



Oregon

Kate Brown, Governor

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Colonel Jose L. Aguilar
U.S. Army Corps of Engineers
Portland District
P.O. Box 2946
Portland, OR 97208-2946

Re: CZMA Consistency Concurrence with Conditions for the 2017 Reissuance of Nationwide Permits

Dear Colonel Aguilar:

The Oregon Department of Land Conservation and Development (DLCD) has reviewed the U.S. Army Corps of Engineers (Corps) 2017 Nationwide Permits for consistency with the Oregon Coastal Management Program (OCMP). The Corps announced the nationwide permits, general conditions, and definitions in the January 6, 2017 *Federal Register*, and the Portland District issued final Regional Conditions on March 2, 2017. DLCD reviewed the nationwide permits, together with the general and regional conditions, pursuant to Section 307(c)(1) of the Coastal Zone Management Act (Act) and attendant regulations of 15 CFR Part 930. DLCD has also reviewed supplemental information provided by the Corps to meet the Part 930 regulations.

DLCD is the state's designated coastal zone management agency, and conducts consistency reviews to ensure that federal agency activities affecting any coastal use or resource are consistent to the maximum extent practicable with the enforceable policies of Oregon's federally-approved coastal management program. Oregon's federally-approved program, the OCMP, is a "networked" program that integrates authorities of local governments and other state agencies as the enforceable policies of the OCMP. As such, the enforceable policies of the OCMP include: 1) the statewide planning goals; 2) the applicable acknowledged city or county comprehensive plan and land use regulations; and 3) selected state agency authorities (e.g. those governing removal-fill, proprietary leasing, water quality, fish and wildlife protections, and ocean shore regulations). The Corps also submitted Consistency Determination supplemental information in order to provide an analysis of the enforceable policies of the OCMP and how the Corps has achieved consistency with state authorities to the maximum extent practicable within the Coastal Zone.

DLCD hopes timing of our review can come earlier in the re-authorization process at the next iteration. Although flexibility is built into the regulations that implement the CZMA, they are also very clear through §930.36 that the Consistency Determination should be provided at least 90 days before final approval of the Federal agency activity, while the federal agency still has the ability to make modifications. Providing the Consistency Determination when the final rule is published in the Federal Register is incongruent with the Act and limited not only DLCD's

ability to fully implement federal consistency review of this federal action, but also hindered the Corps ability to make reasonable changes in order to reach fuller consistency with the enforceable policies of the OCMP.

DLCD conditionally concurs with the Corps determination that the nationwide permits are, to the maximum extent practicable, consistent with the enforceable policies of the OCMP. Except for the categories below, DLCD grants advance concurrence to activities authorized by the nationwide permits provided the Corps agrees to the conditions below and attaches and applies the Standard OCMP Coastal Zone Conditions to each issued nationwide permit.

Conditions:

DLCD does not extend advance concurrence to, and will require individual consistency review (ICR) of, the following categories of permits:

Category 1

Any permit where the project is within or directly impacts the Territorial Sea (waters and seabed extending three (3) nautical miles seaward from the coastline, in conformance with federal law), except for projects permitted under NWP 1: Aids to Navigation.

Rationale: Projects within the Territorial Sea vary widely and thus have unpredictable coastal effects. In order to adequately assess coastal effects and apply Statewide Planning Goal 19: Ocean Resources and the Territorial Sea Plan, DLCD requires an ICR.

Category 2

Any project utilizing NWP 29 (Residential Developments) or NWP 39 (Commercial and Institutional Developments) that requires a local plan amendment, text amendment, zoning change, goal exception, discretionary decision, or action by a city or county council or commission.

Rationale: Changes to local land use laws and regulations have the potential to impact the federally approved enforceable policies of the OCMP, thus DLCD requires an ICR.

Category 3

Any permit where the project is within or directly impacts the following aquatic habitats of special concern: native eel grass beds, mature forested wetland, wetlands in dunal systems, estuarine wetlands (in natural or conservation management units only), state special management areas (including marine gardens, marine reserves, research reserves, state habitat refuges, marine protected areas, and shellfish preserves), kelp beds, rocky substrate in tidal waters (interpreted as all marine subtidal rock substrate and reefs and rocky intertidal shores), and native oyster beds except for projects permitted under NWP 20, 22, 27, 32, and 38.

Rationale: The revised 2017 regional conditions no longer exclude any high value or special concern resources from the expedited nationwide permit process. The previous language was originally established over 10 years ago to ensure ‘no more than minimal environmental impact’ occurred by requiring an individual permit process for rare, high functioning, or sensitive habitats. While the 2012 language made it easier to demonstrate consistency with

the state's enforceable policies, the 2017 language makes it more difficult to demonstrate consistency and virtually impossible for DLCD to grant advance concurrence for this expedited permit process as a whole. Thus, DLCD requires an ICR for these high value habitats, rare habitats, or habitats of special concern in the coastal zone.

Category 4

Any project that utilizes Nationwide Permit 48 (Commercial Shellfish Aquaculture Activities)

Rationale: Projects utilizing NWP 48 can impact other shellfish users, degrade estuary habitat unintentionally or disrupt/impact other aquaculture activities including other native shellfish beds. Coordination with the state's Marine Resources Program at the Oregon Department of Fish and Wildlife (ODFW) is essential to accurately assess coastal effects and apply enforceable policies of the OCMP, thus DLCD requires an ICR.

Category 5

Any project that utilizes Nationwide Permit 53 (Removal of Low-Head Dams), except where ODFW has determined no current or historical native migratory fish presence or the applicant already has a fish passage approval/waiver.

Rationale: The coastal effects of these new Nationwide's are unknown. Removal of low-head dams is desirable, thus an expedited NWP process is an appropriate incentive, however this action will trigger state enforceable policies like water quality and fish passage statutes. Coastal effects from short-term negative impacts to coastal resources from removal also need to be considered, thus DLCD requires an ICR.

Category 6

Any project that utilizes Nationwide Permit 54 (Living Shorelines) unless the project consists solely of wood, vegetation, or other living natural 'soft' elements.

Rationale: It is unclear how NWP 54 will be implemented in areas where additional shoreline development is not allowed in Oregon. Statewide Planning Goals 16 and 18, Estuarine Resources and Beaches and Dunes, are enforceable policies of the OCMP and state that coastal shoreline and beach areas had to be developed by 1977 in order to be eligible for shoreline protection structures now, thus DLCD requires an ICR.

The attached discussion provides additional guidance, and DLCD staff are available to assist in this concurrence. If you have any questions or concerns regarding this federal consistency review or the coastal management program, please contact Elizabeth Ruther of my staff at 503-934-0029 or by e-mail at: elizabeth.j.ruther@state.or.us.

Sincerely,



Patricia L. Snow,
Coastal Program Manager

Cc via email:

Ms. Judy Linton, U.S. Army Corps of Engineers

Ms. Tracie Nadeau, U.S. Environmental Protection Agency

Mr. Marc Liverman, National Marine Fisheries Service

Ms. Sara Christensen, Oregon Department of Environmental Quality

Ms. Joy Vaughan, Oregon Department of Fish and Wildlife

Mr. David Fox, Oregon Department of Fish and Wildlife, Marine Resources Program