



## RESPONSE TO PUBLIC COMMENTS

**To:** File

**From:** Allison Castellan (NOAA), Don Waye (EPA HQ), Barbara Spinweber (EPA R2)

**Date:** 12/11/09

### **RE: Response to Public Comments Received on NOAA's and EPA's Intent to Fully Approve New Jersey's Coastal Nonpoint Pollution Control Program.**

On August 18, 2009, NOAA and EPA (Federal Agencies) jointly announced a 30 day public comment period for the Agencies' intent to fully approve New Jersey's Coastal Nonpoint Program in the Federal Register. NOAA received one set of comments during the public comment period. In a September 18, 2009 letter, Clean Ocean Action (COA) strongly disagreed that New Jersey's Coastal Nonpoint Program (CNP) should be approved at this time. The Federal Agencies maintain that New Jersey has fully satisfied the remaining conditions and should receive full approval of its Coastal Nonpoint Program. NOAA and EPA revised the final decision document for New Jersey's Coastal Nonpoint Program to improve clarity and correct inaccuracies in the draft decision document based on COA's comments.

A summary of COA's comments and a detailed response is below:

**Comment 1:** COA is concerned that there is no clear coordination among NJDEP programs to implement the CNP and ensure the program is implemented and enforced.

**Response:** According to Section 6217 of the Coastal Zone Act Reauthorization Amendments (CZARA), to receive full approval, states must provide for the implementation of management measures, in conformity with the guidance published by the Federal Agencies, to protect coastal waters generally. As such, the state programs: (1) identify nonpoint source land use categories that will be addressed through its CNP; (2) identify management measures to be implemented for those categories; and (3) describe a process by which the state will ensure implementation of those management measures. The program must also establish mechanisms to improve coordination among state agencies with CNP responsibilities. NOAA and EPA believe New Jersey has satisfied all of these statutory requirements. As NOAA and EPA summarized in the November 11, 1997 Findings for the New Jersey Coastal Nonpoint Program, the State has described how it will coordinate the CNP implementation.

NOAA and EPA approve CNP programs based on the programs and authorities that a state has enacted, promulgated, and otherwise established in order to satisfy the CZARA requirements and based on the state's description of how the programs and activities will be coordinated and implemented. The programs do not need to be fully implemented at the time of full approval (See "Final Administrative Changes to Coastal Nonpoint Pollution Control Program Guidance" (Oct. 16, 1998)). Through EPA's work with New Jersey's Section 319 program and NOAA's work with the state's Coastal Zone Management Program, the two programs which serve to implement the fully approved Coastal Nonpoint Program, the federal agencies will continue to

work with the state to ensure it implements its CNP effectively.

**Comment 2:** COA is concerned that there is no comprehensive “plan” for New Jersey’s CNP.

**Response:** CZARA does not require states to submit a single comprehensive plan for the CNP. States are required only to describe how they will implement each of the management measures and meet the other programmatic elements, including a description of its administrative coordination, which New Jersey has done.

**Comment 3:** COA is concerned that New Jersey continues to ignore various comments they have provided regarding the inadequacy of the state’s water quality programs.

**Response:** CZARA identifies specific criteria that NOAA and EPA are to consider when reviewing a state’s CNP. Ensuring that states have a public participation process for their CNP is part of the Federal Agencies’ evaluation. New Jersey provides many opportunities for the public to provide input via public comment periods and other means sufficient for meeting its CZARA requirements. The Federal Agencies’ recognize states often receive opposing comments and must balance input from various groups.

**Comment 4:** COA is concerned that New Jersey’s Category 1 (C1) water definition excludes most marine waters and believes NOAA and EPA must demand that NJDEP correct this significant undermining of the C1 definition prior to approving NJ’s CNP.

**Response:** Federal approval of a state’s CNP does not depend on water classifications or evaluating what percentage of coastal waters fall into certain definitions. States need only identify land use which may cause or contribute significantly to degradation of coastal waters where there is a failure to attain or maintain applicable water quality standards, as well as coastal areas adjacent to those waters where additional management measures may be necessary. New Jersey has done so. Virtually all of New Jersey's coastal and estuarine waters (SE-1 and SC) already include a Category 1 designation. Many other waters in New Jersey along the Atlantic Coast are designated as F-1 or PL, both of which are equivalent to outstanding national resource waters and are protected to the highest degree possible. Also, even Category 2 waters require a 150 foot buffer, which is still among the most protective requirements throughout the United States. The significant protections provided to coastal waters and the many programs and authorities New Jersey has in place to meet the CZARA requirements, support full approval of the State’s CNP.

**Comment 5:** COA is concerned that Wetlands, Riparian Areas, and Vegetated Treatment Systems Management Measures are met on paper but not in practice. Also, NOAA and EPA need to update the management measures to require sea level rise impacts to wetlands and riparian areas be considered.

**Response:** As noted in the response to Comment 1 above, the Federal Agencies’ approval of a state program does not require that the program be fully implemented at the time of approval. If implementation of New Jersey’s Flood Hazard Area Control and Coastal Permit Program rules becomes a problem which prevents full implementation of the State’s CNP in the future, we will

consider those issues as part of routine evaluations of New Jersey's Coastal Management and Nonpoint Source Control Programs.

EPA and NOAA take climate change very seriously and are involved in climate change initiatives, including trend analysis of sea level rise. While we have programs to address various aspects of climate change, and are evolving and strengthening these programs, and while future actions are likely, CZARA is not the appropriate program to address climate change. When approving state CNPs, NOAA and EPA must make sure each state satisfies the requirements laid out in the 1993 *Guidance Specifying Management Measures for Sources of Nonpoint Source Pollution in Coastal Waters* ((g) guidance). The 1993 guidance only contains one mention of sea level rise—that the rate of sea level rise should be considered when siting onsite sewage disposal systems.

Outside of the context of the State's Coastal Nonpoint Program, NOAA is working with the state to address sea level rise and climate change. For example, through New Jersey's Coastal Zone Management Program, NOAA funded a 2007-2008 study on the adaptation of coastal wetlands to sea level rise that identified the requisite parameters for the landward migration of coastal wetlands and recommended strategies for facilitating the response of tidal wetlands to sea level rise. NOAA is also supporting New Jersey's Coastal Zone Management (CZM) Program to develop a coastal resilience indicator to help local communities determine vulnerability to hazards and sea level rise. EPA has recently awarded the Barnegat Bay National Estuary Program a startup grant under their Climate Ready Estuaries program, assisting the Barnegat Bay National Program Office and its partners including the New Jersey CZM Program, develop a climate change adaptation plan for the estuary.

**Comment 6:** COA notes that the New Jersey Integrated Water Quality Report should be included in the approval document's rationale for the Monitoring section. However, improvements to the report are needed. COA is also concerned that impaired waters remain on the 303(d) list too long and TMDL requirements lack timeframes for completion.

**Response:** NOAA and EPA appreciate COA's recommendation to include the Integrated Report on Water Quality as a tool for monitoring implementation of New Jersey's CNP. We agree it would be a good tool to use and have revised the monitoring section to incorporate the Integrated Report as requested.

NOAA and EPA believe the combination of monitoring and assessment programs New Jersey has in place, including the current Integrated Water Quality Report, are sufficient for meeting the intent of CZARA. The suite of monitoring programs New Jersey has in place for the CNP is on par with those approved for other states with fully approved CNPs. Also, because the TMDL program is administered under the Clean Water Act, and not CZARA, the Federal Agencies' decision-making on New Jersey's CNP submission does not provide the appropriate context to evaluate the effectiveness of New Jersey's TMDL program.

**Comment 7:** COA notes that WQM Plans are not in effect because NJDEP extended the deadline.

**Response:** NOAA and EPA thank COA for pointing out that WQM Plan updates have been extended modestly by New Jersey from the original due date of April 7, 2009. We have updated our decision document to reflect the new deadlines.

N.J.A.C. 7:15-5:23 provides the State program with authority to grant extensions for the WQM Plan revisions. Each New Jersey county applied for an extension individually and each was given its own revised due date based on unique, county-specific circumstances, including how far along in the process the county was when it applied for the extension. Of these extensions, none are later than June, 2010. Given the comprehensive updates needed to the WQM Plans and the original short, nine month timeframe allotted for updates, NOAA and EPA feel these extensions are reasonable and appropriate to ensure quality plans are produced. The requirement is legally binding on both the state and its counties.

The fact that WQM Plans are not in effect yet does not change our decision that New Jersey has met the 6217(g) guidance management measure provisions for OSDS. The State needs only to have the authorities in place and a description of how the program will be implemented. NOAA and EPA have found that New Jersey has adequately described how the new WQM Plan regulations will enable the State to meet the OSDS requirement for the CNP. Moreover, EPA Region 2 recently awarded New Jersey approximately 1.6 million dollars to assist in the development of WQM Plans.

**Comment 8:** COA is concerned that: (1) OSDS inspections and maintenance are not currently in place because the deadline for WQM Plans has been extended; (2) rule language regarding the frequency and type of inspection is ambiguous; (3) the authority to implement inspections within the Pinelands does not exist; and (4) inspecting onsite wastewater treatment systems greater than 2000 gallons per day at the time of property transfer is not sufficient.

**Response:** Regarding item #1, see response to Comment 7.

Regarding item #2, NOAA and EPA disagree that the current rule language is ambiguous and believe it is clear and sufficient for meeting the 6217 (g) guidance management measure provisions related to OSDS inspections. N.J.A.C. 7-15-5.25(e)3 notes that WQM Plans must “Demonstrate that areas to be served by individual subsurface sewage disposal systems are subject to a mandatory maintenance program. . . which ensures that all individual subsurface sewage disposal systems are functioning properly.” In New Jersey’s guidance document, “So, You Need a Septic Management Plan . . .”, the State notes “that a reasonable timeframe for the frequency of pump-outs is typically 3 years” although counties have been granted the discretion to select other inspection intervals appropriate to county-specific needs. NOAA and EPA have approved CNPs from other states that rely on inspections at the time of property transfer or require regular OSDS pump-outs every five years. Therefore, we believe New Jersey’s OSDS inspection and maintenance program conforms with the 6217 (g) guidance.

Regarding item #3, while NOAA and EPA believe that the new OSDS inspection and maintenance requirements within N.J.A.C. 7-15 are wholly sufficient to meet this management measure, our rationale included additional information about OSDS inspections in the Pinelands. COA argues that while regular inspections are referenced in the Pinelands Comprehensive Management Plan, the authority to implement this plan does not yet exist. EPA and NOAA have

subsequently determined that rules requiring OSDS inspections every three years in the Pinelands have been proposed but are not in place yet. EPA and NOAA revised the decision document as follows: “An additional rule has been proposed by NJDEP to require all active OSDS within the Pinelands to be inspected every three years and pumped when necessary.”

Regarding item #4, NOAA and EPA accept inspecting systems at the time of property transfer as a way to meet the (g) guidance for existing OSDS. We have revised the disputed sentence to read “All onsite wastewater systems with a design capacity of greater than 2000 gallons per day must be inspected *at the time of property transfer.*”

**Comment 9:** COA is concerned that stormwater permits have been weakened since road erosion control best management practices were removed, the requirement to remove yard waste from roads within seven days was lengthened, and catch basin cleaning requirements were reduced.

**Response:** NOAA and EPA thank COA for pointing out that the Road Erosion Control requirement was removed from the State stormwater rules in 2009. We have updated our decision document to remove the section about the Road Erosion Control requirements. However, NOAA and EPA maintain that the State has sufficient programs in place to address the road, highways and bridges runoff systems and operation and maintenance measures for local roads.

The State and local governments still have other programs in place to develop and implement runoff management systems for existing roads. First, the removal of this permit requirement does not reduce the Department’s ability to take action if an erosive condition is found to be contributing pollutants to the waters of the State. All municipalities and counties must certify that stormwater facilities, including stormwater conveyances, serving roads, highways, and bridges are functioning properly and must include a schedule for repairs in annual reports. In addition, regional stormwater management plans identify the most significant existing sources of stormwater pollution, which include roadways, and include a strategy and schedule for addressing priority problem areas (N.J.A.C. 7:8-3).

Since the original issuance of the Tier A Permit, the NJDEP received comments from municipal residents and officials who believed that the seven day requirement for removing yard waste placed a significant and unnecessary burden on municipalities as well as the public, especially the elderly. The NJDEP removed the seven day requirement from the renewal permit to alleviate this burden from the permittees and to afford those who may require assistance, more time to rake leaves to the curb. The Department has retained the requirement that municipalities have a yard waste collection program, notice collection dates and that yard waste be kept no closer than 10 feet from a storm drain inlet or only allow containerized yard waste at the curb. Although NJDEP did make some changes to how yard waste is managed along roadsides, NOAA and EPA believe these changes still conform to the 6217 (g) guidance for the road, highways and bridges management measure.

NOAA and EPA have learned from New Jersey DEP that the original catch basin cleaning requirement was overly burdensome to achieve for large municipalities because every catch basin was required to be cleaned annually and would have diverted resources from other environmentally valuable programs. NJDEP modified the catch basin cleaning requirement to

establish more realistic standards that still provide for adequate cleaning and inspections. The State also added a private catch basin retrofitting ordinance requirement to the stormwater permit and clarified that municipalities need to retrofit catch basins when resurfacing roadways. NOAA and EPA did not include New Jersey's catch basin program as support for how the State was addressing the roads, highways and bridges operation and maintenance management measure in our rationale. However, the fact that the State has routine inspection and cleaning retrofitting requirements for its catch basins helps strengthen its operation and maintenance program for roads.

**Comment 10:** COA believes stronger stormwater controls are needed for sediment and nutrient reduction from existing development areas. COA also notes that municipalities need more financial support for implementing and enforcing stormwater controls.

**Response:** When approving state CNPs, NOAA and EPA evaluate whether each state program conforms to the 6217 (g) guidance. New Jersey's Stormwater Rules and Best Management Practices are very comprehensive. As described in the final decision document, the New Jersey stormwater rules and other programs allow the State to fully satisfy the existing development management measure for the Coastal Nonpoint Program. Per the 6217 (g) guidance, for existing development a state program submission needs to: (1) identify priority local and/or regional watershed pollutant reduction opportunities; (2) contain a schedule for implementing appropriate controls; (3) limit destruction of natural conveyance systems; and (4) where appropriate, preserve, enhance or establish buffers along surface waterbodies and their tributaries. The 6217 (g) guidance does not include specific provisions for states to reduce sediment from existing development or control nitrogen in stormwater runoff—two concerns COA raised in their comment.

NOAA and EPA recognize COA's concern that additional financial support is needed to effectively implement and enforce stormwater controls. Through EPA's 319 program and NOAA's CZM program (the two programs which oversee implementation of New Jersey's approved CNP), EPA and NOAA will work with the state to ensure available resources are spent wisely to ensure implementation of the CNP as well as meet other requirements of the CWA section 319 and CZMA programs.

**Comment 11:** COA is concerned that the state will not be able to enforce the new pollution controls at marinas.

**Response:** NOAA and EPA note COA's concern over NJDEP's ability to enforce the new marina regulations in the future given staff and budget limitations. See Comment 1 above.

**Comment 12:** COA believes it is inexcusable to NOAA and EPA to approve NJ's CNP without addressing or acknowledging the nutrient-related problems and the state's lack of nitrogen criteria.

**Response:** NOAA and EPA recognize that nutrient impacts and criteria are important environmental issues and have been grappling with the best way forward. However CZARA is not the proper context to advance these issues universally. CZARA and the 6217 (g) guidance do not require a state to establish nitrogen criteria. The 6217 (g) guidance does have a nutrient

management measure for agriculture activities, specifically for the development and implementation of nutrient management plans. The 6217(g) guidance also addresses use of denitrifying septic systems in nitrogen sensitive waters. As NOAA and EPA have described in our final decision document for New Jersey's CNP, we believe the State has programs in place that are sufficient to conform to these specific management measures in the 6217(g) guidance.

NOAA and EPA recognize that nitrogen is a water quality issue of concern for New Jersey waters and are working with the State to reduce nitrogen loading. For example, EPA Region 2, through the New England Interstate Water Pollution Control Commission, recently provided Clean Water Act funds to Rutgers University to fund a study entitled "Assessment of Nutrient Loading and Eutrophication in Barnegat Bay – Little Egg Harbor" in partnership with the U.S. Geological Survey and the Jacques Cousteau National Estuarine Research Reserve.