



## **NORTHWEST ENVIRONMENTAL ADVOCATES OREGON STREAM PROTECTION COALITION**

April 6, 2017

Richard Whitman, Director  
Oregon Department of Environmental Quality  
700 N.E. Multnomah St., Suite 600  
Portland, OR 97232-4100

**Re: Setting Expectations for DEQ Leadership on “Implementation Ready” Total Maximum Daily Loads (TMDLs)**

Dear Richard:

This is an important moment for the Department of Environmental Quality and the Environmental Quality Commission. With new leadership in place, it is time to set a new course for environmental protection in Oregon. We are writing to urge you and your agency to make a public commitment to the reduction of water pollution from nonpoint sources. Specifically, we request that Total Maximum Daily Loads (TMDLs), developed at considerable expense under section 303(d) of the Clean Water Act, be effectively used to control polluted runoff.

We recognize that, historically, it has been well outside the agency’s comfort zone for DEQ to state clearly what nonpoint sources must do to comply with water quality standards, let alone actually require or enforce implementation of nonpoint source controls. And we understand that taking such steps will require a level of leadership heretofore not seen at DEQ and the Commission, particularly with regard to setting hard parameters for its sister agencies, the Departments of Forestry and Agriculture (ODF, ODA). But it is pointless for DEQ to continue preparing expensive science-based analyses, such as TMDLs, while they pile up as nothing more than paper plans, with no effect on the quality of the waters of this state. It is well past time for DEQ and the Commission to step in and take action when the designated management agencies are so captured by their regulated communities that no meaningful progress is made to protect and improve water quality.

This exercise of leadership will, at a minimum, require DEQ to clearly identify what best management practices (BMPs) are necessary to meet state water quality standards—goals established by DEQ and the Commission for the protection of threatened and endangered salmonids and other designated uses. DEQ has previously made a commitment to do exactly this, and is now again at a point where the agency must make a decision.

There are two ways in which DEQ and the Commission could take appropriate action. First, DEQ could establish required BMPs in TMDLs and issue enforceable orders to nonpoint sources, as it previously committed to do.<sup>1</sup> Alternatively, given that ODF and ODA have consistently failed to respond to TMDLs with site-specific rules to meet TMDL load allocations, DEQ could ask the Commission to petition the Board of Forestry and ODA for a review of their rules. Common to both approaches is the need for DEQ to clearly set out the necessary BMPs in the TMDLs in the first place, as a statement of what is necessary to meet Oregon water quality standards.

### **Oregon Has Failed to Use TMDLs to Control Nonpoint Source Pollution, Despite Promises**

As you know, TMDLs allocate the allowable loads of specific pollutants to point and nonpoint sources in order to meet water quality standards. The vast majority of Oregon's TMDLs have been developed for temperature, which is both the most widespread pollution threat to salmonids and an indicator of other water quality and habitat degradation. Despite the fact that most stream warming is caused by nonpoint sources, DEQ's TMDLs do nothing more than point approvingly to ODF and ODA programs.<sup>2</sup> ODA, very simply, does not have a program that protects water quality, let alone one that responds to the findings and allocations of DEQ's TMDLs. ODF's regulatory program provides partial protection of water quality, but completely ignores the TMDLs.

To date, Oregon's temperature TMDLs have determined that the allowable warming by logging and farming sources ranges from as much as 0.1° C to as little as 0.0° C (zero). Although the TMDLs rely on models that are focused on evaluating the temperature impacts of streamside shading, in no case has a TMDL or its accompanying Water Quality Management Plan (WQMP) identified the BMPs that are necessary to achieve those load allocations to nonpoint sources. Assuming, for the sake of simplicity, that the only BMPs needed are riparian buffers for shade, such buffers must consist of the targeted height of native species, along with the width and density that are key to the buffers' being able to generate maximum shade across streams.

In 2010, as part of a legal settlement, DEQ committed to describe such specific BMPs in a new form of TMDL—that it termed “Implementation Ready TMDLs”—that is much more likely to actually result in nonpoint source controls. This commitment was based on a July 2, 2010 legal opinion from Oregon's Attorney General that concluded DEQ can itself establish BMPs where DEQ deems existing logging practices inadequate, and issue them in enforceable orders to pollution sources. Subsequently, in conjunction with the Governor's office, DEQ committed to carry out this approach in a letter to the U.S. Environmental Protection Agency (EPA) and National Oceanic and Atmospheric Administration (NOAA), beginning with the Mid-Coast Basin TMDL.

Over the last four years, the Department's position on Implementation-Ready TMDLs has been contradictory. Although, in 2013, the Department repudiated its 2010 commitments,<sup>3</sup> it also continued to maintain that it would complete the Mid-Coast TMDL pilot "in a manner that makes it an effective tool for on the ground improvements to address impairments and pollutants from point sources and land management activities to improve water quality in the MidCoast."<sup>4</sup> DEQ has claimed it would identify "implementation actions [that] are needed, timelines, and milestones," which would designate this TMDL as being "Implementation Ready." Yet to this day, DEQ has failed to convey clearly how so-called Implementation Ready TMDLs will differ from the garden variety TMDLs it has issued to date. The distinction is key because Oregon's existing TMDLs are—by intention and design—having no impact whatsoever on controlling polluted runoff from Oregon's nonpoint sources.

In a further submission to EPA and NOAA in 2014, DEQ pointed out that its authority to adopt rules regulating nonpoint sources from forest operations would be "triggered by the failure of the Board [of Forestry] to adopt adequate BMPs to implement TMDL allocations for forestry or to avoid impairment of water quality such that standards are not met."<sup>5</sup> It is now time to use this authority.

Not only has Oregon moved at a glacial pace to upgrade the rules that govern private logging practices,<sup>6</sup> the only significant changes to date are patently incapable of meeting temperature TMDL load allocations. In its current rulemaking, the Board of Forestry rejected its own staff's science-based recommendations on the width of riparian buffers that are necessary to meet the warming allowance of 0.3° C established by the Protecting Coldwater Criterion on salmon-bearing stream reaches. Worse, the applicable TMDLs in the regions where these new logging rules would apply contain load allocations for warming of between zero and 0.1° C that supersede the greater pre-TMDL allowance of 0.3° C, thereby rendering the Board's proposed new buffers even more inadequate to meet the state's water quality obligations.<sup>7</sup>

With regard to agriculture, Oregon has moved nowhere at all. DEQ has consistently asserted that "[a]n MOA between ODA and DEQ, updated in 2012, defines how the agencies work together to implement TMDLs, review water quality standards, and implement and review AWQMA Plans and Rules."<sup>8</sup> Yet there is no evidence of ODA rules or other actions that reflect a response to load allocations to agriculture made by DEQ in completed TMDLs.

### **Future Role of TMDLs in Controlling Nonpoint Source Pollution**

DEQ's current website continues to refer to the development of "implementation-ready TMDLs" and labels the Mid-Coast TMDL as "implementation ready."<sup>9</sup> But DEQ has yet to publicly explain what tacking the phrase "implementation ready" onto the title of a TMDL really means, if anything. There is but one document that hints at the possibilities, a single page process map that refers to identifying "alternative management strategies/BMPs that minimize anthropogenic warming and achieve the applicable temperature standard."<sup>10</sup> There is no reason why DEQ cannot commit now to what this tidbit means: will the Mid-Coast TMDL contain the BMPs necessary to meet the load allocations or not? Frankly, we fear it will not and that the word "strategies" in this document is code for maintaining the status quo.

In 2016, in your capacity with the Governor's office, you continued to make assurances that TMDLs will be used to assure sufficient water quality protections from nonpoint sources in Oregon:

In addition to the Board of Forestry rulemaking, both existing and future temperature TMDLs may be used to help address the described deficiency [in forest practices].

\* \* \*

Oregon believes that the process stipulated by federal and state laws to develop TMDLs, pollutant load reduction targets and TMDL implementation plans is the correct arena for determining an appropriate additional management measure [BMP] for small non-fish bearing streams. When additional measures for forestry are identified as critical for meeting water quality through the TMDL process, state law provides a mechanism through which they are to be incorporated into the state's Forest practice rules.<sup>11</sup>

Now, DEQ has just published a discussion draft of a technical report on temperature modeling for the Yachats River watershed in the Mid-Coast TMDL.<sup>12</sup> The report shows how the model evaluates human changes to streamside vegetation. The evaluation of *restored* (primarily agricultural land) and *protected* (primarily forested land) riparian vegetation is based on the mix of tree species expected and their height. DEQ's model results indicate that:

- Most loading from lack of streamside vegetation is on agricultural lands under ODA authority;
- Restoration and protection together will increase effective shade above current conditions by as much as 90 percentage points;
- Reducing human-caused loading will achieve the numeric temperature criterion where it is currently violated in the Yachats River; and
- Maximum warming now is 2.8° C.

Missing from this report, however, is any indication that DEQ will use the model to identify the BMPs that are necessary to eliminate anthropogenic solar radiation from loss of streamside shade. Specifically, while DEQ includes the information on tree heights it used in this analysis, it is silent on the buffer widths and densities that were used in the model to generate the results. Here is our concern: If DEQ does not even include information on the assumed buffer widths and densities in a technical report on how it ran its model, why should we expect that the Department will be prepared to issue a TMDL with actual BMPs, that is to say a truly "implementation ready" TMDL? Moreover, in a recent presentation about this report, DEQ writes:

- DMAs [designated management agencies] may propose implementation scenarios to achieve allocations
- DEQ will evaluate if the implementation scenarios achieve the allocations and applicable temperature criteria<sup>13</sup>

Without doubt, the use of the phrase "implementation scenario" is wide open to interpretation and represents both continuing waffling by DEQ and a repudiation of just how "implementation

ready” these new TMDLs will be. Not only is a “scenario” not a BMP, practice, or management measure, but DEQ’s additional comment—that it will also work with management agencies to identify “priority implementation areas”—is a strong indication that it is not planning on using the Mid-Coast TMDL to achieve widespread nonpoint source controls across the basin.

Given the history of DEQ’s wavering commitments, its multi-year unwillingness to clearly define the meaning of its new brand of purportedly implementation-ready TMDLs, and its continuing inaction in the face of other state agencies’ continued inaction, we have every reason to be concerned that DEQ will continue to walk a tightrope wherein it claims to use TMDLs to clean up water pollution while taking no action to make that a reality. Regardless of whether it is ready to make a commitment to getting off that tightrope, the one step DEQ should be ready to make is to describe the load allocations for shade in the Mid-Coast TMDL as the height, width, and density of riparian buffers. This, at least, would allow decision makers, public officials, and the public to compare apples to apples, using DEQ’s analysis of minimum riparian buffers needed to meet water quality standards with those in use by other agencies.

## **Conclusion**

In your capacity with the Governor’s Natural Resource Office, when discussing ODF’s rulemaking to address the Ripstream analysis, you stated that “TMDLs are a different issue for a different day.” Now, as the Director of DEQ, it is time for your agency to articulate how it will use TMDLs to actually control nonpoint sources, not just produce more paper plans. That articulation needs to start with two actions.

First, DEQ needs to commit now to identifying in the Mid-Coast TMDL what precise BMPs are needed—in height, width, and density—for streamside shade.

Second, DEQ needs to discuss with the Commission how it plans to use that information, whether in enforceable orders to polluting land owners or in direct and timely requests to the Board and ODA for rulemaking.

We look forward to meeting with you to discuss this matter at your earliest possible convenience.

Sincerely,



Nina Bell, Executive Director  
Northwest Environmental Advocates



Mary Scurlock, Coordinator  
Oregon Stream Protection Coalition

cc: Jason Miner, GNRO  
Ed Armstrong, Commissioner  
Sam Baraso, Commissioner

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1. Letter from Neil Mullane, DEQ, to Michael Bussell, EPA, and John King, NOAA, 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"* (July 26, 2010), attached to Final Settlement Agreement in *Northwest Environmental Advocates v. Locke, et al.*, Civil No. 09-0017-PK (Sept. 27, 2010).
  2. *See, e.g.*, John Day TMDL WQMP at 151 (cites DEQ-ODA Memorandum of Agreement 1998 and DEQ-ODF Memorandum of Understanding 1998); at 152 (ODA plans are "programmatically updated once each two years . . . and will be updated as needed after the TMDL is issued" and DEQ and ODF "are expected to review whether current forest practices are sufficient within 18 months of TMDL issuance.").
  3. Letter from Dick Pedersen, DEQ, and Jim Rue, Oregon Department of Land Conservation and Development, to Daniel D. Opalski, EPA, and Margaret Davidson, NOAA Ocean and Coastal Resource Management (July 1, 2013).
  4. Memorandum from Gene Foster, DEQ, to MidCoast TMDL LSAC, TWG Members & Alternates, Re: *MidCoast IR TMDL Approach Update* (March 19, 2013).
  5. Letter from Dick Pedersen, DEQ, and Jim Rue, Oregon Department of Land Conservation and Development, to Daniel D. Opalski, EPA, and Margaret Davidson, NOAA Ocean and Coastal Resource Management, Re: *EPA and NOAA's notice of intent to find that Oregon has failed to submit an approvable coastal nonpoint program* (March 20, 2014) at 12.
  6. In 2002, DEQ and ODF prepared a Sufficiency Analysis that concluded Oregon's logging practices were insufficient to meet Oregon's temperature standards. Follow-up monitoring by ODF, known as RipStream, confirmed problems. Today, in 2017, rules intended to respond to the Ripstream analysis remain a work-in-progress.
  7. In a 2015 memorandum, we explained to you and ODF that DEQ's water quality standards automatically incorporate the load allocations in completed temperature TMDLs. We further cited DEQ's own guidance that supports our conclusion. *See* Memorandum from Nina Bell, NWEA, to Peter Daugherty, ODF, Re: *Why the ODF Ripstream rulemaking must apply the TMDL load allocations in lieu of the Protecting Cold Water criterion* (Feb. 10, 2015).
  8. Letter, *supra* n. 5, at 35.
  9. Department of Environmental Quality, Water Quality, Total Maximum Daily Loads,

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Mid-Coast Basin Local Stakeholder Advisory Committee *available at*  
<https://www.oregon.gov/deq/wq/tmdls/Pages/TMDLs-Basin-MidCoast-LSAC.aspx>

10. DEQ, *Conceptual Model of Temperature TMDL with Points Indicated Where TWG/LSAC Input Needed* (April 11, 2016), *available at* <http://www.deq.state.or.us/WQ/TMDLs/docs/midcoast/Advisory/041316ConcTemperatureTMDLProcessMap.pdf>

11. Letter from Richard Whitman, GNRO, to Jeffrey Payne, NOAA, and Dennis McLerran, EPA, *Re: Your Letter Dated July 28, 2015 Concerning Oregon's Coastal Nonpoint Source Program* (Feb. 10, 2016).

12. DEQ, *Appendix A: Yachats River Watershed Temperature Calibration and Preliminary Model Scenario Report, Temperature TWG Discussion Draft* (March 2, 2017), *available at* [ftp://deqftp2.deq.state.or.us/dwaltz/LSAC/Temp\\_TWG\\_7/Yachats\\_Temp\\_TMDL\\_Tech\\_Appendix\\_2017\\_03\\_2.pdf](ftp://deqftp2.deq.state.or.us/dwaltz/LSAC/Temp_TWG_7/Yachats_Temp_TMDL_Tech_Appendix_2017_03_2.pdf)

13. DEQ, *Mid-Coast Implementation Ready TMDL, Temperature Technical Work Group* (March 9, 2017) at 38, *available at* [ftp://deqftp2.deq.state.or.us/dwaltz/LSAC/Temp\\_TWG\\_7/DEQ\\_Temp\\_TWG\\_presentation\\_20170309.pdf](ftp://deqftp2.deq.state.or.us/dwaltz/LSAC/Temp_TWG_7/DEQ_Temp_TWG_presentation_20170309.pdf).