NORTHWEST ENVIRONMENTAL ADVOCATES

March 22, 2017

Senator Lew Frederick, Co-Chair
900 Court St. NE, S-419
Representative Brad Witt, Co-Chair
900 Court St. NE, H-374
Joint Committee on Ways and Means
Subcommittee on Natural Resources
Salem, Oregon 97301

Re: **Oregon Department of Environmental Quality's Assertions that Oregon's NPDES Permit Backlog is Due in Part to Litigation**

Dear Senator Frederick and Representative Witt:

In a recent budget hearing, Oregon Department of Environmental Quality (DEQ) Director Richard Whitman asserted that litigation—particularly on water quality standards and so-called Clean Water Plans—is one of the reasons for the agency's water pollution permit backlog. As an organization that has brought much, but not all, of the litigation pertaining to Oregon's water quality program, we would like to offer another perspective, namely that the litigation has served an important positive role in Oregon and that it has little to do with DEQ's permit backlog.

DEQ's continuing to cast the blame on others for its failure to embrace the Clean Water Act and to grapple with difficult realities will not advance the agency's efforts to resolve its long-standing difficulty in issuing timely and high quality NPDES permits. We hope that by our explaining this red herring, the Joint Committee will be in a better position to help DEQ focus on the real source of its permitting problems, namely its own program weaknesses.

The Clean Water Act Requires DEQ to Respond to Changing Circumstances and Science

Even without litigation, the Clean Water Act requires a state to be highly responsive to changing circumstances, both legal and factual, in issuing permits pursuant to its National Pollutant Discharge Elimination System (NPDES). Under the statute, NPDES permits are prohibited from allowing a discharge to cause or contribute to violations of water quality standards. The Clean Water Act requires that such water quality standards—the state's formal water quality goals—be reviewed and updated every three years. And, during that triennial review, *any* toxic criteria for which EPA has made new national safety recommendations must be updated.

Likewise, the Clean Water Act requires that permits respond to current knowledge about how water quality in waterbodies stacks up as compared to the water quality standards, an analysis that is contained in the state's 303(d) list of impaired waters. This list is required to be updated every two years. (Oregon does not.) The 303(d) list affects NPDES permits because knowing the pollution status of a waterbody is key to DEQ permit writers' ensuring that a permitted discharge does not cause or contribute to violations of water quality standards.

Finally, the Clean Water Act requires that permits incorporate "wasteload allocations" that are contained within the clean-up plans that are required for waters on the 303(d) list, called Total Maximum Daily Loads (TMDLs). (DEQ referred to these TMDLs as "Clean Water Plans" in its budget presentation.) These TMDLs are to be developed on a regular basis. (Oregon DEQ has failed to finalize any new TMDLs in the last six years.) The TMDLs divide the total allowable amount of pollution for a given waterbody into allowable amounts for each source; federal law requires that these allowable amounts be incorporated into any NPDES permit that DEQ issues.

Northwest Environmental Advocates' Litigation

In a nutshell, Northwest Environmental Advocates' (NWEA) litigation has addressed all of these water quality programs in federal court. NWEA has caused Oregon to update its temperature standards to ensure that they are protective of threatened and endangered cold-water salmon, steelhead, and bull trout; adopt toxic criteria for those fish that are sufficiently protective; and is currently challenging Oregon's temperature TMDLs. This last case involves temperature TMDLs that have had the effect—under a now-court-vacated DEQ rule—of changing Oregon's allowable temperatures to levels that do not protect salmon, including as high as 32º C, a temperature that causes salmon to die *within seconds*. NWEA caused a federal court to throw out a DEQ rule that allowed dischargers to violate water quality standards for miles downstream. NWEA has sought timely EPA actions instead of delay, timely updates to Oregon's 303(d) lists, and put the agencies on a 10-year schedule to complete a portion of Oregon's required TMDLs. (Once that consent decree terminated, DEQ stopped producing TMDLs.)[1] All of these cases were brought against the U.S. Environmental Protection Agency (EPA) and other federal agencies, not DEQ.

This litigation has only had an effect on DEQ's permitting insofar as courts have held that the EPA-approved DEQ actions were inconsistent with the Clean Water Act and/or the Endangered Species Act or that EPA and DEQ collectively failed to take actions that the law requires (e.g.,

[1] NWEA also sought to force DEQ to control nonpoint source pollution in coastal watersheds; DEQ first agreed, and then reneged on its commitments. It is worth noting that without controls on nonpoint sources of pollution, eventually Oregon's industries and municipalities will have to take full responsibility for cleaning up Oregon's rivers and streams.

develop TMDLs). Therefore, had Oregon DEQ not repeatedly attempted to circumvent the requirements of the Clean Water Act in the first place, its water quality program would not have been the subject of these federal lawsuits.

This brings us to the following two points. First, Mr. Whitman told the Joint Committee that individual permittees need certainty on what the law requires and that the constant stream of litigation has created and continues to create uncertainty that has contributed to the backlog because neither DEQ nor the permittees wants permits that might change in the future. However, as Mr. Whitman recounted to the Joint Committee, the recent consultants' report on DEQ's permit backlog found that some DEQ permits do not reflect water quality standards or TMDLs as they are required to do by law, leaving as an open question the degree to which DEQ permitting has, in fact, been hampered by legal constraints.[2] Moreover, Mr. Whitman omitted to point out that those same consultants found that DEQ has a culture of not issuing permits where to do so will require dischargers to install pollution controls.

Second, it is not the litigation that has caused the uncertainty in Oregon; as explained above, Congress built uncertainty into the Clean Water Act—by design—in order to reflect changing scientific information and circumstances. As EPA has said, "[s]tate water quality standards are dynamic in nature and are periodically revised to reflect changes in science and law, which may in turn result in changes to the specific objectives and requirements[.]" And, it is not citizen plaintiffs who have caused the excess of pollution that results in more waters' being listed as impaired, a circumstance that must be factored into permit limits.

Finally, we would like to mention one more of our lawsuits against EPA, pertaining to the use of compliance schedules in permits. In that 2007 case, NWEA sought to improve Oregon's NPDES permitting program by procuring DEQ's agreement[3] that it would obtain up-to-date information before attempting to issue permits, information that is key to timely and legal permitting. The side agreement with DEQ included other provisions pertaining to timely permitting, such as to ensure that the agency would anticipate in advance the kinds of difficulties that both it and

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[2] DEQ's ineptitude or disregard for the law—we are not in a position to know which—has been on display in its issuance of a permit to Clean Water Services (Hillsboro). As the consultants pointed out in their report, EPA raised numerous questions about the draft permit before DEQ issued it as final. On June 20, 2016, NWEA and the Northwest Environmental Defense Center petitioned DEQ for reconsideration of the permit, a request that was granted on August 17, 2016 without explanation. Since that date, seven months ago, DEQ has not been able to explain to us what it believes that it did incorrectly in issuing the final permit.

[3] The agreement was set out in 2010 in an unenforceable side agreement between DEQ and the plaintiffs.

permittees would face in responding to new water quality standards. Of interest to the Joint Committee should be that many of the commitments DEQ made in this 2010 side agreement to improve its permitting program mirror the consultants' findings in their 2016 report on Oregon's permit backlog.

Conclusion

By definition, a state's NPDES program is required to be nimble in its response to changing science and changing water quality information that the Clean Water Act requires be translated into changing water quality standards, updated lists of impaired waters, new TMDL clean-up plans, and new EPA minimum technology requirements . . . all of which must be translated into appropriate permit limits. This is DEQ's real beef: that it is hard to issue NPDES permits when information and regulatory requirements are in a state of constant flux. We do not doubt that the job is difficult, but that is the task set out by the Clean Water Act, which its authors specifically designed to respond to society's changing understanding of the effects of water pollution and our ability to control those effects.

We would be happy to provide any additional information that you might find useful.

Sincerely,

Nina Bell
Executive Director