

COASTAL NONPOINT PROGRAM PROGRAM IMPLEMENTATION WHITE PAPER

4/07/03 DRAFT

Introduction

The Program Implementation Workgroup's objective was to identify and flesh-out the issues associated with the implementation of state coastal nonpoint source pollution control programs to help frame the national discussion of how states can approach long-term program and management measure implementation.

In accordance with Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA), the purpose of state coastal nonpoint source pollution control programs is "to develop and **implement management measures** for nonpoint source pollution to restore and protect coastal waters, working in close conjunction with other State and local authorities." [16 USC §1455b(a), emphasis added.]

The purpose of this paper is move the national program toward defining what "implementation" really means. Is it programmatic or does it mean physical, on-the-ground construction activities? Since the degree of implementation is directly related to funding, what is the degree of implementation that can be achieved? Are there impediments to program implementation that are difficult to adequately address?

Several things became abundantly clear to the workgroup as we framed this program implementation discussion and attempted to define "implementation":

1. Implementation of coastal nonpoint source pollution control programs is a daunting task.
2. Implementation of coastal nonpoint source pollution control programs will mean different things to different states, and must be defined by each state based on their own unique governmental infrastructure, water quality issues, financial and technical resources, and management priorities.
3. Implementation of coastal nonpoint source pollution control programs is all encompassing and touches upon the other three workgroup issues:
 - Program evaluation and reporting needs will provide utility for 5-year implementation plans and 15-year implementation strategies;
 - Program coordination will play a key role in identifying the implementation responsibilities of various federal, state, and local agencies and other program partners;
 - Monitoring and tracking efforts will provide assurances that management measures are being implemented, help identify gaps, and establish the need for implementation of additional measures.

In light of this extensive overlap, the other workgroups' discussions will undoubtedly augment and support the implementation workgroup's efforts.

Expected workgroup outcome from the meeting

This paper frames a national discussion of the implementation of Section 6217 management measures and coastal nonpoint source pollution control programs. It is intended to guide the

discussion at the coastal nonpoint meeting in April 2003, provide direction and “recommendations” for states and territories in how to continue program implementation, and will also raise other questions that must be addressed in order for states to properly and efficiently implement their coastal nonpoint source programs.

Issue Identification

One of the first attempts at identifying the scope of issues associated with coastal nonpoint source pollution control program implementation was the “Defining Implementation” presentation provided at the 2002 Lansdowne conference. The issues identified were:

- What is coastal nonpoint program implementation?
- 5-year implementation plan/15-year strategy
- Use of the \$10M “to implement programs developed pursuant to Section 6217”
- Programmatic evaluation
- Auto-incorporation

Not surprisingly, the issues identified in this paper closely reflect and build upon the Lansdowne scope of issues. The following questions were used to guide the development of the issues contained in this paper:

1. Why are we implementing the program? Is the congressional intent of the CZMA the reason?
2. How can we ensure management measures are being implemented? What infrastructure is necessary to achieve this goal?
3. Who are the program constituents and what are their respective roles? (Federal, state, local governments, non-governmental organizations, state and federal elected officials.)
4. What is the role of the 5/15-year plans? How should they be structured? If the 5/15-year plans are not used, what is the mechanism that allows for setting program goals and priorities?
5. What is the message we are trying to convey and impact to those we are trying to communicate with?
6. What will it take to move from programmatic projects to on-the-ground BMP support?
7. Are there management measures that should be removed from consideration?
8. Should Total Maximum Daily Loads be viewed as “additional” management measures? If so, how do we determine that all applicable management measures were implemented and did not achieve the desired water quality improvements to justify the “additional” management measures?

Based on these questions, the discussion at the April 2003 meeting will focus on the following themes:

Mechanisms for implementation

- Identifying the roles and responsibilities of various implementation partners
- Stormwater General Permit Phase II overlap
- Tracking of management measure implementation
- Establishment of additional management measures
- Technical assistance to partners

Timeframes for implementation

- Practicality of currently established timeframes for management measure and full program implementation

Targeting

- Prioritization of nonpoint source categories and individual management measures
- Nitrogen management feasibility
- Continued opportunities to exclude categories and/or individual management measures

Funding

- Sanctions
- Adequacy and stability of funding for program implementation
- Potential competition for funding among coastal nonpoint source pollution control programs and other water quality programs such as Phase II stormwater permitting, TMDLs, etc.

Administrative challenges

- Development of 5-year/15-year plans
- Process for incorporating coastal nonpoint source programs into coastal management programs and Section 319 nonpoint source programs
- Reporting requirements
- Evaluation follow-up
- Ensuring that lead agencies and partners are committed to moving the program forward
- Overcoming negative perceptions about the program
- Better marketing of program goals, understanding that individual actions are part of the problem and the solution

Issue Evaluation**Mechanisms for implementation**

CZARA and many of the subsequent guidance documents issued by NOAA and EPA all contain broad references to implementation of management measures. According to CZARA, each state program established under Section 6217 shall provide for the implementation, at a minimum, of management measures in conformity with the guidance published under subsection (g), to protect coastal waters generally.

CZARA also requires that coastal nonpoint source pollution control programs contain provisions for the implementation and continuing revision from time to time of additional management measures that are necessary to achieve and maintain applicable water quality standards and protect designated uses. According to the 1998 Final Administrative Changes, NOAA and EPA recognize that all water quality problems attributable to nonpoint sources, e.g., nitrate contamination of groundwater, may not be resolved within 15 years. This is an extremely important point as it could affect the states' and territories' needs to develop and implement additional measures.

Programs must also provide for technical and other assistance to local governments and the public for implementing management measures which may include assistance in developing ordinances

and regulations, technical guidance, and modeling to predict and assess the effectiveness of such measures, training, financial incentives, demonstration projects, and other innovations to protect coastal water quality and designated uses.

States and territories must identify the roles and responsibilities of all implementation partners and program constituents (e.g., municipal government, educational institutions, federal agencies, non-governmental organizations). Implementation of management measures also entails tracking to ensure that measures are fully implemented, which is important to note for those measures that the state or territorial lead agency does not have primary statutory authority for implementing.

The Coastal Nonpoint Pollution Control Program: Program Development and Approval Guidance (NOAA and EPA, January 1993) also provides background on program implementation. The Program Development and Approval Guidance reiterates the statute and legislative history which indicate that the central purpose of Section 6217 is to strengthen the links between Federal and state coastal zone management and water quality programs in order to enhance state and local efforts to manage land use activities that degrade coastal waters and coastal habitats. This is to be accomplished primarily through the implementation of: (1) management measures in conformity with guidance published by EPA under Section 6217(g) of CZARA, and (2) additional state-developed management measures as necessary to achieve and maintain applicable water quality standards. There is no explicit implementation guidance since the focus of the document is on developing programs for approval.

Section 306(d)(16) of the CZMA requires state coastal zone management programs to contain enforceable policies and mechanisms to implement the applicable requirements of the coastal nonpoint programs. The 1993 Program Development and Approval Guidance indicates that in order to satisfy this requirement, states will need to adopt, at a minimum, enforceable policies and mechanisms to implement the (g) guidance management measures and the additional management measures. These enforceable policies and mechanisms may be state and local regulatory controls, and/or non-regulatory incentive programs combined with state enforcement authority.

CZARA requires states to provide technical and other assistance to local governments and the public for implementing the additional management measures. The 1993 Program Development and Approval guidance expects states to identify those portions of the coastal nonpoint programs that are to be implemented by local governments and to include a program to provide technical and other assistance to local governments and the public in the state coastal nonpoint program.

CZARA requires states to provide opportunities for public participation in all aspects of the coastal nonpoint program, including implementation. The ***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 16, 1998)*** strongly encourage states and territories to seek public input on coastal nonpoint program implementation plans and the evaluation of those plans.

As stated in the 1993 Management Measures Guidance, any storm water runoff that ultimately is regulated under an NPDES permit will no longer be subject to the Section 6217 (g) guidance and is not required to be addressed in a state's/territory's coastal nonpoint control program. In accordance with the policy clarification memorandum between EPA's Storm Water Phase I and II regulations and 6217 management measure requirements, effective December 20, 2002, EPA and NOAA have identified that the following ten management measures specified in the 6217(g) guidance that overlap in part or in full with the expanded NPDES storm water regulations:

- New Development (geographically limited)
- Construction Site Erosion and Sediment Control
- Construction Site Chemical Control
- Existing Development (geographically limited)
- Road, Highway and Bridge Construction Projects
- Road, Highway and Bridge Construction Site Chemical Control
- Road, Highway and Bridge Operation and Maintenance (geographically limited)
- Road, Highway and Bridge Runoff Systems (geographically limited)
- Hydromodification, Erosion and Sediment Control for Dams
- Hydromodification, Chemical and Pollutant Control for Dams

Timeframes for implementation

CZARA Section 6217 is silent with regard to timeframes for implementation of approved coastal nonpoint source pollution control programs. NOAA and EPA initially provided up to three years for states and territories to meet conditions of approval, and the *1995 Flexibility Guidance* indicates that NOAA and EPA would work with states and territories to establish a schedule for meeting specific conditions that the state or territory must satisfy prior to final program approval. NOAA and EPA subsequently provided up to five years from the time of conditional approval for states and territories to complete their coastal nonpoint program, while also acknowledging that a five-year implementation timeframe was likely to be insufficient.

According to the 1998 Final Administrative Changes, states and territories will determine program priorities and communicate those priorities to NOAA and EPA by submitting a 15-year program strategy that briefly describes the State's overall approach and schedule to ensure implementation of all Section 6217(g) management measures to protect and restore coastal water quality within 15 years of the date of **conditional approval**, though NOAA and EPA recognize that all water quality problems attributable to nonpoint sources, e.g., nitrate contamination of groundwater, may not be resolved within 15 years.

Some reviewers said their understanding was that the 15-year implementation timeframe was counted from the date of full approval, not conditional approval. This point needs to be clarified. Overall, the practicality of currently allowed timeframes needs to be revisited, especially in light of the level of funding provided to states for program implementation.

Targeting

According to the 1995 Flexibility Guidance, the state coastal nonpoint programs envisioned by Section 6217 are designed to restore and protect coastal waters. The statutory approach is iterative, beginning with the widespread implementation of management measures to protect coastal waters generally, followed by additional management measures where needed to achieve state water quality standards.

In the 1998 Final Administrative Changes, NOAA and EPA agree that states may focus resources on preventing and controlling significant impacts of nonpoint source pollution on living coastal resources and human health.

In accordance with the 1998 Final Administrative Changes, coordination and integration of coastal nonpoint programs with other programs and water quality initiatives should be considered

in establishing priorities and developing strategies to meet Section 6217 CZARA program requirements. These other programs include state Section 319 nonpoint source programs, the development of Total Maximum Daily Loads (TMDL) under section 303(d) of the Clean Water Act, the Environmental Quality Incentives Program under the 1996 Farm Bill, National Estuary Programs, and State Watershed Plans. In establishing priorities, states must address both pollution prevention and water quality improvement goals, including the protection of pristine areas and coastal waters that are threatened by reasonably foreseeable increases in pollution loadings from new or expanding sources. Targeting program implementation will involve a balance between the need to implement nonpoint source controls broadly and the need to address specific water quality problems for particular watersheds.

Targeting efforts will help states and territories establish priorities for nonpoint source categories, management measure implementation, and geographic importance. In establishing priorities, states and territories should also be allowed to investigate the overall feasibility of implementing management measures, such as those related to nitrogen management.

Funding

The need for sufficient funding for coastal nonpoint source pollution control program implementation is critical. Funding for the coastal nonpoint program has historically been unstable (e.g., \$0 in FY'96 and FY'97), and when compared to other programs seems woefully insufficient (e.g., \$2 billion available under the Farm Bill). Any reductions in funding levels will have serious impacts on the states' ability to implement their programs.

However, in accordance with CZARA Section 6217, if the Secretary of Commerce finds that a coastal State has failed to submit an approvable program, the Secretary shall withhold for fiscal year 1999, and each fiscal year thereafter, 30 percent of grants otherwise available to the State for the fiscal year under section 306 of the Coastal Zone Management Act of 1972 [16 USC §1455], until such a program is submitted. The Secretary shall make amounts withheld under this paragraph available to coastal States having fully approved programs.

Likewise, in accordance with CZARA Section 6217, if the Administrator of EPA finds that a coastal State has failed to submit an approvable program, the Administrator shall withhold for fiscal year 1999, and each fiscal year thereafter, 30 percent of the amount awarded for fiscal year 1998 granted to the State under Section 319 of the Federal Water Pollution Control Act [33 USC §1329], until such a program is submitted.

It is well known that the conditionally approved states and territories would like to forestall the imposition of sanctions. Efforts to work with NOAA and EPA to avoid sanctions are on-going and are being coordinated through the Coastal States Organization and the Association of State and Interstate Water Pollution Control Administrators.

The 1998 Final Administrative Changes reiterate NOAA and EPA's commitment to work with the coastal states, the environmental community, affected interests, and others to find sources of funding for continued development and implementation of the Coastal Nonpoint Program, to provide technical support, and to ensure federal agency coordination.

On November 27, 2002, Congress enacted the Great Lakes Legacy Act of 2002, Public Law 107-303. This law includes a section that authorizes the use of Section 319 funds in fiscal year 2003 to carry out projects and activities that relate to the development or implementation of Phase II NPDES programs. Several states had already allocated fiscal year 2003 funds by the time this

law went into effect, and it is not clear if subsequent fiscal year funds will also be made available for funding Phase II programs. If so, there is some concern that Section 319 funds will be diverted from nonpoint source-related demonstration projects and earmarked for Phase II activities.

If subsequent funding remains as unstable and insufficient as levels have been historically, the nation's coastal nonpoint source pollution control programs will not be able to move forward in any meaningful or credible way.

Administrative challenges

CZARA states that fully approved programs, including the management measures, shall be implemented through changes to the State plan for control of nonpoint source pollution approved under Section 319 of the Federal Water Pollution Control Act [33 USC §1329]; and changes to the State coastal zone management program developed under section 306 of the Coastal Zone Management Act of 1972 [16 USC §1455], as amended by this Act. This raises the issue of identifying the process by which states should incorporate all components of coastal nonpoint source programs, especially networked coastal nonpoint source programs, into coastal zone management programs.

The 1993 Program Development and Approval Guidance indicates that state programs must ensure implementation of both the (g) guidance management measures and the additional management measures. State programs must include designation of a lead state agency for each source category and/or subcategory, a description of the legal authorities to implement the management measures (i.e., enforceable policies and mechanisms), a description of how the lead agency will implement the program, and a schedule for full implementation of the (g) guidance management measures.

In accordance with the 1998 Administrative Changes, NOAA and EPA do not expect states to implement management measures for nonpoint sources that do not, individually or cumulatively, have a significant impact on coastal waters. Subsequent to program approval, including conditional approval, NOAA and EPA will allow states to further exclude sources either by category, subcategory or management measure or on a geographic basis (e.g., a Section 6217 management area, watershed, county) where states can provide either existing or newly developed information (e.g., monitoring data) to demonstrate that a source is not, and is not reasonably expected to, become significant, either individually or cumulatively.

According to the 1998 Final Administrative Changes, each state will develop a 5-year implementation plan describing when, where, and how program implementation will occur, including mechanisms for tracking and monitoring implementation. The plan will contain interim milestones and benchmarks, including a time frame, and be updated as necessary, but at least every five years. Achieving the milestones and benchmarks of these plans will serve as a basis for evaluating progress in achieving program implementation goals. The 5-year implementation plan will be more specific than and nested within the longer-term 15-year program strategy for achieving full implementation of the Section 6217(g) management measures. The 5-year implementation plan will be designed to ensure adequate progress in achieving the 15-year program strategy and should be integrated and consolidated with other federal and state water quality programs.

States and territories will determine program priorities and communicate those priorities to NOAA and EPA by submitting a 15-year program strategy that briefly describes the State's

overall approach and schedule to ensure implementation of the Section 6217(g) management measures and improve water quality within 15 years of the date of conditional approval. This means that all applicable Section 6217(g) management measures to protect and restore coastal waters will be implemented, though NOAA and EPA recognize that all water quality problems attributable to nonpoint sources, e.g., nitrate contamination of groundwater, may not be resolved within 15 years.

The 15-year program strategy should include: a description of the means that the state will use to demonstrate progress in implementing the management measures; a basis for determining whether its program will succeed in ensuring implementation within the 15 year implementation period (e.g., implementation rates); and, a process whereby the state will determine the need to use a backup authority and/or adopt additional enforceable policies and mechanisms to ensure implementation of the management measures within 15 years.

At least every five years, NOAA and EPA will evaluate progress in achieving goals established through the 5-year implementation plans and the 15-year program strategies, including the success of existing authorities, coupled with voluntary or incentive-based programs, in achieving management measure implementation.

Rather than the existing program schedule that calls for implementation of (g) management measures, monitoring, and implementation of additional management measures in succession, NOAA and EPA stated in their 1998 Final Administrative Changes that they will support the establishment of an iterative process for implementing (g) management measures, assessing their effectiveness in achieving water quality goals and determining the need for additional management measures. NOAA and EPA will continue to expect that management measures for new sources (e.g., new development) will be implemented as the new sources come online.

The administrative challenges that lie ahead for states include identifying the process for incorporating coastal nonpoint source programs into coastal zone management programs; and continuing an iterative program implementation process that helps determine the need for additional management measures and, possibly, allows for future exclusion of nonpoint sources either by category, subcategory or management measure, or on a geographic basis.

Perhaps one of the biggest administrative challenges for the program will be overcoming long-held negative perceptions about the program. Coastal nonpoint source pollution control programs need to be better marketed to government agencies and individuals noting that we are all part of the problem and the solution.

Another administrative challenge will be ensuring that lead coastal nonpoint agencies and partners are fully committed to moving the program forward in a meaningful way. Coordination and cooperation will play a large role in meeting this challenge.

Primary Issues

Mechanisms for Implementation

Implementation partners must be made aware of tracking and reporting requirements to ensure full management measure implementation. Consistent tracking and reporting processes, with clear expectations, must be established.

NOAA and EPA have recognized in the 1998 Final Administrative Changes that all water quality problems attributable to nonpoint sources, e.g., nitrate contamination of groundwater, may not be resolved within 15 years. This can have a profound effect on the need for states and territories to develop and implement additional management measures.

TMDLs could be one tool that states and territories can use to identify gaps and establish additional management measures.

States should share their outreach and technical assistance materials as much as possible, perhaps through one clearinghouse website or through website links.

Timeframes for Implementation

CZARA is silent on the timeframe for full implementation.

It is not clear if each state was consulted in accordance with the 1995 Flexibility Guidance in establishing their schedule for meeting specific conditions.

It also is not clear if NOAA and EPA have consistently provided each state with an evaluation of their progress in meeting conditions in accordance with the 1998 Final Administrative Changes.

The practicality of currently allowed timeframes needs to be revisited, especially in light of the level of funding provided to states for program implementation. NOAA and EPA must continue to recognize that the current implementation timeframe might not provide states and territories with enough flexibility to fully implement their coastal nonpoint programs. NOAA and EPA recognized in the 1998 Final Administrative Changes that all water quality problems attributable to nonpoint sources, e.g., nitrate contamination of groundwater, may not be resolved within 15 years.

Targeting

Are there mechanisms other than the 5-year plan/15-year strategy that states and territories can use to establish management and implementation priorities?

In establishing priorities, states and territories should also be allowed to investigate the overall feasibility of implementing management measures, such as those related to nitrogen management.

States and territories should continue to investigate and pursue exclusions of categories and/or individual measures.

Funding

NOAA and EPA must work with the states to avoid, at all costs, the imposition of sanctions for states and territories that have not obtained full approval of their coastal nonpoint source pollution control plans.

Additional guidance is necessary to clarify the role of Section 319 funds in implementing Phase II stormwater programs.

There is a strong need to address historically unstable and insufficient funding of the program. In order to meet the CZARA requirements of program implementation there should be a predetermined annual allotment for implementation activities.

Administrative Challenges

Negative perceptions of the coastal nonpoint source pollution control program must be overcome. The program must be better marketed to partners and constituency groups.

Lead agency and partner commitments to program implementation are paramount and must be achieved for the program to move forward.

The overall role and utility of 5-year plans and 15-year strategies must be established. How should these plans/strategies be structured?

Monitoring, tracking, evaluation, and reporting procedures should be established, with clear expectations.

The process for incorporating coastal nonpoint programs into coastal management programs should be clarified and simplified.