

## **FLEXIBILITY FOR STATE COASTAL NONPOINT PROGRAMS**

### **1. INTRODUCTION**

The Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) established Section 6217 to protect coastal waters from nonpoint source pollution. This program, administered jointly at the Federal level by the National Oceanic and Atmospheric Administration (NOAA) and the Environmental Protection Agency (EPA), is designed to help protect and restore coastal waters in coastal states and territories. CZARA requires states and territories to provide for the implementation of management measures for categories of nonpoint sources within a 6217 management area and, over time, achieve water quality standards. Under CZARA, states and territories must submit their coastal nonpoint programs to NOAA and EPA in July 1995. NOAA and EPA have until January 1996 to review the program and approve or conditionally approve it.

NOAA and EPA have completed threshold reviews for most coastal states and territories that are subject to the requirements of section 6217. Based on these reviews, NOAA and EPA agreed that several significant changes needed to be made to provide additional time and flexibility to states and territories developing coastal nonpoint programs. In January 6, 1995 letters to the Chairman of the Coastal States Organization (CSO) and the President of the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA), NOAA and EPA outlined several important actions that they will take to help resolve the major outstanding issues with this program.

The purpose of this document is to provide further detail on the actions identified in that letter. This document provides clarifications of a number of issues discussed in the January 1993 *Coastal Nonpoint Pollution Control Program: Program Development and Approval Guidance*. Specifically, this document provides additional information on: the purpose and requirements of conditional program approval; expected timeframes for program development and implementation; flexibility in implementing the program; expectations for the geographic scope of programs; the range of acceptable enforceable policies and mechanisms; and, the overall process that NOAA and EPA will undertake for program approval.

### **2. CONDITIONAL APPROVAL**

#### ***What is conditional approval?***

CZARA requires states and territories to submit a coastal nonpoint program in July 1995 that meets all the requirements of section 6217. However, NOAA and EPA recognize that in some situations, a state or territory's program may require changes before final approval can be granted. Therefore, NOAA and EPA will grant conditional approval in order to provide states an opportunity to make necessary changes.

Conditional approvals are intended primarily to provide states and territories additional time to: (1) address identified gaps, including obtaining new statutory or regulatory authority, if necessary; (2) demonstrate that existing authorities are adequate for ensuring implementation of the (g) measures; and, (3) develop other incomplete program elements (e.g., identification of critical coastal areas, technical assistance). During the period of conditional approval, penalty provisions will not apply. NOAA and EPA will work with states and territories to establish a

schedule for meeting specific conditions that the state or territory must satisfy prior to final program approval.

States and territories may receive conditional approval of their programs to complete one or more of the seven statutory elements of coastal nonpoint programs (e.g., administrative coordination, implementation of (g) measures, identification and implementation of additional management measures, technical assistance, public participation<sup>1</sup>, coordination with other state and local programs, and determination of the 6217 management area). In addition, conditional program approval may be granted for individual source categories, sub-categories, or individual management measures (e.g., forestry, existing development, confined animal facilities, etc.). While conditional approval provides additional time to complete development of program elements where necessary, NOAA and EPA encourage states and territories to include as many complete elements as possible in their July 1995 submission. Final program approval will be granted only after all required elements are satisfied.

The specific requirements for states and territories that wish to request conditional approval on portions of their coastal nonpoint program are discussed under Program Submission and Approval in section 7, below.

### ***How will the conditional approval be structured?***

States and territories that receive conditional approval for their coastal nonpoint programs must meet certain conditions before NOAA and EPA can grant final program approval. NOAA and EPA will work with individual states and territories to determine an appropriate schedule and milestones for meeting those conditions.

Once a state or territory has received either conditional or final program approval of its coastal nonpoint program, implementation activities will become eligible for Clean Water Act

section 319(h) funding. Upon final program approval, states and territories may be awarded additional funds from the 25 percent set aside of appropriated funds under section 6217(f)(4).

If a state or territory does not meet the conditions, the coastal nonpoint program will be found unapprovable, and the financial penalties under Clean Water Act section 319 and Coastal Zone Management Act section 306 will apply. Consistent with section 6217, penalties, if invoked, will begin at 30 percent in fiscal year 1999 and beyond.

### **3. EXTENDED TIMEFRAME**

#### ***How much time will states and territories with conditionally approved programs have to complete development of their programs?***

NOAA and EPA will provide up to five years from the time of conditional approval for states and territories to complete their coastal nonpoint program. The length of the conditional

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<sup>1</sup> States and territories do, however, need to provide a 30 day public review period for their coastal nonpoint program prior to submitting the program to NOAA and EPA in July 1995.

approval period will depend on which element(s) are subject to conditions and how long it will take to finalize those elements. Conditional approval may be granted for a shorter period for those program elements that need less time to complete (e.g., general identification of management measures to be implemented, or identification of critical coastal areas).

Because of the need to address coastal water quality problems as quickly and effectively as possible, conditional approval of a coastal nonpoint program should not delay overall program implementation. States and territories with conditionally approved programs should immediately begin to implement those portions of their programs that can be implemented, and begin to work to meet the conditions.

***How much time will states and territories have for program implementation?***

States and territories will have until the year 2004 to fully implement the (g) measures and until 2009 to fully implement their coastal nonpoint programs. This schedule for the implementation of management measures will be the same for programs that receive either full or conditional approval.

Although the January 6, 1995 letters to CSO and ASIWPCA stated that the time for program implementation will be extended from three to five years (beginning at the time of either full or conditional approval), NOAA and EPA have determined that even this timeframe is likely to be insufficient, especially where a state or territory does not receive final approval until 2001. In addition, having different schedules for different programs or parts of programs could result in inequities among the states and territories and could create unnecessary administrative complexity and costs. Therefore, NOAA and EPA have agreed to simplify the process and provide one schedule for all coastal nonpoint programs.

A summary of this timeline is provided below:

1995 (July)	States and territories submit coastal nonpoint programs to NOAA and EPA.
1996 (January)	NOAA and EPA review programs and grant conditional or final program approval of state and territory programs that meet appropriate legal and programmatic requirements. Program implementation begins.
1999	NOAA and EPA evaluate the progress of states and territories that received conditional approval in order to demonstrate that voluntary and incentive-based programs, coupled with existing, general state authorities, result in widespread implementation of management measures. See further discussion under Enforceable Policies and Mechanisms in section 6, below.
2001	Statutory penalty provisions are applied to states and territories that have not received final program approval.
2004	Program implementation of (g) measures is complete.
2006	States and territories complete monitoring effectiveness of

implementation of (g) measures.

2009 States and territories complete implementation of additional management measures where necessary to meet water quality standards.

#### **4. TARGETING**

The state coastal nonpoint programs envisioned by section 6217 are designed to restore and protect coastal waters. The statutory approach is iterative, beginning with the widespread implementation of management measures to protect coastal waters generally, followed by additional management measures where needed to achieve state water quality standards.

##### ***How can the states and territories focus their resources to implement their coastal nonpoint programs?***

NOAA and EPA recognize that states and territories are faced with limited resources in developing and implementing their coastal nonpoint programs. We agree that limited resources will necessitate implementation of the management measures incrementally. There are three ways in which a state or territory may focus its program.

- (1) States and territories may establish the geographic scope of their program with the flexibility discussed under Geographic Scope in section 5 below.
- (2) As described in the January 1993 *Program Development and Approval Guidance*, states and territories may exclude categories, subcategories, or individual nonpoint sources where the sources do not exist or are not anticipated, or do not, individually or cumulatively, present significant adverse impacts to coastal waters.
- (3) States and territories have the ability to phase in the implementation of their coastal nonpoint programs over time, as long as implementation is complete by 2004. As described under Extended Timeframe in section 3 above, NOAA and EPA are extending the amount of time available to states and territories to implement their programs, from the 1998 deadline established by the *Program Development and Approval Guidance*, to 2004.

##### ***What must a state or territory include in its program submission in order to be able to exclude a category, subcategory, or individual source?***

As described in the *Program Development and Approval Guidance*, states and territories may exclude from their coastal nonpoint programs sources that do not exist within the 6217 management area or that, individually or cumulatively, do not significantly impact coastal waters. In proposing an exclusion, the state or territory should include a rationale and supporting information in its program submission.

Where a category or subcategory does not exist in the 6217 management area, the submission should simply describe the situation and the source of information, e.g., Department of Agriculture reports indicate no irrigation used because of generally wet conditions, or experts

familiar with forest operations confirm that cable yarding is not used by foresters in the management area.

Where a source category, subcategory, or individual source exists but the state or territory does not believe it has a significant impact on coastal waters, the program submission should include information that shows that the source category, subcategory or individual source will not have a significant impact on coastal waters. Therefore, the program submission should include a description of the characteristics of the source category, subcategory or individual source, such as the location, intensity of the land use, potential for nonpoint source pollution, and its proximity to coastal waters which support the state or territory's rationale. Other factors which could support the proposed exclusion should also be described. Where existing land uses are already addressed by programs designed to minimize runoff, those sources and programs should be included in the state or territory's coastal nonpoint program, rather than excluded.

***What flexibility do states and territories have in implementing their program over time?***

NOAA and EPA believe that by significantly expanding the timeframe provided for implementation, we have provided states and territories considerable flexibility in implementing their coastal nonpoint programs. As discussed above, states and territories will have until 2004 to fully implement the (g) management measures throughout the 6217 management area, and until 2009 to fully implement their coastal nonpoint programs. In developing an implementation strategy, states and territories can prioritize implementation of the management measures based on criteria and opportunities that meet state or territorial needs. States and territories have the flexibility to determine the timing, location, and mechanisms to be used to achieve implementation.

**5. GEOGRAPHIC SCOPE**

***What is the basis for determining the geographic scope of state and territory coastal nonpoint programs?***

Section 6217 requires states and territories to establish coastal nonpoint programs that control sources of nonpoint pollution that impact or threaten coastal waters. As part of its responsibilities under section 6217(e), NOAA reviewed existing state coastal zone boundaries to determine "whether the boundary extends inland to the extent necessary to control the land and water uses that have a significant impact on coastal waters of the State." In consultation with EPA, NOAA then made recommendations to each state and territory on the geographic scope of its program (the section 6217 management area). NOAA's recommendations were generally based on coastal watersheds, i.e., the U.S. Geological Survey Cataloging Units adjacent to the coast and extending inland along estuaries to include Cataloging Units that encompass the head of tide.

NOAA and EPA believe that the coastal watershed provides a logical basis for establishing the geographic scope of coastal nonpoint programs. However, NOAA and EPA recognize the limitations of the data that were used in making boundary recommendations and expect that states and territories will have more specific information to better delineate the geographic scope of their coastal nonpoint programs. Therefore, NOAA and EPA expect that some states and territories will use additional data and information to determine their boundaries, and some may submit an alternative, less extensive 6217 management area in their July 1995 program submittal

than that originally recommended by NOAA and EPA.

***The January 6 letter establishes that the "burden of proof" for determining the adequacy of an alternative section 6217 management area rests with NOAA and EPA. How will NOAA and EPA evaluate a state or territory's proposed 6217 management area?***

As indicated in the January 6, 1995 letters to CSO and ASIWPCA, NOAA and EPA now consider the "burden of proof" for determining the adequacy of a state or territory's section 6217 management area to rest with the Federal agencies. NOAA and EPA will therefore generally defer to a state or territory's 6217 management area, unless NOAA and EPA determine that the section 6217 management area excludes: (a) existing land or water uses that reasonably can be expected to have a significant impact on coastal waters of the state, or (b) reasonably foreseeable threats to coastal waters from nearby activities landward of the state's 6217 management area.

As part of the program approval process, NOAA and EPA must develop Findings on each state and territory's 6217 management area. In order to develop Findings, NOAA and EPA will review the state or territory's rationale for the 6217 management area, as well as any comments received during the public comment period. Where there are indications that the 6217 management area excludes either (a) or (b) above, NOAA and EPA will go through a three-step process and examine:

- (1) whether there is an existing coastal water problem, such as exceedances of state water quality standards, fishing advisories, shellfish bed closures, etc. NOAA and EPA will base this analysis on available information, including 305(b) and 319 reports and 303(d) lists. NOAA and EPA will also examine reasonably foreseeable threats to living coastal resources and evaluate whether threats are due to nonpoint sources landward of the state or territory's 6217 management area.
- (2) whether there are existing or reasonably foreseeable land or water uses excluded from the state or territory's 6217 management area that present or are reasonably expected to present impacts or threats to coastal waters identified above.
- (3) where necessary to resolve remaining questions, NOAA and EPA will work with states and territories to apply a variety of tools, including fate and transport models, local studies, and other modeling analyses, to evaluate the delivery of nonpoint source pollutants to coastal waters.

Many boundary issues will need to be addressed on a case-by-case basis. In situations where NOAA and EPA determine that a state or territory's section 6217 management area is inadequate based on the above analysis, it is NOAA and EPA's goal to work with individual states and territories to resolve any issues related to the geographic scope of coastal nonpoint programs prior to January, 1996.

***What information must be included in a state or territory's July 1995 program submission relating to the section 6217 management area?***

As part of the July 1995 program submission, states and territories must identify the geographic scope of their coastal nonpoint program and provide a rationale for the proposed 6217 management area which demonstrates that the management area will be adequate to protect and restore coastal waters. NOAA and EPA recognize that state- and

territory-specific circumstances will impact the applicability of the types of information that states and territories will use in their analysis. Therefore, NOAA and EPA will work cooperatively with states and territories to agree upon a final boundary for the program that meets both the intent of the statute and specific state and territory needs.

While conditional approval may be granted for a proposed boundary, NOAA and EPA will work closely with states and territories to achieve agreement on the geographic scope of the coastal nonpoint programs prior to any Federal approval action.

## **6. ENFORCEABLE POLICIES AND MECHANISMS**

CZARA requires state and territory coastal nonpoint programs to include enforceable policies and mechanisms to ensure that the (g) management measures and additional management measures are implemented. In the January 1993 *Program Development and Approval Guidance*, NOAA and EPA recognized the important role of voluntary approaches, including incentives and disincentives, in achieving management measure implementation. However, NOAA and EPA also recognized that to ensure implementation of the measures as required by the Act, any nonregulatory approaches must be backed by enforceable state authority. Some states and territories have proposed that voluntary and incentive-based programs are or can be sufficient to achieve implementation of the measures, especially coupled with existing, broad authorities, and that new legal authorities are therefore not necessary.

Responding to this proposal, NOAA and EPA have provided additional flexibility by providing an opportunity for states and territories to demonstrate that voluntary approaches, in combination with existing, more general state authorities, will be effective in achieving widespread implementation of the management measures. Such existing general authorities could include "bad actor" laws, enforceable water quality standards, general environmental laws and prohibitions, and other existing authorities that will accomplish the implementation of the management measures without requiring new, more specific authorities.

State and territory program submissions should address enforceable policies in accordance with the type of approval sought. NOAA and EPA anticipate that where states and territories have an existing authority that specifically applies to one or more or more management measures, that program element would be eligible for full approval. Alternatively, a state or territory program may receive conditional approval if, for any measures not otherwise addressed by specific enforceable policies, the program submission (1) provides general authority coupled with voluntary programs to address the measures; or, (2) provides a strategy to develop additional state authorities where necessary. Each of these three possible approaches is explained further below.

### ***What information will a state or territory need to provide to demonstrate that it has specific enforceable policies and mechanisms to implement its coastal nonpoint program?***

Where a state or territory has specific enforceable policies and mechanisms which can be used to ensure implementation of the management measures, the program submission should include a copy of the statute and applicable regulations. States and territories should also provide a general analysis which describes how the management measures will be implemented and the necessary administrative processes for ensuring implementation.

***What must a state or territory do to receive conditional approval to demonstrate that a voluntary approach, coupled with an existing, general authority, can be successful?***

If a state or territory chooses to rely on voluntary and incentive-based programs and existing, general state authorities, the coastal nonpoint program should provide an explanation of how the state or territory proposes to use its back-up authority, if necessary, to achieve widespread implementation of the measures for which it is cited throughout the 6217 management area. In addition, the state or territory's coastal nonpoint program needs to establish measurable implementation goals, e.g., a schedule for meeting increasing levels of management measure implementation. These goals will form the basis for determining whether the approach has been successful at the end of the three-year evaluation period and, therefore, whether this aspect of the state or territory's program can be found approvable or whether new, more specific authorities will need to be obtained within the five year period.

In providing conditional approval, NOAA and EPA will evaluate the existing authorities and the state or territory's strategy for achieving implementation of management measures, including implementation goals. The state or territory's general authority must be capable of being used to control nonpoint source pollution, and be inclusive (i.e., not contain significant exemptions or special conditions which would render it incapable of being used as a back-up authority for the specific sources or measure(s) in question).

***How much time will a state or territory have to demonstrate widespread implementation of the management measures?***

States and territories that choose to demonstrate the ability to ensure widespread implementation of the management measures through voluntary or incentive based programs backed by general state authorities may be given conditional approval for up to five years. NOAA and EPA will review a state or territory's progress in implementing management measures after three years and assess whether the state or territory's approach will achieve widespread implementation of the management measures or whether it will be necessary to obtain more specific authority by the end of the five year period to ensure implementation of its coastal nonpoint program.

***If a state or territory does not have authority to ensure implementation of some of the management measures, what should be included in the program submission?***

Where a state or territory has identified the need to develop new authority or revise existing authority to be able to ensure implementation of the management measures, the program submission should include a strategy for obtaining the identified enforceable policies. The strategy should provide as much detail as possible, describing the particular legislation or rule making sought and how it would be implemented, and the specific tasks that the state or territory would need to undertake to adopt the legislation or rulemaking.

## **7. PROGRAM SUBMISSION AND APPROVAL**

***What must be included in the state or territory's July 1995 program submission?***

CZARA requires states and territories to submit their coastal nonpoint programs to NOAA and EPA in July 1995. The state submission should address all aspects of the coastal nonpoint



program (see Appendix G of the *Program Development and Approval Guidance* and the outline of a program submission distributed at the Port Deposit meeting). States and territories are encouraged to submit a program that meets all of the section 6217 requirements. Where a state or territory has been unable to complete development of a portion of its coastal nonpoint program, the state or territory may request conditional approval.

***If a portion of a state or territory's program is incomplete, what should the state or territory submit in order to receive conditional approval?***

Where a portion of a state or territory's coastal nonpoint program is incomplete, the state or territory should describe the status of its program development effort and how it intends to complete that development, including a schedule and specific milestones. For example, if the state or territory's program does not currently meet all the requirements for marinas and recreational boating, the state should identify the management measures that are met (including enforceable policies and mechanisms, agency responsibilities, and monitoring and compliance provisions), and describe the strategy the state will pursue to fully meet the section 6217 requirements. This could include expanding existing authorities or securing new authorities, developing interagency agreements or agency procedures such as permit review processes, or developing guidance for marina operators. These steps should be scheduled so that the state can complete full development of its program at the earliest possible time.

***How will NOAA and EPA review a state or territory's request for conditional approval?***

NOAA and EPA will review a state or territory's request for conditional approval to determine whether the existing and proposed program development activities will meet all the section 6217 requirements for that aspect of the state or territory's coastal nonpoint program. NOAA and EPA will grant conditional approval if the strategy for completing program development is likely to succeed in the projected timeframe and will result in a program that fully meets the section 6217 requirements. Where NOAA and EPA have concerns about the state or territory's ability to complete the strategy in a timely manner, the agencies will consult with the state or territory to make any necessary revisions prior to any approval decision.

***Will NOAA and EPA provide conditional approval only where the states and territories request it?***

NOAA and EPA may also grant conditional approval if, upon review of a state or territory's coastal nonpoint program, the agencies find that the program does not fully meet section 6217 requirements. In this case, the Federal agencies will notify the state or territory of the program elements in question, and work with the state or territory to develop an appropriate strategy and schedule to complete development of an approvable program.

***What is NOAA's role in meeting the requirements under the National Environmental Policy Act (NEPA)? What is the role of states and territories?***

NOAA intends to complete development of a Programmatic Environmental Impact Statement (PEIS) by early summer 1995. The PEIS will include an analysis of the environmental impacts of the section 6217 coastal nonpoint program, including the impact of alternative Federal

approval actions. Once a state or territory has submitted its coastal nonpoint program, NOAA will assess whether that program and the impact of a Federal decision to approve the program differs significantly from the environmental analysis contained in the PEIS. Either an Environmental Assessment or an Environment Impact Statement will be prepared and submitted for public review prior to any final Federal action. NOAA may ask states and territories to help supply information to support this effort.

***What are NOAA and EPA's roles in meeting the requirements under the Endangered Species Act? What is the role of the states and territories?***

In reviewing state and territory coastal nonpoint programs, NOAA and EPA must satisfy the requirements of section 7 of the Endangered Species Act. In essence, this section requires Federal agencies to ensure that any action they authorize, fund, or carry out is not likely to jeopardize any endangered or threatened species. The agencies are currently discussing the process by which these responsibilities will be addressed, including any consultation requirements. To the extent that it is possible and appropriate, the process will be integrated with the NEPA process described above. As with that process, NOAA and EPA may ask the states and territories to help supply necessary information.

***How will the state or territory be notified of the Federal agencies' decision?***

After review of the state or territory's coastal nonpoint program submission and completion of an environmental analysis, NOAA and EPA will jointly issue Findings on the state or territory's program. These Findings will describe how the state program meets the specific requirements of section 6217. Where the state or territory's program does not fully meet the requirements, the Findings will describe the specific conditions, with associated milestones and schedule, that need to be met for the state or territory's coastal nonpoint program to receive Federal approval. NOAA and EPA will work collaboratively with states and territories throughout the review process in order to ensure that appropriate schedules, milestones, and conditions are established for individual state and territory programs.

For conditionally approved programs, NOAA and EPA will provide a final notice of approval to the state or territory and the public after the state or territory has successfully completed development of its coastal nonpoint program and met the conditions.