NORTHWEST ENVIRONMENTAL ADVOCATES

February 13, 2015

Dan Opalski, Director
Office of Water and Watersheds, Region 10
U.S. Environmental Protection Agency
1200 Sixth Ave.
Seattle, WA 98101 *Via email only*: opalski.dan@epa.gov

Re: **Request for Early EPA Involvement in Oregon's Development of Water Quality Trading Rules and Guidance**

Dear Dan:

I am writing on behalf of Northwest Environmental Advocates (NWEA) and the Northwest Environmental Defense Center (NEDC) because of our grave concerns about the significant changes to the water quality permitting program under consideration in Oregon. Given the significant impact the proposed changes to Oregon's program, if implemented, will likely have on our water, and in order to avoid an unnecessary expenditure of resources down the road, we ask that the Environmental Protection Agency (EPA) engage in this process to ensure that any water quality trading regulations are consistent with the Clean Water Act and EPA's implementing regulations.

As you are aware, the Oregon Department of Environmental Quality (DEQ) recently proposed draft regulations to authorize water quality trading as part of its National Pollutant Discharge Elimination System (NPDES) permitting program. While we believe that trading, if properly designed and implemented, may provide an avenue to improved water quality in some instances, the regulations as currently proposed will fall well short of ensuring this outcome. This failure is due, in large part, to the fact that DEQ's proposed draft rules fail to comply with federal regulations, fail to follow EPA guidance, and fail to include the specific, detailed elements necessary to ensure that trading under the new program will move us towards restoring and maintaining water quality. As a result, absent a change in approach from DEQ, EPA must use its authority to avoid the promulgation of inadequate rules that fail to comply with the law and will result in unlawful permits.

DISCUSSION

I. EPA Must Review and Approve the Proposed Regulations and Guidance

EPA must review, and approve or disapprove, DEQ's proposed trading regulations. Without question, EPA is obligated to maintain oversight of Oregon's permit program. 40 C.F.R. pt. 123; *see also* National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Oregon and the United States Environmental Protection Agency Region 10, at 6,

28-29 (April 20, 2010) (hereinafter "MOA"). Pursuant to this authority, EPA must ensure that any revision to Oregon's NPDES permitting program is consistent with federal law. *See* 33 U.S.C. § 1342(c)(2); 40 C.F.R. § 123.62(a). It is the state's duty to inform EPA of any proposed changes to its program, whether the result of a change in state law, or a proposed regulatory change. 40 C.F.R. § 123.62(a). EPA must then review the proposed changes against the requirements of the CWA, sections 301 and 402, and 40 C.F.R. pt. 123. If, in that review, EPA concludes the proposed revisions are substantial, EPA must inform the public of the changes and provide an opportunity for public comment. 40 C.F.R. § 123.62(b)(2). EPA must then act, by approving or disapproving the proposed changes. *Id*. § 123.62(b)(3). Of course, no changes to the state's program are effective until approved by EPA. *Id*. § 123.62(b)(4).

Here, Oregon DEQ is proposing to modify its permitting program substantially. Specifically, pursuant to ORS 468B.555, DEQ is charged with developing and implementing "a pollutant reduction trading program as a means of achieving water quality objectives and standards." To implement this statutory directive, DEQ has begun a rulemaking process, with the goal of promulgating regulations and associated guidance in 2015, which will create a trading program in Oregon. The stated purpose of these regulations "is to establish minimum requirements for pollution reduction trading as a means of achieving water quality objectives and standards in Oregon."

There can be no question that these regulations are not only a modification of Oregon's permitting program, but a substantial one. The shift within the permitting program to the use of trading is necessarily a move away from the certainty and specificity of water quality-based effluent limits, to the speculative and general benefits that may be found by looking for purported ecological improvements throughout a watershed produced by trade-sponsored projects. Indeed, DEQ readily admits that, taking the example of a temperature trade, "[s]ince trades involving riparian shade are expected to result in improved habitat for aquatic and wildlife species, DEQ allows credit for such projects to be based on the amount of solar radiation they are projected to block rather than on the thermal benefit they produce[.]" DEQ, Water Quality Trading in NPDES Permits Internal Management Directive (Dec. 2009, updated Aug. 2012) (hereinafter "IMD") at A-4. Thus, DEQ appears willing to forego adherence to the required water quality based effluent limits while in search of ancillary benefits that merely may benefit designated uses and water quality. The risk of this approach is that the assumptions underlying the trade will turn out be incorrect and the purported benefits of the trade will never materialize. The promulgation of regulations imposing this risk on Oregon's waters is a substantial change to Oregon's current, previously approved, NPDES permitting program.

As a result, EPA must review this proposed change, and must affirmatively approve or disapprove any change to DEQ's regulations. Such action is mandated by EPA's own regulation, the MOA, and is in fact called for by Oregon's authorizing statute. ORS 468B.555(5) ("The department shall seek any approvals, waivers or authorizations from the United States Environmental Protection Agency necessary to implement the program"). To date, however, EPA's role in this process, and the timing and nature of its review of this program revision, have been left unclear. Notably, the required EPA review was conspicuously absent from DEQ's proposed project calendar. A failure by DEQ to submit this revision to EPA would of course be a violation of 40 C.F.R. § 123.62(b)(1), and the MOA, section 3.01(3). EPA cannot allow this to occur. Rather, EPA must use its authority under 40 C.F.R. §§ 123.62(a) and/or (d), to review this program revision.

Given our concerns, discussed immediately below, that the content of the proposed rules is inconsistent with the applicable law, we urge EPA's early involvement in the development of these rules. Otherwise, as has happened with Oregon DEQ's previous ill-conceived ideas—the Alternative Mixing Zone rule and human health water quality criteria for arsenic that ignored fish consumption come to mind— a lot of time will be invested that will have been for naught.

II. The Proposed Regulations are Inconsistent with the Clean Water Act, Federal Regulations, and EPA Guidance

While EPA must review, and approve or disapprove, the proposed regulations in any case, the substantial deviation of federal regulations that will result under the regulatory structure currently envisioned by DEQ underscores the need for EPA involvement. Simply put, the proposed regulations are inconsistent with federal law and if implemented as written will likely result in unlawful permits that fail to protect Oregon's waters. For these reasons, EPA must intervene in this process to either work with DEQ to develop a lawful trading program or to disapprove the proposed regulatory changes down the road.

Given that DEQ is only in the very early stages of building its proposed rules, an in-depth critique of the proposed trading regulations may be premature. However, we believe the information DEQ has put forth to date, and the process it has used to convey that information to the public, reveal the flawed foundation upon which the agency hopes to build its rule. If left uncorrected, these flaws will certainly doom the program.

For example, the proposed regulations fail to ensure compliance with the basic premise that water quality-based effluent limitations in NPDES permits must conform to the assumptions and requirements of a Total Maximum Daily Load (TMDL). 40 C.F.R. § 122.44(d)(1)(vii)(B). EPA's trading policy acknowledges that this provision must be met in a permit that allows water quality trades. EPA, Water Quality Trading Policy Statement (hereinafter "2003 Trading Policy") 5 (January 13, 2003). Despite this clear regulatory language, and additional guidance from EPA, DEQ seems to go out of its way to avoid complying with this federal regulation. Indeed, that the proposed trading rules will fail to capture this important regulatory constraint is obvious from the outset, as the stated purpose of those rules fails to mention the implementation of or conformance with TMDLs.

Moreover, the proposed regulations, when defining the "baseline" above which trading credits may be generated, scrupulously avoid referring to the assumptions and requirements of a TMDL. Instead, the proposed rules refer to other agencies' rules and plans, none of which have a direct bearing on the legal requirements that are associated with issuing an NPDES permit. The trading rules, at proposed OAR 340-xxx-0030, demonstrate that DEQ both intends to ignore TMDLs in establishing appropriate baselines and to suggest that the distinction between EPA-approved TMDLs and various informal plans that purport to implement the TMDLs can be blurred in order to cover for that omission. *See also* IMD at 20 (baselines for nonpoint sources are the "[p]rovisions for the TMDL Implementation Plans for designated management agencies.").

In addition to these facial defects in the proposed rules, Oregon's prior history with water quality trades demonstrates that the proposed regulations will not work to comply with the law in practice. It is clear that DEQ is attempting to codify its prior practices—in particular the trade allowed in the City of Medford permit—in these trading rules. Unfortunately for DEQ, as we

have detailed in previous comments to EPA and DEQ, this approach will not meet the requirements of the law nor sufficiently benefit water quality. *See* 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) ("2013 NWEA Letter to EPA") (attached); Comment, NWEA and NEDC to DEQ, Re: Proposed Modification of City of Wilsonville Water Quality NPDES Permit, File #97952 (Sept. 27, 2013) (attached); and Letter from Nina Bell, NWEA, to Dan Opalski, EPA, Re: Request to Review Oregon's Water Quality Credit Trading Program in Light of Continuing Weaknesses (July 17, 2014) (attached). DEQ's failure to comply with federal regulations, combined with the lack of specificity in actual trades and lack of clarity on appropriate goals have led to the predictably poor results we have seen to date. There is very little in the proposed regulatory structure that suggests the outcomes will be different if these rules are promulgated as drafted.

For example, as we have discussed in previous comments, trading ratios are a mechanism that EPA has endorsed for addressing the uncertainty associated with trades between point and nonpoint sources. *See, e.g.*, EPA, Water Quality Trading Policy (Jan. 13, 2003) 9 ("2003 EPA Trading Policy"). EPA states, "the basic categories of trading ratios are delivery, location, equivalency, retirement, and uncertainty." EPA, Water Quality Trading Toolkit for Permit Writers) 43 (August 2007, updated June 2009) (emphasis omitted). The uncertainties for nonpoint sources to which EPA refers include lack of knowledge about precisely how successful the nonpoint source controls will be, the time lag between implementation of some practices and full performance, the location of the pollution controls vis- à-vis the discharge, the uncertainty about when pollution reductions will be achieved, the pollution control effect of the baseline, etc. While DEQ tacitly acknowledges the need to address these types of uncertainties with the use of ratios, both in the new proposed rule and the existing IMD, in practice it has failed to do so as we have pointed out previously. Given that the proposed regulation provides no standards for the proper use of ratios in a permit that allows for trading, there is no reason to believe this is a shift from the status quo.

Similarly, DEQ's proposed regulations, while authorizing the use of compliance schedules to implement trades, fail to provide the specificity necessary to ensure the permits using such schedules will be lawful. In order to be consistent with the statute and its implementing regulations, EPA has stated that every compliance schedule must be an "enforceable sequence of actions or operations leading to compliance with a [water quality based] effluent limitation." Memorandum from James A. Hanlon, Director, Office of Wastewater Management, to Alexis Strauss, Director, Water Division, EPA Region 9, Compliance Schedules for Water Quality-Based Effluent Limitations in NPDES Permits (May 10, 2007); *see* 33 U.S.C. 1362; 40 C.F.R. § 122.2. However, as we have seen before, DEQ has written permits that do not meet this standard. *See* 2013 NWEA Letter to EPA, at 7-8. The proposed regulation, in turn, fails to provide the structure necessary to ensure the resulting permits contain lawful schedules. Absent clear regulatory language guiding the construction of the permits, there can be no assurances that DEQ will not repeat this mistake.

These are merely a few examples of the myriad concerns raised by DEQ's proposed trading regulations. They are indicators of program that has been hastily cobbled together, where the serious work of ensuring that NPDES permits comply with the law and provide protection for Oregon's waters have been left for another day.

CONCLUSION

Oregon has set the process for developing a water quality trading program in motion. It has come time for EPA, in its words, to "use its oversight authorities to ensure that trades and trading programs are fully consistent with the CWA and its implementing regulations." EPA Trading Policy at 11. We believe EPA's early in this process is thus both mandatory, and necessary to ensure Oregon develops a lawful, effective trading program.

If you would like to discuss this matter please feel free to contact Andrew Hawley at NEDC (503/768-6673) or me.

Sincerely,

Nina Bell
Executive Director

Attachments: 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)

Comment, NWEA and NEDC to DEQ, Re: Proposed Modification of City of Wilsonville Water Quality NPDES Permit, File #97952 (Sept. 27, 2013)

Letter from Nina Bell, NWEA, to Dan Opalski, EPA, Re: Request to Review Oregon's Water Quality Credit Trading Program in Light of Continuing Weaknesses (July 17, 2014)

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