

# NORTHWEST ENVIRONMENTAL ADVOCATES ❖ NORTHWEST ENVIRONMENTAL DEFENSE CENTER

December 24, 2014

Jennifer Wigal, Section Manager  
Surface Water Management  
Process Excellence  
Oregon Department of Environmental Quality  
811 S.W. Sixth Ave.  
Portland, OR 97204

*Via email only:* WIGAL.Jennifer@deq.state.or.us

**Re: Water Quality Trading Rules and Guidance Process**

Dear Jennifer:

We are writing to urge the Department, once again, to step back from its planned strategy on developing trading rules and guidance and to adopt another approach. We believe that this process is not at all likely to lead to informed decision-making by DEQ and the Commission, nor will it allow meaningful public input. This is for several reasons.

First, typically the order in which laws are established and implemented begins with statutes, proceeds to rules, and then guidance is crafted that assists in agency and public understanding of how the statutes and rules will be interpreted and applied. With regard to trading, DEQ initially bypassed the establishment of rules and created guidance. We are heartened that DEQ is now planning on promulgating rules for the program. We are not, however, comfortable with the order in which DEQ proposes to move forward, namely to ask us for comments on the existing guidance prior to our seeing even a draft of the rules. This is illogical and backwards if for no other reason than the guidance is intended to interpret the rules, not to drive the rules, nor to anticipate them.

Second, we are concerned that DEQ intends to create the most superficial of rules, more like a table of contents than anything that will resolve key policy issues. Assuming there is no debate that trading is an action that substantially affects the interests of the public, it appears that the recently-signed settlement with the Northwest Pulp and Paper Association and the language of the Oregon APA agree that statements by DEQ that interpret or prescribe law or policy or describe the agency's procedures and practices must be in rule. The caveat, asserted in the exceptions section of the settlement and in your recent memo, is that as long as the guidance does not purport to impose any requirements or obligations, it is not a rule. Although it has always been true that guidance is not binding, DEQ's stated desire to limit the rules to definitions and "the required components of an approvable water quality trading project" appears to assure that neither the rule nor the guidance will completely cover the major issues of law, policy, procedure, and practice with regard to trading. As a result, some of the most difficult issues will be left to debate permit-by-permit. This result not only does not encourage trading but we believe it will have a deleterious effect on permittees both in their initial planning stages, during which they will have to rely on skeletal rules, and during the public comment periods where state policy will be debated because DEQ will have intentionally chosen to skirt those debates in *this* process. Presumably DEQ would agree both that a maximum of four meetings is inadequate to fully air and discuss the major policy issues inherent in trading as well as the fact that attempting to resolve those debates with language in the guidance is not possible for the reasons stated above, namely that it is prohibited.

In addition, we are stumped as to how DEQ imagines it will be able to define key trading issues, such as those listed in your memo, without a full discussion of the policy implications of those

definitions, unless the definitions themselves are so vague as to not be substantive in any way. If that is the case, of course, the new regulations will do little to provide the structure or certain necessary to ensure the trading program will meet the statutory mandate or provide certainty for Oregon citizens and permittees or, for that matter, DEQ permit writers.

Third, communication on this topic continues to fail. For example, after much discussion at the first Policy Forum meeting, DEQ stated it would provide the public with an explanation of the process for submitting comments on the existing IMD. That explanation, and its associated January 7, 2015 deadline for such comments, was contained in a memorandum, dated December 12, 2014. This memorandum, however, was not released to the public through DEQ's email notice system; nor was it mailed to those who specifically signed up to be kept informed about this topic, or to those who attended the meeting; nor was it posted on DEQ's Water Quality Trading webpage, or on its Water Quality Trading Policy Forum webpage, or on its Water Quality Policy Forum Meetings webpage under the heading "Policy Forum Participation." Instead, the memo was placed at the end of a list of documents associated with the first Policy Forum Meeting, without any indication that this was a new document posted after the meeting occurred. Not to belabor the point, but this falls well short of acceptable standards of practice for soliciting public participation and comment. More specifically, the stated purpose for DEQ's use of this Policy Forum approach is to garner broader public involvement; this goal will be systematically undermined if DEQ cannot master the most basic of communications to this broader public.<sup>1</sup>

Furthermore, the agency has repeatedly stated that the reason for foregoing an advisory committee and using a small handful of "policy forums" is to broaden the role of the public in this process. The result will inevitably be the opposite. Instead of broadening the public's role, you are now asking people to put their positions on paper without even the benefit of hearing diverse views. You have completely circumvented the thoughtful and informed dialogue that allows the public to have input into state policies, not merely by asserting individual positions but through the process of crafting agreed-upon policies.<sup>2</sup>

This lack of dialogue will, in turn, lead to a black box in DEQ's decision making, a cascading series of problems that will undermine the public's confidence in DEQ to handle this type of

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<sup>1</sup> In addition, it is truly unreasonable for DEQ to establish a comment period that runs for only seventeen working days, assuming the memorandum was found by an interested member of the public immediately, over a period in the year that more than likely is interrupted with vacation and travel. DEQ has not articulated any rationale for the extreme urgency with which it views this project—particularly in light of its near inability to issue NPDES permits—much less a need to receive comments on an outdated IMD before it has released even a first draft of its proposed regulations. Thus, it is unclear why the public should be rushed to meet this schedule.

<sup>2</sup> DEQ staff have pointed to Washington's use of policy forums for revising its human health criteria for toxics but have failed to recognize that that state not only convened an advisory committee to debate the issues alongside the policy forums but that its Governor also established his own committee in order that he might instruct the Department of Ecology on major policy decisions. In other words, in addition to the policy forums there were two advisory committees. There is simply no way that a series of webinar-style large group meetings can attain the intimacy of discussion and debate that can take place in a smaller setting, a fact recognized by Washington.

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process, and may irrevocably compromise the integrity of the final product. The initial hallmarks of these fatal flaws are already visible. For example, as we have noted previously and discussed again above, DEQ has not made a case that this process will ensure the public is provided sufficient opportunity to provide considered and thoughtful input as DEQ works to craft a solution to this difficult problem. Moreover, DEQ has failed to identify who will make the final policy recommendations to the Commission and how and when DEQ will document the rationale behind significant policy decisions that will underlie that recommendation. Further, there has been no explanation of how that documentation will capture and address the concerns raised by the public— an issue that takes on even greater importance given DEQ's decision to forego a forum that would allow the agency to benefit for a more thorough and complete discussion of these issues among those who have given it the most amount of thought. Finally, and perhaps most importantly, DEQ has yet to explain how its proposed process will result in a robust and lawful rule when the resulting rule will be minimal and the guidance cannot dictate agency policy. By failing to anticipate and provide answers to these most fundamental questions DEQ has demonstrated that it has embarked on a project it is not yet ready to tackle.

As a result, we continue to strenuously object to the superficial process that DEQ has embraced for addressing trading issues in Oregon. Given the obvious shortcomings of this approach in concept and in practice, we hope that DEQ will now take the opportunity to restructure the process into one that will engage the public in a full, fair and frank discussion of the regulatory structure necessary to create a trading program that will meet the goal of achieving water quality standards and objectives.

Sincerely,



Nina Bell, Executive Director  
Northwest Environmental Advocates



Andrew Hawley, Staff Attorney  
Northwest Environmental Defense Center