

September 18, 2012

Attn: Debra Sturdevant
DEQ Water Quality Division
811 SW 6th Avenue
Portland, OR 97204

Dear Ms. Sturdevant:

Pacific Rivers Council appreciates the opportunity to comment on the petition submitted to the Oregon Environmental Quality Commission (EQC) on August 9, 2012, by Northwest Environmental Advocates (NWEA). Pacific Rivers Council's (PRC's) mission is to protect and restore rivers, their watersheds, and the native species that depend on them. In light of this mission, PRC supports NWEA's petition and strongly urges the Commission to take swift action to address the Reasonable and Prudent Alternatives (RPAs) set forth by the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (USFWS) in their Biological Opinions (BiOps) regarding numerous insecticides, herbicides, fungicides, and pesticides (pesticides).

The Oregon Department of Environmental Quality's (ODEQ's) request for comment outlined six items the EQC must consider when taking action on a rulemaking petition:

- The continued need for the rule;
- The nature of complaints or comments received concerning the rule from the public;
- The complexity of the rule;
- The extent to which the rule overlaps, duplicates or conflicts with other state rules or federal regulations and, to the extent feasible, with local government regulations;
- The degree to which technology, economic conditions or other factors have changed in the subject area affected by the rule; and
- The statutory citation or legal basis for the rule.

PRC will address each of these items in turn to the extent they are relevant to NWEA's petition.

The continued need for the rule:

NWEA petitions the EQC to incorporate the RPAs set forth by NMFS and USFWS into Oregon's narrative criterion for toxic contaminants to protect designated and existing uses pursuant to the State's required anti-degradation policy. NWEA accurately states that narrative criteria for toxics are required in order for Oregon to comply with the Clean Water Act's (CWA's) "implementation methods" requirement for each state's anti-degradation policy and water quality standards. Further, under the Coastal Zone Act Reauthorization Amendments (CZARA), Oregon must have an approved plan to control pesticides in coastal watersheds to receive federal funds, as NWEA notes. These "rules" continue to be necessary for Oregon to abide by the CWA's mandates and to receive funds pursuant to CZARA. In addition, as the agency charged with issuing permits under the CWA's National Pollutant Discharge Elimination System (NPDES) permit program, NWEA rightly petitions ODEQ to incorporate the RPAs into the relevant general and individual permits for pesticide discharges so as to decrease the likelihood of jeopardizing or adversely modifying the habitat of listed species in violation of the ESA.

Also, NWEA is correct to petition the EQC to petition the Oregon Department of Agriculture (ODA) and Board of Forestry (OBF) to adopt the RPAs into their own rules regulating agricultural and forest practices, as agricultural operators and private and public foresters are the primary users of the pesticides in question. Any rulemaking by EQC to adopt/incorporate the RPAs into its narrative criteria for toxics or pesticide control plan would be of little effect if other relevant state agencies did not adhere to the same RPA language in their oversight of agriculture and forestry.

Oregon has had ample notice of the relevant BiOps and their respective RPAs; the series of BiOps in question date back to 1989 (USFWS), with others published by NMFS in 2008, 2009, 2010, 2011, and the most recent on May 31, 2012. USFWS and NMFS made clear that adoption of these RPAs could reduce pesticide users' and permit-granters' potential liability under the ESA. Stated differently, failure to adopt and abide by these RPAs would result in a high potential for ESA liability for pesticide users and permit-granters. As such, adoption and/or incorporation by the State of the language included in the RPAs into applicable "rules" (plans, narrative criteria, etc.) is necessary under the Endangered Species Act.

The nature of complaints or comments received concerning the rule from the public:

In order to satisfy Oregon's obligations to assist in the recovery of listed species, most comments likely will support swift action by the State to incorporate or adopt the RPAs into all relevant "rules" to expedite such recovery. Some comments might reflect apprehension to additional language limiting the application and use of the pesticides in question, as practices might need to be adjusted in order to abide by the RPAs, but the BiOps from NMFS and USFWS make clear that in the absence of the RPAs' implementation, ESA liability will arise at various levels.

The complexity of the rule:

The intricate statutory and regulatory framework regarding public health, water quality, and species recovery is by necessity complex. Resolving water pollution concerns and adverse impacts to at-risk species involves many factors and moving parts. However, NMFS and USFWS have laid out RPAs in straightforward, succinct language that lends itself to relatively simple adoption or incorporation into proposed “rules,” including narrative criteria for toxics, pesticide permit language, pesticide control plans, and rules governing the use and application of pesticides by the agriculture and forestry sectors. NWEA’s petition includes language drawn directly from the RPAs and placed into new rules regarding the State’s anti-degradation policy, “Toxic Substances,” and “Pesticides.” The nature of the harms caused by the relevant pesticides and customary application methods require inclusion of fairly specific and descriptive language to properly explain the timing, location, and amount limitations contained in the RPAs. Overall, though, NWEA’s proposed rules are reasonably and clearly stated, without unnecessary complex terminology.

The extent to which the rule overlaps, duplicates or conflicts with other state rules or federal regulations and, to the extent feasible, with local government regulations:

As NWEA points out, the EQC’s current regulatory scheme to implement the Clean Water Act’s required anti-degradation policy is not adequate to ensure the RPAs set forth by NMFS and USFWS will be practically followed or enforced. Amending the 2300A General Permit and relevant individual NPDES permits to incorporate the RPAs will ensure permit holders are aware of the requirements of the RPAs and have clear notice that violation of those RPAs is a violation of their permits.

NWEA accurately recognizes that following the RPAs set forth by NMFS and USFWS does not ensure compliance with water quality standards, but will decrease the risk of jeopardy or adverse modification of listed species or their habitat under the ESA.

It is critical that the EQC petition the Oregon Department of Agriculture and Oregon Board of Forestry (ODA and OBF) to adopt the RPAs so that runoff from agricultural areas and timberlands does not jeopardize, adversely modify the habitat of, or otherwise impede the recovery of listed species. As the direct regulators of private and state agriculture and forestry, ODA and OBF are essential partners in ensuring use of these pesticides does not continue in a manner inconsistent with the RPAs laid out by NMFS and USFWS. It is incumbent upon the EQC to take swift, proactive steps to assist ODA and OBF in moving forward with RPA adoption, compliance, and enforcement. Failure to take such steps exposes the State unnecessarily to ESA and CWA liability, when a path forward to compliance of those statutes’ clear mandates is plainly evident, as NWEA’s petition thoughtfully articulates. Further, failure to take such steps unnecessarily threatens the State with the loss of federal funding under CZARA.

As NWEA’s petition makes clear, its proposed rules do not unnecessarily duplicate or conflict with other state rules or federal regulations, but rather solidify the State’s compliance with the CWA, the ESA, and its own Toxic Reduction Strategy. While the proposed incorporation or

adoption of the RPAs into relevant “rules” overseen and enforced by ODEQ, the EQC, ODA, and OBF might alter and refine limitations on the use of pesticides, such limitations are necessary for lawful compliance with relevant statutes.

The degree to which technology, economic conditions or other factors have changed in the subject area affected by the rule:

Current pesticide application technology can be used to alter or refine past agricultural and forestry practices in order to comply with the language of the RPAs moving forward. Scientific advances have allowed NMFS and USFWS to identify the array of adverse impacts that can result from direct exposure of these pesticides to listed species (mortality), as well as longer durations of lower levels of exposure (reproductive, developmental, and behavioral problems that result in weaker populations). While pesticide users might express concern about additional expenses associated with RPA compliance, the State must also recognize the conversely negative economic impacts that flow from degraded water quality, potentially inedible fish, and unsustainable fisheries for lawful recreational and commercial uses.

The statutory citation or legal basis for the rule:

ESA-listed species in Oregon include many wild runs of chinook, coho, sockeye, and chum salmon, as well as steelhead and bull trout. Wild runs of these species have been decimated by a variety of man-made causes, including dams, loss of and degradation of habitat for various life stages of these species, harvesting practices, competition from introduced/invasive species and hatchery-bred fish, and also pollutants contained in runoff from agricultural areas and timberlands. These pollutants include the chemical compounds found in pesticides. While recovering these species’ wild runs requires efforts to address all of the underlying causes for their declines, ignoring even one of the causes reduces the likelihood and slows the speed of their recovery.

NWEA accurately sets forth the reasons the EQC must adopt rules incorporating the RPAs, encompassing obligations and incentives under the ESA, CWA, CZARA, BiOps, court decisions, and the State’s own Toxic Reduction Strategy. NWEA explains in a straightforward manner the statutory need for Oregon to take action to adopt and implement the RPAs, and the consistency of such action with existing and ongoing policies and commitments by the State as they relate to public health, water quality, and at-risk species. The rulemaking proposed by NWEA would add vital RPA language directly into the State’s suite of rules regarding its CWA anti-degradation policy and pesticide regulation. While a close examination of existing rule language, policies, and mandates is important during rulemaking processes, the EQC must recognize that failure to take action regarding the pesticide RPAs would inevitably pose a conflict with ESA and CWA requirements for the State itself and those who rely on State-issued NPDES permits.

We urge the EQC to quickly move forward with the rule-making and other actions proposed in NWEA’s well-written, legally grounded, and scientifically justified petition. The recovery of listed species cannot continue apace without action by all relevant parties in all relevant arenas.

The use of pesticides in manners that harm salmon and steelhead in particular must not continue if we are to reasonably expect recovery of listed species in an acceptable timeframe.

Sincerely,

Greg Haller
Conservation Director
Pacific Rivers Council
317 SW Alder Street, Suite 900
Portland, OR 97204
(503) 228-3555, ext. 205
greg@pacificrivers.org