

**Report on the
Oregon Department of Agriculture's
Enforcement of the Clean Water Act's
NPDES program related to CAFOs**

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TABLE OF CONTENTS

I. INTRODUCTION	1
II. OREGON NPDES PROGRAM	
A. HISTORY	1
B. CURRENT STATUS	7
III. ANALYSIS	
A. NO EPA AUTHORIZATION FOR ODA INVOLVEMENT	
1. Initial EPA Authorization to DEQ	8
2. Incomplete Attempt to Transfer Authority to ODA by DEQ/EQC and Oregon Legislature	
i. Application Process	10
ii. Conflicting Mandates	13
iii. No Program Approval	16
B. LACK OF CAPACITY AND RESOURCES	21
1. Lack of Enforcement Authority	21
2. Lack of Programs	
i. Lack of Public Participation	25
ii. Lack of Investigation of Complaints	31
iii. Lack of Inspections and Monitoring	34
3. Lack of Knowledge	36
4. Lack of Resources	45
5. ODA's Inconsistent Performance of NPDES Duties	47
C. CONFLICT OF INTEREST	66
IV. CONCLUSION	72
A. RECOMMENDATIONS	72
V. ATTACHMENTS	74

I. INTRODUCTION

The Animal Law Clinic (Clinic) at Lewis and Clark Law School, at the request of and with assistance from Friends of Family Farmers (FoFF), a nonprofit that promotes and protects socially responsible agriculture in Oregon, reviewed Oregon Department of Agriculture's (ODA) handling of the state's National Pollutant Discharge Elimination System (NPDES) program with respect to Concentrated Animal Feeding Operations (CAFOs). The Clinic wrote this report based on independent research, information from ODA files and documents from Region 10 Environmental Protection Agency's (EPA) response to a Freedom of Information Act (FOIA) request. The report details: 1) the lack of requisite EPA authorization for ODA to administer the program; 2) ODA's lack of resources and ability to administer the program; and 3) the inherent conflict of interest in ODA's role to both regulate and promote agriculture.

II. OREGON NPDES PROGRAM

A. HISTORY

Section 402 of the Clean Water Act (CWA) establishes the National Pollutant Discharge Elimination System (NPDES).¹ This program mandates a permitting system to limit water-borne pollutants discharged from point sources into navigable surface waters of the United States.² The Environmental Protection Agency (EPA) administers the permit program except to the extent that a state may receive authorization from EPA's Administrator to administer the national program within its state.³ The CWA defines concentrated animal feeding operations (CAFOs) themselves as point sources, serving to bring all CAFOs that discharge to the waters of the United States under its umbrella.⁴

¹ 33 U.S.C. § 1342.

² 33 U.S.C. § 1342(a).

³ 33 U.S.C. § 1342(b).

⁴ 33 U.S.C. § 1362(14).

The modern version of CWA, also known as the Federal Water Pollution Control Act of 1972, contains provisions whereby states can apply for and receive authorization to operate the NPDES permit program.⁵ In March of 1973, Oregon sought EPA authorization to administer the NPDES program. Its application sought to make the Oregon Department of Environmental Quality (DEQ) the implementing agency. In September 1973, EPA granted Oregon this authorization in response to DEQ's application, based on the assertion that DEQ would administer the program.⁶

Applications for NPDES programs require details regarding how a state NPDES program will be carried out.⁷ Oregon's application stated that Oregon would be "acting by and through its Department of Environmental Quality"⁸ – "the official water quality control agency in the State of Oregon."⁹ The application contained a letter from Oregon's then-Governor, asserting that DEQ "has overall responsibility for this effort..."¹⁰

The CWA requires all states seeking NPDES authorization to submit to EPA a "full and complete description of the [proposed] program."¹¹ Central to this description in Oregon's application was the assertion that DEQ would oversee the program. Oregon's application references an already-established "cooperative joint DEQ-EPA approach" for reviewing and issuing backlogged permits.¹² The initial submission goes on to propose that even its standard, non-backlogged "procedure for processing of NPDES applications" involve an active role by EPA. It suggests that: EPA receive and complete applications for processing; that EPA and DEQ jointly review and concur with field recommendations, as well as with proposed permits and proposed notices or other

⁵ 33 U.S.C. § 1342(b).

⁶ *US EPA Permitting for Environmental Results NPDES Profile: Oregon and Indian Country*, Last updated September 27, 2005, Last accessed April 5, 2011. http://www.epa.gov/npdes/pubs/oregon_final_profile.pdf

⁷ 33 U.S.C. § 1342(b) ("...the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish...").

⁸ Oregon NPDES Program Application, p. 1.

⁹ Oregon NPDES Program Application, p. 1.

¹⁰ Oregon NPDES Program Application, p. 27.

¹¹ 33 U.S.C. § 1342(b).

¹² Oregon NPDES Program Application, p. 1.

proposed actions; that they jointly review applicant comments and revise proposed permits as they agree is necessary; that they jointly evaluate public comments and prepare documents for the recommended action; that they jointly evaluate the hearing record and prepare final recommended actions; and, finally, that EPA send its recommended actions to its regional headquarters for concurrence.¹³ This section of the application concludes with this thought: “The success of this proposed procedure for permit issuance will be dependent on the assistance provided by the Oregon Operations Office of EPA.”¹⁴ ODA is not mentioned anywhere in the application.

In 1988, in conflict with its original submission to EPA, Oregon DEQ and ODA entered into a memorandum of agreement (MOA) granting ODA an active role in overseeing the “Confined Animal Feeding Operation waste management program.”¹⁵ Citing the right of state agencies bound to perform duties imposed on them to “cooperate” with other agencies,¹⁶ the agreement named ODA as DEQ’s “agent” for purposes of performing numerous NPDES duties: receiving and reviewing applications for coverage under the general CAFO permit, negotiating with violators regarding the terms of their consent order, reviewing “plans and specifications for CAFO waste collection and disposal systems,” responding to and resolving all complaints and violations, and conducting at least one inspection per year of previous violators.¹⁷

One statute included in Oregon’s application, for purposes of evidencing DEQ’s legal authority, does allow “cooperation” between DEQ and other agencies or bodies.¹⁸ However, the same statutory scheme that allows “cooperation” explicitly includes a list of bodies allowed to enforce rules promulgated by the state Environmental Quality Commission (EQC), and ODA is not among those listed.¹⁹ From the date of EPA’s approval, DEQ transferred much of the administration of the program to ODA, such as the authority to act as DEQ’s agent, review permit applications, and respond to and

¹³ Oregon NPDES Program Application, p. 9.

¹⁴ Oregon NPDES Program Application, p. 17.

¹⁵ 1988 MOA between DEQ & ODA, p. 1.

¹⁶ O.R.S. § 190.110.

¹⁷ 1988 MOA between DEQ & ODA, p. 2-3.

¹⁸ O.R.S. § 449.035 (as provided in the application on or near p. 210 (unnumbered)).

¹⁹ O.R.S. § 449.064 (as provided in the application on or near p. 211 (unnumbered)).

resolve complaints. ODA later became responsible for general permit issuance and enforcement. Subsequent memorandums of understanding (MOUs) between ODA and DEQ/EQC reinforce DEQ's administrative oversight role and DEQ's deferral of all complaints and suspected permit violations to ODA. Instead of simply cooperating with each other, DEQ has transferred much of its NPDES permitting, compliance and enforcement duties to ODA, without seeking EPA approval for a major program modification.

Besides requiring a description of the intended method for carrying out an NPDES permitting program, CWA also requires all state applications for authorization to provide evidence of "adequate authority to carry out the proposed program."²⁰ Oregon's application cited only DEQ's legal authority, making no mention of ODA's capacity. In this way, Oregon clearly stated that DEQ would, in conjunction with EPA, oversee the state NPDES program. EPA granted approval to DEQ not ODA. After receiving authorization for a DEQ-headed program, there is no record that Oregon later sought permission to amend its program so as to be headed jointly by DEQ and ODA, or even largely by ODA. Further, as will be discussed below, on April 1, 1983 EPA amended regulations regarding state program revisions that required states with approved programs to notify EPA of any NPDES program transfer between state agencies.²¹ Subsequently, on January 4, 1989 EPA added rules regarding state agency program-sharing which allowed conditional sharing of NPDES duties but both DEQ and ODA would have been responsible for filing program submissions.²² No evidence of such a request was present in the EPA FOIA documents reviewed or in the ODA records examined

Whether or not authorization for ODA participation was sought, it appears, based on provisions and caveats found in various statutes, regulations and the Oregon general CAFO permit, that it was never granted. EPA is still working with DEQ as the state agency with authorization to handle NPDES matters.

²⁰ 33 U.S.C. § 1342(b).

²¹ 40 C.F.R. § 123.62(c) formerly 48 F.R. 14146 (April 1, 1983).

²² 40 C.F.R. § 123.1(g)(1).

However, the state and the agencies involved continue to operate as though ODA has authority to not only cooperate with DEQ on CAFO NPDES matters, but to take the lead.

In 1993, the Oregon legislature passed S.B. 1010, which became the Agricultural Water Quality Management Act, authorizing ODA “to require any landowner whose land is located within an area subject to a water quality management plan to perform those actions on the landowner's land necessary to prevent and control water pollution from agricultural activities and soil erosion.” It also allowed ODA to “enter into agreements with any agency of this state, including but not limited to a soil and water conservation district, or with any agency of the federal government, for the purposes of carrying out the provisions of ORS 568.900 to 568.933 including the development of a plan.”²³ Also in 1993, the legislature passed S.B. 1008, directing ODA to enter into an MOU with EQC to “perform any function of the EQC or the DEQ relating to the control and prevention of water pollution from a confined animal feeding operation.”²⁴ This legislation did not address the fact the authority for CWA enforcement derived from the EPA, and thus could not be changed without EPA approval, and not by a state legislature.

In 1994, ODA entered into another MOA (this time with EQC) to define its role in the statewide CAFO waste management program. It was given all the same tasks as in the prior MOA, but with increased enforcement power: it was to “take prompt enforcement action against [violators],” “adopt enforcement rules and civil penalty schedules,” and “impose civil penalties.”²⁵ In 1995, an additional MOU between the same parties charged ODA with developing and maintaining a database of all permit activities.²⁶ Also in 1995, the legislature went even further, directing “the State Department of Agriculture [to] develop and implement any program or rules that directly

²³ O.R.S. §§ 568.900 – 568.933; (formerly S.B. 1010, 67th Or. Legis. § 263 (1993)).

²⁴ O.R.S. § 468B.217.

²⁵ 1994 MOA between ODA & EQC, p. 3.

²⁶ 1995 MOA between ODA & EQC, p. 6.

regulate farming practices... that are for the purpose of protecting water quality and that are applicable to areas of the state designated as exclusive farm use zones... or other agricultural lands in Oregon...”²⁷

In 2001, in clear recognition that EPA approval of a program change was both required and absent, the Oregon Legislature directed ODA and DEQ to pursue EPA authorization for a transfer of CAFO NPDES authority from DEQ to ODA such that ODA could finally “assume all permitting and enforcement responsibilities for confined animal feeding operations.”²⁸ However, at the same time, the law also purported to allow ODA to take control of Oregon’s CAFO NPDES program: “The State Department of Agriculture may perform or cause to be performed any acts necessary to be performed by the state to implement the provisions of the Federal Water Pollution Control Act... and any federal regulations or guidelines issued pursuant to the Act, relating to the control and prevention of water pollution from livestock and other animal-based agricultural operations.”²⁹

In 2002, ODA and EQC updated their previous MOU, citing an anticipated transfer of NPDES authority from EPA to ODA. This MOU divided ODA’s responsibilities into pre-authorization and post-authorization time periods, but allowed ODA to “receive and review permit applications,” “assign [permit] coverage,” “take prompt enforcement action,” and “impose civil penalties” even before receiving the anticipated EPA authorization.³⁰

In December 2009, the state MOU was again updated, this time granting ODA the power to “perform the CAFO related functions of DEQ and the EQC”³¹ despite still acknowledging “the anticipated delegation of NPDES permitting authority to ODA.”³² Like the previous MOU, it was divided into pre-and post- authorization time periods, but

²⁷ O.R.S. § 561.191.

²⁸ H.B. 2156, 71st Ore. Legis. § 248 (2001).

²⁹ O.R.S. § 468B.035(2).

³⁰ 2002 MOU between ODA & EQC, p. 3-4.

³¹ 2009 MOU between ODA & EQC, Section II, p. 1.

³² 2009 MOU between ODA & EQC, Section VIII (A)(3), p. 4.

the pre-authorization period granted ODA virtually all NPDES permitting powers. For example, ODA was allowed to receive, review, and issue general permits. ODA was also to review and approve or reject waste management plans, including developing “its own method for accepting certification from outside professional engineers as to the sufficiency and quality of the plans and specifications.”³³ The MOU also allowed ODA to enter onto premises for inspection, to implement enforcement procedures, and to provide technical and financial assistance to CAFO operators.³⁴

B. CURRENT STATUS

While explicitly recognizing that EPA authorization is necessary for CWA enforcement, Oregon continues to act as if it is not. This leads to a gap between what is legally authorized, and the current practice. Currently, (in practice, but not legally) DEQ and ODA share NPDES duties in Oregon: DEQ oversees all facets of the Oregon NPDES program besides those that are CAFO-related.³⁵ The CAFO-related water quality permitting program is jointly overseen by DEQ and ODA, and while state statutes as well as internal ODA and DEQ documents indicate that DEQ remains the sole agency authorized by EPA to oversee the NPDES program,³⁶ ODA has been authorized by Oregon’s legislature since 2005 to issue general CAFO permits even separate from DEQ.³⁷ ODA has in fact been issuing CAFO general permits jointly with DEQ, the most recent having been issued in 2009.³⁸ Beyond permitting, ODA enjoys virtually exclusive control over all other aspects of the CAFO NPDES scheme, including inspections, monitoring, advising livestock operations and enforcement. In fact, the 2009 MOU between ODA and EQC makes no distinction among the various facets of the permitting program, but rather “authorizes ODA to perform the CAFO related

³³ 2009 MOU between ODA and EQC, Section VIII (A)(9), p. 4.

³⁴ 2009 MOU between ODA and EQC, Sections VII and VIII, p. 3 – 4.

³⁵ O.R.S. § 468B.048; O.R.S. § 468B.030; O.R.S. § 468B.035.

³⁶ Attachment 1 – Oregon DOJ report to US EPA on the status of Oregon’s NPDES Permit Program, October 27, 2010.

³⁷ O.R.S. § 468B.050(1),(2) (formerly S.B. 45, 73rd Ore. Legis. §523 (2005)).

³⁸ Oregon CAFO NPDES General Permit 01-2009.

functions of DEQ and the EQC.”³⁹ None of this changes the fact that EPA has not authorized these changes.

Most recently, in April 2010 EPA and Oregon entered into an MOA that detailed the roles and responsibilities of EPA and DEQ regarding the NPDES program. ODA is not mentioned anywhere in the agreement, nor is there any reference to DEQ sharing its authority with another agency. Instead, the agreement states that DEQ assumes authority of the Oregon NPDES CAFO program “as originally authorized in the 1973 MOA and its amendments...”⁴⁰ DEQ and EPA are to cooperate and coordinate together, essentially in “partnership”⁴¹ for DEQ to administer the program with EPA’s oversight. In addition, DEQ agreed to ensure that any proposed revisions of the program are submitted to EPA for approval⁴² and DEQ agreed to notify EPA of any legislative actions that may amend DEQ’s authority or that may affect DEQ’s ability to implement the program.⁴³ ODA administers the majority of NPDES duties, an arrangement that differs substantially from the 2010 MOA. Accordingly, DEQ should have notified EPA that ODA, instead of DEQ, is administering the NPDES program and applied for the necessary EPA approval for such a change prior to implementing them.

III. ANALYSIS

A. NO EPA AUTHORIZATION FOR ODA INVOLVEMENT

1. Initial EPA Authorization to DEQ

The CWA requires each state seeking to administer the NPDES permit program to file an application with EPA’s Administrator, documenting its legal authorities and describing the state’s capabilities for administering an effective program. Specifically, the state must submit a “full and complete description of the program it proposes to establish and administer under State law”⁴⁴ and it must submit a statement

³⁹ 2009 MOU between ODA and EQC, Section II, p. 1.

⁴⁰ 2010 MOA between DEQ and EPA, 6.

⁴¹ 2010 MOA between DEQ and EPA, Section 1.0, p. 1.

⁴² 2010 MOA between DEQ and EPA, Section 3.0, p. 3.

⁴³ 2010 MOA between DEQ and EPA, Section 9.0, p.28.

⁴⁴ 33 U.S.C. § 1342(b).

from the attorney general assuring that the state's laws "provide adequate authority to carry out the described program."⁴⁵ EPA's Administrator must then "approve each submitted program unless he determines that adequate authority does not exist" to meet certain program requirements.⁴⁶ A central requirement is the ability to issue permits that are targeted, effective, adhered to, and can be terminated or modified for cause.⁴⁷ In addition, the program must be able "to abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement."⁴⁸

At the time of its March 1973 application, DEQ did not possess full legal authority to administer the program per CWA submission requirements – this was admitted in its application. If it did not manage to meet all CWA criteria by the time of its authorization by EPA, the authorization itself could have been invalid. Oregon Governor Tom McCall, in a letter to EPA constituting part of Oregon's program proposal, admitted "the state of Oregon intends to achieve full compliance with the requirements of Section 303(e) of the Act by July 1, 1975."⁴⁹ However, the Clean Water Act's section 303 for "water quality standards and implementation plans" are essential to developing and carrying out targeted and effective NPDES permits, as permit-enforced effluent levels must sometimes take into account water quality standards (in addition to technology-based standards).⁵⁰

Hence, this central criterion for program approval was admittedly undermined with this deficiency. Oregon's application also stated that it was awaiting two state bills affording it "basic legal authorities to meet NPDES requirements."⁵¹ Once these passed, it claimed, DEQ would modify its rules for permit issuance as well as civil penalties so as "to be consistent with approved procedures and NPDES requirements."⁵² Of the two

⁴⁵ 33 U.S.C. § 1342(b).

⁴⁶ 33 U.S.C. § 1342(b).

⁴⁷ 33 U.S.C. § 1342(b)(1).

⁴⁸ 33 U.S.C. § 1342(b)(7).

⁴⁹ Oregon NPDES Program Application, p. 25.

⁵⁰ 40 C.F.R. § 122.44.

⁵¹ Oregon NPDES Program Application, p. 20.

⁵² Oregon NPDES Program Application, p. 20.

bills, only one dealt with the issue at hand. It proposed to authorize the “Environmental Quality Commission to implement within the jurisdiction of this state provisions of Federal Water Pollution Control Act.”⁵³ The bill passed on May 30, 1973. EPA then approved Oregon’s NPDES program in September 1973.⁵⁴ However, the program’s legal authority was still in question, as it does not appear that Oregon had come into compliance with CWA § 303(e) (at that time or since). Thus, DEQ’s authorization from EPA to manage the NPDES program may possible be invalid because Oregon did not meet the application requirements at the time. Clearly, ODA did not and does not meet these requirements, so it is not an appropriate agency to receive authority under the program should EPA wish to grant it.

2. Incomplete Attempt to Transfer Authority to ODA by DEQ/EQC and Oregon Legislature

i. Application Process

While Oregon law allows agencies to cooperate with other willing but non-authorized agencies⁵⁵ (and in fact ODA and DEQ cite this as authority for an NPDES power share in their 1988 MOA), CWA requires authorization from the EPA for any agency to administer the NPDES program, and provides clear prerequisites for obtaining such authorization, including an application process.⁵⁶

The CWA does not expressly address state agencies sharing NPDES duties except for a partial permit program, (which will be discussed in more detail below) wherein one agency’s program covers merely “a portion of the discharges into the navigable waters in such State.”⁵⁷ However, this arrangement was not part of the CWA until 1989, and was not part of Oregon’s application and hence was not an option when

⁵³ H.B. 2436; Oregon NPDES Program Application, p. 379.

⁵⁴ *US EPA Permitting for Environmental Results NPDES Profile: Oregon and Indian Country*, Last updated September 27, 2005, Last accessed April 5, 2011.

⁵⁵ O.R.S. § 190.110.

⁵⁶ 33 U.S.C. § 1342(b).

⁵⁷ 33 U.S.C. § 1342(n).

Oregon applied for NPDES program authority in 1973.⁵⁸ Oregon could still have proposed this special arrangement later, but it would have been obliged to submit a program revision to EPA for approval, as CWA requires “a full and complete description of the program [the state] proposes to establish...”.⁵⁹ Oregon’s application made no such mention of this option nor did it ask for the authority to change the arrangement later with a new submission. Rather, it expressly stated multiple times through the application that DEQ would oversee the NPDES program.⁶⁰ And though the application did mention other agencies with whom DEQ may “cooperate,” ODA was not among these.⁶¹

Assuming that DEQ decided only after submitting its program application and obtaining authorization to transfer its CAFO duties to ODA, either Oregon, or one or both agencies – was obliged to seek EPA approval.⁶² This is because the “full and complete description of the program” would have changed dramatically, as a new agency with its own legal authority, or lack thereof, would have been involved.

EPA regulations also dictate procedures states must follow to administer the NPDES program. Since April 1, 1983, Federal Rules have required:

*“States with approved programs must notify EPA whenever they propose to transfer all or part of any program from to the approved State any other State agency, and must identify any new division of responsibilities among the agencies. The new agency is not authorized to administer the program until approved by the [EPA] Administrator...” [emphasis added].*⁶³

DEQ was the sole agency authorized to administer the NPDES permitting program based on Oregon’s 1973 application. At the time DEQ purportedly transferred its

⁵⁸ 54 F.R. 246-01 (January 4, 1989).

⁵⁹ 33 U.S.C. § 1342(b).

⁶⁰ Oregon NPDES Program Application, pp.1, 5-6, 27.

⁶¹ Oregon NPDES Program Application, p. 2-3.

⁶² 33 U.S.C. § 1342(b).

⁶³ 40 C.F.R. § 123.62(c).

program duties to ODA via their 1988 MOU, Oregon should have applied to EPA for a program revision as required by EPA's regulations. As the rule states, ODA is not authorized to administer the program until approved by EPA. There is no application for program revision on record, and thus, the attempted transfer of NPDES program responsibilities from DEQ to ODA is invalid.

Additionally, since January 4, 1989, EPA regulations have expressly allowed general sharing of NPDES duties provided "each agency [has] Statewide jurisdiction over a class of activities or discharges"⁶⁴ but if more than one agency is responsible for issuing permits, each must submit a formal application.⁶⁵ According to their current state legislative mandate and their most recent MOU, DEQ and ODA share CAFO permitting responsibilities.⁶⁶ Hence, assuming DEQ wanted to transfer NPDES duties to ODA after January 4, 1989, both DEQ and ODA would have been required to submit an application for such a change to the EPA for approval. If they began sharing responsibilities prior to this date, it is conceivable that EPA would apply the law retroactively and expect them to submit an entirely new application for EPA approval based on this rule.

In 1988, DEQ and ODA entered into an MOA naming ODA as DEQ's "agent" for purposes of the "Confined Animal Feeding Operation waste management program."⁶⁷ Hence, sometime between 1973 and 1988, DEQ changed the plan outlined in its approved application to EPA for implementing Oregon's NPDES program but did not seek additional approval from EPA for this change. EPA's authorization was based on Oregon's original submission that DEQ administer the program. Even if EPA wanted to allow such a change, it has no discretion to do so, as its own rules required a new application and review process. Moreover, Oregon could not unilaterally affect the change in program management because the power to grant authority to administer the

⁶⁴ 40 C.F.R. § 123.1(g)(1) ("NPDES authority may be shared by two or more State agencies but each agency must have Statewide jurisdiction over a class of activities or discharges.").

⁶⁵ 40 C.F.R. § 123.1(g)(1) ("When more than one agency is responsible for issuing permits, each agency must make a submission meeting the requirements of § 123.21 before EPA will begin formal review.") as published in the Federal Register on January 4, 1989 at 54 F.R. 246-01.

⁶⁶ O.R.S. § 468B.035; O.R.S. § 468B.050(1),(2); O.R.S. 468B.217(2)(a); 2009 MOU between ODA and EQC.

⁶⁷ 1988 MOA between DEQ & ODA, p. 1.

program stems from EPA. Neither the state of Oregon, nor the EPA has completed the necessary steps for authorizing ODA to administer the NPDES permit program, whether jointly with DEQ or on its own.

ii. Conflicting Mandates

Compounding the confusion are Oregon's contradictory mandates to ODA, which, at times, assume authority ODA simply does not possess. In 1993, the legislature passed the Agricultural Water Quality Management Act, permitting ODA "to require any landowner whose land is located within an area subject to a water quality management plan to perform those actions on the landowner's land necessary to prevent and control water pollution from agricultural activities and soil erosion." It also allowed ODA to "enter into agreements with any agency of this state..."⁶⁸ Also in 1993, the legislature directed ODA to enter into an MOU with EQC to "perform any function of the Environmental Quality Commission or the Department of Environmental Quality relating to the control and prevention of water pollution from a confined animal feeding operation."⁶⁹ In 1995, the Oregon legislature declared that "the State Department of Agriculture shall develop and implement any program or rules that directly regulate farming practices... that are for the purpose of protecting water quality and that are applicable to areas of the state designated as exclusive farm use zones... or other agricultural lands in Oregon, including but not limited to rules related to... protection of the quality of surface or ground water..."⁷⁰

Collectively, these laws reveal the legislature's belief that ODA was capable of managing CAFO-related NPDES duties. However, in 2001, the legislature passed H.B. 2156, directing ODA and DEQ "to pursue [EPA] approval of the transfer of the permitting program implemented pursuant to [The Clean Water Act's NPDES program] as it relates to confined animal feeding operations, from the Department of Environmental Quality to

⁶⁸ O.R.S. § 568.900 – 568.933 (formerly S.B. 1010, 67th Ore. Legis. §263 (1993)).

⁶⁹ O.R.S. § 468B.217 (formerly S.B. 1008, 67th Ore. Legis. § 567 (1993)).

⁷⁰ O.R.S. § 561.191 (formerly S.B. 502, 68th Ore. Legis. § 690 (1995)).

the State Department of Agriculture” such that ODA can “assume all permitting and enforcement responsibilities for confined animal feeding operations.”⁷¹

Thus, the legislature acknowledged that ODA in fact had no authority to oversee the NPDES program. Further confusing things, however, the same legislation included a provision allowing ODA to control Oregon’s CAFO NPDES program while *awaiting* authority from EPA: “The State Department of Agriculture may perform or cause to be performed any acts necessary to be performed by the state to implement the provisions of the Federal Water Pollution Control Act... and any federal regulations or guidelines issued pursuant to the Act, relating to the control and prevention of water pollution from livestock and other animal-based agricultural operations.”⁷² These mandates are confusing at best; completely contradictory at worst. Even though the legislature granted state authority to ODA, the legislature also recognized the lack of federal authority, which is a prerequisite to management of the NPDES program.

The Oregon legislature is not the only body to have taken it upon itself to assign ODA broad and untenable authority. As noted above, EQC and DEQ have similarly assigned ODA a broad range of NPDES duties without proper authorization. However, these mandates, like their statutory counterparts, reveal a fundamental confusion regarding the extent of ODA’s authority. While the most recent MOU between ODA and EQC, dated December 2009, “authorizes ODA to perform the CAFO related functions of DEQ and the EQC,”⁷³ some provisions require it to consult with DEQ (such as “on significant determinations regarding the interpretation of the permit, related rules, and the Clean Water Act”)⁷⁴ or even to wait for full authority from EPA before beginning any substantive work. Hence, even assuming that ODA possessed some level of EPA authorization, these contradictions reveal an authority that is not being exercised in keeping with its mandates.

⁷¹ H.B. 2156, 71st Ore. Legis. §248 (2001).

⁷² O.R.S. § 468B.035.

⁷³ 2009 MOU between ODA and EQC, p. 1.

⁷⁴ 2009 MOU between ODA and EQC, p. 4.

The 2009 MOU incorporates by reference the language of Oregon's contradictory 2001 law in an attempt to provide authority for the attempted transfer of CAFO NPDES program duties to ODA.⁷⁵ However, the MOA later acknowledges that the very same law provides no such authority, stating that: "In 2001, the legislature again amended the CAFO statutes... the purpose of the amendments was to authorize and direct the transfer of the federally delegated NPDES permit program for CAFOs from DEQ to ODA *at such time as the transfer is approved by EPA*"⁷⁶ [emphasis added]. In addition, a list of ODA's "roles and responsibilities" found in the MOU begins: "*Prior to EPA approval of NPDES program delegation to ODA, ODA will...*"⁷⁷ [emphasis added]. One of the specific responsibilities listed in this same MOU is "develop and implement administrative rules that are appropriate for *the anticipated delegation of NPDES permitting authority* to ODA."⁷⁸ [emphasis added]. Further, in a letter dated October 27, 2010, Oregon acknowledges that the transfer of authority to ODA from EPA has not taken place. The only federal authorization thus far is from EPA to DEQ. There has been no federal authorization to ODA to administer the NPDES program.

This fundamental lack of clarity regarding ODA's powers and role is a problem even apart from that of ODA lacking EPA authorization. DEQ's own administrative rules only add to the confusion by assigning NPDES permitting authority solely to the "Director"⁷⁹ but defining "Director" as "the Director of the Department of Environmental Quality or the Director's authorized designee."⁸⁰ The rules for the Department of Agriculture appear at first glance to defer to DEQ's interpretation, stating that CAFO permits "will be issued under the applicable provisions of [the chapter pertaining to DEQ],"⁸¹ but then go on to define "Director" as either the director of DEQ *or* the director of ODA.⁸²

⁷⁵ 2009 MOU between ODA and EQC.

⁷⁶ 2009 MOU between ODA and EQC, p. 3.

⁷⁷ 2009 MOU between ODA and EQC, p. 3.

⁷⁸ 2009 MOU between ODA and EQC, p. 4.

⁷⁹ O.A.R. 340-045-0015.

⁸⁰ O.A.R. 340-045-0010(4).

⁸¹ O.A.R. 603-074-0012.

⁸² O.A.R. 603-074-0010(5).

Regardless of whether legislative or agency action actually granted ODA authority to manage the CAFO NPDES program, state action alone is legally insufficient because EPA is the source of authorization for enforcement of CWA programs. As discussed above, neither ODA, nor any other agency, applied for EPA approval and, as will be discussed in the following section, EPA did not grant approval for ODA's administration of the program. As such, ODA is not authorized to conduct the NPDES program.

iii. No Program Approval

As a separate problem, even if EPA wanted to, it has no discretion to allow ODA to administer the NPDES program without following CWA program authorization requirements.

To be a valid transfer of NPDES program authority, ODA's proposed program would have had to meet the same nine criteria required of DEQ for its initial application. These requirements include the ability to:

- (1) issue permits that are targeted, effective, adhered to, and can be terminated or modified for cause;
- (2) "inspect, monitor, enter, and require reports" of the facilities it oversees at least to the extent required by CWA;
- (3) "insure that the public... receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;"
- (4) "insure that the Administrator receives notice of each application;"
- (5) insure that any state affected by the permit may submit written recommendations regarding any permit application;
- (6) insure that no permit will be issued if anchorage and navigation of navigable waters would be substantially impaired;

- (7) “abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;”
- (8) insure, to the extent relevant, that any permit for discharge from any publicly owned pretreatment works includes certain conditions; and
- (9) insure, to the extent relevant, that any industrial user of any pretreatment works comply with CWA.⁸³

The CWA is clear that for a state to be granted authority to administer its own permit program a full and complete program description, adequate legal authority, and the above nine criteria need to be met.⁸⁴ ODA did not meet these requirements and thus, even if EPA knew of the attempted transfer to ODA by DEQ, EPA could not waive the legal requirements that are set out in CWA for approval to administer the NPDES program.

As discussed above, the Federal Rules explicitly require EPA approval whenever an approved state-run water program is transferred from the approved agency to another agency.⁸⁵ If more than one agency is issuing NPDES permits, each agency must submit a separate application before EPA will begin formal review.⁸⁶ There is no record that Oregon submitted a program revision request to EPA for the transfer of the NPDES program from DEQ to ODA. EPA only granted authorization to DEQ and without separate approval, ODA is not authorized to administer the program.

Not only does ODA lack approval from EPA to run the program, ODA also lacks authorization for a partial permit program. There is no evidence that Oregon or its agencies filed an amended program submission with EPA meeting CWA requirements to request a partial permit program. Such a permit program may take the form of either a “major category partial permit program” or a “major component partial permit

⁸³ 33 U.S.C. §§ 1342(b)(1) – (9).

⁸⁴ 33 U.S.C. § 1342(b).

⁸⁵ 40 C.F.R. § 123.62(c), formerly 48 F.R. 14146, (April 1, 1983).

⁸⁶ 40 C.F.R. § 123.1(g)(1).

program.”⁸⁷ The former may only be approved if it “represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the State” and if, in addition, the Administrator determines that it “represents a significant and identifiable part of the State program required by” CWA’s provisions for state permit programs.⁸⁸

Alternatively, a major component partial permit program is a partial and *phased* program “covering administration of a major component (including discharge categories) of a State permit program.” It also may only be approved if the Administrator determines that it “represents a significant and identifiable part of the State program.” Additionally, approval requires the state to submit, and the Administrator to approve, a plan for the state to assume administration of the remainder of the program by phases falling into required parameters.⁸⁹ There is no evidence from the results of the FOIA request that Oregon proposed either partial permit program to EPA.

Even if Oregon had submitted either partial permit proposal, EPA’s Administrator would have been obliged to engage in a substantive review of each agency’s capacity to oversee “at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program...”⁹⁰ If Oregon proposed a “major category” partial permit program, the Administrator also would have needed to find evidence of ODA’s program constituting “a complete permit program” covering “all of the discharges under the jurisdiction of a department or agency of the State” and representing “a significant and identifiable part of the State program” required by CWA.⁹¹ Alternatively, if Oregon proposed a “major component” partial permit program, the Administrator would have needed to be convinced that ODA’s phased program covered the “administration of a major component (including discharge categories) of a State permit program” as well as

⁸⁷ 33 U.S.C. § 1342(n)(2).

⁸⁸ 33 U.S.C. § 1342(n)(3).

⁸⁹ 33 U.S.C. § 1342(n)(4).

⁹⁰ 33 U.S.C. § 1342(n)(2).

⁹¹ 33 U.S.C. § 1342(n)(3).

represented “a significant and identifiable part of the State program.”⁹² There is no evidence of any program application from ODA,⁹³ and there is no analysis of ODA’s capacity to administer either partial permit program. Thus, it follows that there can be no EPA approval of such.

ODA’s lack of authority to carry out the program is further evidenced by EPA’s repeated outright requests for ODA to submit formal program revisions as per 40 C.F.R. § 123.62. In 2001, EPA stated “a long-term resolution” of ODA’s lack of authority is that “Oregon *will* initiate NPDES program revision procedures to obtain *formal approval for a transfer of NPDES authorities over CAFOs from DEQ to ODA.*” [emphasis added].⁹⁴ In 2003, EPA again refers to ODA’s need to submit “a *formal NPDES program revision* that acknowledges the transfer of the CAFO portion of Oregon’s NPDES program from DEQ to ODA.”⁹⁵ [emphasis added]. Even though the revision relates only to the CAFO portion of the permit, “...the *procedures in which the [ODA] will need to follow are the same as if the state agency was applying for authorization to implement a comprehensive NPDES program.*” [emphasis added]. In 2005, EPA reiterates that ODA has yet to submit its NPDES program modifications and that ODA is not directly authorized to administer CWA CAFO program until the revision is submitted, reviewed and approved.⁹⁶

The state of Oregon and ODA acknowledge ODA’s absence of authority as well. In April 2002, ODA recognized that it had “not yet submitted a modified program description and Attorney General’s Statement.”⁹⁷ As recently as October 2010, the Oregon Department of Justice (DOJ) acknowledged that while the Oregon legislature has authorized “DEQ and ODA to seek EPA’s approval to allow ODA alone to operate the state’s NPDES program as it applies to [CAFOs, t]hat transfer has not taken

⁹² 33 U.S.C. § 1342(n)(4).

⁹³ O.R.S. § 468B.035; O.R.S. § 468B.050(1),(2); O.R.S. 468B.217(2)(a); 2009 MOU.

⁹⁴ Attachment 2 – EPA letter to ODA, June 13, 2001.

⁹⁵ Attachment 3 – EPA letter to ODA and DEQ, October 30, 2003.

⁹⁶ *US EPA Permitting for Environmental Results NPDES Profile: Oregon and Indian Country*, http://www.epa.gov/npdes/pubs/oregon_final_profile.pdf, Last updated September 27, 2005, Last accessed April 5, 2011.

⁹⁷ Attachment 4 – ODA letter to EPA, April 17, 2002.

place.”⁹⁸ This is problematic as previously explained because: (1) action by a state legislature alone is legally insufficient to authorize an agency to administer the program; (2) CWA’s allowance of conditional program sharing mandates each agency submit a formal application;⁹⁹ and (3) federal regulations require states to seek EPA approval whenever they propose to transfer all or part of any program from the approved State agency to any other State agency.¹⁰⁰

To support its contention that it received EPA approval, ODA might refer to its September 2003 MOA with EPA, signed by L. John Iani, Regional Administrator of EPA Region 10 and Katy Coba, Director of ODA, in which EPA recognized ODA as the “primary agency” for CAFO NPDES activities.¹⁰¹ Some of ODA responsibilities included enforcing and promulgating rules to regulate CAFOs, conducting inspections, submitting annual reports, and reviewing and approving Animal Waste Management Plans (AWMPs). However, despite EPA’s acknowledgment of ODA’s role, the MOA also directed ODA “to pursue EPA approval of the transfer of the primary administration of the CAFO program from ... DEQ to ODA...”¹⁰² As discussed above, EPA’s acknowledgement of ODA’s role in the NPDES program does not constitute proper approval as neither CWA requirements nor federal regulations can be waived. Moreover, the agreement may have expired, as term of the agreement was five years and there was no indication in the records reviewed that this term was extended.

What is more, EPA subsequently asked DEQ in two separate letters (December 2009 and May 2010) to provide a revised program description¹⁰³ and to clarify its relationship with ODA, addressing the current division of labor between it and ODA.¹⁰⁴ Thus, it is clear that despite an affirmative duty and repeated EPA requests, Oregon has not submitted the application for approval of shared authority between DEQ and ODA or for sole ODA responsibility.

⁹⁸ Oregon DOJ report to US EPA on the status of Oregon’s NPDES Permit Program, October 27, 2010.

⁹⁹ 40 C.F.R. § 123.1(g)(1).

¹⁰⁰ 40 C.F.R. § 123.62(c).

¹⁰¹ 2003 MOA between ODA and EPA.

¹⁰² 2003 MOA between ODA and EPA, p. 1.

¹⁰³ Attachment 5 –EPA letter to DEQ, December 15, 2009.

¹⁰⁴ Attachment 6 – EPA letter to DEQ, May 25, 2010.

Both EPA and ODA have acknowledged ODA's lack of federal authority to manage the NPDES program. In the most recent MOA in April 2010 between DEQ and EPA, DEQ is again required to "ensure that any proposed revision of the NPDES program is submitted to EPA for approval."¹⁰⁵ Notably, and despite the documents mentioned above, according to the agreement *all* responsibility for the NPDES program is carried out by DEQ; ODA is not mentioned anywhere in the agreement. All evidence points to the lack of federal authority for ODA to manage the NPDES program. Yet it continues to attempt to manage this program, even in the face of acknowledgements by the state legislature, EPA, DEQ and state Department of Justice that it lacks such legal authorization.

B. LACK OF CAPACITY AND RESOURCES

ODA wants to assume CAFO NPDES duties, but it has proven itself unable to perform them. Specifically, ODA lacks requisite programs, knowledge, and resources to meet minimum NPDES requirements.

1. Lack of Enforcement Authority

As discussed above, CWA requires all state NPDES programs to have full legal authority to implement various programs. These include an effective permitting program;¹⁰⁶ opportunities for public participation;¹⁰⁷ an inspection and monitoring component;¹⁰⁸ and a robust enforcement program.¹⁰⁹

However, while ODA has been granted broad power within the state, it lacks the necessary authority to carry out the programs listed above. The CWA requires that all NPDES programs have adequate authority "to abate violations of the permit or the

¹⁰⁵ April 2010 MOA between DEQ and EPA, § 3.01(3).

¹⁰⁶ 33 U.S.C. § 1342(b)(1).

¹⁰⁷ 33 U.S.C. § 1342(b)(3).

¹⁰⁸ 33 U.S.C. § 1342(b)(2).

¹⁰⁹ 33 U.S.C. § 1342(b)(7).

permit program, including civil and criminal penalties and other ways and means of enforcement.”¹¹⁰ While DEQ possessed criminal penalty authority at the time of Oregon’s application,¹¹¹ neither DEQ nor ODA currently has such authority. This is a direct violation of CWA’s requirements. No criminal provisions are found in any of ODA’s state mandates. There is only a general provision appearing to be unattached to any particular enumerated crime: *“Justice courts have concurrent jurisdiction with circuit courts of all prosecutions arising under any law under the jurisdiction of the State Department of Agriculture.”*¹¹²

ODA may likely argue that it has been granted all criminal enforcement powers found in CWA itself, as the Oregon legislature has granted it power to enforce all aspects of CWA’s NPDES program as it pertains to CAFOs.¹¹³ However, this may be a moot point based on two reasons discussed previously. First, there is no evidence ODA received authority from EPA for the NPDES program. Hence, despite its alleged authorization by way of state legislation, it would in fact have no EPA-granted authority to administer the program. Second, CWA requires a state to have state law-granted enforcement authority as a *prerequisite* for authorization to oversee an NPDES program.¹¹⁴ It is also possible that ODA believes its criminal powers originate from various "environmental crimes" provisions found in the state Code, which do in fact include water pollution, and specifically, the crimes of unlawful water pollution in the first and second degrees. However, these provisions are part of the Code's public health & safety provisions and not specifically assigned to ODA. In fact, their ordering in the Code suggests that they fall under the jurisdiction of DEQ, although this is not explicitly stated. It is possible that the Oregon legislature intended to convey this power with broad legislative language, but ODA has not used this power. Instead ODA seems to

¹¹⁰ 33 U.S.C. § 1342(7).

¹¹¹ O.R.S. § 449.90(3) (“Violation of ... subsection (1) of O.R.S. 449.083 [the waste discharge permit requirements] is punishable, upon conviction, by a fine of not more than \$1,000 or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment.”).

¹¹² O.R.S. § 561.290.

¹¹³ O.R.S. § 468B.035.

¹¹⁴ 33 U.S.C. § 402(7) (“The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist: To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.”).

rely on the state DOJ or the county District Attorneys offices to prosecute criminal offenders. ODA appears to have no internal criminal sanction authority. If ODA has such authority, there is no evidence that it has used it, which may lead to the same conclusion.

ODA's civil enforcement power is similarly questionable. Beyond the flawed potential argument explored above that ODA's powers flow from CWA itself, ODA's civil powers appear restricted to injunctions¹¹⁵ and "civil penalties" i.e. fines.¹¹⁶ Of these, only injunctions are accompanied by an explicit right to go to court.¹¹⁷ Beyond this, the precise scope of ODA's powers is unclear. In part, the confusion stems from the fact that CWA employs the term "civil penalty" without defining it and, in turn, the state mandates on which ODA relies repeat this phrase, also without providing any definition. Case law provides no further clarification. However, based on the context in which the phrase is used in the Code, "civil penalty" appears to refer to a fine. There is no language explicitly allowing ODA to go to court to collect fines, or to sue for a violation of the NPDES permit program, however there is no language explicitly barring it from doing so either.

The only provisions somewhat on point come from the state Code's statutes on environmental quality. However, these provisions raise two concerns. First, they do not fall under ODA-specific provisions, but rather seem to require DEQ enforcement. Second, while the first provision appears to support civil enforcement authority, the latter (although admittedly encompassing a more narrow scope, as it deals only with "additional civil penalties") seems to stand for the alternative. Together, they present a confusing picture. The first provision appears in a statute on general civil penalties, and appears to indicate that the ODA may access courts: *"Where any provision of ... ORS chapters 468, 468A and 468B provides that each day of violation of ... a section of ORS*

¹¹⁵ O.R.S. § 561.280.

¹¹⁶ O.R.S. § 568.933; O.R.S. § 468B.230(1).

¹¹⁷ O.R.S. § 561.280 ("In addition to the other remedies provided by law, the State Department of Agriculture may apply to the circuit court for, and such court shall have jurisdiction upon a summary hearing and for cause shown to grant, a temporary or permanent injunction restraining any person from violating any provision of a law under the jurisdiction of the department.").

chapters 468, 468A and 468B constitutes a separate offense, violations of that section that occur within the same court jurisdiction may be joined in one indictment, or complaint, or information, in several counts."¹¹⁸ However, the second provision,¹¹⁹ found in laws concerning environmental quality enforcement proceedings -- specifically "additional civil penalties," refers to the Administrative Procedures Act, which provides only that an agency seeking to collect a civil penalty may file with the county clerk -- it says nothing about going to court¹²⁰ and in fact makes clear that the provision creates no new authority in an agency to impose civil penalties.¹²¹ However, just as this provision cannot create new authority, neither can an agency's independently-existing civil authority be removed.¹²²

It is important to note that the state places express limits on all penalties (i.e. fines) issued by ODA both for lands within agricultural or rural areas subject to water quality management plans, and for subsequent penalties against CAFOs.¹²³ Penalties issued by ODA against CAFOs are also reduced by any civil penalty imposed by EQC, DEQ, or U.S. EPA provided the penalties are against the same person and for the same violation.¹²⁴ Similarly, ODA-issued penalties against landowners who violate water quality management plans are also reduced by the amount of any civil penalty imposed by EQC or DEQ against the same person for the same violation.¹²⁵ In contrast, full EPA enforcement powers are much broader with the power to bring civil, criminal or administrative actions.

¹¹⁸ O.R.S. § 468.997.

¹¹⁹ O.R.S. § 468.140.

¹²⁰ O.R.S. § 183.745(6) ("When an order assessing a civil penalty under this section becomes final by operation of law or on appeal, and the amount of penalty is not paid within 10 days after the order becomes final, the order may be recorded with the county clerk in any county of this state. The clerk shall thereupon record the name of the person incurring the penalty and the amount of the penalty in the County Clerk Lien Record.").

¹²¹ O.R.S. § 183.745(8) ("This section creates no new authority in any agency to impose civil penalties.").

¹²² O.R.S. § 183.745(9) ("This section does not affect: (a) Any right under any other law that an agency may have to bring an action in a court of this state to recover a civil penalty; or (b) The ability of an agency to collect a properly imposed civil penalty under the provisions of O.R.S. 305.830.").

¹²³ O.R.S. § 568.933(3); O.R.S. § 468B.230(3).

¹²⁴ O.R.S. § 568.933(8).

¹²⁵ O.R.S. § 468B.230(7).

Upon finding a violation of a NPDES permit, EPA has the option to issue an order to comply, bring a civil action directly or notify the state in which the violation occurred and let the state enforce the permit.¹²⁶ Additionally, unlike the limits imposed on ODA, there are no express limits on fines sought by EPA in civil cases against permit violators.¹²⁷ In administrative actions, there are specific classes of penalties available to EPA, with a maximum penalty of \$125,000.¹²⁸ In comparison, ODA's enforcement authority is below that of the EPA because ODA lacks criminal enforcement power and its ability to issue fines is significantly curtailed.

Finally, even if ODA were to possess adequate enforcement authority, it would be unqualified to wield such power, as it appears confused by its civil and administrative enforcement powers. At the very least, ODA representatives do not seem to have a common understanding about their enforcement authority. When asked in a recent meeting whether ODA possesses any civil enforcement powers whatsoever, an ODA representative stated that she was unsure, but that in any event, ODA would have no interest in pursuing civil action. However, upon being given the example of an administrative agency crossing into the civil realm following the appeal of an administrative case, the representative stated that ODA in fact has such power. In response to a second example – that of seeking an injunction – the representative stated that ODA possesses this power as well.¹²⁹ Such confusion reveals an additional problem beyond ODA simply possessing limited enforcement powers. Again, despite any confusion, there is no history of strong civil enforcement by ODA.

2. Lack of Programs

i. Lack of Public Participation

Although it lacks the necessary authority, ODA has maintained that it in fact has the authority and duty to implement the NPDES program in Oregon. Despite that, ODA

¹²⁶ 33 U.S.C. § 1319(a)(3).

¹²⁷ 33 U.S.C. § 1319(b).

¹²⁸ 33 U.S.C. § 1319(g)(2)(B).

¹²⁹ Lisa Hanson, ODA Deputy Director, October 12, 2010 meeting with ODA.

has simply failed to implement various facets of the NPDES scheme as required by law. The first requirement is public participation. The CWA requires each NPDES-administering program to have authority to “insure that the public... receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application.”¹³⁰ Though ODA may generally provide notice and hearing opportunities on the renewal of the general permit, ODA’s regulations have no public participation requirement and merely state that the agency will investigate public complaints.¹³¹

The most recent CAFO general permit ODA jointly issued with DEQ states “Prior to approving new permit coverage, renewing permit coverage, or approving proposed substantial changes to an [Animal Waste Management Plan] AWMP, ODA will provide public notice and participation,”¹³² consisting of public notice, a comment period, an opportunity for a public hearing, and written responses to relevant comments. The permit limits public hearings to situations in which written requests are received from at least 10 people, or from an organization(s) representing 10 or more people. DEQ’s regulations also require public notice and participation in all new permit actions, as CWA requires.^{133 134}

However, it is cause for concern that while according to various mandates, ODA has been put in charge of the CAFO NPDES permit program, the only public participation provisions outside of permit provisions are provided by DEQ. Hence, it is not clear that ODA’s regulations meet the CWA standard. ODA’s regulations state that “permits for Confined Animal Feeding Operations will be issued under the applicable provisions of OAR chapter 340, division 45,” presumably meaning that DEQ’s more detailed provisions will be implemented.¹³⁵ However, DEQ’s permitting rules are to be

¹³⁰ 33 U.S.C. § 1342(b)(3).

¹³¹ O.A.R. 603-074-0016(1) (“Complaint” means information provided by a person concerning possible violations of O.R.S. Chapter 468 or 468B or any rule, order, or permit adopted thereunder).

¹³² Oregon CAFO NPDES General Permit 01-2009.

¹³³ O.A.R. 340-045-0027.

¹³⁴ Although DEQ regulations require public notice and participation, there is no link on its website to the general permit.

¹³⁵ O.A.R. 603-074-0012(1).

implemented by the “Director,”¹³⁶ which it defines as “the Director of the Department of Environmental Quality or the Director’s authorized designee.”¹³⁷ This would seem to limit ODA’s ability to be involved in the permitting process. For its part, however, ODA defines “Director” as either the director of DEQ or the director of ODA.¹³⁸

DEQ’s rules require the Department, presumably meaning DEQ, to provide public notice and an opportunity for comment for set period of time before issuing new or renewal general and individual permits.¹³⁹ These rules are promulgated by DEQ and make no mention of ODA, so it is not clear whether ODA regulations satisfy CWA public participation requirements. Additionally, while DEQ and ODA did have public meetings and comments prior to adoption of the last new general permit,¹⁴⁰ the public participation for the general permit is less meaningful because it does not address public concerns for specific individual uses of the general permit.

Another troubling aspect of the lack of public participation is Oregon’s representational standing rules to challenge state-issued NPDES permits may not meet the minimum federal requirements for program approval. CWA mandates that a federally approved state-administered NPDES program provide opportunities for public participation.¹⁴¹ EPA regulations explicitly require all states seeking to administer a federally approved NPDES program to “provide an opportunity for judicial review in state court for the final approval or denial of permits that is sufficient to provide for, encourage, and assist public participation in the permitting process.”¹⁴²

¹³⁶ O.A.R. 340-045-0015.

¹³⁷ O.A.R. 340-045-0010(4).

¹³⁸ O.A.R. 603-074-0010(5).

¹³⁹ O.A.R. 340-045-0027(1)(c)-(d) and (2)(c)-(d); O.A.R. 340-045-0033(5); O.A.R. 340-045-0035(3), (6), and (7).

¹⁴⁰ EPA commented on and approved the General Permit on June 10, 2009.

http://www.oregon.gov/ODA/NRD/docs/pdf/2009cafoeval_fs.pdf?ga=t Last accessed September 15, 2011.

¹⁴¹ 33 U.S.C. § 1342(b)(3); and 33 U.S.C. 1251(e): Congressional declaration of goals and policy: “*Public participation* in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under [the CWA] *shall be provided for, encouraged, and assisted by* the Administrator and the States.”¹⁴¹ (emphasis added).

¹⁴² 40 C.F.R. §123.30; Amendment to Requirements for Authorized State Permit Programs Under Section 402 of the Clean Water Act, 61 F.R. 20972 (May 8, 1996).

Public participation in the NPDES permitting process is closely tied to the opportunity for permit challengers to seek judicial review, as will be explained below. EPA "... believes broad standing to challenge permits in court [is] essential to meaningful public participation in NPDES programs."¹⁴³ A citizen's ability to participate in permitting decisions, such as public comments and public hearings on proposed permits, may be seriously compromised without the opportunity to challenge agency decisions in court and directly contradicts CWA mandate that a proper NPDES program provide for, encourage, and assist public participation in the permitting process. For example, a state agency may not adequately consider comments from a public that it is not judicially accountable to. Further, limited access to judicial review could have a chilling effect on public participation, as citizens may view such participation as fruitless. Also, inadequate public participation may increase the likelihood that the state-issued permits are inadequate to protect the environment.¹⁴⁴

Oregon's NPDES permitting program may fall below the federally required standard for public participation and judicial review. In 1998, EPA published a Notice of Deficiency, which found Oregon's requirements for judicial standing to challenge state-issued permits under the Title V Clean Air Act (Title V or CAA)¹⁴⁵ below the minimum federal requirements for program approval.¹⁴⁶ Federal regulations require states to provide an opportunity for judicial review in state court of the final approval or denial of permits "that is sufficient to provide for, encourage, and assist public participation in the permitting process."¹⁴⁷

¹⁴³ Amendment to Requirements for Authorized State Permit Programs Under Section 402 of the Clean Water Act. 61 F.R. 20976 (May 8, 1996). The U.S. Court of Appeals for the Fourth Circuit has also recognized that "broad availability of judicial review is necessary to ensure that the required public comment carries its proper purpose. The comment of an ordinary citizen carries more weight if officials know that the citizen has the power to seek judicial review of any administrative decision harming him." *Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996) (upholding EPA's denial of Virginia's proposed Title V CAA permitting program).

¹⁴⁴ Proposed Rule 60 F.R. 14588 and Final Rule 61 F.R. 20972.

¹⁴⁵ 42 U.S.C. § 7661 - 7661f.

¹⁴⁶ Notice of Deficiency for Clean Air Act Operating Permits in Oregon. 63 F.R. 65783 (November 30, 1998).

¹⁴⁷ 40 C.F.R. § 123.30. The regulation also provides in part: "A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit (see § 509 of the Clean Water Act). A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permittee can obtain judicial review, if persons must demonstrate injury to a pecuniary interest in order to obtain judicial

In its Notice of Deficiency, EPA concluded that a 1996 Oregon Supreme Court decision, *Air Contaminant Discharge Permit Application of Willamette Industries, Inc. Local No. 290 v. Ore. Dep't of Env'tl. Quality*, 919 P. 2d 1168 (1996) (*Local 290*), should be interpreted to mean that representational standing is not allowed under Oregon Administrative Procedures Act (APA). In *Local 290*, the union brought challenges under the State APA against air and water discharge permits issued by DEQ. The Oregon Supreme Court found that based on the statutory construction of the APA,¹⁴⁸ the union did not have standing to challenge DEQ's actions and that an organization has standing to bring a lawsuit on behalf of its members only if the organization itself is adversely affected or aggrieved. EPA concluded that *Local 290*'s restriction on representational standing to persons "adversely affected or aggrieved," limited judicial review of Title V permits thus rendering Oregon's Title V permitting program deficient.

Oregon's NPDES program may be similarly deficient in light of *Local 290*'s representational standing limits. While EPA interpreted the limits on representational standing in *Local 290* as to Oregon's Title V program, *Local 290* applies to limit judicial review of NPDES permits as well. First, the union in the case brought challenges to both NPDES and Title V permits. The Court's holding that the State APA provided standing to those "adversely affected or aggrieved," not to those filing actions as representatives, was not circumscribed to judicial review of Title V permits. Second, EPA specifically pointed out in its Notice of Deficiency that Oregon's representational standing limits may pose a problem for continued EPA approval of Oregon's NPDES program¹⁴⁹ as well as CAA permits. The EPA Notice also stated that restoring representational standing to challenge NPDES permits would obviate the need for further inquiry into whether *Local*

review, or if persons must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review.)"

¹⁴⁸ O.R.S. § 183.484(3) states: "The petition shall state the nature of the petitioner's interest, the facts showing how the petitioner is adversely affected or aggrieved by the agency order and the ground or grounds upon which the petitioner contends the order should be reversed or remanded. The review shall proceed and be conducted by the court without a jury."

¹⁴⁹ Notice of Deficiency for Clean Air Act Operating Permits in Oregon. 63 F.R. 65783, 65784. (November 30, 1998).

290 poses a problem for continued EPA approval of Oregon's NPDES program.¹⁵⁰ However, challengers seeking judicial review of NPDES permits may still lack representational standing because Oregon's statutory revision extending standing to organizations seemingly only applies to Title V permits. The statute provides "organizational standing to seek judicial review of final orders in Title V permit proceedings;" NPDES permit proceedings are not mentioned.¹⁵¹ Thus, Oregon's representational standing rules may still fall short of the minimum requirements of a federally approved NPDES program.

EPA also requires opportunities for public participation in the "state enforcement process." This may be accomplished by either allowing intervention as of right in all civil and administrative actions, or else by providing assurance that either the agency or the appropriate enforcement authority will investigate all citizen complaints and respond to them, as well as not oppose permissive intervention, and, finally, publish notice of any proposed settlement and receive comments thereto.¹⁵² The state's mandate to ODA on enforcement makes no mention of this.¹⁵³ Similarly, ODA's CAFO regulations on enforcement make no mention of a private right of action or notice and comments on settlements, allowing only for Notices of Noncompliance (NONs), plans of correction

¹⁵⁰ 63 F.R. 65784.

¹⁵¹ Clean Air Act Approval of Revisions to Operating Permits Program in Oregon, 67 F.R. 39630 (June 10, 2002). O.R.S. § 468.067 provides: (1) Notwithstanding ORS 183.480 and 183.484, an association or organization has standing to seek judicial review of any final order, as defined in ORS 183.310, of the [DEQ] or of the [EQC] that relates to a proceeding described in subsection (2) of this section if:

(a) One or more members of the association or organization is adversely affected or aggrieved by the order;
(b) The interests that the association or organization seeks to protect are germane to the purpose of the association or organization; and
(c) The nature of the claim and the relief requested do not require that the members of the association or organization who are adversely affected or aggrieved by the order participate in the judicial review proceedings.
(2) Subsection (1) of this section applies to a permit proceeding pursuant to Title V of the Clean Air Act, 42 U.S.C. 7661 to 7661f, as implemented under ORS chapter 468A.

An association has standing to bring suit on behalf of its members when (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members. Citing *Warth v. Seldin*, 422 U.S. 490. Pp. 342-343. *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 341-345 (1977).

¹⁵² 40 C.F.R. § 123.27(d).

¹⁵³ O.R.S. § 468B.230.

(POC), and Notices of Civil Penalty Assessment.¹⁵⁴ With regard to civil penalties, ODA states only that “in addition to any other penalty provided by law, the *department* may assess a civil penalty against the owner or operator...”¹⁵⁵ [emphasis added]. For its part, DEQ makes no mention in its rules of a private right of action. Neither agency’s rules state that it will investigate all citizen complaints and respond to them, nor that it will allow for permissive intervention, nor publish notice of any proposed settlement. Moreover, the general CAFO permit makes no mention of any such provisions. Hence, the state program appears to fall short of federal requirements regardless of whether the state wishes authority to be vested in DEQ, ODA or both.

ii. Lack of Investigation of Complaints

The authorized agency is charged by EPA with encouraging the public to report NPDES violations – another requirement designed to encourage public participation in the NPDES program.¹⁵⁶ However, the state mandate to ODA on complaints and investigations is silent on this point, and neither agency’s regulations make mention of it.¹⁵⁷

In practice, ODA does not have a good record of investigating all complaints or encouraging the public to report violations. ODA’s records show numerous formally filed complaints with no documented follow-up.¹⁵⁸ For example, a complaint about Robert

¹⁵⁴ O.A.R. 603-074-0040.

¹⁵⁵ O.A.R. 603-074-0070.

¹⁵⁶ 40 C.F.R. § 123.26(b)(4) (“Public effort in reporting violations shall be encouraged, and the State Director shall make available information on reporting procedures.”).

¹⁵⁷ O.R.S. § 468B.225.

¹⁵⁸ Some examples (From ODA Files) –

Volbeda Dairy - A complaint was filed on August 4, 2009 for a lagoon breach and for solids pushing toward a creek.
July 11, 2008 – Complaint that dairy was pumping manure directly into creek and into storm drain flowing into creek.

Wendell Sparling – Complaint in May 2008 of a broken pipe leaving irrigation water to flow directly into creek.

Triple T Calf Barn – Complaint in May 2008 of manure piled outside, dead calves in the river, and possibly no permit.

Double LL Stables – Complaint in 2008 of a manure pile left out in rain continuously.

Pacific Natural Foods – Complaint in December 2008 of spilling manure onto road and of dumping urine on wetlands next to ditch that drained into the Willamette.

T. Taylor Farm – Complaint in April 2009 that farm was possibly operating beef and pig CAFO. May 2009 – Complaint was assigned to “Chris.” No follow-up noted.

and Debra Churnside Farm regarding potential run-off, mud, manure, and lack of vegetation has a note a month later (presumably from an internal ODA source) asking whether an inspection was ever done and noting that a case number was never assigned. No update is written in the file.¹⁵⁹ Another complaint filed against GDD Farm included the inspector's written note that Wym (Matthews, CAFO manager at ODA,) would be consulted, yet there was no documentation of the consultation or response by Wym or anyone else at ODA.¹⁶⁰

In discussing lack of follow-up with ODA, their response was that not all enforcement activity is reflected in the files. However, while this may be true, it leaves an unclear picture, at best, of enforcement. The records also fail to reflect what actions are taken if or when violations are found, or if the violators are brought into compliance.

Complaints against certain farms are repeatedly submitted.¹⁶¹ At times, ODA issues these farms Notices of Noncompliance (NONs) and Water Quality Advisories (WQA)¹⁶² with no explanation of the result. In one instance, ODA received a complaint in May 2008 that Jack & Kim Snell Farm had an overflowing manure tank. ODA responded to this initial complaint by issuing an NON. ODA received the same complaint seven months later (December 22, 2008). However, there is no subsequent action documented.¹⁶³ In another situation, a complainant reported Hiday Poultry Farms in October 2008 for piling manure behind chicken houses. At the time ODA found a violation. A different complainant reported the same problem seven months later (May

¹⁵⁹ Robert and Debra Churnside Farm - March 7, 2008; March 26, 2008 note on the form.

¹⁶⁰ GDD Farm - February 2009.

¹⁶¹ Hoodview Dairy – Complaint on July 21, 2008 that the big gun was spraying within 40 feet of a neighbor's blueberry farm. No follow-up recorded besides a note on complaint form saying Wym was contacted and that he will call the complainant. February 26, 2009 – Complaint that surface water samples exceed limits. Note on complaint form says

Tessa will conduct unannounced visit and sample the waters. No follow-up listed.

Lee Valley Dairy – Complaint on September 17, 2009 of application area running into creek tributary. September 21, 2009 – same complaint again. No specific follow-up listed. October 14, 2009 – NON issued for too many animals, violating discharge limits, and for curbs allowing flush water to escape.

¹⁶² Hazenberg Dairy – Complaint on November 9, 2009 of direct pollution via an underground ditch to a lake that went into the Willamette, and for using a big gun for application. No follow-up recorded. December 23, 2009 - NON was issued for lack of depth marker. July 2008 – Complaint of filling in a floodplain and manure in the ditches. No follow-up recorded.

¹⁶³ Jack & Kim Snell – Complaint on December 22, 2008 of an overflowing manure tank. No follow-up recorded. May 2008 - Same complaint again. A NON was issued.

29, 2009). But after the second complaint, again, no follow-up was recorded. Notably, ODA recently issued this farm a WQA for the same issue on February 10, 2010.¹⁶⁴

ODA acknowledges difficulties due to the limited number of inspectors available to cover all CAFOs and the broad number of facilities regulated under the general permit. Given this resource shortage, complaints serve to bring potential violators to ODA's attention.¹⁶⁵ Unfortunately many complainants report that ODA is unresponsive and dismissive of their concerns.¹⁶⁶ It is not uncommon then, for complainants to give up reporting discharges despite witnessing continuous problems.¹⁶⁷

To the extent that ODA does respond to complaints, its records show many instances of investigations with no follow-up or cursory notations with no explanation.¹⁶⁸ In some instances ODA suggests that complainants contact other resources¹⁶⁹ or that someone else is handling the problem.¹⁷⁰ Some complainants have indeed resorted to calling the state police or city or county commissions to address the problems,¹⁷¹ despite ODA's claims that it is responsible for NPDES issues relating to CAFOs.¹⁷²

¹⁶⁴ Hiday Poultry Farms – Violation found on October 2008 for manure piled behind chicken houses. May 29, 2009 - Same complaint from someone else. February 10, 2010 - WQA issued for same issue.

¹⁶⁵ July 14, 2010 meeting with ODA.

¹⁶⁶ Interviews with Complainants #1; #3; #4; #9; #10; #11; #16.

¹⁶⁷ Interview with Complainant #11

¹⁶⁸ Maria Harkey – Complaint in February 2008 for mud, manure, noise. Form has “follow-up 2/7/08” written on it with no explanation of the result.

Noris Dairy –Complaint on January 11, 2010 for plate cooler water discharging into field. Form has “follow-up 2/7/08” written on it with no explanation of the result. March 24, 2009 – Complaint of water escaping from barn, flooding field. Note on complaint form two days later suggests complainant contact someone else.

Kelley's Pig Farm – Complaint in March 2009 of pigs in swale and contaminated runoff. April 9, 2009 - investigation but no follow-up recorded.

¹⁶⁹ Noris Dairy - March 24, 2009 complaint; interview with Complainant #9.

¹⁷⁰ Ocean Trails Riding Stables - Internal email sent by Wym Matthews to Carol Devore on July 17, 2009 – Department of AGWC was responding; July 7 and July 12, 2009 (by two different complainants); and Interview with Complainant #16.

¹⁷¹ Interviews with Complainants #11 and #16.

¹⁷² O.R.S. § 468B.217.

iii. Lack of Inspections and Monitoring

In addition to failing to carry out public participation requirements and failing to record complaint follow-up, ODA also fails to implement various inspection and monitoring requirements. The CWA requires that any NPDES program have adequate authority “to inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of [the Clean Water Act, which is titled “Inspections, Monitoring and Entry provisions].”¹⁷³ ODA appears to have been granted this authority by the state.¹⁷⁴ However, CWA’s specific monitoring provisions require permitted CAFOs to use such monitoring equipment and sample such effluents as the Administrator may reasonably ask of them. It also requires them to establish and maintain all records, and make all reports, as the Administrator reasonably asks of them. Beyond records and reports, they must provide any other information the Administrator may reasonably require.¹⁷⁵

EPA largely defers to each particular permit regarding the monitoring that must be done, and the information that must be kept.¹⁷⁶ However, it stipulates that each permit must require recordkeeping sufficient to attest to the implementation of the following things: the weekly depth of all manure and process wastewater in any liquid impoundments,¹⁷⁷ each farm’s nutrient management plan,¹⁷⁸ the storage design for manure, litter and process wastewater, including calculations documenting its adequacy,¹⁷⁹ actions taken to correct any deficiencies,¹⁸⁰ proper management of mortalities¹⁸¹ (permit states that each Animal Waste Management Plan (AWMP) should to the extent possible include procedures for this), appropriate diversion of clean water from production areas,¹⁸² detailed records of any overflow incidents,¹⁸³ no direct contact

¹⁷³ 33 U.S.C. § 1342(b)(2)(B).

¹⁷⁴ O.R.S. §§ 561.275; 561.265; 561.200.

¹⁷⁵ 33 U.S.C. § 1318(a)(1)(A).

¹⁷⁶ 40 C.F.R. § 122.41; 40 C.F.R. § 122.42(e)(1)(ix).

¹⁷⁷ 40 C.F.R. § 412.37(b)(2).

¹⁷⁸ 40 C.F.R. § 412.37(c); 40 C.F.R. § 122.42(e)(1).

¹⁷⁹ 40 C.F.R. § 412.37(b)(5); 40 C.F.R. § 122.42(e)(1)(i).

¹⁸⁰ 40 C.F.R. § 412.37(b)(3).

¹⁸¹ 40 C.F.R. § 412.37(b)(4); 40 C.F.R. § 122.42(e)(1)(ii).

¹⁸² 40 C.F.R. §§ 122.42(e)(1)(iii), (ix).

of animals with U.S. waters (but permit states that each AWMP should to the extent possible include procedures for this),¹⁸⁴ proper disposal of all contaminants,¹⁸⁵ planned conservation practices (permit states that each AWMP should to the extent possible include procedures for this),¹⁸⁶ protocols for properly testing manure, litter, process wastewater and soil,¹⁸⁷ and protocols for land application in accordance with the given nutrient management plan.¹⁸⁸

Under the federal definition, facilities that are CAFOs (*concentrated* animal feeding operations¹⁸⁹) must adhere to these provisions. In contrast, Oregon applies the broader state definition of CAFOs as *confined* animal feeding operations,¹⁹⁰ which encompasses a greater number of facilities. A state is free to set NPDES permit requirements that are more stringent than the federal standard.¹⁹¹ Thus, more facilities are required to get NPDES permits in Oregon and once the permit applies, the CAFO is required to meet all of the permit protocols.

However, in the general permit they jointly issue, ODA and DEQ fail to stringently require some of these protocols. Specifically, the permit fails to require all but large CAFOs to sample the nitrogen and phosphorous levels of their manure, litter, and process wastewater, both land-applied and exported. Smaller CAFOs are only required to sample soil from their land application areas.¹⁹² Further, mortality management, contact between animals and U.S. waters, and projected future conservation practices are only accounted for to the extent that each AWMP “must, to the extent applicable” include protocols for maintaining these records.¹⁹³

¹⁸³ 40 C.F.R. § 412.37(b)(6).

¹⁸⁴ 40 C.F.R. §§ 122.42(e)(1)(iv), (ix).

¹⁸⁵ 40 C.F.R. §§ 122.42(e)(1)(v), (ix).

¹⁸⁶ 40 C.F.R. §§ 122.42(e)(1)(vi), (ix).

¹⁸⁷ 40 C.F.R. §§ 122.42(e)(1)(vi), (ix).

¹⁸⁸ 40 C.F.R. §§ 122.42(e)(1)(viii), (ix).

¹⁸⁹ 40 C.F.R. 122.23, 33 U.S.C. § 1362(14).

¹⁹⁰ O.A.R. 603-074-0010(3). For purposes of this report, the difference in definitions is relevant as to which livestock facilities must apply for a permit.

¹⁹¹ 33 U.S.C. § 1370.

¹⁹² Oregon CAFO NPDES General Permit 01-2009.

¹⁹³ Oregon CAFO NPDES General Permit 01-2009, p.12.

Additionally, the permit requires only large CAFOs to record the weather conditions 24 hours prior to, at the time of, and 24 hours after, land application, despite the fact that land application at agronomic rates is dependent on weather, and is a key component to any nutrient management plan.¹⁹⁴ Finally, the general permit requires only large CAFOs to report actions taken to correct any deficiencies discovered during inspections, despite the fact that all CAFOs are subject to equipment deterioration and malfunction.¹⁹⁵ These distinctions in requirements based on size of the facility are not warranted under EPA regulations. Highlighting the need to hold smaller facilities accountable, EPA requested in an October 2003 letter that ODA include smaller AFOs in its annual reports because “EPA’s inspectors have observed over the past several years that within Region 10 some of these smaller operations present some of the more significant water quality issues.”¹⁹⁶

3. Lack of Knowledge

ODA appears to fundamentally misunderstand the various aspects of the NPDES program, including necessary scientific principles. This undermines its ability to play a helpful role in the NPDES scheme (assuming it could be validly granted such a role).

ODA takes issue with the very construct of the NPDES program. Its belief that the bulk of pollution originates from non-point sources causes it to question the efficacy of NPDES, which is a point-source-based program.¹⁹⁷ Furthermore, it suspects that CAFO producers may not be able to control the myriad minor discharges putting them just over the maximum-allowable discharge threshold due to weather fluctuations and the fact that animal waste is not controllable in the same way factory effluent can be in terms of shutting off valves or smokestacks to control discharges.¹⁹⁸ One example of this is ODA’s suspicion that the fecal levels found in Oregon waters may in fact be

¹⁹⁴ Oregon CAFO NPDES General Permit 01-2009, p.17.

¹⁹⁵ Oregon CAFO NPDES General Permit 01-2009, p.17.

¹⁹⁶ Attachment 7 – Letter from L. John Iani, EPA Region 10 Administrator to Katy Coba, ODA Director, October 15, 2003.

¹⁹⁷ July 14, 2010 meeting with ODA.

¹⁹⁸ July 14, 2010 meeting with ODA.

primarily from the waste of wild birds. It believes that the wild bird waste may be significantly distorting total bacterial counts.¹⁹⁹ This belief has been shared with recent complainants, and more recently, has been acted upon by ODA. A 2008 letter from ODA to a complainant who had reported possible pollution from a dairy, states:

*“The fifth sample was taken above the area where manure could have entered the river. This upstream sample did violate water quality standards... The most probable explanation for the violation of water quality standards in the fifth sample is that wildlife manure was present in the watershed and the water.”*²⁰⁰

More recently, using Microbial Source Tracking (MST) ODA has tested water samples from Hoodview Dairy and concluded that any E. coli comes mostly from birds who must track cow manure onto the dairy's roofs, from which it runs off. ODA claims that CAFOs are not responsible for such run-off, as they cannot be expected to restrict birds from their land.²⁰¹ However, there are several concerns around this form of testing. First, it is a relatively new method – one which a scientist at the laboratory conducting the tests for ODA has stated takes a couple of years to rely upon, as a reliable base must first be established.²⁰² In contrast, ODA appears to have begun relying on its results immediately, without using baseline testing, using them to inform its policy. In addition, ODA appears to selectively test particular E. coli samples for DNA results. For example, a recent complainant alleges that two 2010 tests taken roughly two weeks apart at Hoodview Dairy produced markedly different E. coli counts: 11,000²⁰³ and 1,200, respectively. It is alleged that ODA used only the second, much lower, sample to conduct additional testing for DNA sources.²⁰⁴ Finally, it is worth investigating whether it is the case, as has been alleged, that E. coli samples taken closer to CAFO fields tend

¹⁹⁹ July 14, 2010 meeting with ODA.

²⁰⁰ Attachment 8 – Letter from Wym Matthews, ODA CAFO Program Manager to complainant Robert Collier, regarding Moss Creek Dairy, July 24, 2008.

²⁰¹ Attachment 9 – Letter from Ray Jaindl, ODA Natural Resources Division Administrator to Dale Skiles concerning Hoodview Dairy, September 20, 2010.

²⁰² Alleged statement by Hyatt Green of OSU Water Lab, as conveyed by Complainant # 4.

²⁰³ Attachment 10 – Water sample report dated March 29, 2010.

²⁰⁴ Interview with Complainant #4.

to show lower returns than those samples taken further downstream.²⁰⁵ Given that the volume of waste produced by a dairy compared with that of wild animals is quite different, it is hard to imagine that wildlife pose the pollution problem.

An August 2011 E. coli outbreak in Oregon strawberries was also attributed to deer droppings found on one farm.²⁰⁶ Wildlife excrement may pose a threat to human health, but it is unknown how many deer carry the harmful bacterium strain or why incidents of E. coli contamination from deer have not previously been reported. According to one report, “It has been known since 1995 that deer can carry E. coli, but investigators don't know why it hasn't, until now, shown up in strawberries anywhere in the United States.”²⁰⁷ The state senior epidemiologist was also unsure why the same E. coli strain turned up in three separate locations on the farm because “they have not done much testing.”²⁰⁸

Despite relying on this science in one setting, ODA also cites its present uncertainty over DNA sources as justification for currently focusing less on violators whose discharges exceed the allowable E. coli limit by only a small fraction, in favor of pursuing the few but more egregious violators.²⁰⁹ However, waters with E. coli levels above EPA limits violate CWA regardless of whether the discharge is from larger or smaller violators and whether the violation is egregious or not.

Similarly, ODA does not believe that monitoring water levels at individual facilities is useful – rather, it chooses to test river segments into which facilities' discharges may

²⁰⁵ Attachment 11 – Water sample report dated June 1, 2010. E. coli measured at the western edge of the lagoon tested at 1,100 MPN/100 ml versus farther downstream which measured only 740 MPN/100 ml/.

²⁰⁶ Lynne Terry, *Oregon confirms deer droppings caused E. coli outbreak tied to strawberries*, The Oregonian, August 17, 2011, http://www.oregonlive.com/washingtoncounty/index.ssf/2011/08/oregon_confirms_deer_droppings.html

²⁰⁷ Jonathan J. Cooper, *Deer droppings proven cause of E.coli outbreak*, Capital Press, August 17, 2011, <http://www.capitalpress.com/orewash/AP-OR-E-coli-strawberries-081711>

²⁰⁸ Lynne Terry, *Oregon confirms deer droppings caused E. coli outbreak tied to strawberries*, The Oregonian, August 17, 2011, http://www.oregonlive.com/washingtoncounty/index.ssf/2011/08/oregon_confirms_deer_droppings.html

²⁰⁹ July 14, 2010 meeting with ODA.

run.²¹⁰ This approach leads ODA to conclude that if a river's overall water quality is good, there must be no worrisome discharges in the area. This approach hampers ODA finding the source(s) of waters that are contaminated: ODA itself admits that when overall water quality is not good, it is difficult to determine which facility may be contributing because all it knows is the location along the river where the given sample was taken.²¹¹ However, despite admitting as much, ODA insists that it would be problematic to have volunteers help with limited resource issues by monitoring individual facilities (volunteers currently monitor overall water body levels along some river and stream segments in the state and report the results regularly to ODA).²¹²

Further, ODA classifies nearly every farm with livestock as a CAFO for NPDES purposes, which obligates ODA to inspect them all. According to EPA, an animal feeding operation is either a "significant contributor of pollutants to waters of the United States" or else houses a large number of animals: at least 200 dairy cows, 300 veal calves, 300 other cattle, and so forth. The fewest of any species needed in order to qualify as a CAFO is 150 horses.²¹³ By contrast, ODA's definition of a CAFO provides:

(a) The concentrated confined feeding or holding of animals or poultry, including but not limited to horse, cattle, sheep, or swine feeding areas, dairy confinement areas, slaughterhouse or shipping terminal holding pens, poultry and egg production facilities and fur farms;

(A) In buildings or in pens or lots where the surface has been prepared with concrete, rock or fibrous material to support animals in wet weather;

or

(B) That have wastewater treatment works; or

(C) That discharge any wastes into waters of the state; or

²¹⁰ July 14, 2010 meeting with ODA.

²¹¹ July 14, 2010 meeting with ODA.

²¹² July 14, 2010 meeting with ODA.

²¹³ 40 C.F.R. § 122.23(b)(2).

(b) An animal feeding operation that is subject to regulation as a concentrated animal feeding operation pursuant to 40 CFR § 122.23.²¹⁴

The term “concentrated” is not defined, creating no minimum requirement for number of animals. As a result, ODA defines almost every farm housing animals as a CAFO, obliging itself to inspect each on a regular basis. ODA has admitted as much, and stated recently that it may need to realign its definition with that of the federal government.²¹⁵

Finally, ODA believes it is incapable of taking certain actions to punish violators. For example, it maintains that it cannot confiscate animals when necessary, nor have someone else do so, from farms operating with revoked permits.²¹⁶ It handles this conflict by simply allowing violating farms to continue operating, although it has been exploring alternatives.²¹⁷ ODA is correct that neither federal nor state law allows it (or DEQ, for that matter) to impound animals solely due to NPDES permit revocation. Nor does case law mention this topic. However, ODA has been not only allowed, but charged, to pass all rules necessary to administer and enforce all laws it is charged with overseeing. An Oregon legislative mandate clearly charges it with compiling all relevant rules into a pamphlet for distribution.²¹⁸ Hence, ODA had, and continues to have, an opportunity to address this concern.

Moreover, a CAFO with a revoked permit is not entitled to continue with its current farming practices, regardless of whether it retains animals, because these practices are not protected by the law unless permitted through NPDES.²¹⁹ ODA has various methods available to it to ensure that a farm without an NPDES permit does not in fact continue operating as a CAFO. First, it may seek, with a show of cause, “a temporary or permanent injunction restraining any person from violating any provision of

²¹⁴ O.A.R. ADC 603-074-0010(3).

²¹⁵ July 14, 2010 meeting with ODA.

²¹⁶ July 14, 2010 and October 12, 2010 meetings with ODA.

²¹⁷ July 14, 2010 and October 12, 2010 meetings with ODA.

²¹⁸ O.R.S. § 561.190 (“The State Department of Agriculture is authorized and directed to make any and all rules and regulations necessary for the administration or enforcement of any law with the administration or enforcement of which the department is charged... Such rules and regulations shall be compiled and printed in pamphlet form for distribution.”).

²¹⁹ O.R.S. § 468B.050(1); O.A.R. 340-045-0115(1),(2).

a law under the jurisdiction of the department.”²²⁰ Second, ODA (from the state’s perspective) may enter a CAFO’s land to determine the source of any water pollution as well as “compliance with a statute, rule, standard or permit condition relating to the control or prevention of water pollution from the operation.”²²¹ Hence, they would arguably be able to monitor a farm whose NPDES permit was revoked to ensure it ceased all animal-rearing activities.

Finally, with regard to the animals themselves, state animal control officers are authorized to impound animals abandoned or otherwise neglected by a farm. Hence, if a permit revocation leads to animal neglect, others besides ODA will be authorized to impound any affected animals²²² – as such, ODA ought to carry out permit revocation when necessary.

ODA is mistaken regarding other areas of the law as well. It believes it is limited in its ability to deny permits. Specifically, it claims that it may not deny an initial permit based on siting concerns (besides those strictly related to zoning), and that it may not deny a permit renewal due to prior permit violations.²²³ However, ODA appears mistaken on both counts. Regarding siting, ODA claims it may only deny a permit to a CAFO seeking to build outside of an exclusive farm use zone believing it cannot regulate siting decisions within exclusive farm use zones. But Oregon law requires ODA to “develop and implement any program or rules that directly regulate farming practices ... for the purpose of protecting water quality... *applicable to areas of the state designated as exclusive farm use zones*.”²²⁴ [emphasis added]. Hence, just because a CAFO is sited in an exclusive farm use zone does not mean it cannot be regulated by ODA, as appropriate and including permit denial, in order to protect against water pollution.

²²⁰ O.R.S. § 561.280.

²²¹ O.R.S. § 468B.217.

²²² O.R.S. § 167.345(2).

²²³ October 12, 2010 meeting with ODA.

²²⁴ O.R.S. § 561.191(1).

Additionally, ODA's own rules require that "[a]ll confinement areas, manure handling and accumulation areas and disposal areas and facilities must be *located*, constructed, and operated such that manure, contaminated drainage waters or other wastes do not enter the waters of the state at any time... ;"²²⁵ "A person constructing or commencing to operate a confined animal feeding operation... shall first submit detailed plans and specifications... and other necessary information to the Department and obtain approval for the proposed facility and operation from the Department in writing: ... (b) Topographic map of the proposed site showing *the natural drainage pattern and the proposed surface water diversion and area and roof drainage control system or systems*; ... (d) *Information regarding the occurrence of usable groundwaters and typical soil types in the area of the proposed site and disposal areas*; (h) *Any additional information* that the Department may reasonably require to enable it to pass intelligently upon the effects of the proposed confined animal feeding operation;"²²⁶ and, finally, "[i]n interpreting and applying these rules the Department may consider *variations in soils and climate*..."²²⁷ [emphasis added]. In fact, ODA's own CAFO General Permit 01-2009 takes this same approach, as it states "The permittee must *site*, design, construct, operate, and maintain all waste storage facilities consistent with the AWMP."²²⁸ Despite all of this, siting is left out of the list of variables taken into consideration when deciding whether to grant a permit.

Further, permits have been issued to farms located in environmentally-sensitive areas, such as floodplains. While an adequate AWMP would address this concern, ODA does not always require this paperwork as it ought to and it may fail to properly review the submitted plans. Bar MC Feedlot and Windy Ridge Dairy are two farms with navigable water bodies bordering their land, but have no such acknowledgment in their AWMPs.²²⁹ Cowan Dairy is an example of a farm with fields established directly on floodplains, yet still allowed to operate.²³⁰

²²⁵ O.A.R. 340-051-0020(1).

²²⁶ O.A.R. 340-051-0015.

²²⁷ O.A.R. 603-074-0005.

²²⁸ Oregon CAFO NPDES General Permit 01-2009.

²²⁹ ODA Files.

²³⁰ ODA Files.

ODA's claim that it may not deny a renewed permit to an offender contradicts CWA itself, which makes the authority to terminate or modify permits for cause a prerequisite for all state NPDES programs. If ODA had CWA-derived authority, it would include the power to revoke or deny permits for cause. Acceptable causes include "violation of any condition of the permit."²³¹ EPA rules highlight this concept in required language that must be included in all NPDES permits: "The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or denial of a permit renewal application"²³² and "[t]his permit may be modified, revoked and reissued, or terminated for cause."²³³

Separate from EPA authority, state authority to run the program would include the power to revoke permits as well. ODA's own CAFO General Permit 01-2009 contains support for refusing permit renewal for cause: "[t]he permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or denial of a permit renewal application,"²³⁴ "This permit may be modified, revoked and reissued, or terminated for cause,"²³⁵ "Modification or revocation of coverage under this permit as it applies to any person may be initiated by ODA,"²³⁶ and, finally, "[a]fter notice, registration under this permit may be modified or revoked as it applies to any person for cause as follows: (a) Violation of any terms or conditions of the permit..."²³⁷

Despite all of this, ODA continues to renew permits for, and allow expanded building by, offenders, indicating a severe misunderstanding of its state duty, not to mention CWA requirements. One way in which farms often violate their permit is by

²³¹ 33 U.S.C. § 1342(b)(1)(C)(i).

²³² 40 C.F.R. § 122.41(a).

²³³ 40 C.F.R. § 122.41(f).

²³⁴ Oregon CAFO NPDES General Permit 01-2009.

²³⁵ Oregon CAFO NPDES General Permit 01-2009.

²³⁶ Oregon CAFO NPDES General Permit 01-2009.

²³⁷ Oregon CAFO NPDES General Permit 01-2009.

initiating building without ODA's permission. Yet despite such a severe infraction, ODA's response is often to simply issue, through a Notice of Noncompliance and Plan of Correction (NON/POC), a deadline by which to apply, or to submit building plans. There is often no order to cease building, and there is almost never an administrative order or penalty. Since 2006, at least 10 CAFOs have begun unapproved building projects, yet ODA has issued an administrative order against only one – RSC Dairy – for expanding its above ground liquid manure tank in 2009. Despite this infraction, the dairy was simply told to retroactively submit its construction plans and an approval request form. No fine was issued. Such automatic retroactive approval does not allow for a serious assessment of potential impact on water quality and does not encourage facilities to take CWA regulations seriously.

Numerous such examples abound,²³⁸ but one of the most egregious includes Zehner Farms. In late July 2008, an ODA inspection found “ongoing unapproved construction” to expand a lagoon. An NON/POC was issued ordering the farm to “consult technical assistance to design lagoon expansion” and to “submit plans and timeline for lagoon expansion.” A deadline was set, but no order was given to halt construction. Two and a half months later (October 2008), an inspection found a storage pond being constructed without permission. Again, an NON/POC was issued instructing the farm to submit its engineered designs and plans for ODA approval by a stated deadline, but no administrative action was brought, and no fine issued. Over a year later (December 2009), a third inspection found that the original unapproved lagoon expansion had in fact continued, and no design information was ever submitted, despite more than a year passing since ODA ordered the facility to retroactively submit its construction plans. Despite this blatant disregard, ODA once again chose not to issue penalties but instead relied on its standard response, issuing yet another NON/POC which this time gave the farm over six additional months to complete paperwork already more than a year overdue.

²³⁸ ODA Files.

Besides engaging in approved construction projects, farms violate CAFO rules in numerous other ways, yet are often approved not just for renewed permits, but for increased herd sizes as well. In fact, in 2000, an ODA employee stated in an email to fellow employees that he had informed the operator of Threemile Canyon Farms that “ODA has never, to my knowledge, had an operator reduce his herd size.”²³⁹ On January 15, 2004, Threemile Canyon Farms (a.k.a. Willow Creek Dairy) was found to have manure escaping from its facility. There was also evidence of overflows from two of its emergency overflow ponds. Yet, despite this critical inspection report, ODA approved, *on the very same day*, a herd increase. Similarly, in 1997, ODA signed off on a herd increase proposed by Rickreall Dairy less than three months after issuing it a WQA.

4. Lack of Resources

By its own admission, ODA is incapable of meeting the many requirements of a comprehensive NPDES program. First, it has too few inspectors for the number of farms it monitors: ODA classifies nearly every Oregon farm as a CAFO for NPDES purposes, bringing some 565 farms under its jurisdiction. However, it employs only six inspectors, and attempts to inspect each farm roughly every 10 months, with high-risk farms receiving more frequent oversight. This forces each inspector to conduct some 80 inspections per year—too many to maintain a high level of quality.²⁴⁰ Additionally, these calculations are just based on annual inspections. They do not account for additional inspections required to follow-up on complaints and repeated inspections for egregious violations. Nor do they include educational, administrative or other duties of the inspectors.

ODA also admits that limited time and money force it to choose between enforcing on-the-ground compliance and paperwork compliance. It has sided with on-

²³⁹ “I noted to him that ODA has never, to my knowledge, had an operator reduce his herd size, but that it was not out of the question.” Internal email among ODA staff, October 27, 2000.

²⁴⁰ July 14, 2010 meeting with ODA.

the-ground compliance, overlooking various paperwork violations by CAFOs.²⁴¹ ODA acknowledges that the current paperwork requirements for CAFOs are already the “bare minimum.”²⁴² However, it admits that its inspectors often help farms fill out the requisite papers, sometimes by taking information gained through on-the-ground inspections and inserting it into incomplete annual reports.²⁴³ Indeed, its own records reflect this reality. A 2008 inspection report for Danish Dairy states “*Helped draft letter to EPA.*” An inspector at the same farm reported the following year “*Met to help develop materials for proposed construction.*” Similarly, in 2007, ODA ordered Mira Farms to develop an AWMP which it then helped it develop and subsequently, and not surprisingly, accepted.

ODA asserts that farms’ lack of compliance with paperwork requirements does not necessarily reflect producers’ lack of compliance on the ground.²⁴⁴ For example, an ODA representative stated in a July 2010 meeting that some producers keep records scrawled on feed bags or barn walls – and that ODA gladly accepts such calculations as valid records. Not only does this fall short of EPA’s requirement that farms make certain paperwork on-site and available to inspectors,²⁴⁵ but the danger in this is that it treats paperwork compliance and on-the-ground compliance as mutually exclusive when, in fact, paperwork is meant to reflect the very situation that is occurring on the ground. In fact, a CAFO’s truthfully-completed paperwork is a method of self-reporting and as such presents one of ODA’s only opportunities to assure on-the-ground compliance given the limited inspection resources.

ODA has also maintained two separate information databases which do not always contain identical information: while ODA keeps electronic files on individual CAFOs, many conversations with these farms occur between an ODA inspector and the farm operator, either by phone or in person, and are never noted in either system. Advice and sometimes warnings may be given to farms during these conversations,

²⁴¹ July 14, 2010 meeting with ODA.

²⁴² July 14, 2010 meeting with ODA.

²⁴³ July 14, 2010 meeting with ODA.

²⁴⁴ July 14, 2010 meeting with ODA.

²⁴⁵ 40 C.F.R. § 412.37(c).

creating an important record that ought to be consistently maintained.²⁴⁶ ODA recognizes this problem and noted it is moving to a more comprehensive computer database system.

Additionally, as mentioned earlier, ODA admits to leaving CAFOs largely to their own devices when it comes to establishing methods to avoid discharging. It terms this approach “adaptive management” – producers are told they may not discharge, but are not told how precisely to achieve compliance, nor limited in the methods they may try. As a result, very few restrictions are placed on producers – an approach meant to encourage and recognize diversity among Oregon’s farms. However, ODA admits that this system is both harder to teach farmers, as well as harder to enforce, than a more prescriptive approach.²⁴⁷ While some flexibility is useful to account for variances in geography and production, clarity and consistency is also needed to set a foundation for prevention and enforcement.

In an effort to address its lack of resources, in June 2011 the Oregon legislature approved ODA’s 2011 – 2013 budget, which raises the previous flat \$25 annual permit fee to a tiered fee schedule according to the number of animals confined in the CAFO.²⁴⁸ However, the proposal to shift the cost burden to suspected violators by charging operators follow-up inspection fees²⁴⁹ was not included in the final approval.²⁵⁰

5. ODA’s Inconsistent Performance of NPDES Duties

In addition to lacking legal authority and resource capacity to meet NPDES oversight requirements, ODA also appears unwilling to perform certain central NPDES mandates. It displays a level of complacency simply out of line with what is required of an NPDES permitting agency.

²⁴⁶ July 14, 2010 meeting with ODA.

²⁴⁷ July 14, 2010 meeting with ODA.

²⁴⁸ *ODA Director Pleased with Legislatively Approved Budget*, June 10, 2011.
<http://oregon.gov/ODA/news/110610budget.shtml>.

²⁴⁹ Mitch Lies, *Oregon Proposes CAFO Fee Increase*, Capital Press, July 22, 2010,
<http://www.capitalpress.com/content/ml-cafo-fee-increase-072310>.

²⁵⁰ O.A.R. § 603-074-0020.

The ultimate purpose of the NPDES program is to prevent or halt polluting discharges to navigable surface waters. Hence, a discharge from a facility is perhaps the most obvious NPDES violation. All NPDES rules as well as the rules contained in each farm's NPDES permit are meant to support this ultimate goal of no discharges. Should an accidental discharge occur, it is to be recorded in the CAFO's required paperwork and reported to ODA within 24 hours.²⁵¹ In addition, the farm is to take all possible measures to stop the flow as soon as possible.²⁵² Tragically, discharges of pollutants to surface waters are common, and discharging farms often fail to report (sometimes complaints come from neighbors or are even noticed during an inspection) or take the required remedial measures.

Further, ODA does little to deter farms to reduce their discharges. Discharges occur in several ways. Most commonly, farms discharge as a result of either leaky or overflowing equipment, land application exceeding agronomic rates, or improper channeling of wastewater (including manure escaping out of, or running off of, barns and other facilities). Over-application is all too common. Since 2007, at least 11 farms have over-applied waste to their fields on at least 17 separate occasions.²⁵³ These are the ones noted; it is impossible to tell how many such discharges actually occurred.

Most worrisome is that ODA has rarely brought administrative actions and, when it has, almost never assessed fines. This pattern applies even to farms that have repeatedly offended. For example, in February 2008, the Gary Shull Dairy, which had a history of exceeding agronomic rates,²⁵⁴ was found to be over-applying its waste, leaving its fields saturated to the point of standing water. An administrative order was issued over a year later for this along with many other violations. A fine was assessed – a hopeful sign. However, six months after the initial violation, the farm was again found to be applying waste in violation of its AWMP. A mere NON/POC was issued. Nine

²⁵¹ 40 C.F.R. § 412.37(b)(6) (requirement to record); 40 C.F.R. § 122.41(l)(6)(ii) (requirement to report).

²⁵² 40 C.F.R. § 412.37(a)(3).

²⁵³ ODA Files.

²⁵⁴ July 2003 WQA issued for not land-applying at agronomic rates.

months later, it was once again caught exceeding agronomic rates. ODA again chose only to issue an NON and not pursue the issue any further.

Another chronic offender, Mayfield Dairy, has been found discharging, either through run-off from barns or from over-application (sometimes ODA's reports fail to state the precise source) over 10 times since 2008. During this time, ODA has issued it seven NON/POCs and seven administrative orders. All but one order had no fine attached. On September 1, 2009, following six months of issuing administrative orders involving no fines,²⁵⁵ and significant community protest, a fine was finally assessed for all previous violations dating back to March 26, 2008.²⁵⁶ However, three months later, another discharge was discovered (this time due to off-season application), and while an administrative order was issued, no fine was attached.²⁵⁷ Rather, ODA issued a Notice of Permit Registration Modification requiring Mayfield to retain a consultant to conduct water quality tests. No additional penalty was assessed on the farm.

ODA is aware of the tendency of permitted CAFOs to discharge through over-application, as internal correspondence reveals. In 2008, ODA sent a letter to Threemile Canyon Farms reviewing the results of its annual report against those of previous years. It informed the farm that *"In general, these reports show that there appeared to be more problems with managing nitrogen (N) and irrigation water compared to 2006"* and went on to explain that *"the 2007 report shows 140 fields had increased N levels at five (5) feet compared to the 2006 report, representing a 60 percent increase..."*

Discharges as a result of equipment malfunction or misuse are also common. Since 2007, at least 24 separate discharge events have occurred due to seepage or overflow from manure transfer lines, tanks, lagoons and irrigators.²⁵⁸ ODA issued administrative orders in roughly half of these cases, relying on NON/POCs for the

²⁵⁵ March 30, 2009; April 15, 2009; June 12, 2009.

²⁵⁶ ODA Files – Mayfield Dairy was issued an administrative penalty of \$9,630 on September 1, 2009 for violations from March 26, 2008 – April 29, 2008, and from April 25, 2009 – May 7, 2009.

²⁵⁷ Administrative Order dated December 18, 2009.

²⁵⁸ ODA Files.

remainder. Of the 24 incidents mentioned above, 11 resulted in administrative orders.²⁵⁹ However, only four carried penalties,²⁶⁰ one of which was held in abeyance and only enforced once the farm failed to adhere to orders. In that case, the initial penalty assessment only occurred following four violations, only two of which it addressed.²⁶¹

The number of farms with problematic run-off in just the last few years is significant. ODA records reveal that some farms have continuing problems in this arena, and even after being unable to prevent or change their behavior, ODA often does little to punish their discharges. For example, OSU Dairy has a long history of discharges dating back to at least 1992, when DEQ fined it \$3,000. Twice in 1995, it experienced spills, yet it appears that ODA did not issue NON/POCs. In 1999, it again had a spill along with mysterious seepage. In 2006, OSU again discharged, this time finally receiving an administrative order. In April 2008, ODA found more problems. It warned OSU through a WQA of various leaks, including a leak in its flush system. OSU did not properly fix this problem, as two months later its flush pump line blew, discharging pollutants to surface water. ODA did issue an administrative order but failed to assign a fine, despite OSU's long history of warnings and violations, and despite the fact that with regard to this most recent discharge, OSU was clearly warned two months prior and given an opportunity to prevent the discharge.²⁶²

²⁵⁹ ODA Files.

²⁶⁰ L&L Holsteins – In October 2009 a \$580 fine was issued for an overflowing above ground liquid manure tank and for not reporting the discharge.

December 10, 2010 – A \$2,040 penalty previously held in abeyance for the above ground liquid manure tank and below ground liquid manure tank both repeatedly violating the limits.

Nes-Till Farms – In June 2009 a \$960 fine was issued for an above ground liquid manure tank overflowing into a ditch that flowed to a river and excessive E. coli found.

Riverfront Dairy – In June 2009 a \$640 fine was issued for a big gun malfunctioning and continuously applying to one area and excessive E. coli found.

²⁶¹ L&L Holsteins – In January 2008 a NON/POC was issued for a broken pump causing manure to pool on field and no report of the discharge.

May 23, 2008 – An NON/POC was issued for above ground liquid manure tank being clogged and completely full, 5/23/08

June 12, 2009 – An inspection reported 3 feet of solids in above ground liquid manure tank. A \$2,040 penalty was issued for the most recent violation plus not having application records. But the fine was held in abeyance pending further violation.

December 10, 2010 – An above ground liquid manure tank and below ground liquid manure tank both in violation triggered the previously-assessed \$2,040 penalty.

²⁶² ODA Files.

Another recent example of a chronic discharger is Rock Ridge Dairy. From 2007 to 2009, it was found discharging at least five times. In one ten-month span alone (from November 27, 2007 through September 29, 2008) it was at least four times found to be creating run-off from its land application. Yet inexplicably, even after three violations, ODA failed to levy a fine, choosing to simply issue an administrative order containing a warning. Finally, when the same problem was discovered yet again later that month, a \$6,240 fine was assessed. The farm later was made to pay only \$4,680 of this, the remainder held in abeyance contingent upon no additional discharges for one year, and meeting all ODA orders.²⁶³

Despite clear rules that dischargers must record and report all such incidents,²⁶⁴ this often does not happen. ODA sometimes discovers discharges through citizen complaints, or during routine inspections. This creates a major barrier to effective enforcement, as ODA aims to allow CAFOs as much leeway as possible, entrusting them to self-monitor and self-report to a large extent. In this regard, one would expect that violations of this trust would be seriously punished. However, ODA tends to rely only on NON/POCs and administrative order warnings to respond to such incidents, generally focusing only on the discharge and not even addressing the failure to report. From 2006 through 2008, at least 12 incidents of non-reported discharge were discovered, including three farms with repeated offenses. Yet ODA brought only eight administrative actions, and all but three involved no fines. Two of the three fines assessed were for multiple previous violations, and one of these – for two violations merged together – totaled a mere \$570.²⁶⁵ Unbelievably, one of the incidents incurring no fine involved a center pivot irrigator at Threemile Canyon Farms negligently left on for seven hours without being checked. As it turned out, it was stuck and unable to pivot, causing discharge over 18,000 gallons of manure to one point on the field. This resulted in two standing ponds of manure spread across 1¼ acres of land. Making

²⁶³ ODA Files.

²⁶⁴ 40 C.F.R. § 412.37(b)(6) (requirement to record); 40 C.F.R. § 122.41(l)(6)(ii) (requirement to report).

²⁶⁵ ODA Files.

matters worse, the incident was never reported to ODA and was not discovered until weeks later.²⁶⁶

One reason for chronic, repeat discharges appears to be ODA's lax follow-up, which does little to deter farms from re-offending. ODA's records reveal numerous instances of WQAs, NON/POCs, and even administrative orders going unacknowledged by farms, and ODA doing little in response.²⁶⁷ This applies to all manner of violations. One area of significant deficiency is operations reporting compliance (referred to by ODA as "paperwork"): ODA has allowed farms to linger indefinitely without current animal waste management plans and without submitting annual reports. For example, in January 2008, ODA issued Classen Dairy an NON/POC for not having an AWMP. The NON/POC extended its deadline by four months.²⁶⁸ It is unclear from the record what happened next, but at some point, another deadline of February 1, 2009 was issued – possibly for yet another, more updated version of the AWMP.²⁶⁹ Come that date, the AWMP was still not complete. ODA did nothing for three months. Finally, in May 2009, ODA issued an NON/POC, but only to further extend the deadline to June.²⁷⁰ The June deadline passed and still the farm had no AWMP. That August, one year and eight months later, ODA issued an administrative order, but only to repeat the instructions already given numerous times: to submit an AWMP. No fine was issued.²⁷¹

ODA has also allowed farms to ignore its warnings regarding ongoing manure mishandling. In February 2008, ODA issued Ever-May Farms an NON/POC for applying manure too near surface water.²⁷² Ten months later, it discovered manure piles not being kept on pads, and missing berms. It issued another NON.²⁷³ Two months later, ODA found solid manure being stored on bare ground, and issued a third NON.²⁷⁴ Eight

²⁶⁶ ODA Files.

²⁶⁷ ODA Files.

²⁶⁸ NON/POC issued January 25, 2008.

²⁶⁹ As referenced in NON/POC issued May 13, 2009, extending the deadline to June 12, 2009.

²⁷⁰ NON/POC issued May 13, 2009.

²⁷¹ Administrative Order signed on August 10, 2009.

²⁷² NON/POC issued February 14, 2008.

²⁷³ NON/POC issued December 8, 2008.

²⁷⁴ NON/POC issued February 26, 2009.

months later, it once again discovered mishandled manure piles, and a badly maintained manure lagoon. Another NON was issued – the fourth in less than two years.²⁷⁵ Five months later, still more manure mismanagement was discovered – this time over-application and evidence of run-off. This time, ODA issued a Water Quality Advisory.²⁷⁶ This was never followed up with an administrative action of any sort.

ODA does not efficiently regulate offenders as there are no regular consequences attached to violations. NONs, Administrative and Civil Orders, as well as penalties are inconsistently meted out.²⁷⁷ As a result, ODA's regulatory power is diluted and does little to prevent discharge or dissuade violators. For example, some repeat violators are given multiple WQA warnings before ODA issues a more serious response. Myrtle Lane Dairy failed to submit an annual report for one year. ODA issued three WQAs with no effect before finally issuing an NON.²⁷⁸ At times violations may not incur any corrective action. For example, ODA failed to issue an NON to Konyn Dairy despite an operator reported discharge in 2002. Pressure from a plugged pipeline caused a ground pipe to explode causing manure to flow into an irrigation canal. However, an NON was not issued even though the dairy had also discharged two years previously. In 2000, ODA found the dairy's E. coli levels to be too high, noting that it was likely due to a spill that occurred the same morning. An NON was not issued at that time either.²⁷⁹

Moreover, ODA's response does not seem to correlate with the severity of the violation. Instead of treating an offense by issuing the appropriate sanction, ODA seemingly allows some farms more leeway than others. At Volbeda Dairy, for example,

²⁷⁵ NON/POC issued October 12, 2009.

²⁷⁶ WQA issued March 5, 2010.

²⁷⁷ Over the course of seven years, Van Beek farm was cited four times for various offenses – a complainant reported a dead animal pit too close to a stream; liquid application was done on bare ground; composting manure was uncovered; and runoff ran from the roof through the manure area. In these instances ODA issued the farm a WQA. ODA did not mete out a more serious sanction.

²⁷⁸ Myrtle Lane Dairy – Had no annual report one year. Three WQA's were issued before an NON finally issued.

²⁷⁹ Konyn Dairy – On April 4, 2002 the operator reported a discharge caused by a plugged pipeline to a separator. Pressure caused a ground pipe to explode which caused manure to flow into an irrigation canal. No NON was issued. February 8, 2000 - E. coli levels are too high, likely because of a spill the same morning. No NON was issued.

five inspections over the course of a month found violations, yet ODA issued no fines. This dairy chronically caused run-off from manure piles into ditches, and subsequently into the creek. Inspectors repeatedly find the same freeboard and seepage violations in its lagoons. Notably, during at least three inspections, several E. coli tests violated limits. Yet despite these offenses, no NONs were issued. A note on each inspection states ODA can issue a civil penalty if the farm does not comply. However, no penalties were ever issued.²⁸⁰ Contrast this with the situation with RSC Dairy, which was recently issued a penalty of \$12,000 for discharging into surface waters. The fine was based on violations found in January 2010 by a joint EPA and ODA inspection.²⁸¹

There are problems when ODA issues NONs as well. Issuance can be irregular with seemingly no explanations. Roaring River Dairy was cited for manure slopping over the curb of the tank caused by a bursting pipe. Six months later, manure was still escaping. A year after the first violation, gutters and diversions needed repair and the farm's application exceeded agronomic rates. In all three situations, only an NON was issued.²⁸² An incongruous NON was issued to Gary Shull Dairy in 2008. The farm suffered from a broken pipe, ramp, drain allowing for possible discharge, and ground oversaturated from improper application. But the NON written the same day failed to include the above-mentioned violations. Eventually, the violations including several others from the same day, led to an administrative fine.²⁸³

²⁸⁰ Volbeda Dairy – The operator reported a discharge due to a broken flush valve. An NON was issued on July 30, 2008. February 11, 2009 - Complaint of ditch dumping. February 12, 2009 - Inspection found compost pile running to the ditch and the same freeboard violations from January 29, 2009 (seeping lagoon and E. coli over limits). No NON issued. February 5, 2009 - Follow-up noted that no records were kept and the containment systems were not meeting requirements. No NON was issued.

²⁸¹ *Oregon Dairy Pays \$12,000 for Alleged Animal Waste Discharges*, EPA Press Release, June 21, 2011. <http://yosemite.epa.gov/opa/admpress.nsf/0/56C018622F93CF34852578B6005D772F>

²⁸² Roaring River Dairy was only issued NONs. February 2008 - Inspection noted that manure was escaping from various areas, a burst manure tank pipe caused the spill, manure slopping over curb, and the dairy had no records available. An NON was issued. August 2008 - Notes that manure escaped over curb and the curb needs repair. An NON was issued. February 10, 2010 - Notes that application exceeds the agronomic rate and the gutters and diversions need repair. An NON was issued.

²⁸³ Gary Shull Dairy – On February 12, 2008 an inspection reported a broken pipe, a broken ramp, a drain that allows for possible discharge, and saturated ground after application. None of these violations were included in an NON written the same day, but eventually led to an administrative fine of \$5,070 on March 2, 2009.

Contrast this with the situation at Fir Ridge Holstein Farm who did not face a fine despite multiple discharge violations, including waste flowing from the facility into the holding and freshwater ponds, E. coli amounts over limitations, and application exceeding agronomic rates. A follow-up three months later, the inspector found overflow and liquid manure contacting bare soil among other problems. The farm subsequently faced a civil order for these violations and for not submitting a discharge report, but never faced a fine.²⁸⁴

Threemile Canyon Farms, a chronic offender discussed previously, also serves as another example of an ODA sanction falling short of the severity of the violation. The operator did not report a discharge of more than 18,000 gallons of manure. Incredibly, when ODA learned of the spill, it only issued an NON, no administrative or civil orders, or fines.²⁸⁵

Yet another example of ODA's laissez-faire approach to enforcing its orders is allowing farms to continually eschew their duty to repair malfunctioning equipment. For all of 2008 and most of 2009, ODA issued repeated warnings to Parrish Gap Dairy for malfunctioning manure tanks, yet ultimately failed to curtail the violations. In January 2008, the dairy's below-ground liquid manure tank (BGLMT) overflowed due to a broken pump. ODA issued an NON/POC ordering the farm to repair its pump.²⁸⁶ The following January, the tank's broken pump again caused an overflow. (It can only be assumed that it was never fixed). A second NON was issued.²⁸⁷ The following month, an administrative action was brought levying a fine for both violations plus two more which

²⁸⁴ Fir Ridge Holstein Farm – On March 5, 2009 inspection noted that waste was flowing into ponds, application exceeded agronomic rates, and E. coli tested over limits. Orders issued with no status. March 12, 2009 - Follow-up notes problems were not fixed. June 13, 2009 - 2nd follow-up notes waste was overflowing, liquid manure was coming into contact with bare soil, and there were missing/broken gutters/curbs. May 13, 2009 - Routine inspection found more problems. June 15, 2009 – A civil order was issued for not having a discharge report and other violations. ODA said they can fine if the farm does not comply.

²⁸⁵ Threemile Canyon Farms – A December 17, 2007 inspection noted that application exceeded agronomic rate because the center pivot left the irrigator on, discharging 18,000+ gallons manure, and forming two ponds covering 1¼ acres. The farm did not report the spill. An NON was issued but no fine. January 9, 2008 - ODA may issue penalty and take other actions if farm doesn't comply.

²⁸⁶ NON/POC issued January 14, 2008 ("Repair pump at below ground liquid tank so that manure system is operational.").

²⁸⁷ NON/POC issued March 24, 2009.

had occurred in the meantime involving manure mishandling (presumably due to having to compensate for the broken pump).²⁸⁸ Despite this penalty, the farm's pump remained broken, causing it to re-offend with another overflow a mere two months later. Rather than increase penalties or try a new approach altogether, ODA simply issued another NON/POC.²⁸⁹ However, the dairy continued to ignore requests to fix its pump, and precisely one month later, another overflow occurred. ODA simply issued yet another NON.²⁹⁰ In total, from what the records indicate, the dairy's BGLMT pump had remained broken for roughly a year and a half, and had caused at least four documented overflows during this time.

ODA similarly abrogates its duties when it comes to ensuring that all new facility construction and modification is approved before beginning. Making matters worse, when it discovers unapproved construction, it tends to simply issue an NON/POC modifying the date by which building plans must be submitted rather than halting all building and/or issuing penalties.

In July 2008, Zehner Farms was cited for expanding its manure lagoon without permission. The resulting NON referred to "*ongoing* unapproved lagoon expansion," [emphasis added] which was evidently an ongoing violation, however there is no earlier record of this issue in ODA's file.²⁹¹ In any event, the NON/POC directed the farm to get technical assistance, submit plans and a timeline for expansion, and to only fill the lagoon to its original capacity. A deadline of October 1, 2008 was set for consulting technical assistance, and a deadline of October 31 was set for submitting all plans. Nothing was said about halting construction pending approval, and no punishment was assigned. The deadline for gaining technical assistance was ignored, and on October 14, 2008, ODA issued the farm another NON/POC. The second deadline was also missed, but ODA remained silent until December, when it finally issued an NON/POC

²⁸⁸ Administrative penalty for \$1,800 signed on April 27, 2009.

²⁸⁹ NON/POC issued June 1, 2009.

²⁹⁰ NON/POC issued July 1, 2009.

²⁹¹ NON/POC issued July 28, 2008.

for failing to submit design plans. However, despite issuing repeated warnings over the course of more than a year, ODA still refrained from issuing a penalty.

Properly completed paperwork is a key component of the NPDES program. Various paperwork requirements are placed on both permitted CAFOs and on the CAFO permitting agency. Permitted CAFOs must submit annual reports²⁹² -- something required since 2002.²⁹³ Indeed, CWA requires all NPDES programs to have legal authority to “require reports.”²⁹⁴ Further, it requires the Administrator to “require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports ... as he may reasonably require and to ensure that its permits require compliance with these rules.”²⁹⁵ Finally, EPA requires all permittees to report the results of their regular monitoring at whatever interval is specified in their permit.²⁹⁶ The annual reports, once submitted, are copied and distributed to all state inspectors, who are to investigate any missing, incomplete, or otherwise suspicious forms.²⁹⁷ However, ODA often fails to ensure the reports are submitted on time, if at all. Since 2006, at least 30 permitted CAFOs have failed to file annual reports by the deadline,²⁹⁸ with at least four farms missing the deadline two years in a row,²⁹⁹ and one farm failing to meet the deadline three years in a row.³⁰⁰ Of these, at least 15 appear to have failed entirely to submit a report, as none appears in ODA’s files.

Furthermore, federal regulations require permittees to provide numerous details in their annual reports,³⁰¹ and while the general CAFO permit repeats all enumerated

²⁹² 40 C.F.R. § 122.42(e)(4); Oregon CAFO NPDES General Permit 01-2009, p. 18.

²⁹³ Quote by ODA Deputy Director Lisa Hanson from Mitch Lies, *Panel Debates Effectiveness of State’s CAFO Program*, July 15, 2010. <http://www.capitalpress.com/oregon/ml-cafo-oregon-071610>.

²⁹⁴ 33 U.S.C. § 1342(b)(2)(B).

²⁹⁵ 33 U.S.C. § 1318(a)(4)(A).

²⁹⁶ 40 C.F.R. § 122.41(l)(4).

²⁹⁷ July 14, 2010 meeting with ODA.

²⁹⁸ ODA Files.

²⁹⁹ DeVos Dairy (CY 2007, CY 2008); Hyline Feeders (CY 2007, CY 2008); JR Simplot (CY 2008, CY 2009); Jim Kirsch (CY 2007, CY 2008).

³⁰⁰ Furtado Dairy (CY 2006, CY 2007, CY 2008).

³⁰¹ 40 C.F.R. § 122.42(e)(2). (Requirements include the number and type(s) of animals; estimated total manure, litter and process wastewater; total land application acres covered by the nutrient management plan; total number of acres under the CAFO’s control which were used for land application; all discharges occurring from the production area, with details of each incident; a statement indicating whether a certified professional developed or approved the

requirements, submitted reports are often incomplete and/or inaccurate. Incomplete forms have entire sections left blank³⁰² or are not signed.³⁰³ Inaccurate reports are more prevalent, with the main reporting errors relating to the maximum number of animals for which the farm is permitted, the actual number of animals present over the past year, and the total manure and litter generated over the last year.³⁰⁴ It is sometimes difficult to determine how many animals a farm is permitted for, as ODA paperwork is not always consistent. Examples include an accepted AWMP not matching the relevant permit,³⁰⁵ AWMPs with an increase in the number of animals but no rise in manure amounts,³⁰⁶ as well as different inspection reports for a single facility listing varying numbers of animals under the same AWMP.³⁰⁷

For its part, ODA is to complete annual inspections of each farm, resulting in annual inspection reports.³⁰⁸ Although annual inspection reports constitute only one page, ODA frequently neglects to provide vital information therein. This compromises ODA's own ability to determine whether a CAFO is in compliance with its permit, as the report addresses such key operational aspects as the number of animals for which a facility is permitted, as well as the number it currently maintains; the condition of all animal facilities as well as manure and silage containment facilities; the condition of all manure application areas; and the status of its AWMP and overall record-keeping. While inspectors are meant to examine paperwork, production areas, application areas, confinement areas and storage facilities for compliance,³⁰⁹ annual inspection

nutrient management plan; each field's plantings and yields; nitrogen and phosphorous levels in the manure, litter and process wastewater, with supporting calculations; and the actual amounts of waste applied to fields).

³⁰² Allen Dairy (year is incomplete); Beef Boardman NW (CY 2008 contains no estimate of process wastewater); Fred Esplin Feedlot (CY 2005 is incomplete and unsigned); Mautz Feedlot (CY 2007 fails to list animal numbers); Volbeda Dairy (CY 2006 report contains no estimate of process wastewater).

³⁰³ Fred Esplin Feedlot (CY 2005).

³⁰⁴ Cloud Cap Farms (CY 2004-2007); D&B Poultry (year unknown); Gamble Farms (year unknown); Hiday Poultry (2006-2008); Hollands Dairy (CY 2005, CY 2006); K Diamond Ranch (CY 2008); Keltic Pride Dairy (year unknown); Murata Poultry (year unknown); Norton Cattle Company (year unknown); Perrin Farms (years?); Hiday Poultry Farms (CY 2006-2008); Volbeda Dairy (CY 2006-2008).

³⁰⁵ Holmgren Dairy (CY 2004).

³⁰⁶ Keltic Pride Dairy.

³⁰⁷ Keltic Pride Dairy (CY 2006-2008); Thomas Angus Ranch (CY 2008, CY 2009).

³⁰⁸ Each permitted facility receives an annual inspection from a "Livestock Water Quality Specialist."

http://www.oregon.gov/ODA/NRD/cafofaq.shtml#What_types_of_permits_are_there_in_Oregon_, Last updated March 29, 2011, Last accessed June 1, 2011.

³⁰⁹ ODA "Confined Animal Feeding Operation Facility Inspection Report."

reports often lack any indication of what, if anything, a given inspector examined on-site. Additionally, they often lack sufficient analysis to come to a conclusion regarding a farm's compliance. For example, inspection reports and their corresponding WQAs or NON/POCs ought to note whether a farm is in compliance with its (AWMP) and, if not, why not. However, in at least three recent cases, ODA has issued WQAs or NON/POCs stating that an updated AWMP is necessary, but with no correlating explanation as to why or what problem may exist.³¹⁰

Further, annual inspections do not always occur. For example, ODA failed to inspect Morgan Avenue Feeders in both 2007 and 2008, despite finding violations in 2006. For the most part, however, ODA's failures manifest as performing incomplete inspections and/or incomplete reports. Reports sometimes fail to show which farm records, if any, the inspector reviewed. They also sometimes fail to reflect inspection of production areas and/or application areas. Some of this may be due to crucial information not being shared with inspectors, failure to properly record information, lack of time for a complete inspection or other reasons.

Permitted operators are responsible for making particular information available to inspectors, but only upon request, putting the onus on inspectors to ask for particular records.³¹¹ Required data includes samples and measurements of soil and manure taken by the farm for monitoring purposes, as well as any other records required by their permit.³¹² Yet inspectors often note on annual inspection reports that the required data was not available even when requested. Since 2008, over 50 CAFOs have been found by ODA to not have the required data available for inspection.³¹³ The overwhelming majority of the missing records relate to manure application – one of the bases for determining a farm's compliance with its permit. However, records have also

³¹⁰ Bobcat Holsteins (200 WQA states "AWMP not reflective of current operations."); Reata Ranches (March 2008 NON/POC states "AWMP needs an update"); Sun Valley Jersey Farm (March 2008 NON/POC states "AWMP needs update").

³¹¹ 40 C.F.R. § 122.41(i), (j); 40 C.F.R. § 122.42(e)(2); C.F.R. § 412.37(b).

³¹² 40 C.F.R. § 122.41.

³¹³ ODA Files.

been noted missing for manure samples,³¹⁴ soil samples,³¹⁵ manure export,³¹⁶ livestock mortalities,³¹⁷ and on-site inspections.³¹⁸

In fact, some farms have been noted to be missing numerous categories of records, and sometimes even to maintain no required records whatsoever.³¹⁹ ODA often fails to respond to such cases with an NON/POC³²⁰ or even with a WQA warning. Even when ODA does respond by issuing NON/POCs in these cases, fines are rare. In fact, of the 53 farms which have been found since 2008 to have violated the record-keeping rules, only four have been issued administrative orders. In three of the cases, no fine was assessed: only the threat of a possible fine for further noncompliance.³²¹ In the fourth case, a fine was assessed, but this was for two violations, the first of which had not been punished. Later, the fine was waived by consent order on condition of good behavior.³²² Such lenient measures not only encourage previous violators to reoffend,³²³ but they may also invite others to seek similar competitive advantages.

In addition to crucial records not being made available to inspectors, they are sometimes not kept at all. This appears to sometimes be the result of required monitoring and testing not being done by permittees. EPA requires permittees to perform a number of routine inspections, including visual inspections of various storm water channeling devices, water lines, and manure, litter, and process waste water

³¹⁴ Danish Dairy (2004, 2008); Martin Dairy (2008).

³¹⁵ Captein Dairy (2008); Danish Dairy (2004, 2008); Mike Oppedyke (2009).

³¹⁶ Atsma Dairy (2008); Ever May Farms (2008); Martin Dairy (2008); OSU Dairy Center (2008); Van Beek (2009).

³¹⁷ Martin Dairy (2008).

³¹⁸ Rod Zehr Dairy Heifer (EPA inspection, 2008); Volbeda Dairy (2009); Williams Dairy Heifer (2009).

³¹⁹ Cloverfield Dairy (2008); County Lane (2008); Ever May Farms (2009); Fir Ridge Holstein Farm (2009); Gary Shull Dairy (2008); Roaring River Dairy (2008); Van Beek (2008)

³²⁰ Brelage Pacific Dairy (WQA issued, 2008); Heimdahl Dairy (WQA issued, 2008); OSU Dairy Center (WQA issued, 2008); Ott Dairy (WQA issued, 2008); Pete DeHaan (inspection report with no accompanying warning, 2009); Rock Ridge Dairy (inspection report with no accompanying warning, 2009); Threemile Canyon Farms (inspection report with no accompanying warning, 2008); Volbeda Dairy (inspection report with no accompanying warning, 2009); Williams Dairy Heifer (WQA issued, 2008).

³²¹ Fir Ridge Holstein Farm (2008); Mayfield Dairy (2009); Moisin Dairy (2010).

³²² L&L Holsteins (2009).

³²³ Ever May Farms (NON/POC in 2008; NON/POC in 2009); Van Beek (NON/POC with no fine in May 2008; trip report in September 2008; NON/POC with no fine in March 2009); Volbeda Dairy (February 2009 follow-up inspection to two previous inspections found that inspection records were still not being kept. However, no NON/POC issued); Williams Heifer Dairy (WQA in March 2008; NON/POC in February 2009 but no fine).

impoundments, as well as to conduct tests on, and measurements of, any manure applied to their land.³²⁴ However, such inspections are often simply not done. Since 2008, at least eight CAFOs have been found to have failed to perform some, if not all, monitoring and inspections duties.³²⁵ Two of these findings were revealed during EPA inspections.³²⁶ One farm was found in violation twice in four years.³²⁷ Yet in not a single case has ODA issued a fine or even brought a civil action threatening to do so. Rather, it has restricted itself to issuing WQAs and NONs/POCs.

The EPA also requires the permitting agency to submit (through its EPA state director) quarterly, semi-annual, and annual reports to the appropriate EPA Regional Administrator.³²⁸ These reports are to include a statistical report on “nonmajor NPDES permittees” detailing “the total number reviewed, the number of noncomplying nonmajor permittees, the number of enforcement actions, and number of permit modifications extending compliance deadlines”³²⁹ as well as “a separate list of nonmajor discharges which are one or more years behind in construction phases of the compliance schedule...”³³⁰ The CWA places these requirements in context with the broad requirement that “any information obtained or used in the administration of a State program shall be available to EPA upon request without restriction.”³³¹

Additionally, ODA requires AWMPs for each permitted facility, and its administrative rules require that any AWMP approved by ODA be abided by, at risk of civil penalty.³³² ODA’s general CAFO permit #01-2009 requires each permittee to

³²⁴ C.F.R. §§ 412.37(a)(1), (b).

³²⁵ ODA Files.

³²⁶ Bezates Feedlot, 2008 (“It is unclear whether these inspections were actually being conducted.”); Double M Ranch, 2008 (“The facility could not provide records of inspections at the time of inspection and according to Mr. Sullivan the facility had not started to conduct inspections.”).

³²⁷ Danish Dairy (2004, 2008).

³²⁸ 40 C.F.R. § 123.45.

³²⁹ 40 C.F.R. § 123.45(c)(1).

³³⁰ 40 C.F.R. § 123.45(c)(2).

³³¹ 40 C.F.R. § 123.41.

³³² O.A.R. 603-074-0070(4)(c)(A).

develop an AWMP according to the terms of the permit,³³³ as well as specified ODA rules³³⁴ and the May 2009 National Resources Conservation Service (NRCS) conservation practice standard guidance 590 for Oregon. Far from being mere paperwork, AWMPs serve as representations of actual NPDES permit compliance as carried out by farms: “Upon registration to this permit, the permittee must implement its current ODA-approved AWMP developed for its CAFO... Failure to comply with the ODA approved AWMP constitutes a violation of the terms and conditions of this permit.”³³⁵ The purpose of AWMPs is to ensure that a CAFO’s plan for disposing of animal waste falls within NPDES parameters – in short, that the surrounding environment can handle the proposed waste load: “The permittee must ensure that its AWMP is adequate for the proposed or existing population of animals [and] reflective of the proposed or existing operation...”³³⁶

Yet AWMPs often lack crucial substantive information. Since 2008, farms have submitted AWMPs lacking information on nutrient management plans,³³⁷ storage volume,³³⁸ actual acreage used for application,³³⁹ application areas’ crop yields and application rates,³⁴⁰ the production and handling of process wastewater,³⁴¹ and how the farm plans to protect sensitive areas on or bordering its land such as streams and creeks.³⁴² Some reports are turned in without signatures, rendering them invalid.³⁴³ Further, some ODA inspection reports simply note that AWMPs are incomplete or not updated to reflect the farm’s current operations.³⁴⁴ Of all of these violations, however,

³³³ Oregon CAFO NPDES General Permit 01-2009 (“the general permit only authorizes the discharge of pollutants resulting from the processes, wastes, and operations that have been clearly identified in the permittee’s AWMP approved by ODA.”).

³³⁴ O.A.R. 340-051.

³³⁵ Oregon CAFO NPDES General Permit 01-2009.

³³⁶ Oregon CAFO NPDES General Permit 01-2009.

³³⁷ Rickreall Dairy (2000).

³³⁸ Holmgren Dairy (as of March 2, 2010).

³³⁹ Barker’s Dairy (2008).

³⁴⁰ Lochmead Farms (2009).

³⁴¹ Cloud Cap Farms (as of March 2, 2010).

³⁴² Bar MC Feedlot (as of March 3, 2010).

³⁴³ Kostic Dairy (2009).

³⁴⁴ Mann’s Guernsey Dairy (2008); Willamette Egg (not updated from 2004 to 2009).

only one – the case of the unsigned AWMP – has resulted in an administrative order, and even this incurred no fine.³⁴⁵

Also, ODA often approves AWMPs containing clearly erroneous data. Most common are mistakes regarding animal numbers. AWMPs sometimes list a different maximum allowable number of animals from that listed on the farm's permit or in the farm's plan.³⁴⁶ Similarly, CAFOs may confuse their maximum allowable number of animals (the number for which they are permitted) with their actual number of animals, skewing the results.³⁴⁷

Beyond submitting defective AWMPs, some farms fail to even submit one. Submitting an un-approvable AWMP falls into this category, as functionally, it produces the same result as submitting nothing at all. In 2008 and 2009, at least eleven farms were found to be operating without a current AWMP.³⁴⁸ In at least two of these cases, CAFOs went over a year without a valid AWMP. In the case of Classen Dairy, ODA issued an NON/POC in January 2008 for lack of an AWMP. In May of 2009, the dairy was again cited for lacking an AWMP. ODA responded by issuing another NON/POC, extending the AWMP submission deadline for three additional months. In August 2009, the issue was finally elevated to the status of an administrative order, but no fine was issued. In the case of Olson Road Farm, the farm continued operating for over two years (March 2007 until July 2009) without a valid AWMP. Yet ODA, upon finally bringing an administrative action in August 2009, chose to further extend the deadline rather than issue a fine.

Finally, farms frequently violate their AWMPs and this is discovered either during an inspection or as a result of their annual report. Yet all too often, no penalty is imposed, offering the farm little incentive to improve. Besides discharging pollutants to

³⁴⁵ Kostic Dairy (August 15, 2009).

³⁴⁶ Holmgren Dairy (2004 AWMP); Pete DeHaan (2007); Peter Jensen (2008).

³⁴⁷ Willamette Egg.

³⁴⁸ C&N Dairy (2008); Classen Dairy (2008, 2009); Eugene Livestock Auction (2009); Featherland Farms (brooder) (AWMP was out of date from June 2007 until administrative action in July 2008); Featherland Farms Hatchery (2008); Heat of the Rogue Heifer (2008); Hightide Holsteins (2008); Kostic Dairy (2009); Mayfield Dairy (2009); Mira Farms (2008); Olson Road Farm (2009).

surface water, the most common violation is probably exceeding one's maximum allowed number of animals. Since 2003, at least 14 CAFOs have been found on at least 17 separate occasions to be reporting more animals than they are allowed.³⁴⁹ ODA's standard method of handling such violations is issuing a NON/POC, as it did in all but two of the 17 cases. However, no administrative action was brought in any of these cases, even for the three farms that were repeat violators, despite the fact that two of the re-offenses came on the heels of the original offense.³⁵⁰ Other violations include constructing unapproved waste handling and storage systems (usually for manure or wastewater),³⁵¹ disposing of waste in unapproved ways,³⁵² engaging in unapproved mortality management,³⁵³ failing to install or maintain particular parts or facilities,³⁵⁴ failing to seed proper areas at proper times,³⁵⁵ and failing to maintain proper agronomic rates.³⁵⁶ Other farms have been cited for violations that were not adequately explained in ODA's WQAs or NON/POCs – a problem in and of itself, as ODA inspectors are meant to provide full detail in all inspection reports and other forms.³⁵⁷ This is crucial for clarity to the offender and for follow-up by ODA.

Still more troublesome is that ODA allows certain farms to operate even without NPDES permits.³⁵⁸ ODA's lax enforcement sometimes takes years to result in penalties.

³⁴⁹ ODA Files.

³⁵⁰ Cowan Dairy (2004 NON/POC; 2007 NON/POC); Gary Shull Dairy (2003 inspection report; 2004 NON/POC); Lee Valley Dairy (2008 NON/POC; 2009 NON/POC).

³⁵¹ Barker's Dairy (built a new waste facility, 2008); Cowan Dairy (manure holding system did not match AWMP, 2007); Danish Dairy (unapproved construction of silage pit and barn (2006); Fairview Chad Acres (waste storage not in keeping with its AWMP, 2008); Featherland Farms Hatchery (AWMP does not reflect wastewater system, 2008); Noris Dairy (unapproved manure storage construction, 2008); Rickreall Dairy (Added new silage bunkers and flush tank, and modified the solids settling cell all without ODA approval, 1999); Sun Valley Jersey Farm (liquid storage violates its AWMP, 2009).

³⁵² Barker's Dairy (AWMP did not reflect actual acreage used for land application, 2008); Mayfield Dairy (land application being done in areas not allowed by the AWMP, 2009); Pete DeHaan (land application being done on unapproved fields, 2007); Riverfront Dairy (AWMP does not match land application acreage, 2008); Troost Dairy (not operating the separator as planned).

³⁵³ Elsinghorst Dairy (dead animals were not removed according to the AWMP, 2009); Wildlife Safari (AWMP does not match the farm's mortality management, 2008).

³⁵⁴ Moisan Dairy (two animal waste holding ponds are missing cement weirs, and a third is missing a depth marker, 2009); Mrs. O'Poodles (curbs and roofs are not being maintained according to the farm's AWMP, 2008).

³⁵⁵ Spencer Dairy (Fall seeding did not happen in accordance with AWMP, 2009).

³⁵⁶ Heimdahl Dairy (2008 WQA states "AWMP needs to be updated with current acreage."); Wildlife Safari (AWMP does not match wastewater agronomics nor computations, 2008).

³⁵⁷ Bobcat Holsteins (2009 WQA states "AWMP not reflective of current operations."); Ott Dairy (2008 WQA states "Update AWMP to reflect current management.").

³⁵⁸ Michael Brandt-Drury - July 29, 2008 - no permit and potential run-off.

For example, Holdner Farms was first issued a Civil Order in February 2007 for failing to have a permit. According to ODA records, almost a full year later the farm was still operating without a permit. At that time, a perfunctory NON was issued that stated “Complete and submit the ATR [application to register] to the Department by” and “Submit an AWMP to the Department for your facility by” and neither date is filled in. However, the NON essentially had no force because the farm did not have to comply before any deadline. One year later, in February 2009, ODA issued a second NON/POC for the same violations found in 2007. The POC required Holdner to apply for a permit and to stop placing waste where it can drain into surface water. It was not until December 2009, almost three years after the initial violation, that ODA assessed a penalty of \$1,940.³⁵⁹

ODA relaxes fee deadlines to the point that farms continue to operate without a valid permit.³⁶⁰ For example, Steve Gage farm failed to pay the renewal fee in June 2008. It then submitted an inadequate AWMP in November of 2008. But ODA did not issue a penalty (\$50) until June 2009 when the payment was a year overdue.³⁶¹ Not only do ODA’s own records reveal lax enforcement, EPA inspections revealed at least three farms operating without a permit in 2008.³⁶²

Beyond paperwork and on-the-ground enforcement, ODA fails to meet NPDES requirements in other ways. For example, E. coli is the main standard by which ODA

Rocking Eleven Ranch - April 2008 - NON - no permit.

Olson Road Farm - (date unknown) no permit.

Simon Ranch - (date unknown) - no permit.

Johnson Feedlot - (date unknown) - no Application to Register.

³⁵⁹ ODA Files. Holdner Farms - February 2007 - Civil Order - No permit.

January 3, 2008 - NON - Still no permit.

February 2009 - NON/POC - Still no permit and placing wastes where they can drain into surface water.

December 2009 - \$1,940 penalty - Still no permit application received.

As of August 2011 the Attorney General has taken action in this case.

³⁶⁰ M&M Dairy – June 2009 – Civil Order – Failed to pay permit renewal fee – June 2008 – June 2009 – Included a note that ODA may issue a fine. But no record whether it ever did.

D&L Dairy - January 14, 2010 - Civil Order but no fine - No permit from August 7, 2009 to January 8, 2010 because failed to pay permit fee or late fee.

³⁶¹ Steve Gage - June 2008 - Failed to pay renewal fee due June 2008.

November 2008 - Submitted inadequate AWMP.

June 2009 - \$50 penalty assessed.

³⁶² DeLong Farm, Derek Pearson’s Feedlot, and Harper Ranch per ODA records.

measures water pollution. Federal law requires a holding time for E. coli samples of six hours at a maximum.³⁶³ However, ODA sometimes relies on samples processed significantly outside of this time limit. On January 7, 2009, ODA took E. coli samples at Mayfield Dairy, which were not analyzed by a laboratory until the next day. Other laboratory results and complainant testimony³⁶⁴ appear to reveal similar situations of ODA not following EPA water testing protocols. ODA's inconsistent execution of NPDES provisos such as requiring CAFOs to comply with permits, keeping accurate records, issuing regular and proportional consequences to violators, leaves Oregon with a NPDES program that falls short of CWA standards.

C. CONFLICT OF INTEREST

ODA's website states that "ODA has a three-fold mission: food safety and consumer protection; protecting the natural resource base; and marketing agricultural products." Oregon's legislature has indeed charged it with these disparate duties, asking it to regulate CAFOs,³⁶⁵ develop agricultural markets (through its Agricultural Development Division),³⁶⁶ promote agricultural resources³⁶⁷ and manage natural resources to prevent water pollution (under its Natural Resources Division).³⁶⁸

However, marketing agricultural products demands different priorities than protecting the environment. While marketing is based largely on efficiency and price points, conservation is ultimately based on safety measures and enforcement. Production must sometimes be forcibly altered, diverted or halted, and producers must at times be sanctioned in order to achieve enforcement goals. In fact, sanctions are a linchpin of the NPDES program,³⁶⁹ as deterrence is a central tool in the larger effort to prevent CAFO-derived water pollution. ("The goal is to emphasize the value of deterrence and to establish a minimal national consistency by taking actions across the

³⁶³ 40 C.F.R. § 136.3.

³⁶⁴ Interviews with Complainants #4 and #5.

³⁶⁵ O.R.S §§ 468B.035, 468B.217, 468B.230, 561.191.

³⁶⁶ O.R.S. §§ 561.020, 576.013.

³⁶⁷ O.R.S. § 561.020,

³⁶⁸ O.R.S. § 561.400.

³⁶⁹ 33 U.S.C. § 1342(7).

country...”) ³⁷⁰ Under its promotional duties, ODA must “assist in the establishment and development of new markets and... maintain or expand existing domestic and foreign markets for farm and food commodities produced or processed in this state” as well as “assist in the development and improvement of farm and food commodities and their values and uses...” ³⁷¹ Such pointed tasks seem only to invite a conflict of interest.

History reveals that such a conflict is cause for concern. An example can be found in the dual mandate once held by the Federal Aviation Administration (FAA). Under the Federal Aviation Act of 1958, ³⁷² the FAA was asked to both promote airline commerce and protect fliers from safety risks. ³⁷³ These two mandates often conflicted ³⁷⁴ – a concern finally brought to Congress’s attention by President Clinton’s Secretary of Transportation. In 1996, Congress amended the law, removing the mandate to promote the aviation industry, while strengthening the mandate to protect customers. ³⁷⁵ ODA faces a similar quandary to that of the FAA prior to its conflicting mandates being separated: it is being asked to both *encourage* an industry and *restrain* it. Both tasks cannot be done well by a single agency. EPA would do well to clarify that ODA in fact possesses no NPDES authority. DEQ is in a better position to address a water quality program that includes CAFOs, rather than addressing all other sources of discharge except CAFOs. This would resolve some of the conflict ODA now faces.

Case law also speaks to such conflicting mandates. In *Commonwealth Of Massachusetts v. Clark*, ³⁷⁶ the U.S. District Court found that, like ODA, the Secretary of the Interior was subject to two conflicting mandates: to protect an environmental resource and to encourage economic and resource development. However, the

³⁷⁰ *Interim Guidance to Strengthen Performance in the NPDES Program*, U.S. Environmental Protection Agency, June 22, 2010, p. 2, at <http://www.epa.gov/oecaerth/resources/policies/civil/cwa/interim-guid-npdes-062210.pdf>.

³⁷¹ O.R.S. § 576.013.

³⁷² Pub. L. No. 85-726.

³⁷³ Mark C. Niles, *On the Hijacking of Agencies (and Airplanes): The Federal Aviation Administration, “Agency Capture”, and Airline Security*, 10 AMUJGSP 381, 407 (2002).

³⁷⁴ Lea Ann Carlisle, *The FAA v. The NTSB: Now That Congress Has Addressed the Federal Aviation Administration’s “Dual Mandate,” Has the FAA Begun Living Up To Its Amended Purpose of Making Air Travel Safer, or Is the National Transportation Safety Board Still Doing Its Job Alone?*, 66 JALC 741, 741 (2001).

³⁷⁵ 49 U.S.C.A. § 40101(a), (d).

³⁷⁶ *Com. of Mass. v. Clark*, 594 F.Supp. 1373 (D. Mass. 1984).

resource to be protected – the off-shore marine environment – was the same resource to be developed (for oil and gas leasing). Finding that “the risk to an enormous and important tract of the Atlantic Ocean bed is of relatively greater risk to the public interest than a delay in the hasty leasing of those lands in the absence of any indication that any, let alone large quantities, of non-renewable resources will be there,” the Court preliminarily enjoined the Secretary of the Interior and the Department of the Interior from conducting an oil and gas lease sale.³⁷⁷ Similarly, in *Kelley v. Butz*, the U.S. District Court preliminarily enjoined the U.S. Forest Service from spraying trees with a defoliant – an act that would have fulfilled its mandate under the Organic Act, but which did not meet the requirements of the National Environmental Policy Act (NEPA), its other mandate.³⁷⁸

ODA’s mandate to promote Oregon’s agriculture also bears an inherent risk associated with an agency promoting a private interest: the possibility of “agency capture.” Capture occurs when “a regulated entity” manages to “succeed, through lobbying or other influential devices, in replacing what would otherwise be the public-policy agenda of the agency with its own private and self-serving agenda.”³⁷⁹ Because ODA’s allegiance is arguably already split between its mandates, it is not hard to imagine that it may be more subject to capture than it would be otherwise. Were it to be swayed by the private agricultural interests it is meant to serve and promote, this would make it even harder for ODA to serve the competing interests of the environment and citizens.

There is evidence that ODA has in fact been successfully captured by, or is at least unduly lenient toward, CAFOs. Administrators and staff of ODA’s Natural Resources division (which oversees the CAFO program), refer generally and repeatedly to the CAFOs overseen by ODA as their customers or clients.³⁸⁰ While such statements merely cast doubts on ODA’s ability to remain impartial, other ODA statements and

³⁷⁷ *Com. of Mass. v. Clark*, 594 F.Supp. 1373 (D. Mass. 1984).

³⁷⁸ *Kelley v. Butz*, 404 F.Supp. 925 (W.D. Mich. 1975). – no longer good on at least one point of law.

³⁷⁹ Mark C. Niles, *On the Hijacking of Agencies (and Airplanes): The Federal Aviation Administration, “Agency Capture”, and Airline Security*, 10 AMUJGSPL 381, 390 (2002).

³⁸⁰ July 14, 2010 meeting with ODA.

records indicate actual, undue preference not to regulate farms which borders on partnership.

Some of ODA's approach appears to be informed by a fear of upsetting or angering farms under its regulatory purview. Along the same lines, ODA is also apparently cognizant of the political stakes associated with decision making and appears at times to be motivated by such concerns. For example, an internal email among ODA staff in 2000, regarding Rickreall Dairy's at-the-time failing nutrient management plan, states "This is a very complicated and politically sensitive case."³⁸¹ An email on the same topic a few days earlier expressed concern that requiring further action by Rickreall's operator could cause upset: "If their revised plan ... shows nutrient balance requires fewer than 4200 animals, we will be in the position of having to talk about reducing permitted numbers – this is almost certain to cause greater upset than Mr. Kazemier is already experiencing as a result of our requirements."³⁸² Finally, with regard to the same situation, an ODA employee stated one week later, "The addition of land is significant and Louie Kazemier stressed to me that they paid \$1.5 million for this land." ODA appears to feel that it owes something to these farmers, and must find a way to allow them to continue operating as they desire.

ODA also appears to view farms as partners with whom it must negotiate. With regard to the same Rickreall Dairy situation, an ODA inspector stated in an email to fellow ODA employees, "*Louie and I agreed that he still needed to submit a Nutrient Management Plan...*" as though ODA needed the farm operator's approval. The inspector went on to state, "*The timing issue (how long before an operation has to 'achieve' demonstrated nutrient balance) that I mentioned in my earlier note on this subject is certainly pertinent to how we will negotiate with Rickreall Dairy.*"³⁸³ Even paperwork appears to be up for negotiation. In a recent meeting, an ODA administrator stated that the Rock Ridge and Mayfield dairies, which are owned by one entity and

³⁸¹ Internal email among ODA staff, October 27, 2000.

³⁸² Internal email among ODA staff, October 20, 2000.

³⁸³ "Louie and I agreed that he still needed to submit a Nutrient Management Plan (or equivalent) that represented his nutrient management relative to his newly acquired land base." Internal email among ODA staff, October 27, 2000.

operated as one dairy, expressed a desire to operate under two separate NPDES permits in order to avoid the large CAFO designation and the attendant regulations, and that ODA complied with this wish.³⁸⁴

ODA's decisions about whether to issue NON/POCs also appear influenced by farms. In 1995, ODA honored Rickreall Dairy's wish of not issuing an NON/POC in response to a violation.³⁸⁵ The year prior, ODA had drafted an NON/POC against Rickreall but later failed to issue it. This reversal is noted in ODA's database but not explained.³⁸⁶

Another facet of this partnership perspective appears to be helping farms complete required paperwork – even to the extent of adding missing information to submitted forms. ODA inspection reports from Danish Dairy in 2008 and 2009 state, respectively, “Helped draft letter to EPA”³⁸⁷ and “Met to help develop materials for proposed construction.”³⁸⁸ In 2007, Mautz Feedlot submitted an annual report without providing its current number of animals; ODA filled in this information itself (according to notes in the file). Again, ODA is working more as a promoter or protector on behalf of clients than a regulator requiring compliance with federal and state rules.

Much of this may be due to ODA's self-professed “adaptive management” approach to overseeing CAFOs. The goal is to leave CAFOs largely to their own devices and restrict them as little as possible. It is reasonable to recognize that a one-size-fits-all permit does not account for different-sized operations with, among other things, different types and number of animals. However, total flexibility ignores the need for a standard system of regulation and enforcement, which ensures that the mandates of CWA are being followed.

³⁸⁴ Ray Jaindl, ODA Natural Resources Division Administrator, July 14, 2010 meeting with ODA.

³⁸⁵ “ODA's Chuck Craig sent letter to Louie Kazemier, Rickreall Dairy. Letter met Louie's request of no NON...” ODA electronic files, June 30, 1995.

³⁸⁶ “Drafted NON based on March 2, 1994 investigation. Division never sent NON.” ODA electronic files, March 24, 1994.

³⁸⁷ Danish Dairy inspection report, November 12, 2008.

³⁸⁸ Danish Dairy inspection report, April 22, 2009.

At a July 2010 meeting, an ODA representative stated that “the point of a performance-based program is having flexible guidelines.” However, she admitted that such an approach increases the challenges involved in enforcement.³⁸⁹ We see the results of this confusion in ODA’s attempts to set limits for farms which are not consistently enforced. In 2000, internal emails among ODA staff sought to determine how to manage a dairy whose land application chronically exceeded nutrient limits. One ODA employee raised the concern:

“If we have a producer with nutrient management “problems”, what are reasonable time scales for allowing them to get into compliance? If we could figure this out ourselves, we’d do ourselves a great favor. Mike Gangwer likes to write down that it takes “years” to get a management program worked out and operating at a level to balance nutrients. Unfortunately, it is a sad fact that much of Mike’s own data, from farms he’s been working with for years, shows that the high goals he sets are not being achieved.”³⁹⁰

The email went on to present several possible scenarios for managing the farm, revealing an ad-hoc approach which seems out of line with the EPA’s intent for the NPDES program. Such internal confusion does little to ensure that NPDES standards are being met, and it undermines any attempt by ODA to instill confidence among farmers and the public by presenting itself as capable, consistent and reasonable.

It’s not ODA’s job to bring farms along slowly. The job they wish to take on is that of protecting water quality and they (or DEQ) could do this more efficiently by enforcing regulations and letting producers decide how best to come into compliance. They would provide more incentive to do this quickly if enforcement and penalties were clear, quick, consistent and certain. One barrier to ODA’s ability to do this may be the conflict it faces trying to both promote and regulate facilities at the same time.

³⁸⁹ Lisa Hanson, ODA Deputy Director, July 14, 2010 meeting with ODA.

³⁹⁰ Internal email among ODA staff, October 26, 2000.

IV. CONCLUSION

The NPDES permit program under CWA limits the amount of pollutants discharged by CAFOs (and other point sources) into U.S. waters. In 1973 EPA authorized Oregon to administer the NPDES program based on the state's application, which stated that DEQ would administer the program, with no mention of ODA involvement.

In a 1988 MOU, DEQ began sharing its CAFO NPDES duties with ODA. Under the purported authorization of additional MOUs and conflicting state mandates, ODA took over program administration, management and enforcement from DEQ. However, ODA's administration of the CAFO NPDES program is problematic in three respects: (1) ODA lacks the necessary legal authority, including specifically EPA authority; (2) it lacks the necessary programs, capacity, resources and willingness to effectively manage the program; and (3) it suffers from an inherent conflict of interest.

RECOMMENDATIONS

First, EPA should start proceedings to withdraw Oregon's program approval to administer the NPDES program per 40 C.F.R. §123.63.

Second, EPA should immediately investigate ODA's current administration of the NPDES permit program.

Third, in the alternative, if EPA does not withdraw Oregon's program, it should clarify that DEQ should clearly assume full responsibility for the NPDES CAFO program, as DEQ is the authorized agency. ODA has demonstrated its ineffectiveness in running the program within the existing framework. Not only is DEQ in a better position to take on program administration and enforcement, it is not saddled with conflicting duties to both regulate as well as promote agriculture and natural resources, as ODA is.

Fourth, EPA (or DEQ in the alternative) should institute a moratorium on issuing new NPDES permits and on approving new buildings on CAFOs until CWA compliance is insured at currently permitted facilities.