NORTHWEST ENVIRONMENTAL ADVOCATES

December 14, 2012

Dan Opalski, 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@e pa.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 Agriculture Including Dairy Wastes

Dear Messrs. Opalski and King:

On May 2, 2012 Northwest Environmental Advocates (NWEA) sent you a letter discussing the many ways in which Oregon's coastal nonpoint program fails to adequately control agricultural runoff. As we noted in that letter, the predominant agricultural activity in Oregon's coastal zone is dairy farming. At pages 24-28 we discussed how the combined efforts of the Oregon Departments of Agriculture and Environmental Quality have failed to curtail dairy farm manure from entering the Tillamook bay and sloughs, despite the federal money provided through the National Estuary Program starting in 1994 and the Oregon Department of Environmental Quality's (DEQ) having completed a Total Maximum Daily Load (TMDL) for fecal bacteria in 2001.

Attached in the e-mail by which this letter is sent is a short video from July 30, 2012 of dairy waste in the Tillamook River. The video was shot from the handicapped fishing pier on the Tillamook, looking downstream to the Netart's Highway Bridge and upstream to some houses. The video was taken by Jesse Hayes, an oyster farmer whose grandfather started Hayes Oyster Co. in 1912. Mr. Hayes took the video around noon on the incoming tide. He says that means the waste was dumped between 3:00 and 5:00 AM, on a dark out-going minus-tide. The manure did not make it to the Pacific Ocean but instead was returning on the incoming tide. Mr. Hayes, who often must be harvesting oysters during hours when the rest of us are sleeping, states that this is a common occurrence.

It is worth pointing out that the DEQ recently has promoted the improvements in water quality in some rivers entering the Tillamook Bay (the NEP does not monitor the bay). Interestingly this promotional information references whether rivers are meeting the *recreational use criterion*

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when, in fact, it is the far more stringent *shellfish criterion* that applies. As the TMDL states:

> Although recreational uses in rivers are considered safe if bacterial concentrations are higher than those allocated in this TMDL, protection of shellfish harvesting is a more sensitive beneficial use, and requires lower concentrations in the rivers to ensure low concentrations in the Bay. The TMDL targets river concentrations that will limit the loading to the Bay and result in low concentrations in shellfish harvesting beds.

It goes on to say that

> The loading capacity is set to meet the shellfish criterion requiring that the median of fecal coliform concentration be no greater than 14 COUNTS/100mL in the Bay. This loading capacity relies on achieving low concentrations of bacteria in the rivers and dilution with bacteria free water in the Bay.

While there may be some reduction in animal wastes in some rivers entering the Tillamook Bay, DEQ is not holding itself to its own TMDL and applicable standards in evaluating those improvements. And the bay continues to be closed for shellfish harvesting for up to 100 days each year. As we said in our earlier letter, the infusion of huge amounts of federal money and the development of a TMDL have little effect on water quality and no beneficial effect on water quality of the bay.

As you know, the DEQ is developing a pilot "implementation ready" TMDL for the MidCoast basin in order to demonstrate that it has the capacity to regulate nonpoint forestry impacts to water quality in order to resolve the outstanding issue of inadequate forest practices in coastal watersheds. In NWEA's view, as we have said, DEQ must also use that pilot project to demonstrate its capacity to regulate agricultural nonpoint sources in coastal watersheds because the federal agencies' preliminary sign-off for agriculture was both premature and incorrect. Conveniently, the MidCoast TMDLs include fecal bacteria, as well as other parameters to which agricultural lands contribute pollutant loads. Unfortunately, however, Oregon DEQ may not have grasped the importance of this TMDL to gaining full approval from EPA and NOAA for its coastal nonpoint program. For example, in a meeting of the Local Stakeholder Advisory Committee (LSAC) that is providing advice to Oregon DEQ concerning the development of this MidCoast TMDL, it was reported that a subcommittee recommended prioritizing human sources first because they were the most risky. DEQ staff took the opportunity to comment to the effect that that prioritization was also useful because on-site septic systems are already regulated and other sources – namely agricultural – "aren't as straightforward." Indeed.

In a meeting of that same LSAC this week, staff from the Oregon Department of Agriculture (ODA) explained how landowners do not have to abide by the results of any TMDL, including this one, but rather must just comply with existing ODA rules. DEQ did not disagree with ODA's characterization and merely added that it was going to evaluate ODA rules and plans. At no time in this discussion did DEQ explain how an "implementation ready" TMDL was going to actually work to revise the ways in which agricultural landowners manage their lands and animal wastes such that it would be more effective than DEQ's regular TMDLs. For example, DEQ did not state that it would be developing "safe harbor" Best Management Practices (BMPs) for sources of bacteria, sediment, or temperature that would apply to agricultural lands. Nor did DEQ state that it might identify agricultural sources as "significant" nonpoint sources and for

those sources that it would issue enforceable load allocations. DEQ did not even offer that it would expect ODA to incorporate changes in its rules to ensure compliance with the TMDL. Instead, there was a description of how DEQ plays no role in ensuring nonpoint source controls on agricultural lands, how TMDLs have no impact whatsoever on agricultural landowners, and how the ODA might or might not revise its voluntary plans (but not its enforceable rules) in response to the TMDLs.

Regulating the dairy industry in Oregon's coastal watersheds has not been "straightforward" and neither has it been successful. Yet Oregon must demonstrate that it has both the legal authority and a commitment to use the existing enforcement authorities where necessary in order to gain approval of its coastal nonpoint program under CZARA. Given the passage of time since the NEP began and the TMDL was approved by EPA, the federal agencies must see substantial movement by Oregon DEQ to curtail the dairy wastes that foul coastal waters on a regular basis. Relying on anything less to support a federal approval action would be inconceivable under the circumstances.

Sincerely,

Nina Bell
Executive Director

Attachment: 2012-07-30 11-37-10 70.mp4 (5 MB)

cc: Dick Pedersen, Director DEQ
Bill Blosser, Chair, EQC
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Allison Castellan, NOAA
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