether to adopt BMPs under the Forest Practices Act. The purpose of this paper is to assist the Board in that endeavor by describing how a court would likely construe the two statutes together.

B. SUMMARY OF KEY PROVISIONS OF ORS 527.765 & 527.714

The joint briefing document states in pertinent part regarding ORS 527.765:[2]

2. *Best Management Practices.* As a substitute for EQC "limitations or controls," the legislature directed the Board to adopt best management practices (BMPs), i.e. "forest practices rules adopted to prevent or reduce pollution of waters of the state." ORS 527.765(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. * * *."

3. BMP enforcement shield. The FPA provides that forest operations conducted in accordance with BMPs "shall not be considered in violation of any water quality standards." ORS 527.770.

4. Enforcement savings clause. The forestry exemption, BMP rules, and BMP shield, are narrowly drawn. Apart from these provisions, the EQC retains full enforcement authority:

"Subject to ORS 527.765 and 527.770, any forest operations on forestlands within this state shall be conducted in full compliance with the rules and standards of the Environmental Quality Commission relating to air and water pollution control. In addition to all other remedies provided by law, any violation of those rules or standards shall be subject to all remedies and sanctions available under statute or

[2] ORS 527.765 is set forth in its entirety in the Appendix to this white paper.

rule to the Department of Environmental Quality or the Environmental Quality Commission." ORS 527.724.

The provisions of ORS 527.714[3] were succinctly summarized in the joint briefing document. That summary is reproduced here:

> The FPA contains important substantive limitations on new rules which directly affect forest practice standards. ORS 527.714. Rules which implement the FPA's resource-protection objectives and which would "provide new or increased standards for forest practices" must meet stringent evidentiary criteria. ORS 527.714(1)(c), (5). For example, evidence must show that existing practices are likely to cause degradation of protected resources, and the proposed rule must reflect available scientific information, relevant monitoring, and, as appropriate, adequate field evaluation at representative locations in Oregon. ORS 527.714(5)(a)-(c). Proposed rules must be drafted with precision to prevent the harm or provide the benefits for the resource requiring protection. Rules must directly relate to, and substantially advance, their underlying objective. ORS 527.714(5)(d). New rules must undergo an alternatives analysis, and the "least burdensome" alternative must be chosen. ORS 527.714(5)(e). The benefits to the resource achieved by the rule must be proportional to the harm cause by forest practices. ORS 527.714(5)(f). New rules must also be accompanied by a detailed economic impact analysis. ORS 527.714(7).

C. NEED TO HARMONIZE THE STATUTES

ORS 527.765 requires that the Board of Forestry adopt BMPs that "to the maximum extent practicable" ensure maintenance of water quality standards. ORS 527.714 requires the Board of Forestry when adopting a new or "increased" rule to choose the "least burdensome" alternative. The perceived difference between those two phrases has led to confusion over the meaning of the phrase "to the maximum extent practicable" and over the degree of discretion that the Board has to define that phrase by rule or order in such a way as to minimize the perceived conflict between the two statutes. Hence, there is a need to determine the legal relationship between ORS 527.765 and ORS 527.714.

An Oregon court would seek to harmonize two statutes that bear on the same subject by giving meaning to all provisions. ORS 174.010 provides: "In the construction of a statute, * * * where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."

[3] ORS 527.714 in pertinent part is set forth in the Appendix to this white paper.

D. APPROACH OF COURTS IN CONSTRUING AND HARMONIZING STATUTES

Oregon courts apply a three-part test when interpreting a statute. First, they look to the text and context of a statute; second, if that is ambiguous, to the legislative history; and third, if the meaning is still unclear, the courts will apply canons of statutory construction. *PGE v. BOLI,* 317 OR 606, 610-11, 859 P2d 1143 (1993).

At the first level, the courts look to the statutory provision itself to determine legislative intent. To ascertain the meaning of a statute, Oregon courts consider rules of construction of the text that bear directly on how to read the text. One rule of construction, mandated by statute, is "not to insert what has been omitted or, or to omit what has been inserted." ORS 174.010.

As noted *ante*, an Oregon court would seek to harmonize two statutes that bear on the same subject by giving meaning to all provisions. ORS 174.010. In this context, there does not appear to be irreconcilable conflict between ORS 527.765 (including the MEP standard) and ORS 527.714 (including the "least burdensome alternative" standard)." Under ORS 527.765, any BMP on water quality must meet the MEP standard. There may be more than one alternative to the proposed BMP that meets the MEP standard, that is, that as far as is feasible ensures maintenance of WQSs.[4] Some alternatives might be more burdensome than others, considering the factors listed in ORS 527.765, among other considerations. Under ORS 527.714, the Board of Forestry would be required to choose the *least burdensome* BMP. But that does not obviate the need for the BMP to ensure that WQSs will be maintained "to the maximum extent practicable."

ORS 527.765, including the phrase "to the maximum extent practicable," was added to the Oregon statutes in 1991. Or Laws 1991, c 919 § 20 (SB 1125). ORS 527.765 specifically pertains to adoption by the Board of Forestry of BMPs for water quality.

[4] While the use of the word "maximum," which is a superlative, seems to suggest there might be only one BMP that could meet the MEP standard, that is not necessarily true as a matter of logic. ORS 527.714(5)(e) requires the Board to consider alternatives to the proposed rule, including the null option, and choose the least burdensome alternative vis-à-vis landowners and timber owners that still achieves "the desired level of protection." Alternate rule formulations of the same BMP approach could equally protect water quality but approach it in slightly different ways that have different impacts on landowners and timber owners. ORS 527.714 requires only that the Board find that the proposed rule is the least burdensome alternative of the alternatives that still achieves "the desired level of protection," i.e., that satisfies the MEP standard.

ORS 527.714 was adopted in 1996. Hence, ORS 527.714 is the more recent statute. ORS 527.714 applies to all new or "increased" rules, not just to BMPs for water quality; it is the more general statute, at least in that sense. ORS 527.714 also imposes specific finding requirements not previously required under ORS 527.765.

Only if there is conflict between two statutes that cannot be resolved through harmonization, would a court follow the legislative directive that a more specific statute controls over a more general conflicting statute on the same subject. ORS 174.020 provides: "When a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent."

Hence, ORS 527.765 is more specific as to BMPs for water quality; ORS 527.714 is more specific as to required findings for new or "increased" rules. Because the phrase "to the maximum extent practicable" is found only in ORS 527.765, a court would likely look to that statute to determine the meaning of MEP, not to ORS 527.714. As to the meaning of MEP, ORS 527.765 is more specific.

The relative degree of specificity, however, would not become an issue, unless the two statutes could not be harmonized without resort to ORS 174.020 (specific controls over general). A reviewing court would likely find that these two statutes can generally be read together in a harmonious manner.

E. MEANING OF MEP IN ORS 527.765.

1. MEP as a term of art

In the process of statutory construction as it is conducted by courts in Oregon, analysis of text includes reference to well-established legal meanings for terms of art that the legislature has used. *McIntire v. Forbes*, 322 Or 426, 431 (1996). Terms of art must, however, be "well-established" to be acknowledged in the statutory construction context. *Beaver Creek Coop. Tel. Co. v. PUC*, 182 Or App 559, 571-572 (Or App 2002) (where no Oregon case defined a term in the same context, and cases from other jurisdictions yielded diverse definitions, the court declined to give the phrase "for hire" its meaning as a term of art).

It is possible that an Oregon court could find that the phrase "to the maximum extent practicable," as used in the context of water quality, is a term of art from the Clean Water Act (CWA). To the extent the Oregon court could determine the established legal meaning of that phrase in federal law, the court would likely construe it in a manner consistent with such meaning in the context of the Clean Water Act (CWA). That is because, as the joint briefing document makes clear, it is the CWA that requires states to

adopt Water Quality Standards (WQSs), and it is Section 319 of the CWA that requires states to adopt and implement nonpoint source management programs. (Joint Briefing Document at 2-3).

The pertinent text of §319 of the Clean Water Act provides: "The governor of each state shall, after notice and opportunity for public comment, prepare and submit to the Administrator for approval, a report which – (A) identifies those navigable waters within the State which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards or the goals and requirements of this chapter; (B) identifies those categories and subcategories of nonpoint sources or, where appropriate, particular nonpoint sources which add significant pollution to each portion of the navigable waters identified under subparagraph (A) in amounts which contribute to such portion not meeting such water quality standards or such goals and requirements; (C) describes the process, including intergovernmental coordination and participation, for identifying best management practices and measures to control each category and subcategory of nonpoint sources and, where appropriate, particular nonpoint sources identified under subparagraph (B) and to reduce, *to the maximum extent practicable*, the level of pollution resulting from such category, subcategory, or source." 33 USC § 1329(a)(1) (emphasis added).

The term "maximum extent practicable" appears in numerous places in §319 of the Clean Water Act, as well as in many other federal statutes and rules. Although the "maximum extent practicable" standard is in broad use in federal law, its meaning remains largely undefined, which likely adds to its appeal for decision-makers. As EPA noted in its *Storm Water Phase II Compliance Assistance Guide*, "maximum extent practicable" is a "standard for water quality that applies to all MS4 operators regulated under the NPDES Storm Water Program. *Since no precise definition of MEP exists*, it allows for maximum flexibility on the part of MS4 operators as they develop and implement their programs." (EPA 833-R-00-002) (March 2000) (emphasis added).

Although "maximum extent practicable" as found in ORS 527.765 was likely derived at least indirectly from the Clean Water Act, the term has not been well-defined in the CWA context. That is not to say that it has been given contradictory meanings. Rather, in the CWA context, courts have tended to avoid defining it precisely, which has left decision-makers with maximum flexibility in applying it in practice.

The closest a court has come to defining MEP in the CWA context was in *Defenders of Wildlife v. Browner*, 197 F3d 1035 (9th Cir 1999). The plaintiff organization in that case claimed that the EPA could not approve a municipal storm water plan if it did not have to strictly comply with the numerical effluent limits of 33 USC § 1311(b)(1)(C). Under § 1311(b)(1)(C) of the CWA, permittees must achieve effluent limitations that include those necessary to meet state water-quality standards. Section

1342(p)(3)(A) of the Water Quality Act provides that NPDES permits associated with industrial activity must meet all applicable provisions of S 1311; subsection (p)(3)(B)(iii) states that permits for discharges from municipal storm sewers must have controls to reduce the discharge of pollutants "to the maximum extent practicable."

The court in *Defenders of Wildlife* examined the differences between the two statutory sections, and determined that the function of MEP in subsection (p)(3)(B)(iii) was to give EPA discretion in applying limitations on municipal sewer systems. The court reasoned that the "Water Quality Act unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C)"; rather, it had only to comply to the maximum extent practicable. As the plaintiff organization had not alleged that particular permits did not attain reduction to the maximum extent practicable, but only that the municipalities had to conform to the numerical effluent limits, the court did not address the precise meaning of MEP, beyond finding that it authorizes the EPA to exercise some discretion in determining how much effluent reduction to require. Thus, the case reaffirms that the MEP standard operates to require something less than strict enforcement of effluent standards.

In *Environmental Defense Center, Inc., et al v. EPA,* 344 F3d 832 (9th Cir., 2003), another plaintiff organization challenged EPA's rule for storm sewer pollution control. Among other allegations, EDC claimed that the rule violated 33 USC § 1342(p)(3)(B)(iii), the same statute involved in the *Defenders of Wildlife* case. That statutory subsection provides that NPDES permits "shall require controls to reduce the discharge of pollutants *to the maximum extent practicable,* including management practices, control techniques and system, design and engineering methods and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." (Emphasis added).

Although the court in *EDC* invalidated the EPA's rule, it did so on the basis that the rule did not allow for review of applications from municipalities *before* the EPA issued permits for discharge. The court reasoned that if the EPA did not review the application, it could not ensure that the permittees would, in fact, "reduce the discharge of pollutants to the maximum extent practicable." Thus, while the court held that EPA's rule did not allow the MEP determination to be made, the court did not reach the precise meaning of MEP.

In view of the foregoing, it is likely that a court would find that "to the maximum extent practicable" as used in ORS 527.765 is a term of art from the Clean Water Act,

although its precise meaning as a term of art has not been elaborated upon by courts construing the CWA or other federal regulatory regimes.[5]

2. MEP as a function of dictionary definitions

If a reviewing court opted not to treat MEP as a term of art used in the CWA, the applicable rule of statutory construction in Oregon case law is that words of common usage typically are given their plain, natural and ordinary meaning. *PGE v. BOLI,* 317 Or at 611. Oregon courts typically use Webster's Third New International Dictionary (unabridged ed. 1993) for assistance in construing modern statutes. *State v. Running,* 336 Or 545, 564, 87 P3d 661 (2004).

Webster's defines "maximum" as "greatest in quantity or highest in degree attainable." *Webster's* defines "practicable" as "possible to practice or perform: capable of being put into practice" and offers "feasible" as a synonym. "Feasible" is similarly defined as: "capable of being done, executed or effected." Hence, doing something "to the maximum extent practicable" means, in ordinary terms, doing something to the greatest extent that it is *capable* of being done.

When the standard dictionary definitions are applied, it is clear that doing something "to the maximum extent practicable" requires more than doing something in a cost-effective manner. Considerations of cost-benefit are not central to the core concept of MEP, i.e., that something is *capable* of being achieved. On the other hand, the word "practicable" is less broad than the concept of "possible." Neither Congress in the CWA nor the Oregon legislature in ORS 527.765 used the phrase "to the maximum extent possible," which might have required state agencies to develop new technologies that did not previously exist. It is not likely that a reviewing court applying dictionary definitions of the phrase MEP would require that new methods of technology be invented. Rather, it is more likely that a reviewing court would view "maximum extent practicable" as indicating that something be done to the greatest extent feasible, using currently available scientific information and methods.

---

[5] Even in other federal regulatory contexts, courts have avoided defining the phrase "to the maximum extent practicable." *See e.g., Sausalito v. O'Neil*, 386 F3d 1186 (9th Cir 2004) (court found that National Park Service failed under Coastal Zone Management Act to take actions affecting coastal zones consistent *to the maximum extent practicable* with enforceable state policies; but court did not define phrase); *Biodiversity Legal Foundation v. US Fish and Wildlife Service,* 146 F3d 1249 (10th Cir 1998) (in ESA context, court found MEP phrase ambiguous and extended *Chevron* deference to federal agency's action re its meeting the MEP standard); *Defenders of Wildlife v. Dept. of the Interior*, 294 F3d 173, 185 (DC Cir 2002) (without precisely defining MEP as used in the ESA context, court found FWS not to have met MEP standard for mitigating harm of development to endangered fox squirrel habitat).

In determining the meaning of MEP in ORS 527.765, a reviewing court would likely address the question whether the five factors listed in subsection (1)(a-e) serve to define MEP (i.e., the statutory reference to beneficial uses, effects of past forest practices, appropriate practices employed by other forest managers, technical, economic and institutional feasibility, and natural variations in geomorphology and hydrology). That question has not yet been resolved by a court.

A court would first look to the literal statutory text. The sentence in ORS 527.765 that contains the phrase "to the maximum extent practicable" requires the Board of Forestry to establish BMPs as necessary to ensure that "to the maximum extent practicable" nonpoint sources of pollution do not impair achievement and maintenance of water quality standards set by the EQC. That first sentence appears to require development of BMPs necessary to achieve and maintain the water quality standards. The five factors are listed in the third sentence of the statute as required considerations for the Board of Forestry to take into account in developing BMPs, without explicit reference to MEP. Particularly if MEP were to be viewed as a term of art from the CWA, a reviewing court would view those listed factors as not defining or modifying MEP but rather as simply constituting required considerations when the Board is establishing a BMP.

On the other hand, some of the factors listed in ORS 527.765(1)(a-e) seem to be related conceptually to practicability, including "appropriate practices employed by other forest managers," "technical, economic and institutional feasibility," and "natural variations in geomorphology and hydrology." Moreover, the statute does not limit the Board of Forestry to consideration of only the factors listed: "Factors to be considered by the board in establishing best management practices shall include, where applicable, *but not be limited to* * * * [the five listed factors]" (emphasis added). Thus, the legislature has conferred a measure of discretion on the Board of Forestry with respect to the range of factors that it may consider in adopting best management practices.

On balance, a reviewing court would likely construe the concept "to the maximum extent practicable" to be an independent criterion that a BMP must meet. But while the listed factors do not appear expressly to define the phrase "to the maximum extent practicable," they are nonetheless considerations the board must take into account in establishing best management practices that satisfy the MEP standard.[6] Hence, both the MEP standard and the five factors listed in ORS 527.765(1)(a-e) must be considered by the Board of Forestry in establishing best management practices for water quality.

[6] It is unlikely, however, that a reviewing court would view those factors as modifying the water quality standards themselves, which are established by the EQC.

3. Deference to Oregon agencies in defining statutory terms

The deference Oregon courts afford agency statutory interpretations varies, depending on the nature of the statute's language and structure, according to one line of Oregon cases. When a statutory term is "exact," carrying a "relatively precise meaning," the agency's role is confined to applying the statute to particular situations. *Springfield Ed. Assoc. v. Springfield Sch. Dist. No. 19.*, 290 Or 217, 223 (1980). The court does not defer to an agency's interpretation of an exact term, because the term requires no interpretation.

"Inexact" statutory terms are similar to exact terms, in that the court believes the legislature intended them to be complete expressions of legislative intent. Thus, the court need not defer to agency constructions of inexact terms, as the legislature intended to give them complete meaning. But, a court can give some weight to an agency's interpretation "if the agency was involved in the legislative process or if [the court] infer[s] that it has expertise based on upon qualifications of its personnel or because of its experience in the application of the statute to varying facts." *Id*. at 227-228.[7]

Finally, in some cases the legislature purposefully leaves statutory terms or concepts incomplete to "which the agency is given delegated authority to complete." In such cases, the legislature creates a general standard and delegates to the agency the authority to make policy decisions in implementing the statute. Examples of such "delegative" terms are "good cause" or "public convenience and necessity." *Id*. at 228. The legislature leaves value judgments to the agency, in order to give some flexibility to the statute's implementation. For delegative terms, the court's role is most limited, determining if "the agency's decision is within the range of discretion allowed by the more general policy of the statute." *Id*. at 229. Thus, when a court finds that a statutory term is "delegative," the agency's interpretation of it receives a measure of deference from reviewing courts.

There is some question whether the methodology of statutory construction under the *Springfield* line of cases is still valid after *PGE v. BOLI*. The *Springfield* analysis appears to *begin* with a legal conclusion that under *PGE v. BOLI* should be reached only after considering text and context and legislative history. We assume for the purposes of this white paper, however, that the *Springfield* line of cases retains some validity, given that *Springfield* has been cited by the Oregon Supreme Court in cases that also cite *PGE v. BOLI*. *See, e.g., V.L.Y. v. Bd. of Parole and Post-Prison Supervision*, 338 Or 44, 50, 53 (2005).

---

[7] With respect to legislative history, both DEQ and ODF were involved in the legislation resulting in ORS 527.765, and hence those two agencies have some understanding of the statute based upon that involvement.

Oregon's approach to statutory interpretation differs significantly from the more deferential approach federal courts take with respect to federal agency statutory interpretation. *See Chevron v. Natural Resources Defense Council*, 467 US 837 (1984). The two-step test enunciated in *Chevron* affords deference to federal agencies if there is ambiguity in the statutory language or structure. Federal agency interpretation of ambiguous statutory language will be allowed to stand, "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id*. quoting *United States v. Shimer*, 367 U.S. 374, 382, 383 (1961). In contrast, Oregon's courts maintain control over resolving the meaning of ambiguous statutory language, without deferring to agency interpretation. *PGE*, 317 Or at 612.

Oregon courts do, however, defer to an agency's interpretation of its own rules. While a "court is authorized to overrule an agency's interpretation of a rule if an agency has 'erroneously interpreted a provision of law' *** [when] the agency's plausible interpretation of its own rule cannot be shown either to be inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law, there is no basis on which [a] court can assert that the rule has been interpreted 'erroneously.'" *Don't Waste Or. Comm. v. Energy Facility Siting Council*, 320 Or 132, 142 (1994). Thus, agencies do have some leeway in applying their regulations, so long as the application does not conflict with the court's interpretation of controlling statutes or constitutional provisions.

In light of the foregoing, the question is whether the Board of Forestry would receive deference from a reviewing court in promulgating rules that further define terms, like MEP, that are contained in ODF's governing statutes.

To the extent a reviewing court chose not to view MEP as a term of art from the CWA, it is likely the court would view MEP, as used in ORS 527.765, as an inexact term. A term is "inexact" if it appears that the legislature intended the term to be a "complete expression of legislative meaning, even though that meaning may not always be obvious." *Springfield Ed. Assoc*., 290 Or at 224. A court will not find that the legislature delegated policy-making authority to an agency, if it believes the legislature "expressed itself not in the semantic sense, but rather in the sense of having made a complete policy statement." *Id*. at 225. As noted *ante*, deference by reviewing courts is not extended to agency interpretation of inexact terms.

Moreover, it is not likely that a reviewing court would view the phrase MEP as a delegative term. Although it is true that the word "practicable," if used by itself, would appear to give the agency some degree of discretion, the word is paired with "maximum," and the deferential space it creates is thus correspondingly narrower. "Maximum" has a standard and well-established meaning that requires no value judgment. Unlike "good" or "fair," "maximum" is a set quantity, being "the greatest quantity or value attainable in

a given case." Thus, by writing the statute such that "maximum" modifies "practicable," the legislature appears to have expressed a complete policy choice. Further, to the extent the five factors for creating BMPs do bear on the meaning of MEP, that would tend to indicate further the completeness of the legislature's policy choice.

In determining the meaning of MEP as an inexact term in ORS 527.765, a reviewing court would likely conclude that the legislature did not leave legislative tasks for the agency to complete. Rather, a reviewing court would likely view MEP as a "complete policy statement" within the meaning of *Springfield Ed. Assoc*., 290 Or at 225. Although the Board of Forestry may develop BMPs to attain MEP in specific situations, a reviewing court would likely conclude that ORS 527.765 does not authorize the Board of Forestry to make independent policy choices about what MEP, generally, means. That is not to say that the Board of Forestry could not seek to define the term by rule, but whether the Board of Forestry's definition of MEP is consistent with legislative intent would ultimately be determined by a reviewing court.

F. PROCEDURAL RELATIONSHIP BETWEEN ORS 527.765 AND ORS 527.714.

1. Consideration of existing practices

It appears that both ORS 527.765 and ORS 527.714 have analogous provisions that bear on the adequacy of existing practices.

ORS 527.765 allows either the EQC or a third party to petition the Board of Forestry to adopt a BMP for water quality if the water quality standards are not being met. That provision in ORS 527.765 is analogous to ORS 527.714, which provides that the Board of Forestry must determine that degradation of resources is likely before proceeding further with adoption of new or "increased" rules. ORS 527.714(5) imposes a requirement that for proposed rules that would provide new or "increased" standards for forest practices (apart from clarifying rules), the Board first must determine that there is monitoring or research evidence documenting that if forest practices continue under existing regulations, "degradation of resources maintained under ORS 527.710(2) or (3) is likely."

The reference in ORS 527.714(5)(a) is in the plural to "resources" maintained under ORS 527.710(2) & (3). That reference arguably creates ambiguity as to whether likely degradation of all resources considered on an overall basis is required before the BMP adoption process may continue under ORS 527.714, or whether likely degradation of only one resource is a sufficient basis to continue. ORS 527.710(2) requires that "the rules shall provide for the overall maintenance" of air quality, water resources, soil productivity, and fish and wildlife. The reference to "rules" in the plural, however,

appears to require that the forest practice rules *as an aggregate* must provide for the overall maintenance of the listed resources. Moreover, ORS 527.710(3) also lists, without mention of "overall maintenance," threatened and endangered fish and wildlife under state and federal law, sensitive bird sites, significant ecological sites, and significant wetlands. (*See* Appendix for pertinent text of ORS 527.710(2) & (3)). Further, several subsections of ORS 527.714(5) that follow subsection (a) revert to the singular in referring to "the resource" rather than "resources." *See* ORS 527.714(5)(b); 527.714(5)(d)(A); 527.714(5)(f). On the other hand, ORS 527.714(5)(f) again refers to the "overall resource concern."

Although the foregoing textual elements in the pertinent statutes furnish a mixture of clues bearing on the meaning of ORS 527.714, a court reviewing the statutes would likely lean toward the view that likely degradation of any one resource is sufficient to allow the rule adoption process for new or "increased" rules to proceed under ORS 527.714.

With respect specifically to BMPs for water quality, a reviewing court would likely avoid a potential statutory conflict in order to reach the conclusion that degradation of only one resource (water quality) is sufficient for purposes of ORS 527.714(5)(a). An interpretation of ORS 527.714(5)(a) that required the Board of Forestry to find likely degradation of *all* resources considered on an overall basis, before a new or "increased" BMP for water quality could be adopted, would appear to conflict with ORS 527.765(3). ORS 527.765(3) requires that the BMP adoption process be commenced if nonpoint sources of pollutants from forest operations are a significant contributor to violations of water quality standards, absent a contrary determination by the Board of Forestry that the current best management practices are neither significantly responsible for particular water quality standards not being met nor a significant contributor to violations of those standards. ORS 527.765(3)(b).

If likely degradation of all resources considered on an overall basis were required under ORS 527.714(5)(a), the Board of Forestry would find itself in a "catch-22" situation. That is, ORS 527.765(3) would require the Board of Forestry to commence the BMP adoption process when water quality standards would be impaired by existing forest practices, yet ORS 527.714(5)(a) would allow the Board of Forestry to proceed with the rule adoption process only if it found likely degradation of *all* listed resources considered from an overall perspective. To avoid the potential conflict between the two statutes, a reviewing court would harmonize them by ruling that, at least with respect to BMPs for water quality, a finding that water quality would likely be degraded is a sufficient finding under ORS 527.714(5(a) for the Board of Forestry to proceed with the BMP adoption process.

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.

An off-ramp at this early point in the BMP adoption process is created if the Board of Forestry determines that forest operations are not significantly responsible for WQSs not being met and that they are not a significant contributor to violations of the WQSs. Under those circumstances, the Board of Forestry is directed to dismiss a third-party petition. ORS 527.765(3)(c). If the EQC has petitioned, however, the EQC must concur in the dismissal. ORS 527.765(3)(d).

2. Further steps under ORS 527.714

Once a BMP for water quality is proposed, the next step is for the Board of Forestry to propose alternatives to address the identified problem. ORS 527.765(3) requires establishing or modifying a BMP; ORS 527.714 requires looking at both regulatory and nonregulatory options.

ORS 527.765 requires that a BMP for water quality must meet the MEP standard. A reviewing court could find that that means the BMP must ensure water quality is maintained to the maximum extent feasible within existing practices and technologies, but not necessarily on the most cost-effective basis. In addition, in adopting the BMP, the Board of Forestry must consider the several factors listed in ORS 527.765(1)(a-e). Again, those factors do not appear to define MEP explicitly, but at a minimum, those factors must be considered and weighed by the Board of Forestry before adopting a BMP that meets the MEP standard.

Another off-ramp is provided for the Board of Forestry under ORS 527.765(3)(e), when that statute is read together with ORS 527.770, after the Board of Forestry commences the BMP adoption process yet ultimately decides not to adopt a revised BMP. The Board of Forestry must adopt a revised BMP within two years of the date of filing a petition, ORS 527.765(3)(e), unless the EQC requests the Board of Forestry to expedite the process to avoid damage to beneficial uses identified by the EQC. ORS 527.765(3)(f). ORS 527.770 (*see* Appendix) clearly contemplates that the Board of Forestry may determine *not* to adopt a revised management practice, in that it provides that the EQC may enforce water quality standards against forest operators, unless the Board of Forestry has made a finding that revised BMPs are not required, presumably under ORS 527.765(3)(b) or any other applicable statute.

Yet another potential off-ramp for the Board of Forestry is the ability of the Board to petition the EQC to modify the water quality standards if the Board of Forestry believes that current water quality standards are not appropriately protective of beneficial uses. ORS 468B.105.[8]

The legislative history of ORS 527.710 as amended in 1987 sheds light on the intended meaning of the "overall maintenance" standard the Board of Forestry must meet in protecting resources through its forest practice rules. In the process of adoption of HB 3396 in 1987, a statement of legislative intent for the House version of HB 3396 was articulated by Gail Achterman, then Natural Resource Assistant to the Governor.[9] That

---

[8] ORS 468B.105 provides: "Upon request of the State Board of Forestry, the Environmental Quality Commission shall review any water quality standard that affects forest operations on forestlands. The commission's review may be limited to or coordinated with the triennial or any other regularly scheduled review of the state's water quality standards, consistent with ORS 468B.048, 468B.110 and applicable federal law."

[9] In pertinent part, the "Statement of Intent" recited:

> "**Subsection (2)** requires that the Board's rules assure the continuous growing and harvesting of forest tree species and, consistent with the forest policy set forth in ORS 526.630, generally maintain certain widespread resources. These include air quality; water resources, including water quality and quantity and sources of domestic drinking water; soil productivity; and fish and wildlife.
>
> The intent of this subsection is for the Board's rules to generally maintain the listed widespread resources, as opposed to maintaining them without any change or disturbance. This recognizes that forest operations may adversely affect these resources but that the integrity of the resources overall should be maintained. It is also intended to continue the long-standing policy that forest landowners are not required to provide

expression of legislative intent was endorsed by the Chair of the Senate Committee that finalized amendments to ORS 527.710.[10]

G. WHETHER FINDINGS REQUIRED BY ORS 527.714 MAY BE SEQUENCED

ORS 527.714(5) imposes a requirement that certain findings must be made by the Board before it can adopt a rule that provides a new or "increased" standard for forest practices, apart from rules that clarify or make minor adjustments to existing rules.

Procedurally, the question is whether the Board may "sequence" making those findings by addressing them *seriatim*. The answer appears to be: yes.

The likely degradation determination is made under ORS 527.714(5)(a), which is analogous to ORS 527.765(3). When a rule (BMP) is proposed that meets the MEP standard, and after Board of Forestry has considered the necessary factors under ORS 527.765, the remaining specific required findings under ORS 527.714 must be made:

> 1. If the resource to be protected is a wildlife species, the scientific or biological status of a species or resource site to be protected by the proposed rule has been documented using best available information. ORS 527.714(5)(b).

> "drinkable" domestic water, but rather to provide "treatable" water consistent with the federal and state water quality laws.

Minutes, Senate Agricultural and Natural Resources Committee (HB 3396), June 19, 1987, Ex A at 9-10.

[10] A memorandum dated June 24, 1987, from then Senator Bill Bradbury, Chair of the Senate Agriculture and Natural Resources Committee, to Ron Cease, Chair of the House Energy and Environment Committee, states in pertinent part:

> **SECTION 14(2):** The bill passed by the House required the board to adopt rules which "generally maintain" certain widespread resources. The Senate Committee felt this phrase was unclear and amended it to require instead that the board's rules "provide for the overall maintenance" of the same resources. The Senate Committee believed that this language more accurately expressed the intent of this subsection as explained in Gail Achterman's Memorandum of June 18, 1987.

Minutes, Senate Agricultural and Natural Resources Committee (HB 3396), June 22, 1987, Ex D at 2-3.

The proposed rule reflects available scientific information, the results of relevant monitoring and, as appropriate, adequate field evaluation at representative locations in Oregon. ORS 527.714(5)(c).[11]

2. The objectives of the proposed rule are clearly defined, and the restrictions placed on forest practices as a result of adoption of the proposed rule:

(A) Are to prevent harm or provide benefits to the resource or resource site for which protection is sought, or in the case of rules proposed under ORS 527.710 (10), to reduce risk of serious bodily injury or death; and

(B) Are directly related to the objective of the proposed rule and substantially advance its purpose. ORS 527.714(5)(d).

3. The availability, effectiveness and feasibility of alternatives to the proposed rule, including nonregulatory alternatives, were considered, and the alternative chosen is the least burdensome to landowners and timber owners, in the aggregate, *while still achieving the desired level of protection*. ORS 527.714(5)(e) (emphasis added).

4. The benefits to the resource, or in the case of rules proposed under ORS 527.710 (10), the benefits in reduction of risk of serious bodily injury or death, that would be achieved by adopting the rule are in proportion to the degree that existing practices of the landowners and timber owners, in the aggregate, are contributing to the overall resource concern that the proposed rule is intended to address. ORS 527.714(5)(f).

If the required findings cannot be made under each of the foregoing provisions, then the Board of Forestry cannot proceed to adopt the proposed rule, under the provisions of ORS 527.714(5) ("the board may adopt such a rule only after determining that the following facts exist and standards are met"). If any one of the findings cannot be met, the Board must stop, at least for purposes of ORS 527.714.[12] That constitutes an

[11] It would be efficient to address those two required findings at the same time, if a wildlife species is among the resources to be protected, given that both finding requirements under ORS 527.714(5)(b) and (c) relate to scientific information.

[12] If the EQC has initiated the BMP process by a petition under ORS 527.765, however, the Board cannot dismiss the petition without the EQC's concurrence. The joint briefing document states: "If the EQC is the entity petitioning for review, the Board has two options: terminate review with the EQC concurrence, or begin rulemaking. ORS 527.765(3)(c)."

off-ramp, which exists for each required finding under ORS 527.714. It follows that the Board could stop after determining that any one of the required findings cannot be made.

The procedural question is whether the required findings can be made sequentially. There is nothing in the text or context of the statute that requires that the findings be made as a package. Hence, it would appear that 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. Hence, it would appear that the Board has the discretion to address those findings in the order that it prefers, in any given case.

An additional procedural requirement is set forth in ORS 527.714(7), which does not explicitly prevent the Board from adopting a rule. Subsection 7 requires that the Board, for new or "increased" forest practice standards (apart from rules that clarify existing rules), prepare and make available to the public, before the close of the public comment period "a comprehensive analysis of the economic impact of the proposed rule." That requirement is in addition to the fiscal impact statement required under the Oregon APA, as provided by ORS 183.335(2)(b)(E).

The economic impact analysis required under subsection 7 must address an estimate of the change in timber harvest caused by the rule; the overall statewide economic impact on output, employment and income; the total economic impact on the forest products industry and common school and county forest trust land revenues regionally and statewide; and the impact of the proposed rule based on consultation with landowners and timber owners. That provision does not appear to require a cost-benefit analysis, but rather an economic impact analysis containing the listed elements.

Failure to comply with this procedural requirement for an economic impact analysis before the end of the public comment period would not appear to prevent the Board from adopting a rule, and hence ORS 527.714(7) does not qualify as a legal off-ramp *per se*. Any rule so adopted without compliance with that procedural requirement, however, would be subject to a rule challenge on the basis that the rule was adopted without compliance with "applicable rulemaking procedures." ORS 183.400(4)(c). A challenge based on lack of compliance with applicable rulemaking procedures must be brought within two years after the date the rule is filed in the office of the Secretary of State, "if the agency attempted to comply with those procedures and its failure to do so did not substantially prejudice the interests of the parties." ORS 183.400(6). Thus, attacks on the Board of Forestry's compliance with that procedural rule, or with any rulemaking procedure provided for in ORS 527.714, would be prohibited after two years have passed since the rule was filed with the Secretary of State.

There are legal on-ramps to the BMP adoption process, after the Board has stopped the BMP adoption process because a required finding under ORS 527.714(5) could not be made. If the EQC has filed a petition for adoption of a BMP for water quality, the Board cannot dismiss that petition without the EQC's concurrence. ORS 527.765(3)(d). In third-party petitions under ORS 527.765, an on-ramp could occur with the filing of a new petition. Similarly, if the BMP adoption process was initiated by a petition for rulemaking under the Oregon APA, then an on-ramp would exist if another interested person filed another such petition.

In the existing statutes, there are no periodic or automatic on-ramps for the Board to revisit BMPs, after the adoption process has halted because a required finding could not be made under ORS 527.714. That would not prevent the Board from fashioning internal mechanisms in the form of additional on-ramps or feedback loops to provide for revisiting BMPs previously proposed for adoption, on the Board's own initiative or pursuant to a petition for rulemaking under ORS 183.390 or a petition under ORS 527.765.

Indeed, in the existing forest practice rules there are periodic on-ramps for considering changes to rules. Specific to protection of water resources, OAR 629-635-0110 (3) provides:

> (a) Monitoring and evaluation of the water protection rules are necessary because of the innovative approach taken in the rules. Monitoring and evaluation are needed to increase the level of confidence of all concerned that the rules will maintain and improve the condition of riparian vegetation and waters of the state over time. (b) In cooperation with state and federal agencies, landowners and other interested parties, the department shall conduct monitoring on a continuing basis to evaluate the effectiveness of the water protection rules. The monitoring shall determine the effectiveness of the rules to meet the goals of the Forest Practices Act and the purposes stated in the rules, as well as their workability and operability. (c) It is the Board of Forestry's intent that the department and its cooperators place a high priority on assessing the monitoring needs and securing adequate resources to conduct the necessary monitoring. The department shall work with its cooperators and the Legislature to secure the necessary resources, funding and coordination for effective monitoring. (d) The department shall report to the Board of Forestry annually about current monitoring efforts and, in a timely manner, present findings and recommendations for changes to practices. The Board of Forestry shall consider the findings and recommendations and take appropriate action.

Further, OAR 629-635-0120 provides an on-ramp for "Watershed Specific Practices for Water Quality Limited Watersheds and Threatened or Endangered Aquatic Species." That rule provides a process for determining whether additional watershed

specific protection rules are needed for watersheds that have been designated as water quality limited or for watersheds containing threatened or endangered aquatic species. The process requires that the Board of Forestry appoint an interdisciplinary task force, including representatives of forest landowners within the watershed and appropriate state agencies, to evaluate a watershed, if the board has determined based on evidence presented to it that forest practices in a watershed are measurably limiting to water quality achievement or species maintenance, and either: (a) The watershed is designated by the Environmental Quality Commission as water quality limited; or (b) The watershed contains threatened or endangered aquatic species identified on lists that are adopted by rule by the State Fish and Wildlife Commission, or are federally listed under the Endangered Species Act of 1973 as amended. Under that process, the task force is to analyze conditions within the watershed and recommend watershed-specific practices to ensure water quality achievement or species maintenance.

H. PROS AND CONS OF ADOPTING RULES PROVIDING PROCEDURAL GUIDANCE TO THE BOARD OF FORESTRY RE BMP DECISION-MAKING

Decision-making bodies sometimes perceive a need to adopt detailed procedures to provide themselves guidance in making complex or difficult decisions. Indeed, the Oregon Supreme Court's own creation of a template for statutory construction, as achieved in the watershed case of *PGE v. BOLI*, 317 OR 606 (1993), can be seen as the attempt by the Oregon judicial branch to provide a step-by-step approach to guide its own task of ascertaining the legislature's intent in enacting a particular law. Guidance in the form of procedural rules for how a board will proceed, step by step, in its decision-making function can provide consistency to the agency and a hedge against erosion of an agency's practices over time.

On the other hand, guidance that is primarily directed to the purely internal practices of the Board may not qualify for formal rulemaking. When rules announce standards or statements of general applicability that interpret law or policy, ORS 183.310(9), they clearly qualify for formal rulemaking. A rule that interprets terms in a statute can reasonably be viewed as substantially affecting the public. ORS 183.310(9)(a) provides that a "rule" does not include "internal management directives, regulations or statements which do not substantially affect the interests of the public." A rule that spells out the order in which the Board will make required findings under ORS 517.714, or that declares that the Board intends to make its findings under ORS 527.714 sequentially, as opposed to adopting findings as a package, may be little more than an internal management directive.

The drawback in promulgating any administrative rule is that it can be facially challenged on the basis of inconsistency with governing statutes. Facial rule challenges are governed by ORS 183.400 in the Oregon APA and generally involve no determinations of fact. There is no formal standing requirement for filing a rule challenge, and the proceeding is an original proceeding commenced in the Oregon Court of Appeals. Hence, facial rule challenges essentially provide a forum for the public to debate the theoretical validity of rules, without the benefit of their actual application to provide valuable context and to ground the discussion in factual reality.

An illustration of the theoretical nature of a facial rule challenge and its potential to derail a regulatory program is furnished by *WaterWatch v. Water Resources Department*, 199 Or App 598 (2005). In that case, the Court of Appeals invalidated the entire ground water mitigation program in the Deschutes Basin because: (1) a definition of "mitigation" that used a dictionary synonym ("moderate") was deemed to be inconsistent with the statutory requirement that scenic waterway flows be maintained, although the rules explicitly provided for annual monitoring to ensure that such flows were maintained; and (2) the mitigation program's annual monitoring requirement to ensure that required flows were met was deemed by the court to be an "experiment" that the court was not persuaded (in a facial rule challenge) would ultimately succeed in maintaining protected flows. Although that court decision was abrogated during the 2005 legislative session by the enactment of HB 3494, which includes a savings clause protecting ground water permits issued under the existing mitigation rules, the court's decision would otherwise have placed into jeopardy existing permits issued under the ground water mitigation program.

The risk of adopting a rule elaborating on the adoption process for BMPs affecting water quality, or a rule defining the statutory term "to the maximum extent practicable," is that rule adoption creates the risk of a challenge being brought regarding agency policy in the abstract, without the factual context that would be present in an as-applied challenge to an actual decision on the merits. Furthermore, invalidation of a procedural rule for adopting BMPs could arguably jeopardize BMPs promulgated according to the procedural rule or definition of MEP, somewhat analogous to the status of ground water permits issued under the invalidated mitigation rules in the Deschutes Basin.

The Court of Appeals has invalidated administrative rules in whole or in part approximately 16 times since 1980. For example, in *Joint Council of Teamsters v. OLCC*, 46 Or App 135, *rev den* 289 Or 337 (1980), the Court of Appeals invalidated OLCC's rules listing acceptable methods of pasteurization and including nonheat methods of purification. The court, relying on the dictionary definition of "pasteurize," defined in terms of heating a fluid, concluded that the OLCC's definition was invalid, because it included *nonheat* methods. That case, like *WaterWatch*, demonstrates that the

court will not hesitate to invalidate regulatory programs on the basis of a definition contained in a rule that is contrary to the meaning of a word as used in a statute.

In *Guthrie v. Support Enforcement Division*, 110 Or App 622 (1991), *adhered to on reconsideration* 112 Or App 266, *rev den* 313 Or 627 (1992), the court upheld all but one of the Child Support Guideline Rules. The decision illustrates that the Court of Appeals will sometimes invalidate a single rule, while upholding the balance of the rules.

BMPs for water quality are forest practices, which by statute must be established in the form of administrative rules. ORS 527.710(1) ("the State Board of Forestry shall adopt * * * rules to be administered by the State Forester establishing standards for forest practices"). Hence, BMPs are administrative rules. Rules governing the process for BMP adoption would essentially be rules concerning adoption of other rules.

The Board of Forestry is not *required* to adopt additional procedural rules that govern the rule adoption process, as it has already adopted general procedural rules governing rule adoption, as required by ORS 183.341(4) (agencies shall adopt rules of procedure which will provide a reasonable opportunity for interested persons to be notified of the agency's intention to adopt, amend or repeal a rule). *See* OAR 629-001-0000 (procedural rule governing notice in rulemaking) and OAR 629-001-0005 (adopting Attorney General's Model Rules of Procedure).

In sum, the risk of adopting a rule that defines MEP, or that specifies further rulemaking procedures for BMP adoption, is that such rules would be subject to facial rule challenge for consistency with governing statutes. Any rule so adopted, therefore, would need to clearly correspond to statutory directives to avoid that risk.

The Board of Forestry has discretion to apply existing statutes, on the basis of its understanding of those statutes, in adopting particular BMPs. The more comfortable the Board is in its understanding of the relationship between ORS 527.765 and 527.714, the less need it may perceive to adopt rules governing adoption of rules in the form of BMPs.

I. Legislative solutions to effectuate policy objectives

To the extent existing statutes do not reflect the policy on forest practices sought to be advanced, or the desired procedure to be followed, the Board has available to it the solution of adopting statutory changes. The existing statutes essentially reflect legislative policy adopted for the State of Oregon. When the statutory framework itself has been amended, the validity of any rules, whether procedural, definitional or substantive (BMPs), will be measured against the new statutory standards, under ORS 183.400.

APPENDIX

ORS 527.710 provides in pertinent part:

(2) The rules shall ensure the continuous growing and harvesting of forest tree species. Consistent with ORS 527.630, the rules shall provide for the overall maintenance of the following resources:

(a) Air quality;

(b) Water resources, including but not limited to sources of domestic drinking water;

(c) Soil productivity; and

(d) Fish and wildlife.

(3)(a) In addition to its rulemaking responsibilities under subsection (2) of this section, the board shall collect and analyze the best available information and establish inventories of the following resource sites needing protection:

(A) Threatened and endangered fish and wildlife species identified on lists that are adopted, by rule, by the State Fish and Wildlife Commission or are federally listed under the Endangered Species Act of 1973 as amended;

(B) Sensitive bird nesting, roosting and watering sites;

(C) Biological sites that are ecologically and scientifically significant; and

(D) Significant wetlands.

(b) The board shall determine whether forest practices would conflict with resource sites in the inventories required by paragraph (a) of this subsection. If the board determines that one or more forest practices would conflict with resource sites in the inventory, the board shall consider the consequences of the conflicting uses and determine appropriate levels of protection.

(c) Based upon the analysis required by paragraph (b) of this subsection, and consistent with the policies of ORS 527.630, the board shall adopt rules appropriate to protect resource sites in the inventories required by paragraph (a) of this subsection.

ORS 527.714 provides in pertinent part:

(5) If the board determines that a proposed rule is of the type described in subsection (1)(c) of this section, including a proposed amendment to an existing rule not qualifying under subsection (3) of this section, and the proposed rule would provide new or increased standards for forest practices, the board may adopt such a rule only after determining that the following facts exist and standards are met:

(a) If forest practices continue to be conducted under existing regulations, there is monitoring or research evidence that documents that degradation of resources maintained under ORS 527.710 (2) or (3) is likely, or in the case of rules proposed under ORS 527.710 (10), that there is a substantial risk of serious bodily injury or death;

(b) If the resource to be protected is a wildlife species, the scientific or biological status of a species or resource site to be protected by the proposed rule has been documented using best available information;

(c) The proposed rule reflects available scientific information, the results of relevant monitoring and, as appropriate, adequate field evaluation at representative locations in Oregon;

(d) The objectives of the proposed rule are clearly defined, and the restrictions placed on forest practices as a result of adoption of the proposed rule:

(A) Are to prevent harm or provide benefits to the resource or resource site for which protection is sought, or in the case of rules proposed under ORS 527.710 (10), to reduce risk of serious bodily injury or death; and

(B) Are directly related to the objective of the proposed rule and substantially advance its purpose;

(e) The availability, effectiveness and feasibility of alternatives to the proposed rule, including nonregulatory alternatives, were considered, and the alternative chosen is the least burdensome to landowners and timber owners, in the aggregate, while still achieving the desired level of protection; and

(f) The benefits to the resource, or in the case of rules proposed under ORS 527.710 (10), the benefits in reduction of risk of serious bodily injury or death, that would be achieved by adopting the rule are in proportion to the degree that existing practices of the landowners and timber owners, in the aggregate, are contributing to the overall resource concern that the proposed rule is intended to address.

* * * * *

(7) If the board determines that a proposed rule is of the type described in subsection (1)(c) of this section, and the proposed rule would require new or increased standards for forest practices, as part of or in addition to the economic and fiscal impact statement required by ORS 183.335 (2)(b)(E), the board shall, prior to the close of the public comment period, prepare and make available to the public a comprehensive analysis of the economic impact of the proposed rule. The analysis shall include, but is not limited to:

(a) An estimate of the potential change in timber harvest as a result of the rule;

(b) An estimate of the overall statewide economic impact, including a change in output, employment and income;

(c) An estimate of the total economic impact on the forest products industry and common school and county forest trust land revenues, both regionally and statewide; and

(d) Information derived from consultation with potentially affected landowners and timber owners and an assessment of the economic impact of the proposed rule under a wide variety of circumstances, including varying ownership sizes and the geographic location and terrain of a diverse subset of potentially affected forestland parcels.

(8) The provisions of this section do not apply to temporary rules adopted by the board.

ORS 527.765 provides in its entirety:

(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.

ORS 527.770 provides in its entirety:

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.

GENN6174.DOC