



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

January 9, 2007

Mr. David J. Conboy, P.E.
Chief, Technical Services Division
Department of the Army
Buffalo District, Corps of Engineers
1776 Niagara Street
Buffalo, New York 14207-3199

Dear Mr. Conboy:

Thank you for your letter of November 16, 2006, providing U.S. Army Corps of Engineers (USACE), Buffalo District, comments on the proposed changes to the Pennsylvania Coastal Management Program (PACMP) submitted for approval to the Office of Ocean and Coastal Resource Management (OCRM) of the National Oceanic and Atmospheric Administration (NOAA). Your letter focuses on the PACMP's proposal to amend its Program Document to include a subsection on interstate consistency, and the PACMP's intention to review listed federal actions within a specified geographic area in the State of Ohio. OCRM appreciates the comments submitted, but respectfully disagrees with the comments. OCRM has, therefore, approved the interstate consistency changes to the PACMP (approval letter is enclosed). Below are OCRM's responses to the comments raised in your letter.

Comment 1: The USACE believes the proposed change to the PACMP should be considered an amendment under 15 C.F.R. § 923.80 rather than a routine program change (RPC) under 15 C.F.R. § 923.84.

Response 1: 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 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 Ohio is a substantial change to any of the five program areas. OCRM's finding that the change to the PACMP is an RPC is also consistent with the approvals of New York's and Connecticut's interstate consistency lists in 2006. The addition of interstate consistency is a further detailing of the PACMP in the following ways:

1. Uses Subject to Management: The PACMP's RPC request lists several federal agency activities (under 15 C.F.R. part 930, subpart C) within Ohio that it proposes to review for consistency with the enforceable policies of the PACMP. The CZMA and NOAA's regulations require that these activities, whether or not listed in PACMP's list, and even if located within the boundaries of another state, are subject to PACMP federal consistency review if the activity has reasonably foreseeable effects on uses or resources of Pennsylvania's coastal zone. *See* 16 U.S.C. § 1456(c)(1); 15 C.F.R. §§ 930.33(c)(1), 930.34(c) and 930.155(a). In fact, states do not have to complete the requirements of 15 C.F.R. part 930, subpart I, in order to review federal agency activities; federal agencies have an affirmative duty to provide states with consistency determinations for activities with reasonably foreseeable coastal effects, regardless of the location of the federal agency activity, including other states. In recent letters approving Connecticut's and New York's interstate lists as RPCs, OCRM stated:

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 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.

See letters from John King, OCRM to George Stafford, New York (March 28, 2006), and to Charlie Evans, Connecticut (June 20, 2006). Therefore, for this reason alone, describing federal agency activities for interstate purposes is not a substantial change to the PACMP.

In addition, the federal agency activities are currently part of Pennsylvania's list of federal activities and subject to federal consistency review by the PACMP. This RPC does not add new activities or uses subject to management, but includes an expanded geographic area in Ohio, as authorized by 15 C.F.R. part 930, subpart I. The PACMP 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 PACMP boundary. The geographic area outside the PACMP 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 PACMP organization or underlying authorities.
5. Coordination, Public Involvement, and National Interest: The PACMP'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 PACMP coordinated adequately with affected parties prior to the submittal of this RPC request to OCRM. The program worked closely with and sought comments from the USACE's Buffalo District, the U.S. Coast Guard, and the state of Ohio. This coordination resulted in significant reductions to the area in Ohio affected by interstate consistency 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 2: The USACE believes the proposed change to the PACMP is outside the scope of the CZMA because “there are no reasonably foreseeable actions with respect to Federal dredging and dredged material placement activities in the State of Ohio that would require Federal consistency review” under the PACMP.

Response 2: 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 actions by the USACE, and proposals for USACE permits, will have reasonably foreseeable effects on Pennsylvania coastal uses or resources. The USACE has provided a conclusory statement that it does not believe there would be such coastal effects. On a case-by-case basis, USACE will have to determine whether its federal agency activities occurring in Ohio will have reasonably foreseeable effects on Pennsylvania (and Ohio) coastal uses or resources.

Pennsylvania'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. The PACMP has shown that Federal dredging and dredged material placement activities within the specified geographic area in the State of Ohio have interstate effects. Several studies cited by the PACMP have determined that disposal of dredged material at the Federal Standard of 11 feet below low water datum (LWD) will place the material outside the breaker zone of the sediment transporting littoral drift system. As a result, this dredged material will likely move offshore, be lost in deeper water, and will not be available for needed beach replenishment. The PACMP has also shown that this material lost in deeper water is needed to protect Pennsylvania's bluffs. Monitoring data show that the two townships immediately downdrift of Conneaut Harbor have average bluff recession rates twice the average of the other affected areas.

The USACE's comment letter states that the Ohio Department of Natural Resources (ODNR) has "documented downdrift littoral movement of coarse-grain material placed at 8 feet below LWD, and studies indicate that such material remains within the littoral system and provides an adequate resource for beach nourishment." To provide data supporting this statement, the USACE sent OCRM a study done by ODNR entitled "Progress Report on Monitoring of a Nearshore Disposal Area at Painesville Township Park, Lake County, Ohio – 2004." However, although the study found that sand placed at depths between 2.4 and 3.4 meters (approx. 7.8 to 11.1 feet) below LWD will disperse to nearshore areas, the sand does not disperse to the beaches. The study's conclusion states that, "The areal increase in nearshore sand . . . suggests that sand placed in the nearshore disposal site at Painesville is dispersing to the eastward. However, the lack of response in beach width suggests that sand is not migrating onto the beach, possibly because sand placed in the nearshore is finer grained than sand typically found on beaches along this reach of lakeshore."

Comment 3: The USACE believes there are "significant inconsistencies between Pennsylvania's proposed policy changes and existing policies under [Ohio's] Coastal Management Program."

Response 3: The PACMP is not proposing changes to the enforceable policies that the program would apply to federal activities; these policies have been applied to federal activities within the Pennsylvania coastal zone for over 25 years. Moreover, the CZMA specifically allows states to have different policies and federal agencies (including the USACE) have had to address the policies of different states in CZMA reviews for years. An example is the Nationwide Permit Program that establishes regional and state conditions that may be different from other regions and states.

NOAA's regulations encourage, but do not require, states to coordinate "coastal planning, policies, and programs with respect to contiguous areas," and engage in "studying, planning, and implementing unified coastal management policies with respect to such areas." 15 C.F.R. § 930.153. The PACMP coordinated extensively with the State of Ohio when developing the interstate consistency procedures. The PACMP reduced the proposed geographic area for review of federal activities from 86 miles to three miles based on consultation with the Ohio Geologic Survey. Also, the PACMP and Ohio CMP discussed their respective policies on dredged

material disposal, and the PACMP made revisions to its interstate consistency procedures based on those discussions.

Comment 4: The PACMP policy for nearshore placement of dredged material at four feet below low water datum (LWD) is contrary to the Federal Standard (i.e., the least costly alternative(s) consistent with sound engineering and environmental requirements (33 C.F.R. § 335.7)) because it is more costly than the USACE and State of Ohio criteria, which are 11 feet and eight feet below LWD, respectively. The USACE believes that its current practice for nearshore placement of suitable coarse-grain material at Conneaut Harbor, Ohio, at 11 feet below LWD is consistent with the Federal Standard, and the USACE understands that its projects in Ohio must be consistent with the enforceable policies of the Ohio CMP. If the USACE were to adhere to the more costly PACMP policy, the USACE requests that the Commonwealth of Pennsylvania or another non-federal partner pay the additional costs for future scheduled USACE dredging projects.

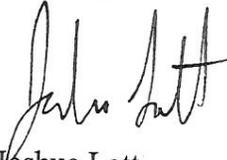
Response 4: Federal agency activities affecting any coastal use or resource must be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of approved management programs. The term “consistent to the maximum extent practicable” means fully consistent with the enforceable policies of management programs unless full consistency is prohibited by existing law applicable to the Federal agency. 15 C.F.R. § 930.32. This same section further states that, “Federal agencies shall not use a general claim of a lack of funding or insufficient appropriated funds or failure to include the cost of being fully consistent in Federal budget and planning processes as a basis for being consistent to the maximum extent practicable with an enforceable policy of a management program.”

OCRM supports efforts by the USACE, the PACMP, and other affected parties to find additional funds necessary to conduct dredging projects in accordance with the PACMP’s enforceable policies and /or avail themselves of cost-sharing provisions in other federal law.

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

Thank you again for your comments on this matter. Please contact me at (301) 563-1178 or via e-mail at josh.lott@noaa.gov if you have further questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Joshua Lott". The signature is written in a cursive, slightly slanted style.

Joshua Lott
Regional Team Leader
Coastal Programs Division

cc: Lance Wood, Assistant Chief Counsel
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