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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Hayes Oyster Company

CV. 16-cv-2028

Plaintiff,

COMPLAINT

v.

Public Nuisance

Oregon Department of Environmental
Quality and Richard Whitman, in his official
capacity as its Interim Director

Art. I § 18 OR Constitution – Unjust Taking
5th Amd. US Constitution – Unjust Taking

Defendant

Plaintiff alleges,

JURISDICTION

1.

The real property that is the subject of this dispute (hereinafter referred to as the Hayes Oyster Company “oyster plats” or “tidelands”) is located in Tillamook Bay, Tillamook County, State of Oregon.

2.

This Court has subject matter jurisdiction over Plaintiff’s claims pursuant to 28 USC § 1331 because they involve as a necessary element a substantial, disputed question of federal law, specifically whether the Department of Environmental Quality’s implementation of 33 USC § 1313(d)(1)C [which requires that authorized States establish Total Maximum Daily Loads (“TMDLs”) for the discharge of pollutants to water quality limited streams] was and is unlawful.

AVERMENTS COMMON TO ALL CLAIMS

3.

Hayes Oyster Company owns six hundred acres (more or less) of oyster plats located in Tillamook Bay, Tillamook County, Oregon, held in accordance with leases administered by the State of Oregon and by right in accordance with Oregon law.

4.

Hayes Oyster Company’s interest in the oyster plats is a vested private property right (as recognized at ORS 622.320, former ORS 509.455 and other statutes).

5.

The Oregon Department of Agriculture regulates commercial oyster culture and harvesting in accordance with its Tillamook Management Plan for Commercial Shellfish Harvesting. The Management Plan is based on water quality sampling (and analytical results) in Tillamook Bay and designed to ensure compliance with the US Food and Drug Administration National Shellfish Sanitation Program (“NSSP”) standards for commercial shellfish harvesting.

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6.

The NSSP standard for fecal coliform bacteria in shellfish growing waters is a median 14 organisms per 100 milliliters, with not more than ten percent of the samples exceeding 43 organisms per 100 ml.

7.

The ODA's Management Plan partitions the Bay into several defined areas. The upper bay (where the Hayes Oyster Company's Dick's Point oyster plats, approximately 250 acres, are located) is "prohibited" to oyster culture year around. The middle bay (where the Company's Biggs Cove oyster plats, approximately 350 acres, are located) are either "restricted" or "conditionally approved" for oyster culture and harvesting. In 2015, ODA shutdown oyster harvesting in the vicinity of Hayes Oyster Company's Biggs Cove plats 10 times for a cumulative period of 100 days, which is typical of shutdowns over the past 15 years.

8.

The water quality standard for fecal coliform bacteria in shellfish growing waters adopted by the Department of Environmental Quality pursuant to Oregon Administrative Rule 340-41-0009(1)(b) is the same as the NSSP standard referenced above.

9.

The United States Environmental Protection Agency ("USEPA") has delegated to the State of Oregon Department of Environmental Quality authority to establish Total Maximum Daily Loads, as required by 33 USC § 1313(d) and authorized by Oregon statutes, to ensure that state water quality standards are met and beneficial uses protected.

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10.

Pursuant to 33 USC § 1313(d)(1)(C), the State of Oregon has a duty to establish for the Wilson, Trask and Tillamook Rivers and for the Tillamook Bay into which those rivers flow, the Total Maximum Daily Load for bacteria, including fecal coliform. The TMDL must be “established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality” (hereinafter referred to as the “TMDL standard”).

11.

DEQ adopted TMDLs for the Tillamook Watershed in 2001.

12.

TMDL “allocations” are the amounts of pollutants (including fecal coliform as bacteria) that various point and nonpoint sources are allowed to discharge.

13.

“Wasteload” allocations are portions of the TMDL that are allotted to point sources of pollution. They guide the development of discharge limits set in National Pollutant Discharge Elimination System (“NPDES”) permits.

14.

“Load” allocations are portions of the TMDL that are allotted to nonpoint sources of pollution. They guide, among other things, the targets that dairy farm manure management practices are designed to meet.

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15.

DEQ established wasteload allocations for individual NPDES permitted facilities in the Tillamook watershed by multiplying the shellfish growing waters standard by a dilution factor of 3:1 and adding as appropriate some allowance for decay from the discharge point to the shellfish growing waters.

16.

The 3:1 dilution factor was derived from salinity data in Tillamook Bay.

17.

As established in the 2001 TMDL Appendix B, in the area “prohibited” to oyster culture, the average winter dilution is 1.45, and the average summer dilution is 1.97. At the gap in Dick’s Point Dike, which coincides with the Hayes Oyster Company oyster plats nearest the mouths of the Tillamook and Trask rivers, the reported average winter dilution is 1.08 and the reported average summer dilution is 1.34.

18.

As established in the 2001 TMDL Appendix B, in the area “conditionally approved” for oyster culture, the average winter dilution is 3.50, and the average summer dilution is 4.49.

19.

DEQ used a dilution factor of 3:1 (saline to fresh water) to establish wasteload allocations for NPDES permitted dischargers in the Tillamook watershed with the expectation that the water quality standard for shellfish growing waters would be met in the vicinity of the “conditionally approved” shellfish harvesting areas as previously established by the ODA but would not be met

in the “prohibited” areas.

20.

Because the wasteload allocations adopted in the 2001 Tillamook Bay Watershed TMDL are not reasonably calculated to attain compliance with the water quality standard for all shellfish growing waters within Tillamook Bay the TMDL does not meet the standard set out at 33 USC § 1313(d)(1)(C).

21.

DEQ adopted a “zero (load) allocation” for dairy farms that operate under ODA issued Confined Animal Feeding Operations (“CAFO”) permits based on the assumption that dairy farms “are allowed zero discharge under the terms of their CAFO permits” and/or “because of the effluent guideline requiring CAFO’s to have a zero discharge to surface waters.”

22.

DEQ’s “zero discharge” assumption was then and continues to be false in that Oregon CAFO permits (including the presently effective CAFO NPDES General Permit #01-2016) *do not* prohibit pollutant discharges to surface water from the land application of manure so long as the application is done in accordance with an approved Animal Waste Management Plan that incorporates certain mandated best management practices mandated at OAR 340-051-0070 “Disposal Facilities and Practices”. [See CAFO NPDES General Permit #01-2016 Paragraph S2.A.1. “Types of discharges that are prohibited include but are not limited to... discharges due to *improper* land application activities from seepage below the root zone, surface drainages or field tile outlets...” (emphasis added).]

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23.

A Water Quality Management Plan (“WQMP”) prepared in accordance with OAR 340-42-0040(4)(l) [as required by 33 USC § 1313(d)(e)] is the element of a TMDL describing strategies to achieve wasteload and load allocations identified in the TMDL to attain water quality standards when NPDES permit effluent limitations are not stringent enough to implement any water quality standard applicable to such waters.

24.

Because DEQ erroneously assumed that ODA issued CAFO permits prohibit bacteria (fecal coliform) discharges from land application of manure, the WQMP included as Appendix D to the 2001 TMDL does not include any strategy to reduce bacteria (fecal coliform) loading from land application of manure beyond enforcement of those CAFO permits. Therefore, the 2001 TMDL does not satisfy the standard set out at 33 USC § 1313(d)(1)(C).

25.

In addition to oysters grown commercially, twelve species of bay clams are found in Tillamook Bay. Gaper, cockle, butter and native littleneck clams are the most important commercially and recreationally. The basin also supports a wide variety of water contact recreation that includes swimming, fishing and boating. Both water contact recreation and shellfish harvesting are compromised by bacterial contamination of water in Tillamook Bay.

**FIRST CLAIM FOR RELIEF
PUBLIC NUISANCE**

Plaintiff re-alleges and incorporates its allegations in paragraphs 1 through 25, above, and

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further alleges:

26.

Fecal coliform contamination in the shellfish growing waters of Tillamook Bay in excess of the applicable water quality standard is a public nuisance in that the contamination has substantially and unreasonably interfered with rights which are common to members of the public generally, specifically attainment of lawfully adopted water quality and shellfish sanitation standards in Tillamook Bay.

27.

By adopting and continuing to implement a TMDL for bacteria (specifically fecal coliform) that does not meet the TMDL standard set out at 33 USC § 1313(d)(1)(C), the DEQ knowingly or intentionally, or with reckless disregard for the rights and safety of the public, has allowed both point and nonpoint sources in the Tillamook Watershed to discharge bacteria, including fecal coliform, in amounts that are reasonably expected to continually and/or repeatedly cause shellfish growing waters in Tillamook Bay to fail to meet lawfully adopted water quality and shellfish sanitation standards in Tillamook Bay.

28.

Hayes Oyster Company has sustained special injury caused by DEQ's conduct in that it has been deprived of all economically viable use and enjoyment of its Dick's Point plats and has been substantially deprived of its use and enjoyment of its Biggs Cove plats. Hayes Oyster Company suffered economic damages as a result of this deprivation in the form of lost profits, lost rents, and/or a reduction in the value of its property.

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SECOND CLAIM FOR RELIEF

UNJUST TAKING

Article I, Section 19 Oregon Constitution

Plaintiff re-alleges and incorporates its allegations in paragraphs 1 through 28, above, and further alleges:

29.

DEQ's adoption and implementation of the 2001 TMDL was motivated by a regulatory purpose [i.e. the mandate of 33 USC § 1313(d)].

30.

Because the DEQ knew that the 2001 TMDL would perpetuate indefinitely the prohibition on oyster culture in a part of Tillamook Bay, and would perpetuate indefinitely continued and repeated harvesting shutdowns elsewhere in Tillamook Bay, its adoption and implementation of the 2001 TMDL constitutes a taking by way of establishing a pollution easement for the benefit of point and nonpoint dischargers of fecal coliform in the Tillamook Watershed without the payment of just compensation to Hayes Oyster Company.

31.

The natural and ordinary consequence of DEQ's adoption of the TMDL for bacteria (including fecal coliform) was to completely deprive Hayes Oyster Company of the common and necessary use and enjoyment of its Dick's Point plats.

32.

The natural and ordinary consequence of DEQ's adoption of the TMDL for bacteria

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(including fecal coliform) was to deprive Hayes Oyster Company of all economically viable or substantial beneficial use and enjoyment of its Biggs Cove plats.

33.

Hayes Oyster Company suffered economic damages as a result of DEQ's adoption of the 2001 TMDL in the form of lost profits and a reduction in the value of its property.

**THIRD CLAIM FOR RELIEF
UNJUST TAKING**

42 USC § 1983 / 5TH AMENDMENT US CONSTITUTION

Plaintiff re-alleges and incorporates its allegations in paragraphs 1 through 33, above, and further alleges:

34.

Hayes Oyster Company brings this claim for unjust taking pursuant to 42 USC § 1983 and the Fifth Amendment to the US Constitution.

35.

The Fifth Amendment to the US Constitution provides that private property may not be taken for public use without just compensation.

36.

Hayes Oyster Company had and has a reasonable expectation that the DEQ acting under the authority granted to it by the U.S. Environmental Protection Agency pursuant to 42 USC § 1313(d) would adopt and implement a TMDL for the Tillamook Watershed that meets the TMDL standard set out at 33 USC § 1313(d)(1)(C) and/or that otherwise protects the

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recognized beneficial use to which the Company is entitled.

37.

DEQ adopted, and continues to implement, a TMDL for bacteria (specifically fecal coliform) that does not meet the TMDL standard set out at 33 USC § 1313(d)(1)(C), does not protect the beneficial use of commercial oyster culture, and has thereby effectively forced the Hayes Oyster Company tidelands to remain idle indefinitely.

38.

By doing so, the State of Oregon Department of Environmental Quality, acting through its Director and employees under the color of state law, specifically Oregon Administrative Rule (“OAR”) 340.42-0025 *et seq.* (the “TMDL Rule”), has taken for public use without just compensation Plaintiff’s private property right to use its Dick’s Point and Biggs Cove plats for commercial oyster culture.

39.

Hayes Oyster Company suffered economic damages as a result of DEQ’s adoption of the 2001 TMDL in the form of lost profits and a reduction in the value of its property.

PRAYER FOR DAMAGES

WHEREFORE, Plaintiff demands judgment against Defendant as follows:

On Plaintiff’s First, Second and Third Claims for Relief:

1. Compensatory damages in the amount of \$100,000;
2. An injunction requiring that the DEQ immediately revise the Tillamook Bay

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Watershed TMDL to comply with the standard set out at 33 USC

§ 1313(d)(1)(C);

3. Costs related to this lawsuit;
4. Reasonable attorney fees incurred in this matter; and
5. Such other relief as the Court may deem just and equitable under the circumstances.

Dated: October 21, 2016



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