March 21, 2011

Ms. Andrea Matzke
Oregon Department of Environmental Quality
Water Quality Division
811 SW 6th Avenue
Portland, OR 97204

RE: Human Health Toxic Pollutants and Implementation Policies Rulemaking

Dear Ms. Matzke:

The Oregon Farm Bureau (OFB) submits these comments on behalf of its 8,000 farming and ranching members statewide who are professionally engaged in agriculture and represent Oregon's vast commodity and geographic diversity. OFB is a voluntary, grassroots, nonprofit organization representing the interests of the state's farmers and ranchers in the public and policymaking arenas. As Oregon's largest general farm organization, our primary goal is to promote educational improvement, economic opportunity, and social advancement for its members and the farming, ranching, and natural resources industry as a whole.

OFB appreciates the opportunity to submit comments on the proposed rule changes made by the Department of Environmental Quality (DEQ) to revise water quality standards throughout Oregon. OFB seeks to provide comments on the DEQ rulemaking package in four arenas. First, we will discuss how a small but important portion of the rules in the procedural portion of the package go against OFB stated policy as determined by our members. Second, these comments will describe the current regulatory process under the Agriculture Water Quality Management Act (SB 1010) and why we believe the 1010 process, as it is currently implemented, is what the legislature intended when passing SB 1010 legislation in 1993. Third, OFB will review the extent of the legal authority granted in Oregon statute to DEQ and the Oregon Department of Agriculture (ODA) over farming practices. Next, OFB will challenge the specific portions of the rulemaking language proposed by DEQ which we feel are incorrect and offer suggested language we believe will keep agricultural water quality regulation within the bounds of federal and state statute. Finally, we will describe the potential negative impact on Oregon's economy this rulemaking will have on production agriculture, if the current proposal is adopted.

I. OFB Policy on Water Quality Regulation

Regarding agricultural water quality management, OFB policy supports "efforts to protect and/or improve the quality of our state's surface and ground water, provided such point and nonpoint

programs are based on sound science."[1] In the proposed rulemaking language there is the implication that direct regulation by DEQ of agricultural nonpoint sources could occur without utilizing best available crop, soil and animal science crucial to the conditions-based regulatory approach implemented in Oregon. DEQ regulation of farming practices risks becoming a best estimate of how to improve water quality if the agency refuses to provide guarantees that DEQ will implement best available agricultural science. The lack of scientific validity in the proposed DEQ regulation poses a risk of creating a prescriptive regulation that would not solve Oregon's water quality problems.

OFB policy supports water quality programs that are "attainable, site specific standards that are based on the ability of the water body or system, if functioning properly, to achieve those standards."[2] We believe ODA is the best agency to determine those conditions-based practices and programs that will help Oregon agriculture achieve those site-specific standards.

OFB policy encourages water quality programs to be "designed to protect private property and the owner's ability to economically use their land for agricultural purposes."[3] The proposed rules could result in prescriptive regulations that would ignore a farmer's need to economically use the land for farming affecting the agricultural industry as a whole throughout Oregon. The proposed rules also contravene OFB policy that declares "state water laws and rules must be built on a sound basis that recognizes the general benefit to agriculture and encourages individual enterprise."[4]

Finally, OFB policy strongly supports nonpoint regulatory programs that are "based on the overall goal that each water body or system function in a proper and healthy manner given the system's potential, judged in light of natural conditions as well as current and projected land use." We fear the proposed change in regulation of farming practices will overlook the critical element of natural background conditions by using arbitrary numeric standards that do not consider all sources of pollution to waterways associated with agricultural land. DEQ's proposed regulation of farming practices has tremendous potential to diminish the collaborative water quality regulation already established through ODA and their statutorily delegated water quality management program. The 1010 program cost the state of Oregon substantially in terms of public and private time and resources. The program is working well and should not be altered. OFB therefore makes the following comments on the DEQ proposed regulations involving Oregon agriculture.

II. Agriculture Water Quality Management Act and Legislative Intent

In 1993, the Oregon Legislature passed SB 1010 which enacted the Agriculture Water Quality Management Act requiring (referred to herein simply as "1010") landowners to prevent and control water pollution from agriculture activities and soil erosion. This mandate led to the adoption of Water Quality Management Area Plans and Rules throughout Oregon, specific to individual watershed basins. Area Plans provide information on water quality issues and recommend management practices. Area Rules describe requirements for agriculture landowners to protect water quality.

[1] 2011 Oregon Farm Bureau Federation Policy Book, Page 56.
[2] *Id*.
[3] *Id*.
[4] *Id*. At 49.

In 1995, the Legislature passed SB 502 and 503 declaring the Oregon Department of Agriculture (ODA) to be the agency responsible for developing and implementing "any program or rules that directly regulate farming practices…that are for the purpose of protecting water quality."[5] OFB believes it is imperative that ODA continue to manage any water quality regulation required of agriculture landowners and land managers through these Area Plans and Rules.

The Area Plans and Rules implemented through 1010 regulate conditions on the farm or ranch in question, not practices specific to achieving a predetermined water quality standard. It is up to the farmer or rancher to determine what practices to implement to meet the outcome-based conditions prescribed by ODA, the Local Advisory Committees and other collaborative participants. The 1010 process is unique to Oregon and considered a model for the country on creating a cooperative regulatory management program for agricultural practices as they relate to water quality. OFB believes it is imperative that any water quality regulation required of agriculture landowners and land managers continue to be managed through these Area Plans and Rules by ODA. Any deviation from the current regulation of farming practices would jeopardize the collaborative spirit of 1010 and hinder progress of water quality management on farmland throughout Oregon.

The Oregon Legislature designated ODA to be the regulator of farming practices because of its ability to use best available science when identifying specific conditions needed in the varied watershed basins across the state. ODA is well positioned to utilize the best crop, animal and soil sciences available to agriculture. Agriculture schools, such as the school located at Oregon State University and its extension services, were established to develop best available science on which farmers and ranchers could base their practices. Substantial soil and water conservation research is conducted within these schools and is readily available to ODA as they regulate farming practices. The proposed DEQ regulations of farming practices in Oregon would undercut this important scientific research by imposing new rules that force farmers and ranchers to meet a specific numeric water quality standard as opposed to a land condition based on a scientific causal connection to water quality.

The enactment of SB 1010 in 1993 established the role of agricultural water quality regulation in Oregon. The legislative intent was clear that regulation of farming practices in Oregon is to be initiated and enforced by ODA. In his testimony, then ODA Director Phil Ward testified that ODA "is authorized to develop [water quality] plans and adopt the regulations and fees and, if necessary, carry out those plans if persons refused to comply with provisions of the plans [and] authorize the department to assess civil penalties [and provide] a mechanism for the EQC and DEQ to address any deficiencies they feel would be present in the plans we develop." This intent indicates a role for EQC and DEQ in the development of Plans, however, there is nothing in the legislative history of SB 1010 that identifies any direct regulation or enforcement powers bestowed to any agency other than ODA. When asked by Senator Shoemaker why ODA was the preferred regulatory agency for agricultural water quality issues, then DEQ Director Fred Hansen stated, "[ODA is] in fact most appropriate to be able to have that interface to be able to achieve those standards that are being established independently by the EQC….We do not feel [DEQ] is necessarily the most effective body to be able to have that one-on-one involvement with individual agricultural activity, but do believe we are the ones that need to be able to set that standard that is a *performance standard* that would need to be

[5] ORS 561.191

achieved."[6] The statements of both DEQ and ODA directors during the SB 1010 legislative hearings make clear that agricultural water quality Area Plans and Rules are to be developed by ODA, the only agency with the ability to interact collaboratively with the agricultural community while achieving performance-based water quality standards. OFB strongly believes it is these general performance standards by which 1010 Area Plans and Rules should continue to be judged against and not numeric water quality standards or other standards that may be part of a Total Maximum Daily Load (TMDL).

III. ODA/DEQ Legal Authority Over Farming Practices Regulation

DEQ's proposed rules attempt to insert direct regulatory authority over agricultural practices in violation of Oregon law. While DEQ has authority to establish water quality standards for Oregon[7], state statutes establish ODA as the primary agency responsible for regulating farming practices[8] and for determining how nonpoint source agricultural practices should be judged against the state's goal of improving water quality. DEQ proposes in this rulemaking to regulate and potentially penalize a specific landowner for causing or contributing to water quality standards violations.[9] This language directly violates Oregon statute that declares ODA rules adopted under a 1010 Act Plan "shall constitute the only enforceable aspects of a water quality management plan."[10] Therefore, the proposed language that would imply DEQ is permitted to penalize a landowner outside of the 1010 process should be removed.

Oregon law requires agricultural landowners to conduct their activities "within the boundaries of an area subject to a water quality management plan, in full compliance with the rules implementing the plan and with all the rules and standards of the Environmental Quality Commission relating to water pollution control."[11] The law declares the landowner to be "subject to all remedies and sanctions available" to DEQ or EQC[12]. If DEQ becomes aware of a situation where an individual landowner subject to an Area Plan and implementing Rules is not in compliance with the applicable Area Rules, it is up to DEQ to refer the activity to ODA for further evaluation and potential action. If a landowner is found in violation of ODA Plans and Rules and applicable ODA remedies and sanctions are not sufficient to bring about compliance, then ODA may use the remedies and sanctions available to EQC and DEQ to garner compliance. DEQ should remove any proposed language that implies ODA is not the primary regulatory authority over agricultural nonpoint sources and/or that the 1010 process is not the exclusive remedy for water pollution from agricultural nonpoint sources. Oregon statute declares ODA is the agency to enforce rules in an agricultural 1010 plan. Once again, it is ODA's responsibility as the designated 1010 management agency to "develop and implement any program or rules that directly regulate farming practices."[13]

Admittedly, the statutory authorities granted to ODA and DEQ when dealing with water quality management in Oregon are complex. ORS 468B.010 provides EQC has authority over water pollution if

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[6] Oregon Senate Agriculture & Natural Resources Committee Public Hearing, April 14, 1993.
[7] ORS 468B.048
[8] ORS 561.191
[9] DEQ Proposed New and Amended Rule Language, Human Health Toxics Rulemaking, Page 16.
[10] ORS 568.912(1)
[11] ORS 568.930(1)
[12] *Id.*
[13] ORS 561.191

there is a conflict with any other law. However, a careful reading of the statutes which guide both DEQ and ODA in this area show how they are intended to complement each other. As explained above, the Oregon Legislature has well established policy declaring all regulation of Oregon agriculture and farming practices to be conducted by ODA. DEQ has clear authority to set water quality standards. ODA is the primary agency responsible for developing and implementing programs defined by the 1010 Act. Enforcement measures of agricultural water quality shall be conducted through ODA. Should a dispute arise between ODA and DEQ on water quality management of farming practices, EQC has authority to petition ODA on water quality plans, but Oregon law is clear that the "petition must allege with reasonable specificity that the plan or the rules are not adequate to achieve compliance with applicable state and federal water quality standards."[14] This language limits the reach of EQC by precluding any arbitrary alteration of agricultural water quality management plans or creating a separate program or separate standards for judging the adequacy of 1010 plans and rules.

IV. The Clean Water Act Does Not Require DEQ to Regulate Nonpoint Sources by Altering the Way Load Allocations are Established Through the TMDL Process

DEQ's proposed rulemaking language reaches beyond the federal Clean Water Act (CWA) and it is not allowed under Oregon law. ODA's authority delegated by statute to regulate farming practices under ORS 561.191 is consistent with the State nonpoint source management program under CWA section 319. Section 319 requires states to develop nonpoint source pollution control plans.[15] In order to comply with the CWA, state management programs under section 319 must, among other requirements, identify the best management practices and measures that will be used to reduce significant nonpoint sources of pollution "to the maximum extent practicable."[16] The Clean Water Act, however, does not place any constraints on a state's choice of agencies to develop and implement its nonpoint source management programs. Legislation passed in 1995 granting ODA authority to regulate farming practices "for the purpose of protecting water quality" does not include any direct regulatory exceptions for EQC or DEQ.[17] Thus, the decisions made by the Oregon Legislature to designate ODA as the regulatory authority over agricultural practices are not inconsistent with EQC or DEQ authority.

While the CWA requires states to develop plans concerning nonpoint source pollution under section 319, it does not provide for regulation of nonpoint sources through the creation of Load Allocations (LAs) that are part of a TMDL. Under 468B.110(1) Oregon law directs DEQ to establish TMDLs only "as provided in the Federal Water Pollution Control Act (33 U.S.C. § 1321) and federal regulations and guidelines issued pursuant thereto." This language guides DEQ to create a program that directly mirrors the federal program. The federal TMDL program establishes that load allocations are attributed and not allocated and they do not form the basis for regulating nonpoint sources. The distinction between attribution and allocation is an important one and will be further explained below.

For water bodies within a State that do not meet water quality standards because of excessive additions of a pollutant, the CWA requires the State to establish (and obtain EPA approval of) the TMDL of the pollutant that is consistent with meeting water quality standards. *See* 33 U.S.C. § 1313(d)(1)(C), (2). EPA defines a "TMDL" as:

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[14] ORS 568.930(3)(a)
[15] 33 U.S.C. § 1329.
[16] See *id.*, § 1329(a)(1)(B), (C), (b)(2)
[17] ORS 561.191

> The sum of the individual WLAs [wasteload allocations] for point sources and LAs [load allocations] for nonpoint sources and natural background. If a receiving water has only one point source discharger, the TMDL is the sum of that point source WLA plus the LAs for any nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments. . . . *If* Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations [LAs] practicable, *then* wasteload allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs. [18]

EPA defines LAs and WLAs as:

> (g) *Load allocation (LA)*. The portion of a receiving water's loading capacity that is *attributed* either to one of its existing or future nonpoint sources of pollution or to natural background sources. *Load allocations are best estimates of the loading*, which may range from reasonably accurate estimates to gross allotments, depending on the availability of data and appropriate techniques for predicting the loading. Wherever possible, natural and nonpoint source loads should be distinguished.[19]
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> (h) *Wasteload allocation (WLA)*. The portion of a receiving water's loading that is *allocated* to one of its existing or future point sources of pollution. *WLAs constitute a type of water quality-based effluent limit*.[20]

What these EPA definitions demonstrate is that a WLA to a point source is fundamentally different from an LA to a nonpoint source. A WLA genuinely is an allocation—*i.e.*, an allotment, which may range from zero up to the full amount of the remaining TMDL available to point sources. It is a type of water quality-based effluent limit, which is enforceable through the point source's NPDES permit.

By contrast, a LA is not an allocation but an *attribution*.[21] It is the portion of the loading capacity that is "attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources." A LA must reflect the actual current or predicted future loading attributed to a nonpoint source or natural background source; the agency establishing the TMDL cannot arbitrarily

[18] 40 C.F.R. § 130.2(i) (emphasis added).
[19] 40 C.F.R. § 130.2(g) (emphasis added).
[20] 40 C.F.R. § 130.2(h) (except for headings, emphasis added).
[21] In addition to the different meanings of "allocated" and "attributed" reflected in EPA's regulations, these terms have distinct dictionary meanings that are consistent with EPA's use of the terms. To "allocate" is to "distribute according to a plan; allot." *The American Heritage Dictionary of the English Language* 48 (4th ed. 2009). To "attribute," on the other hand, is to "relate to a particular cause or source; ascribe." *Id.* at 117.

assign a value to a LA, as it may for a WLA.[22] "Load allocations are best estimates of the loading, which may range from reasonably accurate estimates to gross allotments, depending on the availability of data and appropriate techniques for predicting the loading."

The Clean Water Act provides that the standard Area Plans and Rules should be judged against is whether they reduce to the "maximum extent practicable" the level of pollution resulting from agricultural nonpoint sources.[23] It would be inappropriate to mandate that the 1010 Plans and Rules must meet or implement load allocations in a TMDL. There is nothing allowing for such a mandate in the Clean Water Act and federal regulations and guidelines issued pursuant thereto. It is also inappropriate to say that 1010 Plans and Rules or nonpoint source agricultural activities must meet WQS. Again, there is nothing in the CWA or federal rules or guidelines that provides for that. When DEQ rules address a standard against which a 1010 Area Plan or Rule will be judged, the rule should use the specific 1010 language which states "prevention and control of water pollution from agricultural activities and soil erosion"[24] or the CWA language which states "reduce, to the maximum extent practicable, the level of pollution resulting from" agricultural nonpoint sources of pollution.

If best management practices or other nonpoint source pollution controls, such as the 1010 Area Plans and Rules, make more stringent load allocations practicable for agriculture, then wasteload allocations can be made less stringent, however, it is imperative to identify this is not a reversible process. Oregon law requires regulation of agriculture water quality to follow the process for developing a TMDL set out in federal law and that process does not allow DEQ to create a LA to become a standard against which a 1010 plan or implementing rules would be judged. As currently drafted, DEQ's proposed rules could allow a more stringent LA for nonpoint sources to establish a less stringent WLA for point sources. That would be a violation of Oregon law.

V. Challenges to the Presented Rulemaking Language and Suggested Changes

a. Definition of Load Allocation

After careful review of the proposed rule language, OFB requests the following changes to the rule language be made to keep DEQ regulations consistent with both federal and state law.

In OAR 340-042-0040(4)(h), DEQ seeks to revise the definition of load allocations. As detailed above, a load allocation does not allocate, rather it attributes a load. The rules as currently written inaccurately use the term "allocated" when referencing nonpoint source loading capacity.[25] The word "allocated" should be changed to "attributed" to remain consistent with the CWA regulation of nonpoint sources.[26] We also request the word "deposition" be completely removed altogether. Deposition refers to pollution from the air that ends up in Oregon waters. Any regulation of air deposition should be implemented through separate administrative rule under the direction of the DEQ Air Quality division. Last, "groundwater discharges" should be changed to "groundwater additions."

[22] Of course, a WLA can be no larger than the remaining loading capacity available under a TMDL; but within that limit, neither the CWA nor EPA's implementing regulations dictate the amount of the WLA. State law, however, may set forth requirements or guidelines for allocating WLAs to individual point sources. *See, e.g.,* OAR 340-042-0040(6).
[23] 33 U.S.C 1329(a)(1)(c)
[24] ORS 568.909(2); See also 568.912(2)
[25] DEQ Proposed New and Amended Rule Language, Human Health Toxics Rulemaking, Page 19.
[26] CFR of SECTION 319 - CORRECT

Nonpoint sources do not discharge, as a discharge requires a National Pollutant Discharge Elimination System (NPDES) permit under the federal CWA.[27] Nonpoint sources do not need a permit to add pollution. Nonpoint sources are regulated through the use of best management practices and measures to control and reduce, to the maximum extent practicable, the level of pollution resulting from them.[28] The above requested changes to the definition of Load Allocation will result in a definition consistent with both federal and state laws.

Highlighting OFB requested changes, OAR 340-042-0040(4)(h) should read as follows:

(h) Load allocations. This element determines the portions of the receiving water's loading capacity that are ~~allocated~~ attributed to existing nonpoint sources, including runoff, ~~deposition,~~ soil contamination and groundwater ~~discharges~~additions, 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.

b. Other Implementation of Water Quality Criteria

In proposed OAR 340-041-0061(~~12~~11), OFB requests DEQ remove the statement "Area plans and rules must be designed to achieve and maintain water quality standards" and replace it with language set forth in CWA section 319 which indicates "area plans and rules must be designed to reduce, to the maximum extent practicable, the level of pollution resulting from agricultural nonpoint sources of pollution." The OFB proposed language reflects the section 319 language set forth in the CWA. Agricultural nonpoint sources of pollution have only an indirect effect on water quality and thus agriculture is only one part of the water pollution equation in Oregon. ODA Area Plans and Rules are designed reduce water pollution to the maximum extent practicable, regardless of any numeric standard. Oregon law does not require ODA to achieve DEQ's water quality standards. It requires ODA to design plans and rules that will improve water quality to the maximum extent practicable without placing an undue economic and practice-based burden on the shoulders of Oregon farmers.[29]

In the third sentence of the proposed changes to OAR 340-041-0061(~~12~~11), we request DEQ remove the words "achieve and maintain water quality standards" and replace with "meet that standard." In the same sentence, OFB requests DEQ remove the language "meet WQS or TMDL load allocations" and insert "the standard." Again, ODA Area Plans and Rules are designed to achieve conditions-based performance standards, not predetermined numeric water quality standards. ODA is required to enact plans that will reduce pollution to the maximum extent practicable as provided in the CWA for nonpoint source pollution control.

In the second to last sentence of the proposed rule, OFB requests DEQ remove the language "causes or contributes to water quality standards violations" and replace with "does not comply with the enforceable terms of such rules." Given the statutory framework providing ODA the authority to

[27] 33 U.S.C. 1342
[28] 33 U.S.C. 1329(a)(1)(c)
[29] While the language provided section 319 of the CWA is not the same as the language in the 1010 Act which defines the goal of Area Plans and Rules to "prevent and control" agricultural water pollution, OFB believes they equivalent and should be treated as such.

establish Area Plans and Rules based on a basin-wide strategy for reducing nonpoint source water pollution, an individual person is responsible for the enforceable terms of the ODA rules. ODA rules are focused primarily on conditions of the land in question and how management of those conditions can significantly reduce water pollution in Oregon water bodies. They are not focused on the specific quality of the water next to the land. Federal law does not regulate individual nonpoint sources to achieve water quality standards. Oregon law requires the state to follow federal law.[30] It is impractical for the state to try to meet a numeric water quality standard by regulating an individual nonpoint source when such a calculation is nearly impossible to determine. Requiring farmers to comply with rules that implement the applicable 1010 plan, the current conditions-based approach is the most effective way to improve water quality in Oregon because it is based on land management and best available agricultural science.

Finally, OFB requests the entire final sentence of the proposed rule be removed. This sentence states "The department may also require remedies of a person causing pollution or contributing to water quality standards violation if ODA does not take action." Oregon statute provides that 1010 planning and rulemaking is the exclusive means for regulating farming practices in Oregon, specifically for the purpose of protecting water quality.[31] It gives ODA the authority to develop and enforce those plans and rules. Any interaction with an agricultural land owner or land manager on water quality enforcement issues should come from ODA and exclusively through the 1010 process. While the law further declares landowners shall conduct their activities "with all the rules and standards of the EQC relating to water pollution control," it is the responsibility of ODA to make sure the 1010 planning process effectively enforces those rules and standards as they relate to agricultural nonpoint sources in Oregon.

Highlighting OFB requested changes, OAR 340-041-0061(~~12~~11) should read as follows:

In areas subject to the Agricultural Water Quality Management Act the Oregon Department of Agriculture (ODA) under ORS 568.900 to 568.933 and 561.191 develops and implements agricultural water quality management area plans and rules to prevent and control water pollution from agricultural activities and soil erosion on agricultural and rural lands. Area plans and rules must be designed to ~~achieve and maintain water quality standards~~ reduce, to the maximum extent practicable, the level of pollution resulting from agricultural nonpoint sources. If the department determines that the area plan and rules are not adequate to ~~achieve and maintain water quality standards~~ meet that standard, the department will provide ODA with comments on what would be sufficient to meet ~~WQS or TMDL load allocations~~ the standard. In addition, the department may request the Environmental Quality Commission (EQC) to petition for a review of part or all of water quality management area plan and rules. If a person subject to an ODA area plan and implementing rules ~~causes or contributes to water quality standards violations~~ does not comply with the enforceable terms of such rules, the department will refer the activity to ODA for further evaluation and potential requirements. ~~The department may also require remedies of a person causing pollution or contributing to water quality standards violation if ODA does not take action.~~

[30] ORS 468B.110(1)
[31] ORS 561.191(1)

c. Implementing a Total Maximum Daily Load

EPA defines a TMDL as "a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards."[32] A TMDL is a number, as recognized by EPA, meant to be an "informational tool."[33] DEQ's proposed OAR 340-042-0080(3) attempts to redefine the use of the Load Allocation portion of a TMDL from a calculation of existing circumstances to a new enforcement mechanism for the agency to regulate agricultural nonpoint practices. OFB requests the following changes be made to the proposed rule language to maintain consistency with state and federal regulations of TMDL implementation.

In the beginning of the second sentence please remove the language "also assign" and replace with "determine, as part of establishing a TMDL," and remove "needed" and "or rural residential" and "implement the load allocations" and replace the remainder of the sentence with "that result from enforcement of ODA rules implementing Area Plans." In the federal program there is a process for developing a load allocation. In areas where water quality may be affected by farming, that process includes developing a load that is attributed to agricultural nonpoint sources given ODA plans implemented and enforced by ODA rules. There must be a scientific basis for establishing a condition that must be met in an area plan and rules. The land condition must reduce agricultural nonpoint source contributions to water pollution to the maximum extent practicable based on best available soil science, crop science and animal science. Even as the regulating agency of farming practices in Oregon, ODA lacks the authority to preclude agricultural land practices without providing a sound scientific basis that the practice does not reduce agricultural nonpoint source contributions to the maximum extent practicable.[34] This reliance on a scientific causal connection is what makes the water quality management process effective in reducing contributions of pollution from agricultural nonpoint sources.

Removing the language "or rural residential" is critical as rural residential lands are not included in the 1010 Act area plans and rules. Oregon statute includes "rural lands" within the boundaries for land subject to water quality plans; however, it does not include rural residential lands.[35] Regulation of rural residences should be determined under an entirely separate and distinct rule. Any inclusion of a residence in the regulation of Oregon agriculture could potentially extend to houses, septic tanks, drain fields and other non-agricultural related activities not specifically regulated under 1010.

In addition OFB requests DEQ remove the language "meet the load allocations" and replace it with "reduce, to the maximum extent practicable, the level of pollution resulting from nonpoint sources on agricultural and rural lands." The correct standard used to determine whether an area plan is sufficient is the standard defined in section 319 of the CWA and not a load allocation in a TMDL.

In the final sentence, OFB requests DEQ remove the language "department determines that" as the Area Plans and Rules established by ODA cannot be arbitrarily changed by DEQ. The question of whether the water quality plan meets the standard should be objective and science-based, not determined by the opinion of DEQ. Next, please remove the language that states "implement the load

[32] http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/index.cfm
[33] *Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir. 2002)
[34] ORS 568.912(3)
[35] ORS 568.909(1)

allocations" and replace with "meet that standard." The ODA Area Plans and Rules are designed to achieve the standard set forth in section 319 of the CWA, not a specific load allocation. Finally, we request DEQ remove the language "implementing the TMDL" and replace it with "in that regard." ODA area plans and rules are not designed to implement a TMDL. Plans and rules are guided by the need to reduce pollution from agricultural nonpoint sources to the maximum extent practical, not to achieve a load allocation.

Highlighting OFB requested changes, OAR 340-042-0080(3) should read as follows:

In areas subject to the Agricultural Water Quality Management Act the Oregon Department of Agriculture (ODA) under ORS 568.900 through 568.933 and according to OAR chapter 603, divisions 90 and 95 develops and implements agricultural water quality management area plans and rules to prevent and control water pollution from agricultural activities and soil erosion on agricultural and rural lands. The department may ~~also assign~~ determine, as part of establishing a TMDL, sector or source specific load allocations ~~needed~~ for agricultural ~~or rural residential~~ nonpoint sources ~~implement the load allocations~~ that result from enforcement of ODA rules implementing area plans. In areas where a TMDL has been approved, agricultural water quality management area plans and rules must be sufficient to ~~meet the load allocations~~ reduce, to the maximum extent practicable, the level of pollution resulting from nonpoint sources on agricultural and rural lands. If the ~~department determines that~~ plans and rules are not adequate to ~~implement the load allocations~~ meet that standard, the department may request the Environmental Quality Commission to petition ODA for a review of part or all of water quality management are plan and rules ~~implementing the TMDL~~ in that regard.

VI. Conclusion

OFB is very concerned about the proposed DEQ regulations. We believe these could impose numeric standards that would cost Oregon agriculture in both jobs and production in exchange for a new set of regulations that would not meet Oregon's goal of improving water quality. We contend these rules are not required or allowed under the guidelines of the federal Clean Water Act and thus, we do not believe EPA will act if the changes suggested in this letter are adopted by the EQC. We also believe the rule language drafted by DEQ is impermissible under Oregon law and would be vulnerable to future litigation.

Agriculture plays an important role in protecting water quality and maintaining economic stability throughout Oregon's watersheds. Effective uses of conservation practices and systems by farmers and ranchers across the state are reducing pollution from cultivated cropland and grazing lands. The effective approach implemented through the 1010 process is delivering significant and proven results. Any further regulation by DEQ outside of the 1010 Area Plans and Rules will only bring uncertainty which will endanger the successes already achieved and unnecessarily increase the cost of producing food and fiber in Oregon.

DEQ's proposed rules will change the way Oregon regulates an already highly regulated industry. Having both ODA and DEQ regulating farming practices in potentially different ways not only violates Oregon law, but it will establish tremendous uncertainty for those who work and manage the fields. Farmers and ranchers need to be able to make quick land management decisions when in the field without fear of sanctions or remedies enforced by two different state agencies. Agriculture accounts

for 15% of Oregon's economy. Approximately, 1 in 8 jobs in our state is directly tied to the agriculture sector. As our state continues to struggle to get out of economic difficulty, Oregon agriculture is leading the way to recovery. The last thing Oregon needs is a new set of different rules imposed on a segment of our economy that is producing results. There are many issues under DEQ's purview that could have a direct impact on both agriculture producers and rural communities. We look forward to working with DEQ Director Dick Pederson and his staff in conjunction with Director Katy Coba and the staff at ODA to ensure effective and productive agricultural water quality management planning for Oregon farmland. Hopefully we will find some common ground on the issues expressed in this letter.

OFBF appreciates this opportunity to comment and would like the agency to seriously consider these remarks as it proceeds on this matter.

Sincerely,

Jennifer Shmikler
Regulatory Affairs Specialist
Oregon Farm Bureau