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Via Email Only

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Re: NOAA and EPA Request for Public Comment (78 FR 77104-05) re Implementation of Agricultural Management Measures under Oregon CNCP pursuant to CZARA, Section 6217(b)(3), 16 U.S.C. Section 1455b(b)(3) / Oregon Association of Nurseries' Comments

Dear Mr. Gore:

With this letter, I offer comments on behalf of the Oregon Association of Nurseries (OAN) in response to questions presented by the National Oceanic and Atmospheric Administration (NOAA) and the U.S. Environmental Protection Agency (EPA) (collectively, the Federal Agencies) regarding whether the State of Oregon's (Oregon) Coastal Nonpoint Pollution Control Program (CNCP) includes agricultural management measures necessary to achieve and maintain water quality standards pursuant to the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) section 6217(b)(3), 16 U.S.C. section 1455b(b)(3). As you know, the Federal Agencies presented such questions in addition to – *and therefore independent of* - their proposed disapproval of aspects of Oregon's CNCP relating to new development in urban areas, onsite septic systems, and forest management. The OAN's comments below are therefore limited to the questions presented by the Federal Agencies regarding Oregon's implementation of agricultural management measures within its CNCP and, as such, shall not be construed as comments on issues raised and draft conclusions drawn under the Federal Agencies' separate proposed disapproval.

These comments regarding Oregon's implementation of agricultural management measures within its CNCP are timely filed pursuant to the public notice of the Federal Agencies' questions presented at 78 FR 77104-05.

I. Background on the Oregon Association of Nurseries and the Oregon nursery industry.

The nursery and greenhouse industry remains the state's largest agricultural sector despite a severe economic downturn. As the nation's second largest nursery state with over \$640 million in sales, our growers ship their products throughout the country. Nearly 75% of nursery stock grown in our state leaves our borders – with over half reaching markets east of the Mississippi River. At well over 1,000 in number, OAN members consist of wholesale and retail greenhouse operations, commercial nurseries providing a wide variety of shrubs and trees, Christmas tree



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growers, and related sectors of the state's economy. The OAN's members are predominately located in the fertile Willamette Valley.

As proud stewards of Oregon's natural resources, our growers have been leading the way in innovative and forward-looking conservation actions for decades. Examples of our pioneering efforts include leadership in the development of Oregon's Agricultural Water Quality Management Program (AWQMP) in 1993 under Senate Bill 1010. The OAN takes great pride in its involvement in passing that landmark legislation, and its subsequent creation and implementation of an industry container nursery runoff management program, and in more recent years, the Climate Friendly Nursery Program. As a result of the momentum created with the introduction of the AWQMP, the majority of OAN growers now use highly efficient irrigation delivery systems, with many recapturing and reusing their water many times over to further ensure protection of water quality.

From the original Memorandum of Agreement between the Oregon Department of Environmental Quality (DEQ) and the Oregon Department of Agriculture (ODA) which outlined the creation of the AWQMP, came the establishment and subsequent biennial updating of thirty-nine Agricultural Water Quality Management Area Plans ("Area Plans") that today effectively guide resolution of existing - and offer measures to help prevent future - agricultural water quality issues.

When the time came for DEQ and ODA to renew their regulatory relationship through the creation of a new MOA, the OAN urged that the new agreement contain clear and direct coordination directives for the evolving development of appropriate regulatory standards and the evaluation and revision of Area Plans. Through the local advisory committees and partnerships with local Soil and Water Conservation Districts established under SB 1010, ODA had amassed at that time a great deal of localized, on-the-ground understanding regarding water quality issues. The OAN realized that successful implementation of the AWQMP must employ this understanding and encourage its further development and utilization so that only the most appropriate and practical regulatory standards be developed.

To accomplish this, the OAN urged a more thorough linkage within the MOA among TMDL Development and Implementation, Area Plan Implementation and Review, and Monitoring and Evaluating Effectiveness of Implementation Efforts. The primary regulatory role occupied by ODA (and the Area Plans) and the importance and use of localized information has allowed each Area Plan to develop appropriate regulatory standards. To date, access to this information has been critical to the development of practical, economically feasible, effective measures designed to reduce the introduction of pollutants into state waterways that can be attributed to agricultural nonpoint sources. As a result of these efforts, DEQ and ODA meaningfully coordinate their efforts to ensure the continued integrity of the AWQMP and the resultant Area Plans which provide the state with the tools and an inherent adaptive approach to properly address non-point source pollution.

II. Response to the Questions Presented by the Federal Agencies

In an apparent effort to better understand how agricultural management measures under the Area Plans carried out under Oregon's CNCP are satisfying CZARA and the 6217(g) guidance measures, the federal agencies seek comment on the following questions:

- (1) Has the State satisfied the agriculture conditions placed on its coastal nonpoint program; and

- (2) Does the State have programs and policies in place that provide for the implementation of the 6217(g) agriculture management measures to achieve and maintain water quality standards and protect designated uses?

The OAN submits that both of these questions are to be answered “yes.”

Although the footprint of OAN grower activities are minimal within ODA’s Coastal Zone Water Quality Management Area (CMA), it is also important to remember that the presence of more traditional agricultural activities such as row cropping in the CMA is small. It is the OAN’s understanding that while farming activities may account for as much as 25% of the overall land base in the areas administered subject to the CNCP, *well less than 1% of such acreage is in other than pasture or hay*. The point being that among the numerous activities that exists within the CMA, a relatively small percentage of them are associated with agriculture, and among those that are, nearly all of them consist of practices that represent little opportunity for soil disturbance or nutrient loading via the application of traditional row crop fertilizers and other inputs.

As the OAN is aware that the ODA and other more traditional agricultural stakeholders intend to submit comments addressing these questions, these comments will briefly focus on specific factors as the Federal Agencies seek to better understand the program.

1. The State has satisfied the agriculture conditions placed on its coastal nonpoint program with the design and development of its AWQMP.

As the Federal Agencies acknowledge in their document noticed December 20, 2013, ODA has through its administrative rulemaking authority already adopted Area Plans for each of the affected coastal basins. Each of these plans are designed “for the prevention and control of water pollution from agricultural activities and soil erosion” in the affected management area. Further, as EPA itself has stated, “A well-developed management program supports activities with the greatest potential to produce early, demonstrable water quality results; assists in the building of long-term institutional capacity to address NPS pollution problems; and encourages strong interagency coordination and ample opportunity for public involvement in the decision-making process.”
(<http://water.epa.gov/polwaste/nps/outreach/point4.cfm>)

The AWQMP and the resultant Area Plans designed and implemented for each basin take each of these considerations into account. Under the AWQMP, ODA implements site-specific and site-capable controls to both resolve existing sources and prevent future opportunities for pollution. Such an approach is reflected in the Area Plans today.

Notably, while some of these measures may not be specifically identified under the 6217(g) guidance, nor does the 6217(g) guidance preclude ODA from developing its own alternative approaches. This is because the focus of CZARA is not the use of specific measures identified in the 6217(g) guidance, but rather the design and implementation of appropriate measures – regardless of form - that can be developed and applied to ultimately achieve measurable beneficial results. Hence, CZARA allows for an outcome-based approach to encourage the creation of measures that are deemed to be the most effective for the conditions at hand.

Such an approach is further supported by the fact that when looking to develop the best available approaches to address nonpoint source pollution within each plan, Congress specifically required that such measures could only be implemented so long as they are “economically achievable.” CZARA, 16 USCS § 1455b(g)(5). Together, these two components materially define the management measures to be implemented in the Area Plans—a fact also recognized by EPA:

“The CNCPs must provide for implementation of these measures or alternative management measures in conformity with these measures in the coastal management area generally. “Management measures” are defined by law to be economically achievable measures that reflect the best available technology for reducing pollutants.” (<http://water.epa.gov/polwaste/nps/czara/agricult.cfm>)

Hence, both Congress and the 6217(g) guidance permit an outcome-based approach much like what is already being accomplished in Oregon. Such an approach is also likely to encourage more voluntary efforts within the agricultural community to improve management techniques. This is because such an approach is apt to be more cost effective given the design of the management measure will reflect the particular conditions at issue thereby increasing the chances of success.

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

Under Section II of their noticed document, the Federal Agencies acknowledge that Oregon had previously satisfied CZARA with the introduction of its six Area Plans that address non-point source pollution covering the coastal nonpoint management area. They also, however, allege that “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.” While no references are provided in the document in support of such a broad statement, the Federal Agencies point to NOAA’s National Marine Fisheries Services’ recent listings for Coho salmon and draft recovery plans as allegedly finding that insufficient riparian buffers around agriculture activities are one of the contributors to the salmon’s decline. Notably, however, neither of these two documents appear to support such a conclusion and certainly not one which would characterize agricultural activities as presenting concerns of “widespread” impairment.

Under the analysis concerning Coho viability in particular, when discussing the need for buffers, the study does not appear to distinguish the nature of the activities on the lands referred to (*e.g.*, rural residential, urban development, agricultural, forestry, etc.) nor do the conclusions confirm the degree to which existing conditions on such lands are a contributor to such declines as compared to other sources of pollution. Further, where the maintenance of riparian buffers are called for, the land uses at issue focus on the increasing change of coastal mountain areas to rural residential and urban development. No specific mention of agricultural uses and the alleged related lack of riparian buffers as a contributing factor to salmon declines appears to have been made. While the OAN agrees with the need to identify and address activities that may create water quality problems for listed species, it cannot support an approach that would simply assume (without the benefit of confirming evidence) both the source of the

affecting conditions and the scope of management measures that then must be implemented to address them.

In addition, no less than five bulleted “concerns” about the implementation of agricultural management measures are additionally listed in Section II of the noticed document that could be construed to apply to one or both of the questions presented. As it is our understanding that the ODA is addressing each of these points, we offer some additional comments on some of them as noted below.

- a. *Allegation: 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.*

Initially, this allegation begs the question of how enforcement can be criticized as too limited when immediately followed by a request to confirm the extent to which enforcement actions have been taken. Under the AWQMP, and as provided by rule under each of the Area Plans within the CNCP Area, existing provisions expressly provide for the manner in which enforcement actions are taken. It is also our understanding that ODA will provide information regarding the extent to which enforcement actions have been taken as a means to further Area Plan objectives.

As a practical matter, we also think it reasonable to believe that any reduction or withdraw of Section 319 funds will only serve to diminish ODA’s abilities in this regard, not increase them.

- b. *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.*

For reasons discussed above, neither CZARA nor the 6217(g) guidance prescribes the AWQMP’s adoption of specific management measures. Instead such authorities allow for the utilization of such measures or alternative measures as may be adopted by the AWQMP so long as they achieve a similar outcome. *See also*, CZARA, 16 USC 1455b(g)(5) defining “Management measures” to include measures both known or those as yet identified.

Furthermore, Area Plans do provide for specific measures. By example only, required conditions in the North Coast Basin area in part require as follows:

- (1) All landowners or operators conducting activities on lands in agricultural use shall be in compliance with the following criteria. A landowner or operator shall be responsible for only those required and prohibited conditions caused by activities conducted on land managed by the landowner or operator. Criteria do not apply to conditions resulting from unusual weather events or other exceptional circumstances that could not have been reasonably anticipated.

- (2) Healthy Riparian Streambank Condition. Effective upon rule adoption.

- (a) Allow the natural and managed regeneration and growth of riparian vegetation -- trees, shrubs, grasses, and sedges -- along natural waterways (as defined in OAR 141-

085-0010(27)) to provide shade to moderate water temperatures and bank stability to maintain erosion near background levels.

(b) The technical criteria to determine compliance with OAR 603-095-0840(2)(a) are:

(A) Ongoing renewal of riparian vegetation that depends on natural processes (including processes such as seed fall, seed bank in soil, or sprouting from roots, rhizomes, or dormant crowns) is evident.

(B) Ongoing growth of riparian vegetation that has a high probability of remaining or becoming vigorous and healthy is evident.

(C) Management activities minimize the degradation of established native vegetation while allowing for the presence of nonnative vegetation.

(D) Management activities maintain at least 50% of each year's new growth of woody vegetation -- both trees and shrubs.

(E) Management activities are conducted in a manner so as to maintain streambank integrity through 25-year storm events.

OAR 603-095-0840

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

This statement automatically requires the initial (and significant) assumption that it is even true. As with other concerns that have been raised in the Federal Agencies' document, there is no reason to believe that what is stated here necessarily possesses any basis in fact. Moreover, what is to distinguish management measures that can apply to impaired areas from those under which restoration is sought. Standards that could be used to address an impaired area could just as easily apply to any restoration effort. For example, the excerpt of standards provided above from OAR 603-095-0840 can be said to address an impaired area while also providing protection and restoration benefits.

d. AWQMA planning and enforcement does not address "legacy" issues created by agriculture activities that are no longer occurring.

Nothing within CZARA indicates Congress ever intended that the States consider "legacy" issues nor is there any requirement to address such issues under the 6217(g) guidance. Given that EPA and NOAA have previously determined that Oregon has satisfied the Agriculture Management Measures conditions, it would be entirely inappropriate – in addition to being contrary to fundamental principles of statutory construction – to even pursue a broader interpretation of Congressional intent so many years later in an effort to include consideration of legacy issues now.

CONCLUSION

The OAN realizes that Oregon's AWQMP is still evolving as it was initially designed to do and as it will continue to do going forward. We believe that the continued successful implementation of the program must rely on local management experiences, both currently and in the future, which will inform how to craft the most appropriate regulatory standards. This process of creating ever improving standards of course will come from the existing adaptive management, outcome-based approach within each of the Area Plans. This process, however, will be slowed considerably by any efforts to reposition Congress' intentions regarding (a) the development of coastal management programs and (b) the flexibility it felt was necessary to allow the most effective means to achieve the protection and restoration of coastal management area waterways in response to the adverse affects of nonpoint source pollution.

On behalf of the OAN, I appreciate the opportunity to provide these brief comments and look forward to engaging EPA and NOAA further on these issues should the Federal Agencies wish to take a harder look to truly understand the increasingly effective approach that is the Oregon Agriculture Water Quality Management Program.

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