

# NORTHWEST ENVIRONMENTAL ADVOCATES



August 27, 2014

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*via email only:* everett.carrie@deq.state.or.us

**Re: Proposed NPDES Permit for Foster Poultry Farms, Inc.**

Dear Ms. Everett:

It is a mystery that an agency, namely DEQ, that appears to be incapable of issuing much in the way of NPDES permits would choose to issue a draft permit for a source that is not discharging and has not submitted a complete application to discharge. If this is a demonstration of DEQ's priorities, it is a very sad demonstration indeed.

## **I. Recommencing Discharger**

Oddly, the fact sheet makes no mention of the federal regulatory requirements pertaining to recommending dischargers, of which Foster Poultry Farms is one. 40 C.F.R. § 122.2 (A "*Recommencing discharger* means a source which recommences discharge after terminating operations."). With regard to the applicability of new source performance standards, recommending dischargers "shall install and have in operating condition, and shall 'start-up' all pollution control equipment required to meet the conditions of its permits before beginning to discharge. Within the shortest feasible time (not to exceed 90 days), the owner or operator must meet all permit conditions. The requirements of this paragraph do not apply if the owner or operator is issued a permit containing a compliance schedule under § 122.47(a)(2)." 40 C.F.R. § 122.29(d)(4). The compliance schedule alternative requires "[f]or recommending dischargers, a schedule of compliance shall be available only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised less than three years before commencement of discharge." 40 C.F.R. § 122.47(a)(2).

Here, the permit has long been expired and operations were terminated in October 2006. Fact Sheet at 3. Therefore, Foster Poultry Farms is a recommending discharger. The conditions of Schedule B § 6 to evaluate the functionality of the wastewater system to ensure lagoon cells do not "leak excessively," requires a compliance schedule. This system engineer report has no set deadlines but the condition requires the submission of an "updated permit application" one year prior to any discharge that apparently will include projected production rates, an evaluation of the infrastructure and whether it is expected to consistently meet permit limits, including the lagoon leakage issue, and identification of "improvements necessary to achieve compliance." *Id.* There are numerous problems with this approach. First, this is not a schedule of compliance that meets the requirements of 40 C.F.R. § 122.47 in that it does not specify a schedule of compliance leading to compliance with the Clean Water Act and its implementing regulations. Instead, it

merely contemplates that there will be an identification of improvements needed with no schedule. Second, there is no indication that this non-schedule or condition § 6 of the permit will comply with the requirements for issuing a permit. For one thing, there is not an application on file that DEQ can currently deem to be “complete,” as required by 40 C.F.R. §§ 122.21(a), (e). The regulations specify that an application for an existing manufacturing discharger must include “average flow which each process contributes” and if a technology-based limit applies “the actual production of the facility.” 40 C.F.R. §§ 122.21(g)(3), (4). It also requires identification of any improvements that are necessary. 40 C.F.R. §122.21(g)(6).

The permit calls for an updated application, thereby demonstrating that DEQ has itself already deemed the pending application incomplete. Schedule B § 6.a. As such, DEQ cannot process the application and issue a renewed permit to Foster Farms. 40 C.F.R. §§ 122.21(a), (e). Similarly, the fact sheet states that “[n]o ELG based effluent limits are proposed in this permit since the facility is currently moth balled and the limits are specific to the processing activity that occur.” Fact Sheet at 12. This statement proves several things. First, there is no actual production of the facility upon which DEQ can base a finding of whether a TBEL is required or not. Second, the plant is in disrepair and requires improvements, none of which are either identified as required or set out in a compliance schedule. Third, DEQ has not evaluated these issues with regard to the requirements that apply to recommencing dischargers. Fourth, DEQ’s Condition 6 requirements demonstrate that even DEQ is aware that it has deemed the application inadequate. See Fact Sheet at 12 (required is an “updated application 12 months prior to any discharge [with] . . . projected daily production volumes and units of measure, effluent wastewater strengths, amounts, and an evaluation if any ELG’s apply to the facility. The applicability of ELG based limits will be evaluated upon receipt of the application. If ELG based limits are needed, the permit will be modified to include the limits at that time.”). DEQ cannot issue a permit without knowing that “the conditions of the permit . . . provide for compliance with the applicable requirements of CWA, or regulations promulgated under CWA.” 40 C.F.R. § 122.4(a). Not knowing whether ELGs even apply is the equivalent of not knowing whether the permit DEQ proposes to issue will meet the requirements of the statute and regulations. It is unclear why DEQ is pursuing this idiotic approach to permitting.

## **II. Water Quality-Based Effluent Limits**

According to the fact sheet, “[t]he discharge was evaluated for compliance with water quality standards for dissolved oxygen, temperature, ammonia, total residual chlorine and pH.” Fact Sheet at 12. We are asked to inquire “what discharge”? There is no complete application pending on which DEQ can make any of the analyses it purports to make.

### **A. Dissolved Oxygen-Demanding Pollutants**

The facility discharges to an “unnamed tributary of Camas Swale Creek” at RM 3.3. Fact Sheet at 6. DEQ proceeds, then, to assert that the facility discharges to Camas Swale Creek. *Id.* at 7. We agree that the difference is likely negligible or non-existent but the agency should pay attention to detail. DEQ notes that this waterbody is water quality limited for dissolved oxygen spawning criteria October through May. DEQ apparently believes that in the absence of a TMDL, it does not need to issue a water quality-based effluent limit (WQBEL) for pollutants associated with dissolved oxygen. The fact sheet states: “When a TMDL is completed for Camas Swale Creek, a waste load allocation (WLA) will likely be assigned to the Foster Poultry Farms for oxygen demanding pollutants and the permit can be modified to include the WLA as a

permit limit.” *Id.* at 7. This conclusion is, of course, completely wrong.

DEQ is incorrect in believing that it can proceed on this basis to issue a new permit. First and foremost, federal regulations are very clear: 40 C.F.R. § 122.44(d)(1)(iii) (“When the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a State water quality standard for an individual pollutant, *the permit must contain effluent limits for that pollutant.*”) (emphasis added). DEQ’s view that a wasteload allocation is likely in the event a TMDL is completed is a statement of its view that the facility has reasonable potential to cause or contribute to violations of dissolved oxygen criteria. As such the permit requires a water quality-based effluent limit for pollutants with effects on this parameter. Our view is consistent with that of EPA. For example, in Kentucky, EPA objected to 36 NPDES permits issued by the State of Kentucky without a reasonable potential analysis because the state felt it had insufficient data. EPA told Kentucky that all “available, valid, and representative data showing that the proposed discharges have the reasonable potential to cause or contribute to violations of [water quality standards]” must be considered in conducting a reasonable potential analysis. Letter from James D. Giattina, Director, Water Protection Division, EPA Region IV, to Sandy Gruzesky, Kentucky Department of Environmental Protection, Re: Notice of Specific Objection – Xinerdy Corporation (KY0108014) (Oct. 22, 2010) at 3 (hereinafter “EPA Letter”). EPA pointed out that where there is existing information indicating that there may be reasonable potential for a discharge to interfere with water quality, issuing a permit without first conducting a reasonable potential analysis “does not comply with the CWA and its implementing regulations.” *Id.* at 3. *See also* EPA, Region 4: Kentucky Coal Mine Permits Public Hearings at <http://www.epa.gov/region4/kycoalminehearings/> (“In each case, EPA found that [Kentucky] had provided an incomplete analysis as to whether or not the proposed discharges had a reasonable potential to cause or contribute to a violation of Kentucky’s water quality standards. These incomplete analyses support EPA’s conclusion that [Kentucky] was not able to demonstrate that the permits contained effluent limits necessary to ensure that the proposed discharges would not cause or contribute to violations of Kentucky’s water quality standards.”); EPA, Region 4: Kentucky Coal Mine Permits Public Hearings, Resources at <http://www.epa.gov/region4/kycoalminehearings/resources.html#permits> (list of 36 permits with copies of EPA’s objections).

This same issue has arisen in Wisconsin, in the context of permitting regulations promulgated by the state. The regulations there established a minimum number of data results before Wisconsin could determine whether a WQBEL is required in an NPDES permit for mercury. In a letter disapproving these regulations, EPA found that they were inconsistent with the requirements of 40 C.F.R. § 122.44(d)(1). As EPA explained, this regulation,

does not specify the nature of the information or the number of data points required, but recognizes that permitting authorities may have varying amounts and types of information. To ensure that limits are included in permits when technology-based controls are not sufficient to meet water quality standards, the regulation requires a decision at the time of permit issuance. It does not provide an option of deferring a decision until the next time a permit is issued.

Letter from Bharat Mathur, Acting Regional Administrator, EPA Region 5, to Matthew J. Frank, Wisconsin Department of Natural Resources (Feb. 17, 2009), Attachment: EPA Review of NPDES Program Revisions in Wis. Admin. Code § NR 106.145 at 2-3. Moreover, EPA

continued,

The [122.44(d)] procedure establishes a low threshold for making a decision to include a WQBEL (are or *may be* discharged at a level which will cause, have the *reasonable potential to cause, or contribute* to an excursion above any state water quality standard). Indeed, EPA recognizes that a permitting authority may include a water quality-based effluent limit even in the absence of facility-specific effluent data. Technical Support Document for Water Quality-based Toxics Controls, EPA/505/2-90-001 (U.S. EPA Office of Water, March 1991) at 50.

*Id.* at 3 (footnote 2) (emphasis in original). EPA went on to make clear that the size of the relative contribution of mercury from a source is irrelevant to the requirement to control the pollutant under an NPDES permit, *id.* at 3-4, and to dismiss the state's "scientific indefensibility" rationale for requiring more data, *id.* at 4. With regard to that point, EPA reminded Wisconsin, "[t]he purpose of a reasonable potential procedure is to project whether excursions beyond water quality criteria may occur and compare that projection to an estimated WQBEL, not to establish with certainty that any limit would be exceeded on a repeated basis over time." *Id.* at 5.

It is worth noting that we are unhappy about the prospect of DEQ's setting effluent limits based on no information on water quality of the receiving stream and limited information on discharge quality. However, that is a result of DEQ's incompetence, not ours. Because, as we have explained, DEQ must set effluent limits regardless of its not having these data, it must make assumptions and be as stringent as both the TMDL and the applicable water quality standards require, which have become more stringent since issuance of the TMDL.<sup>1</sup> As EPA explains, these assumptions must be protective:

[Kentucky's] RPA assumes a background concentration of zero. This is not a reasonable assumption . . . [Kentucky] should have obtained actual in-stream data, or if such data was unavailable, used stream data from a reference stream with a similar flow and level of mining activity. Alternatively, [Kentucky] can request the applicant supply in-stream background data prior to permit issuance pursuant to 40 CFR § 122.21(g)(13).

EPA Letter at 6. Similarly, here Foster Farms discharge is to a stream that is likely flow-impaired. See DEQ Fact Sheet, Proposed Renewal Permit for the City of Creswell Wastewater Treatment Plant at pdf 31. In any case, these assumptions must be spelled out, RPAs included in the fact sheet, and limits established in the permit.

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<sup>1</sup> See, e.g., Letter from Michael J. Lidgard, NPDES Permits Unit, EPA Region X to Spencer Bohaboy, DEQ, Re: U.S. Environmental Protection Agency Comments, Draft National Pollutant Discharge Elimination System Permit and Fact Sheet, Oak Lodge Water Reclamation Facility, NPDES Permit No. 100986 (July 18, 2013) at 2 ("temperature limits are required for dischargers to impaired waters with an EPA-approved TMDL and assigned waste load allocation (WLA). Pursuant to 40 CFR [sic] § 122.44, the permit needs to meet all applicable water quality standards (WQS) and be consistent with the assumptions and requirements of any available WLA. . . . The final permit should include a limit [for temperature] based on either the WLA [from the TMDL] or the water quality based effluent limitation, whichever is more stringent.").

This approach of DEQ's, namely to never ensure sufficient information exists on effluent and receiving water quality sufficient to establish effluent limits, is chronic. In fact, DEQ agreed to stop this in a settlement of a lawsuit against EPA over Oregon's compliance schedule rules. *See e.g.* Settlement Agreement, *NEDC v. EPA*, Oregon Civ. No. 07-cv-1396 at 5 ("DEQ will ensure that the water quality of receiving water body is properly characterized."). And DEQ has issued almost no NPDES permits for the last two years, giving its staff more than adequate time to get sources with expired permits to gather the necessary data. But nothing has changed in DEQ's irresponsible attitude towards permitting. For example, DEQ has recently put out five draft permit renewals, every single one of which is lacking sufficient information on which to establish appropriate water quality-based effluent limits.

The permit contains BOD<sub>5</sub> limits for monthly averages and daily maximums. It does not explain how it arrived at these effluent limits, however it appears they are best professional judgment as technology-based limits. *See* Schedule A §1.b Table A1; Fact Sheet at 12 ("No ELG based effluent limits are proposed in this permit since the facility is currently moth balled and the limits are specific to the processing activity that occur. The technology based effluent limits in the current permit are proposed in the permit renewal."). Regardless of whether these came from the last permit or out of thin air, DEQ is required to explain how they were derived. (The same is true of the TSS limits.).

In addition, discharges of dissolved oxygen-demanding pollutants cannot be discharged into a waterbody that is violating dissolved oxygen criteria because such a discharge would impermissibly contribute to a violation of water quality standards. 40 C.F.R. § 122.4(a). There is no indication that DEQ has used procedures "which account for existing controls on point and nonpoint sources of pollution," *inter alia*, in assessing permit limits parameters related to dissolved oxygen. *See* 40 C.F.R. § 122.44(d)(1)(ii).

## **B. Mercury**

DEQ states that "[t]he TMDL assigned load allocations for each sector but did not specify effluent limits for point sources for the Coastal Fork Willamette. However, the TMDL implementation plan may require Foster Poultry Farms to develop a mercury reduction plan." *Id.* at 8. This ambiguous statement is not further explained. For example, to what "TMDL implementation plan" does DEQ refer? And why does DEQ think that an implementation plan has any bearing on its issuance of NPDES permits? We disagree that DEQ can issue a permit without a water quality-based effluent limit ("WQBEL") for mercury. First, while NWEA does not believe that the Willamette Mercury TMDL is an actual TMDL, DEQ did submit it to EPA for approval and EPA did approve it as a TMDL. Therefore, this permit must conform to the assumptions and requirements of the approved TMDL. 40 C.F.R. § 122.44(d)(vii)(B). The TMDL states that "[p]oint sources within a sector will be required to develop mercury minimization plans and to monitor their effluent to better characterize their contribution of mercury and the effectiveness of management measures. The implementation of best management practices (BMPs) should allow point sources to meet the overall allocation for the specific sector." *Id.* at 3-34. It also requires "an 'across the board' reduction of 27% for each of the source categories considered in the analysis." *Id.* Therefore, DEQ must establish a WQBEL of 27 percent of the total mercury loading in the Foster Farms effluent as called for in the TMDL. In addition, as the TMDL states that BMPs should be sufficient to meet the overall allocation for the sector, namely Foster Farms's contribution to the 27 percent reduction, and that minimization plans must establish the "effectiveness of management measures," the permit must

*establish* that the BMPs will in fact result in that level of reduction. BMPs are allowed when numeric effluent limitations are “infeasible.” 40 C.F.R. § 122.44(k)(3). However, DEQ has not demonstrated that it is infeasible to take the amount of mercury measured in the Foster Farms effluent and reduce it by 27 percent to establish a numeric effluent limit. Therefore, there is no basis for use of BMPs *solely* without a numeric effluent limit. If DEQ believes that having the BMPs is also “reasonably necessary to achieve effluent limitations and standards,” DEQ is well within its rights to include the BMPs in addition to the numeric effluent limit. 40 C.F.R. § 122.44(k)(4). We agree that it is appropriate for DEQ to require both. One thing is clear: DEQ cannot ignore TMDL wasteload allocations. *See also* Letter from Michael J. Lidgard, Manager, NPDES Permits Unit, EPA, to Spencer Bohaboy, ODEQ Re: U.S. Environmental Protection Agency Comments Draft National Pollutant Discharge Elimination System Permit and Fact Sheet Oak Lodge Water Reclamation Facility, NPDES Permit No. 100986 (July 18, 2013) at 2 (“temperature limits are required for discharges to impaired waters with an EPA-approved TMDL and assigned wasteload allocation[.]”).

In addition, DEQ cannot rely only on the outcome of the TMDL to meet water quality standards because it was established to meet a human health criterion for mercury that is now superseded by new human health criteria and which failed to address the levels of mercury that can be allowed for the protection of aquatic and aquatic-dependent wildlife pursuant to DEQ’s narrative criteria for toxics. *See, e.g.,* OAR 340-041-0033(2) (toxic substances may “not be introduced . . . in amounts, concentrations, or combinations that may . . . bioaccumulate in aquatic life or wildlife to levels that adversely affect . . . aquatic life, wildlife, or other designated beneficial uses.”). Federal regulations pertaining to the issuance of NPDES permits explicitly require consideration of narrative criteria which are, of course, only pertinent where numeric criteria are not established or they are inadequately protective. *See, e.g.,* 40 C.F.R. § 122.44(d)(i) (“Limitations must control all pollutants or pollutant parameters . . . which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, *including State narrative criteria for water quality*.”)(emphasis added). *See American Paper Institute v. U.S. EPA*, 966 F.2d 346, 351 (D.C. Cir. 1993); *see also In re Town of Newmarket, New Hampshire*, NPDES Appeal No. 12-05, slip. op. at 26 (EAB Dec. 2, 2013) (“In order to translate those narrative standards into numeric effluent limitations for the Newmarket permit, the Region had to perform a three-step analysis: (1) translate the State’s narrative water quality standard into a numeric instream water quality target; (2) determine whether the discharge from the Newmarket Plant has a ‘reasonable potential’ to cause or contribute to an exceedance of that instream water quality target; and (3) if so, calculate the numeric permit effluent limitation that is necessary to achieve the instream water quality target.”). Therefore, DEQ must use the assumptions underlying the TMDL as a basis for WQBELs, but must further increase the load reductions in proportion to the changes that have been made in the human health criteria since the TMDL was developed, and, in addition, interpret and apply the applicable narrative criteria. The WQBEL must be consistent with the assumptions of the TMDL and comply with the currently applicable standards in this permit. *See* 40 C.F.R. § 122.44(d)(1)(vii)(B).

### C. Temperature

The fact sheet states that “[t]he Temperature TMDL determined there is insufficient information for this discharge source to calculate temperature limits. The TMDL specifies that further temperature information is needed for the permit renewal for this facility.” *Id.* at 8. DEQ is mistaken if it thinks that lack of information can be used to avoid issuance of a permit that meets

water quality standards. It is not. 40 C.F.R. § 122.4(a). The absence of a wasteload allocation in the temperature TMDL is synonymous with a wasteload allocation of zero. Moreover, DEQ states that “[o]nce the treatment facility commences operation, in-stream temperature monitoring is required which will assist the Department in conducting a reasonable potential analysis for temperature and other applicable parameters. The assessment will be conducted in accordance with Temperature TMDL. The Department will evaluate if the facility needs a waste load allocation once there is sufficient data to do so.” Fact Sheet at 8-9. DEQ also states there is no indication that Camas Swale Creek is limited for temperature, *id.* at 13, but that is not the complete answer to the question. The discharge is to an unnamed tributary to the Creek. From the photograph supplied, it appears that tributary may very well exceed water quality standards as there is little vegetation. *Id.* at 5. DEQ goes on to say that “[n]o current temperature data is available to conclusively determine whether there is reasonable potential to exceed the temperature standard.” *Id.* at 13. As discussed under the dissolved oxygen section in these comments, DEQ does not need to determine anything conclusively because that is not the requirement of the reasonable potential regulations. The lack of information on receiving stream quality does not relieve DEQ of issuing a permit that complies with water quality standards and EPA regulations.

DEQ in its typical fashion has dragged its feet and failed to require the permittee to obtain the necessary data. See discussion *supra* under dissolved oxygen with regard to DEQ’s obligations, which we incorporate by reference with regard to temperature.

#### **D. Oil and Grease**

The permit proposes to allow a daily maximum of 56 pounds each day of oil and grease. There is no discussion on what basis DEQ has assessed that a tiny tributary of unknown flow can accommodate that much oil and grease. There is no discussion of how Oregon’s narrative criteria apply, including OAR 340-041-0007(10) (“The creation of tastes or odors or toxic or other conditions that are deleterious to fish or other aquatic life or affect the potability of drinking water or the palatability of fish or shellfish may not be allowed”); OAR 340-041-0007(12) (“Objectionable discoloration, scum, oily sheens, or floating solids, or coating of aquatic life with oil films may not be allowed”); and OAR 340-041-0007(13) (“Aesthetic conditions offensive to the human senses of sight, taste, smell, or touch may not be allowed”). The fact sheet fails to meet federal requirements rendering impossible informed public comment on the permit conditions. See 40 C.F.R. § 124.8(b)(4) (the fact sheet must include “[a] brief summary of the basis for the draft permit conditions[.]”).

#### **E. Total Chlorine Residual**

According to the fact sheet, the permit establishes the total chlorine residual as 0.01 mg/L but establishes the compliance level of 0.10 mg/L. Fact sheet at 11. This is the correct approach if there is no way to monitor the actual effluent limit. The fact sheet then discusses 0.05 mg/L as a detection limit. Fact Sheet at 14, Permit Table A2, footnote b. Whichever part of this discussion one wants to take as true, DEQ’s fact sheet is silent on whether there are alternative methods of monitoring that would allow compliance monitoring at the level of the effluent limit. DEQ is required to assess this. EPA has just issued a new rule, National Pollutant Discharge Elimination System (NPDES): Use of Sufficiently Sensitive Test Methods for Permit Applications and Reporting, 79 Fed. Reg. 49001 (Aug. 19, 2014). This rule “codify[ies] that under the National Pollutant Discharge Elimination System (NPDES) program, permit applicants must use

‘sufficiently sensitive’ analytical test methods when completing an NPDES permit application and the Director must prescribe that only ‘sufficiently sensitive’ methods be used for analyses of pollutants or pollutant parameters under an NPDES permit.” *Id.* While the rule is not yet effective, the preamble to the rule makes clear that it merely codifies existing EPA policy and interpretation of existing rules. *See, e.g., id.* at 49003 (“the Agency has historically expected that applicants would select from the array of available methods a specific analytical method that is sufficiently sensitive to quantify the presence of a pollutant in a given discharge. EPA has not expected that NPDES permit applicants would select a method with insufficient sensitivity, thereby masking the presence of a pollutant in their discharge, when an EPA-approved sufficiently sensitive method is available.”). In order to demonstrate compliance with this rule and/or existing rules that have the same meaning, DEQ must discuss the matter in the fact sheet. . *See* 40 C.F.R. §§ 124.8(b)(2), 124.8(b)(4).

#### **F. Ammonia**

The fact sheet is silent about the finding by the National Marine Fisheries Service that Oregon’s ammonia criteria pose jeopardy to threatened and endangered salmonids. *See* NMFS, Jeopardy and Destruction or Adverse Modification of Critical Habitat Endangered Species Act Biological Opinion for Environmental Protection Agency’s Proposed Approval of Certain Oregon Administrative Rules Related to Revised Water Quality Criteria for Toxic Pollutants, NMFS Consultation Number: 2008/00148 (Aug. 14, 2012). As a result of that finding, EPA has disapproved Oregon’s aquatic life criteria. *See* EPA Clean Water Act 303(c) Determinations On Oregon’s New and Revised Aquatic Life Toxic Criteria Submitted on July 8, 2004, and as Amended by Oregon’s April 23, 2007 and July 21, 2011 Submissions (Jan. 20, 2013) at 6. Also as a result, Oregon must apply its narrative criteria to ensure that it protects these species consistent with the EPA action and NMFS finding. OAR 340-041-0033(2). Instead, the fact sheet merely states that “[t]he ammonia RPA conducted for the previous permit renewal demonstrated there was no reasonable potential to violate the acute or chronic ammonia criterion[.]” Fact Sheet at 14. It is really irrelevant because the standards have changed since then. It is unclear what criteria DEQ based its Appendix B analysis on. DEQ has a calculator for ammonia criteria on its website but makes no statements about its use following the EPA disapproval. *See* Calculator for Freshwater and Saltwater Ammonia Criteria, Aquatic Life Toxics Criteria, Water Quality Standards for Toxic Pollutants, Water Quality Standards, DEQ *available at* <http://www.deq.state.or.us/wq/standards/docs/toxics/AmmoniaCriteriaCalculatorv2.xlsx>. DEQ provides no concrete information in the fact sheet for the public to evaluate. *See* 40 C.F.R. § 124.8(b)(2) (A fact sheet must include “[t]he type and quantity of wastes, fluids, or pollutants which are proposed to be or are being treated, stored, disposed of, injected, emitted, or discharged.”); *see also* 40 C.F.R. § 124.8(b)(4) (the fact sheet must include “[a] brief summary of the basis for the draft permit conditions[.]”). Instead, the fact sheet for this discharge states that “[i]f new information submitted by the permittee prior to the initiation of operation indicates a more stringent is needed, the permit will be modified to incorporate the limit.” Fact Sheet at 14. DEQ does not have the option of postponing the development of effluent limits that will ensure the facility’s discharge will not cause or contribute to violations of water quality standards. 40 C.F.R. §§ 122.4(a), 122.44(d)(1). In the case of numeric criteria that have been disapproved by EPA because they are inadequate to prevent jeopardy to threatened and endangered species, DEQ is obligated to employ its narrative criteria to ensure that the discharge does not cause or contribute to violations of water quality standards, including impacts to designated uses.

### **G. Antidegradation**

The fact sheet states that “[p]ermit renewals with the same discharge loadings at the previous permit are not considered to lower water quality from the existing conditions and therefore this renewal is protective of the designated beneficial uses[.]” Fact Sheet at 15. This finding is entirely premature because DEQ has no complete application stating what the discharge loadings will be.

### **H. Instream Flows**

DEQ has alluded to this receiving water’s having insufficient instream flows in the draft Creswell permit out for public comment. See Creswell Fact Sheet at pdf 31 (“[use of a BOD<sub>5</sub> dilution factor not to exceed one] is included in permits where there is concern about inadequate flows in the receiving stream.”) (“This [flow] gauge is now used to accurately adjust the discharge flow so that the dilution factor in the permit is met.”). No information was presented there and the issue is not mentioned here. However, there is reason to believe, due to the use of the BOD<sub>5</sub> dilution factor in the Creswell permit, along with the finding that a mixing zone is not appropriate for Foster Farms, Fact Sheet at 9, that the receiving water is water quality limited for flow regardless of whether it has been placed on Oregon’s 303(d) list. This issue must be addressed in the fact sheet and must be taken into account in determining the effluent limits for all parameters.

### **I. Other/All Pollutants**

DEQ states that “[t]he discharge was evaluated for compliance with water quality standards for dissolved oxygen, temperature, ammonia, total residual chlorine and pH.” Fact Sheet at 12. There is no explanation given as to why the analysis was restricted to these parameters.

This permit does not include language similar to the following that ensures the permit does not allow discharges that cause or contribute to violations of water quality standards: “No wastes may be discharged or activities conducted that cause or contribute to a violation of water quality standards in OAR 340-041 applicable to the XXX basin.” Without this language, the permit does not meet federal requirements. 40 C.F.R. § 122.4(a).

### **III. Monitoring**

Permit limits for oil/grease, TSS, total chlorine residual, and BOD<sub>5</sub> are weekly averages and daily maximums. Because DEQ has not explained how these limits were derived, it is impossible to state how often monitoring should be required. However, what we can say is that monthly grab samples for oil and grease, see Table B1, will not result in either a monthly average or a daily maximum. No location is given for effluent or instream monitoring. Instream temperatures should be continuous monitoring to conform to DEQ monitoring and its water quality standards.

### **Conclusion**

Comments above regarding the inadequacy of DEQ’s fact sheet, the illegality of issuing a permit without setting appropriate water quality-based effluent limits, inappropriate quantitation limits and monitoring requirements, and proceeding without a complete application and adequate data

Carrie Everett (Foster Farms)  
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are intended to cover all parameters, not just the individual parameters discussed in each section.

This permit and fact sheet need a lot of work, so much so that if DEQ were to issue the permit without substantial correction it would not meet federal regulations. If, on the other hand, DEQ revises the draft permit substantially, it must provide further opportunity for public comment. Either way, we look forward to a response from DEQ and request that the Response to Comments, required by 40 C.F.R. § 124.17, be provided to us.

Sincerely,

A handwritten signature in black ink, appearing to read "Nina Bell", with a stylized, flowing script.

Nina Bell  
Executive Director