



# Oregon

Theodore R. Kulongoski, Governor

## Ocean and Coastal Management Program

Department of Land Conservation and Development

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August 3, 2007

Mr. Lawrence Evans  
Chief, Regulatory Branch  
Portland District  
US Army Corps of Engineers  
PO Box 2946  
Portland, Oregon 97208-2946

Re: Nationwide Permit Program

Dear Mr. Evans:

In response to Colonel O'Donovan's April 4, 2007 letter, the Oregon Coastal Management Program (OCMP) has reviewed the new Nationwide Permits, Conditions, and Definitions, as published in the Federal Register on March 12, 2007 (72 FR 11092), for consistency with the OCMP. To be consistent with the OCMP, a federal permit, license, or funded activity must be consistent with:

- The statewide land use planning goals;
- Local jurisdiction acknowledged comprehensive plans and implementing ordinances;
- Select state authorities (e.g., the Removal/Fill Law, water quality regulations, fish and wildlife regulations, the Territorial Sea Plan).

As the state's designated lead coastal zone management agency, the Department of Land Conservation and Development (DLCDD) has coordinated a review of the new Nationwide Permits among our partner state agencies. With the two exceptions noted below, advance concurrence on all Nationwide Permits is hereby authorized, provided the Corps attaches and applies to each permit issued the ten conditions and explanatory notes in Appendix A and Appendix B to this letter (Ref 15 CFR 930.4). DLCDD reserves the right to modify these conditions as necessary to ensure the consistency of any permit, license, or project.

Advance concurrence is not extended to the following two classes of permits:

- 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), excepting projects permitted under NWP 1 or NWP 5.
- Any project utilizing NWP 29 or NWP 39 requiring a local plan amendment, text amendment, zoning change, goal exception, discretionary decision, or action by a city or

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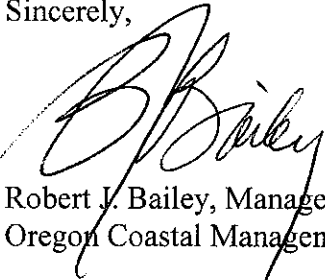
county council or commission.

The District Engineer shall be responsible for determining when permit applications meet one or both of these circumstances. In these instances, the applicant will be asked by the District Engineer to contact the OCMP. DLCD will undertake an individual review of the project to ensure proper adherence to the OCMP. Guidance for District Engineer in making this determination is attached as Appendix C. In cases where advance concurrence clearly applies, no communication between the District Engineer and the DLCD during the application review is required. The Corps will continue to copy DCLD on all final authorization and issues letters. Questions regarding whether a specific project qualifies for advance concurrence, or requests for further clarification of the guidance in Appendix C are most welcome, and will be addressed promptly.

Please direct any comments or questions about this letter or the Oregon Coastal Management Program to Jay Charland, Coastal Permits Coordinator. He can be reached at 503-373-0050 ext. 253, or by e-mail at [jay.charland@state.or.us](mailto:jay.charland@state.or.us).

Thank you for your continued cooperation and coordination with the Oregon Coastal Management Program.

Sincerely,



Robert J. Bailey, Manager  
Oregon Coastal Management Program

cc Kevin Moynahan, DSL  
Yvonne Vallette, EPA  
John Marshall, USFWS

Sally Puent, DEQ  
Patty Snow, ODFW  
Marc Liverman, NMFS

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## Appendix A

### Standard CZM Conditions

All projects permitted, licensed, or funded by the federal government are subject to review for consistency with the Oregon Coastal Management Program (OCMP). Conditions may be placed on federal permits, licenses, or funding to ensure consistency with the OCMP. The 10 Standard CZM conditions given below are required as part of that consistency concurrence for Nationwide Permits issued in Oregon's Coastal Zone.

Appendix B provides an explanation of why the conditions are necessary to ensure consistency with specific enforceable policies of the management program, and an identification of the specific enforceable policies relevant to each condition.

An applicant may choose to not follow one or more of the OCMP conditions. In that instance, an agreement between the OCMP and the applicant must be reached on what conditions will be attached to the federal permit, license or action.

Failure to come to an agreement shall trigger an objection to the federal action by the OCMP. In that instance, the permittee may appeal the state's objection to the Secretary of Commerce, pursuant to 15 CFR 930, subpart H, within 30 days of receipt of the letter informing the applicant of the OCMP's objection. (Ref. 15 CFR 930.63(e)) In order to grant an override request, the Secretary must find that the activity is consistent with the objectives or purposes of the Coastal Zone Management Act, or is necessary in the interest of national security. A copy of the request and supporting information must be sent to the OCMP and the federal funding, permitting or licensing agency. The Secretary may collect fees from the permittee for administering and processing the request. (Ref 15 CFR 930.63, 1-1-07 Edition)

Appendices A & B addresses the requirements of 15 CFR 930.4(a)(1).

### **CZ Condition 1. Consistency with Local Comprehensive Plans.**

(1) Authorization for projects in Oregon's coastal zone under any nationwide permit is valid only if the proposed project is consistent with or not subject to the applicable local comprehensive plan and implementing land use regulations, or to the statewide land use planning goals where applicable. Permits or other authorizations must be obtained, when required, from the applicable local government before work is initiated under any nationwide permit. Verification of the local jurisdiction's decision must be given to the Corps of Engineers in the form of a completed block seven (7) of the Joint Permit Application. All appeals of the local jurisdiction's decision(s) must be resolved before any regulated work may begin.

(2) All conditions placed on an authorization or permit by the local government are incorporated by reference into the conditions for consistency concurrence by the Oregon Coastal Management Program.

**CZ Condition 2. Consistency with Removal-Fill Law.**

(1) Authorization for projects in Oregon's coastal zone under any nationwide permit is valid only if the proposed project is consistent with or not subject to the state statutes for state lands and removal-fill in waters of the state. Permits or other authorizations must be obtained when required from the Oregon Department of State Lands (DSL) before any regulated work may begin.

(2) For projects found not subject to the Removal/Fill Law by DSL, any changes in project design or implementation which may reasonably be expected to require application of the Removal/Fill Law shall be submitted to DSL for review.

(3) All conditions placed on a Removal-Fill permit by the Oregon Department of State Lands are incorporated by reference into the conditions for consistency concurrence by the Oregon Coastal Management Program.

**CZ Condition 2a. Leases of State Lands.**

(1) Authorization for projects in Oregon's coastal zone under any nationwide permit is valid only if the proposed project has obtained any required lease or other license required for the use of state lands or waters. Permits or other authorizations must be obtained when required from the Oregon Department of State Lands (DSL) before any regulated work may begin.

(2) All conditions placed on a lease, license, or authorization by the Oregon Department of State Lands are incorporated by reference into the conditions for consistency concurrence by the Oregon Coastal Management Program.

**CZ Condition 3. Department of Environmental Quality.**

(1) Authorization for a project in Oregon's coastal zone under any nationwide permit is valid only if the proposed project has been certified or does not require certification by the Oregon Department of Environmental Quality (DEQ) through its 401 Water Quality Certification process.

(2) All conditions placed on a DA license, permit, or authorization by the Oregon Department of Environmental Quality are incorporated by reference into the conditions for consistency concurrence by the Oregon Coastal Management Program.

**CZ Condition 4. In-Water Work.**

(1) All in-water work, including temporary fills or structures, shall occur within the ODFW recommended period for in-water work for the affected water body. Exceptions to the recommended time periods require specific approval from the Corps, and:

- (i) The Corps shall coordinate exceptions to work windows with ODFW and NMFS (NOAA Fisheries). Decisions to not apply ODFW or NMFS work windows shall be accompanied by written approval from ODFW;
- (ii) On tribal lands, the Corps shall coordinate exceptions with the EPA.

(2) No work shall be authorized within or directly impacting areas identified by the Oregon Department of Fish and Wildlife (ODFW) as used by or susceptible for use by spawning fish, unless approved by ODFW. This restriction shall apply year-round, and is not limited by spawning season or by the presence or absence of fish at any given time.

**CZ Condition 5. Fish and Aquatic Life Passage.**

- (1) Where applicable, all authorized projects shall be in conformance with ODFW standards for fish passage (<http://www.dfw.state.or.us/fish/passage/>). Decisions to abrogate ODFW fish passage standards shall be accompanied by written approval from ODFW.
- (2) No work shall be authorized that does not provide for adequate passage of "aquatic life." Aquatic life shall be interpreted to include amphibians, reptiles, and mammals whose natural habitat includes waters of this state and which are generally present in or around, or pass through the project site.
- (3) This condition is effective only where ODFW regulations apply.

**CZ Condition 6. Heavy Equipment Use**

- (1) Heavy equipment shall be operated from the bank, and not placed in a stream unless specifically authorized. In-stream work may be authorized by the Corps of Engineers if necessary in the interest of safety or due to site conditions prohibiting work from the bank.
- (2) Heavy equipment in wetlands or on soft soils must be placed on mats or other similar devices to minimize damage to natural resources.
  - (i) If the period of use of heavy equipment on the wetland area will exceed 14 (fourteen) calendar days from start to finish, the applicant/permittee shall notify the Corps prior to starting the work. The Corps shall assess if the longer work period is necessary, and what additional protective measures may be required to minimize or mitigate the impacts.
  - (ii) All mats or other protective measures shall be removed at the end of each workday unless the Corps determines that to do so would cause greater harm to the resource.
- (3) Irrespective of measures taken to limit unintended impacts from heavy equipment, any damage done to vegetation, land, or waterways within or impacting waters of the state beyond the scope of the permit shall be mitigated.
- (4) This condition is effective only in situations where the Removal-Fill Law applies.

**CZ Condition 7. Collateral Damage**

(1) Permittees shall be required to repair, restore, or mitigate for any and all impacts within or impacting waters of the state which occur in the course of the work, including those beyond the scope of the permitted work, whether intentional or unintentional, including those impacts due to accident, misinterpretation, or misunderstanding.

(2) This condition is effective only in situations where the Removal-Fill Law applies.

**CZ Condition 8. Multiple Permits**

(1) For each NWP-authorized activity, the acreage of impact for a permitted activity shall not exceed the limit for that specific permit. When there are two or more nationwide permits combined for a single project site, the impact for each activity must be limited to that specifically permitted under each applicable NWP. For example, when combining two NWPs at a single site, if one nationwide permit authorizes  $\frac{1}{4}$  acre of impact for a house, and another  $\frac{1}{2}$  acre of impact for a road, the total impact *due to the house* may not exceed  $\frac{1}{4}$  acre.

(2) This condition is effective only in situations where the Removal-Fill Law applies.

**CZ Condition 9. Aquaculture**

(1) For projects involving commercial aquaculture or mariculture cultivation of oysters, clams, and mussels, authorization for projects in Oregon's coastal zone under a nationwide permit is valid only if the applicant has obtained authorization, as required, from the Oregon Department of Agriculture (ODA) for use of state submerged and submersible lands for aquaculture purposes.

(2) All conditions placed on an aquaculture or mariculture operation by the ODA are incorporated by reference into the conditions for consistency concurrence by the Oregon Coastal Management Program.

(2) This condition is effective only in situations under the jurisdiction of the ODA.

## **Appendix B**

### **Standard CZM Conditions - Basis in Law**

This appendix provides an explanation of why the conditions given in Appendix A are necessary to ensure consistency with enforceable policies of the Oregon Coastal Management Program, and references the specific enforceable policies relevant to each condition. This Appendix addresses the requirements of 15 CFR 930.4(a)(1).

#### **CZ Condition 1. Consistency with Local Comprehensive Plans.**

OAR 660-031-0030 requires denial of a state permit when a proposed activity is not in compliance with a Statewide Planning Goal or compatible with an Acknowledged Comprehensive Plan. Further support for this condition is found in ORS 197.180(1)(a & b), which requires compliance with goals and acknowledged plans.

Paragraph two is considered a logical extension of the requirements of -0030 and 197.180. Any condition required for local approval must also be an enforceable provision of the coastal program (through the Goals and acknowledgement) to be included in the federal permit to ensure consistency.

#### **CZ Condition 2. Consistency with Removal-Fill Law.**

The OCMP states that the general criteria for assessing consistency are whether the activity or project conforms to the mandatory policies set forth in applicable state statutes and rules. (Green Book, p 51) Those statutes are found in Table 3, page 23, of the Green Book. As referenced in the Green Book, ORS 541 (later renumbered ORS 196 in 1987) is the Removal-Fill Law. DSL is responsible for administering this law, and the decision to issue a permit or find no jurisdiction constitutes an affirmative determination of consistency with the Removal-Fill Law. (Green Book, p 17)

Paragraph two is considered a logical extension of the requirements of ORS 196. Any condition required for state approval must also be an enforceable provision of the coastal program (through the Goals and plan acknowledgement) to be included in the federal permit for consistency.

#### **CZ Condition 2a. Leases of State Lands.**

OAR 141-082-0060 gives DSL the authority to place terms on a lease of state lands as it sees fit. This rule is based upon ORS 274.

Paragraph two is considered a logical extension of the requirements of -0060 and ORS 274. Any condition required for state approval must also be an enforceable provision of the coastal program to be included in the federal permit for consistency.

**CZ Condition 3. Department of Environmental Quality.**

The OCMP states that the general criteria for assessing consistency are whether the activity or project conforms to the mandatory policies set forth in applicable state statutes and rules. (Green Book, p 51) Those statutes are found in Table 3, page 23, of the Green Book. ORS 454, 459, 467, and 468 are referenced as DEQ authorities under the OCMP.

\* Note. To be valid any condition asserted under consistency determination must be based on an authority included in the OCMP. Any other authority may be valid under the requirements of Section 401 of the Clean Water Act, but would not be valid for federal coastal zone consistency. ORS 454, 459, 467, and 468 are referenced as DEQ authorities under the OCMP. Coastal Zone condition 3 is independent of any other conditions DEQ might place on a 401 certifications which are based on authorities other than 454, 459, 467, and 468.

**CZ Condition 4. In-Water Work.**

(1) The Fish and Wildlife Commission is responsible for the protection and management of fish and wildlife in the state. (ORS 496.012) Any federal action should be fully consistent with ODFW policies promulgated under ODFW authorities (ORS 496, 498, 501, and 506), irrespective of ORS 196 (Removal/Fill Law) or other authorities.

ODFW promulgated the *Oregon Guidelines for Timing of In-Water Work to Protect Fish and Wildlife Resources* under ORS 496.012 and 496.138. OAR 141-085-0029(9)(c) requires consultation by DSL with ODFW if in-water work is requested outside the dates set by ODFW in the *Guidelines*. The Corps is given leave to abrogate these rules, but a clear record of their decision is appropriate.

(2) This condition is based upon the plenary authority of ORS 496.012, is consistent with SLOPES, but goes a little further in exerting ODFW authority.

**CZ Condition 5. Fish and Aquatic Life Passage.**

The Fish and Wildlife Commission is responsible for the protection and management of fish and wildlife in the state (ORS 496.012). This is taken to include the management and protection of habitat, though 496.012 does not use 'habitat.' Any federal action should be fully consistent with ODFW policies promulgated under OCMP-incorporated ODFW authorities (ORS 496, 498, 501, and 506), regardless of ORS 196 (Removal-Fill Law) or other authorities. (Green Book, p 23)

ORS 509.585 sets out requirements for fish passage at artificial obstructions. ORS 509 was incorporated in the OCMP as a routine program change on March 20, 2002 in a letter to Nan Evans from John King.

"Waters of this state" shall be interpreted consistent with its meaning for ORS 496.012. See also definition given in OAR 141-085.



Relevant definitions:

141-085-0010 (5) "Aquatic Life and Habitats" means the aquatic environment including fish, wildlife and plant-species dependent upon environments created and supported by the waters of this state. Aquatic life includes communities and species populations that are adapted to aquatic habitats for at least a portion of their life.

(225) "Waters of this State" means natural waterways including all tidal and nontidal bays, intermittent and perennial streams (i.e., streams), lakes, wetlands and other bodies of water in this state, navigable and nonnavigable, including that portion of the Pacific Ocean, which is in the boundaries of this state. "Waters of this state" does not include the ocean shore, as defined in ORS 390.605.

496.004 (19) "Wildlife" means fish, shellfish, wild birds, amphibians and reptiles, and feral swine as defined by State Department of Agriculture rule, and other wild mammals.

**CZ Condition 6. Heavy Equipment Use**

The basis for this condition is found at OAR 141-085-0029.7, .8, and .9c & d, and relates to the minimization of impacts generally for any activity.

**CZ Condition 7. Collateral Damage**

This condition is based upon OAR 141-085-0029.9.c, minimization of impacts, and 141-085-0079, enforcement. This condition would extend a specialized provision to the NWP program based upon general provisions of the OAR. There are currently provisions in state law requiring this type of restoration, but nothing explicit. This would clarify an existing situation, making enforcement easier and bringing to bear the Corps' enforcement authority.

**CZ Condition 8. Multiple Permits**

OAR 141-089-0100(6) prohibits the use of more than one state general permit on a project. This condition brings Corps practice more in line with state enforceable policy. *DSL approval is required for the modification of this condition.*

**CZ Condition 9. Aquaculture**

ORS 622.220 gives ODA authority over shellfish aquaculture. ORS 622 is incorporated into the OCOMP.

## Appendix C

### Guidance for Determination of Denial of Advance Concurrence

Advance concurrence is not extended to the following two classes of permits:

- 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), excepting projects permitted under NWP 1 or NWP 5.
- Any project utilizing NWP 29 or NWP 39 requiring a local plan amendment, text amendment, zoning change, goal exception, discretionary decision, or action by a city or county council or commission.

The District Engineer shall be responsible for determining when proposed projects meet one or both of these circumstances. In these instances, the DLCDC will undertake an individual review of the project to ensure proper adherence to the OCMP.

#### *Territorial Sea:*

Oregon's Territorial Sea extends from the shoreline seaward for a distance of three (3) nautical miles. Estuaries are not considered to be part of the Territorial Sea. Excepting projects permitted under NWP 1, *Aids to Navigation*, and NWP 5, *Scientific Measurement Devices*, any project which occurs on or under the Territorial Sea, or on or beneath the sea bottom, shall be reviewed on an individual basis by DLCDC for consistency with OCMP. In addition, any project which results in new or increased activity or impacts on or under the Territorial Sea, or on or under the sea bottom, shall be reviewed on an individual basis by DLCDC for consistency with OCMP.

Examples of activities falling under this exception include:

- Construction of an offshore structure or platform;
- Installation of wave or wind energy extraction devices and related infrastructure;
- Installation of a buried or exposed cable;
- A new or expanded port facility which increases ship traffic in the Territorial Sea;
- A new or relocated shipping channel in the Territorial Sea.

These examples are illustrative, not comprehensive. Any questions regarding application of this criterion should be directed to the Oregon Coastal Management Program office.

#### *NWP 29 and 39*

Advance concurrence is withheld from any project utilizing NWP 29 or 39 *and* requiring a local plan amendment, text amendment, zoning change, goal exception, discretionary decision, or action by a city or county council or commission. Such projects may be identified by block seven (7) of the Joint Permit Application.

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Examples of situations falling under this exception include:

- Permit applications where the city/county has checked the box “This project is **not** consistent with the comprehensive plan...” in block seven (7) of the JPA;
- The project would require an amendment to a comprehensive plan;
- The project would require a change in zoning;
- The project would require an exception to a Statewide Planning Goal.

These examples are illustrative, not comprehensive. Any questions regarding application of this criterion should be directed to the Oregon Coastal Management Program office.

