February 10, 2010

To: Oregon DEQ
From: Nina Bell, NWEA
Re: **Proposed Method of Addressing Non-Point Source Requirements of 40 C.F.R. § 131.10(h)(2) When Considering Variance Requests.**

EPA interprets its ability to issue variances to individual sources of pollution for individual pollutants as covered under its regulations governing designated use removal.[1] These federal regulations prohibit the removal of a designated use if, among other considerations, "[s]uch uses will be attained by implementing effluent limits required under sections 301(b) and 306 of the Act and by implementing cost-effective and reasonable best managmenet practices for nonpiont source control." 40 C.F.R. § 131.10(h)(2).

In order to meet this finding of future attainability ("will be attained by implementing . . . best management practices"), DEQ should adopt the following procedure, which assumes that variances will only be sought from sources discharging into water quality limited streams:

Pollutants for which variances are being sought. While variances may be sought for pollutants for which BMPs have not specifically been developed, for which DEQ has inadequate data, and for which TMDLs have not yet been done, DEQ can use professional judgment in linking nonpoint source controls and pollutants where TMDLs have been completed and based on the development of new prescriptive TMDLs. As DEQ staff has noted numerous times, while there are some differences (e.g., rates and locations of pesticide and fertilizer applications), controlling one pollutant or parameter from nonpoint source is largely the same as controlling another.

---

[1] EPA has stated repeatedly that variances are subject to the "same substantive and procedural requirements as removing a designated use." (WQS Handbook 1993 at 5.3; Economic Guidance for WQS 1995 at 1-3; CSO 2001 Guidance at 34.) The (h)(2) provision applies to issuance of a variance as a temporary removal of designated uses governed by the same EPA regulations. (WQS ANPRM 1998 at 36760.) EPA echoes this view with regard to evaluating the economic impacts of issuing variances; those impacts include both treatment beyond that required by technology-based regulations for NPDES sources as well as BMPs to nonpoint sources. (Economic Guidance at 1-1.) While Oregon is not required to have enforceable controls on nonpoint sources, where it does have such controls, they must be implemented as part of the Tier II protections. (Interpretation of Federal Antidegradation Regulatory Requirement 1994 at 2.) The same requirement applies to removing designated uses through the provisions of 40 CFR §131.10.

In the GLI this requirement was interpreted to mean that BMPs must be implemented (1) *by the discharger (2) before* a variance is granted, two requirements that are specific to the GLI regulation (GLI Pt. 132, App F, Procedure 2 §A.3.) In contrast, the national regulations are consistent with, and identical to, the Tier II antidegradation protection language which applies to nonpoint sources outside the control of any individual point sources. (Interpretation at 2.) In contrast to the GLI, the national regulations allow for a finding of future attainability.

I. Where an existing TMDL has been completed

DEQ would revisit the "reasonable assurance" findings and allocations set out in the TMDL and either reopen or/or amend the existing TMDL by:

- identifying land owners in the watershed contributing the same or related pollutant in the TMDL amendment;
- review and affirm or alter the allocations of the TMDL;
- issuing the TMDL amendment as an order that covers land owners; and
- conducting the "BMP analysis" set out below.

II. Where no TMDL has been completed

DEQ will conduct the "BMP analysis" described below where there is no TMDL in place. DEQ will use best professional judgment in determining whether currently-applicable BMPs are sufficient to meet water quality standards. For example, since every temperature TMDL completed by DEQ to date has given a load allocation of zero to nonpoint sources, it should be assumed that all nonpoint sources should be implementing BMPs that equate to full natural site potential shade.

III. Where a prescriptive TMDL has been completed

If a prescriptive TMDL has been in place for less than five years, DEQ will assume the BMPs are sufficiently clear, sufficient, and applicable to grant a variance. If the prescriptive TMDL is older than five years, DEQ will use the "BMP analysis" described below and issue a TMDL amendment if necessary to further clarify BMPs, alter allocations based on inadequacy of BMP implementation, or amend required BMPs based on adaptive management.

BMP Analysis: Where an existing TMDL must be amended, a variance will be issued without a TMDL in place, or a prescriptive TMDL must be reevaluated, DEQ would conduct the following analysis, making appropriate findings and documenting them in support of the variance application:

1. Identify currently-applicable BMPs (e.g., SB 1010 rules, FPA rules) and assess whether they are clear (e.g., riparian buffer width is clear; a prohibition on erosion is not clear);
2. Evaluate the sufficiency of the currently-applicable BMPs;
3. Identify if there is evidence the currently-applicable BMPs are being used by land owners;
4. If the currently-applicable BMPs are not currently being used, identify and explain how DEQ will assure they will be used in the near future;
5. If the currently-applicable BMPs are not sufficient to meet load allocations, identify what BMPs are necessary and how they will be implemented in the near future;
6. Ensure that currently-applicable BMPs or their replacements are clear; and
7. Establish monitoring and reporting requirements to assure that sufficient BMPs will be used and that if a renewal of a variance is sought, there are adequate data upon which to judge whether BMPs are being used such that attainment is likely.