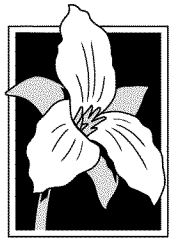
NORTHWEST ENVIRONMENTAL ADVOCATES



April 3, 2012

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Re: **Concerns About Oregon Department of Environmental Quality's Honoring CZARA Settlement Commitments Oregon Coastal Nonpoint Pollution Control Program**

Dear Messrs. Bussell and King:

We are writing to express grave concerns about the Oregon Department of Environmental Quality's (DEQ) apparent disinclination to carry out the commitments it made in settlement of the Coastal Zone Act Reauthorization Amendments (CZARA) litigation, *Northwest Environmental Advocates v. Locke, et al.*, Civil No. 09-0017-PK. At the initial meeting of the DEQ-convened Local Stakeholder Advisory Committee (LSAC), recently held on March 20, DEQ set out its definition of an "Implementation Ready TMDL" (IR-TMDL), which is at the heart of the settlement, and explained how it proposed to meet the CZARA commitments. Specifically, DEQ described a process that strongly suggests it will be seeking to rely on the activities of other state agencies and that it will either fail to establish best management practices (BMPs) sufficient to meet load allocations or it will postpone their adoption. To the extent this is true, DEQ would be describing a process that will not meet its commitments or allow the federal agencies to propose a final Approval decision on Oregon's Coastal Nonpoint Pollution Control Program (CNPCP). The purpose of this letter is to alert you to an opportunity to resolve concerns before it is too late, thereby giving Oregon the best possible chance of obtaining final approval that can withstand outside scrutiny. Understanding that participation in CZARA is not mandatory, we urge you to explain to Oregon DEQ in the clearest of terms its need to adhere to the commitments it made in the CZARA settlement.

As you know, in order to settle the CZARA litigation, DEQ agreed to take specific steps to ensure that it was legally, technically, and politically able and willing to use a new form of Total Maximum Daily Load (TMDL), under section 303(d) of the Clean Water Act (CWA), to directly regulate nonpoint sources that are otherwise regulated (or not) by other state agencies. As set out in the CZARA settlement, on July 2, 2010 the Oregon Attorney General issued a legal opinion

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concluding that DEQ could indeed assign TMDL load allocations to individual property owners, it could establish so-called "safe harbor" best management practices (BMPs) that DEQ believes are adequate to meet the load allocations, and that it could directly regulate landowners if it found that the Board of Forestry BMPs were not as protective as those developed by DEQ to meet the TMDL. Moreover, a Water Quality Management Plan (WQMP) issued in conjunction with the TMDL could additionally require each source to submit a landowner-specific implementation plan to DEQ. In a letter dated July 26, 2010, and key to the CZARA settlement, DEQ committed to specifically identify significant nonpoint sources, to establish enforceable load allocations in the TMDL for such significant sources, to develop "safe harbor" BMPs for those enforceable load allocations, and to additionally issue an implementation order to each of the significant sources with load allocations. However, at the LSAC meeting and in the materials used for that meeting, DEQ presented several different views of its commitments which fundamentally alter the basis of the settlement and we believe will seriously jeopardize the federal agencies' ability to propose an approval of Oregon's CNPCP.

I. DEQ is Signaling an Intention to Avoid Direct Regulation of Nonpoint Sources Contrary to its Commitments

The first problem arises with DEQ's proposed addition of elements to the IR-TMDL process that strongly suggest DEQ plans on relying upon the efforts of other agencies rather than on its own legal authority, as it committed to do. At the LSAC meeting, DEQ presented information that IR-TMDLs must include:

- Enforceable load allocations for all significant sources (IR-TMDLs)
- "safe harbor" BMPs for the load allocations established for significant nonpoint sources (IR-TMDLs)
- Issuance of an implementation order to significant sources (IR-TMDLs)[1]

This is an accurate paraphrase of some of the commitments made in the July 26, 2010 DEQ letter. But from this point on, DEQ's descriptions become more murky and significantly less consistent with its commitments. Using a flowchart graphic that DEQ relied on heavily during the meeting, the agency explained aspects of an IR-TMDL that go beyond those in a regular TMDL.[2] As described by DEQ, the IR-TMDL includes the additional element of "Review Existing Rules and Plans." This review includes three items:

- Interpret Rules and Plans that Relate to Land Conditions
- Identify Practices
- Inventory of Practices[3]

In response to this review, DEQ proposes another additional element to identify the "Water

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[1] Overview of CZARA Litigation, Coastal Nonpoint Program (CNPCP) and Relationship to MidCoast TMDL, Powerpoint, Gene Foster, DEQ, March 20, 2012, Slide: "DEQ Commitments for CZARA Settlement Agreement Between NWEA and USEPA."

[2] *Id.*, Slide: "Traditional Basin TMDL and IR-TMDL."

[3] *Id.*

Quality Response: Does Plan Meet Load Reductions?" If the answer to this question is "no," "More Practices [are] Needed." If the answer is "yes," the TMDL is finalized and it goes to an adaptive management do loop.

We have no inherent objections to DEQ's conducting a review of existing rules and plans of other agencies. We are, however, greatly disturbed by DEQ's *intent* in conducting this review as part of the MidCoast IR-TMDL. Specifically, DEQ does not need to evaluate other agencies' plans and rules in order to meet its CZARA settlement commitments to set out the necessary BMPs for landowners. As described by DEQ, the agency and the LSAC will "Interpret Rules and Plans that Relate to Land Conditions." This additional element strongly suggests that DEQ plans to avoid the very task that is at the heart of the IR-TMDL, namely identifying the land practices that are necessary to meet load allocations and water quality standards. Put another way, it has all the appearance of an exercise in which DEQ, for instance, could "interpret" the Oregon Department of Agriculture (ODA)'s rules as meaning that landowners need to have riparian vegetation sufficient to meet water quality standards, regardless of the fact that ODA does not specify how much vegetation is needed (in rules or plans) and to date DEQ has not told ODA or any landowners how much vegetation is needed. It is not clear what expertise DEQ has to interpret another agency's rules and plans nor why it should do so in order to evaluate what it, the agency with the water quality expertise, must require. And, most important, the CZARA settlement did not include an alternative option for DEQ to interpret other agencies' requirements as sufficient in order to avoid the commitments it did make to identify the BMPs necessary to meet load allocations. Similarly, in order to provide reasonable assurance of nonpoint source controls and to demonstrate that a TMDL will result in the attainment of water quality standards, Oregon cannot point to the programs of other agencies as sufficient, when those rules and plans are not intended to or are known not to meet water quality standards and load allocations.[4]

Similarly, with regard to forestry, it is not clear why DEQ must interpret existing rules of the Oregon Department of Forestry (ODF). The federal agencies have already determined that the ODF rules are inadequate to meet water quality standards with respect to riparian protections, high-risk landslide areas, and "legacy" (high risk) roads. Given that DEQ has a mere nine months in which to complete this TMDL, evaluating admittedly inadequate rules serves no function but to distract from meeting the commitments made by DEQ. While DEQ may desire to issue BMPs that dovetail perfectly with existing ODF rules (or those revisions scheduled to be completed in April 2014) or that only add to those rules to the minimum degree necessary, that is not a part of the DEQ commitment. It is also likely a far more difficult task than only identifying the BMPs necessary to meet load allocations and is likely well beyond what the department can accomplish in the remaining time. While this may be considered desirable by various stakeholders, it is not a necessary step in DEQ's identifying what BMPs are required to meet load allocations.

With regard to agriculture, DEQ proposes to evaluate the ODA's Agricultural Water Quality Management Area Plans (AWQMAPs) and associated rules. As stated above, it is incorrect that under the settlement agreement DEQ can "interpret" these ODA plans and rules to avoid the task of identifying BMPs that are required to meet load allocations. The AWQMAPs are purely

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[4] For example, the ODA Water Quality Program Manager, told a meeting on March 9, 2012 that 'compliance with [ODA] rules is an important backstop, but is not sufficient to achieve load allocations and water quality standards.'

voluntary and therefore cannot function as a substitute for DEQ-ordered compliance with BMPs. The sheer ambiguity of ODA's rules, on the other hand, likewise prevents them from being a substitute for DEQ's commitment to develop BMPs for load allocations. Simply put, DEQ cannot interpret another agency's ambiguous rules to avoid the task to which it committed. The purposelessness of such an endeavor is made even more clear by the fact that even ODA admits that its own rules are entirely ambiguous, bear no relationship to meeting water quality standards, and are subject to the interpretation of staff at any given place and time. In a recent email, for example, the ODA Water Quality Program Manager stated that

> To support vegetation composition determinations, we have relied on a concept we have called "site capability." We define this term as the highest ecological status an area can attain *given political, social, or economic constraints*.[5]

Put another way, ODA does not use science to determine the key width and density parameters of a forested riparian buffer sufficient to meet water quality standards but, instead, considers what a landowner is willing to do.

Moreover, DEQ's proposed approach to evaluate ODA's plans and rules is utterly flawed because it relies on a fiction. At the LSAC meeting, DEQ commented that in evaluating existing rules for agriculture, it would look at '100 percent compliance with existing ODA rules, what would that mean?' and 'percentage of compliance areas linked to water quality conditions linked to prohibited conditions.' As the IR-TMDL is not supposed to be a process that endorses the highly subjective and lax ODA interpretation and enforcement of its ambiguous rules, DEQ cannot rely on those rules. Even a 100 percent compliance with ambiguity is simply more ambiguity. Therefore, an effort to interpret and review them is essentially a pointless exercise. In contrast to ODA's approach, DEQ is required to make a clear statement of the BMPs that are necessary to meet load allocations. (Presumably, ODA will in future use DEQ's BMPs to interpret its own rules.)

Likewise, while we have no objection to DEQ's identifying and inventorying existing practices, as it proposes to do, these practices are not adequate to prevent the long-term and on-going violations of water quality standards in the MidCoast basin and therefore they are mostly irrelevant and a distraction from the effort that DEQ needs to make in short order.

After completing this "review" and inventory of rules, plans, and practices, DEQ proposes to answer the question "Does Plan Meet Load Reductions?" While it is not clear to which plan DEQ refers and whether it includes rules, this is in any case the wrong question. In order for DEQ to meet its CZARA settlement commitments, it need not evaluate whether other agencies' plans meet load reductions because such plans were never based on the DEQ's technical analysis of practices sufficient to meet load reductions nor have they demonstrated the effect of resolving water quality impairments to date. The purpose of the IR-TMDL is to ensure compliance with load reductions called for in load allocations, not for DEQ to continue publishing TMDLs that have little or no effect on land practices and attainment of water quality standards. For forestry,

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[5] Email from Dave Wilkinson, Water Quality Program Manager, ODA, to Nina Bell, NWEA March 3, 2012 (emphasis added) concerning how ODA calculates and expresses width and density requirements of riparian requirements to meet water quality standards for temperature and other parameters.

EPA and NOAA have already for over a decade established that existing ODF practices are inadequate to meet water quality standards, an outcome ODF's own Ripstream study now confirms, so to the extent that those practices are considered by DEQ to be a "plan," the answer is already "no." The ODA's AWQMAPs are purely voluntary and have similarly failed to improve water quality so the answer is "no" on that count as well. DEQ's having added this process of reviewing rules and plans that are vague and inadequate amounts to staff time the agency can ill afford considering the limited time remaining.

II. DEQ is Backpedaling on its Commitment to Issue Orders to Significant Sources

In the settlement of the CZARA litigation, DEQ committed to "establishing enforceable load allocations in the Implementation Ready TMDL for all significant nonpoint sources" and "issuing an implementation order to significant sources ... that have received load allocations." DEQ is now signaling that it has no intention of fulfiling those commitments but, instead, will focus on designated management agencies (DMA) as it does in its existing failed TMDL program. In the presentation made to the LSAC, DEQ discussed what it termed "primary and secondary persons." Specifically, DEQ established that "primary persons" are "DMAs - State and Federal agencies, Cities, Counties, and Special Districts" and "secondary persons" are "[p]rivate Landowners identified as significant sources."[6] The presentation slide goes on to indicate that the "responsibilities" of DMAs are to "[d]evelop implementation plans or rules to implement TMDL" whereas those for actual pollution sources are to "[d]evelop implementation plans for management strategies not already addressed by primary DMA implementation plan or rules." Finally, the slide states that secondary persons "[b]ecome[] responsible only if the primary DMA plan or rules do not address management strategies to meet water quality standards. Primary DMAs will have a grace period to make any needed plan or rule updates." This position was echoed during the LSAC meeting when DEQ staff stated that 'in an IR-TMDL it's part of the process to evaluate whether it's enough to meet water quality or is change needed in rules and plans?'

DEQ's description flatly contradicts its CZARA settlement commitments for coastal watersheds. First, DEQ committed to "issuing an implementation order to significant sources ... that have received load allocations." A "source" of nonpoint source pollution is not a DMA, it is the landowner whose land is contributing the pollution. For example, EPA's website states that "The term 'nonpoint source' is defined to mean any source of water pollution that does not meet the legal definition of 'point source' in section 502(14) of the Clean Water Act."[7] DEQ's own glossary provided to the LSCA at the initial meeting, citing OAR 468B.005(3) and OAR 340-041-0002(42), defines nonpoint source as "[a]ny source of pollution other than a point source; and generally is a diffuse or an unconfined source where wastes can either enter into ot be conveyed by the movement of water to waters of the state." Likewise, this same glossary, citing OAR 340-042-030(12), defines source as "any process, practice, activity, or resulting condition that causes or may cause pollution or the introduction of pollutants to a waterbody." In no sense

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[6] Overview of Implementation Ready TMDL Process and Key Differences from a Basin TMDL Process, Powerpoint, Ryan Michie, DEQ, March 20, 2012, Slide: "Primary and Secondary Persons" (emphasis in original).

[7] EPA website, "What is Nonpoint Source Pollution?" http://water.epa.gov/polwaste/nps/whatis.cfm.

of the term "source" or "nonpoint source" could DMAs[8] be considered pollution sources, yet DEQ has stated it intends for DMAs to develop plans to address pollution loads before DEQ will issue the enforceable load allocations and implementation orders to which it committed as part of the CZARA settlement. In other words, DEQ proposes to continue using the same failed approach that has made no progress towards attainment of water quality standards in coastal watersheds, including where regular TMDLs already are in place. As such it constitutes a direct repudiation of the commitments made by DEQ.

Second, DEQ does not even state that the DMAs will be required to identify the necessary BMPs but only that they will develop plans or rules. Currently, DMAs develop plans and rules, none of which have proven satisfactory to assure that nonpoint sources reduce pollution inputs sufficient to meet water quality standards. Again, DEQ is proposing to do the same exact thing it does now in lieu of honoring its commitment in the CZARA settlement. Third, there was nothing in the DEQ CZARA settlement commitments that allowed the agency to postpone to an unknown time its obligation to issue enforceable orders to pollution sources. Instead, the enforcement orders were to be issued with the TMDL because DEQ committed to "establishing enforceable load allocations in the Implementation Ready TMDL[.]" Yet not only does DEQ propose that DMAs will develop plans and rules "on a schedule identified in the WQMP" with an unknown "grace period" but there is no statement as to when DEQ intends that so-called secondary persons will be the subject of the enforceable orders to which DEQ committed would be issued with the TMDL. Fourth, DEQ makes repeated reference to "management strategies" when its commitment was to identify and require BMPs. Management strategies and plans are what DEQ uses now in its failed TMDL program. The CZARA settlement was intended to establish a program that would work to attain water quality standards, specifically one that would bypass the inadequate ODF and ODA strategies, by having DEQ make clear what BMPs were necessary.

DEQ does further damage to its CZARA settlement commitments in the materials distributed to the LSAC. In a chart[9] comparing water quality management plans (WQMP) to "IR-WQMPs" – an entirely new concept not contemplated in the CZARA settlement for, among other reasons, there is no formal federal agency review of WQMPs – DEQ notes that IR-WQMPs will include "identification of ... responsible persons, including private landowners, if they are identified as significant sources." This however, is not consistent with the DEQ CZARA settlement commitment to identify and issue enforceable load allocations to significant sources in the TMDL itself, not the associated WQMP. DEQ has also loaded up the so-called IR-WQMP with further detail – such as an estimate of the number of management strategies needed, an estimate of the costs of implementation, and "additional detail" for the protocols for revising the implementation plan. None of these are a substitute for the elements that DEQ committed to include in the IR-TMDL itself. They are in some instances pseudo replications of an approach used in Virginia, discussed further below, but the CZARA settlement did not endorse that approach nor did it state that the approach could be used in lieu of the commitments DEQ did make.

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[8] Citing OAR 340-042-030(2), DEQ defines a DMA as "[a] federal, state or local government agency that has legal authority over a sector or source contributing pollutants[.]"

[9] Element by Element Comparison of Basin Total Maximum Daily Load (TMDL) and Implementation Ready TMDL.

Renouncing its commitments, DEQ stated orally at the LSAC meeting that the "primary person" is currently the DMAs and that the agency 'wants to continue to do that.' This was clarified by DEQ's stating a few minutes later that the DEQ orders were be issued to DMAs and later that the 'LSAC will tell us [DEQ] how to meet load allocations and standards.' None of these comments are consistent with the DEQ CZARA settlement commitments. When asked by the Plum Creek Timber Company representative whether costs will be factored into the evaluation of appropriate BMPs, DEQ stated that 'costs will be related to milestones [in the WQMP].' DEQ went on to state that it wanted LSAC 'advice on significant sources and costs.' Given that the query on costs came from a forestry stakeholder, DEQ's answer suggests that it may consider costs in developing the BMPs and that it may phase in those BMPs rather than directly and immediately ordering compliance with them from significant forestry sources. This, too, is inconsistent with DEQ's commitments.

III. DEQ Appears to be Seeking to Avoid Delineation of BMPs in Load Allocations

In addition, DEQ appears to be seeking to renege on its commitment to identify specific BMPs for nonpoint sources sufficient to meet load allocations. In its presentation to the LSAC, DEQ set out the "key" elements of an IR-TMDL:

- Source and implementation analysis focused on smaller geographic areas
- Some private landowners may be identified as significant nonpoint sources
- Estimate of direct costs to implement the TMDL
- Establish detailed timelines and milestones
- Develop and analyze implementation options *during* the TMDL process[10]

Nowhere in the description of the "key" elements is there a clear statement that DEQ is going to identify the BMPs necessary to meet load allocations. Instead, there is a statement that DEQ will "develop ... implementation options," which is manifestly not the same thing. The phrase "implementation options" is simply ambiguous and open to interpretation but it decidedly does not include management measures or best management practices. Had DEQ said "BMP options" we would readily concede there may be more than one way to meet load allocations, but instead the agency has reverted to talking about options, strategies, and the like – planning verbiage – rather than clearly stating the politically-difficult but accurate requirement under the settlement that it identify BMPs. Likewise, DEQ describes its commitment with regard to significant nonpoint sources as "identif[ying]" them as opposed to its issuing such sources enforceable orders to comply with load allocations and BMPs. All the other so-called key elements are nice but irrelevant. The costs, timelines, milestones, options, smaller-scale analysis are all elements that DEQ can include in TMDLs without them ever having any real world on-the-ground results, as required by CZARA and the DEQ CZARA settlement commitments.

A. The Virginia Example

Likewise, the examples of IR-TMDL "management measures" given by DEQ to the LSAC are nice but not sufficient to meet DEQ CZARA commitments. Specifically, DEQ cites to the

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[10] Overview of Implementation Ready TMDL Process and Key Differences from a Basin TMDL Process, Powerpoint, Ryan Michie, DEQ, March 20, 2012, Slide: "Key IR TMDL Elements" (emphasis in original).

approach used to control bacteria in the Blacks Run and Cooks Creek TMDL in Virginia, the WQMP[11] for which (not the TMDL) contains an internal reference to a Virginia Agricultural BMP Manual.[12] Specifically, for example, the agricultural "grazing land protection system" and the "stream protection systems" listed in the DEQ example include references to Virginia BMPs SL-6 and WP-27 respectively. The SL-6 practice, in turn, refers to a variety of BMPs and requirements with objective, numeric, measurable, and enforceable BMPs such as a

> [m]inimum width of the wooded buffer will be the same as NRCS, Technical Guide as follows: A minimum width of 35 feet from the edge of the stream bank, or up to one-third of the flood plain, not to exceed 100 feet is required.[13]

Oregon, however, does not have a BMP manual to which it can refer. For this reason, the CZARA settlement commitments require the development of the BMPs in the IR-TMDL. In addition, unlike Virginia, DEQ's commitments do not include caveats related to cost-shares, including cost-shares that expire over time.

B. The Type N Stream Example

An example of why DEQ's proposal to avoid establishing BMPs is misguided, as well as inconsistent with its commitments, is made clear in considering Type N non-fish-bearing streams. There are many indications, discussed in this letter, that DEQ will seek to rely on ODF's proposed rulemaking for fish-bearing streams to avoid meeting its CZARA commitments but ODF has no intention to address Type N streams, leaving DEQ without even a figleaf of an alternative to its commitments. ODF rules currently provide almost no water quality protection whatsoever for Type N streams.[14] On the other hand, recent evidence from Washington State[15] supports the long-held view of the federal agencies that Type N streams do contribute to water

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[11] Water Quality Implementation Plan for Blacks Run and Cooks Creek (Fecal Coliform and Aquatic Life TMDLs), Virginia Department of Conservation and Recreation, May 25, 2006, available at http://www.deq.virg inia.gov/Portals/0/DEQ/W ater/TMDL/ ImplementationPlans/ccbrip.pdf.

[12] Program Year 2012 Virginia Agricultural Cost Share (VACS) BMP Manual, Department of Conservation and Recreation, Division of Soil and Water Conservation, Commonwealth of Virginia, April 2011, available at http://dswcapps.dcr .virginia.gov/ htdocs/ag bmpman/csmanual.pdf.

[13] http://dswcapps.dcr.virg inia.gov/htdocs/ag bmpman/BMPs/CC I-FRB-1_2012.pdf

[14] ODF Type N rules provide for limited riparian vegetation buffers of 10 feet – except for the Coast Range. There is no equipment exclusion zone or protections for high-energy Type N streams. For Coast Range forests there are only requirements for Type N debris-prone streams (retention of green trees within 50 feet and 500 feet above a Type F stream).

[15] Results of the Westside Type N Buffer Characteristics, Integrity and Function Study Final Report, by Dave Schuett-Hames et al., Washington Department of Natural Resources, CMER 12-1201, December 2011, available at http://www.dnr.w a.gov/Publi cations/ fp_cmer_12_1201.pdf.

quality standards impairments even when some protections are in place (i.e., the Washington Type N riparian buffers and equipment exclusions zones), protections Oregon lacks, particularly for Coast Range forests. Type N streams are among the riparian protections that EPA and NOAA have found missing in ODF's water quality protections since 1998 and therefore are clearly among the streams that must be addressed in the MidCoast IR-TMDL in such as way as to allow the federal agencies to determine that Oregon will be protecting water quality to meet water quality standards.

In this light, DEQ's proposal to review, interpret, and analyze existing rules and plans of other agencies suggests that DEQ will undertake to evaluate ODF rules on Type N streams that essentially mandate no protection even when the federal agencies have already determined they are inadequate. In other words, DEQ's efforts are a wholly unnecessary additional step. Instead, DEQ needs to take the nine months remaining until the TMDL completion date to determine what practices are necessary to meet load allocations and water quality standards. The agency cannot afford to get sidetracked. If DEQ believes that it can instead, postpone addressing Type N streams until after the completion of the MidCoast IR-TMDL, it is seriously mistaken because it will have failed to demonstrate that it has the capacity, authority, and will to address all of the remaining outstanding conditions of the CZARA approval.

Moreover, meeting water quality standards for Type N streams means more than meeting the Protecting Cold Water Criterion (PCW) that limits temperature increases from human sources to 0.3°C where salmonids are present or the colder water is necessary for downstream temperatures to maintain in compliance, and which is the sole focus of the ODF rulemaking process that has just begun.[16] The legal definition of water quality standards includes the designated beneficial uses of aquatic life protection and protection of existing uses under the antidegradation policy, defined as those uses present at any time since November 28, 1975.[17] Despite DEQ's narrow focus on protecting salmonids from human contributions of temperature, Oregon's designated and existing uses also include, among other uses, temperature-sensitive amphibians that live in Type N streams that require protection as part of the definition of attaining and maintaining water quality standards. Such amphibians include: Coastal (Pacific) giant salamander, *Dicamptodon tenebrosus*, torrent salamanders, *Rhyacotriton*, and Coastal tailed frog, *Ascaphus truei*. The thermal tolerances of *Ascaphus* and *Rhyacotriton* are among the lowest known for amphibians.[18] This is likely among the reasons why

> *Rhyacotriton* experience the largest losses of any stream amphibian in the Pacific Northwest following clear-cut logging (Corn and Bury, 1989; Welsh and Karraker, 2005). One explanation may be absence or reduction of forest canopy after logging that result in increased stream temperatures, which may be stressful or lethal to *Rhyacotriton*. * * * In Oregon, Everest et al. (1985) stated that small

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[16] OAR 340-041-0028(11).

[17] *PUD No. 1 of Jefferson County v. Washington Department of Ecology,* 114 S.Ct. 1900, 1905 (1994); 40 C.F.R. §§ 131.12(a)(1) & 131.3(e).

[18] R. Bruce Bury, (2008): Low thermal tolerances of stream amphibians in the Pacific Northwest: Implications for riparian and forest management, Applied Herpetology 5: 63-74.

> streams are more subject to temperature changes (i.e., increases) than large streams. [19]

Failure to leave riparian buffers on Type N streams to ensure protection of water temperatures for amphibians is essential to protecting the species as designated and existing uses:

> Response to warm water for extended periods may be lethal. For example, another coldwater genus in the Pacific Northwest is *Ascaphus*. In constant water temperatures of 22°C, its larvae began to die after 24 hrs and 75% were dead after 48 hrs whereas all adults ($N = 12$) died between 18 and 30 hrs (Metter, 1966). A similar response is expected for *Rhyacotriton* because its C_{tmax} [Critical Thermal Maximum] is 1-3°C less than that reported for *Ascaphus*. However, such periods of extended warm water (e.g., 22°C for 12 hrs day^{-1}) are seldom encountered in the wild.
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> Both *Rhyacotriton* and *Ascaphus* face risk where there are elevated stream temperatures. In the Oregon Coast Range, one small stream in summer rose from 14° to 22°C at mid-day following clear-cutting of the drainage, with a peak in a pool at 30°C (Brown and Krygier, 1970). In the Oregon Cascades, Johnson and Jones (2000) reported maximum water temperatures of 23.9°C in two streams flowing through a clear-cut in a small watershed and in a stand with three small patch-cuts plus construction of logging roads. Both logged areas were burned post-harvest, which is a common forestry practice in the region. Streams in nearby mature forests did not have temperatures exceeding 19°C ($\bar{x} = 16.7$°C) in summer. Temperatures in streams in logged plots did not return to the pre-harvest levels until ca. 15 yr later, coinciding with return of the riparian zone and canopy closure. [20]

While the CWA requires protection of water quality necessary to support existing uses as well as protection of the existing uses themselves, recovery of amphibian populations may take substantially longer than recovery of stream temperatures:

> Specifically, studies have linked large clearcut units and unbuffered streams with reductions in populations of tailed frogs. Bury and Corn, 1988, Corn and Bury, 1989, Welsh 1990, Bury et. al. 1991, Bull and Carter, 1996, Dupuis and Steventon 1999).
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> Once impacted, populations may not recover for many decades. Bury and Pearl found that stream amphibians in the Oregon Coast Range had not recovered 35-50 years after clearcut harvesting (Bury and Pearl 1999; Major and Bury, 2001). Harvest of stands every 60-70 years may be too frequent for sensitive species (e.g., torrent salamander and tailed frog) to recover. (Bruce Bury, personal

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[19] *Id.* at 69.

[20] *Id.* at 70.

communication, 2004).[21]

In the context of the Clean Water Act, agencies are prohibited from authorizing the removal, either permanently or temporarily, of existing uses, that is to say "uses actually attained in the water body on or after November 28, 2975."[22] Therefore, DEQ's MidCoast temperature TMDL, which will apply basin-wide, must demonstrate that it will protect existing and designated uses of amphibians that are not necessarily protected by the applicable numeric or narrative criteria. Specifically, the numeric criteria apply to waters that are mapped for various salmonid uses.[23] In addition, for waters that are not identified on the maps, "the applicable criteria for these waters are the same criteria as is applicable to the nearest downstream water body depicted on the applicable map."[24] This provision, however, explicitly does not apply to the spawning uses.[25] Likewise, the PCW narrative criterion, which functions as an antidegradation provision by limiting the allowable heating for streams in attainment with numeric criteria, does not apply to Type N streams unless "the colder water is ... necessary to ensure that downstream temperatures achieve and maintain compliance with the applicable temperature criteria."[26] Suffice it to say, DEQ must address Type N streams in the MidCoast TMDL from the standpoint of all uses, not just salmonids, and DEQ cannot rely upon either current or future ODF rules for Type N streams to provide that protection.

IV. DEQ's Definition of "Safe Harbor" BMPs is Ambiguous

NWEA is concerned about DEQ's interpretations of the CZARA settlement phrase "safe harbor" BMPs. There are two elements to defining this phrase. First, what does "safe harbor" mean and, second, what is a BMP? The phrase "safe harbor" BMPs in the CZARA settlement originated in the July 2, 2010 legal opinion that stated "DEQ would also establish 'safe harbor' BMPs or other ground control measures that it believes to be adequate to meet the [load allocations] to the maximum extent practicable." In materials associated with the LSAC meeting, however, DEQ appears to be distancing itself from both aspects of this definition. In a handout about the MidCoast temperature schedule, DEQ only refers to "implementation planning" and "select[ing an] implementation scenario" but makes no mention of determining BMPs.[27] In a handout about sediment, however, there is more heartening information, including "Select Landslide Prone Area

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[21] Mary Scurlock, Pacific Rivers Council, Comments on Washington's Forest Practices Habitat Conservation Plan and and Draft Environmental Impact Statement with Emphasis on Amphibian Conservation, May 12, 2005 at 3.

[22] 40 C.F.R. §§ 131.3(e); 131.12(a)(1)("Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.").

[23] OAR 340-041-0028(4).

[24] OAR 340-041-0028(5).

[25] *Id.*

[26] OAR 340-041-0028(11)(c)(C).

[27] Temperature Timeline, DEQ handout.

Management Measures 11/2/12" and "Select Final Road BMP Matrix 11/19/12," both of which appear to be establishing BMPs.[28] Yet, with regard to bacteria, the schedule only calls for implementation "scenarios," "strategy," and "approaches," and identifying "implementation partners," but not a word about BMPs.[29] Orally, DEQ said that an IR-TMDL would involve 'analyzing implementation options.' At best, DEQ is inconsistent and unable to communicate the IR-TMDL approach clearly. At worse, DEQ is planning to avoid its CZARA commitments altogether.[30]

Related to the issue of defining the safe harbor BMPs is the lands to which the BMPs will apply. In the settlement, DEQ was given discretion to determine which landowners would be determined to be "significant nonpoint sources" but if the agency uses that discretion to avoid controlling a sufficient amount of nonpoint source pollution, it will place the federal agencies in a difficult position. Given the sheer number of ways in which DEQ appears to be shrinking from its CZARA settlement commitments, we want to express our concern about this issue before we even hear DEQ's plans on this topic.

V. DEQ Incorrectly Seeks to Rely Upon Adaptive Management to Meet its Commitments

Finally, DEQ has promoted the idea that adaptive management[31] will play a significant role in achieving water quality standards, which is fundamentally at odds with the findings the federal agencies must make to support a full CZARA approval as well as with DEQ's CZARA commitments. DEQ has created what it calls Phase V of the "TMDL/WQMP Implementation (DEQ w/DMAs)" – which will start in November 2013 and extend to "2018+" – specifically for use of adaptive management.[32] Raising further questions about DEQ's commitment to issuing BMPs that will meet water quality standards and apply immediately to all significant nonpoint sources, DEQ presented a slide entitled "Example Implementation projects," implying that

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[28] Sediment Timeline, DEQ handout.

[29] Mid-Coast TMDL Local Stakeholder Advisory Committee (LSAC) Meeting schedule and overall Workplan, draft March 19, 2012.

[30] Adding to the ambiguity, DEQ's Gene Foster told the LSAC that DEQ had abandoned the "safe harbor BMP phrase" and was instead going to "identify things" with which to meet load allocations. When queried by a member of the audience about the meaning of the phrase and what makes the BMPs safe, DEQ stated that the BMPs are a 'condition on the land or a practice to meet the condition' and that 'compliance with load allocations is what makes them safe.' However, DEQ went on to say that DEQ would evaluate how much 'voluntary activity is in play' and that 'maybe there would be an evaluation of how much is needed in the future,' suggesting that BMPs might fall short of what is necessary to meet load allocations.

[31] Overview of CZARA Litigation, Coastal Nonpoint Program (CNPCP) and Relationship to MidCoast TMDL, Powerpoint, Gene Foster, DEQ, March 20, 2012, Slide: "Traditional Basin TMDL and IR-TMDL."

[32] Midcoast Basin TMDL Workplan, Powerpoint, David Waltz, DEQ, March 20, 2012, untitled slide.

implementation will be in projects rather than BMPs that apply to all significant sources or all sources across the basin. In response to a LSAC member query, DEQ admitted that adaptive management was not a new concept in Oregon TMDLs but that its use would be "pro-active" in the context of IR-TMDLs. DEQ may well intend to use adapative management when it has the staff with which to do it, after the state's other TMDLs are completed. As a practical matter, however, adaptive management is unlikely to occur in the near-term given state and federal funding and the large and ever-growing number of impaired waters for which TMDLs are required.[33] The IR-TMDL, as a method of establishing Oregon's willingness and ability to control pollution from nonpoint sources sufficiently to meet water quality standards, does not call for the use of adaptive management any more or less than a regular TMDL. In fact, DEQ's having raised adaptive management as a meaningful element of IR-TMDLs strongly suggests that the agency has no intention of identifying, ordering, and enforcing BMPs that it believes are sufficient to meet water quality standards at the time it issues the TMDL and its load allocations. Instead, it suggests the opposite, that DEQ intends to use a trial-and-error approach to using BMPs and/or to rely upon other state agencies. This represents nothing more than repackaging the failed way in which DEQ and other state agencies approach nonpoint source pollution control today. In short, the proposed use of adaptive management to meet CZARA goals is unacceptable.

VI. DEQ May be Proposing a Schedule that Does Not Meet Federal Agencies's Timelines

To the extent that DEQ is proposing to postpone development of BMPs until after completion of the MidCoast TMDL, it is placing the federal agencies in an untenable position. As you know, NOAA and EPA must announce a proposed final decision for Oregon's program by November 15, 2013. It appears clear that DEQ is planning on taking some actions and obtaining some information after the TMDL is completed. A likely example is DEQ's obtaining inventories of roads and setting priorities for actions to address high risk ("legacy") roads after January 2013. Assuming there is a clear timetable for completion of this set of actions, this is likely an acceptable path and will provide sufficient information to the federal agencies with which to make their proposed decision. However, DEQ is required by the CZARA settlement, and by the needs of the federal agencies, to determine in advance of the TMDL's completion what BMPs will be required, based on the information that is yet to be gathered and analyzed. For example, DEQ can and must identify the prescriptions for landslide prone areas whether or not it has completed an inventory of those areas. DEQ can and must identify what will be required on roads, given their condition, following the inventory of the roads. The identification of the prescriptions or management measures cannot be postponed until after the MidCoast TMDL is completed in order to be consistent with the CZARA commitments.

Finally, DEQ also announced it would continue to issue regular TMDLs in lieu of IR-TMDLs for coastal watersheds until some later date. DEQ would then issue replacement IR-TMDLs for those very same watersheds on the timeframe – all CNCPC watersheds completed by 2021 – that it promised the federal agencies on July 15, 2011. In light of the state's very limited resources and its attenuated timeframe (another decade) for completing the IR-TMDLs to meet CZARA

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[33] *See, e.g.*, DEQ addition of 970 segments and U.S. EPA proposal to add 1004 segments to Oregon's 2010 section 303(d) list of impaired waters, available at http://yosemite.epa.gov/R10/water.nsf/Public+Notice s/oregon303d.

commitments, we think DEQ's plan is misguided.

Conclusion

In conclusion, we are sorely disheartened by the interpretations DEQ has put on the commitments that it made to settle the CZARA litigation. Taken together they represent a bold statement that DEQ intends to continue to do business as usual, to issue TMDLs that bear the appellation "implementation ready" when, in fact, they do not honor the commitments made by the agency. If true, the result will have been a massive waste of EPA special funding and stakeholder and agency staff time and presumably end with the federal agencies' having to propose a Disapproval decision in November of 2013 with the concurrent loss of funding to Oregon. Worse, Oregon will have squandered an opportunity to demonstrate a unique pathway in which TMDLs can address the widespread nonpoint source pollution that plagues Oregon coastal watersheds, threatens public health, and contributes to the threatened and endangered status of coastal species. For this reason, bearing in mind that participation in CZARA is not mandatory, we urge you to explain to Oregon DEQ in the clearest of terms its need to adhere to the commitments it made in the CZARA settlement.

Sincerely,

Nina Bell
Executive Director

cc: Dick Pedersen, Director DEQ
Bill Blosser, Chair, EQC
Greg Aldrich, Water Quality Division Administrator DEQ
Gene Foster, TMDL Program, DEQ
Allison Castellan, NOAA
David Powers, EPA