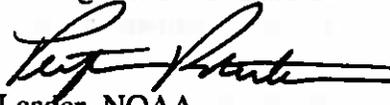




UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL OCEAN SERVICE
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT
Silver Spring, Maryland 20910

MEMO TO: State Coastal Nonpoint Program Coordinators

FROM: Peyton Robertson 
Coastal Policy Team Leader, NOAA

DATE: November 21, 2001

RE: "Bottom Lines" for the Coastal Nonpoint Program

Over the past several years, NOAA and EPA have been working with you in the ongoing development, review and approval of state coastal nonpoint pollution control programs in accordance with Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA or Coastal Nonpoint Program). During our reviews, we rely on four primary policy documents, comprising the formal guidance for the Coastal Nonpoint Program:

- *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters* (EPA, January 1993)
- *Coastal Nonpoint Pollution Control Program: Program Development and Approval Guidance* (NOAA and EPA, January 1993)
- *Flexibility for State Coastal Nonpoint Programs* (NOAA and EPA, March 1995)
- *Final Administrative Changes to the Coastal Nonpoint Pollution Control Program Guidance for Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA)* (NOAA and EPA, October 1998)

In applying and interpreting these documents, we have developed a set of "bottom lines" to assist in making decisions on particular issues associated with the program. Similar to previous Q's and A's developed for the program, this document provides a series of questions and answers to help guide decisions for particular circumstances.

We feel it is appropriate to share this material with you to further assist in your understanding of our basis for decisions. We hope this will further clarify how states can meet original program requirements and conditions of approval. If you have questions on any of this material, please feel free to contact me at 301-713-3155, x115, peyton.robertson@noaa.gov



I. GENERAL CROSS-CUTTING ISSUES

A. Enforceable Policies And Mechanisms (EP&Ms)

Question 1: How detailed must the legal opinion from the Attorney General (or other attorney representing the state agency with enforcement authority) be? Will NOAA/EPA independently review the opinion and State authority?

Answer: The Legal Opinion should include:

1. A sentence or paragraph stating that the State has authority that can be used to prevent nonpoint pollution and require management measure (MM) implementation, as necessary.
2. Citations to relevant authority.
3. A brief explanation of how the authority applies to the MMs.

If an attorney representing the State clearly says the State or enforcing agency has the requisite authority to prevent nonpoint pollution and require management measure implementation as necessary, and cites that authority, we will generally not question that conclusion. NOAA's General Counsel for Ocean Services will review each of the legal opinions. For additional detail on model opinions, see memo from Robertson/Weitman dated January 23, 2001.

Question 2: How detailed must the description be of the State's "methods for tracking and evaluating" its voluntary or incentive-based programs?

Answer: A short description (e.g., 2 pages) that generally describes, by sector (e.g., Agriculture, Forestry, etc.) who will implement (which agency) and how and where the State will track implementation to enable an evaluation of the program's success in achieving implementation (this can be selected watersheds and include sampling rather than census). [Also, states can reference the original program submittal for more detail on implementation.]

Question 3: How detailed must the description be of the "mechanism or process that links the implementing agency with the enforcement agency" and the "commitment to use the existing enforcement authorities when necessary"?

Answer: The State should (1) identify the implementing agency and the enforcement agency; (2) identify a mechanism or process linking the agencies (e.g., a process that describes how an implementing agency can request assistance by the enforcement agency); and (3) state that the implementing agency commits to seeking the use of existing authorities

when necessary. "Commitment" can include a statement of commitment (e.g. MOU), demonstration of past practice (i.e., case law), or plans for how the authority will be used in the future.

Question 4: Can NOAA and EPA fully approve a program that lacks a specific enforceable policy and mechanism for certain "minor" management measures (already conditionally approved for back-up, e.g., O&M for marinas)? Also, are there certain program areas that were conditioned for EP&Ms that are more appropriately considered as MM issues (e.g., "process" for Hydromod.)?

Answer: On a case-by-case basis, we will fully approve existing authorities that are appropriate for their intended application, such as water quality authorities for problems associated with failure to implement the O&M MMs for Marinas.

We have also revisited certain Hydromod. conditions that call for a "process" - some of these were conditioned for enforceable policies when the necessary "process" is really a management measure issue.

B. What is an Acceptable "Adoption" of a Management Measure?

Question 1: Must the State formally "adopt" the measure (i.e., codify in regulation or adopt through a formal policy) or can it otherwise clearly state that it intends to implement the measure (e.g., use it as the basis for its cost-share programs, or promote it in educational programs)?

Answer: A clear statement that "this is the MM [or the set of MMs] that we intend to implement" is sufficient.

Question 2: If the State has not yet clearly committed to adopt or implement the MM, can NOAA and EPA accept draft documents (regulation, handbook, statement of intention, guidance) as the MM? Similarly, can NOAA and EPA accept a written commitment to develop MMs or approaches? How about a Task Force that is looking into the issue?

Answer: It depends on how far along the process is and/or the likelihood that it will be finalized subsequently. For example, an early draft BMP/guidance document or one still subject to public comment is not acceptable, but one that is nearing finality may be. Similarly, a draft handbook is more likely acceptable, particularly if it is in current use by implementing agencies and is simply awaiting final publication. Draft legislation would likely be unacceptable.

C. Exclusions/Boundary

Question 1: How liberal will NOAA and EPA be in excluding categories for “insignificant impact on coastal waters”? (e.g., exclude irrigation if it only affects 5% of cropland? 10%? 20? Exclude if it does not cause water quality impairments? Causes only x% of the State’s impairments?) [NOTE: this issue has arisen in only a few states]

Answer: NOAA and EPA will make decisions on a case-by-case basis – generally we’ll defer to the State if it has sufficient information to affirmatively show lack of significance.

Question 2: What if a State program successfully addresses most but not all of a State’s 6217 management area (e.g., only Puget Sound; new development MM applicable to 90% of management area; new development and RHB measures applicable to 88% of land in the Chesapeake Bay area)?

Answer: NOAA and EPA will afford some flexibility in such cases, but will evaluate each situation on a case-by-case basis.

D. Documentation

Question: What process do NOAA and EPA use to grant final approvals?

Answer: NOAA and EPA publish a Federal Register notice announcing availability of the decision document/intent to fully approve the state coastal nonpoint program - the notice provides for 30 days of comment, noting we will proceed with approval if no comments are received. The Fed. Register notice is jointly signed by NOAA/EPA HQ (EPA HQ assures concurrence for each Federal Register notice by appropriate Regions through a Water Division Director conf. call). We also share a draft of the decision document with the state prior to publishing the notice. Final approval documents are signed by NOAA and EPA Regional Administrators.

E. Monitoring

Question: How detailed must a monitoring plan be for program approval?

Answer: Keep it simple - NOAA and EPA are only seeking a few pages; where the state will monitor, for what types of data, and what methods will be used to assess success. We will generally accept any clear articulation of what the State will do to assess the success of the management measures in reducing pollution loads and improving water quality. We have also made clear that this does NOT necessitate NEW monitoring.

For example, monitoring performed as part of a TMDL implementation could serve as an assessment of management measure effectiveness.

II. SPECIFIC CATEGORICAL ISSUES

A. Agriculture

[NOTE: NOAA/EPA have agreed that we will not require state-level EP&M for non-restricted pesticides or for integrated pest management (IPM). We simply want states to promote IPM as a MM that is incorporated into State programs.]

Question 1: Will NOAA and EPA accept higher cutoffs for applicability of animal waste management measures?

Answer: We allow some limited flexibility (e.g., dairies down to 100 instead of 70 or 20).

B. Forestry

[We have found no significant issues for the Forestry category. Most (if not all) states already have or will soon have both the MMs and EP&Ms. We have granted forestry exclusions to several states and denied others – we have worked cooperatively with states who did not get exclusions to document how their state forestry programs meet Coastal Nonpoint Program requirements.]

C. Urban

Question 1: **Construction Site Erosion and Sediment Control:** How are NOAA and EPA dealing with NPDES Phase II (which addresses construction down to one acre)?

[NOTE: This discussion also relates to construction for roads, highways and bridges]

Answer: NOAA and EPA have decided to defer to NPDES Phase II for construction site erosion and sediment control, since these activities are addressed by Phase II individual or general permits. This means that states who have conditions for construction site erosion and sediment control can simply describe how their NPDES Phase II permits address this measure (and thereby remove it, since activities issued a permit under NPDES are not subject to CZARA).

Question 2: **New Development:** What is the bottom line regarding 80% TSS and maintaining post-development peak runoff rate and average volume at pre-development levels?

But not mandatory?

Answer:

Regarding 80% TSS, we are providing breathing room on the meaning of "design" (measure says "by design or performance") – e.g., a state BMP handbook that includes practices that, either alone or in combination, can achieve 80% TSS removal can suffice. Regarding maintaining pre-development flows, we are keeping our focus on the portion of the MM that states that post-development peak runoff rate and average volume should be maintained at pre-development levels to the extent practicable.

Question 3a: Watershed Protection: What will suffice to meet the 3 elements of the measure?

Answer:

NOAA and EPA are generally being flexible for the entire measure. For elements #1 and 2, we will generally accept a resource protection program (e.g. wetlands, floodplain management, streamside buffers). For the 3rd element, we will accept a planning process that provides consideration of water quality in siting development (e.g., a State NEPA process that addresses reasonably sized projects; similarly, county-level planning processes might suffice), tools that will facilitate achieving the measure (e.g., a GIS product/analysis that is used by local governments with state technical assistance), or a whole-basin planning or other watershed management effort that is sufficiently developed to address the measure (e.g., through basin planning; the state has identified new development as a threat to maintaining water quality and is taking steps to address the issue).

Question 3b: Watershed Protection: Is it sufficient if the State addresses watershed protection only in one or two watersheds?

Answer:

Yes, if there is a plan to implement a similar approach across all watersheds in the 6217 management area over time. [Consistent with "Targeting" provisions of the Administrative Changes]

Question 4: Site Development: What will suffice to meet the 4 elements of this measure? .

[NOTE: These same issues apply, with minor differences, to the MM for Planning, Siting, and Developing roads, highways and bridges]

Answer:

For elements 1 and 2 [protect areas that provide important water quality benefits and/or are particularly susceptible to erosion and sediment loss and limit increases of impervious areas], we will accept a "serious" site planning approach (e.g., a planning process that includes consideration at the site level of appropriate buffers and setbacks, and of avoidance of steep or erosive slopes, in planning a development), even without specific criteria that must be met. For elements 3 and 4 [limit land disturbance activities such as clearing and grading, and cut and fill to reduce erosion and sediment loss; and limit disturbance of natural drainage features and vegetation] we will give full credit for a

Just considers through - what about strict setbacks/buffers etc.?

variety of programs (e.g., wetlands, floodplain management, streamside buffer programs).

— either/or or
in combo?

Question 5: Existing Development: What is sufficient to meet this measure?

[NOTE: The same generic issues raised here apply to MM for road, highway and bridge runoff systems]

Answer: NOAA and EPA are not requiring a minimum threshold of activity or time limit, but the State should identify where there are opportunities to address existing development, include priorities for implementation, and provide a schedule to do so. Also, we will accept a State plan to implement this measure only in selected priority watersheds, so long as the issue is addressed seriously. Commitment to address this issue in the context of developing and implementing a comprehensive watershed plan will suffice.

D. Onsite Disposal Systems

Question 1: Separation Distance (for new OSDS) - what's the minimum acceptable?

Answer: NOAA and EPA are handling separation distance issues on a case-by-case basis, evaluating the factors applicable in the State. We will generally accept 1 ½ feet (18 inches). If less, the state needs to show that local factors justify smaller separation distance.

Question 2: N-limited Waters (for new OSDS) - how are NOAA and EPA handling this?

Answer: States need to implement this measure only in those areas where currently available information shows the likelihood of a link between OSDS and water quality impairments.

Question 3: Inspections (for existing OSDS) - what's the minimum requirement for inspections?

Answer: NOAA and EPA will accept a program that inspects systems at the time of sale of the property/home or a program that focuses inspection on identified problem areas (e.g., lots with older OSDS, known high failure rates, or known OSDS-induced water quality problems), consistent with available resources, if there is sufficient commitment on the part of the state to implement (e.g., commitment to provide staff/resources to all problem areas in the 6217 management area over time).

But time of sale
could be 30 yrs.

E. Roads, Highways, and Bridges

Question: How are NOAA and EPA handling local roads that are not addressed by NPDES (which covers construction) or state highway programs for O&M?

Answer: NOAA and EPA will accept a program less rigorous than that for state roads - more of a state technical assistance/outreach program to the private sector/local jurisdictions on operation and maintenance for local roads. States may also be able to exclude local roads if they can document that they are not significant.

F. Marinas

Question 1: Storm Water Runoff - How are NOAA and EPA handling the 80% TSS requirement?

Answer: NOAA and EPA will accept a Clean Marinas Program or Marinas BMP Manual for existing marinas (which are required to address TSS for hull maintenance areas only). For new marinas, we require 80% TSS for the entire facility (since BMPs to achieve 80% can be designed in at the front end for new facilities).

Question 2: Boat Operation and Maintenance - what are NOAA and EPA looking for to meet (1) "good housekeeping" MMs (solid waste, fish waste, liquid material, petroleum control, boat cleaning, public education, maintenance of pumpout facilities), and (2) restrict boating activities where necessary to decrease turbidity and physical destruction of shallow-water habitat?

Answer: For (1), NOAA and EPA will accept a BMP manual (we have models) and/or a satisfactory Clean Marina Program (which typically includes a guidance BMP manual). For (2), we will accept state policies or programs that restrict boating activities that affect important habitat.

G. Hydromodification

Question: What do NOAA and EPA generally expect for existing hydromodification activities?

Answer: We stress that a good **process** that identifies **opportunities** to make improvements will suffice as the required program or plan. (This is somewhat akin to dealing with Existing Development; see C.5 above.) The process should state what types of problems and opportunities the State will address in its program/plan, and the means by which the State will address them. Silence on the issue is unacceptable - states need to provide

something. [Examples: USVI "Clean Channel" program, riparian restoration program, etc.]

H. Wetlands and Riparian Areas

Question 1: How can a State meet the first MM?

Answer: One of two ways:

1. Directly, through a wetlands protection program that specifically addresses all activities that could potentially impact wetlands, including those in uplands.
2. The "5 for 1" rule - if a state meets the MMs for New Development, Watershed Protection, Site Development, E&SC, and Existing Development, NOAA and EPA have a basis to find the State is addressing upland activities that would potentially reduce the nonpoint source abatement function of downstream wetlands, and therefore can "address activities in wetlands and riparian areas that are not currently reviewed under existing permit authorities" as described in conditions for this measure.

