April 4, 2004

NOAA and EPA Preliminary Decisions on Information Submitted by Oregon to Meet Coastal Nonpoint Program Conditions of Approval

I. ADMINISTRATIVE COORDINATION

CONDITION: Within one year, Oregon will establish a process for ensuring coordination among State and local agencies with a role in the implementation of the coastal nonpoint program.

FINDING: Oregon has satisfied this condition.

RATIONALE:
Oregon has established a process for ensuring coordination among State and local agencies to implement the coastal nonpoint program by developing formal coordination mechanisms such as memorandum of understanding, advisory boards, agency outreach to local municipalities, and having regular informal communication among parties responsible for the program.

The Department of Environmental Quality (DEQ) has signed separate Memorandums of Understanding (MOUs) with the Oregon Department of Agriculture (ODA) and the Oregon Department of Forestry (ODF) to outline agency roles in developing and revising agricultural 1010 Plans and TMDLs for forestry, respectively. Several state agencies including DEQ, ODF, the Oregon Department of Water Resources, and the Department of Fish and Wildlife, have also signed an MOU to provide for continued cooperation to achieve the goals of the Oregon Plan for Salmon and Watersheds, many aspects of which address 6217 (g) measures.

The Community Solutions Team Advisory Board is comprised of several state agencies including the DEQ, ODF, the Department of Land Conservation and Development (DLCD) and the Department of Transportation. The Advisory Board coordinates local development issues including many topics relevant to the coastal nonpoint program such as TMDLs and land use laws.

Oregon's Coastal Management Program also conducts regular outreach to local governments within the coastal zone. Discussions include development and implementation of the coastal nonpont program.

Finally, agency staff involved in the coastal nonpoint program regularly communicate with one another through informal channels. Both DEQ and DLCD have staff dedicated to the coastal nonpoint program and these individuals work with appropriate people at the other state and local agencies as needed to develop and implement the coastal nonpoint program. NOAA and EPA encourage DLCD and DEQ, as the lead state agencies for the coastal nonpoint program, to continue coordination efforts with other state and local government agencies. In particular, they should proactively involve partner agencies such as the Department of Forestry and Department

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of Health in order to meet the state's remaining conditions and implement the coastal nonpoint program throughout the 6217 management area.

II. CRITICAL COASTAL AREAS, ADDITIONAL MANAGEMENT MEASURES AND TECHNICAL ASSISTANCE

CONDITION: Within two years, Oregon will identify and begin applying additional management measures where water quality impairments and degradation of beneficial uses attributable to forestry exist despite implementation of the (g) measures. Within two years, Oregon will develop a process for the identification of critical coastal areas and a process for developing and revising management measures to be applied in critical coastal areas and in areas where necessary to attain and maintain water quality standards. Also within two years, the State will develop a program to provide technical assistance in the implementation of additional management measures.

FINDING:

- Oregon has developed a process to identify critical coastal areas and a process to develop and revise management measures to be applied in critical coastal areas and in areas where necessary to attain water quality standards.
- Oregon has developed a program to provide technical assistance in the implementation of additional management measures.
- Oregon has not satisfied the condition for additional management measures for forestry.

RATIONALE:

Critical Coastal Areas

Oregon has described a process for identifying critical coastal areas that considers the factors recommended in the NOAA/EPA *1993 Program Development and Approval Guidance.* Statewide Planning Goal 16, Estuarine Resources (OAR 660-015-0010(1)) recognizes the importance of protecting Oregon's estuaries where new or substantially expanding uses could cause or contribute to water quality impairment. Goal 16 requires classification of Oregon's estuaries into one of four types–natural, conservation, shallow draft development, or deep draft development. The estuary areas are further divided into "distinct water use management units" which define the permissible uses within each unit. In estuaries classified as natural or conservation, only activities which support these designations are allowed. Therefore, Goal 16 is an appropriate vehicle for identifying critical coastal areas in estuaries.

In addition, the OWEB watershed assessment protocol lays out a process to identify and map areas within watersheds that are in need of protection. Such a process is a good vehicle to identify critical coastal areas in the coastal watersheds. The watershed assessments are used to develop restoration and enhancement plans and prioritize projects within each watershed.

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TMDLs and their associated implementation plans can also identify critical areas for special attention. Oregon requires that TMDLs developed for impaired watersheds be accompanied by water quality management plans (WQMP) that specify load reductions, a schedule for meeting load reductions, and management authorities responsible for achieving the load reduction. It is anticipated that all watersheds in the 6217 management area will have TMDLs completed by 2006.

Technical Assistance

NOAA and EPA have determined that Oregon has satisfactorily developed a program to provide technical assistance. As described in the October 2002 submittal, Oregon has a number of on-going grant programs, publications, and workshops that provide technical assistance to support implementation of additional management measures. The State has adequately described the type of technical assistance provided (grants, technical assistance documents, training workshops); the agencies providing the technical assistance (DLCD, DEQ, OWEB, ODF); the intended recipients (coastal jurisdictions, watershed councils, individual land owners, forest operators); and a schedule of availability as required in the *Coastal Nonpoint Pollution Control Program: Program Development and Approval Guidance* (NOAA and EPA, January 1993).

Additional Management Measures for Forestry

NOAA and EPA have determined that Oregon has not fully satisfied the condition requiring the State to identify and begin applying additional management measures for forestry in several areas critical to water quality protection. NOAA and EPA agree that Oregon has processes in place to identify additional management measures for forestry through review procedures such as that of the Independent Multidisciplinary Science Team and the sufficiency analyses called for in the MOU between ODF and DEQ. However, Oregon has not yet begun to sufficiently apply additional management measures that address our water quality concerns. This determination is consistent with the determination we made in January 2003.

In the 1998 rationale for findings and conditions, EPA and NOAA identified areas under the Forest Practices Act and Administrative Rules that should be strengthened to attain water quality standards and fully support beneficial uses: "These areas include protection of medium, small, and non-fish bearing streams, including intermittent streams; protection of areas at high risk for landslides; the ability of forest practices to address cumulative impacts of forestry activities; road density and maintenance, particularly on so-called 'legacy' roads; and the adequacy of stream buffers for application of certain chemicals."

The latter concern about the adequacy of stream buffers for application of certain chemicals is being addressed by the courts. Judge John Coughenour of the U.S. District Court for the Western District of Washington banned ground spraying of commonly used pesticides within 20 yards and aerial spraying within 100 yards of any stream that could be important to salmon or steelhead populations. The ban applies to 38 types of pesticides, and will remain in place until EPA has completed its Endangered Species Act Section 7 consultation with NOAA.

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NOAA and EPA are pleased to note that more protective forestry rules to address landslides and road construction have been formulated and passed. Amendments to the Oregon Administrative Rules (OAR 629-623-0000 to 08000) require identification of landslide hazard areas in stewardship plans, and road construction and maintenance. Timber harvest and road construction are not allowed on sites with "substantial downslope public safety risk" and harvesting activities that occur on other high landslide hazard areas must use specific practices to prevent ground disturbance. However, hazards are defined only as they relate to risk for losses of life and property, not water quality. NOAA and EPA would like Oregon to explain how these new amendments protect surface water quality, if at all. There have also been other improvements in general road maintenance to provide a better drainage network for water quality purposes (OAR 629-625-0330) and to establish wet weather use requirements/restrictions (OAR 629-625-0700).

In March of 2003, Oregon submitted an update and additional information showing how the Oregon Department of Forestry (ODF) uses recommendations from the Forest Practices Advisory Committee (FPAC), the Independent Multidisciplinary Science Team (IMST), the ODF/DEQ Sufficiency Analysis, and the Eastside Riparian Functions Advisory Committee (ERFAC) to develop rule concepts for riparian areas. The submission included a Forest Practices Process Chart, some detail on recommendations, a sample of minutes from a Board of Forestry meeting, and an anticipated schedule for reviewing riparian concepts and rule making. At that time, it was anticipated that draft rules would be presented to the Board in June 2003 and that rules would be adopted in October 2003.

NOAA and EPA understand that this process is continuing but has fallen behind schedule. At this point, ODF and the Board of Forestry are considering eighteen draft rule concepts for water protection and riparian functions. They are deciding whether the action for each concept will be to draft a rule or to pursue a non-regulatory pathway. Once those decisions are made, the resultant package of draft rules will undergo an analysis of economic impact and examination of alternatives before being put out for public review. At present, three of the eighteen concepts are moving forward into the draft rule package and four of the eighteen concepts are being directed into non-regulatory pathways, leaving eleven still to be decided upon.

The rule concepts that relate most directly to the expressed concerns of the Coastal Nonpoint Program are the following:

Rule Concept	Proposed Action
2. Use Type F prescriptions for large and medium Type N streams	Undecided
3. Riparian management areas (RMA) above fish barriers	Undecided
4. Wood from debris flows and landslides	Draft Rule
8. Basal area target increase for medium and small Type Fs	Draft Rule
9. 60% Basal area cap	Non-regulatory

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10. No harvest within ½ RMA	Non-regulatory
11. Retain largest trees within the RMA	Non-regulatory
12. Small Type N streams	Undecided

Since the BOF's decision-making and rule-making processes for these riparian rule concepts is still on-going, it is premature for EPA and NOAA to make a decision as to whether or not Oregon's approach will adequately address the riparian aspect of the condition. EPA and NOAA will not be able to make a conclusive decision until the new riparian rules have been adopted and/or voluntary, incentive-based programs have been developed that will enable water quality standards and TMDL shade targets to be achieved.

NOAA and EPA encourage the State to take progressive action on these riparian concepts. Recent analyses and studies such as the IMST review, the ODF /DEQ Shade Study funded by CWA Section 319, and TMDLs developed for several coastal watersheds demonstrate that the riparian management practices carried out under the current rules are not adequate to meet shade targets or water quality standards. Riparian rule concepts 2, 3, 8 and 10 have the greatest potential to significantly improve upon management practices designed to achieve water quality standards, including temperature and shade targets. Therefore, we particularly encourage ODF to make progress in these areas.

In Executive Order No. EO 99-01, the Governor charged that:

> "(3)(c) The Oregon Board of Forestry will determine, with the assistance of an advisory committee, to what extent changes to forest practices are needed to meet state water quality standards and to protect and restore salmonids. . . . The Board may determine that the most effective means of achieving any necessary changes to forest practices is through regulatory changes, statutory changes or through other programs including programs to create incentives for forest landowners."

Therefore, as ODF and the Board of Forestry work to improve the riparian management program, they should ensure that the combination of rule changes and voluntary programs proposed will enable water quality standards to be achieved.

If the State wishes to pursue voluntary programs to address these additional management measures, the State would need to submit a legal opinion as required by the *1998 Administrative Changes Memo* to demonstrate is has enforceable mechanisms and policies to back-up their voluntary approach. In addition, Oregon would have to provide: (1) a complete description of the voluntary or incentive-based programs, including the methods for tracking and evaluating those programs it will use to encourage implementation of the management measures; and (2) a description of the mechanism or process that links the implementing agency with the enforcement agency and a commitment to use the existing enforcement authorities where necessary.

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Although the State is making progress to address many of the IMST recommendations and concerns NOAA and EPA raised in the conditional findings, very little progress has been made in addressing cumulative effects from forestry (IMST Recommendation #2). Cumulative impacts from forestry activities, including increased road density, continue to be an important concern that should be addressed. For example, a 1995 temperature study on the Olympic Peninsula concluded that stream temperatures cannot be successfully managed at the reach level unless harvest activities are evaluated on a basin-wide scale. NOAA and EPA recognize that implementing a program that considers the cumulative effects of forestry will require a significant policy change and may take several years to complete. NOAA and EPA strongly encourage Oregon to make progress on this over the next few years. The State should demonstrate a commitment to implement Recommendation #2 or similar program over time by developing a schedule and plan to do so.

Finally, EPA and NOAA continue to support and encourage the voluntary programs under the Oregon Plan for Salmon and Watersheds that address water quality, including projects for road surveys and improvement, fish passage, large wood placement, monitoring, and education. For example, Road Erosion and Risk Projects identify roads that present risks for salmon recovery, particularly targeting "legacy" roads, and establish priorities for reducing these road-related risks. All roads on land belonging to members of Oregon's Forestry Industry Council are assessed through this program as well as some of the industrial and non-industrial forest lands. The State estimates that the forestry industry spends $13 million per year on road improvement projects in the coastal zone. In addition, the State Forests Program spent over $25 million between 1997-1999 on road restoration projects and are proposing to spend an additional $2.5 million over the next two years. These projects are valuable and worth tracking and reporting as part of program implementation. However, the information Oregon has provided on the amount of money that is directed toward these efforts is outdated. In order to help us evaluate the value of the voluntary programs, we would appreciate answers to the following questions: What percentage of forest land in the 6217 management area is included in the Road Erosion and Risk Projects Program? How much has been spent on road improvement, road restoration, and road decommissioning projects in the 6217 boundary between 2000 and 2003? How much is anticipated in the next few years?

NOAA and EPA urge the State to move forward expeditiously to implement these recommended additional management measures, either through application of basin specific rules, changes to the FPA and OARs or by implementing voluntary, incentive-based programs backed by enforceable authorities.

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RECOMMENDATIONS

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In order to fully satisfy the condition on addition management measures for forestry, NOAA and EPA recommend the State do the following:

- *Explain how the new FPA amendments for roads and landslides will protect water quality as well as public safety.*

- *Develop programs that address key riparian conditions and processes (i.e. rule concepts 2, 3, 8, and 10) by adopting new rules or implementing incentive-based programs backed by enforceable authority that clearly show a trajectory towards meeting water quality standards. If the State chooses to pursue a voluntary approach, Oregon must also submit a legal opinion and supporting documents (See Administrative Changes Memo) to demonstrate the State has back-up authority to ensure implementation of the additional management measures.*

- *Provide more recent information on funding expenditures for voluntary road improvement programs within the 6217 boundary.*

- *Demonstrate a commitment to implement a program that will address cumulative impacts of forestry on water quality by submitting a schedule and/or plan for doing so over the next several years.*

III. MONITORING CONDITION: Within one year, Oregon will include in its program a plan that enables the State to assess over time the extent to which implementation of management measures is reducing pollution loads and improving water quality.

FINDING: Oregon has not fully satisfied this condition.

RATIONALE:
While Oregon has developed a general monitoring plan that enables the State to assess over time the extent to which the management measures are being implemented and improving water quality, the State is still in the process of developing additional management measures for forestry and the monitoring and tracking programs that will accompany these new initiatives, specifically the voluntary riparian programs.

The Monitoring Program has established a statewide rotating schedule for monitoring set reference sites and randomly selected sites for compliance with the State's water quality standards. Every year, the State samples 20% of both their reference and random sites for various parameters including temperature, sediment, dissolved oxygen, biological criteria, pH, stream fertility, and some toxics. Depending upon the parameter sampled, Oregon has 50 or 75 established reference sites within the 6217 boundary and another 50 or 150 random sites. In addition, the State also conducts an estuarine monitoring program that specifically samples for

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temperature, salinity and bacteria in shellfishing areas. The State uses this monitoring information to develop 305(b) reports and TMDL Watershed Management Plans which may require additional management measures.

Senate Bill 945 also directs the Oregon Watershed Enhancement Board (OWEB) to develop and implement a statewide Monitoring Program in coordination with state natural resource agencies for activities conducted under the Oregon Plan for Salmon and Watersheds, many of which are relevant to the (g) measures. *A Monitoring Strategy for the Oregon Plan for Salmon and Watersheds* describes the framework for the OWEB monitoring strategy. The Strategy includes assessing general status and trends for physical habitat and biotic conditions in selected sub-watersheds; documenting implementation of OWEB restoration projects; and evaluating the local effectiveness of restoration efforts by monitoring representative samples of specific project, activity and program types. Finally, the State will integrate information from multiple sources to produce data products and reports that assess restoration efforts and evaluate progress towards recovery goals.

Forestry is the dominant land use within the 6217 boundary. Therefore, to better assess the implementation and effectiveness of the Forestry Practices Act (FPA), which is consistent with the (g) guidance, the Oregon Department of Forestry (ODF) carries out the Forest Practices Monitoring Program. The ODF's monitoring program described in the December 2002 *Forest Practices Monitoring Program Strategic Plan*, involves both BMP implementation and effectiveness monitoring. All monitoring data is available in a central database as part of the State of Forests Integrated Information System and ODF analyzes and reports on the information collected annually. The ODF has already released several monitoring studies including the effectiveness of forest road sediment and drainage control practices, harvest effects on riparian areas, effectiveness of the FPA at obtaining temperature standards, and a comprehensive study on BMP implementation. Based on the monitoring conducted, each report recommends changes to the FPA to the Board of Forestry in order to improve the forestry program.

NOAA and EPA strongly encourage Oregon to continue to implement and improve upon the various monitoring programs that comprise their Coastal Nonpoint Control Program monitoring network. The State should continue to dedicate sufficient staff and resources to carry out the monitoring programs. In addition, Oregon should strongly consider developing a tracking/assessment program similar to the Forest Practices Monitoring Program for other select measures that address significant land uses within the 6217 boundary, such as key urban or agricultural measures.

The ODF should also ensure that they continue to conduct comprehensive BMP implementation studies on a regular basis and work towards implementing recommendations from past monitoring studies in a timely manner. Specifically, ODF must demonstrate it will apply the existing ODF monitoring approach to the new additional management measures for forestry it is adopting, especially since the State is proposing voluntary programs to address many of the

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riparian concerns. Therefore, NOAA and EPA defer approval of the monitoring section until the State has adopted the necessary additional management measures for forestry as described in the additional management measure section and demonstrated they have monitoring and tracking programs in place for these new measures.

RECOMMENDATIONS

In order to fully satisfy the condition on monitoring, NOAA and EPA recommend the State do the following:

- *Demonstrate that the current ODF monitoring plan for forestry or a similar monitoring and tracking program will be adopted to assess the implementation and effectiveness of the new additional management measures for forestry.*

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