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## **SUMMARY**

The Oregon Department of Environmental Quality (DEQ) and the Oregon Department of Forestry (ODF) aligned the agencies' water quality responsibilities and processes. Those responsibilities are in the ODF-DEQ Memorandum of Understanding (MOU). Staff will present information about the MOU, public input, agency responses, and revisions to the MOU based on public input.

## **CONTEXT**

The Board of Forestry's (Board) 2011 *Forestry Program for Oregon (FPFO)* supports an effective, science-based, and adaptive Oregon Forest Practices Act (FPA) as a cornerstone of forest resource protection on private lands in Oregon (Objective A.2). The *FPFO* Goal A recognizes that the FPA includes a set of best management practices designed to ensure that forest operations would meet state water quality standards adopted under the federal Clean Water Act. Similarly, Goal D recognizes that the FPA is designed to protect soil and water resources, including aquatic and wildlife habitat (Objective D.6). The Board's guiding principles and philosophies include a commitment to continuous learning, evaluating, and appropriately adjusting forest management policies and programs based upon ongoing monitoring, assessment, and research (Value Statement 11).

## **BACKGROUND AND ANALYSIS**

The Board directed ODF staff to review streamside protections on small and medium fish-bearing streams in the Siskiyou region. The review focused on stream temperature, shade, and desired future conditions of riparian forests. Staff started by reviewing scientific literature related to the region and topics. In September 2020, the Board received the literature review on stream temperature and shade. Next, the Board asked ODF staff to work closely with DEQ to incorporate information from Total Maximum Daily Loads (TMDLs) into ODF's analyses to help determine if forestry rules sufficiently protect water quality. This direction led to an interagency process to revise the existing MOU, which is over 20 years old.

The MOU needs to be revised to reflect current:

- Program requirements and operations.
- Technical and scientific analyses.
- Understandings of how landscape conditions impact water quality.

The proposed MOU (Attachment 1) sets processes that build on each agency's respective areas of expertise, meet state and federal requirements, are collaborative in nature, and reduce redundancy where possible.

ODF and DEQ have been clarifying ODF's role and responsibilities for developing and implementing TMDLs. The agencies are determining how TMDLs, related information, and analysis can be used to evaluate whether the forestry rules sufficiently protect water quality. The agencies continue the work on how to develop, implement, and report on TMDLs.

The Oregon Department of Justice (DOJ) explained the Board's and Environmental Quality Commission's (EQC) authorities, roles, and responsibilities for protecting water quality on nonfederal forestland. First, EQC and DEQ assess waters then set water quality standards and TMDLs. Then the Board and ODF set forest practices to meet those requirements.

The agencies jointly issued a notice seeking public input on the draft MOU and prepared responses to the comments. In response to public input, the agencies revised the MOU to:

- Clarify terms and delete redundant language.
- Improve accountability and transparency through progress reports to EQC and the Board.
- Commit to documenting implementation processes and amending the MOU.

## **RECOMMENDATION**

Information only.

## **NEXT STEPS**

The Agencies' directors will sign the MOU. The Agencies will implement it.

## **ATTACHMENTS**

1. Memorandum of Understanding: Oregon Department of Forestry – Oregon Department of Environmental Quality Collaboration on Achieving Water Quality Goals.
2. ODF-DEQ MOU public input and response summary with public comments on the September 1, 2021, draft of the MOU.



**November 10, 2021 DRAFT**

**Memorandum of Understanding:**

**Oregon Department of Forestry – Oregon  
Department of Environmental Quality  
Collaboration on Achieving Water Quality Goals**



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**I. Introduction**

**I.1 Vision**

Where rivers, streams and lakes are clean, we will continue to protect them. Where they are not, we will identify why, and work collaboratively to make the changes needed to improve water quality. We recognize that both regulatory and non-regulatory measures are needed to restore our waterways, and that changes on the ground will take years to show results.

At the same time, we also recognize that our climate is warming quickly and that our environment is under increasing stress, as evidenced by the continuing decline of many fisheries toward extinction. As a result, our work is urgent. We must work deliberately, based on science, but efficiently. To succeed we need clear objectives, regular monitoring and reporting, and accountability to require further actions if we are not making sufficient progress.

## **I.2 Purpose**

The purpose of this MOU is to describe how the Agencies will work together to protect clean water on non-federal forestlands that already have high quality waters, and to improve water quality on waterways that are not meeting water quality standards.

The Oregon Department of Environmental Quality (DEQ) and the Oregon Department of Forestry (ODF) (collectively, the Agencies) each have responsibilities for protecting and restoring water quality on non-federal forestlands in Oregon. These responsibilities originate in both federal and state law. Broadly speaking, the federal Environmental Protection Agency (EPA) has delegated implementation of the federal Clean Water Act (CWA) in Oregon to DEQ. As a result, DEQ is responsible for setting water quality standards, identifying where those standards are or are not being met, and carrying out programs to improve water quality where needed. The Oregon legislature has directed ODF to carry out the state Forest Practices Act (FPA) to accomplish a variety of purposes, including protecting water quality. As a result, the Agencies must work together to meet their respective but related responsibilities. This agreement updates and replaces the 1998 Memorandum of Agreement between the Agencies concerning water quality on non-federal forestlands; it does not alter any statutory or rule requirement governing either agency's responsibilities. This agreement reflects written legal advice from the Oregon Department of Justice dated March 2, 2021, which is included as Appendix 1.

## **I.3 Considerations and Limitations**

DEQ and ODF are party to other agreements that address water quality-related activities. In addition, the Agencies each are developing new policies on important topics such as climate change, wildfires, and drinking water protection.

This MOU is not intended to cover every aspect of the nexus between forestry and water quality, or to replace the following agreements or supersede existing statutory or regulatory requirements.

1. Land use conversions (for more information, see ODF *et al.*, 2006)
2. Pesticide Analytical and Response Center (for more information, see PARC, 2006)

## **II. Interagency Coordination**

### **II.1 Principles of Interagency Coordination**

The Agencies will use the following principles in working together to protect and improve water quality:

1. A commitment to collaboration.
2. Freely sharing information and expertise.
3. For transparency, explicitly documenting how each agency uses information and analyses provided by the other agency.
4. Adherence to all relevant state and federal laws, including those governing cultural resources.

5. Striving toward achieving efficiency and limiting redundancy in the work that the Agencies do to protect water quality.
6. Using available data, scientific information, uncertainty, and accepted scientific methods.
7. A commitment to use our respective programs to protect clean water, and to improve water quality where standards are not being met, including:
  - a. Continued progress to achieve conditions on the ground needed to improve water quality, even where uncertainty exists; and
  - b. Adaptive management informed by data and scientific information.

## **II.2. DEQ-Led Water Quality Processes**

### **1. Water Quality Standards Revisions**

DEQ, acting through the EQC, is required by federal law to establish water quality standards to protect designated and existing beneficial uses. Water quality standards are adopted as rules by the EQC, but also must be approved by EPA. In addition, the EQC must periodically review and revise the standards if needed to protect beneficial uses of water.

DEQ conducts public processes at several points during the water quality standards revision and adoption process. First, DEQ broadly solicits public input on what its priorities should be for changes to standards, which are made through the triennial review process. Following informal input and review by EPA, DEQ and the EQC carry out changes through rulemaking. This process includes, at a minimum, an advisory committee, preparation of a fiscal impact statement, and public notice and comment, including a public hearing. DEQ includes persons and communities likely to be affected by the changes on its advisory committees. DEQ frequently includes other state and federal agencies in advisory committees, particularly where the rulemaking may have an effect on that agency's programs.

DEQ will consult with ODF regarding priorities for revisions to water quality standards during the initial phase of the triennial review.

DEQ will provide an opportunity for ODF to participate on the EQC rules advisory committees for water quality standards revisions where the proposed revisions have a nexus with forestry-related activities.

### **2. Integrated Report**

Every two years, DEQ prepares a statewide assessment of water quality as required by sections 305(b) and 303(d) of the federal CWA. The Integrated Report identifies segments of rivers, streams, estuaries and other water bodies where water quality standards are not being met, where programs are needed to improve water quality, and priorities for developing clean water plans called Total Maximum Daily Loads or TMDLs. The Integrated Report is submitted to EPA for its review and approval.

DEQ will consult with ODF regarding revised or new methodologies used to evaluate water quality prior to development of the Integrated Report.

DEQ will consult with ODF in advance of actions seeking input and data for the Integrated Report, including the data solicitation window.

DEQ will consult with ODF regarding draft assessment conclusions.

### **3. Section 319 Program: Plan and annual reporting**

The Oregon Nonpoint Source Management Program Plan (NPS Plan) describes the state's goals, priorities, objectives, and strategies for preventing, controlling, and eliminating pollution from nonpoint sources, including forestry activities.

The NPS Plan includes measures needed to meet water quality standards and established limits on nonpoint source pollution set by TMDLs.

EPA requires the NPS Plan to be updated every five years and submitted to EPA for approval. The NPS Plan and NPS annual report approvals are required by the CWA. When revising Oregon's NPS Plan, DEQ will consult with ODF regarding elements of the plan and the annual reports that relate to non-federal forestlands. The input sought from ODF includes review of draft descriptions and requests for data and information for inclusion, as appropriate.

## **4. TMDL Development and Implementation**

### **4.1. TMDL Development, Generally**

For water bodies that do not meet water quality standards, and that are prioritized for further planning and programmatic actions to improve quality, DEQ develops a TMDL and a Water Quality Management Plan (WQMP). TMDLs include decisions about how much pollution must be reduced from both point sources, such as wastewater treatment plants, and from non-point sources, such as private forest operations. When developing or revising a TMDL, DEQ forms a TMDL local advisory group or a rules advisory committee that includes people and communities likely to be affected by the rules.

DEQ will request that ODF participate in TMDL committees when the TMDL includes non-federal forestlands. In addition, DEQ and ODF will meet at least once every two years to discuss upcoming priorities for TMDL development, which will allow for early and regular collaboration.

### **4.2. Development of TMDLs other than Temperature TMDLs Addressed in 4.3**

When DEQ is developing a TMDL that will include load allocations for non-federal forestlands the Agencies will engage and collaborate during the initial stages of development as described in a. and b. below.

During planning for the development of a particular TMDL, ODF and DEQ will confer regarding existing monitoring or research data that ODF has access to regarding the condition of water quality on non-federal forestlands, and ODF will make such data available to DEQ if the data are relevant to the TMDL being developed, the TMDL load allocations, or the WQMP. DEQ and ODF also will confer regarding any additional data the Agencies believe may be necessary to assess whether existing generally applicable FPA rules are adequate to meet TMDL load allocations for non-federal forestlands.

**a.** During the initial stages of TMDL and WQMP development, DEQ will inform ODF of:

- i. The area or geographic extent that will be covered by the TMDL.

- ii. The water quality standards and 303(d) listings and impairments to be addressed.
- iii. The models and analytical methods that DEQ expects to use for TMDL development.
- iv. The existing data that DEQ expects to use and additional data that may be sought in development of the TMDL, including development of TMDL load allocations for non-federal forestlands.

**b.** During the subsequent stages of development of a TMDL that DEQ expects will include TMDL load allocations for non-federal forestlands, DEQ and ODF will confer regarding:

- i. Review of model calibration results.
- ii. Discussion of uncertainty and variability.
- iii. Model validation as appropriate (type of model, data availability, etc.).
- iv. TMDL model scenarios set up to identify sources, evaluate proposed allocations, and determine implementation options.
- v. Potential surrogate measures that identify landscape or water segment conditions likely to achieve TMDL load allocations.

During the TMDL and WQMP development, DEQ will make a preliminary determination regarding whether generally applicable Forest Practices Act (FPA) rules are adequate to achieve TMDL load allocations on non-federal forestlands. If DEQ makes a preliminary determination that additional measures are needed to achieve a load allocation, DEQ will identify the river, stream segment or types of conditions along with an estimate of the additional load reduction needed. In addition, DEQ will seek technical and programmatic input from ODF on additional regulatory or non-regulatory measures that are technically feasible and that could be implemented by rule revisions, stewardship agreements, incentive programs or other means and that, if implemented, would provide reasonable assurance to achieve the applicable TMDL load allocations. In cases where a TMDL is being adopted by rule, the final determination regarding adequacy of generally applicable FPA rules will be made by the EQC. If the DEQ or EQC determination is that the generally applicable FPA rules are not adequate to achieve the TMDL load allocations, ODF or the Board of Forestry will be given an opportunity to either revise the FPA rules or develop a TMDL implementation plan that includes additional measures. Implementation plans are subject to review and action by DEQ as to addressing TMDL allocations.

See Appendix 3 for a more detailed visual representation of the Agencies' collaboration on TMDL development, implementation and adaptive management.

#### **4.3. Development of revised temperature TMDLs pursuant to court schedule**

DEQ and EPA are under a court-ordered schedule for revising existing temperature TMDLs in 15 project areas around the state. See Appendix 2 to this agreement for the schedule by which DEQ and EPA will coordinate in carrying out these revised TMDLs. This expedited schedule requires a streamlined process for collaboration between DEQ and ODF for these particular TMDLs.

The steps to update the temperature TMDLs will follow the elements described in section 4.2. to the extent practicable. However, DEQ will not be able to incorporate additional data into the

development of the TMDLs or WQMPs. DEQ will inform and solicit input from ODF regarding DEQ's analysis as described in 4.2.b., although that engagement will necessarily be limited.

#### **4.4. TMDL Implementation**

The WQMP is the framework for TMDL implementation and is designed to work in conjunction with implementation plans provided by Designated Management Agencies (DMAs) and other responsible persons. ODF may propose additional measures to achieve TMDL load allocations in an implementation plan. Implementation plans are subject to DEQ review and approval. If DEQ does not approve an implementation plan it may specify additional measures needed for approval, or may request that the EQC petition the Board to adopt additional measures. The WQMP and implementation plan commitments constitute DEQ's federally-required reasonable assurance demonstration that the TMDL will be implemented, and that TMDL load allocations will be achieved. Reasonable assurance is a CWA requirement and is considered by EPA in its review.

TMDL implementation plans can take several forms:

- a. An existing "plan" or program, such as a Habitat Conservation Plan approved by the National Marine Fisheries Service and/or the U.S. Fish and Wildlife Service, a state forest management plan, a stewardship agreement, area-specific supplemental Forest Practice Act rules of the Board, multi-party landowner agreements, or other existing measures specific to non-federal forestlands. DEQ will document either geographically or describe the particular waterbody types or fact sets where current actions to carry out the "plan" satisfies the TMDL load allocation or is expected to achieve the TMDL load allocation with implementation over time. DEQ will also identify geographies or fact sets within the TMDL project area not covered by the plan or where the plan does not sufficiently address the TMDL load allocation, if any.
- b. A new plan or program may be proposed where existing measures are not adequate. If a new plan or program is needed, DEQ will confer with ODF to specify in the TMDL and/or WQMP the changes in environmental conditions that must be attained to meet applicable TMDL load allocations.

If DEQ or the EQC determine that generally applicable FPA regulations are not adequate to meet a TMDL load allocation, then ODF will prepare an implementation plan including additional measures designed to meet the applicable TMDL load allocations and submit it to DEQ for review. Generally, the implementation plan will be submitted within 18 months of DEQ's issuance of the TMDL and WQMP, with the submittal timeframe specified in the WQMP.

### **II.3. ODF-Led Water Quality Processes**

#### **1. Non-regulatory and incentive-based programs**

Non-regulatory programs (including incentive-based) as a supplement to regulatory programs are key to successfully achieving water quality goals. Implementing measures, with certainty, to attain the predicted outcomes identified to achieve water quality standards and reach TMDL load allocations is important to maintain and improve water quality. The Board and ODF encourage the use of non-regulatory measures where feasible. In addition, the FPA already has models of incentives for non-regulatory practices (e.g., OAR 629-642-0300). ODF will therefore expand implementation of non-regulatory measures, with incentives where possible, as a potential tool to achieve water quality standards and TMDL load allocations on non-federal, non-tribal



forestlands using its authority and direction from the Board. These measures will also be designed to provide reasonable assurance of implementation.

## **2. Water Quality Standards and TMDLs: Implementation Evaluation and Reporting**

ODF and DEQ concur that the focus of implementation of TMDLs and water quality standards will occur at the program-wide level to the greatest extent possible, for both regulatory (i.e., FPA) and non-regulatory measures. There will likely be instances (e.g., for certain TMDLs) where basin-specific implementation may be the best option, which the Agencies will determine as the need arises. ODF will enhance policies and practices for implementation measures through stakeholder input and/or adjustments in agency priorities. ODF will then report the implementation of regulatory and non-regulatory measures to DEQ on a regular basis.

## **3. FPA Sufficiency Reviews**

ODF has longstanding policy and rules on reviewing sufficiency of FPA rules to meet goals, including protection of water quality. DEQ will continue to be invited to participate in external review teams for soliciting input and seeking clarity and transparency for sufficiency reviews. For water quality-related rules, ODF completes these reviews using a variety of information sources such as literature reviews, field studies, and information from TMDL analyses, and with input from partner agencies. For FPA sufficiency reviews, TMDL information would be requested from DEQ that aligns with analysis at a site or reach level. ODF staff brings this information to the Board for their decisions on sufficiency of these rules to meet desired goals. If the Board finds the rules are insufficient at protecting water quality, there are several findings required to make changes to rules. In such instances, ODF and the Board coordinate with DEQ and the EQC to change the rules.

## **4. Basin-specific Rules**

If the Board determines based on evidence that forest practices in a watershed are measurably limiting achievement of water quality, it will appoint an interdisciplinary task force to analyze conditions in a watershed and recommend watershed-specific practices to ensure water quality achievement. The task force should rely on the findings and analysis used by the EQC in establishing the water quality standards and any approved TMDLs for the waterbody.

# **III. Mechanics of MOU**

## **III.1 MOU Implementation**

The Agencies are committed to carrying out their commitments and implementing the processes described in this MOU. The Agencies anticipate that implementation of this MOU will result in additional clarity and detail for these new, complex interactions, the details of which cannot be developed *a priori*. To ensure such processes are documented and transparent both within the Agencies and to the public, the Agencies will document these processes as they are developed. This documentation will be added to the MOU as addendums and be made available to the public.

## **III.2 MOU Amendment and Review processes**

The Agencies will periodically evaluate progress on implementation of this MOU and report on it to the Board and EQC, the meetings of which provide a public forum for increased

transparency. The Agencies will review this MOU every five years, or sooner if agreed upon by the Agencies. No amendments may be made to this agreement without the express written agreement of both Agencies.

### **III.3 Dispute Resolution**

Regarding water quality goals, the Agencies are committed to working together with the intent to resolve issues at the staff level in a timely manner. If issues cannot be resolved, elevation of specific disagreements within the Agencies' will occur as follows:

- If issues cannot be resolved at the staff and manager levels, managers will raise the issue to the Director and State Forester.
- The Director and State Forester will meet to provide direction to reach resolution before invoking options outlined in statute.

If resolution is not reached within the Agencies, state statutes lay out processes whereby the Board may request that the EQC review any water quality standard that affects forest operations on forestlands. Similarly, in the instance that DEQ determines that existing Board rules or any other measures proposed to reduce pollution from these forestry activities (which may include voluntary actions as well as regulatory changes) are inadequate to achieve water quality standards, DEQ will initiate the petition process set forth in state statute by asking the EQC to petition the Board to revise its rules to protect water quality on forestlands.

\_\_\_\_\_ Date: \_\_\_\_\_  
Calvin Mukumoto, State Forester  
Oregon Department of Forestry

\_\_\_\_\_ Date: \_\_\_\_\_  
Richard Whitman, Director  
Oregon Department of Environmental Quality

### **References**

ODF, ODA, DSL, ODFW, OPRD, DLCD, DEQ. 2006. Memorandum of Agreement (MOA), Conversions of Forestland.

PARC. 2006. Memorandum of Agreement (MOA) between Oregon Pesticide Analytical and Response Center (PARC) and Oregon Department of Forestry.



**DEPARTMENT OF JUSTICE  
GENERAL COUNSEL DIVISION**

**MEMORANDUM**

DATE: March 2, 2021

TO: Peter Daugherty, State Forester, Department of Forestry  
Richard Whitman, Director, Department of Environmental Quality

FROM: Matt DeVore, Assistant Attorney General, Natural Resources Section  
Diane Lloyd, Assistant Attorney General, Natural Resources Section

SUBJECT: Authority to Protect Water Quality on Forestlands

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**Question presented:**

What are the respective authorities and obligations of the Environmental Quality Commission and the Board of Forestry for the protection of water quality on forestland? <sup>1</sup>

**Short answer:**

The Environmental Quality Commission (Commission) is charged with protecting the quality of waters of the state and with administering the federal Clean Water Act (CWA) in Oregon. This responsibility includes establishing water quality standards to protect beneficial uses of waters, issuing permits and certificates that limit water pollution, and (in areas where water quality standards are not met) overseeing development and implementation of plans to further limit pollution from all sources in order to improve water quality so that standards are met in the future. These plans, known as “Total Maximum Daily Loads” or “TMDLs” identify the amounts of pollution that can occur from particular sources in order to achieve water quality standards. If pollution reductions are needed from particular sources in order to improve water quality and meet standards, they are achieved through limits and requirements in permits and certificates (for point sources), and through implementation plans (for non-point sources, such as forest

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<sup>1</sup> Public disclosure of this Memorandum is not intended to operate as a waiver of the attorney-client privilege. The Attorney General provides advice and representation to the Governor, any officer, agency, department, board or commission of the state or any member of the legislature. The Attorney General may not render opinions or give legal advice to persons other than the state officers listed above. Any opinions or conclusions in this memo are not intended to be advice, except as provided in ORS 180.060.

operations). To approve TMDLs, the Department of Environmental Quality (DEQ) (or the Commission), and then the federal Environmental Protection Agency (EPA), must conclude that these management actions (carried out through permits and certificates issued by DEQ), and implementation plans (which are normally prepared by other governmental entities and approved by DEQ), are likely to be implemented to achieve water quality standards.

The Board of Forestry (Board) is obligated to establish best management practices and forest practice rules to ensure that, to the maximum extent practicable, nonpoint source discharges of pollutants resulting from forest operations on forestlands do not impair the achievement and maintenance of water quality standards set by the Commission. This obligation includes two elements, first, maintaining the water quality of water bodies that already meet those standards, and second, the implementation of plans (including TMDL implementation plans) to improve the water quality of water bodies that do not meet the standards. In considering forest practice rules, the Board also must make a series of determinations related to the need, effectiveness and impacts of the proposed rules.

## **Discussion**

### Environmental Quality Commission and Department of Environmental Quality

The Commission has controlling authority for regulating water pollution.<sup>2</sup> Under the direction of the Commission, the legislature charged DEQ with taking such actions as are necessary for the prevention of new pollution and the abatement of existing pollution.<sup>3</sup> The legislature charged the Commission with the obligation to adopt water quality standards and to take other steps necessary to implement the CWA in Oregon.<sup>4</sup> Water quality standards, if approved by EPA, have the effect of federal law.<sup>5</sup> If the EPA does not approve the standards, the EPA must develop and adopt standards that would apply to Oregon's water bodies.<sup>6</sup>

Water quality standards consist of three components: a designated use or uses for the water body, water quality criteria based upon such uses and antidegradation requirements.<sup>7</sup> One of the designated uses that frequently creates a limiting factor relevant to forestry operations is native cold water dependent aquatic species, such as salmon and trout. Water quality standards include the water quality criteria and policies to protect these designated uses. In the case of temperature, the criteria are made up of numeric and narrative elements, including (a) biologically-based numeric criteria (for example, with temperature, a 7-day average of the daily

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<sup>2</sup> ORS 468B.010.

<sup>3</sup> ORS 468B.020(2).

<sup>4</sup> ORS 468B.048, ORS 468B.035. *See also* Clean Water Act, 33 USC §1251 et seq.

<sup>5</sup> 33 USC §1313(c)(3).

<sup>6</sup> 33 USC § 1313(c)(4); 40 CFR § 131.22.

<sup>7</sup> 40 CFR § 131.3(i), 40 CFR § 131.6.

maximum stream temperature)<sup>8</sup>; and (b) a narrative criterion or criteria (for example, no increase in temperature is allowed that would reasonably be expected to impair cool water species).<sup>9</sup> The temperature standard also includes an anti-degradation requirement, designed to prevent high-quality waters that meet the biologically-based numeric criteria from being degraded (for example, the protecting cold water standard that limits temperature increases from all sources taken together to 0.3 degrees Celsius).<sup>10</sup>

Every two years, DEQ must assess water quality throughout the state and report to the EPA on the condition of Oregon's waters. DEQ prepares an Integrated Report that meets the requirements of CWA sections 305(b) and 303(d). Section 305(b) requires a report on the overall condition of Oregon's waters. Section 303(d) requires DEQ to identify waters that do not meet water quality standards. If a waterbody fails to meet one or more water quality standards, DEQ is required to identify the amounts of pollution coming from different sources, and determine what reductions are necessary in order for the applicable standard to be met. This determination is called a Total Maximum Daily Load (TMDL).<sup>11</sup> CWA section 303(d) requires that a TMDL be "established at a level necessary to implement the applicable water quality standard." Federal and state regulations define a TMDL as the sum of the wasteload allocations (allowable pollutant loads from point sources), load allocations (allowable pollutant loads from nonpoint sources), and background."<sup>12</sup> The TMDL identifies the amounts of pollutants that a water body can receive and still meet water quality standards.

Where a pollutant is highly variable or difficult to measure directly, a TMDL may use surrogate measures as an additional means to express allocations.<sup>13</sup> One example, particularly important for nonpoint sources such as farm and forestry operations, is the use of riparian shade as a surrogate measure for temperature TMDLs. EPA regulations allow TMDLs to be "expressed in terms of either mass per time, toxicity, or other appropriate measure."<sup>14</sup> For TMDLs for water bodies that do not meet temperature standards, DEQ typically determines nonpoint source heat loads by analyzing current shade levels relative to the amount of shade likely to occur without operations impacting shade cover in riparian areas. Under this analysis, DEQ is able to correlate shade levels needed along particular stream segments within sub-basins (fourth order hydrologic units set by the U.S. Geological Service, such as the Imnaha subbasin of the Grande Ronde in eastern Oregon, and the Applegate subbasin of the Rogue basin in western Oregon) in order for biologically-based numeric criteria to be met.<sup>15</sup>

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<sup>8</sup> See, e.g. OAR 340-041-0028(4)(a), limiting temperature to 13 degrees Celsius for certain streams at certain times of the year.

<sup>9</sup> OAR 340-041-0028(9)(a).

<sup>10</sup> OAR 340-041-0028(11).

<sup>11</sup> 33 USC § 1313(d); ORS 468B.110.

<sup>12</sup> 40 CFR 130.2(i); OAR 340-042-0040(4)(b).

<sup>13</sup> OAR 340-042-0040(5)(b).

<sup>14</sup> 40 CFR § 130.2(i).

<sup>15</sup> See Willamette Temperature TMDL, Figure 4.17, p.4-71 and Appendix C, <https://www.oregon.gov/deq/FilterDocs/chpt4temp.pdf>.

TMDLs must be reviewed by EPA for consistency with federal requirements. In order to be approved by EPA the TMDL must be accompanied by a management plan that provides reasonable assurance that, when implemented, it will result in attainment of the relevant water quality standard.<sup>16</sup> When a TMDL is developed for waters impaired by point sources only, the issuance of discharge permits to the point sources provides the reasonable assurance that the wasteload allocations in the TMDL will be achieved because federal regulations require that effluent limits in permits be consistent with wasteload allocations in applicable approved TMDLs.<sup>17</sup> Where a TMDL is developed for waters impaired by both point and nonpoint sources, EPA evaluates whether nonpoint source reductions specified in the TMDL have a “reasonable assurance” of occurring. In its evaluation, EPA considers whether practices capable of reducing the specified nonpoint source pollutant loads: “(1) exist; (2) are technically feasible at a level required to meet allocations; and (3) have a high likelihood of implementation.”<sup>18</sup> EPA’s requirement of reasonable assurance of implementation of load allocations for nonpoint sources was upheld by the United States Third Circuit Court of Appeals.<sup>19</sup> Load allocations for nonpoint source pollution are often broad in nature and can be assigned to types or sectors of nonpoint sources such as all non-federal forest operations in a sub-basin.<sup>20</sup>

As discussed, DEQ’s TMDLs are not water quality standards, but are the state’s primary plan for achieving the water quality standards in waterbodies where standards are not met.<sup>21</sup> As noted above, the TMDL wasteload allocations for point sources are implemented through discharge permits issued by DEQ.<sup>22</sup> For non-point sources, the TMDL allocations are implemented by designated management agencies (DMAs), such as cities, counties and other government agencies (including ODF for non-federal forestlands), as identified by DEQ in the TMDL.<sup>23</sup> DMAs develop TMDL implementation plans that may contain regulatory measures, non-regulatory measures, or both, and that are subject to review and approval by DEQ.<sup>24</sup>

For non-federal forestlands, the Commission has adopted a specific TMDL implementation rule. This rule provides that “[n]onpoint source discharges of pollutants from forest operations on state or private lands are subject to best management practices and other control measures established by the Oregon Department of Forestry under \* \* \* ORS 527.610 to 527.992 and according to OAR chapter 629, divisions 600 through 665.”<sup>25</sup> However, “[i]n areas where a

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<sup>16</sup> *EPA Guidance for Water Quality-based Decisions: The TMDL Process*, p. 24. April 1991.

<sup>17</sup> 40 CFR 122.44(d)(1)(vii)(B).

<sup>18</sup> *See, e.g.*, Environmental Protection Agency, EPA Chesapeake Bay TMDL. Section 7. Reasonable Assurance and Accountability, available at [www.epa.gov/sites/production/files/2014-12/documents/cbay\\_final\\_tmdl\\_section\\_7\\_final\\_0.pdf](http://www.epa.gov/sites/production/files/2014-12/documents/cbay_final_tmdl_section_7_final_0.pdf).

<sup>19</sup> *American Farm Bureau Federation vs. United States Environmental Protection Agency*, 792 F3d 281, 300-301 (2015).

<sup>20</sup> 40 CFR § 130.2(g).

<sup>21</sup> 40 CFR § 130.7(c).

<sup>22</sup> ORS 468B.050.

<sup>23</sup> ORS 468B.110(1).

<sup>24</sup> OAR 340-042-0040(4)(1)(G), OAR 340-042-0080(1).

<sup>25</sup> OAR 340-042-0080(2).

TMDL has been approved, site specific rules under the Forest Practices Act rules will need to be revised if [DEQ] determines that the generally applicable Forest Practices Act rules are not adequate to implement the TMDL load allocations.”<sup>26</sup> If the Board fails to act following such a determination by DEQ, then DEQ must request that the Commission petition the Board for rule changes.<sup>27</sup> If the Commission made such a petition and the Board failed to adopt changes within two years,<sup>28</sup> the Commission could adopt by rule and enforce, or DEQ could adopt by order and enforce, source-specific requirements on forest operations in a sub-basin in order to comply with the TMDL requirements of section 303(d) of the federal Clean Water Act and the need to establish “reasonable assurance” of implementation.<sup>29</sup>

State law provides that neither the Commission nor DEQ may adopt or enforce any effluent limitation upon nonpoint source discharges from forest operations, unless they are required to do so by the provisions of the CWA.<sup>30</sup> TMDL load allocations are not effluent limits as that term is defined in the context of the CWA to apply to limits on point source discharges of pollutants in discharge permits.<sup>31</sup> Additionally, as discussed above, when a water body is not meeting water quality standards a TMDL is required by the CWA and therefore the state law limitation on the adoption of “effluent limitations” cannot be interpreted as a prohibition on adopting load allocations in the context of TMDL development.

#### Board of Forestry and Department of Forestry

The legislature delegated to the Board the responsibility to “supervise all matters of forest policy and management under the jurisdiction of the state.”<sup>32</sup> The legislature provided the Board with exclusive authority to develop and enforce forest practice rules and the obligation to coordinate with other state agencies concerned with the forest environment.<sup>33</sup> The Board must adopt forest practice rules that provide for the overall maintenance of air quality, water resources, soil productivity, and fish and wildlife.<sup>34</sup> Specifically as to water quality, the Board must establish best management practices (BMPs) and forest practices rules to ensure that to the maximum extent practicable nonpoint source discharges of pollutants resulting from forest operations on forestlands do not impair the achievement and maintenance of water quality standards established by the Commission.<sup>35</sup> To establish best management practices the Board must adopt rules for forest practice that prevent or reduce pollution to waters of the state.<sup>36</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> ORS 527.765(3)(e).

<sup>29</sup> ORS 468B.110(1).

<sup>30</sup> ORS 468B.110(2).

<sup>31</sup> 33 USC § 1311; 40 CFR § 122.2.

<sup>32</sup> ORS 526.016.

<sup>33</sup> ORS 527.630(3).

<sup>34</sup> ORS 527.710(2).

<sup>35</sup> ORS 527.765(1).

<sup>36</sup> *Id.*

The legislature provided further direction to guide the Board's rulemaking process. When the Board enacts forest practice rules that are not specifically addressed in statute, it must do all of the following:

- Describe the purpose of the rule and the level of protection desired.<sup>37</sup>
- Determine that there is monitoring or research evidence that documents that degradation of resources is likely.<sup>38</sup>
- Determine that the proposed rule reflects available scientific information, the results of relevant monitoring and, as appropriate, adequate field evaluation at representative locations in Oregon.<sup>39</sup>
- Determine that the objectives of the rule are clearly defined.<sup>40</sup>
- Determine that the restrictions placed on forest practices as a result of adoption of the proposed rule:
  - Are to prevent harm or provide benefits to the resource or resource site for which protection is sought,<sup>41</sup> and
  - Are directly related to the objective of the proposed rule and substantially advance its purpose.<sup>42</sup>
- Determine that the availability, effectiveness and feasibility of alternatives to the proposed rule were considered, and the alternative chosen is the least burdensome while still achieving the desired level of protection.<sup>43</sup>
- Determine that the benefits to the resource that would be achieved by adopting the rule are in proportion to the degree that existing practices are contributing to the overall resource concern.<sup>44</sup>
- Prepare and make available to the public a comprehensive analysis of the economic impact of the proposed rule.<sup>45</sup>

Current Board rules provide that if the Board determines that forest practices in a watershed are measurably limiting water quality achievement or species maintenance, and the water body in the watershed is either: (a) designated by the Commission as water quality limited, or (b) contains threatened or endangered aquatic species, the Board must appoint an interdisciplinary task force that includes representatives of forest landowners within the watershed and from appropriate state agencies.<sup>46</sup> The task force must analyze the conditions in the watershed and recommend

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<sup>37</sup> ORS 527.714, ORS 527.714(4).

<sup>38</sup> ORS 527.714(5)(a).

<sup>39</sup> ORS 527.714(5)(c).

<sup>40</sup> ORS 527.714(5)(d).

<sup>41</sup> ORS 527.714(5)(d)(A).

<sup>42</sup> ORS 527.714(5)(d)(B).

<sup>43</sup> ORS 527.714(5)(e).

<sup>44</sup> ORS 527.714(5)(f).

<sup>45</sup> ORS 527.714(7).

<sup>46</sup> OAR 629-635-0120(2).



whether additional watershed-specific protection rules are needed.<sup>47</sup> The task force should rely on the findings and analysis used by the Commission in establishing the water quality standards and any approved TMDLs for the waterbody.

Forest operations must be conducted in full compliance with the rules and standards of the Commission.<sup>48</sup> If the operation is conducted in accordance with the Board's rules currently in effect, then an operator shall not be considered in violation of any water quality standard.<sup>49</sup> This is often referred to as a "BMP shield." The BMP shield can be lost if the Board does not take timely action to review BMPs in response to a petition from the Commission, as described below.<sup>50</sup>

### Implementation of Water Protection Measures on Forestlands

As described above, the Board, the Commission, ODF, and DEQ have interconnected roles in protecting Oregon's water quality on forestlands. Broadly speaking, the Commission and DEQ assess waters and establish the water quality standards, while the Board and ODF then establish forest practices to comply with and work towards compliance with those standards. The legislature intended for the two agencies to work collaboratively on their efforts so that each agency brings in its specific perspective and expertise to create a coordinated effort with the goal of protecting water quality and complying with the CWA.

Coordination between the agencies is an ongoing process. This coordination can help to inform the Commission's development of water quality standards, which can include waterbody specific criteria. The Commission establishes water quality standards in rule based on EPA regulations and guidance as well as DEQ's research and analysis.<sup>51</sup> The Board and ODF may assist in the Commission's decisions related to water quality standards and also participate in DEQ's water quality standards revision process.<sup>52</sup> The Board may also request that the Commission review any water quality standard that affects forest operations on forestlands.<sup>53</sup> However, state water quality standards must be reviewed and approved by EPA, so the state's authority in developing standards is limited by what is approvable by EPA.<sup>54</sup>

If a waterbody is meeting the Commission's water quality standards, the Board's obligation is to ensure that forest practices do not impair maintenance of those standards.<sup>55</sup> If a waterbody is not meeting the Commission's water quality standards, DEQ will establish a TMDL for that

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<sup>47</sup> OAR 629-635-0120(3).

<sup>48</sup> ORS 527.724.

<sup>49</sup> ORS 527.770.

<sup>50</sup> ORS 527.770, 527.765(3)(e).

<sup>51</sup> ORS 468B.048.

<sup>52</sup> ORS 468B.110; OAR 340-041-0001.

<sup>53</sup> ORS 468B.105.

<sup>54</sup> 33 USC § 1313(c)(3); 40 CFR 131.21.

<sup>55</sup> ORS 527.765.

waterbody, and determine whether current Board rules and any other measures proposed by ODF are adequate to achieve the pollution reduction required by the TMDL.<sup>56</sup> The Board and ODF should participate actively in DEQ's development of any TMDL involving state and private forestlands, including sharing data and information prior to and during TMDL development, and by participating in and providing input during DEQ's Local Advisory Group.<sup>57</sup> Once a TMDL is adopted and approved by EPA, any load allocations for non-federal forestlands and operations included in the TMDL will be binding. The Board is then obligated to implement rules that establish forest practices (which may include voluntary actions as well as regulatory changes) consistent with the TMDL. If DEQ then determines that existing Board rules or any other measures proposed to reduce pollution from these forestry activities (which may include voluntary actions as well as regulatory changes) are inadequate, DEQ will initiate the petition process set forth in ORS 527.765, by asking the Commission to petition the Board to revise its rules to protect water quality on forestlands. This process could lead to the loss of the BMP shield provisions for forest operations if the Board fails to revise the rules within the required time.

If the Board initiates rulemaking to adopt basin-specific water protection rules, it must follow the procedural steps required by forestry statutes, including making the findings required by ORS 527.714. DEQ's determination of a load allocation for non-federal forestlands in a sub-basin would be binding on the Board in establishing an overall target for the Board. However, the Board would retain discretion to determine *how* to achieve that target or outcome. In particular, under ORS 527.714(5)(e), the Board is obligated to choose the alternative practice that is the "least burdensome to landowners \* \* \* while still achieving the desired level of protection." In addition, ORS 527.765(1) requires the Board to establish forest practice rules that meet a "maximum extent practicable" (MEP) standard. The Commission is not under an obligation to consider the burden to the landowners, however, nor is the MEP limitation included in Section 303(d) of the Clean Water Act. For the Board to meet its statutory obligation, it must look beyond the analysis of the Commission and take into account the effect that a particular forest practice would have on landowners. But because TMDL implementation is a requirement of the Clean Water Act, this required analysis does not authorize the Board to change the Commission's determination of water quality standards or TMDL requirements.

In sum, as the Board and Commission work cooperatively to improve water quality in sub-basins that are not currently meeting water quality standards, the Commission is responsible for determining the overall amount of pollution reduction needed on non-federal forestlands, and the Board is responsible for determining how to achieve those reductions. In determining whether current, generally applicable, Board rules are adequate to achieve reductions, the Board, ODF, DEQ and the Commission may also consider non-regulatory measures so long as DEQ can establish that there is a reasonable assurance that the measures, when implemented, will result in attainment of the relevant water quality standard.

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<sup>56</sup> 33 USC § 1313(d); ORS 468B.110.

<sup>57</sup> ORS 468B.110; OAR 340-042-0050.

## **Appendix 2. Temperature TMDL Replacement Schedule**

DEQ must amend and submit replacement temperature TMDLs for the areas listed below. DEQ must submit TMDLs to EPA at least 30 days in advance in order for EPA to complete its approval or disapproval by the dates listed below.

### **Jan. 15, 2024**

- Southern Willamette Subbasins\*
- Mid-Willamette Subbasins\*
- Lower Willamette, Clackamas, and Sandy Subbasins\*

*\*This TMDL will exclude the Willamette River mainstem and major tributaries. TMDLs for the Willamette River mainstem and major tributaries will be developed and submitted for EPA's approval or disapproval by Feb. 28, 2025.*

### **Feb. 28, 2025**

- Willamette River mainstem and major tributaries  
Tributaries included in the Willamette mainstem and major tributaries project area:
  - Willamette River from the confluence of the Columbia River including the Willamette Channel and the Multnomah Channel to confluence of Coast and Middle Forks (approximately river mile 187)
  - Clackamas River up to River Mill Dam/Estacada Lake (approximately river mile 26); Santiam River (all 12 miles)
  - North Santiam River up to Detroit Dam (approximately river mile 49)
  - South Santiam River up to Foster Dam (approximately river mile 38)
  - Long Tom River to Fern Ridge Dam (approximately river mile 26)
  - McKenzie River to confluence with the South Fork McKenzie River (approximately river mile 56)
  - South Fork McKenzie River to Cougar Dam (approximately river mile 4)
  - Blue River to Blue River Dam (approximately river mile 1.9)
  - Middle Fork Willamette to Dexter Dam (approximately river 17)
  - Fall Creek to Fall Creek Dam (approximately river mile 7)
  - Coast Fork Willamette to Cottage Grove Dam (approximately river mile 30)
  - Row River to Dorena Dam (approximately river mile 7.5)
- North Umpqua Subbasins
- South Umpqua and Umpqua Subbasins

### **Apr. 17, 2026**

- Applegate, Illinois, Lower Rogue, and Middle Rogue Subbasins

- John Day River Basin
- Upper Rogue Subbasin

**June 4, 2027**

- Snake River - Hell's Canyon
- Lower Grande Ronde, Imnaha and Wallowa Subbasins
- Middle Columbia-Hood, Miles Creeks

**May 29, 2028**

- Walla Walla Subbasin
- Willow Creek Subbasin
- Malheur River Subbasins

**Appendix 3. Flowchart : DEQ/ODF Collaboration in TMDL Process**

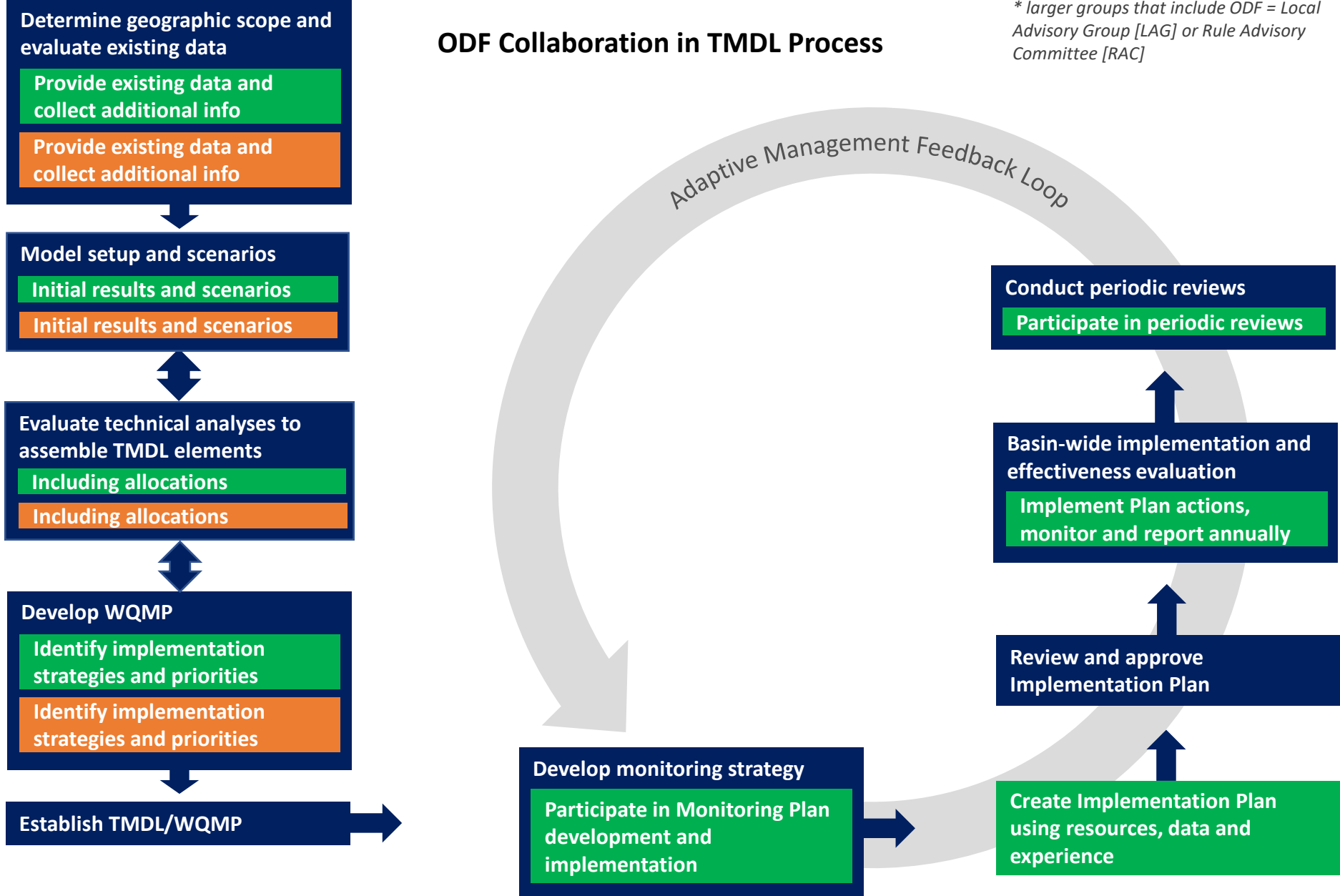
# Every 2 years, DEQ reports TMDL priorities to EPA

Discuss TMDL development priorities

- DEQ process/decision point
- ODF-DEQ discussion
- LAG or RAC input\*

\* larger groups that include ODF = Local Advisory Group [LAG] or Rule Advisory Committee [RAC]

## ODF Collaboration in TMDL Process



# ODF-DEQ MOU Public Input and Response Summary

## 1. Overview of public process

The Oregon Department of Forestry (ODF) and the Oregon Department of Environmental Quality (DEQ) drafted a Memorandum of Understanding (MOU). It describes the Agencies' collaboration to protect high quality waters and improve water quality where water quality standards are not met. The Agencies requested public input on the draft MOU from September 1 through 30. Two parties requested to extend the deadline, which the Agencies extended to October 7.

The Agencies received 621 comments, 27 of which were unique. These comments ranged from 1-21 pages long. Twelve submittals represented organizations or coalitions. Most of the unique comments were from the environmental community, two from agencies, a couple from political organizations, two from the landowner/operator community and one from a Native American Tribe.

## 2. Summary of comment themes and the Agencies' responses

The Agencies reviewed all comments received and considered whether revisions to the MOU were warranted.

### Summary of MOU changes

The final MOU includes numerous revisions based on public comments, internal review and feedback from members of the Board of Forestry (Board) and the Environmental Quality Commission (EQC). The MOU was edited to reduce redundant language and sections, highlight a sense of urgency for the work of DEQ and ODF and add a commitment for regular progress reporting to the Board and the EQC. The MOU now commits the Agencies to documenting and institutionalizing important processes outlined in the MOU.

The Agencies made the latter revisions due to comments that requested additional specificity, timelines and commitments. The Agencies recognize that they must be accountable and transparent in work performed under this MOU. The Agencies also have a shared sense of urgency to finalize this MOU and begin implementing these actions and processes. Also, the Agencies acknowledge that further efforts to refine and detail processes could delay the important work described and committed to within this MOU. Therefore, the Agencies will document the details of their interactions in various programs and processes as they are encountered during their collaboration. The Agencies will append this documentation to the MOU as appropriate.

### Comment themes and responses

The comments received and how they were considered are summarized below. Comment topics were grouped into themes, listed in **bold**. Each specific topic is presented along with how many commenters provided input, commenter identification numbers and a response from the Agencies. The list of commenters with identification numbers follows the comment summary. All comment letters are attached.

### **Support for MOU**

Seven commenters (1, 6, 8, 12, 13, 14, 24) supported the Agencies' work on the MOU and recommended the Agencies make changes to the MOU. The Agencies did not receive any comments that were not supportive of this effort.

### **Request for language on compliance with cultural resources laws**

The Coquille Tribe (23) requested the MOU explicitly address compliance with cultural resource laws.

Response: While the MOU implies the Agencies' agreement to follow all relevant state and federal laws, the Agencies added an explicit statement of this intent to the section on principles of collaboration.

### **The MOU needs to clarify language and terms, including using precise terminology**

Vision and Purpose - clarity and urgency needed: Eight commenters (10, 12, 15, 16, 19, 20, 25) supported the vision and purpose of the MOU, but also requested accountability for meeting the goal of improved water quality on forestlands. They requested this accountability because of the urgency of degraded waters and beneficial uses as demonstrated by their examples.

Response: The Agencies appreciate this concern for protecting and restoring water quality and reframed the introduction to reflect urgency. The Agencies anticipate implementation of the MOU as an important and needed step to address these persistent issues. In addition, MOU changes to increase accountability include regular evaluation of collaboration results and reporting in the public forums offered by meetings of the Board and the EQC.

Voluntary practices/BMPs: Seven commenters (12, 14, 16, 19, 20, 21, 24, 25) raised concerns that voluntary practices are not adopted into rule and may be insufficient or even undermine regulations to meet the MOU's water quality goals. In contrast, the Associated Oregon Loggers suggests using non-regulatory programs whenever possible to achieve Clean Water Act (CWA) requirements to retain the Agencies' good partners (forestland owners and operators).

Response: The Agencies considered these contrasting comments and decided no changes to the MOU were warranted. Due to the broad nature of sources across a watershed, approaches to TMDL implementation must also be broad. The implementation framework necessarily includes regulatory and non-regulatory management strategies across all sectors and sources within a watershed. Implementation tracking and reporting and periodic watershed monitoring and evaluation are intended to ensure that both regulatory and voluntary practices are implemented and effective at achieving TMDL goals. As part of the adaptive management framework, implementation plans may need revisions when voluntary measures are found to be inadequate. Such revisions may include adding regulatory measures.

DOJ memo misinterpreted: Four commenters (5, 8, 20, 25) stated that the Agencies misinterpreted sections of the 2021 DOJ Memo appended to the MOU.

Response: The Agencies specifically requested the 2021 DOJ Memo to guide development of the MOU. The Agencies believe the MOU is consistent with the legal authorities and DOJ Memo.

### **Details needed on roles, timelines, history and context and the concepts of climate change, reasonable assurance, adaptive management and implementation plans.**

Details and timelines for actions and adaptive management needed: Four commenters (8, 12, 20, 25) preferred adding details into the MOU on: the TMDL adaptive management process; enhancement of ODF practices; stakeholder engagement; overcoming ODF staffing and implementation challenges; compliance monitoring; enforcement; and specific timelines for achieving particular goals in water quality improvements or adopting basin-specific rules to do so. Another 580 commenters (4, 10, 27) wanted the MOU to establish timelines for Agencies' agreement on improved forest practices to meet water quality objectives or for DEQ to mandate practices to do so.



Response: The Agencies considered these requests and made some revisions, including adding a flow chart showing collaboration opportunities during TMDL development and implementation. The MOU commits the Agencies to collaborate with existing authorities and programs that address each of these concerns.

MOU history and legal evolution missing: Five commenters (15, 16, 20, 25, 26) preferred adding details into the MOU on: the history of relevant DOJ memoranda and addressing Coastal Zone Act Reauthorization Amendment (CZARA) outcomes.

Response: The Agencies acknowledge there is a long history to these processes. However, the focus of the revised MOU is forward-looking. The MOU commits the Agencies to collaborate within existing authorities and programs and does not negate the DOJ memoranda.

Enforceability and Accountability missing: Four commenters (19, 20, 21, 25) indicated that enforceability and accountability to achieve the MOU's water quality goals were missing.

Response: The Agencies considered the comments and changed the MOU to increase accountability regarding MOU implementation and to state adherence to all relevant state and federal laws. The MOU is a commitment to actions between the Agencies, which follows the reason for developing MOUs. However, the statutes and rules on which the collaboration described in the MOU relies are enforceable, as described in the accompanying 2021 DOJ Memorandum.

Reasonable assurance of implementation: Two commenters (8, 15) questioned how and when reasonable assurance of implementation is determined within the TMDL process.

Response: The MOU describes how the Agencies will determine ODF's implementation of TMDL load allocations in the TMDL and the Water Quality Management Plan. Because EPA's conclusion about whether the TMDL has reasonable assurance of being implemented is addressed between DEQ and EPA during the TMDL process, the Agencies decided those changes to the MOU were not warranted. For clarification purposes, however, the Agencies offer the following facts: 1) EPA's description and consideration of reasonable assurance is documented in its guidance and memos interpreting case law; and 2) Implementation of TMDLs is incumbent upon the states to document relying on their programs and authorities.

Implementation plans or measures to achieve load allocations: Four commenters (13, 14, 15, 19) expressed approval for the MOU's acknowledgement of existing or newly developed implementation plans that may contain pollution control actions beyond forest practices rules. Many of the comments also requested additional information about review, approval and implementation of these plans.

Response: The agencies considered these comments and appreciate the support for plans intended to assist implementation of TMDLs. No changes were made to the MOU because implementation plan development, review, approval and implementation is expected to follow the existing process undertaken by other designated management agencies, which does not need to be repeated in the MOU.

Climate Change needs to be addressed: Nine commenters (5, 10, 12, 15, 16, 19, 20, 24) suggested that climate change should be a significant focus in the MOU.

Response: The Agencies concur that climate change is important and therefore added MOU language referencing climate change efforts and policies.

## **Concerns with DEQ-ODF interactions and authorities**

Inefficient decision processes: Two commenters (20, 25) expressed concern that timelines for achieving improved water quality on forestlands will be further delayed because the MOU relies too much on consensus decision-making, especially when clear decision authority is described in the 2021 DOJ Memo.

Response: While the MOU focuses on collaboration, the Agencies retain their respective decision-making responsibilities. The Agencies will document and append to the MOU when appropriate clear processes for how they will use data, information, and insight gained through collaboration in making their decisions per the MOU.

Water quality processes are DEQ's purview alone: Four commenters (15, 20, 21, 25) asserted that the MOU on agency collaboration equates to DEQ abdicating authority under the CWA and ODF having undue influence on DEQ's process and in a way that other agencies do not.

Response: The Agencies disagree with these interpretations. In contrast, the MOU and accompanying 2021 DOJ Memo describe the distinct authorities of the Agencies, including some of DEQ's federal CWA obligations, as well as the unique nexus of the Agencies' responsibilities for water quality protection and restoration afforded by state statutes and rules. Rather than either agency giving over any authorities, the intent of the MOU is to find ways to work together within both Agencies' authorities toward improved outcomes for water quality. Further, the Agencies have similar agreements and processes with other agencies related to working together for water quality improvement that offer similar opportunities for interagency participation in CWA processes. DEQ's TMDL rules require inclusive processes for participation by the interested public and parties responsible within DEQ's TMDL development and implementation processes.

Transparency with the public, other agencies and affected landowners/operators: There were 580 commenters (4, 15, 24, 26) that indicated a need within the MOU for greater transparency with the public, other agencies and affected landowners/operators and offer some suggestions for how to achieve that.

Response: The Agencies considered these comments and made some changes to the MOU in response. The Agencies determined that existing processes (e.g., public information requests, TMDL advisory and outreach processes) are in place to achieve transparency in activities that occur within the existing authorities of ODF and DEQ, as described in the 2021 DOJ Memo that accompanies the MOU. As described above, the Agencies modified the MOU to increase accountability and public awareness around implementation of the MOU by including periodic evaluation of MOU progress and reporting on it in the public forums offered by meetings of the Board of Forestry and Environmental Quality Commission.

## **Concerns with data gaps and using data and analysis appropriately**

FPA Sufficiency Reviews: There were 590 commenters (4, 6, 9, 10, 11, 12, 14, 15, 16, 20, 21, 24, 25) that requested changes to the MOU specific to the FPA Sufficiency Review process.

Response: The Agencies considered these comments but did not make changes to the MOU in response. The processes for establishing, evaluating sufficiency of, and revising forest practices are delineated in state statutes and rules, as referenced in the 2021 DOJ Memo accompanying the MOU. The MOU is not an alternative to the existing statutes and rules, but rather it enhances coordination within these existing authorities toward improved water quality outcomes. In consideration of these and other comments, the Agencies made changes to the MOU to increase accountability in achieving its goals. The Agencies will consider opportunities for improving collaboration on FPA Sufficiency Reviews as they implement and review the MOU.

Data concerns: Five commenters (6, 10, 15, 19) wanted more details in the MOU on data and adaptive management, including: confirmation that DEQ will evaluate ODF data for use, rather than an expectation of carte blanche acceptance; how to address existing data gaps; objections to ODF involvement in DEQ modeling, calibration, etc.; that monitoring is not mentioned but is a key component of adaptive management; and Pesticide Stewardship Partnership monitoring is not mentioned.

Response: The Agencies considered these issues and found that some were out of the MOU's scope. However, agency collaboration on monitoring and data use is an important element of MOU implementation. DEQ's specification of data quality objectives and relevance is done programmatically and is not specific to ODF. Because the MOU is a guide for DEQ and ODF collaboration, additional specifics were not added. Instead, specifics about implementation will be documented as they are encountered and appended to the MOU as appropriate.

### **Out of scope for the MOU**

Nine commenters (1, 2, 6, 14, 15, 17, 20, 24, 25) raise issues that are important in the context of protecting water quality in Oregon, including: waterways scheduled for TMDL development; makeup of DEQ TMDL advisory groups; elements of TMDL process; ensuring requirements of the CZARA are met; changes to state statutes; not explicitly stating all statutes/rules within the MOU; climate change impacts to water quality and quantity cannot be fixed with riparian management zones; drinking water and water availability; maintaining high quality waters and accessing private lands.

Response: These issues are considered and addressed under processes and authorities outside the scope of the MOU. While DEQ and ODF are confident some of these issues will be positively impacted by the collaboration described in the MOU, no changes were made to the MOU to address any of these specifics.

2021 DOJ Memo misinterprets authorities: Two commenters (13, 24) assert that the DOJ was incorrect in interpreting the Agencies' authorities in their 2021 Memo.

Response: These comments were beyond the scope of input sought by the Agencies. The agencies were not seeking comment on DOJ's analysis. The DOJ memo was provided to provide background and context for the MOU.

Finalize MOU after new state forester approves it: There were 577 commenters (4) that requested the Agencies defer MOU finalization until a new state forester was hired and had time to review the MOU.

Response: The state forester will sign the final MOU.

ODF conflict of interest: Three commenters (5, 9, 15) indicated that ODF should not actively participate in water quality decisions with DEQ because it is beholden to timber interests.

Response: The Agencies both have authorities and responsibilities to carry out programs to protect Oregon water quality. The Agencies must work together, through their respective responsibilities, to accomplish the state's goals to protect and restore water quality. To clarify the collaborative framework, the Agencies added commitments to the MOU to adhere to all statutory requirements and to periodically report to the Board and the EQC on progress in implementing this MOU.

Require ODF participation on TMDL Advisory Committees: This commenter (1) requested the MOU compel ODF to participate in TMDL Advisory Committees.

Response: The Agencies did not make this change. The MOU documents agency commitments within the current statutory authorities and mandates, but does not create new requirements. The Agencies agree that the TMDL process is best served by ODF’s participation in that process where non-federal forestland sources are considered. ODF regularly participates in the advisory process for each relevant TMDL. The Agencies expect that ODF will continue to have capacity to participate on advisory committees.

**Commenter List**

<b>Commenter ID#</b>	<b>First Name</b>	<b>Last Name</b>	<b>Organization</b>	<b>Number of Commenters</b>
1	Susan	Libby		1
2	S.	Neuhauser		1
3	Nina	Bell	NWEA	1
4	Various	Commenters		577
5	Ron	Byers		1
6	Amanda	Crittenden	League of Women Voters of Oregon	1
7	Emily	Bowes	Forest Waters Coalition	19
8	Dan	Brown	EPA Region 10	1
9	Trygve	Steen		1
10	Felice	Kelly	350PDX Forest Defense Team	2
11	Dave	Potter		1
12	Candace	Bonner	small woodland owner	1
13	Mike	Eliason	Oregon Forest & Industries Council	1
14	Catherine	Thomasson	Environmental Caucus of the Democratic Party of Oregon	1
15	Nina	Bell	Northwest Environmental Advocates	1
16	Bob	Van Dyk	Wild Salmon Center	1
17	Lon	Otterby		1
19	Lisa	Arkin	Beyond Toxics	1
20	Samantha	Krop	Forest Waters Coalition	1
21	Carol	Valentine	Oregon Sierra Club	1
22	Barrett	Brown		1
23	Kassandra	Rippee	Coquille Tribe	1
24	Amanda	Astor	Associated Oregon Loggers	1
25	Lindsey	Bonner		1
26	Esther	Johnson	Oregon Department of Land Conservation and Development	1
27	Owen	Wozniak		1

**Attachment: Public Input Received on the ODF-DEQ Memorandum of Understanding  
on Collaboration on Achieving Water Quality Goals**

<b>Commenter ID#</b>	<b>First Name</b>	<b>Last Name</b>	<b>Organization</b>	<b>Number of Commenters</b>
1	Susan	Libby		1
2	S.	Neuhauser		1
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8	Dan	Brown	EPA Region 10	1
9	Trygve	Steen		1
10	Felice	Kelly	350PDX Forest Defense Team	2
11	Dave	Potter		1
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13	Mike	Eliason	Oregon Forest & Industries Council	1
14	Catherine	Thomasson	Environmental Caucus of the Democratic Party of Oregon	1
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17	Lon	Otterby		1
19	Lisa	Arkin	Beyond Toxics	1
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22	Barrett	Brown		1
23	Kassandra	Rippee	Coquille Tribe	1
24	Amanda	Astor	Associated Oregon Loggers	1
25	Lindsey	Bonner		1
26	Esther	Johnson	Oregon Department of Land Conservation and Development	1
27	Owen	Wozniak		1

## Comment ID #1

**From:** [Susan Libby](#)  
**To:** [ODF-DEQ-Collaboration-MOU-Feedback \\* DEQ](#)  
**Subject:** MOU Draft 2021 between ODF and DEQ  
**Date:** Wednesday, September 8, 2021 7:25:23 AM

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A few short comments:

1. Supportive of an update to the 1998 MOU which clarifies and provides greater transparency between ODF and DEQ.
2. Greater clarification needed on paragraph stating “ DEQ includes interested parties on its regulatory commission”. How can this MOU insure that the regulatory commission does indeed include academics, environmental organizations, industry representatives, etc. in a fair and equal balance? How many?
3. Greater clarification on paragraph stating “ DEQ will provide an opportunity for ODF to participate on its regulatory advisory committee”. We feel this needs to be codified and formalized into a “requirement” rather than “ an opportunity”.
4. The timeline for completed waterways assessments places the Snake River into 2027. We feel that the Snake River must receive greater priority and be moved ahead into the first category of 2025.

Sincerely

Su Libby

## Comment ID #2

**From:** [Susan Libby](#)  
**To:** [ODF-DEQ-Collaboration-MOU-Feedback \\* DEQ](#)  
**Subject:** MOU  
**Date:** Thursday, September 9, 2021 3:34:04 PM

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Here are some further comments on the Water Quality MOU,,:  
Water Quality Management Plans necessary to implement Total Maximum Daily Loads, under the nonpoint source control program of the Clean Water Act, need to contain specific, measurable, and enforceable criteria as is required for regulating point source pollution. The plans should contain: 1) quantitative targets for specific actions to meet TMDL load allocations, 2) timelines for implementing these actions, 3) monitoring approaches to track progress in meeting the targets and to identify the reasons why when targets are not being met (i.e., whether the actions were completed but didn't work or were not done), and 4) how deficiencies will be rectified.

C. The MOU needs to ensure that forestry concerns will no longer prevent the National Oceanic and Atmospheric Administration (NOAA) and the U.S. Environmental Protection Agency (EPA) from fully approving Oregon's Coastal Nonpoint Pollution Control Program as necessary to meet the requirements of the Coastal Zone Act Reauthorization Amendments (CZARA). CZARA directs states and territories with coastal management programs previously approved under Section 306 of the Coastal Zone Management Act to develop and implement coastal nonpoint pollution control programs which must be submitted to NOAA and EPA for approval. Concerns about Oregon's Forest Practice Act contributed to disapproval of the coastal nonpoint pollution control program in 2015, which has cost the state millions of federal dollars annually since then and will continue to do so if not addressed.

Thank you

S.Neuhauser



# NORTHWEST ENVIRONMENTAL ADVOCATES



September 21, 2021

Oregon Department of Forestry  
Attn: Private Forests Division  
2600 State Street  
Salem, Oregon 97310

Oregon Department of Environmental Quality  
Attn: TMDL Program  
700 N.E. Multnomah Street, Suite 600  
Portland, OR 97232      *via email only:* [odf-deq-collaboration-mou-feedback@state.or.us](mailto:odf-deq-collaboration-mou-feedback@state.or.us)  
[Nancy.HIRSCH@oregon.gov](mailto:Nancy.HIRSCH@oregon.gov)  
[richard.whitman@state.or.us](mailto:richard.whitman@state.or.us)

Re:    **Aug. 31, 2021 DRAFT Memorandum of Understanding:  
REQUEST FOR EXTENSION OF TIME FOR PUBLIC COMMENT**

Dear Ms. Hirsch and Mr. Whitman and the ODF/DEQ MOU Team:

I am writing to request an extension of time for public comment on the above-referenced draft Memorandum of Understanding. This MOU is likely to last for a long time, as has the extant MOU, and it is important that the agencies get this right. Given the serious problems with Oregon logging practices, the public's say in this MOU is extremely important and relevant. It is, after all, *our* natural resources that are at stake here and, to date, the relationship between the agencies has not been productive to date in protecting those resources.

It has come to my attention that a number of organizations are just being made aware of this public comment opportunity, for which reason Northwest Environmental Advocates is writing to request an extension that would allow them to participate.

Sincerely,



Nina Bell  
Executive Director



## Comment ID #4 (577 emails)

**From:** [Arran Robertson](#)  
**To:** [ODF-DEQ-Collaboration-MOU-Feedback \\* DEQ](#)  
**Subject:** Protect clean water from logging operations  
**Date:** Friday, September 24, 2021 12:06:47 PM

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Dear ODF DEQ Collaboration Clean Water Act,

I am writing with concerns over the Draft Memorandum of Understanding (MOU) between the Oregon Department of Forestry (ODF) and the Oregon Department of Environmental Quality (DEQ).

It is long overdue for DEQ and ODF to focus attention on ensuring water quality is protected from logging operations. While the MOU shines new light on this problem, it is too heavy on process and too light on action given the magnitude and lingering nature of the problem.

Oregon has now missed out on almost \$10 million in federal funds explicitly because our forest practices are out of compliance with the federal Clean Water Act and Coastal Zone Management Act standards. DEQ should not continue to cede authority to ODF for forest practices regulations meant to protect clean water when ODF has demonstrated an inability to act.

The MOU must be strengthened to provide timelines and triggers for action. Some key recommendations I would suggest are:

--Setting a timeline for ODF and DEQ to either reach agreement on improved protections for impaired streams/rivers or for DEQ to mandate changes.

--Establish periodic reviews of the water protection rules with joint evaluation from ODF and DEQ staff to be reported back to the Environmental Quality Commission and Board of Forestry.

--Increased transparency and communication with the public should be central to any MOU.

Finally, given that this very important agreement between DEQ and ODF is still in draft form and ODF will soon have a new State Forester leading the agency, I would also request that any finalization of the MOU wait until the new State Forester has time to review and approve it.

Thank you for your consideration of my comments.

Sincerely,  
Mr. Arran Robertson  
Portland, OR

Comment ID #5

September 20, 2021

To: Oregon Department of Forestry, Private Forest Division  
Oregon Department of Environmental Quality, TMDL Program

From: Ron Byers, Tillamook

Re: Comment on Draft MOU between ODF and DEQ

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Thank you for the opportunity to comment on the draft MOU. I will use Nancy Hirsch's questions as the framework for my response.

### **I.1 Vision and Purpose**

The purpose of the MOU is clear; it's in the details to achieve this purpose that things become less clear. We can't ignore history here, and why it's taken over 20 years to update and clarify the existing MOU, rejecting millions of dollars in federal funding during this time for noncompliance with Clean Water Act (CWA) standards. In many cases, its commercial logging that causes the violations. Obviously, the State has concluded it is financially better to pass on federal compliance dollars than change the forest practices that cause the funding disqualifications. This position makes achieving and maintaining CWA compliance difficult, especially when divided between two state agencies: one charged with achieving water standards, and the other overridingly making money from timber sales.

### **II.2 Agency Roles**

The draft MOU spends a lot of time describing the roles of the agencies, and their statutory authorities and responsibilities. The question here is: why does it take so much processing to determine if there is a CWA violation and how to rectify it? Again, the answer lies in history. ODF has resisted attempts to modify forest practices if it means a loss of revenue, and this financial need supersedes all else, including compliance with the CWA.

Impartiality is the most glaring MOU omission. It's not in the best interest of taxpayers to allow someone who gains financially to have so much say in compliance issues. Good public policy should minimize this kind of conflict of interest. Under the MOU draft, DEQ will have a long, hard road to override ODF opposition to CWA compliance/enforcement. It shouldn't be this way. Access to clean water is a personal right that should supersede timber revenue.

### **III.1 Dispute Resolution**

What would improve the entire process is for ODF to withdraw from CWA decisions where it has a financial conflict of interest. That could be done on a sale by sale basis. Or add a provision requiring the appointment of a neutral arbitrator as soon as the two agencies can't agree on CWA issues. The appointment of an interagency task force is just more delay. We should give someone outside government the authority to make binding decisions, and eliminate the financial gain factor from our water quality. The reason the Draft MOU process is so convoluted and inefficient is to allow financial interests to influence and delay outcomes. The latest evidence of this is how ODF has interpreted parts of the DOJ's memo.

### **III.2 MOU Action Plan**

Water concerns are rapidly growing all over the state as our climate changes. Forests and forest practices play critical roles in providing water supplies to entire communities. We need more than an interagency rework of a MOU that didn't prevent repeated CWA violations. We need that federal funding coming to the State's western region communities. The increase in timber revenue that comes from not being in compliance is not finding its way to rural communities for help with our water problems.

Taxpayers should not fund a process that does a disservice to water users by allowing timber harvesters to have so much say about the problems they are causing. We need to acknowledge this conflict, create a neutral process, eliminate the delays, and get on with solving and protecting our water needs. Please make this your MOU Action Plan. History will show the wisdom of moving forest water management and carbon storage to the top goals of ODF.

Thank you.



*The League of Women Voters of Oregon is a 101-year-old grassroots nonpartisan political organization that encourages informed and active participation in government. We envision informed Oregonians participating in a fully accessible, responsive, and transparent government to achieve the common good. LWVOR Legislative Action is based on advocacy positions formed through studies and member consensus. The League never supports or opposes any candidate or political party.*

September 25, 2021

To: Oregon Department of Forestry, Acting Forester Nancy Hirsch  
Oregon Department of Environmental Quality, Director Richard Whitman  
[odf-deq-collaboration-mou-feedback@state.or.us](mailto:odf-deq-collaboration-mou-feedback@state.or.us)

Re: Proposed Memorandum of Understanding (MOU) between ODF and DEQ – **Support**

In 2011, the League of Women Voters of Oregon adopted the following water policy:

*“LWVOR believes that water is a resource that should be managed for the benefit of the public and as sustainable habitat for all life forms. The League supports Oregon state policies and statutes that promote comprehensive long-range planning for conservation and management of ground and surface water and the improvement of water quality. Regulating agencies that govern the protection and conservation of water should be transparent and provide the public easy access to information. The League supports management approaches that maximize interagency communication to include but are not limited to:*

- 1. Uniform definitions of “beneficial uses” and other terminology for both quality and quantity management,*
- 2. Coordination of activities including water allocation, measurement, monitoring/ testing, enforcement of water law and the promotion of water conservation,*
- 3. Well-defined statutory enforcement procedures and the funding to protect water resources held in common, and*
- 4. Recognition of the variability of local/basin/watershed quality and quantity needs”*

The League appreciates the acknowledgement in the MOU that **“Oregon laws require the Departments of Environmental Quality and Forestry to protect and restore water quality in forests under state jurisdiction. These forests are privately owned, or owned by the state, counties, municipalities, and non-profits.”** We agree that *“... the forest industry, science about water quality, and regulatory programs have changed.”* We were pleased to see this MOU responds to the fact that the *“DOJ clarified each agency’s state and federal authorities.”*

We are delighted to see that this MOU addresses our objectives by clearly defining the roles and responsibilities of the Oregon Department of Forestry (ODF) and Department of Environmental Quality (DEQ) in working together to meet the required water quality standards of the Clean Water Act (CWA). Since DEQ is governed by the federal Clean Water Act and is responsible for implementing it in Oregon and ODF is governed by state statutes, their policies can conflict. DEQ is ultimately responsible for compliance with the federal Act which trumps state authority under the Act.

We support the **Vision** in the MOU: ***“Oregon will maintain high quality waters on waterways on non-federal forest lands in Oregon that are already meeting standards. On the forest lands where waterways are not meeting standards, Oregon will identify the conditions necessary to improve water quality to the point where water quality standards are met and use regulatory and non-regulatory measures to assure that those conditions are attained within a defined period of time.”***

ODF is charged with implementing any “Total Maximum Daily Loads” (TMDLs) in specific Oregon water bodies related to forest practices where those practices might affect meeting any adopted TMDL. A TMDL will identify what pollution reductions must occur for forest waters to meet water quality standards. Basically, the DEQ establishes the water quality standards, while the Board of Forestry and ODF then establish forest practices to work towards meeting those TMDL load allocations. ODF relies heavily on non-regulatory measures and working with timber operators for compliance with the Forest Practices Act (FPA) and are charged with monitoring and enforcing the rules of the FPA. Such non-regulatory measures may not provide assurance that any specific TMDL in a waterbody is met. **This MOU recognizes that BOTH agencies need to meet the requirements of the Clean Water Act and must take action if necessary.**

We want to be sure that any DEQ TMDL Rules Advisory Committee is representative not only of timber landowners but others who live or work near these waters and especially reach out to formerly underrepresented community members. It is not only landowners who need clean water, but all Oregonians. And, while DEQ will “confer” with ODF on any studies or data they might have regarding a specific TMDL, such consultation does not assume acceptance of that data carte blanche.

A question before both agencies is whether the current forest practices set by ODF are adequate in protecting water quality. If the water analysis shows that current practices don’t meet the standards, the Board of Forestry is the body that can change the Forest Practices rules, but they must follow strict guidelines established in statute. We recognize that the Board must find that there is monitoring or research evidence that forest operations carried out under existing rules are degrading resources, before adopting increased requirements [ORS 527.63]. In addition, the Board is directed to balance resource protection with effective and efficient forest harvest operations: [ORS 527.630]. In other statutes, [ORS 527.714(5)(e)] the Board is obligated to choose the alternative practice that is the “least burdensome to landowners while still achieving the desired level of protection” and [ORS 527.765(1)] requires the Board to establish forest practice rules that meet a “maximum extent practicable” (MEP) standard. These terms, such as “Best Management Practice (BMPS)” are vague and not defined and are subject to interpretation.

Depending on how they are applied, these state statutory restrictions could conflict with federal requirements under the CWA. To comply with federal law, state statutes might need changing so that the Forest Practices Act will meet the federal water quality standards. ODF can suggest ways to do this by other means than rule-changing, but the LWVOR believes the Board of Forestry should also explore regulatory measures, if needed, to assure water quality compliance.

The process for negotiating the implementation of TMDLs is balanced and adequate in the MOU, and if conflict cannot be resolved, each agency can petition the other agency. Failing that,

*“current Board rules provide that if the Board determines that forest practices in a watershed are measurably limiting water quality achievement or species maintenance, and the water body in the watershed is either:*

*(a) designated by the Commission as water quality limited, or*

*(b) contains threatened or endangered aquatic species, the Board must appoint an interdisciplinary task force that includes representatives of forest landowners within the watershed and from appropriate state agencies. The task force must analyze the conditions in the watershed and recommend whether additional watershed-specific protection rules are needed] The task force should rely on the findings and analysis used by the Commission in establishing the water quality standards and any approved TMDLs for the waterbody.”*

We expect the two agencies will work together to implement a plan to meet water quality standards and these last measures will prove unnecessary.

Not included in the plan was a clear understanding of the funding and staffing needed to carry out this work. LWVOR reached out to ODF with an inquiry about funding and staffing since we had not specifically engaged in this funding request during the 2021 legislative session. Adam Coble, Forest Health and Monitoring Manager at the Oregon Department of Forestry, replied with this great news and funding included in HB 5006 (2019):

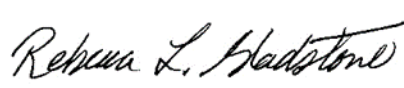
*“ODF has staff assigned to this collaboration and TMDLs. In developing the ODF-DEQ MOU, our Acting Deputy State Forester, Division Chief, Monitoring Coordinator, two Monitoring Specialists, Water Quality Specialist, and Public Affairs Specialist have all contributed to the MOU work and discussions, which signals our collaboration with DEQ as a high priority effort in the Private Forests Division and for the Agency.*

*We will continue to devote staff time toward this collaboration and the TMDL work, including a new position in the Division, a Riparian and Aquatic Specialist as a result of HB 5006. We are in the process of more than doubling our staff in the Unit, so we will soon have significantly more capacity. I’ve initiated discussions with the rest of my division’s management team to determine how to best allocate staff time from Monitoring and other units to work on collaborations with DEQ and maintaining compliance with the Clean Water Act.”*

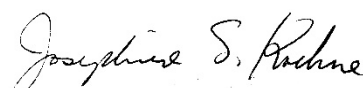
LWVOR worked with DEQ and the legislature to support additional staffing in DEQ’s Water Quality Division to increase work on TMDLs since they need to be assigned specifically to individual water bodies. A court-ordered schedule has been set for DEQ to do the TMDL work needed in certain basins. DEQ also received other water quality staffing to be sure they are providing ODF (and others) with the data needed in order to assure that Oregon is in compliance with the federal Clean Water Act.

We wish to thank both agencies and their leaders who collaborated in creating this thorough and well-thought-out plan. We also thank the legislature for providing the funding and staff approval so that this MOU can be implemented and Oregon’s waters can become cleaner for all.

Thank you for the opportunity to provide these comments. With the commitment by the legislature, agency leaders and agency staff as well as the Environmental Quality Commission and Board of Forestry to assure this MOU is implemented, **we support the document.**



Rebecca Gladstone  
LWVOR President



Josie Koehne  
Forestry Portfolio



Peggy Lynch  
LWVOR Natural Resources Coordinator

Draft MOU: [ExecutiveSummary-and-DEQ-ODF-MOU DRAFT 2021 09.pdf](#)

Cc: Senator Kathleen Taylor  
Representative Jeff Reardon  
Senator Elizabeth Steiner Hayward  
Senator Betsy Johnson  
Representative Dan Rayfield

Comment ID #7



Oregon Department of Forestry  
Attn: Private Forests Division  
2600 State Street  
Salem, Oregon 97310

Oregon Department of Environmental Quality  
Attn: TMDL Program  
700 N.E. Multnomah Street, Suite 600  
Portland, OR 97232  
via email only: [odf-deq-collaboration-mou-feedback@state.or.us](mailto:odf-deq-collaboration-mou-feedback@state.or.us);  
[Nancy.HIRSCH@oregon.gov](mailto:Nancy.HIRSCH@oregon.gov); [richard.whitman@state.or.us](mailto:richard.whitman@state.or.us)

September 27, 2021

**RE: Request for Comment Period Extension on Oregon Department of Forestry & Oregon Department of Environmental Quality Memorandum of Understanding: Improving Water Quality**

Dear Ms. Hirsch and Mr. Whitman and the ODF/DEQ MOU Team:

I am writing on behalf of the Forest Waters Policy Team and the thousands of Oregon based supporters and members that we represent to request an extension of the public comment period for the above-referenced draft Memorandum of Understanding (MOU). The importance of this MOU cannot be understated given that agreements within will be the standard for cooperative operations between the Oregon Departments of Forestry and Environmental Quality for the foreseeable future. There have long been systemic problems within the State's ability to protect our natural resources from the effects of the timber industry. Other agencies, conservation groups, and the general public require more time to develop thoughtful and scientifically driven comments on the present MOU draft to make sure these problems are fully addressed.

We also recognize that ODF is currently in the process of bringing on a new forest supervisor. The person who fills this important new role will also need time to review and provide input on the MOU.



In reviewing the MOU, we noticed that the document references an MOU Action Plan that is not included as an attachment and may not yet exist. In the absence of this Action Plan outlining the concrete steps the agencies plan to take, it is difficult for stakeholders to provide substantive comments on the MOU.

Given the above reasons, and that the cooperative relationship between ODF and DEQ has thus far failed to adequately protect water quality in the State of Oregon, the undersigned organizations respectfully request that the public comment period be extended for an additional sixty (60) days.

Sincerely,

**Forest Waters Coalition Member Organizations:**

350 PDX	Oregon Wild
Audubon Society of Portland	Our Forests
Beyond Toxics	Pacific Coast Federation of Fishermen's Associations
Cascadia Wildlands	Rogue Riverkeeper
Institute for Fisheries Resources	Trout Unlimited
Klamath-Siskiyou Wildlands	Tualatin Riverkeepers
North Coast Communities for Watershed Protection	Umpqua Watersheds
Northwest Guides and Anglers	Wild Salmon Center
Oregon League of Conservation Voters	Willamette Riverkeeper
	Williams Community Forest Project



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10**

1200 Sixth Avenue, Suite 155  
Seattle, WA 98101

WATER  
DIVISION

September 29, 2021

TMDL Program  
Oregon Department of Environmental Quality  
700 NE Multnomah Street, Suite 600  
Portland, Oregon 97232  
[odf-deq-collaboration-mou-feedback@state.or.us](mailto:odf-deq-collaboration-mou-feedback@state.or.us)

Private Forests Division  
Oregon Department of Forestry  
2600 State Street  
Salem, Oregon 97310

RE: Oregon Department of Environmental Quality (ODEQ) and Oregon Department of Forestry (ODF) Memorandum of Understanding.

Dear DEQ and ODF MOU team,

We received your September 1, 2021, announcement regarding the drafting of a new interagency Memorandum of Understanding to replace the 1998 ODEQ and ODF MOU. We understand this MOU is an important part of protecting and improving Oregon's water quality from impacts by non-point-source pollution from non-federal forest management activities. We appreciate the effort made by ODEQ and ODF to update the MOU and applaud the vision of maintaining high quality water on non-federal forest lands in Oregon. The Agencies requested comments on whether the purpose and Agency roles are clear; whether the MOU is missing critical processes or program elements; and what would improve transparency and efficiency of the agencies' joint processes.

The MOU and accompanying Department of Justice Memorandum (appendix 1) clarifies the agencies roles as currently specified in state legislation and administrative rules. Importantly, the MOU emphasizes the need for reasonable assurance that appropriate forest management practices are implemented to meet load allocations specified in Total Maximum Daily Loads (TMDLs). While the need for reasonable assurance of implementation is emphasized, the MOU defers establishing assurances, presumably to future management plans ODF is required to provide in order to meet applicable TMDL load allocations. If any such management plans rely on watershed specific practices not adopted into the Oregon Forest Practice Rules, it will be important for ODF to specify how it works with affected landowners to ensure load allocations are met and for ODF to provide ODEQ and the Environmental Quality Commission (EQC) regular updates on their progress in meeting their applicable Load Allocations.

The MOU establishes a clear vision and general purpose; however, the last bullet in Section 1.1: Purpose; reads "Processes to assess the relevancy of water quality impairments and TMDL development related to potential forestry impacts." This statement is confusing since the relevancy of a water quality impairment is known to be an exceedance of a water quality standards. Perhaps this could be clarified as "processes to assess the potential forestry impacts to water quality impairments and TMDL development."

In terms of improving transparency and efficiency of the agencies' joint processes, the MOU presents contradictory information regarding the priority of meeting water quality standards. Specifically, Section 1.2 Background; ODF Water Quality Authorities; indicates that some statutory provisions, such as ORS 527.630, direct the Board to balance resource protection with effective and efficient forest harvest operations and, therefore, could conflict with requirements under the CWA. However, as discussed in Appendix 1, ORS 527.765 states that the Board shall establish best management practices and other rules applying to forest practices as necessary to insure that to the maximum extent practicable nonpoint source discharges of pollutants resulting from forest operations on forestlands do not impair the achievement and maintenance of water quality standards established by the Environmental Quality Commission for the waters of the state. EPA recommends the MOU provide clarification regarding the priority of protecting water quality.

Finally, while the MOU establishes clear roles for the agencies and a framework for working together, it lacks detail on process and program implementation. There is reference to the agencies' intent to collaborate on the specifics of implementing the MOU by developing an associated MOU Action Plan (Section III.2). In the event development of an MOU Action Plan is delayed or deferred, it is important to include more detail in the MOU itself. EPA encourages the inclusion of additional specifics on the following MOU items:

#### Section II.1 Principles of Interagency Collaboration

- Bullet five: Using available data, scientific information, uncertainty, and accepted scientific methods.
- Bullet six: Commitment to work toward achieving water quality outcomes through:
  - Adaptive management informed by data and scientific information.

The Agencies should consider specifying how available data, scientific information, uncertainty and accepted scientific methods will be used in adaptive management decision making. These are often areas of significant debate resulting in limited agreement on action. The U.S. Department of the Interior Technical Guide for Adaptive Management<sup>1</sup> could be a useful resource. The technical guide presents an operational definition of adaptive management, identifies the conditions in which adaptive management should be considered, and describes a process of using adaptive management for managing natural resources. It may also be helpful to discuss how adaptive management works in concert with existing processes to assist in decision making. For example, TMDLs incorporate a "margin of safety" to account for uncertainty related to the TMDL and, where feasible, quantifies uncertainties associated with estimating pollutant loads, modeling water quality and monitoring water quality.

- Section II.2.A DEQ-Led Water Quality Processes
  - Section 4.1.1: Development of new TMDLS; and 4.1.2: Development of revised temperature TMDLs pursuant to court schedule:

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<sup>1</sup> Williams, B. K., R. C. Szaro, and C. D. Shapiro. 2009. Adaptive Management: The U.S. Department of the Interior Technical Guide. Adaptive Management Working Group, U.S. Department of the Interior, Washington, DC.

<https://www.doi.gov/sites/doi.gov/files/uploads/TechGuide-WebOptimized-2.pdf>

Since development of TMDLs is often done within legal time constraints, such as the court-ordered schedule discussed in the MOU, EPA recommends ODEQ provide an explicit timeframe and deadlines for discussing load-allocations for non-federal forestlands with ODF and obtaining technical and programmatic input for TMDL development.

- Section 4.2 TMDL Implementation:

Paragraph (1) provides several examples of existing “plans” that could possibly meet the load allocation and be appropriate for a WQMP. However, the phrase “or some form of CWA assurances” does not refer to an existing plan and should be deleted from this paragraph. Regarding ODEQ documenting how the “plan” is expected to achieve the TMDL’s load allocation over time, EPA recommends the MOU Action Plan specify a time-period for implementing management practices and achieving reductions necessary to meet load allocations. This would ensure consistency with the MOU Vision of assuring water quality standards are attained within a defined time period. EPA also encourages ODEQ to consider reporting progress on achieving load allocations in TMDLs covering managed forestry lands as part of Oregon’s Nonpoint Source pollution program annual report.

- Section II.2.B ODF-Led Water Quality Processes

- Water Quality Standards and TMDLs: Implementation Evaluation and Reporting

The MOU Action Plan should elaborate on how ODF intends to “enhance” policies and practices and how it will engage stakeholders in evaluating implementation measures. The Action Plan should also specify the frequency of reporting on implementation measures.

- FPA Sufficiency Reviews

The MOU implies that FPA Sufficiency Reviews have been a longstanding and successful process for meeting the goals of the FPA, including protection of water quality. However, the [last sufficiency review published in 2002](#) recommended adequate shade be maintained, or rapidly recovered, for riparian areas along small perennial Type N streams with the potential to impact downstream Type F waters. It’s not clear how this recommendation has been addressed in the subsequent nineteen years. Therefore, EPA recommends the MOU Action Plan specify how FPA Sufficiency Reviews will be better utilized by the Board to protect water quality. To be consistent with the MOU Vision, FPA Sufficiency Reviews should be used to identify specific conditions necessary to attain water quality standards within a defined time period.

- Basin Specific Rules

The MOU should define “measurably limiting achievement of water quality.” In addition, the MOU and MOU Action Plan should establish a timeframe for basin specific rules consistent with the TMDL Implementation specified in MOU Section II.2.A, paragraph 4.2. Specifically, basin specific rules must be established such that ODF can prepare a plan designed to meet applicable load allocations and submit it to ODEQ for review with 18 months of ODEQ’s issuance of the TMDL and WQMP.

Thank you for the opportunity to provide comment on the ODEQ-ODF MOU. Please contact Dan Brown, Forest Sector Advisor, at [brown.dan@epa.gov](mailto:brown.dan@epa.gov) if you need any additional information.

Sincerely,

Cami Grandinetti, Branch Manager  
Standards, Assessment, and Watershed  
Management Branch

Comment ID #9

**From:** [Trygve Steen](#)  
**To:** [ODF-DEQ-Collaboration-MOU-Feedback \\* DEQ](#)  
**Subject:** ##### MOU comment from Trygve Steen, Ph.D.  
**Date:** Tuesday, September 28, 2021 10:09:57 PM

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To: Oregon Department of Forestry and Oregon Department of Environmental Quality

From: Trygve Steen, Ph.D.

Comment on: "Memorandum of Understanding: Improving Water Quality"

between Oregon Department of Forestry (ODF)

and Oregon Department of Environmental Quality (DEQ)

Thank you for the opportunity to comment on this effort to protect water quality in Oregon. Unfortunately, there is a history of inadequate protection of forest related waters by the ODF. **I do not see a sufficiently clear framework in this document for a process that will cope with the level of change that needs to be accomplished.**

**Presently, there is a lack of clear authority provided to DEQ to assure success in accomplishing the needed change in a timely manner. The DEQ needs to use their enforcement authority to protect drinking water that comes from the forests. Also, the role of the Board of Forestry (BOF) needs more explicit delineation and inclusion, so that the Forest Practice Administrative Rules appropriately protect the quality of water coming from Oregon's forests. Change is clearly needed.** I am deeply concerned, even with the significant efforts delineated in this MOU, that Oregon's substantial water quality problems in streams coming from logged watersheds will not be resolved.

**Given that Oregon has not complied with the CWA in relation to the impacts of forest practices on water quality and as a result has foregone significant Federal funding, it is imperative that water protection measures be improved.** I am deeply concerned that the MOU being considered here will not appropriately improve the situation. The DEQ needs more clearly delineated enforcement authority in relation to protecting our state's waters. The complexity of agency involvement is more than this memo makes clear, see the following quotes:

The Department of Justice memo on the relationships of agencies responsible for the protection of water quality makes the following statements that are relevant here:

"Implementation of Water Protection Measures on Forestlands" . . .

"As described above, the Board, the Commission, ODF, and DEQ have interconnected roles in protecting Oregon's water quality on forestlands. Broadly speaking, the Commission and DEQ assess waters and establish the water quality standards, while the Board and ODF then establish forest practices to comply with and work towards compliance with those standards. The legislature intended for the two agencies to work collaboratively on their efforts so that each agency brings in its specific perspective and expertise to create a coordinated effort with the goal of protecting water quality and complying with the CWA. "

Also in the DOJ memo: "Board of Forestry and Department of Forestry" . . .

"The legislature delegated to the Board the responsibility to 'supervise all matters of forest policy and management under the jurisdiction of the state.' **The legislature provided the Board with exclusive authority to develop and enforce forest practice rules and the obligation to coordinate with other state agencies concerned with the forest environment.**"

From the above and my knowledge of the impacts of present industrial forest practices on Western Oregon's waters, it is clear to me that **the rule making authority of the Board of Forestry needs to be more explicitly delineated, invoked, and IMPROVED.** Simply having ODF and DEQ continue within the context of the present Forest Practice Administrative Rules will not be sufficient. **The BOF badly needs to upgrade the Forest Practice Administrative Rules and the ODF needs to enforce them, along with much needed back-up from the DEQ.** A key case in point is the fundamental inadequacy of the stream buffers that are presently being utilized; ODF stewardship foresters competently enforce existing rules; however, neither drinking water nor the aquatic habitats required by salmon are being adequately protected. The MOU considers the use of riparian shade as a surrogate for water quality status, but current inadequately wide buffers very commonly blow down - often completely. Also, this document appears to focus on an individual stream approach to protecting water quality, when it is clear to me that more general improvements in the Forest Practice Rules are in order.

I am also concerned with the section III.1 Dispute Resolution. The process described will likely just produce more delay for needed protection of Oregon's waters. It also does not recognize the inappropriate conflict of interest that the ODF presently displays in relation to simply supervising and approving forest practices that do not adequately protect water at present. **We badly need effective**

**enforcement of better rules. An answer to conflicts exists within the authority of the BOF and their need to change the Forest Practice Administrative Rules as well as the need for the DEQ to have more direct enforcement authority.**

There needs to be more focus on the role of the BOF, as the rule-making authority. **This MOU needs to include the BOF more explicitly in many of its areas.** I see more authority being given to the ODF than is appropriate for the actions required to meet the need for changed forest management. My understanding is that ODF has an important role in data gathering and interpretation as well as enforcement. **The compelling need for policy change and modification of the Forest Practice Administrative Rules needs to be met by the Board of Forestry!**

While the DEQ has the authority to protect water quality in the waters of the state of Oregon, at present it does not do so for water coming from forests. The non-point source pollution caused by logging operations is unfortunately the responsibility of the ODF. **The DEQ needs to use their enforcement authority to protect drinking water coming from the forests. Their role needs to be more than advisory. They have responsibility for water quality monitoring data, and they need to be responsible for enforcement action.** It is reasonable to consider DEQ to be a more neutral agency when it comes to the impacts of forest practices on water. This is very important given the timber bias of the ODF. Unfortunately, the ODF is too supportive of the timber industry, including industry practices that are focused on short-rotation forest management and maximizing logging at the expense of appropriate protection for Oregon's waters. As an agency with extensive on-the-ground experience in Oregon's forested landscape, the ODF has not met its "public trust" responsibilities to protect drinking water. **DEQ needs to have and take more responsibility for the state of Oregon's "public trust" and fiduciary duty to protect water quality as well as water quantity, both of which are being adversely impacted by current forest management practices.**

There is an urgent need to carry out much important change. While this document is a start, I am concerned that the changes it describes are not adequate to meet that need. Thank you for this effort. I wish you well in defining a path forward to accomplish the needed improvements.





September 28th, 2021

Oregon Board of Forestry  
Oregon Department of Forestry  
2600 State Street  
Salem, Oregon 97310

Oregon Environmental Quality Commission  
Department of Environmental Quality  
700 NE Multnomah Street, Suite 600  
Portland, OR 97232

Dear Chair Kelly, Director Whitman, Members of the Boards of Forestry and Members of the Environmental Quality Commission,

The draft MOU between ODF and DEQ is promising because it clarifies DEQ's responsibilities with regards to clean water. However, we are concerned that the MOU does not specify areas where the current system needs to change and includes little specific information about next steps or the timeline of action. Given the urgent need to protect Oregon's rivers from the downstream effects of large-scale clear-cut logging, we hope this MOU can be revised to ensure that its goals will be met in a timely manner.

As Oregon grapples with the effects of climate change, including more frequent droughts, our water resources will be increasingly stressed.. Communities that rely on water from forested watersheds need the state to manage those watersheds to best ensure a reliable supply of clean drinking water. In addition, we have an obligation to future generations and the Indigenous people of Oregon to preserve and recover salmonids. However, our current system for ensuring clean water for people and fish is not working. Many streams in forested areas are failing to meet their TMDL requirements, and Oregon's waterways are frequently out of compliance with the federal Clean Water Act (CWA).

Discussions between ODF and DEQ have shown that some of the problems stem from ambiguity around the specific responsibilities of each of these state agencies. This MOU clarifies that relationship and places most of the responsibility for ensuring compliance with the CWA within the jurisdiction of DEQ. Our expectation is that the DEQ will acknowledge that this MOU mandates action to curb the degradation of Oregon's waters.

We have a few concerns about the MOU as it is currently written. Where the document deals with how to bring waters into compliance, there is a lot of discussion of incentives but little discussion of enforcement. Previous investigations, such this one in 2019 by OPB (<https://www.opb.org/news/article/oregon-forests-logging-rules-compliance-controversy/>), have shown that ODF has little data about whether its rules are being followed, and non-compliance, even to the weak rules that are currently on the books, may be contributing to water quality issues. Similarly, ODF and DEQ have woefully incomplete information about water quality and fish populations, but these information gaps are not addressed in the MOU. If ODF is tasked with collecting data, and DEQ needs those data to make determinations about the sufficiency of the FPA, then, if possible, DEQ should have the authority to compel ODF to collect and provide those data.

The MOU also includes almost no timelines or deadlines besides those mandated by federal law. This raises the concern that the document will be a dead letter, creating a misleading impression that water will be better protected in the state while, in reality, concrete action is deferred to some unspecified future date. This MOU should set a timeline for ODF and DEQ to develop improved protections for impaired waterways or for DEQ to mandate necessary protections. To ensure that improvements are iterative and respond to on-the-ground changes, the MOU should also specify periodic reviews of water protection rules by ODF and DEQ, with those reviews presented publicly to the Board of Forestry and the Environmental Quality Commission.

Finally, we would like to see the DEQ more involved in the assessment of the sufficiency of the FPA, if possible. Beyond providing information for the Board of Forestry, the DEQ should address the Board of Forestry and make recommendations for changes to the FPA that it deems are necessary to protect Oregon waterways.

Thank you for your efforts thus far toward better collaboration and clarification of responsibilities around forest water issues. We encourage you to make the MOU between DEQ and ODF more effective by specifying timelines, enforcement of rules, and collection and sharing of data. This will lay the groundwork for the real improvements in forest water protection that Oregon's communities and ecosystems need at this critical time.

Sincerely,  
Felice Kelly and Leslie Grush  
On behalf of the Forest Defense Team  
350PDX

## Comment ID #11

**From:** [Dave Potter](#)  
**To:** [ODF-DEQ-Collaboration-MOU-Feedback \\* DEQ](#)  
**Subject:** NEEDED: cleaner water from logging  
**Date:** Monday, September 27, 2021 3:51:12 PM

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Dear ODF DEQ Collaboration Clean Water Act,

My wife and I, after at least 20 years of outdoor recreation in our state, firmly believe OUR Oregon Dept. of Forestry is way, way too much in bed with corporate timber operations. Results have been too much scalping of the Coast Range with clear-cuts, too much herbicide aerial applications, too much hillside denuding = landslides into waterways and roads and too often poor results at reforestation to shield waterways.

We feel the Oregon Dept. of Forestry is past due for a significant change of direction towards multiple use management based on sound ecological health criteria. Away from managing forests as tree farms. This change needs to include much less logging pollution from sedimentation, earth slides, herbicide loading and increase temperatures in our streams and rivers.

We feel the Oregon DEQ must not continue to roll over and give in to Oregon Forestry. We feel DEQ has a legal mandate to step in and force, require, ODF to nearly immediately correct the above damaging actions to Oregon's waterways. To this end we strongly urge that the Memorandum of Understanding now under authorship must be very much more strengthened with stiff rules and requirements to address logging caused pollution of our water. Require and provide for enforcement actions often and with stiff penalties. Stop corporate logging from using our ODF as a puppet agency. Indeed, we believe it is needed for DEQ policy to include fines or other punishments for ODF personnel who clearly ignore the DEQ requirements....Put teeth in the rules please!

Sincerely,  
Mr. Dave Potter  
Klamath Falls, OR

Comment ID #12

September 27, 2021

RE: Memorandum of Understanding:

Oregon Department of Forestry – Oregon Department of Environmental Quality Collaboration on Achieving Water Quality Goals

To: Director Richard Whitman, Department of Environmental Quality, and State Forester Nancy Hirsch, Oregon Department of Forestry

From: Candace Bonner, MD, MPH, small woodland owner

Thank you for this opportunity to comment on the new Memorandum of Understanding (MOU) on water quality between Oregon Department of Environmental Quality (DEQ) and Oregon Department of Forestry (ODF.)

An updated MOU has been much anticipated since the 2015 Board of Forestry (BOF) decision on new riparian rules (implemented July 2017) surprised many of us by rejecting riparian rules based on the best available science, which provided “reasonable assurance” that the new rules would achieve the Clean Water Act (CWA) standard for water quality. The Board instead approved riparian rules which had no data to support a “reasonable assurance” that the rules would achieve the CWA standard for water quality.

The purpose of the updated MOU is clear, and the delineation of the roles of DEQ in setting water quality standards and TMDLs and ODF in implementing those standards is clear. What is less clear is how the implementation by ODF and the monitoring to determine that standards are achieved would be accomplished in practice.

As a small woodlands owner, for the past 20 years living on land bordered by Industrial timberlands, Federal lands, and other small woodland owners, I have had the opportunity to see first hand, on the ground, the often severely deleterious effects of legal harvesting on small and medium fish (now mainly SSBT) streams and small n streams, before, after, and many years after, operations, and how this differed by land ownership. I was therefore not surprised when the Ripstream study, carried out by ODF’s excellent science staff under the leadership of Jeremy Groom and Liz Dent, confirmed that FPA harvest rules were not achieving the Protecting Cold Water (PCW) standard under the CWA. Jeremy Groom produced modeling of various riparian buffers with their probability of meeting the CWA standard, IE what degree of “reasonable assurance” they had of achieving CWA standards. With this solid science available, many of us were surprised to have the BOF In November 2015 choose instead new riparian buffer rules without any data-based “reasonable assurance” that the PCW standard would

be achieved. This was justified by invoking the Maximum Extent Practicable (MEP) principle based on the economic loss to timber harvesters of leaving more trees standing. ODF's own data did not support a projection of significant and prohibitive economic loss, nor did the experience of "other timber harvesters" such as in Washington and California where riparian buffers are wider. The high cost of stream restoration when streams fail to meet the CWA was not factored in when applying the MEP principle.

It is the history above that colors my interpretation of this updated MOU. I am looking for reassurances that DEQ is both adequately empowered and has the practical means to make sure that forestry practices as implemented by ODF will result in meeting the CWA standards.

Concerns:

- The MOU is permeated with statements like "working toward achieving" and "continued forward progress toward meeting" water quality goals instead of the firm commitment "to achieve" and "to meet" water quality goals. The new riparian rules of 2017 could be rationalized as "working toward achieving" CWA standards since they provided slightly wider stream buffers, even though there was no "reasonable assurance" that they would achieve the CWA standard. I would like the language to be clear that DEQ and ODF are committed to achieving the CWA standard. I am also concerned that MEP shows up in many places in the document, without clarity on what proof is needed to claim MEP.
- The MOU is also permeated with "voluntary," "non-regulatory," "incentives," "alternative practices," ETC, which can be used instead of science-based rules or FPA rules. I am not aware of data that shows such measures can achieve water quality goals consistently, across the landscape, or long-term. The MOU does not specify how DEQ would confirm these methods are achieving the water quality standards. If such methods are allowed only when backed by data showing "reasonable assurance" that they will result in CWA standards being achieved, this would be consistent with the goals of protecting water quality. If such practices are not determined until post harvest monitoring to fall short of the PCW standard, then the stream has already been damaged. There is also the question of whether these non-regulatory means are also intended to be used in addition to FPA rules, because the FPA rules are too weak to achieve the CWA standard alone.
- Implementation by ODF is likely to have many practical challenges, and the MOU does not make it clear how these would be overcome. Monitoring to confirm that the CWA is met will be particularly challenging. My experience with the ODF stewardship foresters is that they are dedicated, knowledgeable, and hard-working, but chronically understaffed. They do not have legal authority to enter private forest land without permission. ODF's efforts to do compliance monitoring of the FPA itself have been hampered by this, as there is a high risk of selection bias when landowner participation is voluntary only.

Climate change is accelerating, and water quality and quantity should be of the highest priority for the State of Oregon. This updated MUO between ODF and DEQ is much needed and much appreciated. I would like to see the MUO strong enough to reassure all Oregonians that our Department of Forestry has the tools and the staffing it needs to implement forest practices to be fully protective of water quality, and to reassure all Oregonians that DEQ will fully assume the role of actively ensuring that this implementation results in water quality being preserved and restored and TMDL goals met.

Thank you again for the opportunity to comment.



September 29, 2021

TMDL Program  
Oregon Department of Environmental Quality  
700 NE Multnomah Street, Suite 600  
Portland, OR 97232

Private Forests Division  
Oregon Department of Forestry  
2600 State Street  
Salem, OR 97310

VIA EMAIL: [odf-deq-collaboration-mou-feedback@state.or.us](mailto:odf-deq-collaboration-mou-feedback@state.or.us).

Thank you for the opportunity to submit comments on the updated Memorandum of Understanding (MOU) between the Oregon Department of Forestry (ODF) and Oregon Department of Environmental Quality (DEQ) regarding the protection of water quality in Oregon. The comments below are submitted on behalf of the Oregon Forest and Industries Council (OFIC), the trade association representing timberland owners and forest products manufacturers from all over Oregon. Together, our members provide for themselves, their families and nearly 60,000 other households via direct employment from our lands and manufacturing facilities.

First off, we want to acknowledge the valuable function this MOU serves and the utility of updating the now twenty-three-year-old existing MOU. Clarifying roles and responsibilities regarding the development of Total Maximum Daily Loads (TMDLs), creating a transparent process for evaluating the adequacy of Forest Practices Act rules and non-regulatory measures in achieving water quality standards, and understanding the nexus between the agencies are all worthwhile goals. There is much in this MOU that will be helpful to the public and to agency staff going forward. Our members commitment to clean water is unwavering and this MOU is welcome in that respect.

We also appreciate the language in the MOU that appears to recognize that a private forest Habitat Conservation Plan (HCP) could satisfy the load allocation requirements of a TMDL, either immediately or with implementation over time. This is welcome recognition of some of the ongoing discussions in other venues, including the Private Forest Accord negotiations and the state lands HCP. Identifying gaps where an existing plan may not sufficiently address the load allocation could also be a useful aspect of the process outlined in the MOU.

That said, the MOU and the accompanying Department of Justice (DOJ) memo upon which some of the assertions in the MOU are based come to an erroneous conclusion on the authority of DEQ to regulate nonpoint discharges from forest operations to achieve water quality standards. For reasons we will elaborate on below, the Environmental Quality Commission (EQC) and DEQ are prohibited by ORS 468B.110(2) from promulgating or enforcing water quality restrictions on nonpoint discharges from forest operations because the restrictions are not required by the Clean Water Act (CWA). As a result, the MOU should at minimum be revised to ensure DEQ and ODF work together to develop TMDL load allocations, not just work together to implement load allocations already established by DEQ.

As background, the Oregon Forest Practices Act provides the foundation for regulating forest practices in Oregon, including the impacts of those practices on water quality. ORS 527.630(1) declares that the public policy of the State of Oregon is “to encourage economically efficient forest practices that ensure the continuous growing of and harvesting of forest tree species and the maintenance of forestland for such purposes as the leading use on privately owned land, consistent with sound management of soil, air, water, fish and wildlife resources...to ensure the continuous benefits of these resources for future generations of Oregonians.”

Specific to water quality, ORS 527.765(1) requires the Board of Forestry (BOF) to “establish *best management practices* and other rules applying to forest practices as necessary to insure that to the *maximum extent practicable* nonpoint source discharges of pollutants resulting from forest operations on forestland do not impair the achievement and maintenance of water quality standards established by the Environmental Quality Commission for the waters of the state.” In addition, the statute requires the BOF to consider a number of factors when establishing best management practices, including the “*technical, economic, and institutional feasibility*.” Therefore, the BOF must adopt forest practice rules to ensure operations don’t impair water quality standards but only to the extent that the rules are both “necessary” and “practicable.” (emphasis added)

The DOJ memo reaches the conclusion that the BOF must adopt forest practice rules that are sufficient to implement any load allocation for nonpoint forest operations in a TMDL established by DEQ. If the BOF fails to do so within two years of a petition by the EQC, the DOJ memo goes further to state the EQC and DEQ could adopt and enforce limits on nonpoint discharges from forest operations as necessary to achieve the load allocation. These conclusions are then carried over to the MOU, which assumes ODF and the BOF will implement whatever measures are necessary to implement a load allocation for nonpoint discharges from forest operations. All of this is premised on the determination that the prohibition in ORS 468.110(2) on the regulation of nonpoint discharges from forest operations by the EQC and DEQ does not apply.

We believe this is an incorrect statement of law for several reasons. First, as background, ORS 468B.110(2) expressly prohibits the EQC and DEQ from regulating nonpoint discharges unless required by the CWA.

Unless required to do so by the provisions of the Federal Water Pollution Control Act (CWA), neither the Environmental Quality Commission nor the Department of Environmental Quality shall promulgate or enforce any effluent limitation upon nonpoint source discharges of pollutants resulting from forest operations on forestlands in this state. Implementation of any limitations or controls applying to nonpoint source discharges or pollutants resulting from forest operations are subject to [the BOF’s authority under] ORS 527.765 and 527.770.

The DOJ memo assumes that ORS 468B.110(2) does not apply 1) because a TMDL load allocation is not an “effluent limitation” and 2) that a TMDL load allocation is required by the Clean Water Act. Neither of these assertions makes ORS 468B.110(2) inapplicable. Regarding the first assertion, the DOJ memo states that TMDL load allocations are not effluent limits because the term is defined in the context of the CWA to apply to limits on point source discharges of pollutants in discharge permits. That is correct in the sense that “effluent limitation” is defined as any restriction established...on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from *point sources*” (emphasis added). However, if “effluent limitation” were interpreted to mean only restrictions on point sources, ORS 468B.110(2) would be completely meaningless because it only addresses nonpoint sources. The legislature could not have meant to prohibit the EQC and DEQ from restricting point source discharges when it passed ORS 468B.110(2)



and, as used in the statute, “effluent limitation” is intended to refer to any potential water quality restriction on nonpoint forestry operations.

Second, the DOJ memo argues the 468B.110(2) prohibition does not apply because Oregon is required by the CWA to ensure that TMDL load allocations will be achieved. This argument is premised on EPA’s refusal to approve a TMDL absent “reasonable assurance” that the TMDL load allocations will be achieved. This is a misapplication of the “reasonable assurance” requirement and is inconsistent with judicial decisions that have uniformly held that the CWA does not regulate nonpoint sources, including in the context of TMDLs. Unlike a waste load allocation, which is an allocation of loading capacity to a point source, a load allocation is defined as an “attribution” either to one of its existing or future nonpoint sources of pollution or to natural background sources because there is no mechanism under the CWA to regulate nonpoint sources and natural background sources.

The leading Ninth Circuit Court of Appeals decision on the application of TMDLs to nonpoint sources, *Pronsolino v. Nastri*, 291 F.3d 1123 (9<sup>th</sup> Cir. 2002), upheld EPA’s authority to establish a TMDL for the Garcia River in California, a waterbody affected only by nonpoint sources, but in so doing characterized the TMDL as an “informational tool” that “expressly recognizes that ‘implementation and monitoring’ are state responsibilities.” The court noted that “California chose both *if* and *how* it would implement the Garcia River TMDL” but explained that “[s]tates must implement TMDLs only to the extent that they seek to avoid losing federal grant money” since “there is no pertinent statutory provision otherwise requiring implementation of 303 (TMDL) plans or providing for their enforcement.” *Pronsolino*, 291 F.3d at 1140 (emphasis in original). See also *American Farm Bureau Federation v. EPA*, 792 F.3d 281, 302-04 (3d Cir. 2015) (holding that the CWA’s TMDL requirement does not require states to regulate nonpoint sources, although the CWA provides certain incentives for doing so).

As result, the DOJ memo is incorrect in asserting that the CWA *requires* Oregon to regulate nonpoint forest operations or to establish and enforce controls on those operations that are sufficient to achieve a TMDL load allocation for the operations to or otherwise achieve water quality standards. In the absence of such a CWA requirement, ORS 468B.110(2) prohibits the EQC and DEQ from promulgating or enforcing water quality restrictions on the operations. Rather, any restrictions to achieve water quality standards must be promulgated solely by the BOF in accordance with ORS 527.714 and 527.765.

In closing, OFIC appreciates the effort that has gone into updating the MOU and recognizes the importance of the collaboration between ODF and DEQ. Clarifying the process of how TMDLs will be developed and implemented is beneficial to all stakeholders. However, we do request that further review is conducted on the DOJ memo’s assertions regarding the EQC and DEQ’s authority to regulate non source forest operations. We believe that authority is overstated and therefore the memo should be revised to better reflect existing statutory and case law. Thank you for the opportunity to comment and we would be happy to meet and discuss these issues in greater detail.



Mike Eliason  
General Counsel and Director of Government Affairs  
Oregon Forest and Industries Council

Comment ID #14

Oregon Department of Forestry, Attn: Private Forests Division  
Oregon Department of Environmental Quality, Attn: TMDL Program  
via email: [odf-deq-collaboration-mou-feedback@state.or.us](mailto:odf-deq-collaboration-mou-feedback@state.or.us)

Nancy Hirsch, Acting State Forester [Nancy.HIRSCH@oregon.gov](mailto:Nancy.HIRSCH@oregon.gov);  
Richard Whitman, DEQ Director [richard.whitman@state.or.us](mailto:richard.whitman@state.or.us)  
Board of Forestry Members

**RE: Comment on Oregon Department of Forestry & Oregon Department of Environmental Quality Memorandum of Understanding: Improving Water Quality**

These comments are submitted on behalf of the Environmental Caucus of the Democratic Party of Oregon. First, we appreciate the agencies' renewed focus on addressing water quality issues in Oregon. Given the long list of waterbodies in non-compliance on temperature alone at the end of this draft, there is much work to be done. Because of the nature of the separate authority, a Memorandum of Understanding (MOU) is essential to delineate coordination and collaboration. We are in general support of this much more detailed MOU than the prior from 1998 and the call for revisions every five years.

We commend the effort to update this coordinating document but are very concerned that it appears to be focused on voluntary efforts only on private lands (as stated on the summary page). This is not acceptable as Oregon is not in compliance with federal law already and more importantly there has been serious degradation in numerous drinking watersheds resulting in very costly upgrades in water treatment and the need to find alternate sources of drinking water. (Salem, Corbett, Rockaway Beach, Nehalem and others).

The Department of Justice has clearly outlined the authority of the Environmental Quality Commission (EQC) and the Oregon Department of Environmental Quality (DEQ) to protect water quality (including drinking water-though this is not mentioned in the MOU) under the Clean Water Act. They are required to establish a maximum amount of a pollutant a water body can receive called Total Maximum Daily Loads (TMDLs) that quantify the reduction needed to meet the standards and submit that to the EPA. When approved this has the authority of federal law. The Oregon Department of Forestry (ODF) and the Board of Forestry (BOF) has the duty then to apply rules via the Oregon Forest Practices Act (FPA) or other regulation to address serious turbidity, toxins, temperature, and other pollutants due to landslides, roads, clearcuts, pesticide application and extensive clearcuts that have occurred or are likely to occur.

The MOU makes clear on page 4, that the BOF and ODF has their hands tied by state statute to take into consideration not only "...past forest practices impact; technical, economic and institutional feasibility, ... and that there is research evidence that forest operations under the FPA are degrading resources before adopting increased requirements." To top it off, ORS 527.630 requires "a balance of resource protection with effective and efficient forest harvest operations."

The BOF should evaluate what other measures it should recommend to the legislature, to remedy the state statutory provisions that conflict with federal requirements under the CWA (to paraphrase language on Page 5.)

Therefore, it should be noted that the petition action by the EQC to the BOF is the only action that can be taken to enforce the Clean Water Act with the authority of law. It requires action within two years to remedy a situation that has been identified as out of compliance with TMDL's. And yet, this MOU states that this action should be the measure of last resort. Indeed it is, as the EQC has never invoked it. The evocation that a petition by the EQC is one of last resort should be removed from the MOU.

In addition, the MOU does not outline that DEQ is authorized by law, to make its own replacement rules should the BOF not act. This is very important for public accountability and should be included in the body of the MOU and not just in the Department of Justice review.

Water managers in water districts generally identify water quality issues. They and their respective cities or towns should be included in TMDL development as outlined in 4.1 TMDL Development. If they are not, then inclusion of non-federal forest landowners to this process should be excluded as well.

ODF has not taken steps (or is unable) to enforce its current rules. This is apparent by the extremely low level of enforcement fines in the face of serious water degradation. ODF and DEQ seem unable or unwilling to access private lands to take samples to show clearly that elevated water temperatures, presence of pesticides and turbidity are the result of specific logging practices. This issue must be remedied to fulfill the requirement in 4.1.1 Development of New TMDLs that states the agencies will determine what other data is needed to meet load allocations on non-federal forest lands.

We note that Appendix three is not in the draft document, though it is referred to. Neither is the MOU Action Plan. As a result, an additional allotment of time should be added to the public comment period to read and comment on these sections.

We are very pleased to note that a provision was outlined that ODF will work with DEQ in identifying additional measures beyond current FPA rules to achieve load allocations for a TMDL Water Quality Management Plan.

Under the section II.2.B ODF-Led Water Quality Processes, the document states that "The Board and Department of Forestry encourage the use of non-regulatory measures where feasible." This may be current practice but undermines regulations. The example given, ORS 629-642-0300 claims to be an incentive mechanism. It is not. It is an option for private owners to use in stream logs to take the place of the preferable, rule-compliant action of retaining trees in a riparian zone. The purpose of the regulation is not only to provide future downed trees to slow flow but to provide stream shade. This is

a strong example of why so many of our streams and rivers are out of compliance. This is an example instead of work arounds to reduce adherence to current regulations.

In the section on Forest Practices Act Sufficiency Reviews there should be a mechanism for water managers and other water users to bring evidence to either agency to instigate a review.

Last, it must be noted that one of the most serious issues facing our state is the availability of water. Logging practices, specifically clearcut logging and planting of same age plantations or tree farms markedly reduces summer water flow. This document does not address this issue.

In conclusion, we note and recommend:

- Improved clarity for collaboration and cooperation between DEQ and ODF
- Need for an extension of the comment period to review missing parts of the Draft
- Strong encouragement for the BOF and EQC to make recommendations to change state statutes to allow adequate water monitoring and compliance with current the Forest Practices Act. Without these changes it is extremely difficult to improve the FPA to protect water quality
- State statutes should also be changed to allow the Board to protect in stream and downstream water users from contamination without taking into consideration the financial burdens this might cause. That is the purview of the legislature.
- Adherence to regulations should be the paramount goal rather than non-regulatory mechanisms.

Sincerely,

Catherine Thomasson, MD  
Chair, Environmental Caucus of the DPO

Portland OR,

# NORTHWEST ENVIRONMENTAL ADVOCATES



September 30, 2021

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Attn: Private Forests Division  
2600 State Street  
Salem, Oregon 97310

Oregon Department of Environmental Quality  
Attn: TMDL Program  
700 N.E. Multnomah Street, Suite 600  
Portland, OR 97232

*via email only:* [odf-deq-collaboration-mou-feedback@state.or.us](mailto:odf-deq-collaboration-mou-feedback@state.or.us)

Re: **Aug. 31, 2021 DRAFT Memorandum of Understanding: Oregon Department of Forestry – Oregon Department of Environmental Quality Collaboration on Achieving Water Quality Goals**

Dear DEQ and ODF MOU Team:

How utterly pathetic! What a colossal embarrassment!

At a time when Oregon has lost over \$8.1 million in federal grant funds because its logging practices are not adequate to meet water quality standards and protect salmon, the Oregon Department of Environmental Quality (“DEQ”) is now proposing to negotiate away any authority it has to control water pollution from logging. This proposed agreement between DEQ and the Oregon Department of Forestry (“ODF”) says not one word about the urgent need to protect threatened and endangered cold-water species in light of Oregon’s deteriorating water quality, diminishing water quantity, and the effects of climate change—that is, about *the* central point of all of the regulatory programs discussed by the agencies in the proposed agreement. The agencies make not one mention of the on-going loss of federal funds to DEQ and the Oregon Department of Land, Conservation and Development (“DLCD”) because of Oregon’s failed logging practices.

In addition to the agencies’ mutual goal of ensuring that DEQ’s authority to address Oregon’s failed logging practices is, for all practical purposes, completely gutted, this proposed agreement also ensures that the ODF will be invited to dominate every aspect of DEQ’s water quality

program, from its technical work to setting priorities for future projects. What emerges from this proposed agreement is a picture of ODF with its foot pressing down on a submissive DEQ's neck.

This letter constitutes Northwest Environmental Advocates' (NWEA) comments on the August 31, 2021 public review draft of the proposed "Memorandum of Understanding: Oregon Department of Forestry – Oregon Department of Environmental Quality Collaboration on Achieving Water Quality Goals" ("MOU"). The cover email inviting public comments asks that the public answer the following questions:

- Is the MOU's purpose clear?
- Are the agencies' roles clear?
- Is the MOU missing critical processes or program elements?
- What would improve transparency and efficiency of the agencies' joint processes?

## **I. AGENCY QUESTIONS ASKED AND ANSWERED**

### **A. Is the MOU's purpose clear?**

The MOU's purpose is extremely clear. It is two-fold but its overarching purpose is to ensure that little or no action is taken to save salmon, steelhead, bull trout, amphibians, and drinking water sources that are under attack from Oregon's inadequate logging practices.

First, that purpose is for DEQ to invite ODF to critique and participate in every aspect of its regulatory program—from setting water quality standards to establishing Total Maximum Daily Loads ("TMDL"). Not that ODF is not already invited to participate in the programs run by its sister agency; it is. But this MOU locks in a proposed elevation of ODF's involvement in DEQ's entire water pollution regulatory program. *See* MOU at 6–10 (repeated instances of "DEQ will"). In contrast, this lopsided agreement calls for a minimal engagement of DEQ in ODF's processes; ODF will continue to invite DEQ to external review teams and request information—but not seek concurrence—from DEQ. *Id.* at 10–11.

Second, and much worse, the MOU will tie DEQ's hands so that it, and the Environmental Quality Commission ("Commission") will do nothing to control the inadequate logging practices that make an utter mockery of its water pollution control regulatory programs. The proposed MOU will lock in the exceedingly narrow—and incorrect—interpretation of state law provided by the Oregon Department of Justice ("DOJ") in its March 2, 2021 memo: "Broadly speaking, the Commission and DEQ assess waters and establish the water quality standards, while the Board [of Forestry] and ODF then establish forest practices to comply with and work towards compliance with those standards." *Id.*, Appendix 1, Memorandum from Matt DeVore and Diane

Lloyd, DOJ, to Peter Daugherty, ODF, and Richard Whitman, DEQ, Re: *Authority to Protect Water Quality on Forestlands* (March 2, 2021) (hereinafter “2021 DOJ Memo”) at 6.

**B. Are the agencies’ roles clear?**

For the most part, except as described below.

**C. Is the MOU missing critical processes or program elements?**

Yes. *See* sections II and III, *infra*.

**D. What would improve transparency and efficiency of the agencies’ joint processes?**

Transparency would amount to the agencies’ providing the public, without having to resort to the Public Records Act, all documents that reveal the interaction of the agencies—including but not limited to transcripts or notes of meetings and phone calls, emails, memoranda, and the like—wherein ODF expresses its opinions to DEQ about how DEQ should conduct its work. Since the MOU emphasizes the extremely intrusive role that ODF is invited to take in running DEQ’s programs, and ODF is a captured agency,<sup>1</sup> these documents will improve transparency about that relationship. In addition, there are a number of areas, noted in these comments, when the MOU mentions but otherwise entirely skirts *how* issues will be addressed. It is not sufficient to say that issues will arise and they will be addressed. Why bother with an MOU at all if that is all that will be said? As it is currently proposed, the MOU serves only two purposes: (1) to severely curtail DEQ’s use of its own and the Commission’s legal authority; and (2) to obtain commitments to allow ODF to co-manage DEQ’s Clean Water Act programs. Both of these purposes serve to undermine the public interest.

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<sup>1</sup> “Captured agency: A government agency, especially a regulatory agency, that is largely under the influence of the economic interest group(s) most directly and massively affected by its decisions and policies – typically business firms (and sometimes professional associations, labor unions, or other special interest groups) from the industry or economic sector being regulated. A captured agency shapes its regulations and policies primarily to benefit these favored client groups at the expense of less organized and often less influential groups (such as consumers) rather than designs them in accordance with some broader or more inclusive conception of the public interest.” Paul M. Johnson, Department of Political Science, Auburn University, *A Glossary of Political Economy Terms*, available at [http://webhome.auburn.edu/~johnspm/gloss/captured\\_agency.phtml](http://webhome.auburn.edu/~johnspm/gloss/captured_agency.phtml).

## II. WHAT IS WRONG WITH THE PROPOSED MOU?

### A. DEQ Proposes to Forego Using its Direct Legal Authority to Protect Oregon's Water Quality and Aquatic Species

One way of looking at what is wrong—including “missing” from—with the proposed MOU is by looking at a DOJ memorandum on the very same subject written 11 years ago, as well as the DEQ commitments to address inadequate logging practices that were based on that legal memorandum. Produced for the purpose of allowing DEQ to make commitments in furtherance of a settlement that would ensure Oregon continued to obtain those now-diminished federal grant funds referred to above, DOJ came to a significantly broader conclusion about DEQ's authority to ensure that the state's logging practices can protect water quality and salmon. *See Northwest Environmental Advocates v. Locke, et al.*, Civil No. 09-0017-PK, Final Settlement Agreement (September 27, 2010) (“Settlement”), Ex. B, Memorandum from Larry Knudsen, Senior Assistant Attorney General, Natural Resources Section, to Neil Mullane, Water Quality Division Administrator DEQ, Re: *DEQ Authority to Develop and Implement Load Allocations for Forestland Sources* (July 2, 2010) (hereinafter “2010 DOJ Memo”); *see also id.*, Ex. A, Letter from John King, National Oceanic and Atmospheric Administration, (“NOAA”) and Mike Bussell, U.S. Environmental Protection Agency (“EPA”) Region 10, to Neil Mullane, DEQ, and Bob Bailey, Oregon DLCD (May 12, 2010), at 4, Attachment (Oregon to “[p]rovide a legal opinion from the Oregon Attorney General's Office that clearly concludes Oregon DEQ has the authority to prevent nonpoint source pollution and require implementation of the additional management measures for forestry. Specifically, under the state's current proposal, the legal opinion must conclude that DEQ has the authority to enforce TMDLs, including “safe harbor” BMPs, with regard to riparian buffers, landslide-prone areas, and legacy roads.”).

The 2010 DOJ memo was summarized in the Final Settlement of the above-referenced case, describing DEQ's legal authority over logging practices as follows:

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

\* \* \*

WHEREAS, on July 2, 2010, and in response to EPA and NOAA's May 12, 2010, letter, the Oregon Attorney General sent a legal opinion, which is attached



hereto as Exhibit B, to EPA and NOAA that describes the Oregon Coastal TMDL Approach as a new process by which ODEQ “assigns [load allocations] to individual property owners—including forestland owners—adjacent to the waterbody as opposed to the general [load allocation] for the nonpoint source pollution sectors as has typically been done in previous TMDLs. The water quality management plan (WQMP) issued in conjunction with the TMDL would require each source to undertake an approved implementation plan specific to the property. The [O]DEQ would also establish ‘safe harbor’ BMPs or other ground control measures that it believes to be adequate to meet the [load allocations] to the maximum extent practicable.”;

WHEREAS, the July 2, 2010, legal opinion further concludes that “[O]DEQ is authorized to establish its own implementation requirements to the extent required by the [Clean Water Act] [“CWA”] and to the extent that controls adopted by the [Oregon Board of Forestry] under the [Oregon Forest Practices Act] are deemed by [O]DEQ to be inadequate to implement the TMDL. . . . [O]DEQ may legally conclude, and in some cases likely must conclude, that implementation of its safe harbor BMPs is required.”;

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

Settlement at 4–5. Moreover, the attorneys described DEQ’s commitment—based on the 2010 DOJ memorandum—as follows:

WHEREAS, in the July 26, 2010, letter, and Attachment A to that letter, ODEQ commits to developing Oregon Coastal TMDLs that will “specifically identify significant nonpoint sources, including significant forestry sources,” and ODEQ commits to establishing enforceable load allocations in the TMDLs, and to developing safe harbor BMPs for the load allocations established for those sources, as well as to issuing implementation orders to significant sources, including significant forestry nonpoint sources that have received load allocations through the Oregon Coastal TMDL Approach. Further, Attachment A to the July

26, 2010, letter states that ODEQ will approve or disapprove TMDL Implementation Plans “based on the plans ability to meet the load allocations or [Oregon Board of Forestry] basin specific rule[s]” and that ODEQ “would reserve its authority to impose BMPs under ORS 468B.110 to the extent necessary to comply with Sections 303 and 3[1]9 of the CWA.”

*Id.* at 5–6.

Comparing the summary of DEQ’s legal authorities over logging practices in the 2021 DOJ memorandum to encompass generally the act of “assess[ing] waters and establish[ing] the water quality standards” with the 2010 DOJ memorandum, one can see that DOJ has almost entirely ceded the responsibility to regulate polluted runoff from logging entirely to ODF, and DEQ has indeed ceded it entirely to ODF. At a minimum, this is inconsistent with the DOJ’s conclusion set out above that when DEQ deems current logging practices “to be inadequate to implement the TMDL. . . . [O]DEQ may legally conclude, and in some cases likely must conclude, that implementation of its safe harbor BMPs is required.” 2010 DOJ Memo (emphasis added). At a minimum DEQ’s being required to conclude that additional practices are required means that DEQ must evaluate the existing practices for compliance with load allocations and determine what further practices are needed. *See also* Section II.C, *infra*.

**B. The MOU Misinterprets the Federal Requirement to Provide Reasonable Assurances That a TMDL Demonstrate Sufficient Nonpoint Source Controls Will Ensure Compliance With Load Allocations**

“Reasonable assurance” is the legal principle that a TMDL covering both point and nonpoint sources must demonstrate that any load reductions allocated to nonpoint sources in lieu of being required from point sources will, in fact, occur. We will not use this letter to further explain the principle and its detailed requirements as the agencies have the capacity to read EPA guidance and regulations for themselves. Suffice it to say that the MOU is based on a premise that the EPA will approve any TMDL in which DEQ asserts it has demonstrated reasonable assurance, regardless of the substance of those assertions. This is a faulty assumption.

The MOU makes passing references to the concept of reasonable assurances. MOU at 4, 9, 10. It claims, in sum, that an expanded set of non-regulatory, voluntary measures by ODF “will be designed to provide reasonable assurance of implementation.” *Id.* at 10. While citing, at footnote 4, a 2012 email from EPA that provides a compendium of three decades of EPA guidance documents requiring reasonable assurance to support EPA approval of TMDLs, with specific, detailed requirements, the MOU itself simply relies on this conclusory statement without further elaboration. Not only is asserting that voluntary measures will be sufficient to provide reasonable assurance baseless, but given the importance to DEQ that its TMDLs not be disapproved by EPA and the MOU’s purported interest in efficacy, collaboration, and

transparency, it is unclear why the agencies have not taken the time to elaborate on how strictly voluntary measures will be sufficient to demonstrate reasonable assurance. Moreover, ODF states in the MOU that these voluntary measures will be designed to provide reasonable assurance, but gives DEQ no role in evaluating or concurring in that claim, despite its being DEQ's obligation to demonstrate reasonable assurance in its submission of TMDLs to EPA for approval. Moreover, there is not even a reference to the 2021 DOJ memorandum<sup>2</sup> that provides, albeit in highly truncated form, more specific requirements for reasonable assurance than does the MOU: "In its evaluation, EPA considers whether practices capable of reducing the specified nonpoint source pollutant loads: '(1) exist; (2) are technically feasible at a level required to meet allocations; and (3) have a high likelihood of implementation.'" *Id.* What if DEQ disagrees with ODF that its purely voluntary measures exist, are sufficient to meet load allocations, and have a high likelihood of implementation? The MOU is silent. What if ODF points to future potential rulemaking that under its authorities stop short of ensuring that water quality standards and load allocations will be met? The MOU is similarly silent.

In the proposed MOU, neither state agency commits to any actions that will demonstrate sufficient reasonable assurance to ensure EPA approval and that the load allocations will be met. This is equally true for TMDLs in the future, whether new or revised under the October 19, 2020 court order in *Northwest Environmental Advocates v. EPA*, Civil No. 3:12-cv-01751-HZ, in which ODF will now play an increasingly dominant role over both science and policy decisions. *See* MOU at 7–9. What, specifically, will DEQ accept for future TMDLs to demonstrate reasonable assurance if all ODF offers is voluntary programs for which it is extremely unlikely the agency will be able to demonstrate there is a high likelihood of implementation? The MOU does not say. It seems to rest on the principle that whatever ODF offers will be sufficient, which is particularly ironic and inadequate given the Board's history of inaction.

The DOJ, for its part, offers—albeit in a single sentence—one answer:

the Commission could adopt by rule and enforce, or DEQ could adopt by order and enforce, source-specific requirements on forest operations in a sub-basin in order to comply with the TMDL requirements of section 303(d) of the federal Clean Water Act and the need to establish "reasonable assurance" of implementation.

DOJ at 4. This is one interpretation of the very legal authority discussed in Section II.A of these comments, *supra*, that DEQ has failed to ensure it can use in the proposed MOU. Yet, despite

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<sup>2</sup> The 2021 DOJ memorandum claims that "the TMDL must be accompanied by a management plan that provides reasonable assurance[.]" 2021 DOJ Memo at 3. This is an incorrect statement of federal law.

DOJ's bland repetition of this authority, or perhaps *because* DOJ chose to not elaborate on it in the new memorandum, DEQ entirely ignores this option in proposing to sign the MOU that makes no reference to DEQ's ultimate authority to protect designated uses from logging pollution. And, note further, nothing in the 2010 DOJ memorandum requires DEQ and the Commission to go through the petitioning process and waiting period as discussed in the new 2021 DOJ memorandum, a process that would more than likely derail any efforts DEQ or the Commission might, some day, have the courage to initiate. But regardless, the MOU as DEQ has proposed to sign would relegate the petitioning process to as rare an instance as it is currently—*never* having been used despite decades of evidence of logging practices that fail to protect designated uses, meet load allocations, and comply with water quality standards.

**C. The Proposed MOU Is At Best Unclear About DEQ's Role in Determining What Practices Are Necessary to Meet Water Quality Standards and Load Allocations**

The 2021 DOJ memorandum describes DEQ's role in assessing the sufficiency of current logging practices to include "determin[ing] whether current Board rules and any other measures proposed by ODF are adequate to achieve the pollution reduction required by the TMDL." 2021 DOJ Memo at 6. Even so, it repeatedly places the emphasis on ODF's conducting this analysis, not DEQ. *See e.g., id.* at 7 ("the Commission is responsible for determining the overall amount of pollution reduction needed on non-federal forestlands, and the Board is responsible for determining how to achieve those reductions.") (emphasis added).

In turn, the role given to DEQ to determine the adequacy of current logging practices is at best unclear in the proposed MOU. It explicitly states that once DEQ or the Commission have determined "the amount of pollution reduction needed," any "additional measures beyond existing FPA rules are necessary to achieve those reductions, then the Board and ODF are responsible for identifying what measures will be implemented[.]" MOU at 4 (emphasis added). Confusingly, however, the MOU is also riddled with contradictory messages that DEQ and the Commission may also evaluate whether current logging practices are sufficient. *See e.g., id.* at 5 (they may consider non-regulatory measures); *id.* (they may determine additional measures are needed); *id.* at 8 (same); 9 ("ODF will assist DEQ in identifying additional measures" if DEQ has determined existing measures are not sufficient). In this way, the delineation of which agency is doing what—most particularly on *the critical issue* of whether the current logging practices are sufficient and what is needed in their place—is left unclear. There are certainly enough references to its being ODF and the Board's job to determine the adequacy of logging practices to raise significant concerns about the intent of the MOU and how it will be carried out in practice. The MOU should clearly state that it is DEQ's job to determine if current logging practices will meet load allocations and water quality standards and, if not, to determine what practices are needed. *See also* discussion at Section III, Page 4, ¶ 6, *infra*.

Note that the MOU stands in stark contrast to the clarity on this issue presented in the 2010 DOJ memorandum and the commitments made by DEQ in furtherance of a settlement in the NWEA CZARA case. There, DOJ and DEQ made clear that DEQ's obligations include determining what were termed "safe harbor" BMPs, namely practices that would be sufficient to meet water quality standards and load allocations. Whether ODF and the Board chose to adopt, ignore, or partially embrace the safe harbor BMPs was their affair.

Not only is the MOU unclear on DEQ's role in determining needed logging practices, but it seeks to perpetuate a key error DEQ makes in developing its TMDLs, namely to curtail pollution. The agency spends significant resources gathering and analyzing data, building models, and writing TMDL reports. It presents the information about the pollution reductions that are needed to meet water quality standards in pollutant loads and often what are called surrogate measures. These measures include shading, geomorphological conditions, and the like, some of which in theory are readily measured in the field. What the TMDLs routinely fail to do is use the models to determine the needed practices—at their most basic: the width, density, and height of riparian vegetation required to meet water quality standards. In the 2010 settlement, DEQ agreed that it would do this, by determining the safe harbor BMPs. And, DEQ has done this exactly once, when it evaluated the Bureau of Land Management's proposed Western Oregon Plan Revision ("WOPR"). See Science Team Review, *Western Oregon Plan Revision Draft Environmental Impact Statement* (March 3, 2008), Appendix 2, DEQ, *Evaluation of the Western Oregon Plan Revision (WOPR) – Draft Environmental Impact Statement (DEIS) Alternatives for Stream Temperature* (November 26, 2007).

In the WOPR analysis, DEQ evaluated four riparian buffer alternatives against the water quality standards and TMDL load allocations, specifically the TMDLs for Canton Creek in the North Umpqua Subbasin. *Id.* at B-3. As DEQ described, "two changes were made to the original TMDL model" consisting of modifying the riparian vegetation to simulate the WOPR alternatives and changing the model distance step "to offer higher resolution results for evaluating changes in effective shade[.]" *Id.* DEQ's analysis concluded that a 150-foot riparian buffer width was sufficient, 100-foot buffers were not, and that two other alternatives (with smaller buffer widths and thinning) "show temperature increases and reductions to effective shade that exceed the TMDL load allocation and therefore do not meet Oregon's temperature standard. This occurs at a single harvest unit and cumulatively." *Id.* at B-21. To the best of our knowledge, this is the only time that DEQ has conducted and published its use of a TMDL model to test the sufficiency of riparian buffer sizes and conditions. Such an analysis—because it is key to using TMDLs to protect water quality for cold-water species—should be routine and should be incorporated into the MOU as an expectation of DEQ's role so that ODF and the Board understand what DEQ will be doing and why, and will not be surprised by it.

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#### **D. The Role of ODF-Written Implementation Plans is Uncertain**

The proposed MOU highlights the role of potential ODF-written implementation plans for TMDLs. *See* MOU at 9–10 (“ODF may propose alternative management strategies . . . in implementation plans[.]”). It then, generically, discusses implementation plans for designated management agencies of two types: existing plans and new plans. *Id.* at 9. The MOU does not make clear which of the two agencies will determine if a new implementation plan is required, because it uses the passive voice:

A new implementation plan to be developed (where an existing plan or measures are not adequate). If a new implementation plan is needed, DEQ and ODF will specify, in the TMDL and/or WQMP, the changes in environmental conditions that must be attained by the implementation plan to meet applicable load allocations.

*Id.*; *see also id.* at 10 (“If a new implementation plan is required . . .”). Given the purpose of the MOU to clarify how decisions will be made and the agencies will interact, it should make this responsibility clear, namely that it is DEQ’s job to make this determination. Equally unclear is the meaning of the phrase “environmental conditions that must be attained” and whether those conditions bear any relationship to the TMDLs they seek to implement. Moreover, it is highly inappropriate for ODF to specify anything “in the TMDL and/or WQMP” that is necessary to meet load allocations. ODF should not be writing the TMDL or the WQMP; this is just further evidence that the MOU is primarily aimed at inserting ODF into DEQ’s programs, an effort no other sister agency would tolerate.

More to the point, all of this discussion of ODF-prepared implementation plans to be submitted to DEQ for review “within 18 months of DEQ’s issuance of the TMDL and WQMP” begs two major questions. First, to date, DEQ has taken the position that no implementation plan is ever required from ODF. *See, e.g.*, DEQ, Upper Klamath and Lost Subbasins Temperature TMDL and Water Quality Management Plan (“WQMP”) (September 19, 2019) at 250 (“it is expected that all persons, including DMAs other than the Oregon Department of Forestry or the Oregon Department of Agriculture, identified in this WQMP will develop Implementation Plans”) (emphasis added); 252 (“Persons, including DMAs other than the Oregon Department of Forestry or the Oregon Department of Agriculture, identified in a WQMP as responsible for developing and revising sector-specific or source-specific implementation plans must: a) Prepare an implementation plan and submit the plan to the Department for review and approval[.]”) (emphasis added); *see also id.* at 261 (ODF “expected form of planning in response to TMDL” listed as “Ongoing implementation of the Forest Practices Act”); 263–254 (same); 268 (same with reference to reasonable assurances). To the best of our knowledge, every single Oregon TMDL and WQMP asserts this DEQ position with the exception of the very earliest TMDLs produced by DEQ. The basis for this position is the Commission rules on implementing TMDLs

(and prior versions of those rules):

Nonpoint source discharges of pollutants from forest operations on state or private lands are subject to best management practices and other control measures established by the Oregon Department of Forestry . . . . Such forest operations, when conducted in good faith compliance with the Forest Practices Act requirements are generally deemed not to cause violations of water quality standards as provided in ORS 527.770 . . . . In areas where a TMDL has been approved, site specific rules under the Forest Practices Act rules will need to be revised if the department determines that the generally applicable Forest Practices Act rules are not adequate to implement the TMDL load allocations. If a resolution cannot be achieved, the department will request the Environmental Quality Commission to petition the Board of Forestry for a review of part or all of Forest Practices Act rules implementing the TMDL.

OAR 340-042-0080(2).

The proposed MOU does not make clear whether DEQ has changed its “position” and has now decided that ODF will always submit implementation plans or if it will only sometimes be required to submit implementation plans and, if so, when and how will that decision be made. The MOU also does not explain what DEQ will do if, after its review of the proffered ODF implementation plan, DEQ determines that it is not sufficient. A submission for DEQ’s “review” suggests that the result will be either an approval or a disapproval but it is not made explicit. *See* MOU at 10. The MOU does not elaborate on whether the presence of an ODF-written implementation plan is intended to contain only voluntary measures, to presage new Board practice rules, or to otherwise require—without rulemaking—some basin-specific practices. Given the importance the MOU now places on that which DEQ has not required for the entire life of its TMDL program, namely ODF-written implementation plans, the agreement should elaborate on the details of this apparent change in DEQ position.

The second question left unanswered is this: if the implementation plan is submitted to DEQ for review *after* the TMDL is submitted to EPA, how can EPA rely on the implementation plan to evaluate reasonable assurance when it is required to act on the TMDL within the 30 days allowed by the Clean Water Act? 33 U.S.C. § 1313(d)(2). After all, the MOU itself sets up the untenable timeline:

The WQMP and implementation plan commitments constitute DEQ’s federally-required reasonable assurance demonstration that the TMDL will be implemented, and load allocations will be achieved. Reasonable assurance is a CWA requirement and considered as part of EPA’s review and necessary for TMDL approval.

MOU at 9. How can DEQ submit the TMDL to EPA based on its belief that it has demonstrated reasonable assurance without having even having seen the ODF implementation plan? Given the historic inability of the Board to adopt logging practice rules that protect aquatic species, DEQ and the Commission's inability to use the legal authorities they have, and the unlikelihood that purely voluntary measures will be sufficient to meet load allocations, this entire scenario sounds like a house of cards, ready to tumble at the least scrutiny.

#### **E. The Use of Existing "Implementation Plans"**

The MOU states that TMDL implementation plans for non-federal forestlands, previously not required, may now consist of:

An existing "plan" that meets the requirements of a TMDL WQMP as described in OAR 340-042. This "plan" could be a state forest Habitat Conservation Plan, a private forest Habitat Conservation Plan or some form of CWA assurances, rules developed under the FPA, stewardship agreements, sub-basin specific supplemental Forest Practice Act rules of the Board, multi-party landowner agreements, or other existing measures specific to non-federal forestlands. DEQ will document either geographically or describe the particular waterbody types or fact sets where the "plan" satisfies the load allocation, or is expected to achieve the load allocation with implementation over time. DEQ will also identify geographies or fact sets within the TMDL project area not covered by the plan or where the plan does not sufficiently address the load allocation, if any.

*Id.* at 9. This description leaves much unanswered. First, if DEQ identifies "geographies or fact sets . . . not [or insufficiently] covered by the plan" what will it do? What does the MOU mean by "fact sets"? For example, some TMDLs include multiple surrogate measures in load allocations that pertain to the water quality impacts of logging, such as relating to channel morphology, whereas others do not explicitly include load allocations for such key factors but include them in the TMDL's evaluation of what is required to meet water quality standards. Will DEQ's evaluation of the sufficiency of an existing plan differ based on whether such considerations in a TMDL have been made formal load allocations? What constitutes a plan that "does not sufficiently address the load allocation"? Will DEQ look at a plan to see if it contains specific analysis of how it will result in meeting water quality standards? Will it take any plan's logging practices and evaluate them using the TMDL model, as described above? How will DEQ do this where, as in most basin-wide temperature TMDLs, the modeled waters are mainstem rivers and major tributaries? How will DEQ evaluate a plan's sufficiency for Type N streams? How can a plan have evaluated meeting water quality standards as load allocations, if such load allocations have been determined after the plan's preparation? Will it evaluate any plan practices to ensure they meet all of the factors discussion in a TMDL that lead to violations of temperature standards? Will the plan need to be binding and enforceable to be considered



sufficient? And, what does the phrase “is expected to achieve the load allocation with implementation over time” mean? Will a program of adaptive management that cannot demonstrate reasonable assurance that the load allocation will be met as soon as possible be considered adequate under this test? Will reliance on a possible, eventual action by the Board to adopt basin-specific rules be considered “implementation over time”? If an existing plan called for the phasing in of improved practices, would that be considered sufficient?

To the extent that this DEQ review and use of existing plans and potential ODF-written implementation plans are the only actions in the proposed MOU that act as a counterweight to its overarching purpose to prevent DEQ and the Commission from using their legal authorities to control polluted runoff from logging, this section leaves a lot unanswered and fails to provide protection needed for Oregon streams.

#### **F. The MOU is Silent About Implementing Existing TMDLs**

The MOU’s section on implementing TMDLs focuses on implementation plans that already exist that DEQ could rely on or new implementation plans written by ODF for new TMDLs. MOU at 9–10. The MOU says nothing about how the agencies propose to implement *existing* TMDLs, not subject to replacement under the previously-described court order, for which there are no ODF implementation plans, *see* Section II.D *supra*, nor any DEQ review of any existing plans to see if they are sufficient to ensure that load allocations will be met. Instead, all existing TMDLs merely point to current logging practices and the never-been-used petitioning process that the MOU itself describes as a “last resort.” MOU at 5.

### **III. OTHER COMMENTS: PAGE-BY-PAGE**

Page 2, ¶ 2 – The Clean Water Act does not require EPA to improve water quality.

Page 2, ¶ 2 – The history of the DEQ-ODF collaboration should include facts such as the Board’s never having developed basin-specific logging rules in response to TMDLs or water quality standards and the DEQ’s and Commission’s never having used the process set out by the legislature in which the Commission petitions the Board for action. The history should also include the disapproval of Oregon’s Coastal Nonpoint Pollution Control Program, pursuant to the requirements of the Coastal Zone Act Reauthorization Amendments (“CZARA”) because EPA and NOAA determined in 2015 that Oregon “has not adopted additional management measures applicable to forestry that are necessary to achieve and maintain applicable water quality standards under Clean Water Act section 303 and to protect designated uses. NOAA and EPA first identified and notified the State of the need to implement the additional measures in 1998.” NOAA/EPA, *NOAA/EPA Finding that Oregon Has Not Submitted a Fully Approvable Coastal Nonpoint Program* (January 30, 2015) at 1. It might note, too, that the federal agencies specifically found that:

the State has not implemented or revised management measures, backed by enforceable authorities, to (1) protect riparian areas for medium-sized and small fish-bearing (type “F”) streams and non-fish-bearing (type “N”) streams; (2) address the impacts of forest roads, particularly on so-called “legacy” roads; (3) protect high-risk landslide areas; and (4) ensure adequate stream buffers for the application of herbicides, particularly on non-fish-bearing streams.

*Id.* at 4. Needless to say, the MOU makes no specific reference to any of these deficiencies identified by EPA and NOAA.

Page 3, ¶ 1 – The MOU states that “Oregon will maintain high quality waters.” Other than this bald assertion, the MOU does not explain how any collaboration between the agencies will achieve that end. In addition, a “high quality water” may very well be a water for which there are no or insufficient monitoring data on which to place the waterbody on the section 303(d) list of impaired waters. There are certainly many high quality waters in areas above salmonid streams (“Type N waters”) for which Oregon logging practices—namely massive clearcutting—provide no protection, the result of which is that they are impaired after logging, although the lack of data does not result in their being placed on the 303(d) list. Maintaining high quality waters is essential for many reasons, including protection of dwindling populations of amphibians. This subject is entirely ignored in the proposed MOU.

Page 3, ¶ 1 – As a vision, it’s good to see that “Oregon will identify the conditions necessary to improve water quality to the point where water quality standards are met . . . to assure that those conditions are attained within a defined period of time.” The problem is that the MOU does not contain the ingredients necessary to make this vision a reality. Moreover, the use of “non-regulatory,” purely voluntary measures cannot, by definition, “assure” that water quality standards are met. The vision of purely voluntary measures, upon which the MOU appears to rely heavily, is flawed and nowhere have the agencies explained why a regulatory program established by the legislature should be ignored as the means by which water quality standards will be achieved. Moreover, as DEQ has proposed to forego use of its legal authorities, the entire vision hangs on a slim thread indeed.

Page 3, ¶ 2 – The purpose, while fine, is not supported by the content of the MOU. It also falls short in that it aims to “improve water quality on waterways that are not meeting water quality standards” rather than actually meeting water quality standards and doing so in the shortest possible time. This is, in large part, because the agencies and their proposed MOU show no sense of urgency, likely because they and the MOU fail to grapple with the most urgent scientific facts about water quality: it is essential for the preservation and recovery of threatened and endangered species (and candidate species), and it has become and is becoming worse in the face of climate change. EPA has demonstrated in two temperature TMDLs done in the region that climate change has already caused increased water temperatures and will continue to have

an even greater effect in the future. The MOU is not driven by this sense of purpose.

Missing in first of two bullets that encompass the agencies' collaboration, on "processes to assess the adequacy" of current logging practices, is a joint determination to get beyond agency *assessment* processes and ensure that trees are left standing (and other practices) as needed to meet water quality standards and load allocations. Fish and other aquatic life do not derive any benefit from the continued assessment processes of the agencies. That includes TMDLs on which DEQ has spent vast agency resources only to ignore in their repeated assertions, in the accompanying water quality management plans, that current logging practices are sufficient as well as ODF's endless sufficiency analyses.

The purpose should go well beyond agency collaboration and state clearly the Commission and DEQ's intent to use their own legal authorities—through the processes described herein and in the 2010 DOJ memorandum and to a lesser extent the 2021 DOJ memorandum—to ensure that logging practices are used throughout Oregon that are sufficient to protect water quality. That the history of logging practices in Oregon is one of insufficiency and delay in action necessitates a different approach than the business-as-usual proposed in the MOU.

The second bullet on the agencies' collaboration is certainly not "transparent," does not ensure "efficacy" nor will it ensure "efficiency." It states as follows:

Processes to assess the relevancy of water quality impairments and TMDL development related to potential forestry impacts. This includes incorporating forestry-related considerations in TMDL development, implementation, and reporting.

As an initial matter, it is impossible to understand the first sentence because of the way that it has been written; maybe it could be rewritten in normal English. Where a TMDL written by DEQ determines that there is an impact from logging on water quality and, moreover, assigns a load allocation to logging activities, it is unclear what "processes to assess the relevancy" is supposed to mean. It sounds like the agencies will discuss whether DEQ is incorrect in its findings or, alternatively, that ODF will attempt to persuade DEQ in the development of TMDLs that logging has no or minimal water quality impact. This latter interpretation is borne out in an MOU that has ODF inserting its views into every step of DEQ's regulatory program, particularly the development of TMDLs. *See* MOU at 7–9. So, what does it mean to say that "[t]his includes incorporating forestry-related considerations in TMDL development, implementation, and reporting"? Where in the MOU is a "forestry-related consideration[]" defined? What does this mean? As nearly every TMDL written for Oregon waters addresses polluted runoff from logging—from unsafe levels of temperature for fish to unsafe levels of mercury for people—this obscure reference needs to be clarified.

That ODF is intending through this MOU to insert itself into the TMDL process will not ensure efficiency. DEQ, with EPA's approval, has the expertise and is charged with having the expertise to evaluate logging impacts to water quality and to assess its contribution relative to other sources, point and nonpoint. How is it efficient for ODF to be involved in the DEQ's determination of data sufficiency, access to data, model calibration results, model uncertainty and variability, model validation, model scenarios, and potential surrogate measures? *See* MOU at 7–9. This proposed role of ODF—to oversee DEQ's development of TMDLs—is merely the result of ODF's refusal to respect the work of DEQ, with DEQ's response to make ODF co-developers of TMDLs. Efficient this is not.

Achieving “efficacy” would be if some logging practices were improved sufficient to ensure that water quality standards are met—including designated use protection. There is nothing in this MOU that ensures that end or even enhances the likelihood that Oregon forest practices will be efficacious in protecting aquatic life and drinking water.

Page 4, ¶ 2 – The description of ODF authority's being constrained by “maximum extent practicable” is one significant reason why it is unacceptable that DEQ use this proposed MOU to give away, in all practical reality, its residual authority to regulate logging sources of polluted runoff sufficient to meet water quality standards, including protecting designated uses, many of which are listed as threatened or endangered under the federal Endangered Species Act.

Page 4, ¶ 3 – The notion that the Board adopts or amends logging rules “to meet . . . load allocations” established in TMDLs is merely theoretical. The history section, or this section, should indicate clearly that such an action has never been taken.

Page 4, ¶ 5 – The quotation from the recent DOJ memorandum that leaves to the Board and ODF to “establish forest practices to work towards those [water quality standards]” is misleading and incorrect, as explained above.

Page 4, ¶ 6 – It is incorrect for the MOU to state that “[i]f additional measures beyond existing FPA rules are necessary to achieve those reductions, then the Board and ODF are responsible for identifying what measures will be implemented and then monitoring to assure that implementation occurs on schedule.” This negates the role of the DEQ in two areas: (1) identifying what measures are required to meet water quality standards and load allocations; and (2) requiring such additional measures. *See* Section II.C, *supra*. DOJ's 2021 simplistic memorandum notwithstanding, it is DEQ's job to identify whether existing practices are sufficient and what additional practices are necessary. How else, for example, can it make its own assessment of reasonable assurance and develop the load and wasteload allocations to other sources? How else can it determine if it needs to use the processes established in the statute to ensure that the Board takes the appropriate next steps? Even if DEQ and the Commission have no intention whatsoever—as they have not for decades—in taking any action to ensure that water

quality standards are met as the result of developing a TMDL or establishing water quality standards, assessing the sufficiency of logging practices remains squarely DEQ's obligation.

Page 5, ¶ 1 – It is incorrect for the MOU to state that when “determining whether current, generally applicable, FPA rules are adequate to achieve pollution reductions, DEQ and the Commission may also consider non-regulatory measures.” Such purely voluntary measures will likely not meet the requirement that DEQ demonstrate reasonable assurance. *See* Section II.B *supra*.

Page 5, ¶ 2 – This entire paragraph is riddled with errors. It states:

State statutes establish a process for expedited revision of FPA rules when the EQC determines that changes are necessary to meet water quality standards. ORS 527.765(3). This process is initiated by a petition from the EQC to the Board. Through the processes and commitments described in this MOU, the Agencies intend that this authority be used only as a last resort, and that when DEQ or the EQC determine that additional measures are needed beyond generally applicable FPA regulations, that such measures normally be identified and implemented through an implementation plan prepared by ODF and reviewed and approved by DEQ.

First, the cited provision can hardly be described as a process for “expedited revision of FPA rules” when literally no rulemaking has ever taken place because the Commission has determined that new practices are needed to meet water quality standards. A process the MOU itself refers to as “a last resort” can hardly be concurrently described as an “expedited” process. Second, the MOU proposes that any additional measures that are identified as needed by the Commission or DEQ will be “identified and implemented” through an implementation plan prepared by ODF. If such additional practices are purely voluntary, it is clear that a plan will do, as it is non-binding. However, an “implementation plan” has no force of law and therefore cannot be a substitute for binding rules. Third, we would agree that the vision of this MOU and the one before it makes crystal clear that DEQ and the Commission will use their authority as a “last resort.” The question is not, however, does this MOU reflect reality but, rather, should that authority be relegated to the dustbin in favor of the agencies “commitment to collaboration” that infuses this MOU. *Id.* at 5; *see also id.* at 11 (dispute resolution limits DEQ to using only the petitioning process set forth in the statute). We urge that this authority not be ignored and that DEQ and the Commission not sign an MOU that states an intent to only use it as a last resort. In proposing to do so, DEQ is failing its obligation to protect water quality for drinking water and habitat for aquatic species, many of which face extinction without action. If DEQ and the Commission are not able to look at the history of ODF and the Board's failed logging practices—which EPA and NOAA have been pointing out since at least 1998—and recognize that they must do something different, it is unclear why they are even bothering to prepare and

sign a new MOU. It's a certain depraved indifference to stand by and do nothing about species going extinct when one has the legal authority to act.

Page 5, ¶ 4, bullet 6 – The MOU asserts that its signers intend to “work towards achieving water quality outcomes” through two means: (1) “Continued forward progress toward meeting water quality standards and load allocations, even where uncertainty exists”; and (2) “Adaptive management informed by data and scientific information.” Asserting that there is “forward progress” when there is none to “continue[.]” is “doublespeak”<sup>3</sup> in the classical definition of the phrase. Even if, arguably, there has been a modicum of forward progress towards meeting water quality standards, there has been no effort—ever—to make progress in meeting load allocations established in EPA-approved TMDLs developed by DEQ. Likewise, the reference to adaptive management is nonsensical in the context of the content of the MOU. Saying that one intends to use “adaptive management” means nothing unless the agreement establishes the means of implementing it. Yet ODF, which the MOU puts in charge of identifying what logging practices are needed, does not commit to even the most basic starting point of adaptive management, namely monitoring. *See* MOU at 10–11. As there is no commitment to identifying where additional data are needed, gathering any data that are needed, and analyzing the data in order to adaptively manage, this is entirely empty rhetoric. Contrast this with the adaptive management program in Washington State, which while so painfully slow can hardly be described as a model, at the very least has the essential building blocks in place.

Pages 6–10 (“*DEQ-led Water Quality Processes*”) – These pages describe DEQ’s obligations under the Clean Water Act to establish water quality standards, compare data and information to those standards to produce a CWA section 303(d) list of impaired waters, write a CWA section 319 nonpoint source plan, and develop TMDLs (new and revised), as well as to implement TMDLs. The multiple commitments made by DEQ in this section to invite the input of ODF—an entirely captured agency—and the industry it regulates into every step of DEQ’s process demonstrates, first, that DEQ desires to maintain a subservient role in relation to ODF. This takes the form of requesting representation on advisory committees, meeting with ODF staff, seeking input on every regulatory action taken including the setting of priorities for nearly every regulatory program. For example, why is ODF elevated in helping to determine priorities for new or revised water quality standards? *See id.* at 6. Why is ODF involved in establishing methodologies for interpreting and applying water quality standards to data and information?

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<sup>3</sup> Doublespeak: “Any language deliberately constructed to disguise or distort its actual meaning, often by employing euphemism or ambiguity. Typically used by governments or large institutions.” Wiktionary, *available at* <https://en.wiktionary.org/wiki/doublespeak>.  
Doublespeak: “language used to deceive usually through concealment or misrepresentation of truth.” Merriam-Webster, *available at* <https://www.merriam-webster.com/dictionary/doublespeak>

*See id.* Why is ODF being asked to help identify which methodologies are a priority and to look over DEQ's shoulder when it arrives at "draft assessment conclusions"? The list goes on. Not only why does DEQ promise that ODF will co-manage all of DEQ's regulatory program save permitting, but what does DEQ get in exchange for such meddling? Because, the single page of ODF commitments highlights only the following: purportedly an "expand[ed] implementation of non-regulatory measures." *Id.* at 10.

Second, it makes one wonder why DEQ does not have the same inclination to similarly invite the state and federal agencies in charge of protecting aquatic life—such as the Oregon Department of Fish and Wildlife, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, and the U.S. Fish and Wildlife Service—into every step of its execution of the Clean Water Act.

Third, it is completely inappropriate that ODF be involved in co-developing Oregon TMDLs as described on pages 7–9. *See also* comments on Page 3, ¶ 2, *supra*. In addition, DEQ's commitment to curtail its own legal authority along with a stated limitation on how much pollution can be controlled through logging practices is inconsistent with its obligations under the Clean Water Act. Specifically, the MOU states: "if DEQ determines that current generally applicable FPA rules are not adequate to achieve load allocations . . . DEQ will seek technical and programmatic input from ODF on additional regulatory or non-regulatory measures that are technically feasible and that could be implemented by rule revisions, stewardship agreements, incentive programs or other means and that if implemented would achieve the load allocations, as applicable." MOU at 8. The meaning of "technically feasible" is an unknown limitation but an inappropriate caveat nonetheless. If during the development of a TMDL, ODF states that the needed practice improvements are not possible to obtain through rule revisions or voluntary actions, this provision leaves unclear what DEQ will do next. Given the history of the agencies' relationship, the answer is likely that DEQ will simply capitulate to ODF's views. The MOU is an opportunity for DEQ to state clearly that it will use its and the Commission's legal authority where ODF and the Board fail to take the actions needed to protect Oregon's waters and species.

Pages 10–11 ("*ODF-led Water Quality Processes*") – DEQ needs to explain why it "concur[s] that the focus of implementation of TMDLs and water quality standards will occur at the program-wide level to the greatest extent possible." *Id.* at 10. This is precisely what ODF has been doing for decades, regardless of any findings of TMDLs. What, then, is the point of DEQ's developing the TMDLs? What is the point of the load allocations made to logging sources in watersheds or basins if they are just going to be ignored? The MOU itself, and the lack of any additional information supporting it, fail to explain why DEQ agrees with this principle. The proposed MOU goes on to say that "[t]here will likely be instances (e.g., for certain TMDLs) where basin-specific implementation may be the best option" but it does not inform the agencies or the public when this likelihood will be identified and how, how it will be determined that a basin-specific approach is "the best option," and does not explain how "the Agencies will

determine as the need arises.” In other words, for an MOU that claims to clarify how the agencies will work together, it has completely punted on the central issue pertaining to logging practices and TMDL load allocations.

ODF commits in this proposed MOU to continue to involve DEQ in its sufficiency reviews. The missing piece is any information about what sufficiency reviews ODF plans to do, what the time line is for those reviews, and how they will be conducted. ODF claims that in doing these reviews it uses “TMDL information . . . that aligns with analysis at a site or reach level.” *Id.* at 10. The use of TMDL “information” rather than a commitment to work with DEQ to use the TMDLs to identify the needed riparian buffers (and other practice changes) in order to meet the load allocations, as described above, renders this a hollow commitment. In addition, where as the MOU obliquely mentions the Board and ODF staff might find that existing rules are insufficient to protect water quality but “there are several findings required to make changes to rules” and such findings are not made by the Board, why does the MOU not call upon DEQ to take subsequent steps to ensure that it uses its own legal authority to protect water quality and designated uses including drinking water and threatened and endangered species where the Board declines or refuses? As the 2021 DOJ memorandum explains: “The Commission is not under an obligation to consider the burden to the landowners, however, nor is the MEP limitation included in Section 303(d) of the Clean Water Act.” 2021 DOJ Memo at 7. This is yet one more reason why DEQ must assert its own, independent legal authority to act.

It is unclear what the role DEQ’s extensive and EPA-approved analysis in the TMDLs is afforded if, after a Board determination that “forest practices in a watershed are measurably limiting achievement of water quality,” it will proceed to set up an entirely different body to “analyze conditions” and make recommendations. In this event, what does it mean to say that this new body “should rely” on the findings and analysis of the underlying standards and TMDLs? What, specifically, is the role of this new task force? What does the word “measurably” mean in this commitment? (Also, the Commission does not establish TMDLs at this juncture; the DEQ does.) This MOU leaves more questions unanswered than otherwise because it does not, for example, discuss how the TMDL load allocations will be translated into riparian buffers and other practices. It does not state what limitations the Board might put on what it will consider as recommendations. It does not state that the Board will act on the recommendations. It does not assure that the newly formed task forces will have adequate representation from those who are concerned with protecting natural resources rather than protecting their own pocketbooks. It does not even state that DEQ will be invited to participate on such task forces, despite an MOU that is heavy on ensuring ODF’s involvement in nearly all of DEQ’s Clean Water Act obligations. And, it does not establish a timeline for any ODF or Board actions after a TMDL has been approved by EPA.

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## Conclusion

In sum, the MOU proposes that DEQ will give up using both its direct and indirect (petitioning) authority to control polluted runoff from logging as needed to meet the requirements of the Clean Water Act in exchange for ODF's offering one possible benefit and obtaining three primary concessions. In the MOU, DEQ has obtained a new, limited commitment from ODF to prepare non-binding, after-the-fact, implementation plans for future TMDLs of dubious value. However, in addition to agreeing to forego use of its legal authorities, DEQ also agrees to: (1) relying on ODF's purely voluntary fixes to Oregon's failed logging practices; (2) ODF's excessive intrusion into the science and policy work of the DEQ including agency priorities; and (3) no method by which DEQ may resolve the federal agencies' determination that Oregon's logging practices are inadequate and thereby restore full federal funding to DEQ and DLCD.

Sincerely,

A handwritten signature in black ink, appearing to read "Nina Bell". The signature is fluid and cursive, with a large initial "N" and a long, sweeping underline.

Nina Bell  
Executive Director

cc: Richard Whitman, DEQ, [richard.whitman@state.or.us](mailto:richard.whitman@state.or.us)  
Nancy Hirsch, ODF, [Nancy.HIRSCH@oregon.gov](mailto:Nancy.HIRSCH@oregon.gov)



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**Re. Comments on Draft MOU: Improving Water Quality**

Dear Director Whitman and State Forester Hirsch,

Thank you for your efforts to move agency relations and processes forward in a way that improves water quality for Oregon. Please accept these comments on the proposed new “Memorandum of Understanding: Improving Water Quality” between Oregon Dept. of Environmental Quality (DEQ) and Oregon Dept. of Forestry (ODF).

**Better reflection of the current context: legal evolution and urgency**

The MOU would benefit from some additional context relevant to the revised MOU. This includes:

- In the Preamble and/or Background sections, some documentation of the history of MOU’s (1998 to present), the history of Oregon Department of Justice (DOJ) opinions, and the history of litigation and related settlements relevant to water quality in the forest watershed and management context, as well as what that legal evolution means and/or how that history has shaped the current context. In addition, the MOU should provide more reference to relevant portions of the March 2021 DOJ opinion. Currently, the MOU Problem section contains a history of DEQ-ODF collaboration and the Background section discusses respective agencies authorities, but these sections and the

MOU on the whole is void of the above suggested reflection of specific legal history, its evolution and relevance to today, and specific references.

- The urgency of water quality challenges in light of climate change should also be clearly reflected in both the Preamble and/or Background sections as well as the Purpose section. Oregon has a clear history of water quality impaired forested waterbodies that have resided on the 303(d)-list for decades. The state also has a history of forest-relevant TMDLs that have been failing to meet load allocations for non-point sources. The MOU should reflect this status quo as cause for significant concern instead of being silent on it. Further, this status quo is a context of growing Endangered Species Act listings or population concerns related to species dependent upon high water quality, a growing number of citizens relying upon forested watersheds for their drinking water, as well as the growing negative pressures of climate change on waterbodies and water quality. The MOU should reflect this with some sense of urgency in its purpose.

#### **Section I: Purpose (p.3)—need for language correction:**

Related to the above sense of urgency, the Purpose section of the MOU states that for waterbodies already failing to meet water quality standards, the purpose is “to improve water quality”. This standard appears to be below the level of the Clean Water Act’s requirement, and no MOU should enshrine it. Instead, the Purpose should be stated as “achieve water quality standards” for these waterbodies.

#### **Section I.2 (p.3-4): DEQ and ODF water-quality related authorities:**

As part of DEQ’s authorities (p.3), the MOU should more clearly state that it is DEQ’s responsibility to determine if current forest management rules, BMPs, and related logging practices will meet Total Maximum Daily Load (TMDL) load allocations and water quality standards and, if they do not meet the standards, to determine what practices are needed to do so (which may involve collaborating with ODF on the content-types, technical aspects or operational feasibility of such practices). Today, enough technical expertise, model-work and other tools exist to determine the efficacy of given forest management practices related to water quality parameters (e.g., the width, density, and height of riparian vegetation required to meet water quality standards). DEQ has conducted and published its use of a TMDL model to test the sufficiency of riparian buffer sizes and conditions. DEQ is capable of evaluating whether TMDL load allocations for forestry are being met and what it would take to do so, and DEQ should be clearly defined in the MOU as being in the pole-position for doing so.

In describing ODF’s authorities (p.4), the MOU states, *“BMPs may include both voluntary measures and FPA rules. Additionally, the department may develop non-regulatory options to address load allocations.”* These sentences create confusion. First, our understanding is that BMPs need to be adopted by rule under the Oregon Forest Practices Act (FPA). We would

appreciate clarification there. Second, if BMPs can also be voluntary (i.e., not in the FPA rules) and, as the second sentence states, other “non-regulatory options” exist, then what is the distinction between those options and the voluntary-styled BMPs referenced in the first sentence? The MOU should be clarified to address this confusion.

Overall, if BMPs are voluntary and not in the FPA rules, where will they exist such that they are known to forest landowners, managers and operators who are actually taking on-the-ground actions that affect water quality one way or the other? It is our understanding that these entities are tuned into following FPA rules but may be far less aware of voluntary or other measures not in the rules. If these voluntary measures are being relied upon to achieve TMDL load allocations, is it reasonable to expect that they will be known to and implemented by forest landowners, managers and operators? And can this approach create a “reasonable assurance” that implementation will occur to achieve load allocations? In short, voluntary measures may have a place, but they need to be part of a robust program in which the measures are communicated and monitored for implementation and effectiveness.

#### **Section II.2.A.4: TMDL Development and Implementation**

On pp.8-9 of the MOU, a similar version of the following paragraph exists in describing ODF-DEQ co-engagement during the development of new TMDLs (MOU Sec. 4.1.1) as well as court-ordered revision of TMDLs (MOU Sec. 4.1.2):

*“During the TMDL and WQMP development, if DEQ determines that current generally-applicable FPA rules are not adequate to achieve load allocations on non-federal forestlands, OAR 340-042-0080(2), DEQ will seek technical and programmatic input from ODF on additional regulatory or non-regulatory measures that are technically feasible and that could be implemented by rule revisions, stewardship agreements, incentive programs or other means, and that if implemented would provide reasonable assurance to achieve the load allocations.”*

This quoted language should be made consistent as well as revised in the Sec. 4.1.1 and 4.1.2 paragraphs as follows:

- The final sentence of this paragraph should read, “... would provide reasonable assurance that the load allocations will be achieved.” Right now, the Section 4.1.1 language does not say anything about “reasonable assurance”, and the Section 4.1.2 language is worded in a confusing way. The concept of “reasonable assurance” is very significant in the context of water quality / load allocation compliance because it gets not just at the adequacy of the measures themselves but the agency program and practice issue of whether it is reasonable to expect that forest landowners, managers, and operators will know about them and act accordingly.
- Further, a final sentence should be added to this paragraph in both sections, reading, “DEQ will document and determine whether “reasonable assurance” exists that the load allocation compliance measures will be implemented.” This is in keeping with CWA

intentions and can then be advanced to inform EPA's determination on whether to approve a given TMDL.

Lastly, subsections 4.1, 4.1.1, 4.1.2, and 4.2 of Section II.2.A.4 (pp.7-10) all speak to TMDL development, new TMDLs, court-ordered TMDL revisions, and implementation. There does not appear to be anything in this section or elsewhere in the MOU regarding existing TMDLs that are being under-implemented, or put another way, existing TMDLs where load allocations and water quality standards are not being met. We suggest that Section 4.2 (TMDL Implementation, p.9) be revised to address this.

The first paragraph of Section 4.2 should be revised to clarify that ODF must advance an implementation plan for its load allocation in a TMDL. Such a plan may include the alternative strategies mentioned in this subsection, but at present, the subsection does not clarify that ODF must submit an implementation plan, and past history makes this clarification important.

The second paragraph speaks to situations where DEQ has determined that FPA rules are not adequate to assure achievement of load allocations. An analysis by DEQ to evaluate this question would likely arise in the context of developing a new TMDL or court-ordered revision. But what about existing TMDLs? Without explicit language, we do not believe it can be inferred that DEQ will do an evaluation of existing TMDLs, whether load allocations are being met, and if not, whether existing FPA rules or BMPs need to be revised in order to meet load allocations moving forward. Therefore, inclusion of this kind of language in the MOU seems very important. We request that this kind of language be included in this section and that the "MOU Action Plan" section of the MOU (p.11) include a commitment that DEQ will undertake an evaluation of current TMDLs, implementation plan and load allocation compliance, and assess the need for additional measures within an 18-month timeframe.

#### **Section II.2.B—ODF-Led Water Quality Processes (pp.10-11):**

In several places, the language in this section references inclusion of DEQ in ODF's water quality processes. Where these references exist, this language should be revised to clarify that DEQ should also indicate its concurrence as to whether a given ODF-led process outcome will provide "reasonable assurance" in achieving load allocations (if that is the purpose of the process) or what level of contribution the outcome can be expected to make in achieving water quality and related load allocations. It is proper for DEQ to play this role and reasonable that any non-regulatory or incentive-based effort receive some indication of its anticipated level of impact from the state's water quality lead.

#### **Section III.2—MOU Action Plan (p.11):**

This section is one sentence and very open ended. Elsewhere, the MOU states (p.5):

*"State statutes establish a process for expedited revision of FPA rules when the EQC determines that changes are necessary to meet water quality standards. ORS 527.765(3). This process is initiated by a petition from the EQC to the Board. Through the processes and commitments described in this MOU, the Agencies intend that this authority be used*

*only as a last resort, and that when DEQ or the EQC determine that additional measures are needed beyond generally applicable FPA regulations, that such measures normally be identified and implemented through an implementation plan prepared by ODF and reviewed and approved by DEQ.”*

This indicates the agencies do not want to rely on a formal petition process as a matter of first-resort, and that they feel a more efficient approach exists for making improvements needed to achieve water quality. In addition to the suggested language above (Sec. II.2.A.4 comments re. an evaluation of existing TMDLs, whether load allocations are being met, and if not, whether existing FPA rules or BMPs need to be revised), we request that this MOU Action Plan section detail what steps the agencies will take in the near term (short of the last resort petition process) to ensure better compliance with load allocations and water quality standards given the urgency of the need today.

Sincerely,

Bob Van Dyk, Oregon Policy Director  
Wild Salmon Center

Portland, Oregon

## Comment ID #17

**From:** [Lon Otterby](#)  
**To:** [ODF-DEQ-Collaboration-MOU-Feedback \\* DEQ](#)  
**Subject:** Water Temperature for the Mohawk River  
**Date:** Thursday, September 30, 2021 7:34:00 PM

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Memorandum of Understanding: Improving Water Quality,

I am disappointed that the Mohawk River, in northeastern Lane County is not included in the schedules for water way temperature TMDL. We need all the help we can get to lower temperatures for fish and wildlife in the Mohawk River. I know it is a small river, however, if the temps were lowered we would see the return of several fishes and larger populations of river animals.

Thanks for your consideration,  
Lon Otterby

Marcola, OR



**October 7, 2021**

Oregon Department of Forestry  
Attn: Private Forests Division  
2600 State Street  
Salem, Oregon 97310

Oregon Department of Environmental Quality  
Attn: TMDL Program  
700 N.E. Multnomah Street, Suite 600  
Portland, OR 97232

Submitted via email to: [odf-deq-collaboration-mou-feedback@state.or.us](mailto:odf-deq-collaboration-mou-feedback@state.or.us)

**RE: Comment on Oregon Department of Forestry & Oregon Department of Environmental Quality Memorandum of Understanding: Improving Water Quality**

Dear Chair Kelly, Chair George, Acting State Forester Hirsch, Director Whitman, Members of the Boards of Forestry and Members of the Environmental Quality Commission,

Thank you for the opportunity to comment on the Draft Memorandum of Understanding (MOU) between the Oregon Department of Forestry (ODF) and the Oregon Department of Environmental Quality (DEQ) pertaining to improving water quality (hereafter Draft MOU).

Beyond Toxics is a statewide environmental justice organization advancing policies that ensure meaningful participation and cultivating grassroots leadership from Oregon's frontline and impacted communities. For years, Beyond Toxics has advocated for the modernization of Oregon's forest practices with underlying values of climate and ecosystem protection, environmental justice and rural community health. This includes managing Oregon's forests in an ecologically-appropriate manner that promotes holistic watershed health for the provision of clean drinking water, healthy fish and wildlife habitat, and climate mitigation and adaptation.

We have also signed on to and support comments provided by the Forest Waters Coalition, a network of organizations and community stakeholders working to change Oregon's logging laws for the benefit of our forests and watersheds.

With these goals in mind, we have concerns pertaining to the following statements in or omissions from the Draft MOU.



## I. Unclear Processes and Lack of Accountability

The MOU states that the Agencies will achieve water quality outcomes via “continued forward progress” and “adaptive management” methods (page 5). We expect accountability for these commitments. *Thus, we would like to see a clear identification of which agency is the final decision-maker for the processes outlined in the MOU as well as timelines with clear benchmarks tracking water quality improvement measures and progress toward compliance with water quality requirements.*

## II. Ineffective Non-Regulatory or Voluntary Measures

On page 4 of the MOU (emphasis added):

“In addition, for certain types of FPA rules, state statutes also require the Board to make certain findings in order to change regulatory requirements, and to consider additional factors. For example, for rules protecting natural resources, the Board must find that there is monitoring or research evidence that forest operations carried out under existing rules are degrading resources, before adopting increased requirements. In addition, the Board is directed to balance resource protection with effective and efficient forest harvest operations. ORS 527.630. **Depending on how they are applied, these state statutory provisions could conflict with federal requirements under the CWA.**”

This section provides the Board with an avenue to deter compliance with the CWA based on findings that protecting a natural resource would hinder “effective and efficient forest harvest operations.” This is the crux of the state’s water quality improvement problem. The FPA conflicts with the CWA. This MOU keeps these regulatory conflicts in place by putting forward weak voluntary measures regarding those conflicts, including maintaining an off-ramp for compliance with federal statutory requirements. The actions described in the Draft MOU do not go far enough to adequately address the water quality problems Oregon faces.

*This above paragraph should be excluded from the MOU.*

On pages 4-5 of the MOU:

“In determining whether current, generally applicable, FPA rules are adequate to achieve pollution reductions, DEQ and the Commission may also consider non-regulatory measures.” Also, on page 10 of the MOU: “The Board and Department of Forestry encourage the use of non-regulatory measures where feasible.”

The non-regulatory measures that have intended to improve water quality in the past have been inadequate. Still, the MOU relies on non-regulatory, voluntary efforts. This allowance hinders efforts by the DEQ to adopt rules requiring best management practices based on best available science that are necessary to meet water quality standards, despite the DEQ being the agency ultimately responsible for ensuring CWA compliance.

For example, the MOU states that “the FPA already has models of incentives for non-regulatory practices (e.g., OAR 629-642-0300)” (page 10). This [rule](#) allows timber operators to receive credits upon leaving conifer logs or downed trees in streams designated as Type F or Type SSBT. Those credits can then reduce the live tree retention requirements in a stream's riparian

management area. In theory, this rule encourages stream restoration projects. In practice, it results in fewer trees being left on the landscape in riparian zones. The stream maintenance efforts supported by this rule should be common practice.

*The MOU should encourage incentives that do not result in reduced habitat maintenance in other riparian areas as a tradeoff.*

On page 5 of the MOU:

“State statutes establish a process for expedited revision of FPA rules when the EQC determines that changes are necessary to meet water quality standards. ORS 527.765(3). This process is initiated by a petition from the EQC to the Board. Through the processes and commitments described in this MOU, the Agencies intend that this authority be used only as a last resort, and that when DEQ or the EQC determine that additional measures are needed beyond generally applicable FPA regulations, that such measures normally be identified and implemented through an implementation plan prepared by ODF and reviewed and approved by DEQ.”

What process will the agencies follow should DEQ disapprove of the additional measures and/or implementation plan prepared by ODF? Or are implementation plans prepared by ODF *a fait accompli*, in other words, a guaranteed final action with no further oversight by DEQ? This again gets at DEQ’s ultimate authority to make rules and create BMPs that would be protective of our state’s water quality when ODF fails to do so.

*We suggest that, should DEQ disapprove, the Board should revise and return the measures/plan to DEQ for review until DEQ grants its approval.*

### **III. Omission Related to Pesticides**

The Draft MOU fails to mention the [Pesticide Stewardship Partnership](#). When DEQ brings forth water quality monitoring data showing chemicals related to forest management practices in the water, ODF representatives have suggested that there is a lack of evidence that those chemicals originated from forest management. DEQ and ODF must support robust water quality testing and agree upon data standards to avoid hindering water quality monitoring and the development of best management practices. Furthermore, DEQ and ODF could partner more effectively to plan water sampling methods that include fish tissue data and are more closely tied to seasonal pesticide uses in timber management as well as precipitation patterns. For example, the fish tissue sampling data Oregon is required to submit to the US EPA has not been updated since the early-to-mid 1990’s and there is little to no data on pesticides.<sup>1</sup>

*The omission of the Pesticide Stewardship Partnership and the importance of pesticide data collection in water and aquatic species in and downstream of timber management activities highlight the importance of requiring pesticide use recordkeeping for all activities in order to identify timber uses and eliminate other contributions.*

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<sup>1</sup> See data provided at US EPA “Fish Tissue Data Collected by States for State Fish Advisories. Accessed 10/6/2021 at <https://fishadvisoryonline.epa.gov/FishTissue.aspx>

#### **IV. Conclusion**

A strong, impactful MOU is central to Oregon's ability to achieve water quality standards in the midst of a climate emergency, wide scale biodiversity loss, and severe drought. This MOU will impact the lives of many Oregonians who rely on forested watersheds for clean drinking water, especially rural communities who have experienced negative impacts of degraded water quality stemming from poor forest management practices. Despite its importance, the Draft MOU merely upholds the status quo and does not require ODF to fully acknowledge or correct the inadequacies of current BMPs under the OFPA. We and many others expect to see clear plans to enact concrete changes in BMPs and agency coordination processes from this point forward.

Thank you for your consideration of our comments.

Sincerely,

Lisa Arkin, Executive Director  
Beyond Toxics

Eugene, OR

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**September 30th, 2021**

State Forester Nancy Hirsch  
Oregon Department of Forestry  
Attn: Private Forests Division  
2600 State Street  
Salem, Oregon 97310

Director Richard Whitman  
Oregon Department of Environmental Quality  
Attn: TMDL Program  
700 N.E. Multnomah Street, Suite 600  
Portland, OR 97232

**RE: Comment on Oregon Department of Forestry & Oregon Department of Environmental Quality Memorandum of Understanding: Improving Water Quality**

Dear Chair Kelly, Director Whitman, Members of the Boards of Forestry and Members of the Environmental Quality Commission,

Please accept this comment on the Draft Memorandum of Understanding (MOU) between the Oregon Department of Forestry (ODF) and the Oregon Department of Environmental Quality (DEQ) submitted on behalf of the undersigned members of the Forest Waters Coalition. The Forest Waters Coalition is a network of organizations and community stakeholders working to change Oregon's logging laws for the benefit of our forests and watersheds.

We appreciate the agencies' renewed focus on addressing water quality issues in our state. While we commend efforts to support inter-agency collaboration and coordination in the important work ahead, we feel that the MOU does not go nearly far enough to ensure waters are protected on forest lands. The lack of context and recognition of the on-going problems associated with forest regulations, and their contributions to rising water temperatures and other threats to water quality, demonstrates that this MOU does not rise to the level of action required by this moment. Additionally, the MOU is not enforceable, is legally indefensible, and does not outline any processes for agency accountability if agencies fail to take action. With climate change and a legacy of water quality-degrading forest management on state-regulated forest lands, this MOU appears to continue the status quo.

We address several specific concerns with the MOU below by topic.

## **I. The MOU Should Provide Context of the Problem that the Oregon Forest Practices Act (OFPA) is Currently Insufficient to Protect Water Quality**

There is an established body of science, litigation, and federal regulatory action that prove the insufficiency of the Oregon Forest Practice Act (OFPA) and the Oregon Department of Forestry's current Best Management Practices (BMPs) in meeting water quality standards. The U.S. Environmental Protection Agency (EPA) and the National Atmospheric and Oceanic Administration (NOAA) disapproved of the Oregon Coastal Nonpoint Pollution Control Program in 2015. Those decision documents<sup>1</sup> clearly show that the reason for the disapproval was the insufficiency of the OFPA and its inability to protect water quality. In particular, federal agencies cited concerns about lack of protections for headwater non-fish bearing streams and the lack of sedimentation-based controls. As a result, the federal government withholds \$1.2 million a year from the state of Oregon because our state's forestry rules are not in compliance with the federal Clean Water Act (CWA) and the Coastal Zone Management Act (CZMA).

The most recent revision of OFPA rules--the process related to Salmon, Steelhead and Bull Trout (SSBT) rules for protecting coldwater criteria--resulted in a compromised outcome that fell below what EPA and Oregon's Department of Environmental Quality were recommending for meeting CWA standards. And, many examples exist of Total Maximum Daily Loads (TMDLs) associated with streams listed under the CWA as water quality impaired streams where forest-related load allocations are not being met.

In sum, Oregon's forest management practices have a long record of inadequacy in protecting water quality, documented by credible sources<sup>2</sup>. Therefore, this important context and the insufficiency of the current OFPA regulations should be acknowledged in the new MOU between the DEQ and ODF. Acknowledging the need to update OFPA regulations within the MOU will provide a much needed goal and a baseline of understanding between the agencies (and the public) as they work to create a regulatory system that will protect forested waterways and attain water quality

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<sup>1</sup> <https://www.oregon.gov/lcd/OCMP/Pages/Water-Quality.aspx>;  
<https://www.noaa.gov/media-release/noaa-epa-disapprove-oregon-s-coastal-nonpoint-pollution-control-program>

<sup>2</sup>See Multidisciplinary Science Team (Or.), Independent. 1999. Recovery of Wild Salmonids In Western Oregon Forests: Oregon Forest Practices Act Rules and the Measures In the Oregon Plan for Salmon and Watersheds. : Governor's Natural Resources Office; See also EPA, NOAA, *NOAA and EPA Preliminary Decisions on Information Submitted by Oregon to Meet Coastal Nonpoint Program Conditions of Approval*, June 12, 2008 at 10 ("Based on Oregon's recent submittal and our understanding of Oregon's Forestry Program, EPA and NOAA still believe that Oregon lacks adequate management measures under the Oregon Forest Practices Act (FPA) rules for protecting water quality and the degradation of beneficial uses from forestry activities. EPA and NOAA's primary concerns, stated in the 1998 conditional findings and reiterated in the 2004 interim decision document, remain.")

standards. If the agencies do not acknowledge this history, then our Coalition fails to see how this MOU is not simply maintaining the status quo, despite the ample evidence that current forest management practices do not protect water quality here in Oregon.

## **II. The MOU Formalizes Unnecessary and Excessive Consensus Decision-Making Process Between Agencies**

There are several instances within the MOU where the DEQ and ODF must both agree before an action can occur. For example, both the DEQ and ODF would need to agree that data would be beneficial to the DEQ before ODF submits the data. This over-reliance on consensus decision making bogs down the process unnecessarily. There are instances where one agency or the other should be in charge of the decision. Given the established issue with water quality in the state, agencies should prioritize acting swiftly and efficiently. Instead of outlining clear processes toward bringing Oregon's waterways in compliance with water quality standards, the MOU further complicates the administrative process and will likely result in a more drawn out timeline before any action is taken, if any action is taken. We do not see a legitimate reason to require consensus decision making as the default, and this aspect of the MOU seems counter to the memorandum prepared by the Oregon Department of Justice (DOJ) in March of 2021.

The 2021 Department of Justice memorandum ("2021 DOJ memorandum") was clear in determining where each respective agency has authority to initiate action, as well as the responsibility to own its area of authority. For example, the 2021 DOJ memorandum characterizes the DEQ's role in determining the adequacy of current logging practices to "determine whether current Board rules and any other measures proposed by ODF are adequate to achieve the pollution reduction required by the TMDL". However, on page 4 of the MOU it is stated that once the DEQ or the Environmental Quality Commission ("the Commission") have determined "the amount of pollution reduction needed," any "additional measures beyond existing FPA rules are necessary to achieve those reductions, then the Board and ODF are responsible for identifying what measures will be implemented". This statement clearly contradicts with the assertion provided in the 2021 DOJ Memorandum. The draft MOU seems to walk back from the clarity provided in the 2021 DOJ memorandum and create murkiness where clarity is required.

The Forest Waters Coalition is also concerned with the insertion of ODF into processes in which DEQ is the clear authority and expert. The DEQ should be the sole agency responsible for creating water quality standards and developing TMDLs. Why is ODF being allowed a level of influence in DEQ's work that 1) other impacted state agencies don't have and 2) that is not reciprocated in the MOU? If the argument for the insertion

is to foster better agency cooperation then why isn't the DEQ allowed the same level of influence into all of ODF's processes and decisions? ODF should not be allowed this undue level of influence into DEQ's work and allowing such will likely undermine the administration of the Clean Water Act in Oregon.

The Forest Waters Coalition requests the agencies to clearly identify in the MOU where each agency is the final decision maker. Without a clear identification of who is the final authority at each step, the Coalition fears that no real progress will be made and instead there will be agency deadlock due to the inability to come to consensus. It is vital to both an effective and transparent regulatory process that the DEQ and ODF clarify their respective authorities in their plan to ensure clean water for our communities.

### **III. MOU Does Not Include All Regulatory Pathways Identified in the 2021 DOJ Memorandum**

The MOU does not explicitly state all of the processes that were identified in the 2021 DOJ Memorandum. This failing appears to deliberately take some key processes allowed in state statutes off of the table. For example, the MOU does not recognize that if DEQ were to petition ODF to change their rules, and if ODF refused to change the rules at issue, then DEQ has the authority to make their own replacement rules. DEQ's authority to make replacement rules when ODF refuses to act is an important piece of the statutory framework, and it is important to public accountability. This DEQ authority should be explicitly acknowledged in the MOU as a tool for the DEQ to remedy a history of inaction and act swiftly to bring Oregon's waterways up to federal water quality standards. As the agency responsible for ensuring Oregon's water quality standards are met, the DEQ has the ultimate authority to make rules and create BMPs that would be protective of our state's water quality when ODF fails to do so. This crucial authority should be explicitly stated in the MOU.

### **IV. The MOU Should Include a New Voluntary Process to Review the Oregon Forest Practices Act Regularly**

As we have established in this document, evidence that Oregon's forest practices are insufficient at meeting the standards of the Clean Water Act and Coastal Zone Management Act Reauthorization Amendments (CZARA) for protecting water quality is well documented. This issue will only be worsened by a future of climate instability that will challenge our state's water quality and availability on the landscape. Given these formidable challenges, the Forest Waters Coalition believes that the agencies must move swiftly to establish sufficiency reviews on a set schedule to ensure rules stay protective of water quality standards. For example, the agencies could agree in the

MOU to do a voluntary sufficiency review every 2-3 years. During these reviews, agencies could revisit best available science as it develops and, where necessary, update management practices to meet the needs of the changing landscape ahead. Given that, as we understand it, this draft MOU has been in the works for over 3 years, it seems appropriate for the agencies and their oversight commissions / boards to intentionally regularize a process that ensures timely updates based on contemporary evidence.

Making an agreement to revisit and update the OFPA's water quality protections would clearly show the agencies' commitment to meeting the challenges facing Oregon's forested waterways. Doing a regular sufficiency review could also help address concerns raised by the U.S. EPA and NOAA and prevent future disapprovals of the Oregon Coastal Nonpoint Pollution Control Program. As of the submission of this comment, the DEQ has missed out on millions of dollars of federal funds due to the insufficiency of the OFPA in protecting our state's water quality.

#### **V. The MOU Should Include Enforcement and Accountability Measures**

The MOU does not mention any procedures for ensuring accountability or plans for ensuring enforcement of agency actions. For example the MOU states that ODF could choose to meet load allocations using voluntary measures but there is no explanation regarding how that would work or methods to ensure landowners actually undertake such voluntary measures in the volume which would be needed. The Forest Waters Coalition is unclear on how voluntary measures would allow for a determination of reasonable assurances and believes the MOU should do more to expand on how such a program would work and what steps would be taken if voluntary measures do not create the desired result.

Additionally, there is very little in the MOU regarding monitoring and enforcement activities. Without strong monitoring and enforcement of the TMDLs, improvements to water quality on state-regulated forest lands will likely not happen. As it is written, the MOU does not provide any reasonable assurance that TMDLs will be met. The MOU should detail how agencies will enforce that landowners are implementing BMPs in the absence of rule changes, and additionally should clarify a path for changing rules as is necessary to meet clean water standards. Additionally, although the MOU mentions adaptive management, this type of management is meaningless without any complementary monitoring and enforcement mechanisms.

Related to the adaptive management provision, the MOU also lays out the possibility of an associated MOU Action Plan. Just like with adaptive management, such a provision



is virtually meaningless without any substance. The Action Plan section in the MOU should commit the agencies to certain activities and material goals to achieve within the first year, first three years, and beyond.

## **VI. The MOU in Context**

In addition to a legal and administrative record documenting water quality issues in Oregon, there are many site-specific examples of communities across the state who suffered impacts to water quality as a result of industrial forest management.

Residents of Rockaway Beach have witnessed 95% of their drinking watershed clearcut in the past nineteen years, despite the extraordinary efforts of community members to protect Jetty Creek. Following the clearcuts, DEQ issued more than 20 alerts about high risk levels of known carcinogens—byproducts from treating water polluted by private industrial logging—in Rockaway Beach drinking water, requiring the city to construct a new water treatment plant at a cost of \$2 million. From 2004 - 2014, twenty-nine community water systems on the Oregon Coast, including Rockaway Beach, received these water quality alerts from DEQ (Excerpted from Table 3, Summary of Water Quality Monitoring Data and Treatment Methods, Oregon Coastal Drinking Water Protection Planning, DEQ & OHA, 2015)

In another incident of logging impacting community water supplies, residents of Corbett, Oregon were unable to get drinking water from the south fork of Gordon Creek, one of their two water sources, after a logging company clearcut on both sides of the creek. The company left the logging buffer required by the OFPA around the surface drinking water source, but after the clearcut, the creek flow dropped so low that the community of Corbett had to switch to its last remaining water supply.

The small town of Wheeler, Oregon, was forced to transition their water intake from surface to groundwater because of impacts that local private industrial logging operations were causing to Jarvis Creek and Vosburg Creeks. Community members continue to pay off the resulting \$1.1 million dollar debt.

In the city of Carlton, the reservoir was silted-in by commercial logging that caused soil to erode into the reservoir, dramatically cutting storage capacity. There was a landslide from a logging road that slumped into the reservoir, and the city will switch over to McMinnville city water for the summer, as they replace the transmission pipe from their reservoir and dredge the reservoir.

Willamina, colloquially known as Timber Town USA, is currently exploring moving their point of diversion for drinking water from Willamina Creek because the creek, located downstream of a network of private timberland, is dirty from too much silt that runs off clearcut slopes and into streams when it rains. Currently, the community has only 72 hours of stored water available if the water in Willamina creek becomes unusable.

This issue has also affected the city of Amity's point of diversion on the South Fork of the Yamhill River, downstream of Willamina Creek. Amity had to take out USDA loans for over \$2 million dollars to move their source water intake to prevent silt from being taken in.

This is a necessarily incomplete list of communities around Oregon who have been forced to pay the price of polluted water. Many more Oregonians already experience the harmful consequences of private industrial forest practices in their watersheds. Many others, such as the communities of Arch Cape and Rhododendron, have navigated costly and complex processes of purchasing larger buffers, or their entire drinking watersheds, in order to avoid similar fates.

The MOU fails to acknowledge these site-specific examples and the many communities who have engaged with the Department of Environmental Quality over the past decades with concerns about the impacts of logging in their drinking water supplies. Communities on the ground have been experiencing the insufficiency of the OFPA rules first hand and these very serious impacts provide important context that should be acknowledged as a starting place in the MOU.

## **Conclusion**

While we appreciate the renewed effort to clarify how DEQ and ODF will collaborate in the necessary work ahead, the MOU falls far short of laying out a feasible and enforceable path toward improving Oregon's water quality. Oregonians currently experiencing the impacts of harmful industrial logging look to our state agencies for recognition and meaningful action. In the past twenty years, more than two dozen communities have had at least 40% of the forests around drinking water sources cut down<sup>3</sup>. Current management practices operate using the opposite of the precautionary principle, where communities are required to prove harm to their watersheds before agency action is undertaken. Those who have not yet experienced the harmful impacts should not be expected to wait until the issue comes to their watershed.

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<sup>3</sup> <https://www.opb.org/article/2020/12/31/oregon-logging-clear-cuts-drinking-water/>

In order to meet the challenges Oregon waters face today, we recommend a substantial re-write of the MOU to include a recognition of the context of the problem, a clearer delineation of agency authorities to take action, and a transparent implementation and accountability process for ensuring that action is taken on a timeline that reflects the urgency of the problem. Our communities cannot make more water. Please make the necessary changes to the MOU to reflect the reality of the situation, that the OFPA is insufficient to protect water quality and a commitment from each agency to diligently work to correct the acknowledged problem. Anything short of this continues the status quo and is simply not good enough given the significant challenges our forested watersheds and communities face in the climate ahead.

Signed,

**Forest Waters Coalition Member Organizations:**

350 PDX	Oregon Wild
Audubon Society of Portland	Our Forests
Beyond Toxics	Pacific Coast Federation of Fishermen's Associations
Cascadia Wildlands	
Institute for Fisheries Resources	Rogue Riverkeeper
Klamath-Siskiyou Wildlands	Trout Unlimited
North Coast Communities for Watershed Protection	Tualatin Riverkeepers
Northwest Guides and Anglers	Umpqua Watersheds
Oregon League of Conservation Voters	Wild Salmon Center
	Willamette Riverkeeper
	Williams Community Forest Project



## OREGON CHAPTER SIERRA CLUB

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SIERRA  
CLUB

FOUNDED 1892

October 7, 2021

Attn: TMDL Program  
Oregon Department of Environmental Quality  
700 NE Multnomah Street, Suite 600  
Portland, OR 97232

Dear DEQ MOU team,

The Oregon Chapter Sierra Club has grave concerns about the draft update of the Department of Environmental Quality (DEQ) and the Department of Forestry's (ODF) 1998 Memorandum of Understanding. DEQ should not be delegating the protection, restoration, and maintenance of water quality to the Oregon Department of Forestry, whose inadequate stream protection regulations have resulted in unacceptable and unnecessary harms to Oregonians who depend on forest-based sources for drinking water.

While the proposed MOU purports to reflect an increased emphasis on federal law and federal Clean Water Act requirements for TMDLs, the draft MOU fails to require accountability from ODF to meet those requirements. Program-wide reliance on voluntary measures and a weak Forest Practices Act will prove to be utterly inadequate to meet water quality goals in many basins and subbasins.

The MOU should be revised to say that BMPs should not include "voluntary" measures, and that petitioning the Board of Forestry should not be a "last resort." It is clear that additional measures beyond FPA regulations are needed now, because current practices are failing to meet water quality standards.

Federal penalties for inadequate protections of our forest streams under ODF's management have cost Oregonians millions of dollars in Clean Water grants. Unacceptable damage to local drinking watersheds from erosion and herbicide spray continue to put NW Oregon residents at risk. This must stop. In addition, ODF's lax stream protections under the Oregon Forest Practices Act are considered a key contributing factor to the decline in listed salmon species.

ODF has demonstrated that it cannot be entrusted with the critical responsibility of protecting forest streams. It's clearly time for DEQ to resume its authority over protecting the water quality of Oregon's forest streams.

Sincerely,

Debra Higbee-Sudyka  
Chair, Conservation Committee  
Oregon Chapter Sierra Club

## Comment ID #22

**From:** [Barrett - Single Track](#)  
**To:** [ODF-DEQ-Collaboration-MOU-Feedback \\* DEQ](#)  
**Subject:** Draft ODF DEQ MOU comments  
**Date:** Thursday, October 7, 2021 3:33:41 PM

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TMDL project team,

In response to the request of 09/01/2021, I appreciate the opportunity to comment on the draft ODF DEQ MOU.

Throughout, the draft should provide laser-like clarity and consistency in applying the goals and objectives terms “water quality standard” – WQS and “TMDL load allocations.” The weight of this document in guiding future decision-making and as a public communication product demand it. For example, will forestry practice regulations be considered insufficient as long as a WQS with a plausible nexus to forest practices remains unmet? Or will forestry practice regulations be considered insufficient if such practices are not adequate to achieve load allocations? The draft seems too casual and ambiguous with this critical distinction.

Thank you again, and best of luck in your work,

Barrett  
Brown

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**From:** Kassandra Rippee

**Sent:** Thursday, October 7, 2021 4:07 PM

**Subject:** RE: DEQ-ODF Memorandum of Understanding

I have asked our NRD team to weigh in on whether they have concerns but haven't heard back. The only comment that I have is that I don't see any clear process for addressing cultural resources, which is still missing in the state's current process around Clean Water Act responsibilities and.. just about everything ODF is responsible for...

I hope to see something more clear outlined in this MOU that ensures parties are in compliance with state (and federal as applicable) cultural resources laws.

Shuenhalni (take care),

Kassie

*Kassandra Rippee*

Tribal Historic Preservation Officer (THPO)

Coquille Indian Tribe

Coos Bay, Oregon

---

[THPO@coquilletribe.org](mailto:THPO@coquilletribe.org)

pronouns: she/her



# Associated Oregon Loggers, Inc.

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**Date:** October 7, 2021

**To:** Private Forests Division  
Oregon Department of Forestry  
2600 State Street  
Salem, OR 97310

TMDL Program  
Oregon Department of Environmental Quality  
700 NE Multnomah Street, Suite 600  
Portland, OR 97232

**From:** Amanda Astor, Forest Policy Manager  
Associated Oregon Loggers  
2015 Madrona Avenue SE  
Salem, OR 97302

**Subject:** ODF & ODEQ Memorandum of Understanding: Improving Water Quality

## Introduction

Associated Oregon Loggers (AOL) is a local trade association which represents nearly 1,000, family-owned forest contracting businesses. Our member companies have been involved in the management of the Oregon's forests for decades. These nearly 23,000 owners, operators and employees are essential to conduct most, if not all, activities in the woods, be that road work for access, timber falling for management and restoration, reforestation for sustainability, trucking for product transportation, and many other services. AOL's member companies provide a diverse array of services that are necessary for Oregon Department of Forestry (ODF or the Department) to conduct all of their forest management activities.

Our members follow the Oregon Forest Practices Act (FPA) and most participate in the AOL administered Oregon Professional Loggers program. AOL has a Memorandum of Understanding (MOU) with ODF to ensure our members are aware of monitoring efforts, new rules, best management practices and more.

AOL believes the best way to ensure feasibility of new agreements and reasonable expectations is to work with the forest contracting sector and other timber stakeholders. We thank you for the opportunity to comment on the August 31, 2021 DRAFT MOU between ODF and the Oregon Department of Environmental Quality (DEQ). We believe an updated MOU is necessary due to new research, technological innovation, changes in fire frequency and severity, regulatory changes and policy changes that have all occurred since the original 1998 MOU.

## Climate Change, Water Quantity and Water Quality

It is no surprise that climate change has an effect on water. Water will continue to be adversely impacted as temperatures rise, droughts persist and wildfires implicate waterways. Regrettably, the effects of climate change on our waterways cannot be simply rolled back or improved by forest management changes in riparian management zones. It is important as DEQ and ODF reflect on TMDL and WQMP development, revision and review, what the cause of the issue is and whether or not it is reasonable to believe that a landowner or operator can feasibly fix the issue.

We live in a new paradigm and thinking that things such as water quantity and quality will stay stagnant through this change is unrealistic.

It is however [well documented](#) that the best water quality in Oregon is derived from natural and working forest watersheds. AOL suggests utilizing non-regulatory programs whenever possible to achieve Clean Water Act requirements in order to retain the good partners that DEQ and ODF have in forestland owners and operators.

#### **4.1.1. & 4.1.2. Development of New or Revised TMDLs and WQMPs**

Although this MOU is only between DEQ and ODF, the process described for collaborating, conferring and meeting to discuss data, current practices, FPA rule compliance, adequacy of FPA rules, etc. there should be a spelled out and transparent process to include effected landowner(s) and/or operator(s) to gather information, notify the landowner(s) and/or operator(s) of an issue and develop feasible solutions prior to applying strict regulatory or non-regulatory measures to the waterway and landowner(s).

DEQ and ODF need to know how each agency will engage with the effected parties in order to reduce redundancy, ensure accurate information is passed on to the landowner(s) and/or operator(s) and create efficiency in handling the issue or addressing the need to develop a new TMDL or WQMP.

If the Agencies are not aware of each other's processes to communicate with the landowner(s) and/or operator(s) whom are affected, then there will surely be a lack of transparency, efficacy and efficiency.

#### **II.2.B - FPA Sufficiency Review**

AOL believes this MOU is to help each agency understand the other's processes related to water quality review processes. With that said, the process by which the Board of Forestry (the Board) reviews FPA rules is insufficient.

The MOU must relay the specific "findings required to make changes to rules" by the Board. This should include the requirement to use the best available science that is verifiable. A data driven process must be used to make such changes to the FPA, otherwise politically driven changes will occur. The MOU should clearly state the process undergone by the Board to make a determination on FPA sufficiency related to water quality protection.

#### **Legal Obligations**

AOL has been provided with the comment letter that Oregon Forest & Industries Council submitted to DEQ and ODF on this DRAFT MOU and would like to formally state that we agree with the conclusions made by their staff on legal obligations to regulate nonpoint source discharge. We agree that "the DOJ memo is incorrect in asserting that the CWA requires Oregon to regulate nonpoint forest operations or to establish and enforce controls on those operations that are sufficient to achieve a TMDL load allocation for the operation to or otherwise achieve water quality standards." Please refer to their comments and recognize that AOL fully supports them.

Sincerely,



Amanda Astor (She/Her); Forest Policy Manager  
Associated Oregon Loggers



## Comment ID #25

**From:** [Lindsey Bonner](#)  
**To:** [ODF-DEQ-Collaboration-MOU-Feedback \\* DEQ](#)  
**Subject:** Forest Waters memo  
**Date:** Thursday, October 7, 2021 5:05:02 PM

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I am a resident of Bend, Oregon and I agree with the comments made by Forest Waters on the memorandum of understanding between Oregon Department Forestry and Oregon Department Environmental Quality on water quality.



# Oregon

Kate Brown, Governor

Department of Land Conservation and Development

Director's Office

635 Capitol Street NE, Suite 150

Salem, Oregon 97301-2540

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[www.oregon.gov/LCD](http://www.oregon.gov/LCD)

October 7, 2021

Richard Whitman, Director, Department of Environmental Quality

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Portland, OR 97232

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Nancy Hirsch, Acting State Forester, Department of Forestry

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## DEQ-ODF Memorandum of Understanding

Thank you for providing the Department of Land Conservation and Development (DLCD) the opportunity to review and comment on the Memorandum of Understanding (MOU) between the Department of Environmental Quality (DEQ) and the Oregon Department of Forestry (ODF). DLCD provides the following comments and suggestions for DEQ's and ODF's considerations.

### **MOU's Purpose and Agency Roles**

The MOU does not mention DEQ's role in the Oregon Coastal Management Program (OCMP) or the Coastal Zone Amendments and Reauthorization Act (CZARA), which created the requirement for states with approved coastal programs to develop a Coastal Nonpoint Source Pollution Control Program (CNSPCP). CZARA specifies that the CNSPCP is jointly administered by the National Oceanic and Atmospheric Administration (NOAA) and the Environmental Protection Agency (EPA). CZARA mandates coordination between the State's lead agencies for the Clean Water Act (CWA) and Coastal Zone Management (CZMA) and CZARA. CZARA Section 1455b.a.2 states "A State program under this section shall be coordinated closely with State and local water quality plans and programs [...] The program shall serve as an update and expansion of the State nonpoint source management program developed under section 1329 of Title 33, as the program under that section relates to land and water uses affecting coastal waters." Additionally, CZARA requires that DEQ and DLCD establish "mechanisms to improve coordination among State agencies and between State and local officials responsible for land use programs and permitting, water quality permitting

*and enforcement, habitat protection, and public health and safety, through the use of joint project review, memoranda of agreement, or other mechanisms.”* (Section 1455b.b.6). **DLCD strongly recommends the language within the MOU be expanded to include mention of the federal mandate under CZARA and the required coordination with DLCD as the lead state agency for CZMA implementation.**

### **Missing Critical Processes or Program Elements**

While the MOU does address the State’s Nonpoint Source Pollution Program (NSP Program), it does not explicitly address the Coastal Nonpoint Source Pollution Control Program or its disapproval and subsequent withholding of funding for DEQ and DLCD under federal law. **The CNSPCP is a critical program element and DLCD strongly encourages DEQ and ODF to include this program element into the MOU.** The Coastal Zone Amendments Reauthorization Act requires that an approved coastal management program (CMP) work in coordination with its state’s water quality agency to lead and coordinate the mandated CNSPCP. While participation in the Coastal Zone Management’s National Coastal Management Program is voluntary for coastal states, DLCD reminds DEQ and ODF that once a State receives federal approval and is designated to have a CMP, it is required to meet requirements under both the CZMA, CZARA, and associated federal regulations. In addition, the CZMA provides significant benefits through financial incentives and regulatory authority to assist in coastal management and planning activities within Oregon’s coastal zone. **DLCD finds it critical that the MOU include mention of the required federal mandate under CZARA and the CZMA.**

These deficiency in the MOU can be addressed by: recognizing the state’s obligation under CZARA and the CZMA, including coordination with DLCD in its responsibilities under CZMA; describing the state’s use of TMDL's as the mechanism to meet CZARA sections 1455b.b.1.A and 1455b.b.3; recognizing the significant loss of federal funding for the NPS program implementation until this strategy is shown to be effective; and including a commitment from ODF to support DEQ in seeking federal reapproval of Oregon’s CNPCP.

### **Transparency and Efficiency of the Agencies’ Joint Processes**

DLCD recommends that ODF and DEQ provide regular updates to partner agencies and the public on progress made towards approval of Oregon’s CNSPCP. This would include a timeline for approval of Oregon’s CNSPCP including a plan for submission. We recommend a schedule for regular meetings and establishment of a working group.

Thank you for the opportunity to provide these comments. Please do not hesitate to contact us if you have any questions.

Sincerely,

A handwritten signature in black ink, consisting of several overlapping loops and a final horizontal stroke, representing the name Jim Rue.

Jim Rue, Director  
Department of Land Conservation and Development

eCC: Patty Snow  
Heather Wade  
Amanda Punton  
Deanna Caracciolo

## Comment ID #27

**From:** [Owen Wozniak](#)  
**To:** [ODF-DEQ-Collaboration-MOU-Feedback \\* DEQ](#)  
**Subject:** Please ensure logging does not damage water quality  
**Date:** Monday, September 27, 2021 9:48:22 AM

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Dear ODF DEQ Collaboration Clean Water Act,

I wish to comment on the Draft MOU between the Oregon Departments of Forestry and Environmental Quality.

Please set a firm timeline to reach agreement on protections for streams. If no agreement can be reached, DEQ must mandate changes. Our state should not continue to operate indefinitely under forest practices that don't comply with the federal Clean Water Act! This is not acceptable and DEQ must exercise its authority if ODF is unable or unwilling to enforce higher standards.

Thank you.

Sincerely,  
Mr. Owen Wozniak  
Portland, OR