NORTHWEST ENVIRONMENTAL ADVOCATES

August 20, 2012

Michael Bussell, Director
Office of Water and Watersheds
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, OWW-135
Seattle, WA 98101 *Via Email*: Bussell.Mike@epa.gov

John King
Office of Coastal Resource Management
National Oceanic and Atmospheric Administration
1305 East West Highway #11305
Silver Spring, MD. 20910 *Via Email*: John.King@noaa.gov

Re: Oregon Coastal Nonpoint Pollution Control Program; EPA and NOAA's Interim Findings on Pesticides

Dear Messrs. Bussell and King:

As you know, Oregon has been seeking final approval of its Coastal Nonpoint Pollution Control Program (CNPCP) since July 1995, a process that is scheduled to be completed by May 15, 2014 pursuant to the settlement in *Northwest Environmental Advocates v. Locke*, *et al.*, Civil No. 09-0017-PK. On May 2, 2012 Northwest Environmental Advocates (NWEA) wrote to you expressing concern about your agencies' interim sign-off on Oregon's coastal nonpoint program with regard to agriculture as sufficient to meet the requirements of the Coastal Zone Act Reauthorization Amendments (CZARA). In that letter, we discussed the agencies' 2004 interim sign-off on pesticides which we noted relied entirely on a court-ordered injunction in *Washington Toxics Coalition v. EPA*., No. C01-132, 2002 WL 34213031 (W.D. Wash. July 2, 2002) *aff'd*, 413 F.3d 1024 (9th Cir. 2005). As we pointed out in that letter, that injunction has already terminated with regard to a significant number of pesticides and in all likelihood will be completely terminated by June 30, 2013. Therefore, it would be the very definition of arbitrary and capricious for the federal agencies to rely *entirely* upon a *wholly* terminated injunction when you make your proposed final decision on Oregon's CZARA program by November 15, 2013 and the final decision by May 15, 2014.

The purpose of this letter is to emphasize the problem we drew your attention to earlier, to point out that this earlier pesticide sign-off also applies to the use of pesticides on forested lands, and to note that, without the ability to rely upon the injunction, Oregon has a pesticide use that remains unresolved. The issue of pesticide use for silviculture was an outstanding condition in 1998 when EPA and NOAA found that Oregon's

> tools are inadequate to ensure that water quality standards are attained and maintained and beneficial uses protected. . . . Related to these water quality

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> impairments, Oregon has a number of aquatic species, in particular anadromous salmonids, that are endangered, threatened, or otherwise seriously at risk, due in part to forestry activities that impair coastal water quality and beneficial uses, including salmon spawning, rearing, and migration habitat[.]
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> * * *
>
> EPA and NOAA have identified areas where existing practices under the FPA and FPR should be strengthened to attain water quality standards and fully support beneficial uses. These areas included . . . the adequacy of stream buffers for application of certain chemicals."
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> * * *
>
> Forest practice rules in effect at the time the Oregon 6217 program was submitted for approval did not require buffers for aerial application of herbicides or fertilizers for type N (non-fishbearing) streams. Such streams comprise significant portions of total stream length in the coastal zone. In January 1997, the ODF revised its rules governing application of chemicals. The new rules require a 60 foot buffer on type N streams for direct aerial application of fungicides and nonbiological insecticides except as approved by the State forester. The rules do not contain restrictions for aerial application of herbicides, which would appear to leave type N streams still at risk.[1]

In the federal agencies' January 10, 2003 letter to Oregon discussing the status of these outstanding forestry issues, the issue of pesticides was not mentioned beyond quoting the above language from the1998 findings.[2] Although at that point the federal agencies relied upon the injunction, there is now no factual basis upon which EPA and NOAA can make a determination that Oregon has in place a program to achieve and maintain water quality standards and protect designated uses as required by16 U.S.C. § 1455b(b)(3) with regard to the application of pesticides in silviculture.

In order to assist Oregon to address the outstanding condition in Oregon's nonpoint program <u>that will not be addressed by the commitments made in the above-referenced settlement</u>, on August 9, 2012 NWEA filed with Oregon's Environmental Quality Commission a petition for rulemaking on pesticides. We have attached the petition to this letter for your information. We draw your attention specifically to pages 4 through 6 in which we request that the Commission petition the Board of Forestry to amend its rules to require forest operators' compliance with DEQ's water quality regulations and restrictions established to protect threatened and endangered species.

In conclusion, EPA and NOAA should consider urging Oregon to accept this petition for

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[1] EPA & NOAA, *Findings for the Oregon Coastal Nonpoint Program*, January 13, 1998.

[2] Memorandum from Bill Millhouser and Amy Carter, OCRM Coastal Programs Division, NOAA and Christine Reighgott, EPA Region 10 to Amanda Punton, Department of Land Conservation and Development and Don Yon, Department of Environmental Quality, *Re: EPA/NOAA 6217 Boundary Decision; and Response to Oregon's Supplemental Information in response to the Federal Findings of January 1998, submitted April 1999, January 2002, and October 2002* at 10, January 20, 2003.

rulemaking in light of the fact that there is not now nor will there be in the future a basis upon which the federal agencies can propose an approval of Oregon's CNPCP with regard to protection of water quality and designated uses from pesticides, including but not limited to silvicultural uses.

Sincerely,

Nina Bell
Executive Director

Attachment: NWEA, Petition to Initiate Rulemaking and Take Other Actions to Protect Existing and Designated Uses of Fish and Wildlife From Point and Nonpoint Sources of Pesticides, August 9, 2012 with Table of Contents and Appendixes (as noted below).

cc: Dick Pedersen, Director DEQ
Bill Blosser, Chair, EQC
Greg Aldrich, DEQ
Gene Foster, DEQ
Allison Castellan, NOAA (w/appendixes)
David Powers, EPA (w/appendixes)
Kim Kratz, NMFS
Mary Lou Soscia, EPA (w/appendixes)
Dave Croxton, EPA
Alan Henning, EPA
Paul Henson, USF&WS
Will Stelle, NMFS
Rob Walton, NMFS
Dennis McLerran, EPA