U.S. Department of Commerce
National Oceanic and Atmospheric Administration

U.S. Environmental Protection Agency

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Department of Environmental Quality
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Portland, Oregon 97204

Nan Evans
Interim Director
Department of Land, Conservation and Development
635 Capitol Street, NE, Suite 150
Salem, Oregon 97301

Dear Mmes. Schroeder and Evans:

The National Oceanic and Atmospheric Administration (NOAA) and the U.S. Environmental Protection Agency (EPA) Headquarters and Region 10 continue to review Oregon's submittals pertaining to the remaining conditions of approval for Oregon's Coastal Nonpoint Pollution Control Program (CNPCP). We previously sent you written feedback on the boundary, agriculture and urban conditions. Now, we have completed our review of the marina, hydromodification and riparian areas submittals and have enclosed an interim decision document for these conditions. This document addresses each condition, conveys NOAA/EPA findings, presents a rationale for our decisions, and recommends actions the State can take to achieve full approval.

Based on the information provided, NOAA and EPA concluded that Oregon has fully met several of the marina conditions, including: solid waste management; liquid material management; petroleum control; fuel station design; shoreline stabilization; storm water runoff; sewage facility management and maintenance; fish waste management; boat cleaning; and boat operation. The State has also satisfied portions of both the hydromodification and riparian areas conditions.

Please note that NOAA and EPA's final decision on these conditions is contingent upon a public notice and opportunity to comment on our intent to fully approve Oregon's CNPCP. This process will occur once NOAA and EPA conclude that Oregon has met all of the conditions under Section 6217. The final decisions may also be subject to Tribal and ESA consultation. In addition, this letter should not preclude the use of (1) FY03 Clean Water Act Section 319 funding to further support any of the conditions placed on your program; and (2) FY03 Coastal Zone Management Act Section 310 funding to support implementation of approved elements of your program.

NOAA and EPA congratulate Oregon on its progress towards program approval and encourage you to continue working to address the remaining CNPCP conditions. We will be sending additional feedback on Oregon's remaining conditions (administrative coordination; critical coastal areas, additional management measures and technical assistance; and monitoring) shortly. If you have any questions regarding the enclosed interim findings or recommended actions, please contact either Allison Castellan of NOAA at (301) 713-3155, Extension 225, or Teena Reichgott of EPA Region 10 at (206) 553-1601.

Sincerely,

John King, Acting Chief
Coastal Programs Division
National Ocean Service

For Michelle Pirzadeh, Director
Office of Ecosystems and Communities
EPA Region 10

Enclosure

cc:
Don Yon, DEQ
Amanda Punton, DLCD
Don Waye, EPA HQ
Allison Castillan, NOAA
Teena Reichgott, EPA Region 10

January 30, 2004

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

I. MARINAS

A. MARINA FLUSHING, WATER QUALITY, and HABITAT ASSESSMENT

CONDITION: Within three years, Oregon will include in its program enforceable policies and mechanisms to implement the marina flushing and habitat assessment management measures throughout the 6217 management area.

FINDING: Oregon has not fully satisfied the conditions for marina flushing or habitat assessment.

RATIONALE: Oregon's Department of Fish and Wildlife (ODFW) reviews marina applications under the removal-fill law (ORS 196.795-990). ODFW has three policy standards (#14304, #14309, and #14310) consistent with the (g) guidance for flushing to guide their permit evaluations. However, the Division of State Lands (DSL) administers the removal-fill program and is the state agency that can place conditions on permits to address the flushing management measure. It is unclear if DLS is required to adhere to ODFW's recommendations and if they actually place conditions on marina permits consistent with the (g) guidance for flushing. The State should provide examples of DLS permits that have been conditioned based on ODFW's recommendations to address marina flushing issues.

The State's Land Use Goal 16 (OAR 660-015-0010(1)) provides the State with enforceable policies and mechanisms to implement the habitat assessment measure in the estuarine areas of the 6217 boundary. Goal 16 requires all local jurisdictions in the coastal zone to evaluate estuaries and identify appropriate locations for water dependent uses, including marinas. The existing natural condition and function of the estuary must be considered during the evaluation process. Specifically marinas are prohibited in areas with "natural" designations. Natural areas, at a minimum, must contain all major tracks of saltmarsh, tideflats and sea grass beds. However, Goal 16 only applies to marinas sited in estuarine areas. The State still lacks enforceable policies and mechanisms to support the habitat assessment measure in freshwater areas within the 6217 boundary. Oregon should clarify if Goal 16 can apply to fresh waters within the 6217 area as well. If Goal 16 doesn't apply to these fresh water areas, then the State must describe what other programs are in place to marinas are sited and designed to protect against adverse effects to shellfish resources, wetlands, and other important riparian and aquatic habitat areas in non-estuarine waters. If the State proposes voluntary programs for fresh water areas, they must submit a legal opinion stating Oregon has adequate back-up authority to ensure the management measure is implemented throughout the 6217 boundary.

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RECOMMENDATIONS

To fully satisfy this condition on marina flushing and habitat assessment, NOAA and EPA recommend the State do the following:

- *Provide an example(s) of conditions that have been placed (not could be placed) on removal-fill permits to address marina flushing.*
- *Demonstrate the State has programs in place to implement the habitat assessment measure in fresh water areas throughout the 6217 boundary.*
- *If the State pursues voluntary programs to satisfy the habitat assessment measure, the State should also submit a legal opinion stating that they have adequate back-up authority to implement the habitat assessment measure in non-estuarine areas within the 6217 boundary. When submitting a legal opinion to provide back-up authority for voluntary measures, the state must also provide:*
  (a) 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
  (b) 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. (see Final Administrative Changes Memo).

B. SHORELINE STABILIZATION, STORMWATER RUNOFF, FUELING STATION DESIGN, SOLID WASTE MANAGEMENT, LIQUID MATERIAL MANAGEMENT, and PETROLEUM CONTROL

CONDITION: Within three years, Oregon will develop management measures in conformity with the 6217(g) guidance and enforceable policies and mechanisms to ensure implementation of these management measures throughout the 6217 management area.

FINDING: Oregon has satisfied the condition.

RATIONALE: To address many of the marina management measures, the Department of Environmental Quality (DEQ) has developed a guidebook entitled *Best Management Practices for Oregon Marinas*. The Guidebook contains practices consistent with the (g) guidance for the solid waste management, liquid material management, petroleum control, fueling station design and storm water runoff management measures and has been distributed to all marinas within the 6217 management area. However, the Guidebook does not address the shoreline stabilization measure. Oregon cites their Water Pollution Control Regulation (specifically ORS 468B.025) as back-up authority to ensure measures are implemented. In addition, Oregon references OAR

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Chapter 340, Div 101 for Hazardous Waste and DEQ's Air Quality Regulations (OAR 340-246-0010-0230) as other enforceable policies the State can use to prevent hull scrapings and potentially other toxic materials from entering the air and water streams. Oregon's regulations for underground fuel storage tanks (OAR 340-150-0001 through 0620) can be used to implement the fuel station design measure when tanks are below ground.

Although the Guidebook does not address shoreline stabilization, Oregon has satisfied this management measure through other riparian and restoration programs such as the Oregon Watershed Enhancement Board grant (OWEB), the Oregon Aquatic Habitat Restoration and Enhancement Guide and Oregon's Statewide Riparian Management Policy. The State encourages use of bioengineering techniques in bank stabilization projects undertaken by property owners.

C. SEWAGE FACILITY MANAGEMENT and MAINTENANCE

CONDITION: Within three years, Oregon will include in its program enforceable policies and mechanisms to ensure implementation of these management measures throughout the 6217 management area.

FINDING: Oregon has satisfied this condition.

RATIONALE: Oregon's marina guidebook is consistent with the (g) guidance for sewage facility management and maintenance including guidelines for determining the number of boat waste collection devices at marinas and moorages. The State also has a Vessel Waste Facility Construction Program that funds vessel waste disposal facilities. However, these programs are voluntary. Oregon cites their Water Pollution Control Regulation (specifically ORS 468B.025) as back-up authority to ensure these measures are implemented.

D. FISH WASTE and BOAT CLEANING

CONDITION: Within three years, Oregon will issue an NPDES general permit for fish waste management, which will apply to all facilities identified in the 6217(g) guidance.

FINDING: Oregon has satisfied this condition.

RATIONALE: Instead of addressing the fish management measure through a NPDES permit, the State has elected to satisfy the condition through its voluntary marina best management practices guidebook. The Guidebook contains practices that are consistent with the (g) guidance for fish waste management. Oregon cites their Water Pollution Control Regulation (specifically ORS 468B.025) as back-up authority to ensure measures are implemented.

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E. BOAT OPERATION

CONDITION: Within three years, Oregon will include management measures in conformity with the 6217(g) guidance.

FINDING: Oregon has satisfied this condition.

RATIONALE: The Oregon State Marine Board has authority under Oregon Revised Statutes (ORS) 830.175 - .200 to regulate, through administrative rule making, recreational boating in specific waterways for a variety of purposes, including protection of water quality and fish and wildlife resources. In December 1996, the Marine Board revised Oregon Administrative Rule (OAR) 250-019 to further detail the Marine Board's role and responsibility in responding to requests for boating restrictions. Boating restriction requests may be made by citizen groups, local governments, or state agencies. Division 19 provides requirements for the petitioner and guidelines for review of each petition. Several local rules limiting boating activity have resulted due to OAR 250-19.

II. HYDROMODIFICATION

CONDITION: Within two years, Oregon will develop processes to identify and implement opportunities to (1) improve the physical and chemical characteristics of surface waters and instream and riparian habitat in existing modified channels and (2) stabilize eroding streambanks or shorelines causing nonpoint problems that are not reviewed under existing authorities. Also within two years, Oregon will include in its program the dam management measures for chemical and pollutant control and protection of surface water quality and instream and riparian habitat in conformity with the (g) guidance. Within three years, Oregon will also either modify the exemptions to the removal-fill program or demonstrate that the exemptions do not preclude the State from fully implementing the management measures.

FINDING:

- Oregon has developed a process to identify and implement opportunities to improve the physical and chemical characteristics of surface waters and instream and riparian habitat in existing modified channels.
- Oregon has developed a process to identify and implement opportunities to stabilize eroding streambanks or shorelines causing nonpoint problems that are not reviewed under existing authorities.
- Oregon is now exempt from implementing the dam management measures for chemical and pollutant control as part of its Coastal Nonpoint Program. This measure will be addressed through the NPDES Phase II Storm Water Program.
- Oregon has not fully included in its program the dam management measure for the

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protection of surface water quality and instream and riparian habitat in conformity with the (g) guidance.

- Oregon has not fully modified the exemptions to the removal-fill program or demonstrated that the exemptions do not preclude the State from fully implementing the management measures.

RATIONALE:

Improve Physical and Chemical Characteristics of Surface Water Quality

Oregon, through a number of related restoration and protection initiatives, has developed a process to identify and implement opportunities to improve the physical and chemical characteristics of surface water in existing modified channels. Oregon has also developed a process to identify opportunities to restore instream and riparian habitat. Key components include: the Oregon Plan for Salmon and Watersheds, a framework for anadromous fish recovery which fosters local watershed council work to assess and restore watersheds; the Healthy Streams Partnership; the Oregon Watershed Enhancement Board, which funds riparian restoration projects, including stream habitat enhancement and restoration of previously altered stream reaches; the Oregon Aquatic Habitat Restoration and Enhancement Guide, which provides guidance on identifying and conducting restoration activities and state agency criteria and priorities for restoration; riparian management components of Agriculture Water Quality Management Area Plans; and Oregon's Statewide Riparian Management Policy.

In addition, in May of 2002, the Governor's Office published a progressive "Statewide Riparian Management Policy" that states "State agency programs that affect riparian zones should seek to manage for riparian functions as much as possible along the entire stream system, consistent with regional ecology, site capability, and social and economic needs." Among the riparian functions listed are filtration of sediments, organic material, and toxic substances in surface runoff.

Eroding Streambanks or Shorelines

Eroding stream banks in the 6217 management area are primarily due to forestry and agricultural practices which result in the removal of vegetation from riparian areas. The opportunities for riparian corridor restoration identified via the watershed assessments, Oregon Aquatic Habitat Restoration and Enhancement Guide, and the activities of the Riparian Management Working Group, will help to address the effects of vegetation removal on eroding stream banks. In addition, ODA and ODF have entered into a Memorandum of Understanding with DEQ relating to the development of TMDLs and Agriculture Water Quality Management Area Plans (AWQMAPs), both mechanisms for addressing eroding streambanks. Finally, the State is encouraging the use of bioengineering techniques in bank stabilization projects undertaken by property owners. These projects must be reviewed and permitted by DSL and receive section 401 Water Quality Certification by DEQ. Both authorities have guidelines which favor the use of bioengineering techniques in stabilization projects.

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Dam Management Measures

The Oregon Water Resources Department (OWRD) reviews all dam construction, operation, and maintenance activities. Under OAR 690, Division 310 OWRD must determine whether the proposed surface water use will impair or detrimentally affect the public interest. OWRD can then condition dam construction, operation and maintenance activities through its review of permits for water appropriations to protect surface water quality, and instream and riparian habitat. OAR 690-31–0120(3)(b) defines minimum factors to be considered for new appropriations, including "water quality, with special attention to sources either listed as water quality limited or for which total maximum daily loads have been set . . . and sources which the Environmental Quality Commission has classified as outstanding resource waters." OAR 690, Division 33 establishes additional public interest standards with regard to sensitive, threatened, or endangered fish species, and requires OWRD to follow recommendations of an interagency review team comprising representatives of ODA, DEQ, ODFW, OWRD, and other state natural resource agencies as appropriate.

When conditioning a permit, OWRD draws from a list of standard conditions. Several conditions address dam construction, operation and maintenance activities, including withdrawals, fish habitat, sediment, and downstream water quality. While OWRD can condition dam construction, operation and maintenance activities through its water appropriations permit review process to protect surface water quality, and instream and riparian habitats, it is not clear to what extent OWRD actually does place such conditions on permits. Therefore, Oregon has not fully demonstrated, that the condition for protection of surface water quality and instream and riparian habitat for dam operations has been met. NOAA and EPA would like more information on how Oregon manages dam operations that result in the loss of desirable surface water quality and habitat.

EPA and NOAA have determined that, effective December 20, 2002, state coastal nonpoint control programs are no longer required to include the dam management measure for chemical and pollutant control in their Coastal Nonpoint Pollution Control Programs because the NPDES storm water regulations for industrial activities on construction sites apply nationwide and therefore throughout the coastal management areas of states and territories.

Exemptions to the Removal Fill Program

Previously, removal and fill activities involving 50 cubic yards or less of material that were not located within essential fish habitat were exempt from the removal fill laws. Division 102 of the OAR has since been amended to expand the essential fish habitat classification. Now "virtually" all waterbodies in the 6217 management area are designated essential habitat, thus removing the 50 cubic yard exemption for removal and fill activities. However, "virtually" is not well-defined. The State needs to better quantify the extent of essential fish habitat designations within the 6217 boundary. For areas not designated essential habitat, Oregon needs to demonstrate that the removal fill exemption will not have a significant impact on water quality.

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In December 2002, the Division of State Lands amended the removal and fill administrative rules (OAR 141.085) to make Oregon's laws consistent with the federal 404 permit exemptions and more clearly define exempt maintenance and reconstruction activities and exempt farm and forest practices. Although clarified, many exemptions such as maintenance to dikes, dams, levies and tidegates and maintenance of existing agricultural activities, still exist. The State has not adequately examined the effects of these exemptions on surface water quality and the ability of the coastal waters to support beneficial uses as the Findings require. The statement "exemptions for maintenance activities associated with dikes, dams, levies and tidegates and drainage and irrigation ditches, do not affect the state's ability to fully implement the hydromodification management measures" included in Oregon's recent submittal, does not provide an explanation as to *why* these exemptions do not affect Oregon's ability to implement the hydromodificaiton measures relying on the removal and fill law.

The State may have adequately explained why dams exempted under the removal and fill law do not limit Oregon's ability to implement the hydromodification measures. Removal and fill activities related to dams are exempt under the removal and fill law because these activities are addressed through OWRD's review of water rights permits associated with dam construction as discussed above under Dam Management Measures. As long as Oregon can demonstrate that OWRD can condition permits to protect surface water quality (see Dam Management Measure above), NOAA and EPA will be satisfied that this exemption will not interfere with the State's ability to implement the measures.

RECOMMENDATIONS

To fully satisfy the hydromodification condition, NOAA and EPA recommend the State do the following:

- *Provide quantitative information on the extent of essential fish habitat designated waterways within the 6217 management areas.*
- *Demonstrate that activities involving 50 cubic yards or less of material and that are not located within essential fish habitat designated waterbodies will not have a significant impact on water quality.*
- *Provide additional information on how the State manages dam operations that result in the loss of desirable surface water quality and habitat. Specifically, additional information should demonstrate that OWRD does place conditions on permits to protect surface water quality and instream and riparian habitat.*
- *Describe why the removal-fill exemptions for dikes, dams, levies and tidegates and maintenance of existing agriculture activities will not affect the State's ability to implement the hydromodification measures relying on the removal and fill law.*

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III. WETLANDS, RIPARIAN AREAS, AND VEGETATED TREATMENT SYSTEMS

CONDITION: Within two years, Oregon will include in its program management measures in conformity with the 6217 (g) guidance to assure the protection of riparian areas. The State will also develop a process to promote the restoration of riparian areas in conformity with the 6217 (g) guidance.

FINDING:

- Oregon has not fully satisfied the condition to include management measures to assure the protection of riparian areas.
- Oregon has developed a process to promote restoration of riparian areas.

RATIONALE: Oregon has the ability to preserve riparian areas under State Land Use Goal 5. The goal requires local governments to inventory natural resources, including riparian areas, and adopt programs that will preserve significant natural resources. Each local government determines what resources they believe are "significant" and warrant preservation. The significance of each riparian area must be justifiable based on findings derived from the inventory. Every time any comprehensive plan is amended, such as when an urban growth boundary is expanded, local governments must perform a new riparian resource inventory and ensure programs are in place to protect significant Goal 5 resources.

All cities with a population greater than 2,500 and all counties with a population greater then 15,000 must periodically update their comprehensive plans. At this time, they must conduct new inventories of significant riparian resources and ensure they have programs in place to protect Goal 5 resources. All counties within the 6217 management area are required to undergo these periodic reviews.

Although Goal 5 could be an important tool for riparian protection in Oregon, because Goal 5 does not specifically require local governments to preserve significant riparian habitat but only significant "Goal 5 resources" which could include riparian areas, NOAA and EPA are still unclear as to how many local governments within the 6217 boundary are using Goal 5 to adequately protect riparian areas and satisfy the requirements of the (g) guidance. Oregon should provide information on the number of counties within the 6217 boundary that are protecting riparian areas through their land use plans and excerpts from several plans related to riparian protection.

In addition, the State has exempted agricultural and forestry activities from the Goal 5 requirements because riparian protection is addressed through SB1010 plans (agriculture) and the Forest Practices Act (FPA) (forestry). Oregon developed model language on riparian protection that all SB 1010 plans should contain. While the language is consistent with the (g) guidance, it is not clear that all SB 1010 plans within the 6217 management area have incorporated this

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language. The State provided an example from the Coos and Coquille Plan but no other examples were provided. The State should demonstrate that all 1010 Plans within the 6217 boundary meet these requirements.

In the conditional findings on Oregon's Coastal Nonpoint Program, NOAA and EPA were concerned that riparian areas of forest land being converted to other uses are not protected under existing programs. The January 2003 riparian submittal describes an informal agreement among the Oregon Department of Forestry (ODF), the Oregon Department of Agriculture (ODA), the Division of State Lands (DSL) and DEQ to hold land owners who harvest trees for sale prior to a land conversion responsible for providing water quality protection at the same or greater level as under the Forest Practices Act which is consistent with the (g) guidance for riparian protection. We are aware that work on this agreement has progressed and now includes DLCD, the Oregon Department of Fish and Wildlife (ODFW), and the Oregon Parks and Recreation Department (OPRD) in addition to the original four agencies. ODF has published a brochure describing the notification process for conversions. The MOA, although yet unsigned, is moving toward that end. NOAA and EPA encourage the state agencies to sign the MOA, and follow up with outreach to landowners and a training program for agency staff to clarify roles and responsibilities. In watersheds that have TMDLs for temperature and sediment, it will be important to align riparian characteristics with overall TMDL targets in order to achieve water quality standards, which is also the ultimate goal of the Coastal Nonpoint Program under CZARA Section 6217.

As the lead agency in the State on riparian area restoration, the Oregon Watershed Enhancement Board (OWEB) funds many watershed restoration projects. For example, between 1999 and 2001 they funded over $1.2 million worth of restoration projects in the North Coast and South West Coast regions, approximately the same area within the 6217 boundary. Watershed assessments are used to prioritize projects for funding based on the need for restoration and the likely success of a restoration project for the site. OWEB also has a monitoring program to assess the effectiveness of their restoration efforts. In addition to projects funded directly through OWEB, OWEB is also a partner with the U.S. Department of Agriculture's Conservation Reserve Enhancement Program (CREP). The CREP program provides landowners with annual conservation payments to restore riparian farmland to its natural state. Finally, OWEB has also published the *Oregon Aquatic Habitat Restoration and Enhancement Guide*. The Guide provides guidance to the public on restoration and enhancement measures, including many riparian projects. The Guide also provides standards for restoration activities that are required to be met when using state funds for aquatic habitat restoration.

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RECOMMENDATIONS

To fully satisfy the condition on riparian areas, NOAA and EPA recommend the State do the following:

- *Provide information on the number of counties within the 6217 boundary that have incorporated riparian protection measures into their land use plans and examples of several these plans.*
- *Demonstrate that 1010 Plans within the 6217 boundary have incorporated language consistent with the (g) guidance for riparian protection.*
- *Provide a copy of the signed MOA that describes how state agencies will protect riparian areas of forest land that is converted to non-forest uses.*

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