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MEMORANDUM

TO: State Coastal Nonpoint Program Coordinators
State Nonpoint Source Coordinators

FROM: Peyton Robertson, Water Quality Specialist, Coastal Programs Division
National Oceanic and Atmospheric Administration

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SUBJECT: Enforceable Policies and Mechanisms for State Coastal Nonpoint Source Programs

We want to work with you to address remaining conditions on your coastal nonpoint program as expeditiously as possible. We know that many states have struggled with conditions associated with enforceable policies and mechanisms – this memo is intended to help in making progress on those issues. We've outlined specific examples of how states have met conditions for enforceable policies, consistent with the *Final Administrative Changes* for the program issued in October, 1998. The Administrative Changes provide states flexibility by granting full approval for those program elements for which states have proposed voluntary or incentive-based programs, backed by existing state enforcement authorities, if the following is provided:

- a legal opinion from the attorney general or an attorney representing the agency with jurisdiction for enforcement that such authorities can be used to prevent nonpoint pollution and require management measure implementation, as necessary;
- a description of the voluntary or incentive-based programs, including the methods for tracking and evaluating those programs, the States will use to encourage implementation of the management measures; and
- a description of the mechanism or process that links the implementing agency with the enforcement agency and a commitment to use the existing enforcement authorities where necessary.

Below we've provided further detail and specific examples for each of the above three elements, which together form the basis for demonstrating that so-called "back-up authorities" that can be used to meet the requirement for enforceable policies and mechanisms. Some of these examples document how a state's authority can be used to implement all of the management measures while some pertain only to a specific category (e.g., forestry).

1. **Legal Opinion** - approvable legal opinions generally include the following elements:

- **a statement that the State has authority to prevent nonpoint source pollution**

SC South Carolina's legal opinion states that "the Department has broad authority to prevent and control all nonpoint source pollution in the State, whether such sources cause violations of water quality standards or not." This authority is found in the Pollution Control Act, which provides that it shall be unlawful for any person to discharge (point or nonpoint sources) except in compliance with a permit issued by the Department. The Department may issue administrative orders and institute legal proceedings, including proceedings for injunctive relief, to enforce this prohibition.

CA California's legal opinion states that the Porter-Cologne Water Quality Control Act, the State's primary water quality control law, can be used to prevent nonpoint source pollution. Waste discharge requirements issued under Porter-Cologne can prevent NPS pollution by implementing applicable water quality control plans and policies. The Regional Water Boards do not have to find that a discharge, if unregulated, would create or threaten to create pollution; they can regulate any actual or proposed waste discharge that "could affect" the quality of the state waters. Both the State and Regional Water Boards have broad powers to investigate water quality in connection with any action authorized or required under Porter-Cologne, including the development or review of water quality control plans or waste discharge requirements. The Regional Water Boards have the primary authority for enforcement, and may choose from a variety of enforcement options, including: notices to comply for minor violations, time schedule orders, cleanup and abatement orders, cease and desist orders, administrative civil liability orders, and referrals to the Attorney General for injunctive relief and civil and criminal penalties.

RI Rhode Island's legal opinion refers to Rhode Island General Laws (46-12-1 et seq.) as the Department's primary authority for preventing and controlling water pollution from all sources. Pursuant to this statute, it shall be unlawful for any person to discharge any pollutant (including nonpoint sources) except as in compliance with applicable rules and regulations and pursuant to the terms and conditions of a permit. The Department is given broad authority to issue or revoke rules and regulations to control NPS pollution and carry out the purposes of the statute. In so doing, the Department promulgated the *Water Quality Regulations for Water Pollution Control*, which establish specific standards and authority to abate, prevent, and control all nonpoint sources.

PA Pennsylvania's legal opinion refers to the Pennsylvania Clean Streams Law (CSL) as the primary regulatory and enforcement authority to address all areas of water pollution. The CSL prohibits the discharge of sewage or industrial waste, either directly or indirectly, without a permit or regulation authorizing the discharge into waters of the Commonwealth. Additionally, the Department has the authority to regulate any activity not otherwise requiring a permit that may create a danger of pollution, and to establish conditions under which the activity can be conducted. The CSL contains both civil and criminal enforcement tools, authorizing penalties

for any violation of the Act and authorizing the Department to issue enforcement orders as necessary.

NH New Hampshire's legal opinion refers to three water protection statutes that give the State broad legal authority to control water pollution, including NPS pollution. For example, under the NH Water Pollution and Waste Disposal Act, it is unlawful for any person to discharge any sewage or waste to the surface or groundwater without first obtaining a permit. The State also has the authority to establish and enforce surface water quality standards applicable to nonpoint sources as well as point sources. The State's wetlands program and the NH Comprehensive Shoreland Protection Act are also cited to as authorities to prevent and abate NPS pollution.

- **a statement that the State has authority to require implementation of management measures;**

SC South Carolina's legal opinion cites a number of regulations that cover many potential sources of nonpoint source pollution that relate to the nonpoint source categories of Section 6217. South Carolina states that: "any permits granted under these regulations may contain management measures as necessary to abate or control pollution...if the controls available to the Department at present are not sufficient to address nonpoint source pollution, the Department has ample authority under the Pollution Control Act to craft additional regulations as necessary to authorize issuance of permits that incorporate the management measures of Section 6217."

CA California's legal opinion states that Porter-Cologne can be used to "specifically implement, either directly or indirectly, the (g) guidance management measures." Under its Porter-Cologne authority, the State Water Board has adopted a Nonpoint Source Management Plan that describes a three-tiered management approach to address NPS pollution. The plan focuses on implementation of BMPs as the primary way to meet water quality standards. The first tier relies on dischargers' voluntary implementation of BMPs; the second tier is regulatory encouragement of BMPs; and the third tier provides for the adoption of waste discharge requirements by the State and Regional Water Boards. The NPS Plan can be used to directly implement the (g) guidance management measures in the first and second tiers; and the third tier can be used directly or indirectly to implement the measures. Additionally, California cites to Water Code section 13360 as a way to directly require implementation of management measures through discharge requirements if the management measures implement applicable water quality standards. Waste discharge requirements can also indirectly implement the measures by prohibiting or regulating a nonpoint source activity in such a manner that the discharger must implement the management measures in order to comply.

RI Rhode Island's legal opinion refers to its Water Quality Regulations as the primary mechanism and enforcement authority for implementing its animal waste and nutrient agricultural management measures. Among other things, the regulations set specific standards for nutrients, including phosphorus and nitrogen; provide the authority to set special standards

based on TMDLs; and provide that BMPs shall be used to control erosion, sedimentation, and runoff, as determined by the Director.

PA Pennsylvania's legal opinion states that the broad regulatory authority contained in the Clean Streams Law (CSL) can be used to require implementation of the agricultural management measures for nutrients, pesticides, and grazing and the storm water management measures for marinas. The CSL prohibits the discharge of sewage or industrial waste, either directly or indirectly, without a permit or regulation authorizing the discharge into waters of the Commonwealth. Additionally, the Department has the authority to regulate any activity not otherwise requiring a permit that may create a danger of pollution, and to establish conditions under which the activity can be conducted.

NH New Hampshire's legal opinion cites several authorities that can be used to prevent NPS pollution and require management measure implementation throughout the 6217 management area, as necessary. For example, any permit issued under Section 485-A:13 (relating to sewage/waste discharges) or Section 485-A:17 (relating to erosion/siltation problems) of NH's Water Pollution and Waste Disposal Act may contain conditions including abatement schedules and the requirement of complying with best management practices. A range of enforcement activities are associated with these provisions, including criminal prosecution, civil penalties, injunctive relief, administrative fines, and administrative orders. Any injunction or settlement agreement could include a requirement of compliance with appropriate management measures.

- **citations to the relevant authority.**

ALL Each of the above-referenced state submissions cite the appropriate relevant legal authority.

2. Describe Voluntary Programs and Methods for Tracking Programs -In addition to submitting a legal opinion that meets the above elements, the following elements should be clearly discernable from the program document:

- **a description of the voluntary or incentive-based programs the States will use to encourage implementation of the management measures**

A good description of a State's voluntary or incentive-based programs will generally describe who will implement the programs (i.e., which agency) and how this will be done in each sector (e.g., agriculture, forestry, etc.).

SC South Carolina's submission indicates that the South Carolina Forestry Commission has the primary responsibility for implementing its voluntary forestry program. South Carolina clearly describes how it coordinates with the South Carolina Department of Health and Environmental Control to help mitigate silviculture impacts to water quality (also see references to agency MOUs below).

RI Rhode Island's submission identifies the Rhode Island Department of Environmental Management (RIDEM), Division of Agriculture, Natural Resources Conservation Service, and Consolidated Farm Services Agency as the primary agencies who will work with landowners to implement agricultural BMPs (also see reference to MOU below).

CA California's submission includes a table for each management measure that identifies the regulatory and voluntary programs that can be used to implement it. The first 5-year plan further describes voluntary programs.

This element could also be easily extracted from programs in which states have integrated their CZARA programs with their upgraded 319 programs. For example, virtually all 319 program submissions identify the specific State, Federal, and local agencies that will be involved in the implementation of their programs to control the different categories of nonpoint source pollution. States often include a detailed "matrix of agency responsibility," or "Agency Workplans" which reveal more detail on the tasks, time lines, and products associated with each management measure.

- **the methods for tracking and evaluating those programs.**

A good submission will include a description of how and where the State will track implementation to enable an evaluation of the program's success in achieving implementation.

SC South Carolina describes its methods for responding to citizens complaints of potential water quality impacts as a result of timber harvesting activities. Additionally, the South Carolina Forestry Commission catalogs evaluated silviculture sites in a monthly Courtesy Exam Log, which is reviewed by the Bureau of Water Central Office to determine if further enforcement action is necessary.

CA California tracks and evaluates program effectiveness through biennial and 5-year evaluations. Biennial evaluations will focus on assessing continuing implementation of management measures and activities identified in the five-year plans. At the end of each five-year period, the State will conduct an evaluation of how well performance measures and implementation goals identified in the 5-year plans have been met and assess mechanisms, including rulemaking, to improve program implementation.

This element could also be easily extracted from programs in which states have integrated their CZARA programs with their upgraded 319 programs. For example, all state 319 programs include a "feedback loop" whereby the state reviews, evaluates, and revises its nonpoint source assessment and management program at least every five years. States which have integrated their CZARA and 319 programs often commit to these regular 5-year program reviews by focusing on whether they have successfully implemented their CZARA management measures.

3. Link the Implementing Agency With the Enforcement Agency -In addition to submitting a legal opinion that meets the above elements, states need to provide:

- a description of the mechanism or process that links the implementing agency with the enforcement agency; and

A good submission will (1) identify the implementing agency and the enforcement agency; and (2) identify a mechanism or process that links the agencies (e.g., a process that describes how an implementing agency can request assistance from the enforcement agency).

SC South Carolina identifies the South Carolina Forestry Commission and the South Carolina Department of Health & Environmental Control as the implementing and enforcement agencies for its (voluntary) forestry program. South Carolina's submission includes a Memorandum of Understanding (MOU) between these two agencies that details how they will cooperate in correcting potential water quality problems that occur from poor logging practices if they are discovered. The MOU details each agency's specific responsibilities for ensuring that appropriate BMPs which minimize adverse effects on the State's waters are in place.

RI Rhode Island included a Memorandum of Understanding (MOU) between RIDEM, NRCS, and the Farm Services Agency (FSA), spelling out the roles and responsibilities of the respective agencies to implement agricultural management measures. As described in the MOU, "It is the specific purpose of this MOU that the DEM, NRCS and FSA coordinate efforts to assure that these agricultural projects ... are planned, designed, and implemented in a manner which is consistent with the administrative and/or regulatory requirements of the respective agencies and the farmer's operational needs."

CA California's submission includes an MOU between the Coastal Commission and the State Water Resources Control Board regarding their commitments to serve as lead agencies for implementation of the Program Plan.

This element could also be easily extracted from programs in which states have integrated their CZARA programs with their upgraded 319 programs. States' submissions usually provide summary descriptions of the different agencies' implementing and enforcement-related responsibilities, and will often include references to MOUs or cooperative agreements amongst the agencies to carry out activities relating to water quality management.

- a commitment to use the existing enforcement authorities where necessary.

A good submission includes a statement of commitment, demonstration of past practices (examples), or plans for how the authority will be used in the future if necessary.

SC South Carolina's submission includes a consent order issued by the South Carolina Department of Health & Environmental Control in response to logging activities that were conducted without the necessary BMPs to prevent sediment impact to waters of the State and failed to leave a recommended forty feet stream side management zone along the creek bank. The consent order provides a clear example of South Carolina's commitment to use existing enforcement authorities where necessary.

CA California's submission includes a memorandum from the Secretaries of the California Environmental Protection Agency and the California Resources Agency directing all departments and boards within their agencies to use their respective authorities to implement the Program Plan. This memorandum also directs these departments and boards to identify, through a five-year plan, appropriate actions to implement management measures that are targeted in the first Five-Year Implementation Plan, ensure that these actions are tracked, monitored and assessed, and consider the need to establish or revise existing formal agreements with the State Water Resources Control Board and the Coastal Commission to ensure successful program implementation.

This element could also be easily extracted from programs in which states have integrated their CZARA programs with their upgraded 319 programs. For example, some state programs include summaries of enforcement actions that have been taken against nonpoint sources in order to illustrate the use of its enforcement authorities, while others include details about enforcement inspectors who have been hired in certain sectors to augment compliance assurance efforts in priority basins.

We hope that this memo shows how states have been successful in using the flexibility afforded in the *Administrative Changes* to successfully meet conditions for enforceable policies and mechanisms. If you have further questions or you would like additional information, please feel free to contact Stacie Craddock at 202-260-3788.

cc: EPA Regional Nonpoint Source Coordinators

