



OCT 15 2007

Ms. Ruth Ehinger  
Coastal Management Office  
New Jersey Department of Environmental Protection  
PO Box 418  
Trenton, NJ 08625

Dear Ms. Ehinger,

Thank you for the New Jersey Department of Environmental Protection's June 11, 2007, request that changes that add a list of Federal actions having interstate coastal effects be incorporated into the New Jersey Coastal Management Program (CMP). You requested that the changes to the list of Federal actions having interstate coastal effects be incorporated as a routine program change (RPC), pursuant to Coastal Zone Management Act (CZMA) regulations at 15 C.F.R. part 923, subpart H, Office of Ocean and Coastal Resource Management (OCRM) Program Change Guidance (July 1996), and in accordance with 15 CFR 930 Subpart I. OCRM received the request on June 12, 2007, and OCRM's decision deadline was extended until October 16<sup>th</sup>, 2007. OCRM received nine comments on this RPC submission, and a summary response to the comments is attached as an enclosure to this letter.

A change to a state's federal consistency list, including interstate activities, is, generally, a change to Uses Subject to Management since a state is either adding new federal license or permit activities to review, or expanding its review of existing uses/federal license or permit activities to new geographic areas. The federal consistency lists are also part of a state's Coordination, Public Involvement and National Interest component.

Based on our review of your submission, we concur that the changes identified in the chart in Appendix A of your submission are RPCs to Uses Subject to Management and Coordination, Public Involvement and the National Interest, and OCRM approves the incorporation of these activities into the New Jersey CMP. Appendix A of your submission, Interstate Activities, was developed in accordance with 15 C.F.R. part 930, subpart I, as described below.

The NJCMP's list of interstate activities in Appendix A includes two activities that require permits, licenses, or other forms of approval by the U.S. Army Corps of Engineers. The activities are pursuant to sections 9 and 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 410 et. seq.), and section 404 of the Clean Water Act (33 U.S.C. 1344). These two activities are currently part of New Jersey's list of federal license or permit activities and subject to federal consistency review by New Jersey. This RPC does not add new activities, but includes an expanded geographic area in Pennsylvania and Delaware, as authorized by 15 C.F.R. part 930, subpart I.

The geographic location for these activities includes defined areas in the states of Pennsylvania and Delaware. The geographic areas encompass areas located below the high tide line in the Delaware Bay within the state of Delaware, and in the Delaware River within the State of Pennsylvania up to the "Trenton Makes" Bridge.

New Jersey described effects from activities occurring within these areas of Pennsylvania and Delaware as follows. Activities pursuant to sections 9 and 10 of the Rivers and Harbors Act of 1899 affect the use of New Jersey waters by potentially re-suspending contaminated sediments which may have impacts on benthic habitats, aquatic species, public health, and water quality. Additional effects include potential bioaccumulation of contaminants, increased turbidity which can interfere with fish migration, physical damage (entrainment) of finfish and crab species, and water quality effects on commercial and recreational fisheries. Activities pursuant to Section 404 of the Clean Water Act affect New Jersey waters by potentially introducing heavy metals, burying benthic flora and fauna, and increasing turbidity. The effects are described in greater detail in New Jersey's RPC submission.

OCRM concurs with New Jersey's description of effects since New Jersey is limiting its interstate description to those activities that present the most common source of federal permits that would impact New Jersey's coastal uses or resources. If New Jersey, or other states, propose reviewing interstate activities farther removed from a state's coastal zone or for areas or activities not as widely understood, the state's effects analysis may need further information.

During the development of the interstate activities list, the NJCMP consulted with Pennsylvania, Delaware and relevant Federal agencies. OCRM's summary response to the comments is attached as an enclosure to this letter.

Federal consistency shall apply to the approved changes once you publish notice of the approval, pursuant to 15 C.F.R. § 923.84(b)(4). Please provide this office with a copy of the public notice.

Once you publish notice of OCRM's approval, only the listed federal license or permit activities located within the described geographic areas in Delaware and Pennsylvania will be routinely subject to New Jersey's interstate federal consistency review. If New Jersey wants to review other interstate activities, or the listed interstate activities in areas outside of the described geographic areas, New Jersey must either amend its list or seek case-by-case review as an unlisted activity under 15 C.F.R. § 930.54.

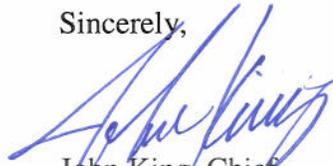
We note that our approval does not in any way displace, supersede, limit, or modify the Delaware River Basin Compact. *See* 16 U.S.C. § 1456(e). OCRM approval of New Jersey's implementation of interstate consistency review pursuant to this RPC submission does not authorize New Jersey to act in conflict with that Compact. Under the Subpart I regulations, OCRM does not make a determination of a State's ability to apply specific enforceable policies

in interstate consistency review, and therefore, OCRM has not made a determination as to how that Compact may limit New Jersey's ability to apply its enforceable policies in the interstate consistency review authorized by this approval. Any objection New Jersey makes under this interstate consistency review approval is subject to appeal by the permit applicant to the Secretary of Commerce. 16 U.S.C. § 1456(c)(3)(A). If the appealed objection is not in compliance with section 307 of the Act (16 U.S.C. § 1456) and the subparts D, E, F, or I of the federal consistency regulations (15 C.F.R. Part 930), the Secretary shall override a State's objection. 15 C.F.R. § 930.129(b). The Secretary may make this determination as a threshold matter. *Id.*

In addition, consistent with recent OCRM advice provided to states seeking interstate review, states do not need to describe geographic areas within other states for the review of Federal agency activities under 15 C.F.R. part 930, subpart C in their coastal management programs. This is because, whether listed or whether a geographic location is described, a Federal agency is obligated to determine whether its activity, regardless of location (including within the boundaries of another state) will have reasonably foreseeable effects on a state's coastal uses or resources. NOAA included 15 C.F.R. § 930.155(a) to specifically address this matter; that, while NOAA encourages states to consult with Federal agencies for interstate Federal agency activities, NOAA's interstate regulations do not affect the obligation for Federal agencies to provide consistency determinations to states for activities with coastal effects.

Thank you for your cooperation in this review. Please contact Kris Wall at (301)-713-3155, extension 168, if you have any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "John King", is written over the typed name.

John King, Chief  
Coastal Programs Division

Enclosure: OCRM Summary Response to Comments

### **OCRM Summary Response to Comments**

The Office of Ocean and Coastal Resource Management (OCRM) received the following comment letters on the New Jersey Coastal Management Program's (NJCMP's) program change submission for interstate consistency:

1. Secretary John A. Hughes, DE Dept. of Natural and Environmental Control (DE DNREC) - July 19, 2007
2. James T. McDermott Jr., Executive Director, Philadelphia Regional Port Authority (PRPA) - July 6, 2007
3. Roy E. Denmark Jr., Chief of Operations Division, Army Corps of Engineers (USACE) - July 6, 2007
4. Cathy Curran Myers, Deputy Secretary for Water Management, PA Department of Environmental Protection (PA DEP) - July 20, 2007
5. Eugene R. Bailey, Executive Director, Port of Wilmington Delaware (DE POW) - July 19, 2007
6. Jonathan S. Stuart, Vice President, Regional Refinery Operations, Valero Delaware City Refinery (Valero) - July 19, 2007
7. John P. Donahue, Attorney at Law, Kittredge, Donley, Elson, Fullem, & Embick, LLP (Pennsylvania) (Donahue) - July 18, 2007
8. Dennis Rochford, President, Maritime Exchange for the Delaware River and Bay (DE MEX) - July 19, 2007
9. Lawrence Toth, Environmental Planner, PA Coastal Resources Management Program (Toth) - October 2, 2007

Below are OCRM's responses to the comments raised in the comment letters:

#### **Comment 1: NJCMP did not clearly demonstrate reasonably foreseeable effects**

*Comment from: DE DNREC; USACE; PRPA; PA DEP; DE POW; Valero; DE MEX, Toth*

**Response 1:** As described in OCRM's January 9, 2007, letter to the USACE regarding Pennsylvania's program change request for interstate consistency, it is NOAA's long-standing view that interstate consistency is within the scope of the CZMA. The matter was formally discussed by the Secretary of Commerce in his Decision and Findings in the Consistency Appeal of Virginia Electric and Power Company (May 1994) and in NOAA's regulations at 15 C.F.R. part 930, subpart I (added in 2000). Effective coastal management is fostered by ensuring that activities having such reasonably foreseeable interstate coastal effects are conducted consistent with the enforceable policies of the management program of each affected state. Effects include both direct effects which result from the activity and occur at the same time and place as the activity, and indirect (cumulative and secondary) effects which result from the activity and are later in time or farther removed in distance, but are still reasonably foreseeable. *See* 15 C.F.R. part 930, subpart I.

The question then is whether the described actions will have reasonably foreseeable effects on New Jersey's coastal uses or resources. Those commenting have provided conclusory statements that they do not believe there would be such coastal effects. On a case-by-case basis, relevant entities will have to determine whether the federal license or permit activities occurring in Pennsylvania or Delaware will have reasonably foreseeable effects on New Jersey coastal uses or resources.

New Jersey's submission contains a reasonable basis for OCRM to determine that coastal effects are reasonably foreseeable for the specified federal license or permit activities under 16 U.S.C. § 1456(c)(3)(A) and 15 C.F.R. part 930, subparts D and I.

**Comment 2: The proposed changes should be considered an amendment rather than a routine program change**

*Comment from: USACE; Donahue*

**Response 2:** NOAA regulations state that amendments to state coastal management programs (CMPs) are substantial changes to one or more of these five program areas:

- Uses Subject to Management (15 C.F.R. part 923, subpart B),
- Special Management Areas (15 C.F.R. part 923, subpart C),
- Boundaries (15 C.F.R. part 923, subpart D),
- Authorities and Organization (15 C.F.R. part 923, subpart E), and
- Coordination, Public Involvement, and National Interest (15 C.F.R. part 923, subpart F).

Routine program changes are the further detailing of a state coastal management program (CMP) that do not result in a substantial change to one or more of these five program areas. OCRM does not agree that the addition of interstate consistency within the specified geographic area in Pennsylvania and Delaware is a substantial change to any of the five program areas. OCRM's finding that the change to the NJCMP is an RPC is also consistent with the approvals of Pennsylvania's, New York's and Connecticut's interstate consistency lists in 2006 and 2007. The addition of interstate consistency is a further detailing of the NJCMP in the following ways:

1. Uses Subject to Management: The NJCMP's RPC request lists two federal license or permit activities (under 15 C.F.R. part 930, subpart D) within Pennsylvania and Delaware that it proposes to review for consistency with the enforceable policies of the NJCMP. These federal license or permit activities are currently part of New Jersey's federal consistency list and subject to federal consistency review by the NJCMP. This RPC does not add new activities or uses subject to management, but only includes a limited geographic area in Pennsylvania and Delaware, as authorized by 15 C.F.R. part 930, subpart I. The NJCMP has followed NOAA regulations by submitting its "lists and geographic location descriptions developed under this section to [OCRM] for approval as a routine program change." 15 C.F.R. § 930.154(d).
2. Special Management Areas: no changes are proposed.
3. Boundaries: This RPC would not change the NJCMP boundary. The geographic area outside the NJCMP boundary is not an extension of the state's CZMA boundary and is

for federal consistency purposes only, as authorized by 15 C.F.R. part 930, subpart I. *See also* 15 C.F.R. § 930.53.

4. **Authorities and Organization**: no changes are proposed in the NJCMP organization or underlying authorities.
5. **Coordination, Public Involvement, and National Interest**: The NJCMP's coordination and public involvement processes will not change with the inclusion of interstate consistency. The program's consideration of the national interest in its policies will not change. The NJCMP coordinated adequately with affected parties prior to the submittal of this RPC request to OCRM. The program sought comments from a number of state and federal agencies, including the states of Pennsylvania and Delaware. This coordination resulted in significant reductions to the area in Pennsylvania and Delaware affected by interstate consistency review, as well as significant reductions in the types of activities New Jersey is seeking to review. As noted in 15 C.F.R. part 930, subpart I, the listing of interstate activities encourages coordination between states, and provides states, local governments, federal agencies, and the public with a predictable framework for evaluating the consistency of these activities under the CZMA.

**Comment 3: Consultation/Notification of affected parties was not adequate**

*Comment from: DE DNREC; PRPA; Valero; Donahue*

**Response 3:** NJCMP documented consultation and notification of relevant state and federal agencies in 2003. NOAA's regulations do not require consultation beyond relevant state and federal agencies. Public comment was provided for during the program change submission process. Additionally, while there was a significant time lapse between the initial consultation and formal submission, the NJCMP had significantly narrowed the scope and addressed all comments received during initial consultation.

**Comment 4: Package/Website information incomplete**

*Comment from: PRPA*

**Response 4:** OCRM has checked and confirmed that all but one appendix is available on the NJDEP website and the missing item was not available electronically and can be requested directly from the NJDEP office.

**Comment 5: No demonstrated need for this action/request, or already adequately addressed by DE and PA coastal management programs or other existing review efforts**

*Comment from: DE DNREC; USACE; DE POW; Valero; DE MEX*

**Response 5:** The NJCMP demonstrated its need for interstate consistency through its coastal effects analysis. While Delaware and Pennsylvania address effects to their coastal uses and resources and their coastal management efforts may benefit New Jersey, the CZMA provides New Jersey with the opportunity to address effects from federal actions to its coastal uses and resources in conformance with New Jersey CZMA policies.

**Comment 6: Effects Analysis does not address effects upland or upstream from the described geographic area**

*Comment from: Toth*

**Response 6:** The NJCMP is not required to address upland or upstream interstate effects. Interstate effects only need to be identified for the described geographic area where NJ will limit its review.

**Comment 7: Interferes with existing interstate compact<sup>1</sup>**

*Comment from: PA DEP; DE POW; Donahue; DE MEX, Toth*

**Response 7:** OCRM does not agree that approval of New Jersey's RPC submission would displace or conflict with the jurisdiction of the Delaware River Basin Commission. We note that our approval does not, and indeed cannot, in any way displace, supersede, limit, or modify the Delaware River Basin Compact. *See* 16 U.S.C. § 1456(e). OCRM approval of New Jersey's implementation of interstate consistency review pursuant to this RPC submission does not authorize New Jersey to act in conflict with that Compact. Under our interstate regulations, OCRM does not make a determination of a state's ability to apply specific enforceable policies in interstate consistency review, and therefore, OCRM has not made a determination as to how that Compact may limit New Jersey's ability to apply its enforceable policies in the interstate consistency review authorized by this approval. Any objection New Jersey may make under its review of an interstate activity pursuant to OCRM's approval is subject to appeal by the permit applicant to the Secretary of Commerce. 16 U.S.C. § 1456(c)(3)(A). If the appealed objection is not in compliance with section 307 of the Act (16 U.S.C. § 1456) and the subparts D, E, F, or I of the federal consistency regulations (15 C.F.R. part 930), the Secretary shall override a State's objection. 15 C.F.R. § 930.129(b). The Secretary may make this determination as a threshold matter. *Id.*

**Notes on Process:** Once approved, only the listed federal license or permit activities located within the described geographic areas in Pennsylvania and Delaware will be subject to New Jersey's interstate review if New Jersey notifies the applicant, USACE and neighboring state pursuant to 15 C.F.R. § 930.155(c). If the NJCMP wants to review other interstate federal license or permit activities, or the listed interstate activities in areas outside of the described geographic area, New Jersey must either amend its list or seek case-by-case review as an unlisted activity under 15 C.F.R. § 930.54.

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<sup>1</sup> For the comments related to the Delaware River Basin Compact, OCRM did not receive any comments directly from staff of the Delaware River Basin Commission, or from the New Jersey or Delaware commissioners or their appointees to the Commission. Pennsylvania later clarified that the comments sent from Cathy Curran Myers represent her concerns on behalf of Water Management at the Pennsylvania Department of Environmental Protection and in her role as Pennsylvania's appointee to the Commission.