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National Oceanic and Atmospheric Administration
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Submitted via email: *joelle.gore@noaa.gov*.

RE: Notice of intent to find that Oregon has failed to submit an approvable coastal nonpoint program (78 FR 77104)

Dear Ms. Gore:

The [redacted] jointly submit the following comments to the National Oceanic and Atmospheric Administration's ("NOAA") and the U.S. Environmental Protection Agency's ("EPA") (collectively the "agencies") proposed finding that Oregon has failed to submit an approvable Coastal Nonpoint Pollution Control Program or "CNPCP" (hereafter the "proposed agencies' finding").

Introduction:

The [redacted] is a voluntary, grassroots, nonprofit organization representing Oregon's farmers and ranchers in the public and policymaking arenas. As Oregon's largest general farm organization, its primary goal is to promote educational improvement, economic opportunity, and social advancement for its members and the farming, ranching, and natural resources industry as a whole. Today, OFB represents over 8,000 member families professionally engaged in the industry and has a total membership of over 60,000 Oregon families.

The [redacted] is a 2144 member, grassroots organization. As the voice of the cattle industry in Oregon, OCA's mission is to advance the economic, political and social interest of the Oregon cattle industry. The OCA has been serving cattle producers since 1913 and is the oldest and largest livestock organization representing the state's second largest agricultural commodity, cattle and calves, which contributes over $713 million to the economy.

[redacted] is a grassroots coalition representing farmers, foresters, and other urban chemical users in Oregon. The primary focus of OFS is representing those who responsibly use pest management products, soil nutrients and biotechnology. OFS has a statewide grassroots reach of over 13,000 members.

[redacted] is the umbrella organization for the seed industry in Oregon. In addition to 1300 farmers that grow and sell grass seed, OSC membership also include: the Oregon Seed Trade Association, Oregon Seed Growers League, Clover Commission, Ag Fiber Association, Penncross Bentgrass Association and the Willamette Valley Specialty Seed Association. The mission of the seed council is to represent the seed industry in matters relating to the production and sale of seed crops in the areas of research, public relations, and public policy regulation.

[redacted] is a nonprofit organization founded in 1898. Today, ODFA represents 270 Oregon dairy farming families and works to create an atmosphere that is conducive for Oregon dairy producers of all production types and sizes throughout the state. Milk is the fourth most valuable agriculture commodity produced in the state, contributing over $497 million to the economy.

[redacted] is the oldest not-for-profit grower trade association in the U.S. wheat industry. Formed in 1926, the primary mission of the OWGL is to represent and advocate on behalf of Oregon wheat producers at both state and federal levels. The OWGL also represents barley growers, and has been actively involved in projects for other crops that are grown in rotation with wheat.

On December 20, 2013, NOAA and EPA issued a draft finding that Oregon has failed to submit an approvable CNPCP. More specifically, the agencies found that Oregon's CNPCP failed to meet federal standards in three particular areas, none of which pertained to agriculture. However, included in the proposed determination was a request for public comment on Oregon's Agriculture Water Quality Management Program ("AWQMP"). This comment letter focuses solely on Oregon's AWQMP and the many reasons it meets and exceeds the federal statutory and regulatory requirements of the Coastal Zone Management Act, amended and modified by the Coastal Zone Amendment Reauthorization Act ("CZARA").[1]

Agriculture land use represents approximately 5% of the land uses within the coastal zone[2]. The primary agricultural land use within the coastal zone is pasture/hay agriculture, not crop land. This land use pattern limits the type and scope of water quality impacts within the coastal zone that might be attributed to agriculture activities and the State's nonpoint source programs.[3] Further, it is our understanding that most, if not all, agriculture landowners are in compliance with the AWQMP rules and, by complying with these rules, meet or exceed CZARA requirements applicable to agriculture. And, as explained below, for any agriculture landowners that are not in compliance with the AWQMP, the State has a process in place to achieve compliance with voluntary and regulatory programs.

[1] 16 USC § 1455b

[2] According to the Oregon Department of Agriculture ("ODA") 2006 CNPCP submission to the EPA and NOAA

[3] As described in the January 1993 *Program Development and Approval Guidance*, states and territories may exclude categories, subcategories, or individual nonpoint sources where the sources do not exist or are not anticipated, or do not, individually or cumulatively, present significant adverse impacts to coastal waters.

I. Oregon's Ag Water Quality Management Program meets all federal requirements for grant funding approval.

A. CNPCP statutory requirements; conditions for approval:

The CZARA established a federal grant program for States that voluntarily developed programs designed to protect and manage coastal resources. As part of that grant program and to receive federal grant funds, each state is required to prepare and obtain approval of a CNPCP. The purpose for the CNPCP is for states to develop and implement management measures for nonpoint source pollution to restore and protect coastal waters.[4]

In order to accomplish that purpose, the state program's management measures must meet certain standards. Specifically, each State CNPCP shall protect coastal waters by implementing, at a minimum, management measures in conformity with the guidance published by the agencies pursuant to 16 U.S.C. 1455b(g), also referred to as the 6217(g) guidance.[5] The term "management measures" means:

> "economically achievable measures for the control of the addition of pollutants from existing and new categories and classes of nonpoint sources of pollution, which reflect the greatest degree of pollutant reduction achievable through the application of the best available nonpoint pollution control practices, technologies, processes, siting criteria, operating methods, or other alternatives."[6]

Meaning, the management measures must be economically achievable and control nonpoint sources of pollution. As explained in Section II, *infra*, Oregon's AWQMP coastal management plans not only directly reference the 6217(g) guidance, but also successfully implement management measures through a sophisticated process of locating the agriculture practice(s) that cause impacts to water quality and working with landowners, State agencies and local authorities to implement economically viable measures that meaningfully address such impacts.

In addition to implementing the 6217(g) management measures, CZARA may also require a state program to implement additional management measures if such management measures are necessary to achieve and maintain applicable water quality standards.[7] Before additional management measures are required, however, a state must identify:

> (1) ***land use[s]*** which, individually or cumulatively, may cause or contribute significantly to a degradation of--(A) those coastal waters where there is a failure to attain or maintain applicable water quality standards or protect designated uses, as determined by the State pursuant to its water quality planning processes; or (B) those coastal waters that are threatened by reasonably foreseeable increases in pollution loadings from new or expanding sources. 16 USCS § 1455b(b)." [and]

[4] 16 USC § 1455b(a)(1)
[5] 16 USC § 1455b(b)
[6] 16 USC § 1455b(g)(5)
[7] 16 USC § 1455b(b)

(2) ***critical coastal areas adjacent to coastal waters referred to 1(A) and (B), within which any new land uses or substantial expansion of existing land uses shall be subject to management measures in addition to those provided for in subsection (g)***.

In other words, the state must first identify land uses that may cause or significantly contribute to water quality degradation, and designate critical coastal areas before it develops and implements additional management measures that are necessary to achieve and maintain water quality standards.[8] According to the State's CNPCP submission and the agencies proposed findings, neither agricultural nor agricultural practices have been identified as causes or significant contributors to water quality impairments within the Coastal Zone. In addition, the state has not designated critical coastal areas or identified new agriculture land uses or a substantial expansion of existing agriculture land uses that require additional management measures. Therefore, additional management measures for agriculture are unnecessary for CNPCP approval.

Although implementation of additional management measures for agriculture is unnecessary for CNPCP approval, Oregon's laws are designed to identify agriculture land uses that cause or significantly contribute to water quality impairments and implement additional management measures if necessary. First, the Oregon Department of Environmental Quality ("DEQ"), in cooperation with ODA, has a process to identify whether agriculture activities may cause or contribute significantly to a degradation of impaired waters and whether coastal waters are threatened by foreseeable pollution loadings.[9] Second, the AWQMP requires Oregon Department of Agriculture ("ODA") to protect water quality and assure that agriculture activities on agriculture lands are part of Oregon's efforts to achievement and maintain of water quality standards.[10]

The proposed agencies' finding does not cite to scientific data or substantial evidence that identifies agriculture land uses as a cause or significant contributor to water quality impairment in Oregon's coastal streams. To the contrary, the EPA has indicated that agriculture is not a threat to foreseeable increases in pollution loadings.[11] Even if the agencies' proposed findings found otherwise, the State's programs and monitoring processes have not identified agricultural land uses in that light and the agencies do not have the authority to question that determination. Indeed, agriculture does not pose a threat to foreseeable increases in pollution loadings and agriculture has and will make improvements to prevent pollution loading where such improvements are economically achievable and needed to achieve and maintain water quality standards. In fact, due to programs like the AWQMP, pesticide stewardship program, CAFO program, efforts by SWCD's, and various voluntary programs, agriculture is expected to continue to reduce any pollution to coastal waters. As explained in Section II.B, there is no sound scientific evidence to demonstrate that agriculture lands within the coastal zone in fact cause or significantly contributing to water quality degradation.

[8] 16 USC § 1455b(b)(3) (CZARA requires a state to include in its CNPCP "additional management measures ***necessary to achieve and maintain applicable water quality standards.")
[9] *See infra* p 14
[10] ORS 561.191
[11] 73 Fed. Reg. 7816, 7821 (fish "habitat conditions on agricultural lands are not likely to show significant improvement or decline.")

Additionally, by law, the ODA is required to regulate, based on science, those agriculture activities that are causing the type of water pollution that prohibits the State from achieving and maintaining water quality standards.[12] In that process, the State identifies those agriculture land uses or activities that individually or cumulatively, may cause or contribute significantly to a degradation of State waters. Therefore, because Oregon's program identifies agriculture land uses, if any, that contribute significantly to water quality problems, because EPA does not find that agriculture will be an expanding source of pollution loadings, and because the agencies do not provide data to support the possible contention that agriculture is causing significant water pollution problems, the agencies should approve Oregon's CNPCP as it applies to Oregon agriculture.

After the land uses that cause or significantly contribute to water quality impairments have been identified, then the state must implement additional management measures "that are necessary to achieve and maintain applicable water quality standards under section 303 of the Federal Water Pollution Control Act (33 U.S.C. 1313) and protect designated uses."[13] The standard to achieve and maintain water quality standards and protect designated uses is redundant because water quality standards are statutorily required to protect designated uses. Therefore, meeting water quality standards is designed to protect the designated uses.

For agriculture, the AWQMP rules are intended to do just what the statute requires, which is to adaptively manage watersheds to achieve and maintain water quality standards. Consistent with the CZARA, the AWQMP management measures must also be economically achievable and actually demonstrate an ability to reduce pollutant loadings that contribute to water quality exceedances.[14] It is worth noting is that nowhere in the CZARA does it require a state's program to remove agriculture from the land or for agriculture landowners to implement management practices that are not economically feasible for a similar agriculture operation or will not make a meaningful difference to reducing polluted runoff into a waterway. Any agency approval condition or regulatory standard, including the 6217(g) guidance, which does not consider those statutory mandates, is unlawful.

In addition to setting regulatory expectations, section 306(d)(16) of CZARA requires state CNPCPs to contain enforceable policies and mechanisms to implement the applicable requirements of the CNPCPs. As explained in Section III, ODA has the enforcement authority necessary to ensure compliance with watershed basin rules on the coast and throughout the State of Oregon. While opponents of the AWQMP highlight the fact that ODA has only taken a few enforcement actions, implying that ODA is not requiring compliance, nothing could be farther from the truth. The truth is that ODA works directly with land owners in noncompliance to make certain land use changes before enforcement is necessary. Because the voluntary efforts of landowners and program participants is dependent upon a healthy, collaborative, and coordinated working relationship, enforcement actions are not the first step in resolving problems, but can be necessary and are used when landowners are unwilling to make changes required under the AWQMP. The success of the AWQMP is that enforcement is rarely required to meet its goals

[12] ORS 561.191(1)-(2)
[13] 16 USC §1455b(3)
[14] 16 USC §1455(b)

and objectives. More importantly here, the legal enforcement authority in AWQMA is all that is required by CZARA for an approvable CNPCP.[15] Oregon's Program satisfies this requirement.

Also important to note is that the process mandated by CZARA is similar to the mandates of Section 319 of the Clean Water Act ("CWA").[16] In fact, CZARA requires that the coastal nonpoint programs be coordinated closely with existing CWA programs.[17] For a state to receive CWA grant funds, the state must have a program that will: (1) identify water ways that cannot reasonably be expected to attain or maintain applicable water quality standards, (2) identify those categories and subcategories of nonpoint sources which add significant pollution that contribute to the state not meeting water quality standards, and (3) create a process for identifying measures to reduce, "to the maximum extent practicable," the level of pollution from nonpoint sources.[18] Oregon's AWQMP addresses this requirement. Again, as set forth in Section II and III, *infra*, Oregon's AWQMA requires that ODA identify water ways in which agriculture practices add significant pollution that contribute to the State not meeting water quality standards. This is, and will forever be, an ongoing process as water quality standards, monitoring data capabilities, and agriculture practices change.

Only after the Secretary and the Administrator determine that the state's program does not satisfy these requirements of 16 U.S.C. 1455(g) can the agencies jointly withhold critical water quality program grant funds. For the reasons stated above, and further described below, any finding that Oregon's AWQMP does not satisfy CZARA's requirements is (1) inconsistent with statutory mandates, (2) based on unpublished standards, or (3) based on scientifically and factually unsupported findings. All such findings would be unlawful and would be challenged by the signators to this letter.

Some have criticized Oregon's AWQMP as it applies to CZARA and suggest that the CNPCP require more or additional regulatory standards for agriculture that exceed CZARA's statutory requirements.[19] A few of those criticisms are included in the agencies' response to Oregon's CNPCP July 2013 submission. However, those criticisms and the conclusion that Oregon's AWQMP fails to meet the CZARA statutory requirements is inaccurate and unjustifiable. For instance, nowhere does CZARA or Section 6217(g) unconditionally require: (1) riparian buffers on agriculture land, (2) that landowners undertake efforts to restore lands to pre -agricultural uses and methods (removing agriculture from the land), (3) management measures that will not result in a reduction of nonpoint source pollution, (4) new or *ad hoc* water quality standards for pesticides, sediment, or any other listed pollutants, or (5) landowners to change land uses, implement management measures, or otherwise employ management measures that are not

[15] Peyton Robertson, NOAA, and Dov Wietman, EPA, "Enforceable Policies and Mechanisms for State Coastal Nonpoint Source Program" (Jan. 23 2001)
[16] *See* 33 USC §1329
[17] 16 USC §1455b(b)(a)
[18] 33 USC §319(1).
[19] Eg. Docket C.4, *Oregon Coastal Nonpoint Pollution Control Program; Additional Information Concerning Oregon's Failure to Regulate Agricultural Nonpoint Pollution* (May 10, 2013); Docket C.8, *Oregon Coastal Nonpoint Pollution Control Program; EPA and NOAA's Interim Approval of Agricultural Management Measures for Oregon are Based on a Flawed Understanding of the State's Enforcement Authority* (June 13, 2012);
Docket C.9, *Oregon Coastal Nonpoint Pollution Control Program; EPA and NOAA's Interim Approval of Agricultural Management Measures for Oregon* (May 2, 2012)

"economically achievable." Suggestions that Oregon must have a regulatory program to require any of these is simply incorrect.

Moreover, NOAA and EPA should not demand that Oregon create new or otherwise more burdensome management measures without sufficient scientific evidence that current agriculture practices are in fact a significant contributor to water quality impairments. Through AWQMP planning, water quality monitoring, and TMDL development, Oregon agencies have and continue to track pollutant loadings and will inform management measures necessary to abate nonpoint source pollution from agriculture.

II. Oregon has programs and policies in place that provide for the implementation of Section 6217(g) agriculture management measures to achieve and maintain water quality standards and protect designated uses in the coastal area.

As explained above, an approvable CNPCP must at a minimum implement management measures that comply with Section 6217(g). Only after the State identifies land uses that cause or significantly contribute to water quality impairments, the state must then implement additional management measures if necessary to achieve and maintain applicable water quality standards. For the reasons explained below, Oregon's AWQMP meets and implements the 6217(g) requirements and has a process in place to implement additional management measures if necessary.

It is important to note that 6217(g) "offer[s] State officials a number of options and permit them considerable flexibility in selecting management measures that are appropriate for their State…."[20] Further, the 6217(g) guidance suggests management measures but these are written to allow flexibility in implementation. [21] Contrary to claims by critics of the Oregon AWQMP, this means that EPA and NOAA can and must approve state programs that address water quality impairments from certain land uses even where they do not employ the precise management measures outlined in the 6217(g) guidance.

A. Agriculture Water Quality Management Act

In 1993, the Oregon agricultural community advocated for and helped pass SB 1010 into law (otherwise known as AWQMA). Since 1993, Oregon agriculture has, working in conjunction with many partners, expended significant resources and invested significant amounts of time to support and help establish the rules and procedures to implement the AWQMP. All of that effort was based on the explicit understanding that the AWQMP would directly regulate agriculture nonpoint source pollution.

[20] Guidance Specifying Management Measures for Sources of Nonpoint Pollution In Coastal Waters, EPA-840-B-92-002, 1-6; *see also*, NOAA and EPA *Coastal Nonpoint Pollution Control Program: Program Development and Approval Guidance,* pg 13 (agencies acknowledges that the (g) measures may be adapted to specific sites or locations pursuant to section 6217(g)(2)(E)) and by the legislative history which directs NOAA and EPA to accord states flexibility in selecting management measures).

[21] Id.

To implement an agriculture water quality program, the Oregon legislature chose ODA to regulate nonpoint source water pollution associated with agriculture activities with the idea that ODA is best equipped to understand how agriculture works, its impact on the environment, and its ability implement new or modified management measures.

The AWQMA requires that ODA develop and implement a program to "directly regulate farming practices*** for the purpose of protecting water quality***[and] to assure achievement and maintenance of water quality standards adopted by the Environmental Quality Commission."[22] The requirement that the State assure achievement and maintenance of water quality requires that ODA ensure that agriculture is not prohibiting the State from attaining water quality standards. This mandate reflects the goals of both the Clean Water Act Section 319 and CZARA.

Additionally, the AWQMA requires ODA to "develop and carry out a water quality management plan for the prevention and control of water pollution from agricultural activities and soil erosion" in areas where Total Maximum Daily Loads ("TMDLs") are necessary or where nonpoint source regulation is required by law.[23] The plans are generally referred to as "Area Plans." The AWQMA requires ODA to establish, implement and enforce rules for the purpose of achieving Area Plans which are driven, in part, by TMDLs or other nonpoint source regulations.

In areas where an area plan and rules are required, ODA may compel a landowner "to perform those actions on the landowner's land necessary to prevent and control water pollution from agriculture activities" so long as the practice is a factor in causing water quality standards to be exceeded."[24] This provides ODA the authority to require management measures that meet the requirements of 6217(g) or impose additional management measures if necessary.

These regulatory processes are vital for both implementing management measures that will meaningfully improve water quality and to identify those agriculture practices that contribute to water quality impairments. These processes also assist the State in developing priority areas for resource investments. For instance, the State has limited budgets to hire technical assistance personnel and expand water quality monitoring. Furthermore, the State has limited grant funds. As a result, by understanding the cause of water quality impairments, the State can prioritize funding and technical assistance to appropriately match management measures with water pollution problems. Using the process of identifying agriculture practices that do in fact contribute to water quality problems and investing in management measures proven to reduce or mitigate pollutant loadings, as well as measures that are achievable because of cost and technology, the State can more efficiently allocate resources for the betterment of coastal waterways. This is precisely the outcome envisioned by the sponsors of the CZARA and is consistent with the statutory language.

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[22] ORS 561.191(1)-(2)
[23] ORS 568.909
[24] ORS 568.912(2)-(3)

B. Water Quality Standards and Agriculture Activities.

According to the proposed agencies' findings, "there is concern that water quality impairments from agriculture activities within the coastal nonpoint management area are widespread and that the State's programs and policies may not adequately meet the 6217(g) management measures for agriculture to protect coastal waters." Notably missing from the proposed agencies' finding is a citation to peer reviewed studies (or study) or to scientific data to validate the concern that water quality impairments from agriculture activities are "widespread." In place of scientific evidence of water quality impairments associated with agriculture activities, the proposed agencies' finding references the coho salmon listings and draft recovery plan findings. These documents' references to agriculture impacts to water quality are limited, based on opinion, anecdotal evidence and are also unsupported by scientific fact or data. For that reason, we request that the agencies remove this assumption or clearly explain that it is a concern that has not been verified with data or science, and therefor may not be a valid concern.

Oregon has developed water quality standards designed to protect designated uses, which in most cases include coho salmon and other endangered/threatened fish species. As referenced above, Oregon's AWQMA is designed to ensure agriculture activities do not inhibit the State from meeting those water quality standards. Water quality standards are required to protect designated uses, fish. Therefore, Oregon's program adequately addresses agriculture activities to ensure the protection of fish species, including coho salmon.

Moreover, under current management, including the AWQMA and associated Area Plans and rules, Oregon's coastal waters are either already in good condition or are improving and moving toward good condition. According to DEQ:

> "The Oregon Water Quality Index provides a general assessment of water quality at a site by combining information from eight water quality pollutants into a single score. The index scores are classified into status from excellent to very poor. Six out of the ten ambient water quality monitoring sites in the North Coast had "excellent" or "good" water quality as depicted by the index. Three sites were in "fair" condition and one location, the Tillamook River, was categorized as "very poor."[25]

That means, in the North Coast watersheds, 9 out of 10 ambient monitoring sites reported fair, good or excellent water quality. The one location with poor water quality is the Tillamook River but it is not significantly influenced by agriculture. Or otherwise put, regardless of ODA action or AWQMP influence, the status of the Tillamook River would not change.

The Mid Coast and South Coast watersheds are in similar condition. Based on the Oregon Water Quality Index Summary Report, the Mid Coast Basin has five out of six ambient water quality monitoring sites with "excellent" or "good" ratings. The last site received a "fair" rating. None of the sites received a poor or very poor rating.

[25] http://www.deq.state.or.us/wq/watershed/Docs/NorthCoastSummary.pdf

In the South Coast Basin nine out of twelve sites reported fair, good or excellent water quality including 4 "excellent" sites. The three sites that received a "poor" or "very poor" rating are not significantly influenced by agriculture. As previously stated with the Tillamook River in the North Coast watershed, regardless of ODA action or AWQMP influence, it would not change the status of the water quality at these sites.

The Oregon Water Quality Index in the Coastal Coho Evoluntionary Significant Unit ("ESU") found the majority of stream sites within the Coastal Coho ESU would be categorized as having fair to good water quality. The study further stated: "Over the period 1993 – 2002, 39% (12/31) of the sites within the entire Coastal Coho ESU had significantly improving trends in water quality." The fact that the AWQMP and other state regulatory programs impacting water quality, as well as voluntary efforts have continued and expanded since 2002 establish a commitment to this trend of significantly improving water quality and an appropriate expectation that the trend will continue.

According to the Oregon Water Quality Index in the Coastal Coho ESU, between 1993 and 2002, 24 out of the 28 monitoring sites reported fair, good or excellent water quality with those sites not categorized as fair or better possibly occurring regardless of ODA action or AWQMP influence. The number of sites that are fair, good, or excellent compared to those that are "poor" or "very poor" suggest that water quality impairments from agriculture activities are in fact not "widespread" and the agencies assertion was unsupported by a credible "finding." Again, Oregon agriculture is neither a significant contributor to coastal water degradation nor "widespread."

C. The AWQMP Processes and Enforcement Mechanisms Satisfies CZARA and the 6217(g) Management Measures.

As required by the AWQMA, the AWQMP has two land management prescriptions: (1) Area Plans, and (2) area rules. Area Plans consist of voluntary measures and strategic goals; area rules implement the Area Plans and are ODA's backstop authority to ensure compliance with the AWQMA.

Area Plans are developed by local working groups in coordination with Soil and Water Conservation Districts ("SWCDs") and Watershed Councils. These Plans are produced by many local officials, agency representatives and volunteer landowners. The Plan participants volunteer countless hours to review water quality issues, research water quality monitoring data, ascertain watershed improvement opportunities, create goals and timelines for improving watersheds, identify funding opportunities to help make watershed improvements, and otherwise advancing the plans through a coordinated effort. This also provides ODA and cooperating agencies the opportunity to stay in regular contact with landowners. Today, each of Oregon's coastal agriculture water quality plans include management measures that directly reference the 6217(g) guidance and include additional goals for improving watersheds. These plans far exceed that which is required under CZARA.

ODA enforces area rules that are based on these Area Plans. The rules are designed to regulate agriculture impacts on water quality and are utilized as a backstop enforcement mechanism to meet Area Plan goals and strategies.

CZARA requires that a state's management measures be implemented with "enforceable policies and mechanisms." The AWQMA and the procedures, plans and rules implemented under it, meet this requirement within the boundaries of the CNPCP.

D. The AWQMA Rules Are Sufficient to Meet and Exceed the 6217(g) Management Measure Requirements for Agriculture.

Pursuant to CZARA, 6217(g) management measures must be economically achievable measures for the control of the addition of pollutants from ***nonpoint sources of pollution, which reflect the greatest degree of pollutant reduction achievable through the application of the best available nonpoint pollution control practices, technologies, processes, siting criteria, operating methods, *or other alternatives*."[26] Based on this language, the agencies have considerable discretion in approving a State's CNPCP and a State has considerable flexibility in implementing 6217(g) management measures; each of which must (1) control nonpoint source pollution to the maximum extent practicable, and (2) be economically achievable. Furthermore, as previously stated, the 6217(g) guidance explains that states have flexibility in selecting management measures that are appropriate to them.

Similarly, the AWQMP requires economically achievable management measures that are known to control nonpoint pollution to the maximum extent practicable. As explained above, this is done through the implementation of Area Plans via area rules. The AWQMP and implemented and enforced in the coastal area satisfies the standard for an approvable CNPCP.

The following are some examples of how Oregon's AWQMP meets or exceeds the management measures set forth in the 6217(g) guidance:

Management Measures for Agriculture Sources.

A. Erosion and Sediment Control

Design and install a combination of management and physical practices to settle solids and associated pollutants in runoff delivered from the contributing area for storms of up to and including a 10-year, 24-hour frequency.

Oregon's AWQMP addresses this management measure by protecting lands from agriculture practices that cause erosion.[27] This is accomplished, in part, by ensuring site capable riparian vegetation is in place to meet ecological functions designed to reduce, as much as practicable, soil erosion.

Additionally, AWQMP exceeds the 6217(g)'s requirement that all management practices be based on pollutant levels from runoff delivered from area storms of up to and including a 10-

[26] 16 USC § 1455b(g)(5)[emphasis added.
[27] OAR 603-095-2240(5); OAR 603-095-2640(5); OAR 603-095-0840(5)

year, 24-hour frequency by requiring that those levels be based on a 25-year, 24-hour frequency.[28]

B1. & B2. Facility Wastewater and Runoff from Confined Animal Facilities (CAFO)

Limit the discharge from the confined animal facility to surface waters.

Oregon's requirements for CAFOs go far beyond those required by 6217(g). First and foremost, CAFOs are subject to a state-wide NPDES permit and are, therefore, exempt from 6217(g) management measure requirements.[29] The NPDES permit requires the operator to ensure there is no discharge to waterways and to have an approved Animal Waste Management Plan. This plan not only ensures that manure and runoff are stored and covered appropriately, but also requires CAFO operators to measure and monitor the waste's and runoff's nutrient levels (N, P, K), temperature, amount of time stored, and time and quantity of application to fields so that they are applied at agronomic rates for the crop being produced.[30]

In addition to the CAFO program, under the AWQMA, ODA requires landowners to avoid agricultural activities that place animal wastes in *any* location where such wastes are likely to escape into Oregon waters.[31] All of this to ensure that there is no runoff and that water quality standards are not exceeded.

C. Nutrients

Develop, implement and periodically update a nutrient management plan to: (1) apply nutrients at rates necessary to achieve realistic crop yields, (2) improve the timing of nutrient application, and (3) use agronomic crop production technology to increase nutrient use efficiency. When the source of the nutrients is other than commercial fertilizer, determine the nutrient value and the rate of availability of the nutrients. Determine and credit the nitrogen contribution of any legume crop. Soil and plant tissue testing should be used routinely. In short, this measure requires the use of a nutrient management plan to focus the time, place, and manner of fertilizer application in order to achieve realistic crop yields and reduce losses to the environment.

Oregon's AWQMP provides a more stringent approach than that of 6217(g) in regards to nutrients. Oregon's AWQMP specifically identifies individual nutrients and sets strict limits on the levels at which they can be found in water sources.[32] Oregon law also prohibits agriculture activities from discharging any nutrient-carrying substances into Oregon waters where it will cause the water quality to fall below set standards. [33]These requirements are much more specific and stringent than those in the 6217(g) guidance. The ODA rules require landowners to not only evaluate the efficiency of their fertilizers, but to assess the layout of their farms and storage

[28] *Id*.
[29] *See* ORS 468B.050(1)(d
[30] ORS 468B.220, Violations of the NPDES permits are enforced through civil penalties to the operators.
[31] OAR 603-095-0740(5)
[32] OAR 603-095-0740(4); OAR 603-095-0840(6)
[33] ORS 468B.025

facilities, locate the areas where runoff could come into contact with any nutrient carrying substances, and relocate or avoid placing any storage facilities in those areas.

On a broader scale, agriculture has taken major steps to ensure nutrients stay where they are applied. The Fertilizer Institute has initiated the 4-R Program which stresses that the (R)ight fertilizer source, at the (R)ight rate, at the (R)ight time, with the (R)ight placement is crucial for good agronomic nutrient management. This is the industry standard and Oregon farmers rely on the "4 R's" to ensure compliance with the AWQMP. In addition, on a practical economic level, fertilizers are becoming increasingly expensive causing farmers and ranchers to apply fertilizers in a more efficient and appropriate agronomic rate. The market will continue to drive this result; even more than mandated management measures.

D. Pesticides

To reduce contamination of surface water and ground water from pesticides; including evaluating the past use, timing, and effectiveness of the pesticides.

Oregon law encompasses all the 6217(g) requirements for pesticide management. For instance, ORS chapter 634 specifies when and under what conditions pesticides can be applied, mixed, stored, loaded or used and when and under what conditions fields can be reentered after application and crops can be harvested.[34] Similarly, landowners are required to meticulously follow the label requirements established by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") for each pesticide they use. It also holds them responsible for any pesticide that leaks or percolates into any water source due to over use, poorly timed use, or other misuse of the pesticides.[35]

The requirement for site capable vegetation in the riparian area also plays a role in keeping pesticides out of surface waters. By acting as filtration for both pesticide products, and soil that may contain pesticide residues, the required vegetation helps keep pesticides out of surface waters.

Finally, much like with nutrients, farmers have every incentive to keep pesticides where they are applied. Pesticides lost to runoff or non-target application are an agronomic and economic waste.

State and federal laws, including the AWQMP, pertaining to pesticide use sufficiently protects waters around agricultural lands from excessive pesticide contamination.

E. Grazing

Protect range, pasture and other grazing lands by implementing management measures to protect sensitive areas (ie. Riparian areas) and managing livestock on range, pasture, and other grazing lands.

[34] ORS 634 Oregon Pesticide Control Law; Upper Willamette AWQMP 38-39; http://www.epa.gov/oecaagct/lfra.html#Labeling%20Requirements
[35] OAR 603-095-1540(4); OAR 603-095-2240.

Consistent with the CZARA and guidance flexibility, this management measure allows states to choose a variety of methods to reduce the physical disturbance and direct loading of animal waste and sediment into waterways. Oregon's AWQMP meets this management objective by protecting streambanks and water sources through grazing management practices consistent with those outlined in the 6217(g) guidance.[36]

In addition, the Area Plans and rules limit the amount of time that livestock have access to waterways. For instance, livestock owners incorporate grazing and herding programs that move livestock to water and then away on a regular basis to avoid unnecessary impacts to riparian areas.

Furthermore, agriculture activities (including livestock management) cannot inhibit the growth of site capable riparian vegetation. If livestock management is found to be in violation of the riparian vegetation rule, the livestock would either need to be removed or more appropriately managed.

F. Irrigation Water

To reduce nonpoint source pollution of surface waters caused by irrigation by operating the irrigation system so that the timing and amount of irrigation water applied match crop water needs, and minimize the harmful amounts of chemigated waters that discharge from the edge of the field and control deep percolation.

Oregon's AWQMP satisfies the 6217(g) requirements for irrigation water management through enforcement of area specific rules that address area specific irrigation usage. Also, Oregon's AWQMP specifically calls for irrigation to not exceed application rates that will cause nitrogen to sink deeper than the root zone. This requires landowners to monitor and adaptively manage irrigation application rates in order to avoid both surface and ground water impacts.

III. **Direct Comments and Responses to EPA and NOAA Concerns That Demonstrate Oregon's Compliance:**

The following statements [*italicized*] were copied directly from page 14 of the proposed agencies' finding that Oregon's CNPCP has not fully satisfied all the conditions placed on the State's program. Although Oregon's agriculture management measures have received agency approval, the public notice raised the following issues that our organizations would like to address:

• *Enforcement is limited and largely complaint-driven; it is unclear what enforcement actions have been taken in the coastal nonpoint management area and what improvements resulted from those actions.*

While it is true that each state must have an enforceable, nonpoint source water pollution program, it is not true that individual states must meet or exceed an enforcement threshold or

[36] OAR 603-095-3540(a)(A); OAR 603-095-2240(2)(a)

number of citations issued. Instead, CZARA requires that the State and its designated water quality agencies possess the regulatory authority to enforce, at a minimum, a water quality program that meet or exceed the requirements set forth in 16 U.S.C. 1455b. Furthermore, as ODA demonstrated to the agencies in Oregon's July 2013 CNPCP submission, it has used that authority to enforce AWQMP rules where necessary and appropriate. Moreover, ODA measures the success of its program not by the number of enforcement actions, but by the level of compliance with the program. The AWQMP meets the CZARA enforcement requirements.

If the agencies have concerns with the number or type of enforcement cases, it should make clear the number, frequency, and overall expectation for enforcement the agencies expect from State CNPCPs and why they think that such metrics are necessary to approve the program. Such information was not provided in 1998, 2004, 2007 or in 2013.

• *The AWQMA plan rules are general and do not include specific requirements for implementing the plan recommendations, such as specific buffer requirements to adequately protect water quality and fish habitat.*

This statement appears to assert that a state's plan must be specific and include riparian buffer requirements. As explained above, however, there is no statutory or regulatory requirement that states institute mandatory buffers or one-size-fits all requirements.

Moreover, 6217(g) guidance provides states significant flexibility in choosing which management measures best suit the states and its relevant constituencies in contributing toward improving and protecting water resources. Oregon has chosen an approach that allows site-specific flexibility while still providing the protections to water quality. It does not specifically require buffers or other one-size-fits-all management measures on agricultural ground, but does ensure that agriculture practices do not significantly contribute to water pollution. That is all that is required by CZARA.

• *AWQMA planning has focused primarily on impaired areas when the focus should be on both protection and restoration.*

As set forth above, the AWQMP directs ODA to "directly regulate farming practices*** <u>for the purpose of protecting water quality</u>***[and] to assure achievement and maintenance of water quality standards adopted by the EQC."[37] While it may be true that the Oregon has focused its attention and resources on impaired watersheds, it is not true that landowners are not expected to protect water quality within watersheds.[38]

Also, this statement does not recognize Oregon agriculture landowners for all of the work they do on a voluntary basis. For instance, in the Wilson River watershed, a variety of partners have spent more than $1.4 million restoring and protecting the lower Wilson River watershed, which included $26,000 in CWA Section 319 funds. Following development of a temperature and bacteria TMDL on the lower Wilson River, between 2002 and 2007, stakeholders voluntarily implemented numerous best management practices in the lower Wilson River watershed. In

[37] ORS 561.191(1)-(2)
[38] *Id.*

addition, between 2003 and 2007, partners helped plant almost 10,000 trees along more than 17 miles of streams in the Tillamook Bay watershed. Thanks to landowners, the Tillamook Bay Watershed Council, Tillamook Estuary Partnership, and Tillamook SWCD, these partnerships completed 20 riparian enhancement projects that included planting, fencing and invasive species removal. There are many other examples where efforts have extended beyond what is required by CZARA and focused on restoration. The agencies should consider these efforts and take these investments into account when evaluating Oregon's CNPCP.

Furthermore, Oregon's AWQMP assures that agriculture land owners protect water quality and assure maintenance of water quality standards, regardless of whether a stream reach is designated as impaired. Therefore, the AWQMP meets the CZARA statutory requirements for its application to all waterways.

• *The State does not administer a formalized process to track implementation and effectiveness of AWQMA plans*.

Oregon Administrative Rules sets forth a formalized process to track implementation and effectiveness of the AWQMP.[39] The rules require that ODA and a local advisory committee complete a biennial review of each Area Plan, which includes a progress report and recommendations for plan and rule changes for the purpose of preventing and controlling water pollution from agriculture activities. According to ODA, approximately 18 biennial review are done annually.

Furthermore, ODA is currently creating a more formalized process for tracking program implementation and effectiveness – known as the Strategic Implementation Areas and Focus Areas processes. Our associations have been involved in the creation of the processes and support ODAs efforts in collecting data and tracking implementation and effectiveness. Unfortunately, the success of this program will only be slowed if the program is not adequately funded.

Additionally, SWCDs and local Watershed Councils, in a less formal way, have individually tracked the success of hundreds of water quality projects across Oregon. Nevertheless, we agree this information would be increasingly useful in a centralized location to validate the effectiveness of the many projects and landowner contributions the agriculture community has made toward improving water quality, which is why we support ODA's efforts to do so.

Also, in 2012, Oregon's Governor established the Enterprise Monitoring Initiative to maximize statewide efforts for environmental protection and restoration. This initiative will monitor waterways that pass through agriculture lands and can also be used to inform the effectiveness of the AWQMA. In 2013, the Oregon legislature approved approximately $4.1 million in funding for water quality monitoring that DEQ and ODA and other state agencies will have access to. Using information generated by ODA, the SWCDs, and the Enterprise Monitoring Initiative, we anticipate that Oregon agriculture will be able to more clearly demonstrate that is improving and protecting water quality in coming years.

[39] OAR 603-090-0020(4)(c)

Lastly, DEQ maintains water quality trend information which, as described in Section II(B), is improving. If that monitoring data shows that agricultural activities are causing pollution to waterways, then that information is passed onto ODA for an appropriate regulatory response.

In sum, contrary to the agencies' concerns, additional comments section suggests, the State does have a process for sharing information; the State does track water quality issues associated with agriculture; agriculture impacts are not a "widespread" problem; and CZARA does not require more from a regulatory program.

• *AWQMA planning and enforcement <u>does not address "legacy"</u> issues created by agriculture activities that are no longer occurring*.

As a threshold matter, the agencies fail to explain or define "legacy" issues created by agriculture. While we may venture a guess, it is difficult to understand what the agencies would be looking for from the State's programs to address this concern, if anything. Furthermore, neither CZARA nor the 6217(g) define legacy issues or require that state CNPCPs address legacy issues.

Nevertheless, Oregon has the Oregon Watershed Enhancement Board ("OWEB") that invests in watershed restoration and enhancement throughout the coastal region. In fact, between 2004 and 2013, OWEB spent over $10 million in projects that protect water quality and fisheries habitat by addressing, at least some, legacy issues.

Furthermore, Oregon has developed processes for identifying opportunities to enhance and restore watersheds, including "legacy" issues, through the Oregon Plan for Salmon and Watersheds, the Oregon Aquatic Habitat Restoration and Enhancement Guide, OWEB riparian restoration projects, Area Plans, and many other federal, public and private partnerships. These programs are successful due to the voluntary efforts of many Oregon agriculture landowners.

Again, EPA and NOAA determined that Oregon has satisfied the Agriculture Management Measure conditions in both 2004 and 2007. Under those findings, neither EPA nor NOAA claimed that Oregon's AWQMP must have regulations that mandate that landowners, without the assistance of the programs referenced above, address "legacy" issues. In fact, nowhere is that required in Section 6217(g) of CZARA or the guidance. And, to continue in the spirit of the CZARA mandate to <u>work in close conjunction with other State and local authorities</u>, the agencies should not now advance this requirement on the state of Oregon without better justification. For that reason, and the reasons stated above, Oregon's approach, beyond the AWQMP meets and exceeds both the statutory and regulatory requirements concerning "legacy" issues.

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Thank you for your consideration. If you have any questions or concerns regarding this comment, please do not hesitate to contact [redacted]

Sincerely,

[redacted]

[redacted]

[redacted]

[redacted]