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ROLL OUT PLAN

Release of Federal Register Notice (FRN) Announcing NOAA and EPA's Determination Finding that Oregon Has Failed to Submit an Approvable Coastal Nonpoint Program

Action: Release of Federal Register Notice (FRN) Announcing NOAA and EPA's Determination Finding that Oregon Has Failed to Submit an Approvable Coastal Nonpoint Program

Date: To comply with a settlement agreement with the Northwest Environmental Advocates, on January 30, 2015, NOAA and EPA will notify the state of our decision. We will also inform the plaintiff and submit an FRN announcing the decision to the Office of the Federal Register for publication in the Federal Register 3-4 business days later.

Roll out lead:
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- Jeff Payne, Acting Director, Office for Coastal Management, NOS

EPA Spokespeople:

- Lynda Hall, Chief, Nonpoint Source Control Branch, EPA HQ
- Christine Psyk, Associate Director, Office of Water and Watersheds, EPA R10
- Dennis McLerran, Regional Administrator, EPA R10

Key Messages:

- On January 30, 2015, NOAA and EPA will jointly issue a Federal Register Notice announcing the agencies' finding that Oregon has failed to submit a fully approvable Coastal Nonpoint Program. While Oregon has made significant progress on meeting many of its Coastal Nonpoint Program requirements, NOAA and EPA found that the state has not satisfied its nonpoint source requirements related to forestry.

- (b)(5) Deliberative [redacted]

- NOAA and EPA recognize the complexities and political challenges Oregon faces in developing a fully approvable Coastal Nonpoint Program. We will continue to work closely with the state to help it address the conditions on its program so that the state can achieve a fully approved program and have full funding restored for its coastal zone management and nonpoint source programs.

Additional Messages:

Prepared by: ACastellan (OCM)
Reviewed by:

- NOAA and EPA jointly administer the Coastal Nonpoint Program. The program establishes a set of management measures for states to use in controlling polluted runoff from six main sources: forestry, agriculture, urban areas, marinas, hydromodification, and wetlands and riparian areas. These measures must be backed by enforceable state policies and mechanisms to ensure their implementation.

- All coastal states and territories that participate in the National Coastal Zone Management Program are required under the Coastal Zone Management Act to develop a Coastal Nonpoint Pollution Control Program (or Coastal Nonpoint Program) that describes the programs and enforceable mechanisms they will use to implement a suite of management measures to prevent and control polluted runoff in coastal waters. The management measures states are expected to adopt are described in EPA and NOAA guidance.

- Per a 2010 lawsuit settlement agreement with the non-profit organization Northwest Environmental Advocates (NWEA), NOAA and EPA were required to make a final decision about the approvability of Oregon's Coastal Nonpoint Program. NOAA and EPA negotiated an extension of the original May 15, 2014, deadline to January 30, 2015.

- In December 2013, NOAA and EPA announced our intent in the Federal Register to find that Oregon has failed to submit a fully approvable coastal nonpoint program. During the 90-day public comment period provided in the Federal Register Notice, NOAA and EPA received a number of public comments, as well as additional information from the state in support of its program. The agencies carefully considered all comments and additional information prior to making the final determination about Oregon's Coastal Nonpoint Program.

Plan Summary and Schedule:
NOTE: this is a proposed schedule and some of the interim dates are likely to still shift pending internal discussions in both agencies.

- Internal NOAA briefings
  - NOS AA/DAA brief—December 8, 2014
  - NOAA OGC brief- *TBD (December)*
  - NOAA Downtown Leadership brief?-*TBD (December or early January)*
- Internal EPA briefings
  - EPA Region 10/RA-November 19, 2014
  - EPA AA/DAA brief—*TBD (December)*
  - EPA OGC brief- *TBD (December)*
- Pre-coordination on FRN/Rollout between EPA and NOAA/OCM (on-going)
- *Two weeks prior to publication of the Final Decision* - NOAA-EPA send a note to the Administration in their Cabinet reports to alert them of this precedent setting decision (for NOAA this is the White House and Secretary's Weekly Report).
- *Two weeks prior to publication of Final Decision* – NOAA drafts press release and send to EPA/NMFS for review (Sherman)

- *January 10:* NOAA OLIA contacts relevant Oregon Congressional offices and committees to offer a briefing (Jarvis/Aylesworth)
- *January 15:* EPA/NOAA Rollout Coordination Call
- *Three to four days before January 30:* NOAA submits Final Decision to Federal Register in time for Jan. 30 publication (Nikki Ndubisi, NOS)
- *Target January 29:* EPA provide draft of press release to OR
- *January 29:* Call or briefing with interested Congressional staff (Jarvis lead, involves rollout spokespeople and others).
- *Target January 29*: OLIA notifies relevant Committee staff and staff in appropriate Member offices of final decision and that FRN and press release will be available publicly (Jarvis).
- *Target January 29*: EPA and NOAA give respective state partners verbal heads-up about forthcoming decision (Pysk and Gore/Castellan).
- *January 30*: EPA (Pysk) send Oregon official letter and decision document informing them of final decision
- *January 30:* GCOC notifies DOJ that state/NWEA have been informed of final decision and FRN will be posted; DOJ notifies plaintiff (Dillen).
- *January 30:* Notice of Final Decision published in Federal Register.
- *January 30*: NOAA posts final decision on OCM website (Castellan) and issues press release (Sherman).

Materials:

- General talking points (above)
- Call List for NOAA and EPA (email maintained)
- Press release (to be developed, NOS Public Affairs coordinating with EPA and NMFS)
- Final decision document will be posted on http://coast.noaa.gov/czm/pollutioncontrol/
- Response to Comments on Proposed Decision to be posted on http://coast.noaa.gov/czm/pollutioncontrol/
- Docket of documents NOAA and EPA used in making decision (to be posted on OCM's website with proposed decision)
- A message will be posted on the NOAA Office for Coastal Management (OCM) website under "Highlights" (http://coast.noaa.gov/) with a link to the press release. EPA and EPA Region 10's websites will link to NOAA's website and the press release. (Note: Content should be ready mid-January but page won't go live until evening before announcement on Jan. 30th)
- Federal Register Notice
- Cover letter to state informing them of decision

Questions and Answers (supplement to Key Messages):

QUESTION: Under what authority is NOAA and EPA undertaking this action?

ANSWER: Congress created the Coastal Nonpoint Pollution Control Program under Section 6217 of the Coastal Zone Act Reauthorization Amendments. Section 6217 authorizes NOAA and EPA to approve or disapprove a state's coastal nonpoint program. CZARA also requires the federal agencies to withhold funding when they find that a state has failed to submit an approvable program.

QUESTION: What is driving the timing of this decision?
ANSWER: The Northwest Environmental Advocates (NWEA) sued NOAA and EPA in 2009 challenging the agencies' joint administration of Oregon's coastal nonpoint program. The plaintiff's primary argument was that NOAA and EPA failed to take a final action on the approval (without conditions) or disapproval of Oregon's coastal nonpoint program, as well as to withhold funds from Oregon for not having a fully approved program. NOAA and EPA settled the lawsuit in 2010 and agreed to announce in the Federal Register our intent to fully approve or disapprove Oregon's program by November 15, 2013, and to make a final decision on the approvability of the program by May 15, 2014. NOAA and EPA negotiated an extension of the May deadline to January 30, 2015.

QUESTION: Does "disapproving" Oregon's Coastal Nonpoint Program mean that the Federal Government will now take over administration of the program for the state like EPA can take over issuing a state's National Pollutant Discharge Elimination System (NPDES) regulatory permit program if EPA finds a state is not doing an adequate job administering the NPDES program?
ANSWER: No. Under CZARA, NOAA and EPA do not have the authority to take over administering a state's coastal nonpoint program. When NOAA and EPA find that a state has failed to submit an approval program, the only action the Federal Government must take is to withhold funding from the state under Section 306 of the Coastal Zone Management Act and Section 319 of the Clean Water Act. The state remains responsible for administering and continuing to develop its coastal nonpoint program.

QUESTION: How can NOAA and EPA expect Oregon to be able to develop a fully approvable coastal nonpoint program when they withhold funding for two important state programs that work to protect and restore water quality and salmon habitat?
ANSWER: We recognize the financial penalties could make it more difficult for Oregon to maintain the same level of effort on key programs that help improve water quality and protect salmon habitat, such as the state's coastal management, TMDL, and nonpoint source programs. However, the penalty provision in CZARA was designed to encourage states to develop fully approvable coastal nonpoint programs in a timely manner in order to provide better protection for coastal water quality. NOAA and EPA are committed to continuing to work with Oregon to develop a fully approvable coastal nonpoint program so that full funding can be restored as soon as possible.

QUESTION: If water quality trends in the state are improving, why are NOAA and EPA proposing to disapprove Oregon's Coastal Nonpoint Program?

ANSWER: NOAA and EPA agree that in many areas, the state is making progress to improve water quality and should be recognized for those efforts. However, despite this progress, significant impairments still exist and more needs to be done to satisfy coastal nonpoint program requirements. The goal of the Coastal Nonpoint Program is to ensure management measures are in place to achieve and maintain water quality standards and protect designated uses in coastal watersheds, which are particularly vital to salmon.

There are still many areas along Oregon's coast that are not achieving water quality standards or fully supporting designated uses. Studies undertaken by the State of Oregon, neighboring states, and the broader science community have clearly demonstrated the need for improving protections around small and medium sized streams and landslide prone areas, and addressing runoff impacts from logging roads built under older and less protective standards, in order to protect and recover salmon and trout species. Neighboring coastal states have already adopted improved forestry protection measures to address these three areas. The Board of Forestry has formally acknowledged that the current Oregon Forest Practices Act riparian protection requirements are not supporting established water quality standards. Based on the latest ODF/DEQ study designed to test Oregon Forest Practices Act buffers for small and medium fish streams, over 40% of the streams evaluated failed to meet the State's water quality standard criteria developed to ensure successful salmonid spawning and rearing.

QUESTION: What does Oregon need to do to obtain full approval for its coastal nonpoint program?
ANSWER: Oregon needs to adopt additional management measures for forestry to protect small and medium fish bearing streams and non-fish bearing streams, add protections for landslide prone areas, ensure that legacy forest roads are not a continuing source of sediment that ends up in rivers and streams, and improve protection for non-fish bearing streams during the aerial application of pesticides.

In addition, NOAA and EPA are continuing to consider the public comment received about the adequacy of Oregon's agriculture programs for meeting CZARA requirements and protecting water quality. While not a basis for this decision, after further evaluation, there may be more that the state needs to do to improve its agriculture programs as well. NOAA and EPA plan to provide the state additional feedback on its agriculture programs soon and are committed to working with the state to ensure the programs are adequate for meeting CZARA requirements, if needed.

QUESTION: Do NOAA and EPA consider past practices and how effectively programs are being implemented when making this decision?
ANSWER: For CZARA approval, NOAA and EPA cannot consider how well a state is enforcing a particular program, only whether or not the state has processes in place to implement the CZARA 6217(g) measures.

QUESTION: NOAA and EPA cite Oregon's failure to adopt additional management measures to address some forestry-related nonpoint source issues as the reason the agencies have found that Oregon has failed to submit an approvable coastal nonpoint program. Does that mean that Oregon only needs to make improvements to its forestry practices to gain full approval?
ANSWER: Not necessarily. While NOAA and EPA are only basing this decision on Oregon's failure to satisfy the additional management measures for forestry condition, that does not necessarily mean Oregon has fully met all other CZARA program requirements and that no further action will be needed to address other CZARA management measures.

NOAA and EPA had previously given Oregon unofficial "interim" approvals for many of the other CZARA management measures the state was also conditioned on, stating that the federal agencies thought the state had satisfied those aspects of its program. However, we also noted that these were only preliminary decisions pending public comment. If and when NOAA and EPA believe the state has fully met all of its CZARA requirements, the public will be provided with an opportunity to comment on the proposed decision to fully approve the state's coastal nonpoint program as well as the rationale for such a decision. Information the public provides during the comment period may cause NOAA and EPA to reassess an earlier "interim" decision or go back to the state for additional clarification.

QUESTION: Why don't NOAA and EPA issue a formal approval for the sections of Oregon's Coastal Nonpoint Program that the federal agencies believe are now approved, such as the management measures for onsite sewage disposal systems (OSDS), new development, and the other management measures NOAA and EPA gave the state prior "interim approval". How can Oregon have any certainty on what work remains for approval (and restoration of full funding) if the agencies' decisions can continue to be open to reassessment and public comment?
ANSWER: Public participation is an important and required component of CZARA. Before NOAA and EPA can officially approve Oregon for any management measures, such as OSDS and new development, the federal agencies must provide the public an opportunity to comment on that proposed decision. In December 2013, when NOAA and EPA solicited public comment on the federal agencies' intent to find that Oregon has failed to submit an approvable coastal nonpoint program, NOAA and EPA did not believe the state had satisfied the requirements for the OSDS and new development management measures at that time. Therefore, the federal agencies solicited public comment on NOAA and EPA's intent to find that the state had not satisfied the OSDS and new development management measure.

During the public comment period, the state provided additional information in support of the OSDS and new development management measures. Given this new information, NOAA and EPA no longer believe that the OSDS and new development management measures are a basis for finding that Oregon has failed to submit an approvable program. However, public has not had the opportunity to comment on the new information the state provided or a proposed decision to find that the state now satisfies these management measures. Therefore, NOAA and EPA cannot formally approve these management measures at this time. Approving just a few management measures is not a complete federal action to either find that the state has submitted a fully approvable program or failed to submit an approvable program. Therefore,

NOAA and EPA do not solicit public comment on the federal agencies' intent to approve a specific management measure until the federal agencies believe the state has satisfied all management measure requirements to receive full approval of its coastal nonpoint program.

NOAA and EPA work closely with the state so that they know what is needed to address the remaining gaps in their program and reach full approval. However, as noted above, public participation remains an important requirement of CZARA. The public comment provides citizens with an important voice in the federal decision process and gives the public an opportunity to bring items to light that perhaps the federal agencies had not fully considered when arriving at the proposed decision. The public comment period ensures that NOAA and EPA are well informed and have fully considered all sides of the issue when making their decision.

QUESTION: Have EPA and NOAA ever found that a state has failed to submit a fully approvable coastal nonpoint program?
ANSWER: No. This is the first time EPA and NOAA have found that a state has failed to submit a fully approvable coastal nonpoint program. The agencies prefer to work with states to build programs that are approvable. However, NOAA and EPA were sued for failing to issue a final approval or disapproval decision for Oregon's program. The Settlement Agreement for that lawsuit required EPA and NOAA to make a final decision regarding Oregon's program by May 15, 2014 (subsequently extended to January 30, 2015, with agreement from the plaintiff). As a result, the agencies needed to act and do not have the flexibility they might have without court-required deadlines.

QUESTION: Why is Oregon the first state NOAA and EPA have found that has failed to submit a fully approvable coastal nonpoint program when some other coastal states would appear to have much dirtier water than Oregon? Is Oregon being held to a higher bar than other states for Coastal Nonpoint Program approval?
ANSWER: Oregon is not being held to a higher bar for approval. The guidance that is used to evaluate and make judgments about Oregon's program is the same that is used to evaluate every other states' program.

However, Oregon is the only state where NOAA and EPA have been sued over the agencies' ability to conditionally approve a state's Coastal Nonpoint Program. The Northwest Environmental Advocates sued NOAA and EPA in 2009 for failing to make a final decision regarding the approvability of Oregon's coastal nonpoint program. As part of the settlement agreement with NWEA, NOAA and EPA agreed to make a final determination about Oregon's program by May 15, 2014, and subsequently extended the deadline to January 30, 2015 with agreement from NWEA. Therefore, the agencies had to act and make a determination regarding Oregon's program. Because the state has clearly not satisfied all conditions on its program, NOAA and EPA found that the state had failed to submit a fully approvable program.

Historically, NOAA and EPA have worked with states to build programs that are approvable rather than make a finding that a state has failed to submit an approvable program which also requires the agencies to withhold funding from the state's coastal management and nonpoint source programs. To receive full approval, CZARA states that each coastal nonpoint program must "provide for the implementation, at a minimum, of management measures in conformity with the guidance published under section (g)….". Therefore, as long as a state has programs in place, backed by enforceable authorities that provide for the implementation of the CZARA management measures, a program is considered approved under CZARA. The state may have some shortfalls in enforcing some of their programs which could lead to continued water quality impairments but enforcement issues are not considered for CZARA approval.

QUESTION: Some of the public comments, including the State, claim that NOAA and EPA are exceeding their authority under CZARA by requiring the state to develop additional management measures. They believe that according to CZARA guidance, only states have the ability to adopt additional management measures. Can you explain why NOAA and EPA have a different interpretation?
ANSWER: The authority for determining the need for additional management measures does not reside exclusively with the state as some, including the state, have asserted. NOAA and EPA also have the authority to impose additional management measures. CZARA requires that a state program provide for "[t]he implementation and continuing revision from time-to-time of additional management measures . . ." 16 U.S.C. 1445b(b)(3). The Act is not explicit about <u>who</u> is to impose these additional measures (it is drafted in the passive voice); however, when read as a whole, the statute is clear that the agencies are intended to identify when management measures are necessary, and to provide technical guidance about what those measures should include. States may have flexibility to design the specific management measures necessary to meet water quality standards, but they do not have exclusive authority to identify when additional management measures are required.

The legislative history supports this interpretation. An early version of the bill that would later become CZARA, provided that the entity responsible for determining when an additional management measure is necessary is "the [state's] coastal management agency, in cooperation with the State water quality authorities and other State or local authorities, as appropriate . . . ."[1] This language – giving states the authority to determine when additional measures were needed – was stricken from the bill prior to enactment, suggesting Congress intended to take a different approach. The language enacted is consistent with the overall design of CZARA –the agencies identify when management measures are necessary to meet applicable water quality standards, and the state then designs measures to meet this compliance benchmark.

QUESTION: In the December 20, 2013, proposed decision, NOAA and EPA solicited public comment on the adequacy of Oregon's agriculture programs for meeting CZARA requirements.

[1] 136 Cong. Rec. H8068-01 (Sept. 26, 1990), 1990 WL 148732 at *64.

However, this final decision does not make a finding on the adequacy of Oregon's agriculture programs. Why not?
ANSWER: Oregon's coastal nonpoint program is "disapproved" if the state fails to meet just one remaining condition on its program. NOAA and EPA found that there was sufficient basis to find that Oregon has failed to submit an approvable program given the state's lack of additional management measures for forestry. In addition, in the December 2013 proposed decision document, NOAA and EPA did not propose a decision on the adequacy of the agricultural programs or provide a rationale for that decision for public comment. Therefore, before the federal agencies can make a final decision on the approvability of the agriculture elements of Oregon's Coastal Nonpoint Program, the public would need to be given an opportunity to comment on a specific proposed decision and rationale for that decision.

NOAA and EPA are carefully considering the comments that were submitted regarding agriculture and plan to provide the state with an updated assessment of the agriculture components of its coastal nonpoint program in the near future. If, at that time, based on comments received and NOAA and EPA's current understanding of Oregon's agriculture programs, NOAA and EPA believe the state has not fully satisfied the CZARA agriculture requirements, then the federal agencies are committed to working with the state to address any deficiencies that may be found. Also, the public will have another opportunity to comment on NOAA and EPA's intended decision regarding the CZARA agriculture elements before the federal agencies make a final decision.

QUESTION: What are the specific concerns you are hearing related to agriculture?
ANSWER: Although the federal agencies initially found that the State's agriculture programs enabled it to satisfy the agriculture condition on its coastal nonpoint program, there is concern that water quality impairments from agriculture activities within the coastal nonpoint management area are widespread and that the State's programs and policies may not adequately meet the 6217(g) management measures for agriculture to protect coastal waters. For example, NOAA's National Marine Fisheries Services' recent listings for coho salmon and draft recovery plans (both under the Endangered Species Act) find that insufficient riparian buffers around agriculture activities are one of the contributors to the salmon's decline.

Some specific concerns with the State's agriculture program that have been brought to the federal agencies' attention and may influence the final decision of whether or not the State has satisfied the 6217(g) agriculture management measure requirements and the conditions placed on its program include the following:

- Enforcement is limited and largely complaint-driven; it is unclear what enforcement actions have been taken in the coastal nonpoint management area and what improvements resulted from those actions.
- The AWQMA plan rules are general and do not include specific requirements for implementing the plan recommendations, such as specific buffer requirements to adequately protect water quality and fish habitat.

- AWQMA planning has focused primarily on impaired areas when the focus should be on both protection and restoration.
- The State does not administer a formalized process to track implementation and effectiveness of AWQMA plans.
- AWQMA planning and enforcement does not address "legacy" issues created by agriculture activities that are no longer occurring.

EMAILS to Congressional Members

Email from NOAA OLIA to Oregon Delegations and Interested Committee Staff

Summary: *NOAA and EPA Issue Determination Finding that Oregon Has Failed to Submit an Approvable Coastal Nonpoint Program*

Dear Colleagues:

On January 30, 2015, NOAA and EPA will jointly issue a Federal Register Notice announcing the federal agencies' finding that Oregon failed to submit a fully approvable coastal nonpoint pollution control program (or coastal nonpoint program) under Section 6217 of the Coastal Zone Act Reauthorization Amendments (CZARA).

Coastal states that participate in the National Coastal Zone Management Program are required to develop a coastal nonpoint program designed to prevent and control polluted runoff in coastal waters. While Oregon made significant progress on meeting many of the requirements, NOAA and EPA found that the state did not satisfy the program requirements related to forestry.

(b)(5) Deliberative

On December 20, 2013, NOAA and EPA announced the agencies' intent in the Federal Register to find that Oregon had failed to submit a fully approvable coastal nonpoint program. NOAA and EPA provided an advance briefing for congressional staff on this topic on December 17, 2013.

During the 90-day public comment period provided in the Federal Register Notice, NOAA and EPA received a number of public comments and additional information from the state. The agencies carefully considered all comments and additional information prior to making the decision.

NOAA and EPA recognize the complexities and challenges Oregon faces. The federal agencies will continue to work closely with state officials to help the state address the issues and achieve a fully approved program and restored funding.

Additional information, including the determination document developed by NOAA and EPA, the federal agencies' response to comments, and other documents related to the Oregon determination is available at: http://coast.noaa.gov/czm/pollutioncontrol/.
Please do not hesitate to contact me with any questions or if you would like a briefing on this topic.

Mike