FINAL SETTLEMENT AGREEMENT

ORIGINAL

WHEREAS, the subject of this Settlement Agreement ("Agreement") is the litigation captioned as Northwest Environmental Advocates v. Locke, et al., Civil No. 09-0017-PK, as filed on January 6, 2009, in the U.S. District Court for the District of Oregon ("Lawsuit");

WHEREAS, Plaintiff in the Lawsuit is Northwest Environmental Advocates ("Advocates" or "Plaintiff"); and Defendants in the Lawsuit are Gary Locke, in his official capacity as Secretary of the Department of Commerce, Lisa P. Jackson, in her official capacity as Administrator of the U.S. Environmental Protection Agency ("EPA"), and Dr. Jane Lubchenco, in her official capacity as Administrator of the National Oceanic and Atmospheric Administration ("NOAA") (collectively, "Defendants");

WHEREAS, the State of Oregon implements a coastal zone management program approved by NOAA under the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1455;

WHEREAS, the Coastal Zone Act Reauthorization Amendments of 1990 ("CZARA"), 16 U.S.C. § 1455b, presently require a state with an approved CZMA program, such as the State of Oregon, to develop a Coastal Nonpoint Pollution Control Program ("CNPCP") and submit the CNPCP to NOAA and EPA for approval;

WHEREAS, CZARA, 16 U.S.C. § 1455b(a)(2), requires State CNPCPs to be closely coordinated with State water quality plans, which include water quality standards and Total Maximum Daily Loads ("TMDLs"), developed pursuant to Section 303 of the Clean Water Act ("CWA"), 33 U.S.C. § 1313;

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WHEREAS, CZARA, 16 U.S.C. § 1455b(b)(3), requires State CNPCPs to implement and from time-to-time revise additional management measures for identified land uses and areas as necessary to protect designated uses and achieve and maintain applicable water quality standards under CWA Section 303;

WHEREAS, CZARA, 16 U.S.C. § 1455b(c), requires NOAA and EPA to withhold certain amounts of grant funds available to states under CZMA Section 306, 16 U.S.C. § 1455, and CWA Section 319, 33 U.S.C. § 1329, respectively, when NOAA or EPA, respectively, determine a state has failed to submit an approvable CNPCP;

WHEREAS, Oregon first submitted its CNPCP in 1995, and, in 1998, EPA and NOAA identified forty conditions that Oregon would have to meet to obtain full program approval of its CNPCP, including a condition that Oregon adopt additional management measures for forestry to achieve and maintain water quality standards;

WHEREAS, forested lands are the primary land type in Oregon's coastal areas, and logging in these areas contributes to impairment of water quality and designated uses;

WHEREAS, EPA and NOAA have not fully approved Oregon's CNPCP under CZARA, in part because Oregon has failed to satisfy the condition requiring additional management measures for forestry;

WHEREAS, EPA and NOAA have not withheld any CZMA Section 306 grant funds or CWA Section 319 grant funds from Oregon;

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WHEREAS, the Lawsuit alleges that NOAA and EPA, by not making a final decision approving or disapproving Oregon's CNPCP, and by not withholding CZMA Section 306 grant funds and CWA Section 319 grant funds from Oregon, are in violation of CZARA and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706;

WHEREAS, the Lawsuit also stated claims under the Freedom of Information Act, 5 U.S.C. § 552, which Plaintiff and Defendants (collectively, "the Parties") settled and the Court dismissed, with prejudice, on September 18, 2009;

WHEREAS, in 1998, EPA and NOAA determined that Oregon's current Forest Practice Rules are inadequate to achieve and maintain water quality and fully support designated beneficial uses, and reiterated this determination in 2004 and 2008 with respect to riparian protections, high-risk landslide areas, and legacy roads;

WHEREAS, Oregon, in order to resolve the outstanding condition on its CNPCP for additional management measures for forestry, has proposed to develop Implementation Ready TMDLs, which is a new and novel approach to achieving and maintaining water quality standards in the State's coastal sub-basins, and which includes the development and issuance of enforceable load allocations, implementation plans, and "safe harbor" Best Management Practices ("BMPs") throughout Oregon's CNPCP management area (collectively, "Oregon Coastal TMDL Approach");

WHEREAS, on May 12, 2010, EPA and NOAA sent a letter to the State of Oregon, a copy of which is attached hereto as Exhibit A, which encouraged the Oregon Department of

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Environmental Quality ("ODEQ") to develop additional management measures for forestry, and to resolve the related outstanding condition on its CNPCP, by implementing the Oregon Coastal TMDL Approach, and which stated the agencies' belief that the Oregon Coastal TMDL Approach, along with measures to address the other outstanding conditions, could enable the State to receive full approval of its CNPCP;

WHEREAS, on July 2, 2010, and in response to EPA and NOAA's May 12, 2010, letter, the Oregon Attorney General sent a legal opinion, which is attached hereto as Exhibit B, to EPA and NOAA that describes the Oregon Coastal TMDL Approach as a new process by which ODEQ "assigns [load allocations] to individual property owners—including forestland owners—adjacent to the waterbody as opposed to the general [load allocation] for the nonpoint source pollution sectors as has typically been done in previous TMDLs. The water quality management plan (WQMP) issued in conjunction with the TMDL would require each source to undertake an approved implementation plan specific to the property. The [O]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.";

WHEREAS, the July 2, 2010, legal opinion further concludes that "[O]DEQ is authorized to establish its own implementation requirements to the extent required by the CWA and to the extent that controls adopted by the [Oregon Board of Forestry] under the [Oregon Forest Practices Act] are deemed by [O]DEQ to be inadequate to implement the TMDL. . . . [O]DEQ

may legally conclude, and in some cases likely must conclude, that implementation of its safe harbor BMPs is required.";

WHEREAS, the July 2, 2010, legal opinion confirms that ODEQ has the authority to develop and enforce the Oregon Coastal TMDL Approach, specifically proposing that "[i]f the [Board of Forestry] does not adopt basin-specific BMPs or if the [O]DEQ finds that the [Board of Forestry's] BMPs are not as protective as the safe harbor BMPs, the [O]DEQ will require the forestland owner to comply with the safe harbor BMPs, or to develop its own BMPs and submit them to the [O]DEQ for review and approval," and concluding that "if the [Board of Forestry] does not promulgate such implementation measures, [O]DEQ has the authority to directly order compliance with the load allocation because such measures are required by the CWA.";

WHEREAS, on July 26, 2010, ODEQ sent a letter to EPA and NOAA, which letter is attached hereto as Exhibit F, in which ODEQ commits to implementing the Oregon Coastal TMDL Approach, as described in the July 26, 2010, letter and Attachment A to that letter, "in the coastal basins beginning with the Mid-Coast Basin and then in the subsequent coastal basin[s]." The July 26, 2010, letter states that Attachment A was reviewed by the "Oregon Governor's Office for the specific purpose of identifying options the state would be committed to implement to resolve the conditional approval issues associated with the state's Coastal Nonpoint Source Control Plan.";

WHEREAS, in the July 26, 2010, letter, and Attachment A to that letter, ODEQ commits to developing Oregon Coastal TMDLs that will "specifically identify significant nonpoint

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sources, including significant forestry sources," and ODEQ commits to establishing enforceable load allocations in the TMDLs, and to developing safe harbor BMPs for the load allocations established for those sources, as well as to issuing implementation orders to significant sources, including significant forestry nonpoint sources that have received load allocations through the Oregon Coastal TMDL Approach. Further, Attachment A to the July 26, 2010, letter states that ODEQ will approve or disapprove TMDL Implementation Plans "based on the plans ability to meet the load allocations or [Oregon Board of Forestry] basin specific rule[s]" and that ODEQ "would reserve its authority to impose BMPs under ORS 468B.110 to the extent necessary to comply with Sections 303 and 309 of the CWA.";

WHEREAS, EPA and NOAA continue to believe that the Oregon Coastal TMDL Approach could meet the additional management measure for forestry, and recognize the importance of the Oregon Coastal TMDL Approach incorporating necessary management practices that will achieve load allocations so as to achieve and maintain water quality standards;

WHEREAS, the Performance Partnership Agreement (PPA)/Performance Partnership Grant (PPG) between EPA Region X and ODEQ for the period July 1, 2010, to June 30, 2012, provides that $100,000 from the CWA Section 319 funding be used for each of the two years for development of the Oregon Coastal TMDL Approach;

WHEREAS, the Parties presently believe that ODEQ's commitment to the Oregon Coastal TMDL Approach puts Oregon on a path to meet the condition for additional

management measures for forestry, which is necessary to achieve full approval of its CNPCP; and

WHEREAS, the Parties therefore believe that their mutual and individual interests will be best served if any and all remaining disputes between them concerning the issues raised by the Lawsuit are resolved without further litigation.

THEREFORE, in the interests of the public, the Parties, and judicial economy, the Parties hereby agree as follows:

1. On or before November 15, 2013, NOAA and EPA shall sign for prompt publication in the Federal Register a notice announcing a proposed decision to either: (a) issue a Full Approval Decision Memorandum approving, without conditions, Oregon's CNPCP, pursuant to 16 U.S.C. § 1455b(c)(1); or (b) make a finding that the State of Oregon has failed to submit an approvable program, pursuant to 16 U.S.C. § 1455b(c)(3) and (4). If EPA and NOAA propose to approve Oregon's CNPCP, the Federal Register notice shall announce a thirty (30) day public comment period on that proposal. If EPA and NOAA propose to find that Oregon has failed to submit an approvable program, the Federal Register notice shall announce a ninety (90) day public comment period on that proposal and shall also announce EPA's and NOAA's intent, pursuant to 16 U.S.C. § 1445b(c)(3) and (4), to withhold CWA Section 319 and CZMA Section 306 grant funds from Oregon beginning in the funding cycles that immediately follow the agencies' finding. EPA or NOAA shall provide Advocates with a copy of the proposed final decision prior to or concurrent with publishing it in the Federal Register. EPA and NOAA may

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use the process outlined in the October 16, 2003, memorandum from Diane Regas, entitled "Approving and Disapproving State Programs under the Coastal Zone Act Reauthorization Amendment of 1990" to guide their final review and decision-making process. The October 16, 2003, Diane Regas memorandum is attached to this Agreement as Exhibit C.

2. On or before May 15, 2014, EPA and NOAA shall either: (a) issue a Full Approval Decision Memorandum approving, without conditions, Oregon's CNPCP, pursuant to 16 U.S.C. § 1455b(c)(1); or (b) make a finding that the State of Oregon has failed to submit an approvable program, pursuant to 16 U.S.C. § 1455b(c)(3) and (4). If EPA and NOAA make a finding that the State of Oregon has failed to submit an approvable program, the agencies shall, pursuant to 16 U.S.C. § 1455b(c)(3) and (4), withhold CWA Section 319 and CZMA Section 306 grant funds from Oregon beginning in the funding cycles that immediately follow the agencies' finding and in all future years unless and until EPA and NOAA issue a Full Approval Decision Memorandum approving the State's CNPCP without conditions. After May 15, 2014, EPA and NOAA shall not award full CWA Section 319 or CZMA Section 306 grant funds to Oregon based on any conditional approval of Oregon's CNPCP. EPA or NOAA shall provide Advocates with a copy of the final decision within five days of it being signed.

3. In their review of ODEQ's proposed schedule for implementing the Oregon Coastal TMDL Approach throughout Oregon's CNPCP management area, EPA and NOAA will consider Advocates' comments on ODEQ's proposed schedule. EPA and NOAA shall review ODEQ's proposed schedule to ensure that it provides a reasonable timeline for implementing the

State's additional management measures for forestry and that it includes developing or updating TMDLs for all sub-basins in the CNPCP management area using the Oregon Coastal TMDL Approach.

4. Pursuant to 33 U.S.C. § 1329(h), and through the CWA Section 319 program generally, EPA shall continue to work with ODEQ to provide that future agreements regarding the use of performance partnership funding be used to assist Oregon in implementing its Oregon Coastal TMDL Approach throughout the CNPCP management area to ensure that forestry impacts to water quality are addressed. Additionally, pursuant to 16 U.S.C. § 1455b(d), and to assist Oregon with satisfying the condition on Oregon's CNPCP that requires the adoption of additional management measures for forestry, EPA and NOAA will consider and respond to any requests by ODEQ for technical assistance with developing and implementing the Oregon Coastal TMDL Approach, including requests by ODEQ to provide preliminary feedback as to whether proposed safe harbor BMPs in the Mid-Coast Basin TMDLs could achieve Oregon water quality standards.

5. By December 31, 2012, pursuant to their authorities under 16 U.S.C. § 1455b(d), and based upon Oregon's July 2, 2010, Attorney General's Opinion, the July 26, 2010, ODEQ commitment letter, the schedule for implementing the Oregon Coastal TMDL approach that EPA and NOAA requested the state submit by March 31, 2011, the Mid-Coast Basin TMDLs implementing the Oregon Coastal TMDL Approach that EPA and NOAA requested the state to submit by June 30, 2012, and any other information, EPA and NOAA shall provide ODEQ with

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a written initial assessment. This written initial assessment will evaluate (a) whether implementation of the Oregon Coastal TMDL Approach in the Mid-Coast Sub-basins, including the safe harbor BMPs, is likely to result in actions that achieve and maintain water quality standards, and (b) whether Oregon's plan for developing and updating TMDLs for all sub-basins in the CNPCP management area using the Oregon Coastal TMDL Approach could satisfy the outstanding forestry condition on Oregon's CNPCP under 16 U.S.C. § 1455b(b)(3). In developing their initial assessment, EPA and NOAA shall consider any comments Plaintiff may have submitted with respect to ODEQ's proposed TMDLs and BMPs. EPA and NOAA shall send a copy of the written initial assessment to Plaintiff.

6. In addition to the fees already paid as part of the settlement of Plaintiff's FOIA claims (claims four and five) in the Lawsuit, EPA and NOAA shall pay Plaintiff a total of eighty-three thousand five hundred dollars and no cents ($83,500.00) for costs and attorneys' fees arising out of the APA claims (claims one, two and three) in the Lawsuit. EPA and NOAA shall make the payments required by this Paragraph within ninety (90) days of the date of entry of the Agreed Order (attached hereto as Exhibit D) dismissing the APA claims without prejudice. Payment shall be made to the Washington Forest Law Center. Payment may be made by electronic funds transfer or by check made payable and sent by First Class Mail to: Washington Forest Law Center, c/o Paul Kampmeier, 615 Second Ave., Suite 360, Seattle, Washington 98104. After entry of the Agreed Order that is attached hereto as Exhibit D, Plaintiff shall provide Defendants with the necessary account information for electronic funds transfer.

7. Plaintiff agrees that receipt of the payment required by Paragraph 6 of this Agreement shall operate as a release of Plaintiff's present claims under the Equal Access to Justice Act, 28 U.S.C. § 2412, for the fees, expenses, and costs incurred through and including the date of this Agreement. Plaintiff shall provide written communication to Defendants to confirm Plaintiff has received the funds. This Agreement, the release described in this Paragraph, and the payments required by Paragraph 6 of this Agreement shall not in any way limit Plaintiff's right or ability to seek or collect costs and attorney fees incurred in any other lawsuit, including any lawsuit that raises claims identical or similar to those raised in the Lawsuit.

8. Within five (5) days of the full execution of this Agreement, and pursuant to Federal Rule of Civil Procedure 41(a), the parties shall file with the United States District Court for the District of Oregon the Agreed Order and Stipulations that are attached to this Agreement as Exhibits D and E. Should the Court, for any reason, modify, alter, or refuse to enter the Agreed Order that is attached hereto as Exhibit D, this Agreement will be void, and the Parties will meet and confer to determine whether they can finalize a settlement agreement that accommodates the Court's concerns.

9. In the event that Advocates, EPA, or NOAA believe that any party to this Agreement has failed to comply with any term or condition of this Agreement, or in the event that there is any dispute or controversy about any part of this Agreement, the parties shall use their best efforts to settle and resolve the controversy. To that end, the party raising the dispute

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shall commence an informal dispute resolution period, to be no shorter than thirty (30) days, by giving written notice to the other party(s) stating the nature of the matter to be resolved and the position of the party asserting the controversy. The Parties shall consult and negotiate with each other in good faith and, recognizing their mutual interests in the ongoing integrity of this Agreement, attempt to reach a just and equitable solution satisfactory to all parties. If, after implementation of the informal dispute resolution process in this Paragraph, EPA or NOAA have not performed the obligations established in Paragraph 6 of this Agreement, Plaintiff may seek enforcement of the Agreed Order dismissing claims one, two, and three without prejudice. If, after implementation of the informal dispute resolution process in this Paragraph, EPA or NOAA have not performed any other obligation established in this Agreement, Plaintiff's sole judicial remedy will be to re-initiate litigation on or after December 16, 2013.

10. Any notices required or provided for by this Agreement shall be in writing, effective upon receipt, and sent to the following:

For Northwest Environmental Advocates:

Paul A. Kampmeier, Staff Attorney
Washington Forest Law Center
615 Second Avenue, Suite 360
Seattle, Washington 98104

Allison LaPlante
Pacific Environmental Advocacy Center
Lewis and Clark Law School
10015 SW Terwilliger Blvd
Portland, Oregon 97219

Nina Bell, Executive Director
Northwest Environmental Advocates
P.O. Box 12187
Portland, Oregon 97212-0187

For Defendants:

Kristofor R. Swanson
U.S. Department of Justice
Environmental & Natural Resources Division
Natural Resources Section
P.O. Box 663
Washington, DC 20044-0663

Stephanie Campbell
Attorney-Adviser
Office of General Counsel for Ocean Services
National Oceanic and Atmospheric Administration
1305 East-West Highway, Suite 6111
Silver Spring, MD 20910

John King
Chief, Coastal Programs Division
Office of Ocean and Coastal Resource Management
National Ocean Service
National Oceanic and Atmospheric Administration
1305 East-West Highway, Room 11305
Silver Spring, MD 20910

Ankur Tohan
Assistant Regional Counsel
U.S. EPA, Region 10
1200 Sixth Avenue, Suite 900 (ORC-158)
Seattle, Washington 98101

David Powers
Regional Manager for Forests and Rangelands
U.S. EPA Region 10, OOO
805 SW Broadway, Suite 500

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Portland, OR 97205

or such other person as either party may designate in writing to the other parties.

11. The parties agree that nothing in this Agreement shall be interpreted as, or shall constitute, a commitment or requirement that EPA or NOAA take action in contravention of the APA or any other law or regulation. With respect to EPA's and NOAA's final decision on Oregon's CNPCP, nothing in this Agreement shall be construed to limit or modify the discretion accorded to EPA and NOAA by the APA, CZARA, or general principles of administrative law.

12. The parties agree that nothing in this Agreement shall be interpreted as, or shall constitute, a requirement that EPA or NOAA obligate or pay any funds exceeding those available, or take any other action in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable appropriations law.

13. This Agreement and the Agreed Order and Stipulations set forth in Exhibits D and E constitute the entire agreement of the Parties, and no statements, agreement, or understanding, oral or written, which is not contained herein, shall be recognized or enforced. Except as expressly stated herein, this Agreement and the Agreed Order and Stipulations set forth in Exhibits D and E supersede all prior agreements, negotiations, and discussions between the parties with respect to the subject matters discussed herein.

14. This Agreement may be modified or amended only by written agreement signed by all parties.

15. The terms of this Agreement shall become effective upon execution by all parties.

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16. The undersigned representatives of each party certify that they are fully authorized by the party or parties they represent to agree to and bind them to the terms and conditions of this Agreement and do hereby agree to the terms herein, including EPA's and NOAA's obligations under Paragraph 6.

17. The parties agree that this Agreement was negotiated and entered into in good faith and that it constitutes a settlement of claims that were vigorously contested, denied, and disputed by the parties. Nothing in this Agreement shall be interpreted as, or constitute, an admission of liability or fact or a waiver of any claims or defenses. Advocates reserves the right to challenge and/or appeal any decision or action by ODEQ, EPA, or NOAA, including but not limited to any TMDL submitted by ODEQ to EPA and any final decision by EPA and NOAA on Oregon's CNPCP.

18. Whenever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid. If a court finds any provision of this Agreement to be prohibited by or invalid under applicable law, the Parties shall work together in good faith to implement the letter and spirit of this Agreement to the extent possible. In no event shall Plaintiff be required to return the payments required by Paragraph 6 of this Agreement.

Approved by Counsel for the parties:

Date: Sept. 22, 2010 WASHINGTON FOREST LAW CENTER

By: _____
Paul A. Kampmeier, WSBA #31560

FINAL SETTLEMENT AGREEMENT

Date: 9/23/10

PACIFIC ENVIRONMENTAL ADVOCACY CENTER

By: _____
Allison LaPlante, OSB #02361

Attorneys for Plaintiff Northwest Environmental Advocates

Date: 9/27/2010

U.S. DEPARTMENT OF JUSTICE

By: _____
Kristofor R. Swanson, Colo. Bar # 39378

Attorneys for Defendants Gary Locke, Lisa P. Jackson, and Dr. Jane Lubchenko

Exhibit A

Final Settlement Agreement
Northwest Environmental Advocates v. Locke, et al.
U.S. District Court for the District of Oregon
Case No. CV09-0017-PK

U.S. Department of Commerce
National Oceanic and Atmospheric Administration

U.S. Environmental Protection Agency

MAY 12 2010

Neil Mullane
Administrator
Water Quality Division
Department of Environmental Quality
811 SW Sixth Avenue
Portland, Oregon 97204

Bob Bailey
Administrator
Coastal Division
Department of Land, Conservation and Development
635 Capitol Street, NE, Suite 150
Salem, Oregon 97301

Dear Mr. Mullane and Mr. Bailey:

The Environmental Protection Agency (EPA) and National Oceanic and Atmospheric Administration (NOAA) have been working closely with you and your staff to address the remaining conditions on Oregon's Coastal Nonpoint Pollution Control Program (Coastal Nonpoint Program). We are very pleased with the progress that has been made. Over the past several months, we have had several meetings and conversations to discuss Oregon's October 29, 2009 draft approach to receive full approval of its Coastal Nonpoint Program the state shared with us in January. We would like to take this opportunity to formally follow up on the state's proposal and clarify what EPA and NOAA would need from the state before we are able to consider fully approving Oregon's Coastal Nonpoint Program.

We are highly supportive of Option #1, the prescriptive TMDL approach, extended to address all three outstanding forestry issues, for meeting the additional management measures for forestry, as well as the two strategies you laid out for satisfying the new development and onsite disposal system conditions. We believe these approaches could enable the state to receive full approval of its Coastal Nonpoint Program. However, additional clarification and details are needed before we can make a final decision.

The enclosed attachment lists the information Oregon must provide and timeline for doing so before EPA and NOAA would be able to approve Oregon's program. We recognize that some of these items may be challenging and require time to complete. EPA and NOAA developed the timeline in consultation with state staff to ensure due dates were reasonable yet keep the process moving forward. If sufficient progress is not being made, EPA and NOAA may disapprove Oregon's program and withhold a portion of the state's Clean Water Act Section 319 and Coastal Zone Management Act Section 306 funding pursuant to 16 U.S.C. § 1455b(c).

After careful consideration, EPA and NOAA no longer believe pursuing a change to the Forest Practices Act (Option #2) is a viable option at this time. It would take years for the rule change process to play out and there is no certainty the resource-intensive effort would ultimately result in substantive rule changes to address NOAA and EPA's remaining forestry concerns: adequate protection of riparian and landslide-prone areas, and management/maintenance of forestry roads impairing water quality, particularly legacy roads.

As always, EPA and NOAA look forward to continuing to work with you to address the remaining conditions on your Coastal Nonpoint Program. Please let us know if there is any specific assistance you need. For example, we would be happy to provide existing reports and data, and/or comparable examples on how the outstanding additional management measures for forestry can be met. NOAA's National Marine Fisheries Service could also provide information on forest management strategies that will help protect aquatic species, including salmon.

We encourage you to share proposed riparian, landslide, and legacy road best management practices (BMPs) as well as drafts of the onsite disposal system rules and TMDL Implementation Guidance with us to review. Early NOAA and EPA feedback will help ensure the BMPs, onsite rules, and TMDL Implementation Guidance will help to protect water quality and aquatic resources and satisfy the conditions on the state's Coastal Nonpoint Program.

Please contact either Dave Powers of EPA Region 10 at (503) 326-5874 or Allison Castellan of NOAA at (301) 563-1125 if you have questions.

Sincerely,

John King, Chief
Coastal Programs Division
Office of Ocean and Coastal Resource Management
National Oceanic and Atmospheric Administration

Mike Bussell, Director
Office of Water and Watersheds
Environmental Protection Agency, Region 10

Enclosure

cc: Don Yon, OR DEQ
Amanda Punton, OR DLCD
Eugene Foster, OR DEQ HQ
Don Waye, EPA HQ
Dave Powers, EPA R10
Allison Castellan, NOAA

Attachment

What NOAA and EPA Need from Oregon for Coastal Nonpoint Program Approval

OSDS:

1. Adopt new rules requiring regular inspections for OSDS. Inspecting the systems at time of property transfer by trained/certified inspectors as laid out in Oregon's October 29, 2009 draft strategy is sufficient. Please provide NOAA/EPA with a copy of the draft rules to review to ensure the final rules will meet Coastal Nonpoint Program requirements.

Timeline:

- **November 30, 2010:** Policy Option Package for Rules Development completed.
- **January 2011 through June 2011:** Request funding from the 2011 Oregon Legislature to support time-of-sale inspections for OSDS.
- **June through December 2012:** Provide draft(s) of rule language to NOAA and EPA for review/comment.
- **December 31, 2012:** Rule development completed.
- **January 31, 2013:** Submit new rules to NOAA and EPA for review/approval.
- **March 2013:** Rule implementation and inspections begin.

New Development:

1. Complete TMDL Implementation Guidelines for the Coastal Nonpoint Program management area that incorporate the new development management measure requirements or practices consistent with the new development measure. Please provide NOAA and EPA with drafts of the guidance to review to ensure the final product will meet Coastal Nonpoint Program requirements.

2. Submit a strategy and schedule for completing and updating TMDL Implementation Plans within the Coastal Nonpoint Program management area to be consistent with the new TMDL Implementation Guidance.

Timeline:

- **June 30, 2010:** Initial draft guidance document completed and provided to NOAA and EPA for review and comment.
- **December 31, 2010:** Final draft guidance document completed and provide to NOAA and EPA for review and comment.
- **March 31, 2011:** Public review of final draft guidance document completed.
- **June 30, 2011:** Final guidance document released and submitted to NOAA and EPA, along with strategy and schedule for updating TMDL Implementation Plans.
- **June/July 2011:** Workshops for Designated Management Agencies begins.

Additional Management Measures for Forestry:

1. Commit to the prescriptive TMDL, Implementation Plan, and "safe harbor" BMP approach ("Option 1" under the State's proposal) that will satisfy the additional management measures for forestry condition, specifically addressing riparian and landslide-prone areas, and road issues.

2. Provide a legal opinion from the Oregon Attorney General's Office that clearly concludes Oregon DEQ has the authority to prevent nonpoint source pollution and require implementation of the additional management measures for forestry. Specifically, under the state's current proposal, the legal opinion must conclude that DEQ has the authority to enforce TMDLs, including "safe harbor" BMPs, with regard to riparian buffers, landslide-prone areas, and legacy roads.

3. Provide a more detailed description of the new prescriptive TMDL process. This revised description should:
   a. Clarify the mechanism DEQ plans on using to require prescriptive, "safe harbor" BMPs. Will the BMPs (or possibly a menu of "safe harbor" BMPs to select from) be placed in the TMDLs themselves or only included in the TMDL Implementation Plans? Does DEQ's enforcement authority apply to both TMDLs and Implementation Plans?

   b. Briefly describe how the prescriptive TMDL approach will address NOAA and EPA's concerns with landslide prone areas and road density and maintenance, particularly on "legacy roads." During our January 14th meeting/conference call, the state discussed the potential use of DOGAMI LIDAR coverages, Relative Bed Stability, and GRAIP methodologies to assess, target, and address landslide prone areas and road issues in support of the new prescriptive TMDL process. DEQ should briefly describe these methodologies and/or others and how they will be used in the new TMDL process. The description should include how these tools will help target and, where needed, develop "safe harbor" BMPs.

   c. Provide a few examples of the types of "safe harbor" BMPs Oregon would use to address our concerns about adequate protection of riparian and landslide-prone areas and management/maintenance of forestry roads, specifically legacy roads, and meet load allocations and surrogate targets. We recognize that the BMPs could vary from parcel to parcel based on the site conditions but we need a reasonable assurance that the types of "safe harbor" BMPs Oregon is developing link to, and would meet, water quality standards and protect beneficial uses. For example, requirements for restricting harvest intensities and methods on high risk landslide prone areas should be described along with the triggers or thresholds for their application. We recommend providing comparable examples of harvest restrictions on high risk landslide prone areas such as those applied under the Washington Forests and Fish rules as well as the harvest restrictions under the Oregon Forest Practices Act rules related to high risk landslide areas above roads and buildings. The Northwest Forest Plan also includes measures for landslide prone areas that DEQ could consider.

   d. Briefly describe DEQ's approval/disapproval process for TMDL Implementation Plans. To address the additional management measures for forestry condition, decisions to approve or disapprove need to be based on the plan's ability to meet load allocations or surrogate targets. If DEQ's decisions are based on a basin-specific rule adopted by BOF, then such rule must have the ability to meet load allocations or surrogate targets.

4. Provide a schedule for developing new prescriptive TMDLs and safe harbor BMPs and updating existing TMDLs and Implementation Plans within the 6217 boundary following the new prescriptive TMDL process.

5. Complete and submit to EPA and NOAA a prescriptive TMDL that includes safe harbor BMPs and a TMDL Implementation Plan for the Mid-Coast basins and that addresses the outstanding additional management measures for forestry condition.

Timeline:

- **June 30, 2010:** Submit a legal opinion from Oregon's Attorney General's Office (Item 2).
- **September 30, 2010:** Provide commitment that Oregon will pursue prescriptive TMDL process for addressing the additional management measures for forestry condition
  January 31, 2011: Provide additional detail on the prescriptive TMDL process (Item 3).
- **March 31, 2011:** Provide a schedule for implementing the prescriptive TMDL approach throughout the Coastal Nonpoint Program management area which includes a timeline for developing new TMDLs as well as updating existing TMDLs.
- **June 30, 2012:** Complete and submit prescriptive TMDLs and TMDL Implementation Plans for Mid-Coast basins.

Exhibit B

Final Settlement Agreement
Northwest Environmental Advocates v. Locke, et al.
U.S. District Court for the District of Oregon
Case No. CV09-0017-PK

JOHN R. KROGER
Attorney General

MARY H. WILLIAMS
Deputy Attorney General

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM

DATE: July 2, 2010

TO: Neil Mullane, Water Quality Division Administrator
Department of Environmental Quality

FROM: Larry Knudsen, Senior Assistant Attorney General
Natural Resources Section

SUBJECT: DEQ Authority to Develop and Implement Load Allocations for Forestland Sources

Question and Brief Answer

You have asked whether the Department of Environmental Quality (DEQ) has the legal authority to develop specific load allocations (LAs) and implementation measures for forestland owners. The question assumes the following facts: A waterbody within the coastal zone fails to meet water quality standards[1] for temperature, turbidity or suspended solids. Forestland operations on properties adjacent to the waterbody contribute significantly to the pollutant load that is responsible for the failure of the waterbody to meet standards. The DEQ has determined that statewide best management practices (BMPs) implemented by the Oregon Board of Forestry (BOF) under the Forest Practices Act (FPA)[2] are inadequate to ensure the achievement of water quality standards.

Based on these assumed facts, the DEQ would issue a total maximum daily load (TMDL) for the waterbody along with a water quality management plan (WQMP). Under the TMDL, the DEQ proposes to assign LAs to individual property owners—including forestland owners—adjacent to the waterbody as opposed to general LAs for the nonpoint source pollution sectors as has typically been done in previous TMDLs. The water quality management plan (WQMP) issued in conjunction with the TMDL would require each source to undertake an approved implementation plan specific to the property. The DEQ also would establish "safe harbor" BMPs or other control measures that it believes to be adequate to meet the LA to the maximum extent practicable.[3] In the case of forestlands, if the Board of Forestry adopts best management practices that are at least as protective as the DEQ BMPs, compliance with the BOF BMPs

[1] In this memorandum, the term water quality standard is used in its narrow sense to mean only those standards required under Clean Water Act Section 303 (33 USC §1313) and the EPA's implementing rules adopted by the Environmental Quality Commission (EQC) under ORS 468B.035 and codified in OAR chapter 340, division 41.
[2] ORS 527.610 to ORS 527.785.
[3] It is anticipated that the DEQ would consult with Oregon Department of Forestry when developing the safe harbor BMPs and in other matters relating to TMDL development and enforcement.

1515 SW Fifth Ave, Suite 410, Portland, OR 97201
Telephone: (971) 673-1880 Fax: (971) 673-1886 TTY: (800) 735-2900 www.doj.state.or.us

would constitute implementation of the LAs. If the BOF does not adopt basin-specific BMPs or if the DEQ finds that the BOF's BMPs are not as protective as the safe harbor BMPs, the DEQ will require the forestland owner to comply with the safe harbor BMPs, or to develop its own BMPs and submit them to the DEQ for review and approval.

As discussed in the Legal Analysis section below, we believe that the DEQ does have the legal authority to develop and enforce these source specific LAs for landowners, including owners of forestlands.

Background

Under the Coastal Zone Management Act,[4] Oregon is required to develop and submit to the U.S. Environmental Protection Agency (EPA) and the National Oceanic and Atmospheric Agency (NOAA) a Coastal Nonpoint Source Pollution Control Plan.[5] Under Clean Water Act (CWA) Section 319, the state is also required to develop and submit to the EPA a plan for the control of nonpoint source pollution.[6] Under coastal zone statutes and the EPA's CWA guidance, a state's coastal nonpoint source plan is to be closely coordinated with its CWA Section 319 nonpoint source plan, and also with any TMDLs developed under CWA Section 303. Essentially, the coastal plan serves to update or supplement the Section 319 plan.

The DEQ has determined that water quality in a number of coastal basins fails to meet certain water quality standards including those for temperature and suspended sediment.[7] Further, the EPA and NOAA have asserted that the coastal plan submitted by Oregon does not adequately protect water quality with respect to pollutant loads from operations on private forest lands, specifically with respect to riparian areas, landslide prone areas, and forest roads. Unless the State of Oregon takes action to resolve these concerns, the EPA and NOAA have indicated that they will consider the state to be out of compliance with these federal laws and they will withhold federal funds under the CZMA that are currently administered by the Department of Land Conservation and Development (DLCD) and funds under the CWA that are administered by the DEQ.[8]

Legal Analysis

Under the federal Clean Water Act, Oregon is required to develop general water quality standards that are adequate to protect designated uses as well as actual uses in existence as of 1975.[9] Under the applicable statutes, the Environmental Quality Commission (EQC) is

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[4] 16 USC § 1451 to § 1466.
[5] 16 USC § 1455(b).
[6] 33 USC § 1329(b).
[7] *See* DEQ's CWA Section 305(b) Report at http://www.deq.state.or.us/wq/assessment/rpt0406.htm.
[8] 16 USC § 1455b(c); 33 USC § 1329. In addition, a suit filed by environmental groups against the EPA and NOAA is presently pending in the U.S. Federal District Court. It seeks an order requiring the agencies to withhold grant funds based on the lack of approval of Oregon's Coastal Plan. *NWEA v. Gutierrez*, C09-017 (D. Or.1/6/09).
[9] 33 USC 1313 (CWA Section 303); 40 CFR 131.4(e); 40CFR 131.6. These standards must then be approved by the EPA and to the extent that a state fails to adopt standards or adopts standards that are not adequately protective, the EPA will promulgate standards for the state. *Id.* 40 CFR part 131.

responsible for adopting these standards.[10] The CWA includes several strategies designed to ensure that water standards are achieved and maintained. Point sources are generally prohibited from adding pollutants to waters of the United States without a National Pollutant System Discharge System (NPDES) permit.[11] Such permits must include technology based effluent limits and additional water quality based effluent limits when needed to ensure that the discharge will not cause or contribute to a violation of standards. Nonpoint sources, in turn, are typically subject to state management plans required by CWA Section 319. [12] Nonpoint source management plans typically use BMPs or similar control measures to reduce pollutants to the maximum extent practicable. There are also mechanisms for addressing water pollution from federal sources and activities.[13]

Oregon's statutes create a special relationship between the DEQ and the Oregon Department of Forestry (ODF) with respect to the regulation of water quality on state and privately held forestlands. The statutes require forest operations to be conducted in full compliance with water quality rules and standards adopted by the EQC.[14] For nonpoint source discharges, the BOF is directed to develop best management practices that ensure, to the maximum extent practicable, that forest operations will be conducted in a manner that will not impair the achievement or maintenance of water quality standards. Thus, the BOF essentially develops the BMPs that are the basis of Oregon's Section 319 plan for controlling nonpoint sources pollution associated with state and private forest lands in order to meet water quality standards. The statutes also provide a mechanism for the EQC to petition the BOF for more effective BMPs in the event the Commission concludes that nonpoint source discharges from forest operation being conducted in accordance with current BMPs significantly contribute to WQS violations.[15] To the extent that a forest operation is being conducted in compliance with applicable BMPs, operators are generally shielded from liability for violation of water quality standards.[16]

Clean Water Act Section 303 has additional provisions, generally referred to as the TMDL program, designed to address situations where standards are not being met despite the Section 402 and Section 319 programs discussed above.[17] The CWA requires states to identify those waters of the U.S. where standards are not being met and where the effluent limits imposed under NPDES permits and the Section 319 Nonpoint Source Management Plan are not expected to bring the waterbody into compliance with the standards.[18] Under this program, the CWA requires and Oregon statutes authorize DEQ to establish a TMDL with load allocations for the various sources of pollutants and to implement these allocations via implementation plans,

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[10] *See* ORS 468B. 010; 468B.035; 468B.048. The standards are codified in OAR chapter 340, Division 41.
[11] CWA Sections 301 and 402 (33 USC §§ 1311, 1342).
[12] 33 USC § 1329.
[13] *See, e.g.*, CWA Section 313 (33 USC § 1323) governing federal facilities and activities and CWA Section 401 (33 USC § 1341) addressing federal licenses and approvals.
[14] ORS 527.724.
[15] ORS 527.765.
[16] ORS 527.770. *See also* ORS 468B.050 (prohibiting violations of water quality standards).
[17] 33 USC § 1313.
[18] 40 CFR § 130.7.

permits and orders developed to bring the water body into compliance with the water quality standards.[19]

The water quality statutes generally give DEQ very broad authority to implement TMDLs.[20] With respect to operations on forestlands, however, neither the EQC nor DEQ may "promulgate or enforce any effluent limitations[21] or controls on nonpoint source discharges" from forest operations, unless controls imposed under the FPA are insufficient to meet the requirements of the Clean Water Act.[22] The EQC's rules governing TMDLs also specify that the DEQ will look to the ODF to act as its designated management agency for implementation of TMDLs on state and private forestlands.

When the DEQ issues a TMDL, it is required to issue waste load allocations to point sources and load allocations to nonpoint sources that contribute significantly to the failure of the waterbody to meet standards.[23] These allocations, along with an accounting for natural background and a margin for safety, may not exceed the assimilative capacity of the waterbody.[24] DEQ also must develop plans to implement the allocations established in the TMDL.[25] The allocations in a TMDL are not water quality standards. They are measures designed to bring a waterbody that fails to meet water quality standards into compliance when the basic CWA provisions, e.g. NPDES permits and the Section 319 Nonpoint Source Plan are not expected to be adequate. Thus, the measures needed to implement load allocations under a TMDL for a specific basin, often will need to be more stringent than the general BMPs designed to maintain water quality standards under the Section 319 Plan.

DEQ is authorized and directed to establish load allocations and implementation requirements based on an individual sources of pollution or sectors of similar sources.[26] The rules specify, however, the ODF is expected to be the designated management agency that develops TMDL implementation plans for nonpoint source pollution from state and private forest operations and that it will use the authorities provided by the FPA.[27] Should ODF decline to act as the designated management agent, however, DEQ is authorized to establish its own implementation requirements to the extent required by the CWA and to the extent that controls adopted by the BOF under the FPA are deemed by DEQ to be inadequate to implement the TMDL. Thus in situations when the ODF is not carrying out the role of designated management agency and implementing BMPs adequate to implement the LA, DEQ may legally conclude, and in some cases likely must conclude, that implementation of its safe harbor BMPs is required.

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[19] 33 USC § 1313(d); ORS 468B.030; 468B.035; ORS 468B.110. Oregon's rules governing establishment and implementation of TMDLS are set out in OAR chapter 340, division 42.
[20] ORS 468B.010; 468B.030; 468B.110.
[21] ORS 468B.110(2). The term "effluent limit" refers to a specific type of water quality permit condition and normally would not be used in the context of nonpoint source pollution controls. Its use in this context is somewhat unclear.
[22] *Id.* (referencing ORS 527.765 and 527.700).
[23] 30 USC § 1313(d); 40 CFR § 130.7.
[24] OAR 340-042-0040.
[25] 33 USC § 1313(d)(1)(D); 40 CFR 131.7(d)(2).
[26] OAR 340-042-040(2)(h) and (l)(H); OAR 340-042-0080(1).
[27] OAR 340-042-0080(2).

Conclusion

We conclude that DEQ is required to develop and implement LAs for nonpoint sources of pollution, including, when applicable, pollutant loads from operations on state and private forest lands. In fulfilling this legal requirement, DEQ is authorized to establish allocations for individual nonpoint sources. Based on the assumptions set out above, we conclude that the law would allow DEQ to identify BMPs or other control measures needed to implement source specific LAs, including allocations for forest operations. In keeping with statutory directives and the policies in the EQC's TMDL rules, however, the BOF would be given an opportunity to adopt new BMPs or control measures that are as effective as the safe harbor BMPs and that would be implemented by ODF. If the BOF does not promulgate such implementation measures, DEQ has the authority to directly order compliance with the load allocation because such measures are required by the CWA.

2076981

cc: Bob Bailey, DLCD
Marvin Brown, ODF

Exhibit C

Final Settlement Agreement
Northwest Environmental Advocates v. Locke, et al.
U.S. District Court for the District of Oregon
Case No. CV09-0017-PK

October 16, 2003

MEMORANDUM

SUBJECT: Approving and Disapproving State Programs under the Coastal Zone Act Reauthorization Amendments of 1990

FROM: Diane Regas, Director /s/
Office of Wetlands, Oceans, and Watersheds

TO: Water Division Directors, Regions II, IV- VI and IX-X

We have made considerable progress during the past year in our efforts to achieve approval of all State coastal nonpoint pollution control programs under Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA). Of the 29 States that originally were part of the program, 15 have fully approved programs and one other is about to be fully approved. I know that this progress could not have been achieved without the hard work of the Regional staff, our partners at the National Oceanic and Atmospheric Administration (NOAA), and, of course, the State nonpoint source and coastal management staff that have worked diligently with all of their partners to produce approvable programs that will benefit their States' coastal waters for many years to come.

Despite this progress, there are also 13 States whose conditional approvals have expired and who have not yet obtained full approval of their coastal nonpoint programs. It remains our challenge to continue and to increase our ongoing efforts to work closely and actively with these States, in partnership with our colleagues in NOAA, to help them surmount any remaining obstacles to full approval.

Our goal is to achieve full approval of all State coastal nonpoint pollution programs. Coastal water quality will be best served if States develop and implement approvable CZARA programs. EPA and NOAA do not have any authority to implement these programs in lieu of the States. Therefore, it is absolutely critical for the States to be positioned to implement these programs fully and effectively. I ask you to give a very high priority to devoting staff time to working closely with the States to help them complete development of their programs and to thereby achieve full approval.

To assure that every State achieves full approval of its CZARA program, Regions may, where appropriate, include specific provisions in State-EPA agreements that call upon States to work assiduously to address those management measures and enforceable policies and mechanisms (EP&M's) that have not yet been approved. Similarly, where appropriate, Regions may include grant conditions in States' Section 319 grants that require the States to take specific steps to resolve remaining issues that currently preclude full program approval.

Regions should be careful to document and to maintain records, as they have in the past, of all communications with and documents provided to or by the State regarding their progress towards full approval. Examples of documents that should be maintained are written comments provided by EPA, NOAA or outside groups to the State; documents provided to EPA/NOAA by the State; records of oral conversations with the State; testimony of State or Federal officials before State legislatures or other relevant bodies regarding the steps being taken by the State to achieve full approval; and any other evidence of the State's progress towards obtaining full approval.

We recognize that there may be a few States that ultimately do not succeed, despite significant efforts by State and Federal staff, in their efforts to develop approvable CZARA programs. In any case where the Region intends to disapprove a State's program, we recommend that the Region should follow these procedures, which will assure that the States and all other interested parties have an adequate opportunity to provide input to the Region before it makes a decision to disapprove the program:

(1) Prepare a draft written document that identifies each of the management measures and EP&M's for which the State program fails to meet program requirements, and include a justification for this finding that explains in what respect the State's program fails to meet the measure or EP&M.

(2) Provide this draft document to the State and provide the State 60 days to comment on the draft and/or to submit additional information that may enable EPA and NOAA to approve the program.

(3) If the State program remains unapprovable at this point, revise the draft document as appropriate and publish a Federal Register notice announcing EPA's proposal to disapprove the program, and provide to the public at least a 90-day comment period on the revised draft document.

(4) Prepare a final document to approve or disapprove the program, including final findings and justifications as appropriate:

(a) If the program is approved, use existing processes for preparing the final approval document.

(b) If the program is not approved, identify each management measure and EP&M for which the State program fails to meet program approval requirements. The document must be accompanied by clear findings.

Regions should coordinate with Headquarters on these State program issues, particularly if a Region is considering a disapproval, since EPA's disapproval of a State program would result in the reduction of that State's 319 grant.

We have coordinated with NOAA in the development of this policy. NOAA concurs with this memorandum, and the two agencies are taking a consistent approach on this issue.

If you have any questions or comments regarding the process described above or more generally regarding CZARA program reviews and approvals, please contact me at 202-566-1146 (regas.diane@epa.gov), or have your staff contact Dov Weitman, Chief of the Nonpoint Source Control Branch, at 202-566-1207 (weitman.dov@epa.gov).

Exhibit D

Final Settlement Agreement
Northwest Environmental Advocates v. Locke, et al.
U.S. District Court for the District of Oregon
Case No. CV09-0017-PK

PAUL KAMPMEIER (WSBA #31560)
Washington Forest Law Center
615 Second Avenue, Suite 360
Seattle, Washington 98104-2245
(206) 223-4088 x 4
(206) 223-4280 [fax]
pkampmeier@wflc.org

Attorney for Plaintiff

IGNACIA S. MORENO
Assistant Attorney General

KRISTOFOR R. SWANSON (Colo. Bar # 39378)
kristofor.swanson@usdoj.gov
U.S. Department of Justice
Natural Resources Section
P.O. Box 663
Washington, DC 20044-0663
Tel: 202-305-0248
Fax: 202-305-0506

Attorney for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

NORTHWEST ENVIRONMENTAL ADVOCATES,

Plaintiff,

Civ. No. CV09-0017-PK

v.

GARY LOCKE, et al.,

Defendants.

AGREED ORDER DISMISSING APA CLAIMS WITHOUT PREJUDICE

2014-919500004493

AGREED ORDER

Having considered the parties' joint motion for dismissal of the Administrative Procedure Act claims (claims one, two, and three) in the complaint filed in this action on January 6, 2009, as well as the parties' stipulations in support of that motion, the Court hereby GRANTS the parties' joint motion for dismissal without prejudice.

Accordingly, IT IS HEREBY ORDERED:

1. On or before November 15, 2013, NOAA and EPA shall sign for prompt publication in the Federal Register a notice announcing a proposed decision to either: (a) issue a Full Approval Decision Memorandum approving, without conditions, Oregon's Coastal Nonpoint Pollution Control Program, pursuant to 16 U.S.C. § 1455b(c)(1); or (b) make a finding that the State of Oregon has failed to submit an approvable program, pursuant to 16 U.S.C. § 1455b(c)(3) and (4).

2. On or before May 15, 2014, EPA and NOAA shall either: (a) issue a Full Approval Decision Memorandum approving, without conditions, Oregon's Coastal Nonpoint Pollution Control Program, pursuant to 16 U.S.C. § 1455b(c)(1); or (b) make a finding that the State of Oregon has failed to submit an approvable program, pursuant to 16 U.S.C. § 1455b(c)(3) and (4). If EPA and NOAA make a finding that the State of Oregon has failed to submit an approvable program, the agencies shall, pursuant to 16 U.S.C. § 1455b(c)(3) and (4), withhold Clean Water Act Section 319 and Coastal Zone Management Act Section 306 grant funds from Oregon beginning in the funding cycles that immediately follow the agencies' finding and in all future years unless and until EPA and NOAA issue a Full Approval Decision Memorandum approving the State's Coastal Nonpoint Pollution Control Program without conditions.

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3. Plaintiff's only judicial remedy for any failure by EPA and NOAA to meet the requirements set forth in Paragraph 1 and 2 of this Agreed Order will be re-initiation of litigation.

4. Within ninety days of entry of this order, EPA and NOAA shall pay Plaintiff a total of eighty-three thousand five hundred dollars and no cents ($83,500.00) for costs and attorneys' fees incurred to date in prosecution of claims one, two, and three. The payment required by this Order shall not in any way limit Plaintiff's right or ability to seek or collect costs and attorney fees incurred in any other lawsuit, including any lawsuit that raises claims identical or similar to those raised in Plaintiff's January 6, 2009, complaint.

5. Pursuant to Federal Rule of Civil Procedure 41(a)(2), claims one, two, and three in the complaint filed in this action on January 6, 2009, are dismissed without prejudice.

6. The Court shall retain jurisdiction to enforce and oversee compliance with the terms and conditions of this Order. See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375 (1994).

IT IS SO ORDERED:

Dated: _____

_____
Paul J. Papak
United States Magistrate Judge

Presented by:

s/ Paul Kampmeier
PAUL KAMPMEIER (WSBA #31560)
Washington Forest Law Center
615 Second Avenue, Suite 360
Seattle, Washington 98104-2245
(206) 223-4088 x 4

2014-919500004493

pkampmeier@wflc.org

ALLISON M. LaPLANTE (OSB #02361)
Pacific Environmental Advocacy Center
10015 S.W. Terwilliger Blvd.
Portland, Oregon 97219-7799
(503) 768-6894 [phone]; (503) 768-6642 [fax]
laplante@lclarke.edu

Attorneys for Plaintiff

s/ Kristofor R. Swanson
KRISTOFOR R. SWANSON
(Colo. Bar No. 39378)
U.S. Department of Justice
Natural Resources Section
P.O. Box 663
Washington, DC 20044-0663
Tel: 202-305-0248
Fax: 202-353-2021
Email: kristofor.swanson@usdoj.gov

Attorney for Defendants

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Exhibit E

Final Settlement Agreement
Northwest Environmental Advocates v. Locke, et al.
U.S. District Court for the District of Oregon
Case No. CV09-0017-PK

PAUL KAMPMEIER (WSBA #31560)
Washington Forest Law Center
615 Second Avenue, Suite 360
Seattle, Washington 98104-2245
(206) 223-4088 x 4
(206) 223-4280 [fax]
pkampmeier@wflc.org

Attorney for Plaintiff

IGNACIA S. MORENO
Assistant Attorney General

KRISTOFOR R. SWANSON (Colo. Bar # 39378)
kristofor.swanson@usdoj.gov
U.S. Department of Justice
Natural Resources Section
P.O. Box 663
Washington, DC 20044-0663
Tel: 202-305-0248
Fax: 202-305-0506

Attorney for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

NORTHWEST ENVIRONMENTAL ADVOCATES,

Plaintiff,

Civ. No. CV09-0017-PK

v.

GARY LOCKE, et al.,

Defendants.

STIPULATIONS IN SUPPORT OF JOINT MOTION TO DISMISS APA CLAIMS WITHOUT PREJUDICE

2014-919500004493

The parties in the above-captioned action hereby request that the Court enter the parties' Agreed Order dismissing, without prejudice, the first, second, and third claims in Plaintiff's Complaint. Plaintiff filed the complaint in this case on January 6, 2009. See Dkt. No. 1. The complaint brought claims under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, the Coastal Zone Act Reauthorization Amendments of 1990 ("CZARA"), 16 U.S.C. § 1455b, and the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The parties previously settled the FOIA claims (claims four and five in the complaint) and the Court dismissed those claims with prejudice pursuant to the parties' stipulated motion and agreed order. See Dkt. Nos. 24 & 25. The remaining claims (claims one, two, and three in the complaint) challenge EPA's and NOAA's implementation of CZARA as it relates to Oregon.

The parties have now entered a settlement agreement as to Plaintiff's first, second, and third claims. Pursuant to the parties' September 2010 settlement agreement, the parties hereby stipulate as follows:

1. On or before November 15, 2013, NOAA and EPA shall sign for prompt publication in the Federal Register a notice announcing a proposed decision to either: (a) issue a Full Approval Decision Memorandum approving, without conditions, Oregon's Coastal Nonpoint Pollution Control Program, pursuant to 16 U.S.C. § 1455b(c)(1); or (b) make a finding that the State of Oregon has failed to submit an approvable program, pursuant to 16 U.S.C. § 1455b(c)(3) and (4).

2. On or before May 15, 2014, EPA and NOAA shall either: (a) issue a Full Approval Decision Memorandum approving, without conditions, Oregon's Coastal Nonpoint Pollution Control Program, pursuant to 16 U.S.C. § 1455b(c)(1); or (b) make a finding that the State of Oregon has failed to submit an approvable program, pursuant to 16 U.S.C. § 1455b(c)(3)

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and (4). If EPA and NOAA make a finding that the State of Oregon has failed to submit an approvable program, the agencies shall, pursuant to 16 U.S.C. § 1455b(c)(3) and (4),withhold Clean Water Act Section 319 and Coastal Zone Management Act Section 306 grant funds from Oregon beginning in the funding cycles that immediately follow the agencies' finding and in all future years unless and until EPA and NOAA issue a Full Approval Decision Memorandum approving the State's Coastal Nonpoint Pollution Control Program without conditions.

3. Plaintiff's only judicial remedy for any failure by EPA and NOAA to meet the requirements set forth in Paragraph 1 and 2 of the parties' Agreed Order will be re-initiation of litigation.

4. Within ninety days of entry of the Agreed Order dismissing claims one, two, and three, EPA and NOAA will pay Plaintiff a total of eighty-three thousand five hundred dollars and no cents ($83,500.00) for costs and attorneys' fees incurred to date in prosecution of claims one, two, and three. The Parties agree that the payment required by the parties' settlement agreement and Agreed Order shall not in any way limit Plaintiff's right or ability to seek or collect costs and attorney fees incurred in any other lawsuit, including any lawsuit that raises claims identical or similar to those raised in Plaintiff's January 6, 2009, complaint.

5. The parties will move the court to dismiss, without prejudice, claims one, two, and three in the present action by seeking entry of the parties' Agreed Order.

Pursuant to these stipulations, the parties respectfully request that the Court sign and enter the parties' Agreed Order dismissing, without prejudice, the first, second, and third claims for relief in Plaintiff's January 6, 2009, Complaint. The parties note that, should the Court decide not to enter the Agreed Order as is, the parties' settlement agreement will be void and the

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parties will need to meet and confer to determine whether they can still finalize a settlement agreement. Entry of the parties' Agreed Order will serve to dismiss Plaintiff's suit in its entirety.

Respectfully submitted this 28th day of September, 2010.

s/ Paul Kampmeier
PAUL KAMPMEIER (WSBA #31560)
Washington Forest Law Center
615 Second Avenue, Suite 360
Seattle, Washington 98104-2245
(206) 223-4088 x 4
(206) 223-4280 [fax]
pkampmeier@wflc.org

ALLISON M. LaPLANTE (OSB #02361)
Pacific Environmental Advocacy Center
10015 S.W. Terwilliger Blvd.
Portland, Oregon 97219-7799
(503) 768-6894 [phone]; (503) 768-6642 [fax]
laplante@lclarke.edu

Attorneys for Plaintiff

s/ Kristofor R. Swanson
KRISTOFOR R. SWANSON
(Colo. Bar No. 39378)
U.S. Department of Justice
Natural Resources Section
P.O. Box 663
Washington, DC 20044-0663
Tel: 202-305-0248
Fax: 202-353-2021
Email: kristofor.swanson@usdoj.gov

Attorney for Defendants

2014-919500004493

Exhibit F

Final Settlement Agreement
Northwest Environmental Advocates v. Locke, et al.
U.S. District Court for the District of Oregon
Case No. CV09-0017-PK

David Powers

Oregon

Theodore R. Kulongoski, Governor

Department of Environmental Quality
Headquarters
811 SW Sixth Avenue
Portland, OR 97204-1390
(503) 229-5696
FAX (503) 229-6124
TTY 1-800-735-2900

July 26, 2010

Michael Bussell,
USEPA Region 10
Office of Water and Watersheds
1200 Sixth Avenue, OWW-135
Seattle, WA 98101

John King
Office of Coastal Resource Management
National Ocean and Atmospheric Administration
1305 East West Highway #11305
Silver Spring, MD. 20910

RE: Oregon Department of Environmental Quality's commitment to implement the Implementation Ready TMDL Approach Identified in the "Oregon Department of Environmental Quality's Response to the EPA and NOAA's Conditions of Fully Approving Oregon's Coastal Nonpoint Program (CNPCP), submitted by letter dated May 12, 2010"

Dear Mr. Bussell and Mr. King:

This letter is to provide additional detail on Oregon Department of Environmental Quality's (DEQ) commitment to implement the Prescriptive TMDL approach. It should be noted, that in the attached material, Attachment A, describing the Options developed by the State of Oregon to address the three conditions to the CNPCP, the Department used the term "Prescriptive TMDL", in the months since this material was first developed that term has evolved to "Implementation Ready TMDLs". The terms mean the same thing, but the Department will be using the term Implementation Ready TMDL to describe the future detailed TMDL approach.

Implementation Ready TMDLs provide additional detail on sources of the pollutant, specifics on TMDL implementation for point and nonpoint sources, and reasonable assurance that the TMDL will result in pollutant load reductions for restoring water quality and meeting water quality standards. DEQ has the authority for developing Implementation Ready TMDLs in OAR 340-042.

The Department of Environmental Quality sent a letter to you on July 21, 2010 in response to your joint letter of May 12, 2010 wherein we committed to resolving the remaining three Nonpoint Source Plan elements for the Coastal Nonpoint Plan within the schedule provided or as modified by the DEQ. However, it has come to our attention that the commitments description was not as clear as it could have been. Consequently, we would like to provide this clarification for the Department's commitments under the " Additional Management Measures for Forestry" section of the July 21st letter.

1.) DEQ commits to implementing the Implementation Ready TMDL Approach (prescriptive TMDL approach), Implementation Plan, and "safe Harbor" BMP approach described in Option 1 of Attachment A to this letter which would identify BMPs that could be used to meet the load allocations. This document was developed by the state and reviewed by the affected state agencies and the Oregon Governor's Office for the specific purpose of identifying options the state would be committed to implement to resolve the conditional approval issues associated with the state's Coastal Nonpoint Source Control Plan.
2.) DEQ will use the Implementation Ready TMDL approach in the coastal basins beginning with the Mid-Coast Basin and then in the subsequent coastal basin on a schedule to be described in a letter to be submitted to EPA/NOAA on or before September 30, 2010.
3.) The Implementation Ready TMDL approach will provide more detailed source delineation than the current Oregon TMDL approach thus allowing DEQ to specifically identify significant nonpoint sources, including significant forestry sources.
4.) DEQ commits to establishing enforceable load allocations in the Implementation Ready TMDL for all significant nonpoint sources, including significant forestry nonpoint sources.
5.) DEQ commits to developing "safe Harbor" BMP's for the load allocations established for the significant nonpoint sources, including significant forestry nonpoint sources.
6.) DEQ commits to issuing an implementation order to significant sources, including significant forestry nonpoint sources that have received load allocations through the Implementation Ready TMDL Approach.
7.) DEQ commits to using the Implementation Ready TMDL approach in the Mid Coast Basin to address temperature and bacteria 303(d) listings. A similar approach will be used for sediment in the Mid Coast Basin.

We hope this clarifies the Department's commitments and position.

Sincerely,

Neil Mullane

Neil Mullane, Administrator
Water Quality Division

Cc: Marvin Brown, ODF
Peter Daugherty, ODF
Don Waye, EPA HQ
David Powers, EPA Region 10
Allison Castellan, NOAA HQ
Don Yon, DEQ WQ HQ
Amanda Punton, DLCD
Eugene Foster, DEQ WQ HQ

State of Oregon Approach to Receive Final Approval of the Coastal Nonpoint Source Control Plan

(Provided to EPA/NOAA on July 26, 2010 to identify the material which had been discussed by the state agencies and the Oregon Governor's Office in the Fall of 2009 and previously approved for release to the federal agencies in an effort to outline proposed approaches for resolving the conditional approval of Oregon's (CNPCP))

Introduction

The purpose of this document is to identify options developed by the State of Oregon for addressing EPA & NOAA's conditional approval of three management measures in the State of Oregon's Coastal Nonpoint Source Control Plan (CNPCP) and getting full approval from the federal agencies for these management measures.

Three management measures in the CNPCP were identified as deficient and received conditional approvals by the federal agencies. These management measures were:

1. Forest Management in Critical Coastal Areas: Specific areas that need to be addressed are:
    a. Increased riparian protection of small, medium, and non-fish bearing streams;
    b. High risk landslide areas;
    c. Mitigating the Impacts of legacy roads.
2. On-Site
3. Urban Development

States with an approved coastal zone management program must develop and submit to EPA and the National Oceanic and Atmospheric Administration (NOAA) for approval a CNPCP. The CNPCP serves as an update and expansion of the State nonpoint source management program developed under section 1329 of Title 33 (Clean Water Act). The three conditionally approved management measures must receive final approval by the USEPA and NOAA to have an approved CNPCP for the State of Oregon.

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Options for Getting Full Approval of Management Measures

Forest management in critical coastal areas

There are two options outlined below for addressing increased riparian protection in the forest management measure. One option is a basin specific approach using TMDLs and the other is a region wide programmatic approach. The second approach would also be used to address high risk landslides and mitigating the impacts of legacy roads.

Option #1: TMDL Process for Increased Riparian Protection (January 2010 through January 2011)

TMDL developed for a basin that is more prescriptive and requires nonpoint sources of pollution to meet the TMDL load allocations. TMDLs are a requirement of the CWA.

A more prescriptive TMDL would evaluate loadings at the landowner scale and assigns load allocations to specific sources such as: land owners, crop type, or a specific land use.

The TMDL and Water Quality Management Plan (WQMP) would be developed to:

1. identify loading capacity to meet a WQS (for example, temperature);
2. use a surrogate for the load allocation (for example, effective shade) to meet the WQS;
3. assign load allocations to specific public and private sources identified in the TMDL;
4. identify "safe harbor" BMPs that could be used to meet the load allocation (for example, basal tree area retention within a riparian management area);
5. require TMDL Implementation Plans from all sources assigned a load allocation, sources would be required to identify in their plan how they will meet their load allocation;
6. The TMDL would be issued as an administrative order by DEQ.
7. DEQ would request that the BOF implement these LAs with *basin specific rules* using the proposed safe harbor BMPs or other BMPs that are equally effective.
8. DEQ approval or disapproval of TMDL Implementation Plans based on the plans ability to meet the load allocations or the basin specific rule adopted by the BOF

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If the Board declines to implement the TMDLs, DEQ could ask the EQC to petition the Board under ORS 527.765. However, DEQ would reserve its authority to impose BMPs under ORS 468B.110 to the extent necessary to comply with Sections 303 and 309 of the CWA.

Option #2: Programmatic Process for Increased Riparian Protection, High Density Landslide Areas, & Legacy Roads (March 2010 through July 2011)

There will be combined EQC & BOF meetings to explore these areas of concern. Five joint sessions would be held one for each of the following areas:

1. CZARA litigation: background, process, and legal issues and definitions, specifically on the meaning of legacy roads
2. Policy: EQC and the CWA for achieving WQS; BOF and FPA for protecting beneficial uses
3. Implementation of TMDLs and FPA and what other land uses, owners (federal, state) and states are doing for riparian protection
4. ODF & DEQ present available technical information (such as RipStream Study results) on these three areas in regards to water quality standards, TMDLs, and Category 4B
5. Recommendations by EQC and BOF on how to move forward

Depending on the outcome of the combined EQC and BOF meetings and recommendations the EQC could petition the BOF to begin rule changes to address identified needs. This may include increased riparian protections for small, medium and non-fish bearing streams, high density landslide areas, and legacy roads in order to receive full approval for the forestry management measure and meet the requirements of the CWA.

On-Site

DEQ will work on a rule change to require inspections by certified inspectors from either DEQ or the County of on-site systems at the time of property transfer. Certification of Inspectors would occur. Inspections would at least include the tank, any treatment units, and drainfield. The schedule for development of this program is:

Policy Option Package for Rules Development completed by November 2010

Request Funding from the 2011 Oregon Legislature to Support On-Site Time of Sale Inspections – January 2011 through June 2011

Rule Development completed by December 2012

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Rule Implementation and Inspections begin in March 2013

Urban Development

A detailed Urban TMDL Implementation Plan Guidance document will be developed by DEQ. The process for developing the Guidance is:

Initial Draft Guidance Document completed March 2010

Final Draft Guidance Document completed September 2010

Public Review of Final Draft Guidance Document completed December 2010

Final Guidance Document completed March 2011

Workshops for DMAs begin April 2011

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