NORTHWEST ENVIRONMENTAL ADVOCATES

May 10, 2013

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Re: Oregon Coastal Nonpoint Pollution Control Program; Additional Information Concerning Oregon's Failure to Regulate Agricultural Nonpoint Pollution

Dear Mr. Opalski and Ms. Davidson:

As you know, 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. Northwest Environmental Advocates (NWEA) has written your predecessors repeatedly with regard to your agencies' interim sign-off on Oregon's coastal nonpoint program for agriculture, noting that Oregon's programs are insufficient to meet the requirements of the Coastal Zone Act Reauthorization Amendments (CZARA). In those letters, we established that this interim finding was based on a number of fallacies and urged you to inform the State that these would have to be rectified should Oregon desire a full approval of its program.

The purpose of this letter is to bring to your attention several new items that relate to agricultural pollution in Oregon's coastal watersheds. First, we discuss the Oregon Department of Agriculture's (ODA) rules for the MidCoast Basin, for which the Oregon Department of Environmental Quality (DEQ) is purportedly completing an "Implementation Ready" Total Maximum Daily Load (TMDL) to meet, *inter alia*, the terms of the above-referenced settlement. Second, we wish to bring to your attention a letter prepared by the National Marine Fisheries Service (NMFS) with regard to needed riparian buffers in lower-elevation agricultural landscapes of Western Washington, findings equally applicable to lower-elevation agricultural landscapes of the Oregon coast with regard to protection of water quality and Oregon coast coho. Finally, we attach and briefly discuss a letter NWEA recently sent to EPA discussing water quality credit trading in the Rogue River Basin. This letter reflects on DEQ's views of the efficacy of its TMDLs as well as whether the applicable ODA basin rules will implement the TMDL's load allocations.

We start our letter with a recent photograph from the Big Elk Creek, a tributary to the Yaquina, that demonstrates the failure of Oregon to protect riparian areas and water quality in the MidCoast Basin. Presumably, were it to receive a citizen complaint about this situation, ODA would find the landowner in violation of its rules, as discussed immediately below. Not at all clear is whether ODA would require restoration of the eroding stream banks, permanent removal of the cows from the stream and riparian area, and planting of riparian vegetation on agricultural pasture that abuts the edge of the stream bank. And equally unclear is what width of riparian buffer ODA would require to be protected and/or restored and whether such a riparian buffer would be established to fully, or even partially, protect stream temperatures (the rules are focused on soil erosion).

Big Elk Creek, Siletz-Yaquina Subbasin, MidCoast Basin, April 2013
(303(d) listed for dissolved oxygen and bacteria)

I. Oregon Department of Agriculture Rules are Ineffective in Protecting Riparian Areas of Coastal Streams

Protection of riparian areas cannot alone achieve the highest possible water quality. Forested riparian buffers, however, are an absolutely essential element of any set of Best Management Practices (BMPs) for agriculture, whether to prevent animal wastes, nutrients, sediment, and

toxic constituents from entering streams or to control stream warming. Oregon's program to protect coastal water quality is based on the ODA's rules and plans for each basin. ODA rules are regulatory in nature; ODA plans are entirely voluntary. Both tend to be vague, leaving landowners, the public, and the regulatory agencies with significant confusion about what is required and even what is desirable on the landscape. Even so, at the outset of DEQ's development of a so-called Implentation Ready TMDL, DEQ defined its job to include evaluation of other agencies' BMPs. While DEQ's efforts to date have made little or no progress towards determining what BMPs are necessary to meet water quality standards and the TMDL's eventual load allocations to nonpoint sources, DEQ has made some progress towards determining what the ODA MidCoast Basin rules require. Attached hereto is a flow chart prepared by DEQ and ODA that sets out the meaning of the ODA rules for that basin.

A. A Summary of the Meaning of the ODA MidCoast Basin Rules

The current ODA program is based on complaints being made by members of the public. We understand that ODA is currently involved in "strategic planning" to improve "strategic management of resources" and a "strategic implementation approach" which would involve a concept called "compliance streamlining." The timeline for "strategic implementation test run areas" will run from the present to March 2015, at which point it will be evaluated. Regardless, at this juncture, the ODA's regulatory system is currently based on complaints. No matter *how* the rules are enforced, the most fundamental question is whether the rules provide more than a modicum of protection to Oregon's water quality and salmon habitat.

The attached flow chart demonstrates that the MidCoast Basin rules are geared towards one goal: removing any *on-going* agricultural *activities* that may exist in riparian areas. This is seen first in the rules' applying only to a landowner's activities if the riparian area qualifies for coverage, e.g., if the water is not an agricultural ditch. (Note the contrast with the NMFS letters discussed below with regard to Class I waters, "constructed ditches; small non-fish bearing streams.") If there is no agricultural *activity* in the riparian area of these agricultural lands – namely cropping up to the stream bank edge or cows with access to the water[1] – the ODA rules do not apply at all. (This begs the issue of pastures which are neither crops nor necessarily cows but are a ubiquitous feature of de-vegetated coastal riparian zones.) If there is agricultural activity but there is anything else present that would prevent riparian vegetation from growing that is not an on-going agricultural activity, such as blackberry bushes, the landowner is in compliance with the ODA rules. If, at this point in the analysis, crops or cows are preventing "site capable vegetation," the landowner is out-of-compliance with the rules. (Note, as discussed in a previous letter, that ODA's definition of "site capable" is "the highest ecological status an area can attain given political, social, or economic constraints.") In fact, the presence of cows or crops appear to be the *only* circumstances that are deemed to be violations of the rules. In such an instance, the ODA rules appear to require that the crops will be removed and the cows will be managed. However, the width of the area in which this removal of agricultural activities will transpire is unknown and yet critical to protecting water quality. Whether restoration of the riparian area will be required is unknown and equally critical. (*See* box No. 4.1 that calls for removal of the agricultural activity but not restoration.) Also unknown is what period of time may pass to turn a

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[1] *See* boxes 2 and 3 of the attached Generalized Decision Path for Assessing Compliance with Mid-Coast Agricultural Rules OAR 603-095-2200 for Establishment and Development of Riparian Vegetation, Draft version 2011_0411.

current activity into a so-called "legacy" condition, which is *not* a violation of the rules. As discussed in our previous letter of June 13, 2012, we have information to suggest that ODA views the results of nearly all past activities as "legacy" conditions.

The narrow construction of the ODA rules and the agency's even more narrow interpretation of them results in at least three major deficiencies in that agency's regulatory program. First, riparian areas on agricultural lands disturbed by *past* agricultural activities, which is nearly everywhere, are not protected. This is demonstrated in the attached document by the findings that there are no agricultural "activities" to be regulated under the rules where there are invasive species, levees and dikes, rip-rap, infrastructure, and "other legacy issues" present, which means broadly any previous removal of riparian vegetation for any reason. Second, with the *possible* exception of situations where ODA finds that agricultural activities, that is crops or cows, are present in the riparian area, no restoration is required for damage done to riparian areas. Third, there is no information about the size of the riparian area that ODA considers necessary to protect water quality and we have reason to believe that in no instance does ODA protect water quality for temperature. In the absence of information on riparian buffer width, the ODA rules are rendered virtually useless, to the landowner seeking to comply with them, to the citizen seeking to make a complaint, and to the ODA inspector charged with making a determination of compliance or noncompliance and charged with evaluating the "political, social, or economic constraints" facing a landowner.

B. Annotations to the DEQ/ODA Flow Chart of the MidCoast Basin Rules

The following remarks pertain to the numbered boxes on the flow chart and may be helpful in understanding the ODA rules:

Box No. 1 This is the definition of a "near stream management area" in the rules, including the exemptions.

Box No. 2. ODA has not defined what precisely it means by the "bank edge" but apparently it typically means the high water mark. If there are invasive species (Box No. 4), there are no agricultural activities and the rules do not apply (Box No. 2.1).

Box No. 4. While "other legacy issues" is not defined, presumably that includes any circumstance caused in the past that precludes the growth of riparian vegetation now, such as denuded, eroding, and undercut banks.

Box No. 4.1. The resolution to cropping in riparian areas is limited to "remov[ing] agricultural activity" and generally, but not always, does not include a requirement to conduct restoration. Equally unclear is how wide of a riparian area would be covered in the "removal" of the agricultural activity. Apparently this decision is based on the slope, soils, and other site aspects that cause runoff and is *not* based on the need to shade streams, despite ubiquitous temperature pollution in Oregon waters.

Box No. 3. Any access to the water by cows at all qualifies to demonstrate livestock have access to riparian area, typically including road crossings.

Box No. 5. The definition of this box is "site specific."

Box No. 5.2. It is unclear why a finding of non-compliance is followed by the word "suggest." Apparently, ODA first makes suggestions and then returns to the site to see if anything was done. If not, they would enter a compliance mode.

II. National Marine Fisheries Service Matrix of Riparian Buffers for Low Elevation Agricultural Landscapes of Western Washington

On January 30, 2013, as part of the Treaty Rights at Risk discussions in the Puget Sound, NMFS provided its recommendations for minimum riparian buffers in lower-elevation agricultural landscapes of Western Washington, amended slightly by a subsequent letter dated April 9, 2013. As the attached letter describes, there is a technical basis for the buffer matrix that accompanies the letter, and the goal of the matrix is to meet state and federal water quality standards and improve salmon habitat. Among other conclusions, NMFS states that "[w]hile the table identifies buffers as narrow as 35 feet for limited situations, in most settings buffers will need to be significantly wider than this to meet salmon habitat needs."

The conclusions drawn by NMFS with regard to the need for riparian buffers in Western Washington are equally applicable to the high intrinsic potential salmon habitat for Oregon coast coho. These habitats for coho are defined primarily as low gradient, unconstrained, with low to moderate mean annual flows and provide winter habitat. These are typically privately-owned lands.[2] In other words, these are among the lands that are most in need of additional management measures under CZARA.

III. Department of Environmental Quality's Views on Requirements for Agricultural Nonpoint Source Controls as Demonstrated by its Temperature Credit Trade for the City of Medford

In a letter to EPA dated March 15, 2013, in which we discussed our concerns about Oregon's water quality credit trading program, we looked at DEQ's assumptions about protection and restoration of agricultural riparian areas in the Rogue River Basin. The letter concerns the policies underlying a temperature credit trading scheme for the City of Medford. What we found is instructive for EPA and NOAA with regard to their CZARA findings because it involves both DEQ's TMDL program and ODA's rules. Turning first to the DEQ Rogue River Basin TMDL,[3]

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[2] *See, e.g.*, High Intrinsic Potential Coho Habitat Maps, Reference Documents, Oregon Coast Coho Conservation Plan, Oregon Department of Fish and Wildlife, at http://www.dfw.state.or.us/fish/CRP/coastal_coho_conservation_plan.asp.

[3] The existing numeric criteria applicable in the Rogue River are 16° and 18° C. TMDL at 2-6, Table 2.5. Numerous river and streams in the Rogue River Basin currently violate water quality standards for temperature between early April and late October. *Id.* at 2-10, Table 2.6; 2-14, Figure 2.6. The TMDL sought to model the results of removing excess loads, defined as restoring riparian vegetation, natural flow conditions, and an estimate of tributary temperatures, *id*. at 2-29. Current temperatures are far in excess of either the estimated "natural thermal potential" temperatures or the numeric criteria. *Id*. at 2-30 – 2-32, Figure 2.18.

DEQ attempted to simulate natural conditions by "restor[ing] riparian vegetation" and "estimat[ing] natural thermal potential conditions" for tributaries. In addition to those modeled natural thermal potential temperatures, the TMDL established a load allocation for all nonpoint sources of 0.04°C. Or, as the TMDL states clearly, "[*m]ost streams simulated have no assimilative capacity, which translates into a zero heat load allocation for nonpoint sources*." TMDL at 2-36 (emphasis added). Even as it acknowledged in the TMDL that nonpoint sources must install the maximum possible riparian vegetation to both achieve the natural conditions *and* to meet this load allocation of zero heat, DEQ curiously assumed the point source discharge of Medford could trade its discharge for riparian tree planting, tree planting the TMDL already assumes will be put in place. Put another way, DEQ does not believe in the assumptions established in its own TMDLs, does not believe that there is reasonable assurance that riparian vegetation will in fact be installed, even though this is the very riparian vegetation upon which the point source wasteload allocations are established in the TMDLs.

Second, DEQ likewise concluded that the City of Medford could plant trees on agricultural use riparian lands to credit against its thermal discharge, based on a tacit finding that the ODA rules do not require any riparian vegetation. It would not surprise you to know that we share DEQ's views that the ODA rules are virtually worthless, so we are not objecting to DEQ's having made this unspoken finding. (We do object to its being unspoken.) What strikes us as curious is that DEQ would so readily conclude that ODA rules require nothing whatsoever in the Rogue River Basin but, in the context of the MidCoast Basin IR-TMDL, insist that a full understanding is required of the ODA rules as if they really hold out some hope of protecting and restoring coastal water quality. We look forward to the day when DEQ clearly and forthrightly articulates the utter inadequacy of all ODA basin rules for meeting water quality standards and load allocations.

In conclusion, evidence continues to mount that Oregon lacks an adequate agricultural nonpoint program sufficient to merit approval under CZARA.

Sincerely,

Nina Bell
Executive Director

Attachments: Generalized Decision Path for Assessing Compliance with Mid-Coast Agricultural Rules OAR 603-095-2200 for Establishment and Development of Riparian Vegetation, Draft version 2011_0411.

Letter from Will Stelle, NMFS to Roylene Rides-at-the Door, USDA and Dennis McLerran, EPA, January 30, 2013 with Attachments: (1) Interim Riparian Buffer Recommendations for Streams in Puget Sound Agricultural Landscapes, November 2012; and (2) Memorandum from Dr. Usha Varanasi, Northwest Fisheries Science Center to Robert Lohn, NMFS, Re: Review "Efficacy and Economics of Riparian Buffers on Agricultural Lands," March 17, 2003

Letter from Will Stelle, NMFS to Roylene Rides-at-the Door, USDA and Dennis McLerran, EPA, April 9, 2013

Letter from Nina Bell, NWEA to Michael Lidgard, EPA, Re: EPA Oversight of Trading in Oregon Permits Needed to Ensure Consistency with EPA Regulations Implementing the Clean Water Act, March 15, 2013.

cc: Dick Pedersen, Director DEQ
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