NORTHWEST ENVIRONMENTAL ADVOCATES

June 13, 2012

Lisa Hanson, Deputy Director
Oregon Department of Agriculture
635 Capitol St., NE
Salem, Oregon 97301-2532 *Via Email*: lhanson@oda.state.or .us

Re: **Interpretation of Oregon Department of Agriculture Basin Rules**

Dear Ms. Hanson:

As you know, Northwest Environmental Advocates is gravely concerned about impaired water quality throughout the State of Oregon including the watersheds in the coastal zone. Agricultural activities, past and present, both cause and contribute to violations of water quality standards that are established to protect a wide range of beneficial uses such as protection of human health and aquatic species, including threatened and endangered species listed under the federal Endangered Species Act. For this reason we are very interested in how the Oregon Department of Agriculture (ODA) interprets its statutory authorities and implements its rules and programs to protect water quality.

We understand that since at least March 2008 ODA has interpreted its basin rules, set out in Division 95 of the Oregon Administrative Rules, to apply only to active agricultural activities and not to so-called legacy conditions caused by previous agricultural activities. Such a distinction may or may not have been intended when ODA adopted the basin rules, starting in 1996 with those developed for the Tualatin River Basin. Recently we wrote to Dave Wilkinson, Program Manager of the ODA Water Quality Program, inquiring about ODA's interpretation of its basin rules and the distinction the agency makes between active agricultural activities and "legacy" conditions, asking for any agency written documents that might clarify this policy and/or asking for a written explanation of it. This letter is attached.

We understand that Dave and his staff are extremely busy at this juncture given the recent listening tour and associated work and for that reason he is unable to commit to a time frame in which he can answer this letter. We are writing to inquire whether you might provide a more timely answer to important questions about this key policy distinction than we are likely to get in response to our earlier letter. Needless to say, this matter is of interest to a large number of parties and thus an answer to our letter will help elucidate this issue for many Oregonians.

While we understand that this is a busy time for the water quality program, it is also true that ODA has been making this distinction between active agricultural activities and so-called legacy

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conditions for at least five years, and perhaps since the inception of the basin rules. It is also a key policy choice made by the agency in interpreting its broad statutory authority. This authority allows ODA to "adopt rules necessary to implement a water quality management plan initiated under ORS 568.909."[1] Under Oregon statute, ODA is given latitude to establish rules to "require any landowner whose land is located within an area subject to a water quality management plan to perform those actions on the landowner's land necessary to prevent and control water pollution from agricultural activities and soil erosion."[2] Whether ODA is interpreting its statutory authority as limited or has chosen to limit its authority through rulemaking is of broad interest to many citizens.

Likewise, people who are concerned about the impacts of agricultural lands on water quality and interested in ODA's programs would like to know to what degree this policy distinction may affect ODA's ability to meet program goals. For example, we have been asked how much of the agricultural impacts in ODA "priority areas"[3] the agency can reasonably be expected to address through its enforceable rules versus its voluntary plans in light of this distinction. Likewise, we have been asked how ODA could ever hope to meet water quality standards or load allocations set out in Total Maximum Daily Loads (TMDL) that interpret and apply water quality standards to pollution sources given this policy. Yet others have inquired as to what constitutes a "legacy condition" from ODA's perspective? For example, does it refer to conditions created by an action taken by a previous landowner, an action taken in previous years by the same landowner, an action that is no longer occurring at the time of a complaint or inspection, or the mere passage of time? And we have been asked how in light of this policy ODA can meet the recent Board of Agriculture resolution which states that

> The Oregon State Board of Agriculture strongly encourages the State Department of Agriculture to implement water quality programs in a thorough, rigorous, and proactive manner such that enforcement of water quality regulations on agricultural lands by the Oregon Department of Environmental Quality is not necessary to ensure compliance with water quality standards.[4]

Naturally we are in no position to answer these and similar questions and can point to no ODA document, other than the ambiguous wording of the basin rules themselves, with which to cast any light on the subject or to interpret ODA's policies.

For this reason I ask that you provide NWEA and the interested public with at a minimum a precise written explanation of this ODA policy, elaborate on whether it reflects ODA's understanding of limitations in its statutory authorities or was a choice to limit the reach of otherwise broad authorities, and explain whether ODA intended for its rules to be limited by this policy at the date of their adoption(s).

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[1] ORS 568.912(1).

[2] ORS 568.912(2).

[3] *See, e.g.*, Measuring Progress in Area Plan Implementation, Powerpoint by Sheila Marcoe, Oregon Department of Agriculture, undated, available from NWEA, slides 35-36.

[4] *Id.* at slide 23.

We, and many others, would be grateful for answers to these basic questions. We look forward to your response.

Sincerely,

Nina Bell
Executive Director

Attachment: Letter from Nina Bell, NWEA, to Dave Wilkinson, ODA, Re: Interpretation of Oregon Department of Agriculture Area Rules, March 24, 2012.

cc: Katy Coba, Director
Dave Wilkinson, Program Manager, Water Quality Program