

Ocean Management  
8. RPC



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
NATIONAL OCEAN SERVICE  
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT  
Silver Spring, Maryland 20910

Ms. Nan Evans  
Director, Oregon Coastal Management Program  
Department of Land Conservation and Development  
635 Capitol Street, Suite 150  
Salem, Oregon 97301-2540

FEB 22 2002

Dear Ms. Evans:

Thank you for your request dated November 21, 2001, to incorporate revisions to Oregon's federally approved Coastal Management Program (OCMP) as a routine program change (RPC) pursuant to 15 CFR § 923.84. Specifically, the RPC request includes changes to the statutes, rules, and plans by which the State manages the resources within the State's territorial sea and, through the Coastal Zone Management Act (CZMA) federal consistency provision, addresses impacts to uses and resources of the State's coastal zone from federal actions occurring within and outside the State's territorial sea.

The Office of Ocean and Coastal Resource Management (OCRM) has reviewed your request and concurs, with the following exceptions and conditions, with your finding that the proposed program change is an RPC. (The specific enforceable policies approved by OCRM are included as an appendix to this letter.)

1. OCRM approves the Territorial Sea Plan amendments and OAR chapter 660, division 036, with the exception of OAR 660-036-0001(3)(a)(B) (the "federal waters" section of *Part Four: Uses of the Seafloor*) and OAR 660-036-0010 (referring to the Ocean Resources Management Plan).
2. OCRM approves Statewide Planning Goal 19, Ocean Resources and the Territorial Sea Plan and its corresponding administrative rule with the condition that the manner in which federal agencies comply with the enforceable policies and information requirements contained in Goal 19 and the Territorial Sea Plan are governed by the National Oceanic and Atmospheric Administration's (NOAA's) CZMA Federal Consistency regulations at 15 CFR Part 930, and thus, the reference to "federal agencies" within Goal 19 and the Territorial Sea Plan, do not impose obligations on federal agencies that are in addition to those described in the CZMA and NOAA's regulations.
3. OCRM does not approve ORS 196.410 (legislative findings for offshore oil and gas leasing) or ORS 196.415 (legislative findings for ocean resource management).
4. Although the State did not specifically request to incorporate the *Oregon Ocean*



*Resources Management Plan (Ocean Plan)*, OCRM notes that the Ocean Plan is referenced in several sections and OCRM's approval could be construed as approving the Ocean Plan. OCRM is not approving the Ocean Plan.

5. The State's public notice of OCRM's approval must include these exceptions and conditions.

### Discussion

#### **The Territorial Sea Plan Amendments and OAR 660-036**

OCRM approves the Territorial Sea Plan amendments and OAR chapter 660, division 036, paragraphs 0000, 0001, 0003, and 0004, with the following exceptions. OCRM does not approve OAR 660-036-0001(3)(a)(B) (the "federal waters" section of Part Four: Uses of the Seafloor). Part Four provides the requirements for the routing, placement, and operation of seafloor utilities including telecommunication cables and pipelines, within State waters. OCRM recognizes and commends Oregon's accomplishments in managing conflicting uses among a variety of stakeholders. However, OCRM cannot approve OAR 660-036-0001(3)(a)(B) since it includes a 2,000-meter burial standard for *federal waters*.

The CZMA does not authorize States to establish regulatory standards for federal lands or waters and, in fact, excludes federally controlled lands and waters from the State's coastal zone. 16 USC § 1453(1). Moreover, a State policy that purports to regulate or otherwise establish standards for federal agencies or federal lands or waters would not meet the CZMA's definition of "enforceable policy," which requires that State policies be legally binding under State law. 16 USC § 1453(6a). Since the State has no regulatory authority over federal agencies under the CZMA, such a policy could not be legally binding under State law.

Under the CZMA federal consistency provision, States can address federal actions in federal waters if the federal action has an effect on the uses or resources of the State. In such cases, States apply their federally approved enforceable policies through federal consistency. Federal agencies must be consistent to the maximum extent practicable and applicants for federal approvals must be fully consistent with the enforceable policies.

One way for the State to address submarine cables in federal waters is to amend the State's federal consistency list for federal license or permit activities to define a geographic location within federal waters where cable and other utility permits have coastal effects and should be reviewed for consistency with the State waters policy in OAR 660-036-0001(3)(a)(A). See 15 CFR § 930.53. In the State's geographic location description the State could define the geographic location, in part, by using water depths. OCRM can assist the State to develop desired language.

## **Statewide Planning Goal 19, Ocean Resources and the Territorial Sea Plan**

OCRM approves the changes to Statewide Planning Goal 19, Ocean Resources and the Territorial Sea Plan and its corresponding administrative rule with the condition that the manner in which federal agencies comply with the enforceable policies and information requirements contained in Goal 19 and the Territorial Sea Plan are governed by NOAA's CZMA Federal Consistency regulations at 15 CFR Part 930. Therefore, the references to "federal agencies" within Goal 19 and the Territorial Sea Plan do not impose obligations on federal agencies that are in addition to those described in the CZMA and NOAA's regulations.

Goal 19 and the Territorial Sea Plan include directives to local, state, and federal agencies that carry out activities likely to affect Oregon's ocean resources. As discussed above, the CZMA does not authorize States to establish specific standards or information requirements for federal agencies. Rather, the CZMA requires that federal agencies be consistent to the maximum extent practicable with enforceable policies that apply to State citizens. While it is usually administratively efficient for both the State and federal agency to use the State's information requirements, a federal agency may provide the State with information to support the federal agency's consistency determination under CZMA section 307(c)(1) in any manner it chooses. 15 CFR § 930.39(a).

Rather than deny the entire Goal 19 and Territorial Sea Plan amendments because of the various directives to federal agencies, OCRM is approving the changes with the condition that the directives to the federal agencies are advisory, in so far as the directives apply under the CZMA and NOAA's regulations through federal consistency. This condition does not alter the application of Goal 19, the Territorial Sea Plan or federal consistency, rather it clarifies the consistency procedure.

OCRM proposes to work with the State to further clarify the "federal agency" language in Goal 19 and the Territorial Sea Plan as the State revises its federal consistency rules.

### **Legislative Findings**

OCRM cannot approve the legislative findings included in the Oregon Resources Management Act (ORMA). Specifically, OCRM does not approve ORS 196.410 (*Legislative findings for offshore oil and gas leasing*) or ORS 196.415 (*Legislative findings for ocean resource management*). These sections are not enforceable policies, but might be construed as enforceable policies. The legislative finding for offshore oil and gas leasing conflicts with the CZMA requirement that coastal States adequately consider the national interest in energy facility siting. *See* 16 USC § 1455(d)(8). The legislative finding for ocean resource management incorrectly states the requirement that federal agencies conduct their activities in a manner consistent to the maximum extent practicable with the enforceable policies of State CZMA programs. *See* 16 USC § 1456(c)(1).

## Referenced Documents

The State did not specifically request to incorporate the Ocean Plan. OCRM notes, however, that the Ocean Plan is referenced in several sections and OCRM's approval could be construed as approving the Ocean Plan. OCRM is not approving the Ocean Plan. OCRM cannot approve state laws, regulations or plans that are merely referenced in an RPC and are external to the documents submitted for OCRM review and approval. Referenced documents or policies often contain more detailed and substantive requirements than the policies under review (e.g., regulations implementing statutes often contain the requirements of concern to OCRM, federal agencies and applicants). The ORMA references the Ocean Plan, which is not a part of the federally approved OCMP. Specifically, the Ocean Plan is referenced at ORS 196.435, 196.443, 196.455, 196.471, and 196.485.

For future clarification, policies, and updates to those policies, must be specifically incorporated into a State's CZMA program so that federal agencies and applicants for federal approvals and funding have the opportunity to comment on potential State CZMA requirements. The CZMA established a state-federal partnership for the management of the nation's coastal uses and resources and requires that States adequately consider the views of federal agencies when developing the State's program and when the program is amended. Any change to a State's CZMA program shall not be considered an enforceable policy for CZMA section 307 purposes until approved by OCRM. 16 USC § 1455(e)(3)(B). The statute also requires that federal agencies and applicants for federal approvals and funding be consistent with the enforceable policies of approved State programs. 16 USC § 1456(c)(1)(A), (c)(2), (c)(3)(A) and (B), and (d). Finally, OCRM must ensure that a State's CZMA program continues to be approvable and that the policies are otherwise approvable under federal law (e.g., the policies are not preempted by federal law, are not unconstitutional, or do not discriminate against federal agencies).

## Partial and Conditional Approvals

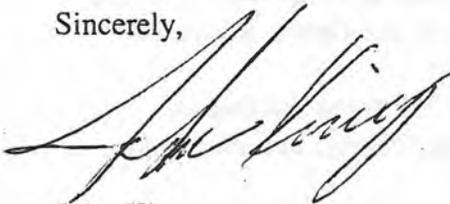
The CZMA and OCRM program change regulations do not specifically authorize conditional or partial approvals. OCRM has, on occasion, partially or conditionally approved RPCs to avoid prolonged State procedural remedies. However, OCRM has found that such partial or conditional approvals lead to confusion and uncertainty. Such approvals create an ambiguous and confusing administrative record of the federally approved State program, and do not provide the public and federal agencies with sufficient notice of which enforceable policies comprise federally approved State CZMA programs. As a result, OCRM, in consultation with the coastal States, is committed to developing a policy that eliminates the practice of issuing partial or conditional approvals.

On the date of publication by the State of Oregon of the public notice required by 15 CFR §

923.84(b)(4) federal consistency will apply to the approved portions of this RPC. As noted above, this public notice must identify the enforceable policies affected by this program change as well as alert affected parties of the portions of the request excluded or conditioned in this approval letter. OCRM proposes to work with the state to ensure that this notice accurately reflects OCRM's approval of the changes to Oregon's ocean policies. Please send (mail, email, or fax) a copy of this public notice to the Coastal Programs Division.

Please contact Bill Millhouser, Pacific Regional Manager, OCRM, at (301) 713-3155 extension 189 or David Kaiser, Federal Consistency Coordinator, OCRM, at (301) 713-3155 extension 144 if you have any questions.

Sincerely,



John King  
Acting Chief,  
Coastal Programs Division

cc: Charles N. Ehler, OCRM  
David Kaiser, OCRM  
Karl Gleaves, GCOS  
Molly Holt, GCOS  
Catherine Lewers, GCOS  
Tony MacDonald, CSO

**Appendix - Enforceable Policies Approved through this RPC**

## APPENDIX

## Enforceable Policies Approved by OCRM

ORMA

- ORS 196.405 - Adds new definitions relating to OPAC and the TSP.
- ORS 196.407 - Establishes policies for interstate coordination in ocean resource management.
- ORS 196.408 - Establishes state agency duties for interstate coordination.
- ORS 196.420 - Clarifies policy components related to research and development of ocean resources and adds a directive for coordination of the Ocean Resource Management Program with local governments.
- ORS 196.425 - Deletes the land use planning element of the OCMP from the Ocean Resource Management Program and updates the ORMA to include the OPAC and the TSP.
- ORS 196.435 - Deletes the requirement for DLCD to adopt rules implementing Goal 19. Requires that state agencies amend their programs and rules to be consistent with the Ocean Plan and the TSP.
- ORS 196.438 - Establishes the Ocean Policy Advisory Council (OPAC) in the office of the Governor, specifies its members, their terms of office, and establishes a quorum.
- ORS 196.443 - Specifies the duties of OPAC, including developing the TSP and amending both the Ocean Plan and the TSP.
- ORS 196.448 - Details compensation of OPAC members, meeting requirements, and administrative rule making.
- ORS 196.451 - Directs OPAC to establish a scientific and technical advisory committee.
- ORS 196.453 - Allows OPAC to establish project review panels.
- ORS 196.455 - Deletes references to the Task Force and adds OPAC and the TSP. Directs OPAC to invite federal agencies to designate a council liaison.
- ORS 196.465 - Deletes references to the Task Force and adds OPAC and the TSP. Directs OPAC to achieve compatibility between the TSP and local comprehensive plans.
- ORS 196.471 - Directs DLCD to review for approval the TSP and any amendments to either the TSP or the Ocean Plan.
- ORS 196.475 - Deletes references to the Task Force and adds OPAC.
- ORS 196.485 - Updates section to refer to the TSP.
- ORS 196.575 - Authorizes DLCD to obtain federal oceanographic data and coordinate with other state agencies in a joint liaison program with NOAA's Center for Ocean Analysis and Prediction.
- ORS 196.580 - Establishes liaison program duties.

**Goal 19, Ocean Resources**

**OAR 660-015-0010(4) - APPROVED WITH CONDITIONS**

**Territorial Sea Plan (TSP) Amendments**

**OAR 660-036-0000 - LCDC adoption of the TSP**

**Part Four: Uses of the Seafloor - APPROVED WITH THE EXCEPTION OF (3)(a)(2)**

**OAR 660-036-0001 - APPROVED WITH THE EXCEPTION OF (3)(a)(B)**

**Ocean Management Goals and Policies - APPROVED WITH CONDITIONS**

**OAR 660-036-0003 - APPROVED WITH CONDITIONS**

**Rocky Shore Management at Cape Arago**

**OAR 660-036-0004**