March 20, 2014

Ms. Joelle Gore
Acting Chief, Coastal Programs Division (N/ORM3)
Office of Ocean and Coastal Resource Management, NOS, NOAA
1305 East-West Highway
Silver Spring, MD 20910
Sent via email: joelle.gore@noaa.gov

Re: NOAA/EPA Proposed Disapproval of Oregon's Coastal Nonpoint Pollution Program

Dear Ms. Gore:
On behalf of The [redacted], I provide the comments below regarding the U.S. Environmental Protection Agency (EPA) and National Oceanic and Atmospheric Administration (NOAA) proposal to disapprove of Oregon's coastal nonpoint pollution program.[1]

Founded in 1983, The [redacted] is a 501(c)(3) not-for-profit conservation organization committed to accelerating the pace and scale of restoration of freshwater ecosystems. As a wild fish advocacy group founded three decades ago that helped list several of the first Pacific Salmon under the Endangered Species Act (ESA), The [redacted] understands well what is at stake for freshwater ecosystems and the species that depend on them. Our focus is, and always has been, on achieving positive restoration outcomes on the ground. This work has shown us that there is room for improvement in Oregon's coastal nonpoint pollution program, but that our rivers and streams also desperately need other practical solutions that can be achieved and quantified in our lifetimes. The Freshwater Trust believes that EPA and NOAA should consider the following two points in evaluating management measures and issuing their decision on the Oregon coastal nonpoint pollution program.

I. Use Data to Uniformly Establish, Prioritize, and Track Programmatic Progress Towards Water Quality Goals

First and foremost, Oregon's coastal nonpoint pollution program should be based on current data and analysis. Before regulators establish and implement goals for the coastal nonpoint pollution program, stakeholders need to know what is truly happening on the ground, the size of the gap between water quality goals and current conditions, and whether current restoration funding can reasonably address this gap (and if not, where funding is going to come from). Only once the

[1] National Oceanic and Atmospheric Admin. & U.S. Envtl. Prot. Agency, Oregon Coastal Nonpoint Program Proposed Finding (Dec. 20, 2013) [hereinafter "Proposed Finding"].

answers to these questions are known, regulators can establish appropriate rules and programs that are prioritized and targeted at the right places.

Through the Clean Water Act (CWA) total maximum daily load (TMDL) process, Oregon has largely quantified the water quality problems in its waterways. However, as the Proposed Finding details, effectiveness data is lacking across multiple programs, including those for designated management agency measures, Oregon Plan-driven improvements, and Agriculture Water Quality Management Areas implementation. Even where adaptive management and effectiveness feedback loops have been put in place, such as with the Pesticide Stewardship Program, monitoring locations are few and water quality data sets limited. Without an ability to quantify progress, regulators have had a difficult time making appropriate adjustments to management strategies over time in accordance with CZARA.[2] From The Freshwater Trust's perspective, this lack of information on quantified nonpoint source impacts from agricultural activities leads to generalized "concerns" that impairments are endemic and not improving. At the same time, the U.S. Department of Agriculture (USDA), the Oregon Watershed Enhancement Board (OWEB), and other organizations continue to make extensive voluntary conservation investments in Oregon.[3] However, these efforts are measured in dollars spent, acres enrolled, or best professional judgment—not in terms of water quality issues addressed—making it difficult to determine what progress is made toward attainment of water quality standards. This lack of a common accounting system leads to skepticism over whether, and how successfully, agricultural landowners and other nonpoint sources are undertaking the actions assigned to them by TMDL and Coastal Zone Act Reauthorization Amendments (CZARA) management plans.[4]

Inadequate restoration funding has also served to compound these issues. Funding has traditionally not been made available for long-term monitoring, maintenance, and study of voluntary investment-driven outcomes. The Freshwater Trust has long advocated for restoration dollars to be spent more holistically on projects that include long-term success metrics. This work is being done in a few projects, including water quality trading-funded projects and other pilot partnership projects, such as a recent riparian restoration collaboration between OWEB and The Freshwater Trust in the Calapooia.

This type of work is made possible by improvements in science and technology that now make it possible to quantify how much progress restoration actions have made toward compliance obligations, and what progress still needs to be made. For example, the shade produced from restored riparian buffers on nonpoint source land can be converted into kilocalories removed from the adjacent waterway, and models can be used to determine how many pounds of nitrogen or phosphorous would be removed as a result from different management practices. The Freshwater Trust recently conducted just this type of analysis on some tributaries of the Willamette River using remote LiDAR and determined that approximately half of the riparian areas on these rivers may be meeting the non-disturbance requirements included in the riparian buffer rules.[5] The technology, the data and the

[2] 16 U.S.C. § 1455b(b) (requiring states to implement, and continue to revise, the coastal zone land management measures that are necessary to achieve the water quality goals of the CWA).
[3] The Freshwater Trust estimates that $50-60 million is spent on voluntary riparian restoration each year.
[4] Or. Admin. R. part 603.
[5] In the absence of a county-specific riparian corridor regulation, the state of Oregon requires 75-foot setbacks for large streams, and 50-foot setbacks for smaller streams. *See* Or. Admin. R. 660-023-0030. Lane County, Oregon imposes one of the more restrictive riparian buffers, 100-foot setbacks. For the purposes of this assessment, The Freshwater Trust utilized the more restrictive requirement of 100-foot buffer widths to assess disturbances within riparian areas. Logically, compliance with these county ordinances would also result in compliance with agricultural management plan area rules, such as those covering the Inland Rogue Basin. *See* Or. Admin. R. 603-095-1440(3)(a)

analysis are real. However, without this comprehensive empirical information, it has been and will continue to be difficult for regulators to set informed implementation targets, timing and priorities, and to track progress towards meeting nonpoint pollution program goals.[6]

Until this type of analysis occurs, and nonpoint source actions are quantified and tracked in the same units as the water quality problems, regulators and stakeholders will continue to lack data on whether, or by how much, a particular action is addressing pollution problems. Without this information, regulators will have no quantifiable basis for establishing attainable and reasonably stringent targets for nonpoint pollution programs. Moving forward with new agricultural regulations, without understanding the gap between the problem and current conditions and without data-based benchmarks for chipping away at the problem, will only perpetuate these same issues moving forward.

II. Focus on Outcomes and Support the Tools that Achieve Progress on the Ground

Despite four decades of CWA-focused effort, more than half of all U.S. stream miles remain impaired.[7] Currently-available tools for achieving restoration outcomes should be championed as elements of Oregon's coastal nonpoint pollution program are revised. The Freshwater Trust is concerned that continued uncertainty regarding nonpoint source pollution controls in Oregon are stagnating opportunities to make progress. In fact, a potential outcome from disapproval—the loss of approximately $4 million per year in funding for on-the-ground restoration[8]—runs wholly counter to what all agree is needed on the ground.

There is undoubtedly room for improvement in Oregon nonpoint pollution programs. As described in Section I of this comment, The Freshwater Trust is confident that these programs can be improved in the near future. At the same time, restoration through CWA section 319 grants[9] is an important key driver of on-the-ground progress—restoration that the Proposed Finding notes is needed right now. In addition to improving water quality, on-the-ground restoration work provides multiple additional benefits for the watershed, including functional riparian habitat for wildlife and aquatic macroinvertebrate life cycles, year-round shading of the waterbody, nutrient-input avoidance, erosion control, and carbon sequestration. In addition, studies have shown that 80 cents of every dollar spent on

("Agricultural management of riparian areas shall not impede the development and maintenance of adequate riparian vegetation to control water pollution, provide stream channel stability, moderate solar heating, and filter nutrients and sediment from runoff.").

[6] A recent GAO study found that 35% of nonpoint source-only TMDLs surveyed, including some Oregon temperature TMDLs, are not monitored for progress by state water quality coordinators. GAO, Clean Water Act: Changes Needed if Key EPA Program is to Help Fulfill the Nation's Water Quality Goals, at 35 (2013). Similarly, while sampling analysis found that 83% of TMDLs are achieving point source reductions, only 20% of the samples were meeting nonpoint source reductions. *Id*.

[7] U.S. EPA, National Rivers and Streams Assessment 2008-2009, Draft Report, at xi (2013), *available at* http://water.epa.gov/type/rsl/monitoring/riverssurvey/.

[8] Oregon Departments of Forestry, Environmental Quality, Land Conservation and Development, and Agriculture, News Release, EPA and NOAA Propose Disapproval of Oregon's Coastal Area Pollution Program, Dec. 19, 2013, *available at* http://www.oregon.gov/deq/docs/121913disapprovalCoast.pdf.

[9] Under section 1319(h) of the Clean Water Act, 33 U.S.C. § 1329, a state with an approved nonpoint source management program can receive grants from U.S. EPA to assist in program implementation.

restoration stays in the local economy, and every $1 million spent on restoration creates 15-20 jobs.[10] Withdrawal of approximately $4 million per year in restoration funding will only make it harder to regain ground that has already been lost, and will prevent the Oregon restoration economy from establishing the capacity that will be needed to truly increase the pace and scale restoration work to needed levels.

Furthermore, the continued entanglement of water quality trading with larger nonpoint source control questions is counter-productive. Water quality trading is a legally implemented tool for states to accelerate on-the-ground progress right now, and is an important vehicle for re-directing compliance dollars to natural infrastructure investments. In its March 15, 2013 letter to EPA regarding the City of Medford, Oregon water quality trading program,[11] and its May 10, 2013 letter to EPA regarding CZARA compliance in Oregon,[12] however, Northwest Environmental Advocates (NWEA) suggested that issues related to CZARA and TMDLs cloud the legality of Medford's water quality trading program. The Freshwater Trust strongly believes that trades implemented under the current legal structure should continue to occur so that gains in water quality can continue to be made.

In its Medford Permit Letter to EPA, NWEA stated that: "EPA and [NOAA] Office of Coastal Resource Management (OCRM) have assumed that agricultural riparian areas are *or will be protected sufficiently* to meet water quality standards and protect designated uses [...] EPA and NOAA concluded on a preliminary basis that Oregon's agricultural program was adequate to meet CZARA's statutory mandate […] [H]ow can EPA and NOAA find that agricultural land owners are *required to maintain riparian vegetation* sufficient to meet water quality standards pursuant to CZARA, but yet allow the Oregon DEQ to ignore that existing requirement in counting riparian planting for the purposes of supplying thermal credits to point sources? Simply put, both cannot true."[13] NWEA reiterated the same point in its May 10, 2013 CZARA Letter, stating that "even as [DEQ] acknowledged in the [Rogue River Basin] TMDL that nonpoint sources must install the maximum possible riparian vegetation to both achieve the natural conditions *and* to meet [a] load allocation of zero heat, DEQ curiously assumed the point source discharge of Medford could trade its discharge for riparian tree planting, tree planting the TMDL already assumes will be put in place."[14]

There are two key points that clarify NWEA's misconceptions and may likewise assist EPA and NOAA in their evaluation of Oregon's program. The first misconception is that CZARA regulations and TMDLs assume complete attainment of water quality goals right now. However, these regulations assume that "agricultural riparian areas are *or will be protected* sufficiently to meet water quality standards and protect designated uses."[15] As The Freshwater Trust has noted in past comments on water quality trading, implementation of water quality management controls has a <u>temporal</u> aspect.[16] TMDL

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[10] *See* M. Nielsen-Pincus & C. Moseley, Institute for a Sustainable Environment, University of Oregon, Economic and Employment Impacts of Forest and Watershed Restoration in Oregon (2010), *available at* http://ewp.uoregon.edu/sites/ewp.uoregon.edu/files/downloads/WP24.pdf.

[11] Letter from Nina Bell, Exec. Dir., NWEA, to Michael Lidgard, NPDES Permits Unit, EPA Office of Water and Watersheds, EPA Oversight of Trading in Oregon Permits Needed to Ensure Consistency with EPA Regulations Implementing the Clean Water Act (Mar. 15, 2013) [hereafter "Medford Permit Letter"].

[12] Letter from Nina Bell, Exec. Dir., NWEA, to Dan Opalski, Director, EPA Region 10 Office of Water and Watersheds, Oregon Coastal Nonpoint Pollution Control Program: Additional Information Concerning Oregon's Failure to Regulate Agricultural Nonpoint Pollution (May 10, 2013) [hereafter "May 10, 2013 CZARA Letter"].

[13] Medford Permit Letter, at 4-5 (emphasis added).

[14] May 10, 2013 CZARA Letter, at 5-6 (emphasis in original, footnote omitted).

[15] Medford Permit Letter to EPA, at 4-5.

[16] *See infra* notes 24–25.

implementation plans or CZARA obligations may not currently require controls, but instead contemplate future actions. The inference, then, that TMDL and CZARA regulations *already* require landowners to install shade-producing riparian buffers is incorrect. Until the future TMDL goals are translated into enforceable mechanisms—TMDL implementation plan obligations, regulations, etc—point sources may achieve compliance via trading based on current conditions. As discussed in Section I, it is imperative that any revised or future nonpoint regulations be based upon current conditions and include measureable, achievable milestones for progress towards standards attainment.

Second, existing regulations do not require affirmative restoration of riparian areas in many locations. Existing regulations on agricultural lands are passive, non-disturbance regulations.[17] The closest requirement that relates to stream restoration is OAR 603-095-1440(3)(a), which states that "agricultural management of riparian areas *shall not impede* the development and maintenance of adequate riparian vegetation to control water pollution…") (emphasis added). This regulation, however, does not require landowners to plant vegetation, or even to maintain what is already there. The same is true for local riparian area ordinances,[18] and TMDL implementation plans in the Rogue Basin—the only enforceable aspect of TMDLs on nonpoint sources.[19] Simply put, non-disturbance requirements are not the same as active restoration requirements (and as some of the The Freshwater Trust's preliminary findings have revealed, these regulations are effective in some impaired waterways). Therefore, trading, as it is currently implemented in Oregon, is not at odds with the current nonpoint source regulatory framework, and DEQ is not "ignor[ing] that existing requirement in counting riparian planting for the purposes of supplying thermal credits to point sources."[20]

Lastly, the administrative record list in Section III of the Proposed Finding currently includes NWEA's letter to EPA regarding the Medford trading permit.[21] However, the correspondence section does not include reference to The Freshwater Trust's April 22, 2013 response letter to EPA clarifying factual and legal inaccuracies in NWEA's Medford Permit letter to EPA.[22] The Freshwater Trust respectfully requests that its April 22, 2013 letter be added to Section III of the Proposed Finding as section III(C)(4)(c). In addition, The [redacted] requests that NOAA and EPA add The Freshwater Trust's September 27,

[17] *See generally* Inland Rogue Agricultural Water Quality Management Area Plan (2010), *available at* http://www.oregon.gov/ODA/NRD/docs/pdf/plans/inland_rogue_2010_plan.pdf; Inland Rogue Agricultural Water Quality Management Program Rules, OAR 603-095-1400 *et seq.*

[18] *See e.g.,* Jackson Cnty. Land Dev. Ord. § 8.6.4(A) (existing vegetation and tree cover "will be retained" on land within 75 feet of the top of the Rogue River bank and within 50 feet of any Class 1 or 2 streams, except in certain narrowly prescribed, regulator-approved situations).

[19] TMDLs, and load allocations in particular, are not self-implementing requirements. *Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir. 2002) (TMDLs are "primarily informational tools" that "serve as a link in an implementation chain that includes federally regulated point source controls, state or local plans for point and nonpoint source pollutant reduction, and assessment of the impact of such measures on water quality, all to the end of attaining water quality goals for the nation's waters."). Thus, required implementation actions must be established by other supporting agencies. The U.S. EPA Trading Toolkit notes that a Nonpoint Source's Baseline (i.e., what it is already required to do) "would be derived from the Nonpoint Source's LA[,]" but does not specify how to derive Baseline for particular sites from the LA. EPA, Water Quality Trading Toolkit for Permit Writers, at 29 (2009), *available at* http://water.epa.gov/type/watersheds/trading/WQTToolkit.cfm.

[20] Medford Permit Letter to EPA, at 4-5.

[21] Proposed Finding, § III(C)(4)(b).

[22] Letter from Joe Whitworth, President of The Freshwater Trust, to Michael Lidgard, NPDES Permits Unit, EPA Region 10 Office of Water and Watersheds, Corrections to Northwest Environmental Advocates' March 15, 2013 Letter Seeking EPA Oversight of Oregon Water Quality Trading Program and Medford Permit (Apr. 22, 2013) (on file with the author).

2013 public comments to Oregon DEQ on Wilsonville's now-withdrawn WQT program[23] as section III(C)(4)(d) of the Proposed Finding, as this letter also provides a thorough discussion of how trading continues to be a legal tool for achieving water quality improvements right now.

III. Conclusion

While The [redacted] concurs that Oregon's coastal nonpoint pollution program may be improved, first and foremost, our rivers and streams desperately need practical solutions that can be *achieved* and *quantified* right now. Oregon's coastal nonpoint pollution program should be based on the latest scientific data and analysis, and new or revised CWA and CZARA regulations should be based on current conditions and directed towards bridging any gap between water quality goals and conditions on the ground. While this analysis is being conducted, existing legal mechanisms for driving nonpoint source water quality improvement—water quality trading and CWA section 319 grants—should continue. Imperiled waters, species, and ecosystems have urgent and growing needs; none of these can afford additional delay and inaction.

Yours in conservation,

[redacted]

[redacted]

[23] [redacted]