NORTHWEST ENVIRONMENTAL ADVOCATES

June 13, 2012

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Re: 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

Dear Messrs. Bussell and King:

Oregon has been seeking final approval of its Coastal Nonpoint Pollution Control Program (CNPCP) since July 1995, a process that is scheduled to be completed by May 15, 2014 pursuant to the settlement in *Northwest Environmental Advocates v. Locke*, *et al.*, Civil No. 09-0017-PK. Recently we wrote to you expressing our concerns about the interim approval given to Oregon's agricultural programs as sufficient to meet the requirements of the Coastal Zone Act Reauthorization Amendments (CZARA) by the U.S. Environmental Protection Agency (EPA) and the National Oceanic and Atmospheric Administration (NOAA)(hereinafter collectively "federal agencies"). We set out a number of reasons why we think the federal agencies erred in making this interim approval.

Our letter today brings to your attention yet another critical issue with regard to the federal agencies' interim approval of Oregon's coastal agricultural program, namely whether there is sufficient enforcement authority to back up the voluntary approach taken by the state to meet the CZARA (g) guidance management measures and state water quality standards. The federal agencies' policy regarding this needed "back-up" enforcement is set out in their 1998 policy document, Administrative Changes to the Coastal Nonpoint Pollution Control Program Guidance for Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990) (hereinafter

"Administrative Changes Policy").[1]

I. Oregon Department of Agriculture's Enforcement Authority

On January 13, 2004, the federal agencies concluded that Oregon had fully met conditions of approval for its CNPCP with regard to agriculture. As we pointed out in our earlier letter, that interim determination was based on flawed findings, including the federal agencies' belief that the Oregon Department of Agriculture's (ODA) wholly voluntary Agricultural Water Quality Management Area Plans (AWQMAP) and associated appendixes, in which the (g) measures can be found, were enforceable. The underlying assumption in our letter was that in contrast to the ODA's voluntary basin *plans*, the agency's basin *rules* were enforceable and, while highly ambiguous[2], could be read as broadly prohibiting various conditions related to causing or contributing to violations of state water quality standards. The rules are, after all, frequently referred to as establishing "prohibited conditions."[3]

However, this assumption that the ODA rules prohibit various conditions is not correct. In fact, ODA reads its rules as strictly limited to applying to *current* agricultural *activities*, excluding what it terms "legacy conditions." Simply put this means that if identical unacceptable conditions exist on two sides of the same stream, one the product of current agricultural activities and the other the product of earlier activities, ODA's position is that its rules allow enforcement only against the former.[4] ODA's view is that its unenforceable AWQMAPs can be used to remedy "legacy" conditions that are the result of past practices.

Clearly water quality impairments in Oregon's coastal watersheds are a product of past agricultural activities as well as current agricultural activities. The existing conditions, regardless of when and how they were caused, are a significant contributor to widespread violations of water quality standards in Oregon's coastal watersheds. While this issue comes into play in numerous situations, it may be the most obviously related to Oregon's most ubiquitous

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[1] Final Administrative Changes to the Coastal Nonpoint Pollution Control Program Guidance for Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA), October 16, 1998 available at http://coastalmanagement.noaa.gov/nonpoint/docs/6217adminchanges.pdf.

[2] In our letter to you of April 24, 2012, we pointed out that EPA had expressed concern about whether the "general language of the prohibited conditions" in ODA's basin rules would preclude enforcement. Letter at 15-18. We also pointed out that the rules fell short of prohibiting all conditions related to water quality impairments noting, for example, that with one limited exception pesticides are not included in the ODA's Basin Rules.

[3] For example, EPA itself stated that "[e]nforcement [of ODA basin rules] is based on violation of *prohibited conditions*." Letter from Elbert Moore, EPA, to Ray Jaindl, ODA, undated comments on draft AWQMAP for Umpqua Basin at 6-7 (emphasis added). ODA also refers to its rules as "Prohibited Conditions," *see, e.g.*, the Memorandum of Agreement Between Oregon Department of Agriculture and Oregon Department of Environmental Quality Relating to Agricultural Nonpoint Source Pollution, May 17, 2012 at 2.

[4] This hypothetical is drawn from an actual example.

water quality problem: temperature. ODA's policy, which we now know dates to at least March 25, 2008, is that its rules do not allow enforcement action against previously removed vegetation. Despite our attempts to elucidate information on this policy[5], which have gone unanswered to date, we (and others) are unclear on what precisely constitutes a "legacy" condition from ODA's perspective – an action taken by a previous landowner, an action taken in previous years by the same landowner, an action that is no longer occurring at the time of a complaint or inspection, or the mere passage of time. However, it is clear that ODA believes it has no enforcement mechanism associated with the vast amount of removal of vegetation – the restoration of which is vital to restoring stream temperatures – solely because that removal took place in the past and has been deemed a "legacy" condition.

II. Oregon Department of Environmental Quality Enforcement Authority

Without an ODA back-up enforcement mechanism to address a significant portion of the water quality impacts from agricultural lands, the federal agencies must look instead to the enforcement authority of the Oregon Department of Environmental Quality (DEQ).[6] As you know, DEQ has broad enforcement authority under state statutes.[7] There is, however, a significant problem. Just last year, DEQ made clear in its administrative rules that it intends to take no enforcement action on agricultural nonpoint sources, thereby negating its statutory enforcement authority for all practical purposes. Specifically, DEQ sought and obtained the Oregon Environmental Quality Commission's adoption of the following rule:

> In areas subject to the Agricultural Water Quality Management Act, the Oregon Department of Agriculture (ODA) under ORS 568.900 to 568.933 and 561.191 develops and implements agricultural water quality management area plans and rules to prevent and control water pollution from agricultural activities and soil erosion on agricultural and rural lands. Area plans and rules must be designed to achieve and maintain water quality standards. If the department determines that the area plan and rules are not adequate to achieve and maintain water quality standards, the department will provide ODA with comments on what would be sufficient to meet WQS or TMDL load allocations. If a resolution cannot be agreed upon, the department will request the Environmental Quality Commission (EQC) to petition ODA for a review of part or all of water quality management area plan and rules. *If a person subject to an ODA area plan and implementing rules causes or contributes to water quality standards violations, the department will refer the activity to ODA for further evaluation and potential requirements*.[8]

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[5] *See* Letter from Nina Bell, NWEA, to Dave Wilkinson, ODA, Re: Interpretation of Oregon Department of Agriculture Area Rules, March 24, 2012. *See also* Letter from Nina Bell, NWEA, to Lisa Hanson, ODA Deputy Director, Re: Interpretation of Oregon Department of Agriculture Basin Rules, June 13, 2012.

[6] It is worth noting that the recently-signed Memorandum of Agreement between ODA and DEQ is silent on the issue of enforcement against agricultural land owners.

[7] ORS 468B.010.

[8] OAR 340-041-0061(11)(emphasis added), adopted on June 16, 2011.

DEQ has thus made clear that it will not use its existing enforcement authority. As a consequence of this rule adoption, DEQ may very well not be in a position to obtain a "legal opinion from the attorney general ... that such authorities can be used to prevent nonpoint source pollution"[9] as required by the federal agencies because it has just passed a rule that seemingly precludes use of the authority the state has granted the agency by statute. Moreover, DEQ cannot claim to have made a "commitment to use the existing enforcement authorities where necessary,"[10] as required by the Administrative Changes Policy, because it has, in fact, passed a rule stating that it will not use its enforcement authorities granted to it by state statute but rather will refer the matter to another agency.[11] Of course, as discussed above, the very agency to which DEQ will refer such matters believes it has no such enforcement authority over any activity or condition that does not constitute "active" agriculture.

As the federal agencies stated in a memo setting out their 2004 findings with regard to Oregon forestry

> If the State wishes to pursue voluntary programs to address these additional management measures, the State would need to submit a legal opinion as required by the 1998 Administrative Changes Memo to demonstrate i[t] has enforceable mechanisms and policies to back-up their voluntary approach. In addition, Oregon would have to provide: (1) a complete description of the voluntary or incentive-based programs, including the methods for tracking and evaluating those programs it will use to encourage implementation of the management measures; and (2) a description of the mechanism or process that links the implementing agency with the enforcement agency and a commitment to use the existing enforcement authorities where necessary.[12]

The federal agencies can do no less with regard to agriculture in Oregon, a virtually unregulated nonpoint source that is contributing to violations of Oregon's water quality standards within the boundary area of Oregon's CNPCP.

In conclusion, it is unclear what Oregon has in mind to meet the CZARA requirements. In its letter of July 26, 2010 to the federal agencies[13], DEQ committed to "establishing enforceable load

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[9] *See* Administrative Changes Policy at 4.

[10] *Id*.

[11] It bears noting that apart from issues of enforcement, the state does not have a "a description of the voluntary or incentive-based programs, including the methods for tracking and evaluating those programs, the states will use to encourage implementation of the management measures" as required by the Administrative Changes Policy. *Id*. at 4.

[12] NOAA and EPA Preliminary Decisions on Information Submitted by Oregon to Meet Coastal Nonpoint Program Conditions of Approval, April 8, 2004 at 5, citing the Administrative Changes Policy.

[13] Letter from Neil Mullane, DEQ, to Michael Bussell, EPA, and John King, NOAA, Re: Oregon Department of Environmental Quality's commitment to implement the

allocations ... for all significant nonpoint sources" and "establishing enforceable load allocations in the Implementation Ready TMDLs for all significant nonpoint sources," yet on June 16, 2011, pursuant to DEQ recommendation, the Oregon Environmental Quality Commission approved the rule quoted above that can be read quite plainly as DEQ's repudiation of its early commitments with regard to non-forestry nonpoint sources.

Sincerely,

Nina Bell
Executive Director

Attachments: Letter from Nina Bell, NWEA, to Dave Wilkinson, ODA, Re: Interpretation of Oregon Department of Agriculture Area Rules, March 24, 2012.

Letter from Nina Bell, NWEA, to Lisa Hanson, ODA Deputy Director, Re: Interpretation of Oregon Department of Agriculture Basin Rules, June 13, 2012.

Memorandum of Agreement Between Oregon Department of Agriculture and Oregon Department of Environmental Quality Relating to Agricultural Nonpoint Source Pollution, May 17, 2012

cc: Dick Pedersen, Director DEQ
Bill Blosser, Chair, EQC
Greg Aldrich, Water Quality Division Administrator DEQ
Gene Foster, TMDL Program, DEQ
Allison Castellan, NOAA
David Powers, EPA
Kim Kratz, NMFS
Mary Lou Soscia, EPA
Jeff Lockwood, NMFS
Dave Croxton, EPA
Alan Henning, EPA
Paul Henson, USF&WS

Implementation Ready TMDL Approach identified in the "Oregon Department of Environmental Quality's Response to the EPA and NOAA's Conditions of Fully Approving Oregon's Coastal Nonpoint Program (CNPCP), submitted by letter dated May 12, 2010."