NORTHWEST ENVIRONMENTAL ADVOCATES

February 17, 2012

Greg Geist
Northwest Region
Department of Environmental Quality
2020 S.W. Fourth Ave. Suite 400
Portland, OR 97201
Geist.Gregory@deq.or.state.us

Jim Graybill, Lake Manager
Fairview Lake Management Committee
Fairview Lake Property Owners Association
21130 N.E. Interlachen Lane
Fairview, OR 97204
jgmudlk@msn.com

Re: **Application for Coverage Under General Permit NPDES No. 2300A by Fairview Lake Property Owners Association; Proposed Use of Fluridone on Fairview Lake and Upper Slough**

Dear Mr. Geist and Mr. Graybill:

Northwest Environmental Advocates (NWEA) has long been concerned about water quality in the Columbia Slough and its associated lakes and wetlands. We are writing to raise concerns related to the pending or imminent application by the Fairview Lake Property Owners Association (hereinafter "Lake Association"), or its contractors, (hereinafter collectively "Applicant") for coverage under the General NPDES Permit No. 2300A to apply the herbicide fluridone to Fairview Lake (hereinafter "Lake") and connected waterbodies (hereinafter collectively "Slough").

For the reasons discussed below, NWEA does not believe that the Applicant will be able to meet the terms of the permit under which it seeks coverage. Specifically, 2300A Schedule A's discharge limitations include the following restriction: "[1.a.] The discharge must not cause or contribute to the violation of water quality standards." As demonstrated below, the discharge of fluridone into Fairview Lake and the Upper Slough will cause or contribute to violations of water quality standards and is therefore prohibited. However, it appears, from conversations with DEQ staff, that the agency does not review the Notices of Intent (NOI) submitted by applicants for coverage under the state's general permits. For this reason, prior to explaining our substantive concerns, we discuss in this letter DEQ's role in issuing permit coverage to the Applicant.

I. The Department's Role in Issuing Coverage Under a General Permit and Public Participation Requirements

As we discuss below, federal regulations address the issuance of a permit that might or will cause or contribute to violations of water quality standards. One such is 40 C.F.R. § 122.4(i). Section 122.4 begins with the language "[n]o permit may be issued[.]" The other section we discuss below is 40 C.F.R. § 122.44(d). Section 122.44 begins with the language "each NPDES permit shall include conditions meeting the following requirements when applicable." It is clear from these EPA regulations that the burden of ensuring that an applicant or permittee will comply with state and federal requirements is initially – at the point of issuance – on the Department itself. DEQ cannot shift that burden to an applicant by simply hoping that a proposed discharge falls within the terms and conditions of a general permit.

Moreover, in the Ninth Circuit, a NOI, such as has been or will be submitted by the Applicant in this case, is equivalent to an application for an NPDES permit and is thus subject to the same public availability and public hearing requirements as a permit. In *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003), the Ninth Circuit found that NOIs are the functional equivalents of NPDES permit applications when an NOI "crosses the threshold from being an item of procedural correspondence to being a substantive component of a regulatory regime." *Id*. at 853. Specifically, the NOIs in that case involved dischargers' having to demonstrate what they would do to reduce discharges to the "maximum extent practicable." *Id*. Here, Section E of the 2300A NOI requires an applicant to submit a Pesticide Discharge Management Plan consistent with requirements set out in the 2300A permit. *See* NOI available at: http://www.deq.state.or.us/wq/wqpermit/docs/general/npdes2300a/2300A.pdf. Schedule A of the permit requires that the operator[1] "select and implement, for each pest management area, efficient and effective means that minimize discharges resulting from application of pesticides by implementing Pest Management Measures at a more intensive level [presumably than has been used to date] to **identify the problem, evaluate pest management options** and **minimize pesticide use**." 2300A Schedule A.6 (emphasis in original). The permit goes on to enumerate and describe numerous issues to be discussed in the required Plan including the need to "minimize discharges resulting from application of pesticides" by such means as evaluating options other than use of pesticides and "reduc[ing] the impact on the environment and non-target organisms by evaluating site restrictions, application timing, and application method in addition to applying the pesticide only when the action threshold has been met." *Id*. The 2300A limits and Plans that require an applicant to "minimize discharges" of pesticides are the same as the NOIs the Ninth Circuit found were the functional equivalents of NPDES permit applications in *EDC v. EPA* because "it is the NOIs, and not the general permits, that contain the substantive information about how the operator of a small MS4 will reduce discharges to the maximum extent practicable." *EDC* at 856. Such effluent limits are subject to public scrutiny and participation. Accordingly, permit application materials, including the Plan, must be made public and DEQ must provide an opportunity for public participation in the permitting process to operators covered under 2300A.

II. The Columbia Slough

The entire Columbia Slough is water quality limited (WQL) for numerous parameters and pollutants. In 1998, DEQ completed a Total Maximum Daily Load (TMDL) for a large number of pollutants. Columbia Slough Total Maximum Daily Loads (TMDLs) For: Chlorophyll a, Dissolved Oxygen, pH, Phosphorus, Bacteria, DDE/DDT, PCBs, Pb, Dieldrin and 2,3,7,8 TCDD, September 1998, available at: http://www.deq.state.or.us/WQ/TMDLs/docs/willamettebasin/columbiaslough/tmdl.pdf. According to the TMDL, the Upper Slough, Reach 3, "receives considerably less groundwater than the Middle Slough." *Id*. at 5. Put another way, the Upper Slough is highly dependent upon the flow from Fairview Lake. And, as stated by the TMDL, "[p]otential sources of pollutants include sediments, groundwater, storm water, industrial discharges and water from Reach 4 [Fairview Lake]," making the Lake a source of pollutants for the Upper and Lower Slough. For this reason, DEQ cannot evaluate only the impact of the discharge on the Lake itself but must also evaluate its impacts on downstream waters, namely the entirety of the Columbia Slough and its wetlands.

---

[1] The Lake Association is an "operator" for purposes of this permit, according to the permit's definitions.

III. Impact of Proposed Discharge on Dissolved Oxygen of the Slough

The proposed discharge of fluridone is intended to kill rooted aquatic plants. The proposed discharge is aimed at eradicating *Elodea canadensis*, also known as native American waterweed, a perennial submerged macrophyte native to North America. The rooted aquatic plants are growing in Fairview Lake because of several converging factors. First, there are ongoing sources of nutrients which stimulate the growth of aquatic plants. The sources of these nutrients are, among others, groundwater (contaminated by former cesspools) and, likely, fertilizer running off residential properties. Second, the water has become unnaturally clear due to human actions. People have killed the carp that formerly stirred up sediments on the bottom of the lake. *See*, *e.g.*, Fairview Lake Monitoring Report, January 2009 at 1, available at http://fairview-lake.org/files/FairviewReport_2008.pdf (hereinafter "2009 Report")("The carp population decreased due to excessive fish extraction. As a result, sediment suspension has receded and the water cleared up. These conditions increased light penetration of the water and allowed the establishment of rooted aquatic plants."). In fact, the authors of the 2009 Report specifically recommend that the Lake Association petition the Oregon Department of Fish and Wildlife for a catch-and-release requirement to preserve the role of carp in the lake. (There is no evidence that the Association took such steps.) In addition, sediment controls have reduced the input of sediment into the lake. These and other human activities have stimulated excessive plant growth in the lake.

The targeted macrophytes in Fairview Lake contribute to dissolved oxygen levels in the water, during the day, through the process of photosynthesis. Conversely, when these plants die or are killed, aerobic microorganisms (bacteria and fungi) feed upon them, thereby removing dissolved oxygen from the water. The effect of this source of biological oxygen demand (BOD) on dissolved oxygen (DO) levels will be greater as temperatures rise, making the seasonality of the proposed discharge relevant to its water quality impacts on the Lake and the Slough. On one hand, the BOD inputs from the proposed discharge will have a greater adverse impact during the summer months precisely because of temperatures, while on the other hand, the BOD inputs will combine with other adverse influences on DO during the winter months to cause additional problems during that season.

The Columbia Slough, including but not limited to Reach 3, the Upper Slough, and Reach 4, Fairview Lake, is listed by DEQ as WQL for DO. The TMDL states that it is WQL for DO for "cool water aquatic life" on an "annual" basis. Oddly, the "uses affected" noted by the TMDL include "[s]almonid fish rearing" which would include cold, not cool, water species. The Slough, however, is no longer designated for "Cool-Water Aquatic Life" which includes "aquatic organisms that are physiologically restricted to cool waters, including but not limited to native sturgeon, Pacific lamprey, suckers, chub, sculpins, and certain species of cyprinids (minnows)." OAR 340-041-0002(12). Instead, DEQ's most recent use designation for the Columbia Slough is for the "Salmon & Trout Rearing and Migration" use. *See* OAR 340-041-0002(53)("Salmon and Trout Rearing and Migration Use" means thermally suitable rearing habitat for salmon, steelhead, rainbow trout, and cutthroat trout as designated on subbasin maps set out at OAR 340-041-0101 to 340-041-0340: Figures . . . 340A."); OAR 340-041-0340, Figure 340A: Fish Use Designations, Willamette Basin, Oregon. As a result, the DO criterion that applies to the Slough is not the Cool Water criterion of 6.5 mg/L (30-day mean minimum) but rather the Cold

Water criterion of 8.0 mg/L.[2]

The TMDL was based on achieving a numeric criterion of 6.5 mg/L of DO, in line with the criteria that applied to the Cool Water Species designated use at the time. TMDL at 8. Given that the designated use has changed, and therefore the applicable DO criteria have changed, the TMDL loading capacity and allocations are no longer biologically conservative as required by the Clean Water Act (CWA). Specifically, the CWA requires that there be a "margin of safety which takes into account any lack of knowledge concerned the relationship of effluent limitations and water quality." CWA § 303(d)(1)(C). Therefore, any conceivable implied reserve capacity in the TMDL – and we do not believe there are any – is not available for a newly-permitted NPDES source because the margin of safety in the existing TMDL does not address the numeric DO criteria that actually apply to the Slough. In addition, the TMDL specifically found that the outlet of the Lake into Reach 3 "showed frequent and long term oxygen depressions in the summer." This outlet area is immediately downstream of the waterbody into which the applicant proposes to discharge and will be affected by the discharge. These frequent and long-term oxygen depressions are also directly linked to the Lake Association's own actions in maintaining the water level of the Lake as high as possible in the summer, thereby reducing the flow to the Upper Slough and increasing its stagnance. *Id*. at 20. The proposed discharge will result in an increased BOD load that will, in turn, reduce DO levels in the Slough or will maintain them at levels that violate applicable criteria.

The TMDL notes that the "dissolved oxygen criterion violations may prevent the Slough from supporting salmonid fish rearing as well as resident fish and aquatic life." *Id*. at 4. The TMDL found that DO violations existed "throughout the Slough." *Id*. at 8. However, DEQ concluded that summer violations of DO were related to algal processes addressed in the eutrophication section of the TMDL, and for this reason issued load allocations for BOD that are applicable only to the months of November through March. *Id*. at 9-10. It is, however, unclear whether the effects of the proposed activity will effect either the BOD or DO levels in the Slough during those months. For example, it appears that the Applicant intends to discharge in September. *See* http://www.fairview-lake.org/files/minutes-fall-2011.pdf. To the extent that the discharge may affect DO levels in November through March by further reducing DO levels or maintaining DO at current impaired levels, the activity is prohibited because the TMDL states, with regard to new discharges, of which this application would be one, that "[f]uture growth and development will either have to demonstrate that adequate reserve capacity exists in the TMDL or trade effluent with the City of Portland, PDX or other DMA." *Id*. at 16. In other words, there is no reserve capacity allocated in the TMDL for any new permitted source of BOD. Moreover, there is no evidence that DO levels are now meeting water quality standards such that there is reserve capacity for new BOD sources.

To the extent that the new source of BOD is to the Slough in the months of April through October, the discharge is also prohibited. First, as explained above, the TMDL has not targeted the correct and currently applicable criterion so there is no evidence that there is reserve capacity for an addition permitted source in the non-winter months. Second, the discharge will result in

---

[2] Additional criteria apply such as the 7-day minimum mean and the absolute minimums. See OAR 340-041-0016(2)&(3) and Table 21, Dissolved Oxygen and Intergravel Dissolved Oxygen Criteria. Available at: http://www.deq.state.or.us/wq/rules/div041/table21.pdf.

increases in BOD which will reduce DO or maintain it at current impaired levels. EPA regulations, consistent with section 301(b)(1)(C) of the CWA, prohibit such a "new source or new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards." 40 C.F.R. § 122.4(i). The only exception to this prohibition exists where there is a TMDL in place but only if the new source or new discharger demonstrates

> before the close of the comment period, that:
>
> (1) There are sufficient remaining pollutant load allocations to allow for the discharge; and
> (2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with the applicable water quality standards.

40 C.F.R. § 122.4(i). In *Friends of Pinto Creek v. U.S. E.P.A.*, 504 F.3d 1007 (9th Cir. 2007), *cert. denied*, 129 S. Ct. 896 (2009), the Ninth Circuit Court of Appeals held that without a plan to achieve water quality standards, a permitting agency cannot allow new discharges that will exacerbate the existing water quality standards violations. The court held that all existing dischargers must be subject to compliance schedules, *id*. at 1012-13, and that "[i]f there are no adequate point sources to do so, then a permit cannot be issued unless the state or the [discharge permit applicant] agrees to establish a schedule to limit pollution from a nonpoint source or sources sufficient to achieve water quality standards." *Id*. at 1014. In other words, a TMDL is a necessary condition for a source to use the exception provided in EPA rules to the general prohibition on new sources into impaired waters but a TMDL by itself is not sufficient. Reduction from sources – whether point or nonpoint – under compliance schedules is also necessary.

Here, the applicant cannot have demonstrated anything before the close of the comment period because DEQ has not provided a comment period for general permit applications and because the applicant did not comment during the comment period for the issuance of General Permit NPDES No. 2300A. Moreover, the TMDL does not demonstrate that there are remaining allocations, i.e., a reserve capacity, to accommodate the discharge because the TMDL does not include a reserve capacity and because the TMDL loading capacity and allocations are set to meet less protective criteria than are currently applicable to the waterbody. Likewise, for the non-winter months for which DEQ issued no load allocations for DO, there is no longer any margin of safety given the changes in applicable criteria and therefore there is also no reserve capacity. The same limitation applies to the applicant's ability to demonstrate that it has met the terms of 40 C.F.R. § 122.4(i)(2) because this TMDL does not, in fact, aim to bring the impaired segments into compliance with the "applicable water quality standards" and therefore no existing dischargers can be deemed to be either in compliance or subject to compliance schedules to achieve that end.

To the extent that the Applicant or DEQ believes that conditions can be placed on the discharge to ensure compliance with water quality standards, a permit may be issued. 40 C.F.R. § 122.4(d). However, if such conditions are not in the 2300A permit, the Applicant cannot obtain coverage under a general permit. DEQ may not merely rely on the permit's statement that it does not allow discharges that will cause or contribute to violations of water quality standards because it is the Department's obligation to only issue permits that will comply with the Clean Water Act. 40

C.F.R. § 122.4(a). Likewise, DEQ may not issue a permit if it does not contain the requirements necessary to "[a]chieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality." 40 C.F.R. § 122.44(d). A permit is required to contain limitations to "control all pollutants or pollutant parameters ... [which] 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." 40 C.F.R. § 122.44(d)(i)(emphasis added, as the discharge proposed and the standard affected need not be identical). In an instance such as this one, where the discharge is proposed into a WQL waterbody, the discharge will cause or contribute to violations of water quality standards. Therefore, to allow this proposed discharge, DEQ would be obligated to issue a permit with effluent limitations to prevent such an outcome – which in any event is prohibited by 122.4(i) – taking into consideration the lack of existing controls on other pollution sources, both point and nonpoint. 40 C.F.R. 122.44(d)(ii) & (iii). As it cannot issue such a permit, it is prohibited from allowing the discharge.

IV. Impact of the Proposed Discharge on pH and Nutrients

The TMDL also addresses the WQL status of the Slough with regard to pH and nutrients. The water quality criteria for pH addressed by the TMDL is for values to remain within the following range: 6.5 - 8.5. The TMDL concludes that values above 8.5 have occurred in the Slough from Spring to Fall. TMDL at 17. The discussion below regarding nutrients applies to pH. For example, nutrients are released by decomposing macrophytes, which leads to subsequent phytoplankton blooms. Such phytoplankton blooms consume carbon dioxide, raising pH levels. *See, e.g.*, .Conceptual Model of Aquatic Plant Decay and Ammonia Toxicity for Shallow Lakes, Farnsworth-Lee et al., available at: http://larrybakerlab.cfans.umn.edu/wp-content/uploads/farnsworth-ammonia-toxicity.pdf. High nutrient levels leading to increased aquatic plant growth frequently increase pH levels, which are already impaired in the Slough, which in turn may influence the availability and solubility of nutrients.

Total phosphorus concentrations greater than a guideline of 0.1 mg/L occur throughout the Slough at all times of year. *Id*. The 2009 Report confirms these findings with regard to the Lake: "Total phosphorus concentration in Fairview Lake ranged from 0.16 mg/L to 0.68 mg/L." Report at 12. The TMDL states that Reaches 1 and 2 have "frequent exceedance" of the dissolved orthophosphate guideline but is silent on the degree, if any, of exceedances in other Slough reaches and what the guideline is that DEQ uses. For this reason, we are unable to draw any conclusions as to the relevance of the 2009 Report's finding that "[i]n Fairview Lake, Soluble Reactive Phosphorous (orthophosphate) ranged from 0.002 mg/L to 0.29 mg/L." Report at 13. Likewise, the TMDL concludes that there are exceedances of the unstated nitrate guideline throughout the Slough at all times of year. TMDL at 17. As with orthophosphate, we are unable to assess the relevance of the 2009 Report's findings that "total nitrogen concentration ranged from 1.0 mg /L to 4.9 mg /L." Report at 13. The Report's authors, however, observe that "total phosphorous and total nitrogen concentration in Fairview Lake indicated the lake is [a] hypereutrophic lake," leaving little doubt that nitrogen concentrations are above the guidelines used by DEQ.

According to the TMDL, the Upper Slough is impaired by excessive dissolved orthophosphate from groundwater and the Lower Slough is impaired primarily from the water coming from the Upper Slough. TMDL at 22. DEQ also observed that rooted aquatic vegetation growing in the Upper Slough has resulted in a "significant loss of nutrients supplied by groundwater." *Id*. ("The

loss appears associated with greater settling of solids and uptake by epiphytes associated with the macrophytes."). The corollary to this observation would be that removal of the rooted aquatic vegetation, by the proposed discharge, would result in release of these nutrients back into the water along with the loss of a process by which the nutrients are removed from the water. *See, e.g.,* Aquatic Weed Decay: Dissolved Oxygen Utilization and Nitrogen and Phosphorus Regeneration, William J. Jewell, Journal (Water Pollution Control Federation), Vol. 43, No. 7 (Jul., 1971), pp. 1457-1467, available at: http://www.jstor.org/pss/25037124 ("At the end of the growing season, or when the weeds are killed, their decomposition may exert heavy demands on the oxygen resources of water. In addition, large quantities of nutrients may be released from this decaying mass."). In this way, the proposed discharge will cause or contribute to the violations of water quality standards for nutrients that have been observed throughout the Slough, including Fairview Lake and the Upper Slough. Specifically, the TMDL divides the loading capacity for total phosphates between groundwater, stormwater, a single NPDES source, the required margin of safety, and "the loss due to macrophytes." *Id*. at 23. The discharge proposed by the Applicant will result in the removal of the load allocation made to the macrophytes because it proposes to remove the macrophytes. The result is a loss of whatever reserve capacity may remain (we think there is none), a required shift to the remaining sources to increase their reductions, and/or a smaller margin of safety. In fact, it appears there was a "remaining loading capacity" that was set aside as a numeric margin of safety. As it was not set aside for new sources, and the margin of safety is required by statute, it is not availble for new sources. Moreover, the TMDL underscores this point by stating that "a [wasteload allocation] of zero for new point source loads of PO_4 is established." *Id*. at 24. While the applicant does not propose to discharge a new point source load of PO_4 it does propose to increase PO_4 through its discharge. It is prohibited from doing so by the TMDL's wasteload allocation of zero for such increases.

In addition, as explained with regard to dissolved oxygen above, EPA regulations prohibit a new source to cause or contribute to violations of water quality standards. 40 C.F.R. § 122.4(i). With regard to nutrients, there is no demonstration that there are sufficient remaining pollutant load allocations to allow for the discharge because, in fact, the activity itself will reduce whatever remaining allocations might exist – and none are in evidence in the TMDL. Moreover, there is no indication that water quality has improved due to the TMDL and therefore it is impossible to demonstrate that existing dischargers are subject to compliance schedules designed to bring the segment into compliance with the applicable water quality standards. In fact, the most recent data collected, published in the 2009 Report, indicate that water quality has not improved and may have declined since the TMDL was developed and approved by EPA. That is indication enough that no remaining capacity exists in the Columbia Slough and Fairview Lake for the proposed discharge.

V. Impact of the Proposed Discharge on Nearby Agricultural Lands and Wetlands

Immediately adjacent to the outlet of Fairview Lake is a dam, under which water from the Lake flows through toe drains to relieve pressure on the dam. These drains flow into wetlands, mitigation wetlands, and canals. Specifically, there are canals between the dams and the fields of the adjacent Cereghino farm on the west and there is an additional canal that runs out into the fields in the center. In the spring, lake managers close the dam control structure at the mouth of the Slough to impound water in the Lake and raise the lake level for recreational and aesthetic purposes (for those who prefer open water to wetlands). Lake water levels also rise during winter storm events. When the water level of the Lake rises it causes the level of water flowing under the dam and into the canals and fields to rise. As a result, as late in the calendar year as

June, parts of the agricultural fields flood due to surface water and filling of the unconfined upper aquifer, which itself is tied to the Slough. (Both Blue and Fairview Lakes are charge and recharge areas for the City of Portland and Interlachen well fields.) As a result of field flooding in June, newly seeded crops would be in serious risk of exposure from fluridone on the eastern edge of the Cereghino fields, especially in the center and southeastern areas. According to the application label for fluridone,

> If the concentrations of fluridone are greater than 5 ppb, tobacco, tomatoes, peppers or other plants within the *Solanaceae* Family and newly seeded crops or newly seeded grasses such as over-seeded golf course greens should NOT be irrigated with [fluridone]-treated water. Rotation Crops: Do not plant members of the *Solanaceae* family on land that has been previously irrigated with water containing more than 5 ppb of fluridone. Consult an aquatic specialist prior to commencing irrigation of such sites.

See, e.g., Whitecap SC Aquatic Herbicide Specimen Label, available at: http://www.fluridone.com/documents/whitecap-fluridone-label-instructions.pdf. For newly seeded crops, an assay is required before determining the number of days to wait before irrigating with fluridone-treated water. *Id*. For the Cereghino fields, where the Lake water rises on the land, the irrigation is a function of the rising water, not an intentional decision, so there will be no waiting period consistent with the label. While we are aware that the Lake Association has made arrangements to pay the electrical bills for the Cereghino Farm so that it can use groundwater, not surface water, on its fields while they are contaminated with fluridone, it is not clear that anybody has considered the uncontrolled field water and its effects on newly-seeded crops, which are likely to have been planted in June. It is not clear that Cereghino Farms is aware that it will have to conduct assays to ensure that the flooding in its fields has not exceeded the levels allowed on the fluridone label.

Moreover, fluridone has varying effects on aquatic plant life, from killing certain species, to "partially controlling" some, to having no effect on others. The natural and mitigation wetlands adjacent and connected to the Lake and the Slough contain wetlands plants that may be at risk of being damaged or killed through the application of fluridone. The destruction of wetlands values through an NPDES permitted source is a violation of Tier I of the antidegradation policy which requires the maintenance and protection of existing uses – that is, any use that has been in place since November 28, 1975 – and the level of water quality necessary to protect the existing uses. 40 C.F. R. § 131.12(a)(1). Granting the application to discharge an herbicide that would harm the existing wetlands plants, if fluridone would have that effect on the plants that are in those wetlands, would be inconsistent with the antidegradation policy and therefore constitute a discharge that causes or contributes to violations of water quality standards and is, therefore, prohibited. CWA § 301(b)(1)(C). Unless the Applicant can demonstrate that proposed discharge will not harm the wetland plants, DEQ must decline to issue the permit.

Conclusion

As we noted at the outset of our comments, it is DEQ's obligation under federal regulations to issue a permit that is consistent with the Clean Water Act and implementing regulations. In doing so, it must place protection of the existing and designated beneficial uses at the forefront of its analysis and regulatory actions. At its heart, this application for coverage under the 2300A permit pits the designated uses of Fish & Aquatic Life, as well as Wildlife and Irrigation, against

the designated use of Boating. It also pits differing views of individuals who live around the Lake as to its Aesthetic Quality, a designated use that DEQ cannot weigh because of its entirely subjective nature. *See* OAR 340-041-0340 Table 340A. Federal regulations give guidance to the Department in weighing one set of designated uses against another by requiring states "[f]or waters with multiple use designations, [to adopt] criteria [that] shall support the most sensitive use." 40 C.F.R. § 131.11(a). Similarly, in designating uses for waterbodies, states are required to consider the impact of use designations on downstream waters and "shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters." 40 C.F.R. § 131.10(b). DEQ is obligated to provide protection to the most sensitive uses – that is, aquatic and aquatic-dependent species such as migratory waterfowl – over the desire of residents to float party barges on the Lake and to engage in other forms of boating. It is its obligation under the CWA to provide protection for species and human health over the impairment of a recreational activity (and conflicting aesthetic concerns) that were caused by the actions of people, including area residents. There is no evidence that the Applicant has attempted to control the water quality conditions – whether through fertilizer ordinances, restrictions on the killing of carp, or any other means – that have led to a native aquatic plant's having grown uncontrolled in the Lake. Finally, DEQ is obligated to consider that the state of the Lake at present supports a wide range of migratory birds and waterfowl, species that have been hard hit by many adverse circumstances including loss of habitat such as the massive loss of wetlands habitat along the Lower Columbia River, including the area now occupied by the Columbia Slough.

In closing, we urge DEQ to deny the application for the proposed Lake Association discharge. If, instead, DEQ decides to issue the permit, we urge you to disclose the application and Plan to the public and to offer the opportunity for public comment.

Sincerely,

Nina Bell
Executive Director

cc: Mike Johnson, President, Fairview Lake Property Owners Association
Dave Hendrick, Manager, Multnomah County Drainage District
Jane VanDyke, Executive Director, Columbia Slough Watershed Council
Steve Fancher, City of Gresham
Allan Berry, City of Fairview
Kathleen Brennan-Hunter, Director, METRO Natural Areas Program
Todd Alsbury, District Fisheries Biologist, Oregon Department of Fish &Wildlife
Anna Buckley, Acting Director, Wetlands Program, Division of State Lands
Rebecca Geisen, Senior Planner, Columbia Southshore Wellhead Protection, Portland Water Bureau
Mike Lidgard, Manager, NPDES Permits Unit, U.S. Environmental Protection Agency Region X
Paul Henson, U.S. Fish & Wildlife Service
Michael Cereghino, Cereghino Farms
Esther Lev, Executive Director, Wetlands Conservancy
Steve Pribyl, State Habitat Chair, Oregon Ducks Unlimited
Bob Sallinger, Conservation Director, Audubon Society of Portland