Message

From: METZ Eric [eric.metz@state.or.us]
Sent: 4/12/2018 7:02:33 PM
To: Vallette, Yvonne [Vallette.Yvonne@epa.gov]; Hurld, Kathy [Hurld.Kathy@epa.gov]
Subject: RE: Interest in 404 Assumption has picked up and feedback urgently requested
Attachments: Linn_BentonAARP_FinalOrderColor.pdf

P.S. Attached is the Final Order approving the "Advance Aquatic Resource Plan for Selected Industrial Sites in Linn and Benton Counties, Oregon"

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From: METZ Eric
Sent: Thursday, April 12, 2018 11:30 AM
To: Yvonne Vallette <vallette.yvonne@epamail.epa.gov>; hurld.kathy@epa.gov
Subject: Interest in 404 Assumption has picked up and feedback urgently requested

Yvonne and Kathy,

In the past week or two interest in 404 assumption has picked up dramatically among the following two important stakeholder groups in the South Willamette Valley:

Albany Millersburg Economic Development Corp
https://business.albanychamber.com/list/member/albany-millersburg-economic-development-corp-albany-4078

Oregon Cascades West Council of Governments-Cascades West Regional Consortium
http://www.ocwcog.org/

One of the common threads is their desire to plan for advance mitigation for wetland impacts associated with their master/comp plans in locations that will improve wetland/waterway function, habitat connectivity and greenway development in conjunction with development. The background is that the Corps decided not to provide any expedited or special permit for the Linn-Benton AARP (Advance Aquatic Resource Plan (OAR 141-085-0768) and at a recent meeting Kirk Jarvie (one of our operations managers) happened to mention 404 assumption and they picked right up on it.

I will be talking to both of these groups this week and next about assumption. As I don't want to over promise and under deliver, is it safe to assume that if Oregon assumed the program, we could base future permit application decisions on a DSL-approved AARP plan?

For your convenience, our rule is provided below, verbatim. Also, can you tell me if Michigan or New Jersey have ever undertaken a similar planning process? That's one area I have not explored with either of them previously.

141-085-0768

Advance Aquatic Resource Plans

(1) **Purpose.** The purpose of an Advance Aquatic Resource Plan is to:
create a flexible framework for persons to voluntarily plan for anticipated future water resource – development conflicts within a defined planning area; identify and characterize water resources; make necessary decisions now to avoid and minimize those conflicts to the extent practicable; and, develop a compensatory mitigation strategy to offset the anticipated unavoidable impacts to water resources. An approved Advance Aquatic Resource Plan is intended to inform and streamline future removal-fill permit application processes for projects within a defined planning area. The Advance Aquatic Resource Plan is not intended to replace the Wetland Conservation Plan (ORS 196.668 *et seq.*) as a wetland conservation planning tool where binding local land use decisions are sought.

(2) **Outcomes.**

(a) The Department's approval of an Advance Aquatic Resource Plan pursuant to this section may provide regulatory outcomes which include, but are not limited to:

(A)Jurisdictional determinations pursuant to OAR 141-090.

(B) Reduction in removal-fill permit application processing timelines otherwise established by OAR 141-085 for projects within the Advance Aquatic Resource Plan area.

(C) Modification of the application completeness requirements otherwise established by OAR 141-085 for projects within the Advance Aquatic Resource Plan area.

(D) Consideration of the approved Advance Aquatic Resource Plan when applying criteria for issuance of a permit pursuant to ORS 196.825 for projects within the Advance Aquatic Resource Plan area.

(b) Approval of an Advance Aquatic Resource Plan will not authorize removal-fill activity within the Plan area.

(3) **Standards for Establishing Advance Aquatic Resource Plans.**

(a) Required Minimum Content. The level of analysis required for each content element is only broadly defined by this administrative rule. It is the Department's intent that Advance Aquatic Resource Plans will be a flexible tool with the level of analysis customized to meet the specific planning goals, purpose, and needs for the defined area, and considering the outcomes sought from the Department. An Advance Aquatic Resource Plan will include the following minimum content unless otherwise approved in writing by the Department:

(A) Advance Aquatic Resource Plan Sponsor. The Advance Aquatic Resource Plan will identify the person acting as the Plan sponsor. The sponsor will: coordinate land owners and local government participation in Plan development; coordinate with the Department and other affected local, state and federal agencies through Plan development process; administer the Technical Advisory Committee created pursuant to this section; and be responsible for Advance Aquatic Resource Plan content, execution, reporting, amendments, and renewals as may be required.

(B) Advance Aquatic Resource Plan Goals, Purpose and Need. The Advance Aquatic Resource Plan will: establish a comprehensive set of goals for the effort including both conservation and development objectives; describe the purpose for developing an Advance Aquatic Resource Plan for the defined area; identify what public need(s) the Plan seeks to fulfill; and, describe outcomes sought from the Department by approval of the Plan.

(C) Coverage Area. The Advance Aquatic Resource Plan will define, in text and map form, the geographic boundaries of the Advance Aquatic Resource Plan coverage area. An Advance Aquatic Resource Plan will not include lands planned or designated for farm or forest uses, or mixed farm and forest uses, pursuant to goals adopted by the Land Conservation and Development Commission under ORS 197.225.

(D) Activity Types. The Advance Aquatic Resource Plan will describe the types of removal-fill activities or projects intended to be addressed by the Advance Aquatic Resource Plan.

(E) Identification of Waters of This State. Unless otherwise approved by the Department, waters of this State within the coverage area will be identified, at a minimum, to the standards defined in a subset of the local wetlands inventory standards and guidelines that are described in (OAR 141-086-0180 through OAR 141-086-0240) as designated by the Department. At the discretion of the Advance Aquatic Resource Plan sponsor and with input from the Department, boundaries may be defined by a complete delineation pursuant to OAR 141-090, and therefore meet requirements for future removal-fill authorizations pursuant to (4)(c)(D) of this section.

(F) Characterization of Waters of This State. Wetland functions and values will be evaluated using the Oregon Rapid Wetland Assessment Protocol. Other methods may be allowed at the discretion of the Department. Non-wetland waters of this State will be functionally assessed using methods approved by the Department. Other ecological evaluation parameters will be defined in consultation with the Department and Technical Advisory Committee created pursuant to this section, depending on natural resource characteristics of the Plan area and the defined goals, purpose and need for the Advance Aquatic Resource Plan.

(G) Avoidance and Minimization Strategy. The Advance Aquatic Resource Plan will:

(i) Describe the methodology and results for identifying protection or development of wetlands and other Waters of This State considering, at least, the characterization results from (3)(a)(F) of this section and anticipated development needs for the coverage area. Protection and development identifications may be further refined at the Plan sponsor's discretion and with input from the Technical Advisory Committee created pursuant to this section.

(ii) Include text and maps illustrating designation results and the rationale for each protection and development identification.

(iii) Identify buffers as necessary to maintain, protect or restore the functions and values of waters of this State around identified protection areas, and describe proposed uses to be allowed in the buffer areas.

(iv) Include demonstration that practicable, less damaging alternatives, including alternative locations for development, are not available for any waters of this State that are proposed for a development identification.

(v) Include a description of proposed best management practices that will ensure that the adverse effects to waters of this State, where not avoidable, will be minimized.

(vi) Include description of proposed allowed, conditional and disallowed uses for protection and development identification categories.

(H) Compensatory Mitigation Plan. The Advance Aquatic Resource Plan will describe how anticipated future adverse impacts to Waters of this State within the coverage area will be mitigated. This portion of the Plan may be conceptual in nature or it may have sufficient detail so that it satisfies all of the requirements that are specified in OAR 141-085 for compensatory mitigation plans. The level of mitigation planning will be determined at the discretion of the Advance Aquatic Resource Plan sponsor and with input from the Department considering the goals, purpose and need for the Advance Aquatic Resource Plan and the desired outcome(s) sought from the Department. The compensatory mitigation plan must, at a minimum, address the principal objectives for compensatory mitigation specified in OAR 141-085-0680(2).

(I) Public Involvement Plan. The Advance Aquatic Resource Plan will describe a plan for engagement with affected local, state and federal government agencies, affected tribal governments and the public through the planning process.

(J) Other Advance Aquatic Resource Plan Elements. Other elements may include, but are not limited to: cultural resources evaluations, storm water management planning as may be required for future Clean Water Act Section 401 water quality certifications, biological assessments for Endangered Species Act compliance, and environmental contamination assessments.

(b) Department Approval Prior to Initiating Planning Work. A person intending to develop an Advance Aquatic Resource Plan shall consult with the Department before initiating the planning work. The purpose of this consultation is to ensure that an Advance Aquatic Resource Plan is the appropriate planning tool; that the scope and scale of the Plan is commensurate with the goals, purpose, need and desired outcomes; and that sufficient Department resources are available. The Department may, in its discretion, decline to participate in developing an Advance Aquatic Resource Plan for any reason, including for example, that the Department determines that there are not adequate staff resources available or that an Advance Aquatic Resource Plan is not a suitable tool for the identified need. The decision to participate or decline to participate will be made in writing by the Department within 30 days of receiving a written request. The Department's decision whether to participate is a final order in other than a contested case and may be appealed as provided in ORS chapter 183. An Advance Aquatic Resource Plan will only proceed with an affirmative statement of Department participation.

(c) Technical Advisory Committee Participation. The Advance Aquatic Resource Plan sponsor will establish and convene an advisory body to provide input on Advance Aquatic Resource Plan content and development. At a minimum, advisory committee membership will include (to the extent these agencies desire involvement or unless otherwise approved by the Department): Department of State Lands, Department of Fish and Wildlife, Department of Environmental Quality, Department of Land Conservation and Development, US Army Corps of Engineers, National Marine Fisheries Service, US Fish and Wildlife Service. Membership may additionally include, but is not limited to: land owners or their representative(s) within the Advance Aquatic Resource Plan coverage area; applicable local

government staff; local watershed council(s) representative; business representatives, conservationist or environmental interests, affected tribal governments, and elected officials. Other membership will be at the discretion of the Advance Aquatic Resource Plan sponsor.

(4) **Approval Process for Advance Aquatic Resource Plans.**

(a) Submittal Requirements. A completed Advance Aquatic Resource Plan will be submitted to the Department in the form, manner and number prescribed by the Department. Submittals will be processed as a request for a proposed order of the director.

(b) Completeness and Technical Sufficiency Review.

(A) The Department will conduct a review to determine if all required Advance Aquatic Resource Plan elements are complete and technically sufficient to prepare a draft order of the director.

(B) If the Department determines that the Advance Aquatic Resource Plan is incomplete or technically insufficient, the Department will notify the Advance Aquatic Resource Plan sponsor in writing including identification of issues and provide opportunity for re-submittal. This determination does not preclude further agency consideration of the subject matter.

(c) Draft Order

(A) In developing the Draft Order, the Department will evaluate the information contained in the Advance Aquatic Resource Plan and conduct any investigation that the Department considers appropriate.

(B) In developing the Draft Order, the Department will consult with affected local, state and federal agencies and affected tribal governments to assess any potential effects of the Advance Aquatic Resource Plan on those entities' programs, policies or requirements.

(C) If the Advance Aquatic Resource Plan is complete and technically sufficient, the Department will prepare a draft order including at least the following elements:

(i) Findings of compliance or noncompliance with the determinations described in (4)(e)(B) of this section.

(ii) A summary of the Advance Aquatic Resource Plan coverage area and activity types addressed by the Plan.

(iii) A description of other eligibility criteria or standards for projects involving removal or fill activity to be included in the Advance Aquatic Resource Plan.

(iv) Jurisdictional determinations of presence or absence of waters of this State or approval of boundaries of waters of this State, depending on level of identification conducted pursuant to (3)(a)(E) of this section. All remaining requirements to obtain wetland delineations for future removal-fill applications will be defined.

(v) A description of standards by which future applications for removal-fill authorizations will be processed including the requirements for when an application will be determined complete, and whether the Department will shorten its processing timelines. At the Department's discretion, application completeness requirements may be reduced to the extent such information is already provided in the Advance Aquatic Resource Plan. The information included in future removal-fill

application must be sufficient to allow the Department consider the factors listed in ORS 196.825(3), to consider any other factors identified by the Department, and to make the determinations that are listed in ORS 196.825(1). At the Department's discretion, applications for future removal-fill authorization may be processed on a shorter timeline than otherwise established by OAR 141-085 except that public review requirements pursuant to OAR 141-085 will always apply.

(vi) Any general conditions that are identified in the Advance Aquatic Resource Plan for activities addressed by the Plan.

(vii) A description of the annual reporting requirements, amendment process, and 5-year renewal process for the approved Advance Aquatic Resource Plan.

(viii) Grounds and mechanisms for suspension or revocation of the order.

(ix) Any other conditions of, or limitations to, the order that the Department determines are appropriate.

(d) The draft order shall be released for a 30-day public comment period prior to finalization. The form and manner of public noticing shall be determined by the Department. After completion of the public comment period, the Sponsor shall be provided the opportunity to respond to public comments received. The Department may release an amended draft order for a second 30-day public comment period if the Department determines that significant changes to the draft order warrant a second comment period.

(e) Final Order. A final order will approve, approve with conditions, or deny the Advance Aquatic Resource Plan.

(A) If denied, the director shall identify the reasons for denial and provide an opportunity to amend and resubmit the Advance Aquatic Resource Plan. This determination does not preclude further agency consideration of the subject matter

(B) The director will only issue an order approving an Advance Aquatic Resource Plan where the director determines that:

(i) The Advance Aquatic Resource Plan is consistent with the protection, conservation and best use of the water resources of this state as specified in ORS 196.600 to 196.905;

(ii) The Advance Aquatic Resource Plan would not unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing, and public recreation;

(iii) A public need is fulfilled by approval of the Advance Aquatic Resource Plan; and

(iv) Implementation of the Advance Aquatic Resource Plan not inconsistent with governing jurisdiction(s) Comprehensive Plan(s) and local land use regulations and ordinances.

(f) Appealing the Decision. A final order of the director approving, approving with conditions, or denying an Advance Aquatic Resource Plan may be appealed as described in OAR 141-085-0575 for permit decisions. All final orders will include a notice of the right to a contested case hearing.

(5) **Administration of Approved Advance Aquatic Resource Plans.**

(a) Annual Reports. The Advance Aquatic Resource Plan sponsor shall prepare an annual report summarizing use of the Advance Aquatic Resource Plan for the previous year, its effectiveness in meeting the established goals and purpose, and any known, substantive changes in conditions within the coverage area that could materially affect ongoing implementation or cause unintended adverse effects to waters of this State. Other annual report content requirements may be defined in the final order. The first annual report is due one year from the date that the Department issued the final order. Each subsequent report will be due the same date each year thereafter that the final order approving the Advance Aquatic Resource Plan remains in effect.

(b) Amendment Process. The Department or plan sponsor may initiate an Advance Aquatic Resource Plan or final order amendment upon a finding that the current Advance Aquatic Resource Plan or final order is not substantially achieving the goals, purpose or need; or substantive changes in conditions within the coverage area are materially affecting ongoing Advance Aquatic Resource Plan implementation or causing unintended adverse effects to waters of this State. The requirements and mechanism for Advance Aquatic Resource Plan or final order amendment will be defined in the final order. At the Department's discretion, draft amended Advance Aquatic Resource Plans and draft amended orders may be circulated for Technical Advisory Committee review and public comment.

(c) 5-Year Review and Renewal.

(A) Each final order is effective for five years from the date of issuance. The final order may be renewed up to four times, for a total term of 20 years. Upon written notice from the plan sponsor that renewal of the Advance Aquatic Resource Plan is desired, the Department will review each approved Advance Aquatic Resource Plan and final order. The plan sponsor shall submit the request, if any, at least six months prior to the expiration of the final order. After such review the director may request new or updated information and act to modify, reissue or revoke the final order approving the Advance Aquatic Resource Plan. In making this decision, the Department will consider whether:

(i) There have been substantive changes in circumstances or conditions that would affect the waters of this State to a greater extent than originally anticipated or would otherwise adversely affect the compliance of the Advance Aquatic Resource Plan with the determinations made pursuant to (4)(d)(B) of this section;

(ii) There have been changes in applicable laws, administrative rules or regulations that require the Advance Aquatic Resource Plan or final order to be re-evaluated;

(iii) The Advance Aquatic Resource Plan and final order, as implemented, over the preceding five years is substantially meeting the goals, purpose and need as established in the Advance Aquatic Resource Plan and final order.

(B) The Department may initiate Advance Aquatic Resource Plan or final order review at any time outside of the five-year cycle if it determines that there have been changes in circumstances or conditions that must be considered in advance of the five-year cycle.

(d) Suspension, Revocation. At any time, and upon a finding by the director that the Advance Aquatic Resource Plan or final order is not being implemented in good faith or implementation of the Advance Aquatic Resource Plan or final order is otherwise allowing or facilitating significant, unanticipated adverse effects to waters of this State, the director may either suspend the final order and provide opportunity to correct, or revoke the final order without opportunity to correct. Each final order will state whether it may be suspended or revoked without a right to an appeal. If a right to appeal a suspension or revocation is allowed, it shall be as provided in OAR 141-085-0575 for permit decisions.

(e) Cancellation. Upon written request by the Advance Aquatic Resource Plan sponsor and for any reason, the Department will act to cancel the final order.

Stat. Auth.: ORS 196.825800 - 196.990 & 196.600 - 196.692
Stats. Implemented: ORS 196.600 - 196.692 & 196.800 - 196.990
Hist.: DSL 3-2014, f. 8-14-14, cert. ef. 9-1-14

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