



March 2, 2021

TO: Members of the Natural Resources Subcommittee of the Joint Committee on Ways and Means

FM: Richard Whitman, DEQ Director
Jim Rue, DLCD Director
Peter Daugherty, ODF State Forester/Director

RE: Joint W&M NR Subcommittee Request - Coastal Zone Act Reauthorization Amendments

The following is a coordinated response from DEQ/DLCD/ODF responding to recent questions and concerns raised by members of the Joint Ways & Means Subcommittee on Natural Resources – and subsequent questions posed by LFO – regarding the status of Oregon’s Coastal Nonpoint Pollution Control Program (CNPCP). The requirement that a CNPCP be developed by states with federally approved coastal management programs was established by Congress in 1990 under section 6217 of the Coastal Zone Act Reauthorization Amendments (CZARA). The program is jointly overseen by the National Oceanic and Atmospheric Administration (NOAA) and the U.S. Environmental Protection Agency (EPA). The goal of the program is to reduce polluted runoff to coastal waters. Coastal states are eligible to receive federal funding in part to implement CNPCPs, subject to EPA and NOAA review and approval. NOAA and EPA did not expect states to develop and implement stand-alone coastal nonpoint programs, but rather expected that states would develop and implement the coastal nonpoint program through changes to the approved state nonpoint source management program (DEQ) and to the approved state coastal zone management program (DLCD) developed under section 306 of the CZMA, as amended.

EPA and NOAA have had a long-standing national practice of conditionally-approving state CNPCPs; in essence providing full funding for these programs, subject to conditions requiring improvements and changes to the programs over time. Currently, there are ten states and territories still in conditional approval status. <https://coast.noaa.gov/czm/pollutioncontrol/> (last visited 2/27/2021). Oregon was in this status as well until 2015 when EPA and NOAA, in response to Oregon-specific litigation challenging the practice of conditional approvals, determined that Oregon’s CNPCP was not fully-approvable. As a result, since federal fiscal year

(FFY) 2015, Oregon has been subject to penalty reductions in funding eligibility for the state’s Coastal Zone Management Act (CZMA) Section 306 and Clean Water Act (CWA) Section 319 grant programs (administered by DLCD and DEQ, respectively).

The remainder of this memo responds to the following specific questions directed to the agencies by LFO:

1. *A clear timeline (exact dates and recipient of notifications) of when the State received notice from NOAA and the EPA that Oregon was out of compliance, the date of the lawsuit, and when the State received notice from NOAA and the EPA of their intent to disapprove Oregon’s coastal nonpoint program under CZARA.*
2. *What was the exact ruling that led to the disapproval of the coastal nonpoint program?*
3. *What has been done by DEQ, ODF, and DLCD to bring the State into compliance? What else needs to be done? What is the plan?*
4. *Do Washington and California apply for the same funds? Are they subject to the same regulations? Are Washington and California out of compliance?*

1. Chronological Timeline

Table 1. Chronology of events for Oregon Coastal Nonpoint Pollution Control	
Date	Event
1990	Congress enacts Coastal Zone Act Reauthorization Amendments (CZARA)
1995 (July)	State of Oregon submits Coastal Nonpoint Pollution Control Program (CNPCP) to NOAA/EPA
1998 (Jan 13)	EPA/NOAA issue Conditional Approval for Oregon’s CNPCP and publish findings which establish need for additional management measures
2004 (Apr)	EPA/NOAA issued interim CNPCP approval for several management measures, including all in the category of agricultural land use.
2008 (Jun)	EPA/NOAA issued interim CNPCP approval for eleven of the remaining seventeen management measures. The six unapproved were: four additional management measures for forest lands, stormwater management for new urban area development, and operating onsite disposal systems.
2009 (Jan 6)	Northwest Environmental Advocates (NWEA) files lawsuit against EPA/NOAA over the conditional approval status of Oregon’s CNPCP.
2010 (May)	EPA/NOAA provide letter to DEQ indicating information needed and the schedule for providing information before approval could occur (See 5/12/10 EPA letter to DEQ)
2010 (July)	Oregon commitment to institute the “Implementation Ready” TMDL approach
2010 (Sep 28)	Settlement Agreement between NWEA and US DOJ on behalf of EPA & NOAA - establishes timeline for State of Oregon actions and resulting EPA/NOAA response if actions are not fully achieved within set timelines

2013 (July 1)	DEQ and DLCDC send information to EPA and NOAA on the state's plan for meeting remaining management measures, identified in the Settlement Agreement.
2013 (Dec 20)	EPA/NOAA provided notice of intent to disapprove Oregon's CNPCP because of insufficient management measures for: additional management measures for private forest lands, stormwater management for new urban area development, operating onsite disposal systems
2014 (Mar 20)	DEQ and DLCDC submit new information for the six unapproved management measures: additional management measures for private forests, stormwater management for new urban area development, operating onsite disposal systems
2015 (Jan 30)	EPA/NOAA inform DEQ/DLCDC of their finding that: <ul style="list-style-type: none"> • EPA/NOAA provide interim approval for new urban area development stormwater management measure and the onsite disposal systems management measure • The state has not met additional forestry conditions for approval (four management measures) and therefore has not submitted a fully approvable coastal nonpoint program under Section 6217 of the CZARA. As a result, partial federal funding will be withheld for CZMA Section 306 and CWA Section 319 programs
2015 (July)	EPA/NOAA transmit 'Closing the Gaps' document to DEQ/DLCDC with guidance on measures that need to be taken to achieve a fully approvable CNPCP
2015 (July 1)	CZARA penalties begin resulting in reductions to funding for DLCDC and DEQ grant programs (see table below for penalty details)
2016 (Feb)	State of Oregon transmits approach to address Closing the Gaps guidance from EPA/NOAA
2016 (Mar)	EPA/NOAA transmit that the State of Oregon's February 2016 approach is insufficient
2017 (July)	New Oregon Forest Practice Act rules (riparian buffers) take effect for small and medium streams containing Salmon, Steelhead and Bull trout (SSBT) in Western Oregon
2018 (July 16)	EPA transmits letter to DEQ identifying progress made by the state toward closing CZARA gaps and ongoing efforts and approaches to address the deficiencies (see 7/16/18 EPA letter to DEQ)
2019 (July)	DEQ and ODF continue interagency collaborative effort to assure alignment concerning their respective roles and responsibilities regarding nonpoint source water pollution on non-federal forest lands with respect to total maximum daily loads (TMDLs).
2020 (Jun)	Legislature enacts SB 1602 – extending SSBT stream protection rules to Siskiyou geographic region and applying certain restrictions on aerial application of pesticides by helicopter.

2. What was the exact ruling that led to the disapproval of the coastal nonpoint program?

In 1998, under Section 6217 of the CZARA, EPA/NOAA provided conditional approval of Oregon’s CNPCP, while identifying a need for the state to address multiple areas of improvement. EPA/NOAA granted interim approvals in 2004 and 2008 for all but six management measures: four additional management measures for non-federal forest lands, stormwater management for new urban area development, and management of existing onsite disposal systems. In 2015, EPA/NOAA provided interim approval for two of the remaining six management measures but determined that the state had not fully met requirements for management measures on non-federal forestlands and therefore had not submitted a fully approvable coastal nonpoint program. As a result - since FFY 2015 - Oregon has been subject to penalty reductions in grant funding eligibility for CZMA Section 306 and CWA Section 319 programs. Table 2 describes the reductions in federal funding that have resulted from the partial disapproval in 2015.

Table 2. CZARA related penalties to State of Oregon (2015-2020) compared to eligible grant funding amount per program area		
Year	CWA Sec. 319 grant penalty (to DEQ from EPA)	CZMA Sec. 306 penalty (to DLCD from NOAA)
FFY2015	\$631,500 (out of \$2,083,000)	\$598,800 (of \$1,996,600)
FFY2016	\$435,540 (out of \$2,153,000)	\$637,500 (of \$2,125,000)
FFY2017	\$515,600 (out of \$2,227,000)	\$637,500 (of \$2,125,000)
FFY2018	\$509,100 (out of \$2,202,000)	\$696,900 (of \$2,323,000)
FFY2019	\$507,900 (out of \$2,179,000)	\$703,500 (of \$2,345,000)
FFY2020	\$501,300 (out of \$2,272,000)	\$724,500 (of \$2,415,000)

The specific findings from EPA and NOAA’s 2015 decision may be viewed here:

<https://coast.noaa.gov/data/czm/pollutioncontrol/media/ORCZARAddecision013015.pdf>

In summary, EPA/NOAA determined that the basis for disapproval was that the State has not implemented or revised forestry management measures, backed by enforceable authorities, to:

- (1) protect riparian areas for medium-sized and small fish bearing streams, and riparian areas along non-fish-bearing streams,
- (2) address water quality impacts of forest roads, particularly impacts associated with “legacy” roads (forest roads not in current use),
- (3) protect high-risk landslide areas, and
- (4) ensure adequate stream buffers for the application of herbicides, particularly on non-fish-bearing streams.

Descriptions of approaches that EPA and NOAA may accept as sufficient to address these deficiencies have been refined over time. The State of Oregon has made efforts to address identified deficiencies through changes in programs, statute and regulations since the disapproval in 2015. These changes are described further in the next section.

3a. What has been done by DEQ, ODF, and DLCD to bring the State into compliance?

The State of Oregon has addressed two of the six deficiencies identified by EPA/NOAA in the notice of intent to disapprove Oregon's CNPCP.

DEQ addressed urban area new development management measures and onsite disposal systems management through:

- Programmatic changes for new development, including a low impact development manual; and
- A time-of-transfer education program for buyers of properties with onsite septic systems.

These measures have been accepted by EPA and NOAA.

With regard to the forestry management measures for which the state has not received approval or interim approval, noted in Table 1 above, ODF (working with DEQ and other partners and the Oregon legislature) has addressed several of the deficiencies concerning nonpoint source pollution from forest operations on non-federal forest lands in the coastal zone. These include:

- Significant increases in riparian buffer protections on small and medium SSBT streams in Western Oregon and the Siskiyou geographic region; and
- Additional protections for non-fish bearing streams from impacts of aerial application of pesticides, resulting from SB 1602.

Since 1993 DLCD has worked with DEQ and other state agencies to compile information on state enforceable authorities and voluntary programs that met the objectives described for the 56 management measures, described in the CNPCP federal program guidance. These management measures address many different water quality issues including agricultural practices, riparian and wetlands protection, clean marinas, urban development, etc. The original program submittal and several supplemental submittals were prepared jointly by DLCD and DEQ.

The Oregon Coastal Management Program (OCMP) is a highly networked program comprised of many state agencies and associated authorities, including DEQ and ODF. DLCD is the lead agency for the OCMP. While DLCD does not have direct regulatory authority regarding policies and enforcement authorities for forest practices, the agency is committed to continue its support of its networked agency partners of the Oregon Coastal Management Program. DLCD hopes to support and facilitate where appropriate the changes needed for approval.

3b. What else needs to be done? What is the plan?

Additional work remains to address certain specific forest management issues. The primary remaining issues identified by EPA and NOAA are:

- (1) protection of riparian areas along non-fish-bearing streams, adequate to achieve water quality standards and protect beneficial uses,
- (2) the adequacy of protections for riparian areas along medium-sized and small fish bearing streams, particularly for streams that are not currently meeting water quality standards,
- (3) programmatic approaches to identify high-priority legacy roads on forest lands, and means to mitigate water quality impacts from those roads (sedimentation), and
- (4) programmatic approaches to identify and manage high-risk landslide areas.

Over the past several years DEQ, ODF, EPA and NOAA have explored potential strategies for these remaining areas of work. Beginning in late 2019, DEQ and ODF began work to revise and update the 1998 Memorandum of Understanding between the agencies that describes their respective roles and responsibilities for achieving clean water on non-federal forest lands. This effort is expected to describe how the agencies will work together to address situations where water quality standards or other pollution limits are not being met on forest lands, particularly with regard to temperature. Under current federal and state law, DEQ is responsible for identifying waterways that are not meeting clean water standards, along with what changes in conditions are needed to meet standards. If changes in riparian or other conditions are necessary, and current forest practices are not sufficient to achieve those changes, the two agencies work together to develop and implement watershed-specific management plans. This process may be capable of achieving the desired standards and outcomes identified by EPA and NOAA regarding the adequacy of forest management measures in Oregon's CNPCP. EPA and NOAA require enough detail regarding this approach to be able to determine that it will produce the desired outcomes from the additional management measures, and DEQ and ODF are working to develop that information.

The objective of these efforts is identifying needed protections for Oregon's waters and critical species of concern, while establishing practicable administrative and on-the-ground means for accomplishing these outcomes. The agencies anticipate this effort may address the remaining issues standing in the way of full program approval. EPA and NOAA have consistently communicated that the threshold for approval is for the state to demonstrate the development and implementation of programs that address management measures backed by enforceable authorities. These can be regulatory, non-regulatory or mixed regulatory and non-regulatory programs. In addition, accountability and tracking measures are required for non-regulatory measures.

Relatedly, both ODF and DEQ are participating in the Private Forest Accord collaboration authorized by SB 1602 (2020). The Accord process is a science-based effort to reach agreement on changes to the Forest Practices Act (FPA) that could be included in a federally-approved plan

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that provides regulatory assurances to participating landowners to meet Endangered Species Act requirements. DEQ and ODF anticipate that the measures that will be considered as part of this process may also achieve many, if not all, of the outcomes and processes needed to address the remaining CNPCP deficiencies identified by EPA and NOAA.

Finally, in the current work program of the Oregon Coastal Management Program with NOAA, DLCD has committed to conduct a current, thorough audit of all statutes, rules and programs on which conditional and interim approvals were based.

4. Do Washington and California apply for the same funds? Are they subject to the same regulations? Are Washington and California out of compliance?

Thirty-three other coastal (which includes Great Lakes) states and territories have Coastal Nonpoint Control Programs that are either conditionally or fully approved by EPA and NOAA. These states and territories received their full allocation of federal funding to support state CWA section 319 and CZMA section 306 grant programs. California's CNPCP was fully approved in 2000 (https://coast.noaa.gov/data/czm/pollutioncontrol/media/6217ca_fnl.pdf). Washington's CNPCP was proposed for approval by NOAA and EPA on June 6, 2020. NOAA and EPA continue to consider the public comment and tribal input received on their proposed findings and will issue a final finding as soon as they complete that process. (https://coast.noaa.gov/data/czm/pollutioncontrol/media/washingtondocket/wa-proposed-decision_factsheet.pdf).

Conclusion

Oregon has made progress toward resolving the remaining issues to its Coastal Nonpoint Source Pollution Control Program required by EPA, NOAA and applicable federal law and rule. However, several important and challenging issues remain to be resolved. ODF, DEQ and DLCD have committed substantial time and effort to this work over the past several years and will continue to press forward to secure federal approval of the state's program. Finally, it is important to understand that, while federal funding for DLCD's and DEQ's grant programs is sorely needed, the principal driver for completing this work is to assure all Oregonians that we are doing what is needed to protect clean water for our communities and our environment.