

September 10, 2003

MEMORANDUM FOR: State and Territory Coastal Program Managers

FROM: Eldon Hout
Director

SUBJECT: Incorporating Coastal Nonpoint Pollution Control Programs into State and Territory Coastal Management Programs

This memorandum transmits the Office of Ocean and Coastal Resource Management's (OCRM's) revised guidance, called *CNP Incorporation Guidance*, for the incorporation of a State's or Territory's (coastal States) Coastal Nonpoint Program (CNP) policies into a coastal State's federally approved coastal management program. Under section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990, coastal States with federally approved management programs under the Coastal Zone Management Act (CZMA) are required to develop CNP's and under CZMA section 306(d)(16), must include in their coastal management programs enforceable policies and mechanisms to implement the applicable requirements of the coastal State's CNP. The *CNP Incorporation Guidance* supercedes OCRM's previous *Guidance on Incorporating Coastal Nonpoint Pollution Control Programs into State and Territory Coastal Management Programs* (May 1998).

The attached *CNP Incorporation Guidance* provides coastal States and OCRM with an efficient means to meet the program change requirements of the CZMA and OCRM's responsibilities under the National Environmental Policy Act. Please note that, for the reasons stated in the guidance, the *CNP Incorporation Guidance* provides an *alternative* to, and is separate from, the program change process in NOAA's regulations at 15 CFR part 923, subpart H. Thus, a coastal State may use this guidance, if applicable, or the program change process in 15 CFR part 923, subpart H.

Please submit proposed CNP policies to be incorporated into your coastal management program to John King, Acting Chief, Coastal Programs Division (CPD), OCRM. Please coordinate with your CPD Coastal Management Specialist before submitting the CNP policies. For questions on any sections of the *CNP Incorporation Guidance* please contact David Kaiser at 301-713-3155, extension 144.

Attachment

Incorporating Coastal Nonpoint Pollution Control Programs into State Coastal Management Programs

September 10, 2003



**Office of Ocean and Coastal
Resource Management
NOAA National Ocean Service**

Under section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA), States with approved CMP's under the Coastal Zone Management Act (CZMA) are required to develop CNP's and under CZMA section 306(d)(16), States must include in their CMP's enforceable policies and mechanisms to implement the applicable requirements of the State's CNP. The National Oceanic and Atmospheric Administration (NOAA) and the Environmental Protection Agency (EPA) issued 6217 Guidance in January 1993, which referred to "auto-incorporation" of CNP's into State CMP's. NOAA's Office of Ocean and Coastal Resource Management (OCRM) elaborated on auto-incorporation when it issued *Guidance on Incorporating Coastal Nonpoint Pollution Control Programs into State and Territory Coastal Management Programs* (May 1998).

However, NOAA and EPA's conditional or full approval of a State's CNP is for CZARA section 6217 purposes and does not constitute NOAA approval under the CZMA to incorporate CNP components into a State's CMP. Thus, auto-incorporation is a misnomer since it was never envisioned that approved CNP components would automatically become part of the State's CMP, and OCRM will no longer use the term "auto-incorporation." The May 1998 guidance and the "auto-incorporation" statement in the January 1993 6217 guidance are superseded by this document, referred to as *CNP Incorporation Guidance*. Please note that, for the reasons stated below, this guidance provides an *alternative* to, and is separate from, the program change process in NOAA's regulations at 15 CFR part 923, subpart H.

This *CNP Incorporation Guidance* applies only to components of a State's CNP that are to be incorporated into a State's CMP and that were evaluated in the Environmental Assessment for the State's conditionally approved CNP. CNP components to be incorporated into a State's CMP should be enforceable policies and mechanisms as described in CZMA sections 304(6a) and 306(d)(16). If a CNP component was developed pursuant to the Federal Clean Water Act or Clean Air Act, then it is automatically incorporated into a State's CMP. *See* Section III of this guidance for more details.

OCRM, with assistance from NOAA's Office of General Counsel for Ocean Services (GCOS), has determined that some of the efficiencies from the May 1998 guidance may still be used, but that additional steps are needed to comply with NOAA and State responsibilities under the National Environmental Policy Act (NEPA) and the public and Federal agency notification requirements under NOAA's CMP program change regulations at 15 CFR part 923, subpart H. Below are three sections: I. Current Status of CNP NEPA and CZMA Program Change Compliance, II. Steps Needed to Incorporate CNP Components into State CMP's, and III. Incorporation of Enforceable State CNP Policies Developed Pursuant to the Federal Clean Water Act or Clean Air Act.

I. Current Status of CNP NEPA and CZMA Program Change Compliance

a. NEPA Compliance

A Programmatic Final Environmental Impact Statement (PFEIS) for the CNP was issued on March 15, 1996. Following the PFEIS, NOAA and EPA conditionally approved most State CNP's in 1997 and 1998, two State CNP's in 2001, and two more in 2003. NOAA issued an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) for each of the conditionally approved State CNP's. All States, except Indiana, have received conditional approval, and sixteen (counting soon-to-be-approved Connecticut) of the thirty-four CZMA States now have fully approved CNP's. NOAA and EPA determined that the PFEIS and EAs were sufficient for NEPA purposes for their action to fully approve State CNP's. See Attachment A for a detailed list of State CNP approval and EA dates.

b. CZMA Program Change Compliance

There are three primary purposes to the program change requirements in the CZMA and NOAA's regulations. (1) NOAA must determine whether a change to a CMP would be compatible with NOAA's original approval of the CMP, CZMA objectives and requirements, and other applicable Federal law. (2) NOAA's CMP program change process provides an opportunity for the public and Federal agencies to participate in the development of the program change and to comment to OCRM on whether a change should be incorporated into the State's CMP. (3) NOAA uses the program change procedures to comply with NEPA for NOAA's action of approving changes to State CMP's.

There was substantial opportunity for public and Federal agency comment on the development of the Coastal Nonpoint Program and each State's CNP. Many Federal agencies provided input into EPA's *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters* (January 1993) (the "g guidance"), and the *Coastal Nonpoint Pollution Control Program: Program Development and Approval Guidance* (January 1993) (the "6217 Program Guidance") developed jointly by NOAA and EPA. These two documents, along with NOAA/EPA's "flexibility guidance" (1995) and CNP "administrative guidance" (1998), were noticed in the *Federal Register*.

During the development of each State's CNP, leading up to conditional approval, States provided public comment periods, public hearings and workshops. When NOAA and EPA conditionally approved each program, the agencies published a notice in the *Federal Register* providing a 30-day public comment period on the content of the State's CNP and NOAA and EPA's action to approve the CNP, and provided notification that the program had been conditionally approved.

For full approval of a State's CNP, NOAA publishes a notice in the *Federal Register* announcing NOAA's and EPA's intent to fully approve the CNP. The *Federal Register* notice also provides the public with an opportunity to comment to NOAA on NOAA and EPA's intent to fully approve the CNP.

II. Steps Needed to Incorporate CNP Components into State CMP's

To incorporate State CNP components into a State's CMP using the efficiencies provided by past NEPA and notice actions, the State and OCRM must take the steps described below. Otherwise, the State can submit CNP components pursuant to NOAA's CZMA program change regulations at 15 CFR part 923, subpart H, either as a Routine Program Change or as an Amendment. If a CNP component was developed pursuant to the Federal Clean Water Act or Clean Air Act, please skip Section II and see

Section III of this guidance. Prior to submitting CNP components for incorporation into a State's CMP, States should consult with OCRM staff to ensure that the State's submission is complete and meets this guidance.

a. State Submission to OCRM. The State's submission to OCRM needs to:

1. Identify the specific CNP policies/component(s) the State wants to incorporate and request OCRM approval.
2. Identify how these policies are enforceable under State law.
3. Include a statement as to whether any of these CNP policies have changed from the time of NOAA's conditional approval. In particular, the State must identify new authorities that were adopted to meet the conditions that it now wants to incorporate into its CMP. If any of the policies have changed since NOAA's conditional approval, the State must briefly describe:
 - A. the significance of the change,
 - B. whether each coastal nonpoint policy as proposed to be incorporated was evaluated in NOAA's conditional approval and findings and the EA,
 - C. whether the baseline assumptions and anticipated effects in the EA have changed in relation to the submitted CNP components, and if so, how, and
 - D. how the incorporation of the CNP policy(ies) will impact the environment (positive, negative and cumulative impacts).
4. Include the public notice that the State published announcing the submission. The public notice should (1) note that the State is submitting the CNP components to OCRM for incorporation into the State's CMP pursuant to CZMA § 306(d)(16) and OCRM's *CNP Incorporation Guidance*, (2) include the information in 1-3 above, and (3) indicate that any comments on incorporating the CNP components into the State's CMP may be submitted to OCRM within three weeks of the date of issuance of the notice.
5. Include the letter transmitting the public notice to affected Federal agencies.

b. OCRM Action

1. OCRM, after considering any comments from the public and Federal agencies, will issue its decision in a timely manner.
2. OCRM's decision may be delayed if OCRM determines that additional time is needed because:
 - A. the CNP policy is not covered under the EA,
 - B. the baseline assumptions and/or anticipated effects in the EA have changed, or
 - C. other conditions render the original EA irrelevant.
3. If 2.A., B. or C. apply, then OCRM will determine whether the change requires NOAA to issue a supplemental or new EA, or rely on the existing EA and issue a new FONSI (pursuant to NOAA NAO 216-6.04, p.35) articulating any difference in effects.

4. Whether or not OCRM issues a supplemental or new EA and/or FONSI, OCRM's approval or denial will note that its action of incorporating the previously reviewed and approved CNP policies into the State's CMP is a slight modification in the nature of its previous action to approve the CNP's as described in the original EA/FONSI.

III. Incorporation of Enforceable State CNP Policies Developed Pursuant to the Federal Clean Water Act or Clean Air Act

Section III of this guidance describes how State enforceable policies developed pursuant to the Federal Clean Water Act (CWA) or Clean Air Act (CAA) are incorporated into a State's CMP, pursuant to CZMA section 307(f). CZMA section 307(f) applies to such policies whether or not the State policies are part of the State's CNP. CZMA section 307(f) provides:

Notwithstanding any other provision of [the CZMA], nothing in [the CZMA] shall in any way affect any requirement (1) established by the Federal Water Pollution Control Act, as amended, or the Clean Air Act, as amended, or (2) established by the Federal Government or by any state or local government pursuant to such Acts. Such requirements shall be incorporated in any program developed pursuant to [the CZMA] and shall be the water pollution control and air pollution control requirements applicable to such program.

This section was included in the statute to ensure close coordination between the CZMA and the CWA and CAA, two of the seminal pieces of environmental legislation enacted in the same time frame as the CZMA. By including section 307(f), Congress did not want the Federal consistency process to modify or repeal Federal or State CWA or CAA requirements. H.R. Rep. No. 1049, 92d Cong., 2d Sess. (May 5, 1972), *reprinted* in SENATE COMM. ON COMMERCE, LEGISLATIVE HISTORY OF THE COASTAL ZONE MANAGEMENT ACT OF 1972, AS AMENDED IN 1974 AND 1976 WITH A SECTION-BY-SECTION INDEX, 94th Cong., 2d Sess. at 324 (December 1976). Congress also wanted to ensure that the Federal and State CWA and CAA requirements "shall be included as a part of the State coastal zone program," H.R. Conf. Rep. No. 1544, 92d Cong., 2d Sess., (Oct. 5, 1972), *reprinted* in SENATE COMM. ON COMMERCE, LEGISLATIVE HISTORY OF THE COASTAL ZONE MANAGEMENT ACT OF 1972, AS AMENDED IN 1974 AND 1976 WITH A SECTION-BY-SECTION INDEX, 94th Cong., 2d Sess. at 457 (December 1976).

NOAA's long-term interpretation of CZMA section 307(f) and its legislative history means that State policies developed pursuant to the CWA or CAA are part of the State's federally approved CMP by effect of the statute and, thus, States do not have to submit these requirements to OCRM pursuant to NOAA's program change procedures in 15 CFR part 923, subpart H. However, to ensure that Federal agencies and the public are aware of these requirements, State CMP's must notify OCRM, Federal, State, and local agencies, and other interested parties, of the incorporation of the State CWA and CAA requirements into the state CMP. *See* OCRM, Program Change Guidance at 14 (July 1996).

Therefore, to ensure that all parties are aware of the most recent version of State enforceable policies that the State believes were developed pursuant to the CWA or CAA, and that the State included in its CNP, the State's CNP/CMP submission to OCRM under this guidance must include a list of these State CWA and CAA policies. Any issue as to whether the State's policy is appropriately ascribed to the CWA or CAA shall be resolved by NOAA in its review of the State's CNP/CMP submission.

ATTACHMENT A - State CNP Approval and NEPA Status (PFEIS for CNP issued on March 15, 1996)

State	Conditional Approval/Findings	EA Noticed in F.R.	Full Approval/F.R. Date
Alabama	6/30/1998	7/9/1998	
Alaska	6/30/1998	7/9/1998	
American Samoa	10/3/1997	10/31/1997	5/8/03
California	6/30/1998	7/9/1998	5/1/2000
Connecticut	6/30/1998	7/9/1998	
CNMI	10/3/1997	10/31/1997	6/27/03
Delaware	10/3/1997	10/31/1997	1/30/2002
Florida	11/18/1997	12/5/1997	
Georgia	9/28/2001	9/28/2001	
Guam	10/3/1997	10/31/1997	
Hawaii	6/30/1998	7/9/1998	
Indiana	N/A	N/A	
Louisiana	6/30/1998	7/9/1998	
Maine	2/23/1998	3/10/1998	5/18/03
Maryland	10/3/1997	10/31/1997	10/6/1999
Massachusetts	9/24/1997	10/31/1997	7/30/2001
Michigan	9/24/1997	10/31/1997	
Minnesota	3/17/2003	3/17/2003	
Mississippi	11/18/1997	12/5/1997	
New Hampshire	11/18/1997	12/5/1997	7/30/2001
New Jersey	11/18/1997	12/5/1997	
New York	11/18/1997	12/5/1997	
North Carolina	2/23/1998	3/10/1998	5/8/03
Ohio	9/28/2001	9/28/2001	
Oregon	1/13/1998	1/13/1998	
Pennsylvania	10/3/1997	10/3/1997	2/22/2001
Puerto Rico	11/18/1997	12/5/1997	9/5/2000
Rhode Island	9/24/1997	10/31/1997	3/17/2000
South Carolina	2/23/1998	3/10/1998	
Texas	4/7/2003	4/7/2003	
Virgin Islands	11/18/1997	12/5/1997	1/30/2002
Virginia	2/23/1998	3/10/1998	2/22/2001
Washington	6/30/1998	7/9/1998	
Wisconsin	9/24/1997	10/31/1997	12/27/2002