

State of Oregon
Department of Environmental Quality

Memorandum

Date: Oct. 31, 2016

To: Environmental Quality Commission

From: Richard Whitman, Director

Subject: Agenda item C, Informational and discussion item: Director's report
Nov. 2-3, 2016, EQC meeting

Recent litigation updates: TMDL Program

On October 12, federal Magistrate Judge John Acosta issued a recommended decision in ongoing litigation (Northwest Environmental Advocates (NWEA) v. EPA). In an earlier phase, Judge Acosta had determined that EPA erred in approving the Natural Conditions Criterion (NCC) element of Oregon's temperature standard. This second phase involves Total Maximum Daily Loads (TMDLs) that were approved by EPA relying, at least in part, on the NCC criterion. Acosta's found in favor of NWEA on its Clean Water Act (CWA) claims, and in favor of EPA on NWEA's claims that EPA violated another federal law, the Endangered Species Act, in approving the TMDLs.

The Magistrate instructed the parties to confer on what should happen next with the TMDLs. If the parties are unable to agree, there will be another round of briefing.

Earlier in the case, EPA requested that the Klamath Temperature TMDL and the Willamette Mercury TMDL be remanded to EPA for further action. Magistrate Judge Acosta agreed, and recommended a two-year time limit for further action on both TMDLs. He also recommended the Willamette Mercury TMDL remain in place during that period of time.

The parties have agreed to an extension of time for objections to the Magistrate's recommendations, but likely will need to decide whether to object/appeal the decision in the next few months if not sooner.

The outcome of this litigation is very relevant to work on the NPDES permit backlog, as the validity of the TMDLs may affect permit requirements.

Updates on Cleaner Air Oregon

On October 18, Governor Brown kicked off the first of six advisory committee meetings for Cleaner Air Oregon. These meetings will inform the policy development underway between DEQ and the Oregon Health Authority, and are part of the state's comprehensive regulatory reform for air toxics. Former state Senator Jackie Dingfelder and environmental attorney Claudia Powers are serving as co-chairs of the committee, which is meeting once a month through the end of 2016, with three additional meetings in early 2017. The committee will review policy recommendations based on the analysis and information developed by a technical workgroup of

scientists and other experts. These materials will be developed by DEQ and OHA staff in preparation for a rule proposal to the commission in late 2017.

Addressing illegal dumping

Many local governments are aware of illegal dump sites and have asked DEQ for assistance to clean them up. DEQ is evaluating if, and how, the agency can assist local governments on this issue through use of Solid Waste Orphan Site Account Funds.

DEQ is consulting with the Oregon Department of Justice regarding two questions:

1. Can Solid Waste Orphan Site Account Funds only be used on property owned by local governments, or also on private property where there is no responsible party?
2. Can these funds be used on dumpsites related to prior homeless settlements?

DEQ will evaluate what process would be best to determine eligibility, prioritize sites, and equitably distribute funds to local governments to cleanup illegal dump sites. DEQ aims to complete its evaluation and make a recommendation by the end of 2016.

Oregon's new Onsite Septic System Loan Program

In 2016, Senator Roblan championed Senate Bill 1563 which directed DEQ to enter into an agreement with a third-party lender to develop and implement a loan program to provide low-interest loans for the repair or replacement of failing on-site septic systems. The primary objective was to create a financial assistance program for low and moderate income applicants facing expensive repairs or replacement, who are unable to obtain traditional financing. The bill authorized \$250,000 in General Funds for this purpose, with the requirement that at least \$200,000 be awarded through the grant. Senator Roblan's intent was to gain some experience with a loan program with a small amount of seed funding, and seek additional funding in the upcoming session.

DEQ signed a grant agreement with Craft3 – a non-profit lending organization – in September. Craft3 has been successfully implementing a similar program in Washington for several years, so they were able to hit the ground running. They also were able to match the state's funding with additional capital from private sources, which doubled the amount they have to lend out.

Craft3's "Clean Water Loans" cover all costs associated with a septic system repair or replacement, including permitting, design and installation – and also includes an allowance for ongoing maintenance (e.g., pumping). They offer special rates and deferred payment options for homeowners with lower incomes, as noted in the project brochure.

DEQ will provide additional details verbally at the Nov. 2, 2016, meeting about activities since early September, including outreach and publicity, number of loan application received, number of loans issued or in process and geographic distribution.

New online statewide system for onsite permit applications

DEQ's new ePermitting system for onsite septic system permits went live Monday, October 24. It allows those applying for permits, site evaluations and authorization notices to do so online instead of submitting a paper application in person or through the mail. Kiosks are available in

DEQ offices to help those without online access. A special hotline and email helpdesk are also in place. DEQ employees held three trainings at locations around the state the week of October 24 to help permit holders with the transition. DEQ partnered with the Oregon Department of Consumer and Business Services for this project to expand DCBS's existing ePermitting system that is used for building permits to now include onsite septic permits. DEQ provides septic services in 10 Oregon counties, with the pending delegation of operations in Umatilla County.

DEQ delegates onsite program to Umatilla County

DEQ will formally delegate operation of the local onsite septic program to Umatilla County on Nov. 1, 2016. The Umatilla County Department of Health will operate the program which has offices in both Pendleton and Hermiston. The Umatilla Board of Commissioners passed an enforcement ordinance and signed the Memorandum of Agreement, taking on the septic program in the county. A meeting was recently held by the county with local septic contractors to discuss the transition. The delegation of this program will provide more local service to residents of the county, and maintain the levels of environmental protection and regulatory requirements for onsite septic systems in the region.

CAFO permit application for Lost Valley Dairy

Last year the Oregon Department of Agriculture received a permit application for the Lost Valley Dairy on 5,700 acres near Hermiston. The proposal calls for a Confined Animal Feeding Operation, or CAFO, with 30,000 head of cattle. The dairy would be located in the Lower Umatilla Groundwater Management Area, an area where there is documented nitrate contamination in the shallow aquifer.

DEQ is the delegated NPDES Permit authority for Oregon, including for the CAFO program; however, since 2002, DEQ has worked with ODA under a memorandum of understanding to jointly issue CAFO NPDES Permits. Once issued, ODA administers the permits. This requires close coordination and communication between DEQ and ODA, especially since the agencies have different processes and procedures for these types of permits.

DEQ's role is to work with ODA to assure that if ODA is proposing to issue a permit, that it is protective of ground and surface water quality. A permit must regulate CAFO operations so that manure and processed wastewater do not enter groundwater or reach surface water. For example, in this case ODA's draft permit requires:

- An Animal Waste Management Plan, which describes how the manure, mortalities and other waste products would be stored, transferred and utilized
- That the wastewater lagoon be lined
- Limits on land application of wastewater and solids
- Zero runoff to surface waters
- Groundwater and soil monitoring to demonstrate the protection groundwater

The original public comment period for the draft permit closed Sept. 4, 2016, and resulted in almost 3,000 comments. The agencies have been responding to the original set of comments and are considering them as they determine how to proceed.

Some common concerns expressed during the initial public comment period include:

- Additional contributions from the proposed CAFO to already nitrate-contaminated groundwater
- A lack of an Oregon Dairy Air Quality Program, citing specific air quality threats, such as:
 - An increase in methane, a greenhouse gas, would strike a blow to Oregon's GHG reduction goals;
 - An increase PM2.5 particulate, a health concern, would add to particulate generated by an already large number of animals in the area; and
 - An increase in ground-level ozone precursors, NOx and VOCs from manure handling and animal operations would add to Hermiston's borderline ozone problem in the summer, as monitored by DEQ.
- A lack of meaningful outreach using environmental justice principles during the comment period.

ODA extended the comment period until Nov. 4, 2016, specifically to conduct outreach to and solicit input from people and communities that may be disproportionately affected by the proposed facility, and that may be underrepresented. Both agencies worked with Environmental Justice Task Force members and other stakeholders to develop this outreach.

Together, the agencies have focused on low-income and underrepresented communities living or working in the area. The agencies have done in-person and print-based outreach, in both Spanish and English, with an outreach team, in addition to working through the traditional stakeholder and interested-party mailing lists for CAFO permits. The Confederated Tribes of the Umatilla Reservation also requested and have received separate consultation with both agencies.

Portland Harbor update

On September 21, commissioners and partners from several state agencies had a chance to visit, by boat, many of the project sites for the Portland Harbor Superfund project. DEQ project staff prepared a summary report, attached to this report, to provide a comprehensive update on the sites observed during the tour, state actions and next steps related to the cleanup of Portland Harbor.

At present, DEQ continues to expect that EPA will issue a Record of Decision in late December or early January.

Jim McKenna has been hired as Portland Harbor coordinator for the Governor's office. Jim is currently located in DEQ NW Region, but will be transferring over to a location with the Portland metro Regional Solutions Team in the near future. Jim has extensive experience with the harbor, and is working exclusively on post-ROD implementation (e.g., actions that may occur following issuance of the ROD in order to move this effort forward).

Background

The U. S. Environmental Protection Agency listed the Portland Harbor reach of the Willamette River as a federal Superfund Cleanup Site on Dec. 1, 2000. Cleanup of the Harbor is focused on sediments within the lower 11 miles of the river which are contaminated with elevated levels of polychlorinated biphenyls (PCBs), polycyclic aromatic hydrocarbons (PAHs), dioxins/furans, pesticides and other contaminants.

In 2001, DEQ signed a Memorandum of Understanding with EPA, six tribal governments, and three natural resource trustees, collectively referred to as the MOU Partners, which outlines a framework for cooperation in the investigation and cleanup of the Harbor. EPA was designated the lead agency responsible for oversight of the in-water cleanup and DEQ, using state authority, was identified as the lead agency for control of sources adjacent to or upstream from the site.

To coordinate in-water cleanup and upland source control work, DEQ and EPA developed the December 2005 Joint Source Control Strategy, which provided a framework for identifying and controlling potential sources of contamination consistent with the objectives of the in-water work.

In-water update

Since 2002, EPA has been working with the Lower Willamette group, a group of fourteen potentially responsible parties, to conduct the remedial investigation and feasibility study for the site. More than 150 potentially responsible parties are working through self-directed mediation in an attempt to allocate overall cleanup costs. The Lower Willamette Group's draft remedial investigation report was submitted in October 2009 and revised in 2011. The final report was substantially reworked by EPA and approved in February 2016. The Lower Willamette Group submitted a draft feasibility study in March 2012 which was subsequently rewritten by EPA in summer 2015. This study was the basis for a conceptual remedy that EPA Region 10 presented to EPA's National Remedy Review Board and Contaminated Sediments Technical Advisory Group to evaluate in November 2015. DEQ provided detailed comments on EPA's draft feasibility study and conceptual remedy on behalf of the Oregon Governor's office and other state agencies including Oregon Department of Fish and Wildlife, Oregon Health Authority, Oregon Marine Board, Oregon Department of State Lands, Oregon Department of Transportation, Business Oregon and the State Historic Preservation Office.

Proposed plan summary and next steps

On June 8, 2016, EPA released their Proposed Plan and Feasibility Study for a 90-day public comment period. The Proposed Plan evaluated nine cleanup alternatives ranging from the No Action alternative to capping/dredging of the entire site. EPA is recommending Alternative I as the preferred remedy, which is estimated to cost \$810 million. Alternative I consists of dredging and capping across 13 "hot spot" areas which pose the greatest risks to human health and environment. These areas comprise approximately 15 percent of the total site acreage and EPA estimates that targeting them will result in a post-construction human health risk reduction of approximately 85 percent. The plan calls for the lesser contaminated areas throughout the remaining 85 percent of the site to be naturally remediated over time as the river delivers cleaner sediment from upstream. This process is referred to as monitored natural recovery.

EPA estimates that the active dredging and capping in this alternative can be completed in seven years, but

are uncertain about the number of years or decades required for monitored natural recovery to achieve the long term remedial objectives. The Proposed Plan's seven-year estimate does not include the lead-time required to negotiate performing party orders and design the alternative prior to construction. Extensive site wide monitoring will be needed to assess the long-term effectiveness of the remedy and need for additional action to meet remedial goals.

On Sept. 6, 2016, DEQ, the Governor's Office and the other state agencies, submitted comments on EPA's Proposed Plan and Feasibility Study. After reviewing comments and assessing the degree of state and community acceptance of their preferred alternative, EPA intends to issue a final Record of Decision by January 2017. DEQ, on behalf of the State of Oregon, will have a brief opportunity to review a draft of the record of decision before it is publicly issued. Oregon will inform EPA whether it concurs with the final cleanup plan, although concurrence is not required for EPA to move forward with a cleanup decision.

Key concerns and recommendations Oregon asked EPA to consider in its revisions to the Feasibility Study and the final Portland Harbor cleanup plan include:

- Importance to the community and the environment of maintaining the project schedule and issuing a Record of Decision by January 2017;
- Enhanced community outreach and early actions to protect public health, environmental health and environmental justice communities;
- Maintaining current and future uses of the Harbor for marine commerce, recreation, and fishing access;
- Concerns regarding the high level of uncertainty in EPA's cost and construction duration estimates;
- Importance of incorporating constructability and flexibility during remedial design;
- Consistency of the remedy with project risk assessment documents, particularly in defining and addressing ecological risk to the benthic community and lamprey;
- Establishing formal cleanup levels based on sediment preliminary remedial goals only and retaining surface water, groundwater, and fish/shellfish tissue criteria as measures of progress to evaluate effectiveness of the sediment remedy;
- Integration of EPA's remedy with DEQ source control efforts;
- Additional detail needed on the evaluation of monitored natural recovery effectiveness following the Record of Decision;
- Consideration of potential impacts to the community, economy, and existing infrastructure from transporting dredge spoils; and
- Need for clarity and accuracy in defining the roles and authority of various state agencies during remedy implementation.

Upland Source Control summary report

DEQ is the lead agency for identifying, evaluating and, if necessary, controlling upstream and land-based sources of contamination that may pose a recontamination threat to the in-water sediment remedy. In accordance with DEQ's role under the 2001 MOU and the goals identified in the 2005 Joint Source Control Strategy, DEQ prepared a summary report in November 2014 documenting DEQ's evaluation of upland sites for potential contaminant sources from direct discharges (including wastewater, stormwater, and overwater

activities); groundwater; soil and bank erosion; and upstream inputs, the status of source control efforts and schedule for completion. The report concluded that upland source control was on track to have adequate source control measures in place at all the sites prior to implementation on the in-water remedy.

On March 25, 2016, DEQ updated the Portland Harbor Upland Source Control Summary Report to support the release of EPA's Proposed Plan and to inform public comment. DEQ's report concludes that the Joint Source Control Strategy framework was comprehensively applied to identify, characterize and sufficiently control all potential sources of contaminants to the Portland Harbor study area. DEQ identified approximately 495 commercial and industrial properties within the study area uplands. Approximately 35 percent of these were screened in for further evaluation. DEQ excluded 63 sites as having no significant pathway for contaminant transport to Portland Harbor. Source control measures for one or more pathway were implemented at 105 sites. Final actions, demonstration of effectiveness and decisions for 60 percent of upland sites have been completed. Controls are in place for all pathways and effectiveness demonstration is underway at half of the remaining 57 sites. Source control decisions for these are anticipated by 2016 and 2017, which will confirm control of 75 percent of the sites evaluated. Completion and monitoring of controls at the remaining 23 percent of sites is anticipated prior to or in conjunction with the in-water remedy. Comprehensive investigation and stormwater controls were applied at more than 70 percent of the developed area draining to Portland Harbor and on-going regulation of stormwater discharges under the NPDES program will continue to monitor and improve discharges to protect the water column and sediment of the river. In addition to source control within the study area uplands, DEQ completed evaluations and cleanup upstream of Portland Harbor at eight upland sites and six in-stream sediment areas in the "Downtown Reach" of the Willamette River.

Regardless of where in-water remedial actions are implemented in Portland Harbor and which cleanup levels are used to assess recontamination and risk to river receptors, source control efforts in the uplands surrounding and upstream of the study area will be sufficient to prevent sediment recontamination and unacceptable risk to receptors from upstream and upland -related discharges.

EQC involvement

There is no request for EQC action at this time. DEQ will provide periodic updates on the status of the Portland Harbor work at the commission's request.

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