NORTHWEST ENVIRONMENTAL ADVOCATES

October 20, 2010

Bill Blosser, Chair
Ken Williamson, Vice-Chair
Donalda Dodson, Commissioner
Jane O'Keeffe, Commissioner
Judy Uherbelau, Commissioner
c/o Oregon Department of Environmental Quality
811 S.W. Sixth Ave.
Portland, OR 97204

Re: **Human Health Toxics Rulemaking; Proposed Non-NPDES Actions**

Dear Chair Blosser and Members of the Commission:

As you know, the Rulemaking Work Group (RWG) for the current triennial review of Oregon's water quality standards worked on developing "implementation tools" for NPDES permitted sources to address new human health criteria for toxic contaminants based on 175 grams per day fish consumption. Very late last year, DEQ belatedly expanded that work group for the purpose of addressing non-NPDES sources. The purpose of this letter is to explain why the actions proposed by the Department are inadequate to meet the Commission's October 2008 directive to address non-NPDES sources.

I. The Background: Will Any Sources Be Regulated Under the New Toxic Criteria?

It is critical that the Commission understands what DEQ's failure to address nonpoint source contributions of toxics really means in the context of this proposed rulemaking. First, the Department has been looking for ways, such as variances and built-in loopholes, to entirely remove or reduce the impacts of the new toxic criteria on NPDES-permitted sources. Some of this is necessary and some of it pulls the Clean Water Act to a breaking point. In any case, this effort is against the backdrop of Oregon's longtime failure – according to both Department staff and industry representatives – to have issued NPDES permits with effluent limits based on *existing* human health criteria. Moreover, these proposed methods of not implementing the new toxic criteria in NPDES permits do not take into account that 48 percent of the new toxic criteria will be below the quantitation limit. In other words, for nearly half of the toxic pollutants, NPDES sources may experience no regulation simply because of the limitations in monitoring technology.

Second, as discussed further below, the Department has declined to require even the very first step towards assigning responsibility for pollution controls to significant air and land sources of toxic pollution. There are two implications of this omission: either the pollution from these sources will continue to enter Oregon's waters unchecked by any regulatory program or the responsibility for controlling that pollution will be thrust on some other source, such as land owners with stormwater permits. In theory, both of these represent the status quo. Shockingly, it turns out that the second of these is not true. DEQ has recently stated that as a matter of policy it does not intend to regulate toxics in any of its stormwater NPDES permits based on human health criteria.[1] Unless EPA or the Commission informs DEQ that its policy is inconsistent with the Clean Water Act, or the matter is brought to court by a third party, only those few toxic pollutants for which there are aquatic criteria will be restricted from entering Oregon's waters from air and land sources and only after becoming the problem of a stormwater permit holder. This is a significant regulatory gap DEQ is apparently content to perpetuate.

Third, as set out in NWEA's letter to the Commission regarding use of the Tier I antidegradation policy to control nonpoint sources,[2] the Department has refused to engage in a discussion of how it could use these federally-required implementation methods to control nonpoint sources. This approach would address numerous significant gaps in controlling nonpoint sources yet the Department has chosen to focus almost exclusively on use of Total Maximum Daily Loads (TMDLs), a program we strongly support but which will be slowed due to Department resources and the cost of making TMDLs into something more than the paper exercise they are now.

Against this backdrop, the Department allegedly took as its starting point the October 2009 memorandum drafted by Northwest Environmental Advocates (NWEA) and the municipal representatives to this process.[3] In the end, however, having discarded nearly all of those

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[1] ODEQ, Draft Fiscal and Economic Impact Narrative, September 27, 2010 at 8. "DEQ issues three different types of stormwater permits: individual Municipal Separate Storm Sewer System (MS4) permits, construction stormwater permits, and industrial stormwater permits. Because stormwater discharges are intermittent, DEQ does not apply the human health criteria (which are generally based on a 70 year exposure) to permits for these discharges and instead, uses the aquatic life criteria as the basis for stormwater permit requirements. Therefore, DEQ would not anticipate any fiscal impact to permit holders or DEQ related to stormwater permits attributable to the proposed criteria."

[2] Letter to the EQC from Nina Bell, NWEA, Re: Rulemaking Needed to Protect Oregon's Waters: Antidegradation Tier I, September 13, 2010.

[3] Memorandum to Rulemaking Workgroup from Mixed Media Subcommittee (Nina Bell, Charlie Logue, Peter Ruffier) Re: Controlling Non-Point Source Runoff of Toxic

proposals, the Department has committed to making only the most minimal of changes to its rules and nothing that could realistically be considered to alter the status quo. Its approach is set out in the two issue papers and associated rulemaking proposals to address non-NPDES sources that are the subject of this letter.

II. DEQ's Proposals As Set Out in its Issue Papers

DEQ has divided its nonpoint source discussion into two overlapping parts: (1) changes to Division 41 and 42 rules, and (2) so-called "Implementation Ready" TMDLs. For the Commission's convenience, we start this letter with a summary of the two issue papers.

A. "Implementation Ready" TMDLs Issue Paper

The issue paper on "Implementation Ready" TMDLs sets out the following seven items as individual proposals.[4] Distilled to its essence, this appears to be a proposal to issue one Internal Management Directive (IMD) and to revise one rule. The seven items are to:

(1) Conduct more detailed source assessment work that has been done to date.
*Outcome: an **IMD***.

(2) Revise rules to allow, not require, DEQ to assign an individual load allocation to a significant air or land source.
*Outcome: a **revised rule that allows DEQ to do exactly what DEQ is doing now***.

(3) Require TMDLs to have specific timelines and associated milestones.
*Outcome: the **same IMD;*** DEQ rules already require this.[5]

(4) To provide "reasonable assurance" nonpoint sources will be controlled with specific timelines and milestones.
*Outcome: the **same IMD***; DEQ rules already require this as does the previous item.

(5) Address unclear TMDL goals for agriculture and forestry.

Contaminants, October 21, 2009.

[4] ODEQ, "Implementation Ready" TMDLs for Reducing Toxic Pollutants in Oregon Waters from Nonpoint Sources Draft Issue Paper, September 27, 2010.

[5] According to the DEQ Issue Paper, "The department currently has authority to set timelines and milestones in TMDLs. [OAR340-042-0040(4)(l)(D) and (F)]."

*Outcome: an **IMD*** on "how to develop TMDLs with stakeholders and DMAs to facilitate implementation."[6] DEQ's regulations already require the stated outcomes.

(6) Address unclear goals for urban and rural stormwater management.
*Outcome: the **same IMD**; this item is ironic given DEQ's stated intent not to regulate toxics in stormwater permits.*[7]

(7) Address DEQ's lack of a method to evaluate BMP effectiveness for meeting TMDLs.
*Outcome: the **same IMD**.*

B. Division 41 and 42 Rule Changes Issue Paper

In this issue paper on proposed rule revisions, DEQ proposes to change the language of several rules that currently indicate that nonpoint sources are *not* required to meet state water quality standards.[8] These include the following water quality standards rules:

- 340-041-0007(5) Logging and forest management activities
- 340-041-0061(11) Forestry on state and private lands
- 340-041-0061(12) Areas subject to the agricultural plans

DEQ also proposes to revise its TMDL rules to accurately reflect state statutes and to add some additional language that presumably is intended to increase DEQ's ability to control nonpoint sources. The language to meet that latter purpose is:

> The department *may* also assign sector or source specific load allocations needed for nonpoint sources of pollution on state and private forestlands to implement the load allocations. In areas where a TMDL has been approved, Forest Practices

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[6] DEQ states that the IMD should "describe a process for evaluating the adequacy of ODA's and ODF's regulations and programs for achieving TMDL load allocations. Work with ODA and ODF to decide how they should be involved in the evaluation process. Describe in the IMD what information needs to be included in TMDLs in order to use surrogate measures effectively."

[7] See footnote 1.

[8] ODEQ, Divisions 41 and 42 Proposed Rule Changes to Clarify Regulation of Nonpoint Sources of Pollution Draft Issue Paper, September 27, 2010.

Act rules may need to be revised to meet the TMDL load allocations.[9]

The department *may* also assign sector or source specific load allocations needed for agricultural or rural residential nonpoint sources to implement the load allocations. In areas where a TMDL has been approved, agricultural water quality management area plans and rules must be sufficient to meet the TMDL load allocations.[10]

III. NWEA's Response to the DEQ Proposals

A. The Internal Management Directive(s)

As described above, DEQ has proposed to issue one or more IMDs on how it will implement Division 42 rules governing TMDL development and implementation, rules it acknowledges have been on the books for many years. We certainly do not object to the idea that DEQ is now going to take its existing regulations seriously. The admission by DEQ that it has not been doing so to date, however, should raise serious questions as to how the Commission will ensure that DEQ actually does so in the future. This is important because TMDLs are currently the *only* regulatory framework the DEQ has to control nonpoint sources, and the *only* one that DEQ apparently has any interest in using, as it has rejected the approach of using the antidegradation policy.[11] DEQ's general disinterest in asserting regulatory control over nonpoint sources has been demonstrated by just how little it has proposed to respond to the Commission's clear directive. The Department's focus on preparing IMDs merely directs staff on how to do its job. An IMD is not binding, as are water quality standards, on other agencies – whether state, federal, or local – or on pollution sources. An IMD is not an enforceable regulation. An IMD is not subject to the Commission's review to judge whether the document's unenforceable commitments are a sufficient response to its directive. So, while IMDs can be staff-intensive to prepare, they have dubious value and they are of no value to the Commission whatsoever in ensuring that the state's waters are protected from non-NPDES sources of pollution.

B. The Proposed Rule Revisions

DEQ has also proposed to revise some nonpoint source rules in its standards division (Division 41) and its TMDL division (Division 42). For the reasons set out briefly below, we object to

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[9] Proposed OAR 340-042-0080(2) (emphasis added).

[10] Proposed OAR 340-042-0080(3) (emphasis added).

[11] See footnote 2.

DEQ's passing off these minor rule changes as having much relevance to addressing the Commission's directive.

1. Division 41 Proposed Rule Revisions

We strongly support revising these standards rules as we are currently challenging the way in which they undermine Oregon's water quality standards in our pending litigation against EPA for its 2004 approval of Oregon's temperature standards.[12] To the extent that these standards rules are revised to clearly and unequivocally state that nonpoint sources are expected to meet water quality standards and that the practices, plans, and rules of other agencies are likewise expected to meet water quality standards, that would be a good development.[13] By themselves, however, these rule changes are the most minimal of steps and therefore entirely inadequate to meet the Commission's directive. It is worth noting that the agriculture proposal at proposed OAR 340-041-0061(12) is particularly deferential to the Oregon Department of Agriculture and strongly implies that DEQ will have no role in ensuring agricultural practices are sufficient to meet water quality standards.

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[12] *Northwest Environmental Advocates v. United States Environmental Protection Agency et al.*, U.S. District Court for the District of Oregon, 3:05-cv-01876-HA.

[13] Excerpts of draft proposed rule OAR 340-041-0007(5): "Logging and forest management activities must be conducted in accordance with the water quality standards and implementing rules established by the Environmental Quality Commission. . . . Forest operations may be subject to load allocations established under ORS 468B.110 and OAR 340-042, however, to the extent needed to implement the federal Clean Water Act."

Excerpts of draft proposed rule OAR 340-041-0061(11): "Forest operations on state and private lands may be subject to load allocations under ORS 468.110 and OAR 340, Division 42 to the extent necessary to implement the federal Clean Water Act."

Excerpts of draft proposed rule OAR 340-041-0061(12): "Area plans and rules must be designed to achieve and maintain water quality standards. If the department determines that the area plan and rules are not adequate to achieve water quality standards, the department will provide ODA with comments on what would be sufficient to meet WQS or TMDL load allocations. . . . If a landowner's activities are causing or contributing to water quality standards violations, the department will refer the activity to ODA for further evaluation and potential requirements. The department may also require remedies of landowner causing pollution or contributing to water quality standards violation if ODA does not take action."

2. Division 42 Proposed Rule Revisions

With regard to the Department's proposed revisions to the TMDL rules it is instructive to look at the language quoted in the summary above, see pages 4-5. These two rules, one each for forestry and agriculture, say that DEQ "*may*" assign "source specific load allocations needed" for nonpoint sources "to implement the load allocations." A rule that leaves a key issue to the complete discretion of the TMDL writer is a worthless rule. It merely says that DEQ may – or may not – do something. Just as it may now. Similarly, the proposed rule[14] to allegedly address significant air deposition and land sources of toxic contaminants has the same effect: it states that DEQ may, or may not, assign an individual load allocation to a significant air or land source. In other words, business as usual.

IV. Suggested Commission Action

A. Incorporate Existing Commitments to Control Nonpoint Sources into Rules

At a minimum, the Commission should instruct DEQ to propose rule revisions that incorporate the commitments the Department made in the recently-settled lawsuit challenging EPA and the National Oceanic and Atmospheric Administration's (NOAA) continued grant funding of Oregon given its inadequate Coastal Nonpoint Source Program (hereinafter "CZARA commitments").[15] Since 1998, the federal agencies have repeatedly found Oregon's coastal nonpoint source program inadequate based on the need for "additional management measures for forestry." In other words, Oregon's forest practices do not meet water quality standards. In Exhibit F to the Final Settlement Agreement executed in that case, DEQ informs EPA and NOAA that, with regard to the development of coastal TMDLs and to ensure the control of logging runoff as necessary to meet water quality standards, the Department will:

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[14] Proposed revisions to OAR 340-042-0040(h) Load allocations. "This element determines the portions of the receiving water's loading capacity that are allocated to existing nonpoint sources, including runoff, deposition, soil contamination and groundwater discharges, or to background sources. Load allocations are best estimates of loading, and may range from reasonably accurate estimates to gross allotments depending on the availability of data and appropriate techniques for predicting loading. Whenever reasonably feasible, natural background, long-range transport and anthropogenic nonpoint source loads will be distinguished from each other."

[15] *Northwest Environmental Advocates v. Locke, et al.*, U.S. District Court for the District of Oregon, Civil No. 09-0017-PK, signed September 28, 2010. This case was filed pursuant to the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA).

(1) "identify BMPs that could be used to meet the load allocations";
(2) "provide more detailed source delineation than the current Oregon TMDL approach thus allowing DEQ to specifically identify significant nonpoint sources, including significant forestry sources";
(3) "establishing enforceable load allocations in the Implementation Ready TMDL for all significant nonpoint sources, including significant forestry nonpoint sources";
(4) "developing 'safe Harbor' BMP's for the load allocations established for the significant nonpoint sources, including significant forestry nonpoint sources"; and
(5) "issuing an implementation order to significant sources, including significant forestry nonpoint sources that have received load allocations."[16]

These CZARA commitments go considerably beyond the proposed rule changes the Department has suggested are a sufficient response to the Commission's directive. Whereas the Department's rule revision proposal would merely *allow* it to assign sector or source specific load allocations, DEQ's July 2010 CZARA *commitments* include: (1) DEQ's specifically identifying significant nonpoint sources and giving them load allocations, (2) DEQ's identifying the practices that are needed to meet those allocations, and (3) DEQ's making those load allocations enforceable. The issue papers for the triennial review stand in stark contrast to those CZARA commitments because the Department merely describes the current relationships between the agencies and a plan for DEQ's continued deference to the Oregon Departments of Forestry and Agriculture. Nowhere is this made more clear than the Department's bald and patently false statement that "[o]ur partners such as ODA, ODF, federal land management agencies and municipalities have programs in place to address sources of pollution to meet water quality standards and TMDL load allocations."[17]

NWEA urges the Commission to adopt into rules the CZARA commitments made by the Department that are related to Oregon coastal basin TMDLs. Certainly by putting these commitments *into its rules* the Commission can better assure that DEQ takes these commitments seriously, avoids jeopardizing future DEQ federal grant funding, and controls nonpoint runoff from forestry. In addition, because the approach established in the CZARA commitments offers

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[16] Letter to Michael Bussell, EPA Region 10 and John King, Office of Coastal Resource Management, NOAA Re: Oregon Department of Environmental Quality's commitment to implement the Implementation Ready TMDL Approach identified in the "Oregon Department of Environmental Quality's Response to the EPA and NOAA's Conditions of Fully Approving Oregon's Coastal Nonpoint Program (CNPCP), submitted by letter dated May 12, 2010" from Neil Mullane, Administrator, Water Quality Division, July 26, 2010. Exhibit F to Final Settlement Agreement in *Northwest Environmental Advocates v. Locke*.

[17] "Implementation Ready" TMDLs Issue paper at 2.

the prospect that DEQ might actually control nonpoint source runoff, the Commission should strongly consider incorporating into its rules these same CZARA commitments to TMDLs *outside* the coastal basins and to nonpoint sources *other than* forestry. To do so would advance the cause the Commission made so clear in its original directive to the Department.

B. Reject the Department's Proposed Rule Revisions and IMD Promises as Inadequate

DEQ's proposal to use its rules and standards merely to reiterate state statutes, defer to other agencies, and to memorialize some of its own authorities in only the most rudimentary fashion is an inadequate response to the Commission's directive. For example, a recent Attorney General's opinion prepared to address the Coastal Nonpoint Source Program deficiencies specifically notes that DEQ

> is authorized to establish its own implementation requirements to the extent required by the CWA and to the extent that controls adopted by the [Board of Forestry] under the [Oregon Forest Practices Act] are deemed by DEQ to be inadequate to implement the TMDL. . . . DEQ may legally conclude, and in some cases likely must conclude, that implementation of its safe harbor BMPs is required.[18]

Yet DEQ's proposed rules are silent on the need for the Department to establish sufficient management practices for nonpoint sources. Likewise, with regard to agriculture where DEQ's legal authority is broader than it is with forestry, the proposed rules defer to the ODA and call for little more than the Department's "provid[ing] ODA with comments." The Department is well aware that the other state and federal agencies have a long track record of inadequate nonpoint source pollution controls and that it must step in if the status quo is going to change. Its weak proposals have failed to take the substantial step that is necessary to accomplish this goal. The Commission should not allow the Department's inertia and its unwillingness to confront its sister agencies to render this entire triennial 2004-2011 review – *a seven year review* – a virtual nullity for human health and the environment.

C. Address Nonpoint Sources Outside the TMDL Context

On September 13, 2010, we addressed two letters to the Commission regarding the need to

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[18] Memorandum to Neil Mullane, Water Quality Division Administrator, ODEQ, from Larry Knudsen, Senior Assistant Attorney General, Natural Resources Section Re: DEQ Authority to Develop and Implement Load Allocations for Forestland Sources, July 2, 2010 at 4, Exhibit B to Final Settlement Agreement in *Northwest Environmental Advocates v. Locke*.

address nonpoint sources outside the TMDL context. Specifically, we conveyed that the Department should be using the federally-required Tier I antidegradation policy implementation methods as a way of addressing nonpoint sources prior to the development of a TMDL and perhaps to avoid having to develop a TMDL.[19] Incorporating such provisions into water quality standards, of which antidegradation policies are a part, would ensure the use of baseline controls for nonpoint sources. In fact, the memo written to jumpstart the Department's thinking about the Commission's directive, referred to in footnote 3 of this letter – and prepared one year ago – urged that action be taken pursuant to the antidegradation policy. DEQ ignored that recommendation. Second, we pointed out that industrial, commercial and residential sources discharge toxics into sewage collection systems with only some large or very hazardous industries regulated under the federal "pretreatment" program.[20] We urged the Commission to ensure that those sources that discharge into sewage collection systems without treatment and without permits be subject to regulation because, again, the Department was entirely disinterested in adopting any approach that might make progress to control even a tiny fraction of these sources. NWEA continues to believe that these two approaches have substantial merit in reducing toxic inputs to Oregon's waters.

Conclusion

For the reasons set out in this letter, we urge the Commission to:

(1) direct the Department to develop rules that incorporate the CZARA commitments regarding the Coastal Nonpoint Source Program into its water quality standards and TMDL rules and expand those commitments to include all nonpoint sources and all basins;
(2) reject the Department's proposed rule revisions as necessary but inadequate;
(3) direct the Department to issue new Division 42 rules that would require TMDLs to identify and give load allocations to significant air and land sources;
(4) reject the Department's proposal to develop one or more Internal Management Directives as a necessary but insufficient response to the need to control nonpoint source pollution;
(5) direct the Department to develop rules to control traditional nonpoint sources through Tier I antidegradation implementation methods; and
(6) direct the Department to develop rules to regulate toxic discharges from industrial and commercial sources to municipal sewer collection systems.

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[19] See footnote 2.

[20] Letter to the EQC from Nina Bell, NWEA, Re: Rulemaking Needed to Protect Oregon's Waters: Municipal Source Control, September 13, 2010.

In closing, we would like to say that Northwest Environmental Advocates appreciates the very significant technical, legal, resource, and political difficulties associated with tackling non-NPDES sources. These difficulties and barriers are among the reasons why the nation's waters continue to deteriorate and those that are impaired remain impaired. Therefore, when the Commission directed DEQ to address non-NPDES sources it established a tall order. But, it was absolutely correct to have done so. That the Department has spent two full years accomplishing almost nothing in response to the Commission's directive on non-NPDES sources should serve to encourage the Commission in its mission, to underscore the Commission's indispensable role in bringing about the changes that are needed in Oregon. Indeed, without some clear and timely action by the Commission, this prolonged triennial review will amount to a paper exercise – the adoption of very stringent criteria that will apply to very few sources.

Sincerely,

Nina Bell
Executive Director

cc: Dick Pederson, Director, Oregon DEQ
Neil Mullane, Administrator, Water Quality Division
Jannine Jennings, Manager, Region X Water Quality Standards Unit
Christine Psyk, Associate Director, Region X Office of Water and Watersheds
Mike Bussell, Director, Region X Office of Water and Watersheds
Dennis McLarren, Regional Administrator, Region X
Ephraim King, Director, EPA OST