

July 2000

**RESPONSE TO COMMENTS ON THE CALIFORNIA COASTAL NONPOINT PROGRAM
NOAA/EPA DECISIONS ON CONDITIONS OF APPROVAL**

I. CMC, NRDC, Surfrider, Heal the Bay, Environmental Health Coalition, Pacific Coast Federation of Fishermen's Associations

The following comments are in reference to the Foreword of the California Coastal Nonpoint Program NOAA/EPA Decisions on Conditions of Approval (Decision Document):

Comment 1.

Include the following goal language, or similar, equivalent language, in the *California Coastal Nonpoint Program NOAA/EPA Decisions on Conditions of Approval* (Decision Document) as a statement of intent for outcome of the California Coastal Nonpoint Pollution Control Program (Program):

Upon full implementation of this Program, all beneficial uses that are currently impaired by nonpoint source pollution will be met, and all State water quality standards (including but not limited to those in the California Toxics Rule, the Ocean Plan, the Basin Plans, etc.) shall be met in water bodies receiving nonpoint source pollution.

Response:

As noted in the discussion of Additional Management Measures, Section 6217 envisions that states will undertake a continuing process of identifying and implementing additional MMs where necessary to attain and maintain water quality standards and protect beneficial uses. However, in any given waterbody, even with the implementation of additional management measures (MMs) for nonpoint sources of pollution, impairments attributable to point sources may continue. In addition, even where impairment of a waterbody is attributable entirely to nonpoint sources, it may take a waterbody some time to respond to the reduction in polluted runoff so as to meet water quality standards. Therefore, NOAA and EPA do not agree that the proposed language should be included in the Decision Document since we cannot predict that all standards can be met by 2013 (the date for full implementation of the Program).

Comment 2.

In the last line of the first paragraph of the Decision Document, add “or will meet” before “the conditions.”

Response:

NOAA and EPA have found that California has met all the conditions for full approval of its coastal nonpoint program. The rationale for this decision is discussed under each of the conditions.

NOAA and EPA have based their approval of the Program on the authorities of the California

July 2000

Coastal Commission (Coastal Commission) and the State Water Resources Control Board (State Board) to implement the MMs directly within their respective jurisdictions. The ability of these agencies to implement MMs under the California Coastal Act and the Porter-Cologne Water Quality Control Act, respectively, is documented in legal opinions from the agencies included in Appendix B of Volume 1 of the Program Plan. Other State authorities and activities are viewed as supplemental to these enforcement mechanisms. Please note the application of this concept under the Agriculture section of the Findings. Therefore, it is NOAA and EPA's decision that California has met the conditions for approval.

While NOAA and EPA find that California's Program meets the requirements for approval, it is also important to note that the section 6217 program is meant to be implemented over a 15-year period (see *Final Administrative Changes to the Coastal Nonpoint Pollution Control Program Guidance for Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990* for more information), culminating in 2013. It is expected that the State will implement the actions described in the *Plan for California's Nonpoint Source Pollution Control Program* (Program Plan) according to the Program Plan's schedule by 2013. NOAA and EPA will periodically review the status of the Program and determine if these actions are being completed in a satisfactory manner.

The following comments are in reference to the Enforceable Policies and Mechanisms section of the Decision Document:

Comment 3.

On page 5 (State Board and Regional Board Authority) of the Decision Document, include the commitment to put the enforcement guidance document out for public review, just after the sentence on completing the guidance by February 1, 2001. Move up the date for release of this document for public review to December 1, 2000.

Response:

The State Board is required by State law to develop, on or before February 1, 2001, guidance to be used by the State Board and the Regional Water Quality Control Boards (Regional Boards) concerning enforcement of the state's nonpoint source management plan. NOAA and EPA expect that in carrying out this State mandate, the State Board will provide sufficient time for public review, consistent with the public participation priorities described on page 45 of the Program Plan.

Comment 4.

Amend the last paragraph of the "Other State Authorities" section (page 7) to include the state's specific commitment to update existing agreements with DPR, NRCS and BLM by December 31, 2001. This language is currently found in the Agriculture section on page 10 of the Decision Document.

Response:

The Decision Document has been amended to include the State's commitment to update existing agreements with DPR, NRCS, and BLM by December 31, 2001 in the last paragraph of the "Other State Authorities" section (page 7).

Comment 5.

The letters from the California Environmental Protection Agency (CalEPA) and the Resources Agency (Resources) direct their own agencies to "consider" the "need to establish or revise existing formal agreements" rather than to actually develop and enter into needed agreements. The letter to the Department of Food and Agriculture, Department of Health Services, and the Department of Transportation includes merely "requesting" that these agencies "consider" the need for new or revised Memoranda of Understanding (MOUs) and Management Agency Agreement (MAAs). These agreements are necessary to meet the third part of the test of enforceable policies and mechanisms based on NOAA and EPA's assessment of the adequacy of a state's coastal nonpoint pollution control program. The State agencies can and should make a more direct commitment to develop and enter into needed agreements, rather than just "consider" them.

Response:

See *Comment 2* for a discussion of NOAA and EPA's basis for approving the Program.

While the development of MOUs between the Coastal Commission, the State Board, and other State agencies is not specifically required for approval of the California program¹ due to the direct authority attributable to the California Coastal Act and the Porter-Cologne Water Quality Control Act, NOAA and EPA agree that such agreements would further strengthen the program and ensure a consistent approach to the management of nonpoint sources. The first five year implementation plan requires the Coastal Commission and the State Board to review and update existing MAAs and MOUs as appropriate and to develop others as needed. The State has begun to coordinate all appropriate State agencies through the establishment of the Interagency Coordinating Committee (IACC), which held its first meeting on June 9, 2000. NOAA and EPA will monitor the State's progress in achieving the goals of its five-year plan.

Comment 6.

Given that the State's Program identifies a number of implementing agencies other than the State Board or the Coastal Commission (*see, e.g.*, page 10 of the Decision Document with regard to Agriculture), the clear commitment of these agencies is an essential piece of the Program.

¹ The Final Administrative Changes to the Coastal Nonpoint Pollution Control Program Guidance requires that where a state proposes voluntary or incentive-based programs backed by general state enforcement authorities, the state must provide a description of the mechanism or process that links the implementing and enforcement agencies. This mechanism or process may be an MOU or other appropriate process.

July 2000

This is particularly true in light of the State Board's repeatedly-stated position that the Program must be implemented as a cooperative effort among a number of agencies, and not just the State Board and Coastal Commission. We therefore request that EPA and NOAA condition approval on additional commitment from the State in this regard. In the alternative, we request that the Decision Document reflect this issue and identify it as a major point to be addressed during the first biennial review, with continued funding contingent on active participation by designated agencies.

Response:

See Comment 2 for a discussion of NOAA and EPA's basis for approving the Program.

While participation of other State agencies is not part of the basis for approval, NOAA and EPA do recognize that other State agency participation would strengthen the overall program. The Program Plan includes several components that address State agency participation, including a memorandum from the Secretaries of the CalEPA and Resources directing all departments and boards within their agencies to use their respective authorities, the establishment of the IACC, and commitments to revise existing agreements and establish additional agreements that may be needed to strengthen the commitment of other agencies. The biennial review described in the Program Plan is the state's own internal review process, and therefore not subject to change by NOAA and EPA. In addition to the State's process, however, NOAA and EPA will regularly undertake their own review of the Program to examine how successfully the State is meeting its milestones to ensure full program implementation by 2013. Part of this process will include considering how well the State has addressed the Program Plan components that involve other State agencies.

The following comments are in reference to the Tracking Implementation section of the Decision Document:

Comment 7.

The State agreed to complete the five-year matrix of activities by July 1, 2000 except for numeric performance measures, which it committed to completing by October 1, 2000 (Program, Volume 1, pp. 2, 86). The State also agreed to distribute the revised five-year plan to the public by November 1, 2000. These agreements are essential to the adequacy of the Program and should be added to the Decision Document in the first paragraph of the "Tracking Implementation" section.

Response:

The Decision Document has been amended to include the State's commitment to:

- complete the five-year plan matrix by July 1, 2000, with numeric performance measures to be completed by October 1, 2000; and
- distribute the revised five-year plan to the public by November 1, 2000.

This language has been included in the first paragraph of the *Tracking Implementation* section of

the Decision Document.

Comment 8.

We also suggest that the second paragraph of the “Tracking Implementation” section be edited to reflect the enforcement commitment the State needs to make in order to meet decision point #3 of the three-part test above. Specifically, we suggest that the first sentence of that paragraph be rewritten as follows: “In cases where adequate progress in MM implementation has not been made, *the State will ensure successful implementation of specific MMs through rulemaking or other identified processes.*” This avoids emphasis on the State “considering” actions to implement the MMs, and commits the State to actually implementing the MMs.

Response:

The following revision has been made to the first sentence of the second paragraph of the *Tracking Implementation* section:

In cases where adequate progress in MM implementation has not been made, *NOAA and EPA expect that the State will ensure successful implementation of specific MMs through rulemaking or other identified processes.*

The State has indicated its commitment to implement the MMs through adoption of the MMs by the State Water Resources Control Board and California Coastal Commission and various actions described in the Program Plan. See *Comment 2* for a further discussion of how the State’s authorities can be used to ensure implementation of the MMs.

Comment 9.

In the third paragraph of this section, we request that it be stated clearly that the biennial review process is open to the public, and that the State has agreed to biennial public workshops to explain and respond to comments on progress with Program implementation.

Response:

The following language has been included in the third paragraph of the *Tracking Implementation* section of the Decision Document:

“As part of the biennial review process, the State will hold public workshops to explain and respond to comments on progress with Program implementation.”

As noted in the response to *Comment 6* above, the biennial review process is the State’s own process. Also see *Comment 6* for a discussion of NOAA and EPA’s program review process. Part of this process will be examining how well the State has provided opportunities for public participation in all aspects of the program, including planning, implementation and evaluation. NOAA and EPA’s review process will include ample opportunity for public input on the effectiveness of the State’s coastal nonpoint pollution control program.

Comment 10.

In the third paragraph of this section, the list of topics to be addressed in biennial reviews should include and emphasize “funding for implementation of the Program Plan,” which is critical to adequate implementation (see Program, Volume I, pp. 77, 87).

Response:

The language “funding for implementation of the Program Plan” is now included in the list of topics to be addressed in biennial reviews described in the Decision Document (third paragraph of *Tracking Implementation*).

Comment 11.

The last paragraph of this section (page 9) should include the requirement pursuant to AB 982 that the State Board, on or before November 30, 2000 and annually thereafter until November 30, 2002, must “report to the Legislature on the structure and effectiveness of its water quality program as it relates to Section 303(d) of the Clean Water Act.” The state’s Total Maximum Daily Load program under Section 303(d) is a major driving force behind the targeting of MMs for implementation, and should not be ignored in the Decision Document or subsequent Program reviews.

Response:

The following language pursuant to AB 982 was added to the last paragraph of the *Tracking Implementation* section:

“By November 30, 2000 and annually thereafter until November 30, 2002, the State Board is to report to the State Legislature on the structure and effectiveness of its water quality program as it relates to Section 303(d) of the Clean Water Act.”

The following comment is in reference to the Agriculture, Forestry, Urban, Marinas and Recreational Boating, Hydromodification, Wetlands/Riparian Areas sections of the Decision Document:

Comment 12.

Request that NOAA and EPA recognize gaps in the Program by either conditioning approval on the State filling those gaps or amending the “Decision” for each of these substantive areas to read as follows: “*Based on the current Program Plan and the State’s commitments to complete the Plan, including but no limited to the commitments to complete and distribute the first five-year plan by November 1, 2000 and to prepare, circulate for public review and implement enforcement guidance, California has satisfied this condition.*”

Response:

See *Comment 2* for NOAA and EPA’s basis for program approval. The actions described in the Program Plan, including the five-year plans, show how the Program will be implemented. It is NOAA and EPA’s expectation that these actions will be completed according to the schedule described in the Program Plan. NOAA and EPA will assess the State’s progress in their regular review of the Program (See *Comment 6* for a discussion of NOAA and EPA’s program review

July 2000

process). The following language has been included as the last paragraph of the Overview on page 9:

NOAA and EPA expect that the actions described in the Program Plan will be completed according to the schedule outlined in the Program Plan, including but not limited to the commitments to complete and distribute the first five year plan by November 1, 2000 and prepare, circulate for public review and implement enforcement guidance.

The following comment is in reference to the Public Participation section of the Decision Document:

Comment 13.

Request that NOAA and EPA add language emphasizing the Program's specific commitments to public outreach and review, including but not limited to: early public review of the draft enforcement guidance, public biennial reviews and workshops, public reviews at the end of each five-year period, public document production as per Water Code Section 13369, public involvement with the Interagency Coordinating Council, and other opportunities. We also ask that this section include a specific requirement that the State respond, in writing and in a timely fashion (*i.e.*, before decisions are made), to written comments related to the Program reviews. This information and opportunities for comment will help the public become far more effectively involved in their Program.

Response:

The decision to approve the Public Participation component of the Program was made on June 30, 1998 in the document *Findings for the California Coastal Nonpoint Program*. In that document, NOAA and EPA urged California to build its public participation efforts in order to ensure broad public participation in implementation of the program and provide regular communications on the status of the program. It is not a requirement of the 6217 program that states respond in writing to written comments related to the states' own program reviews. As described in *Comment 6*, NOAA and EPA will be examining the public participation component of the program as part of their overall program review process and expect that the State will meet the commitments and schedule outlined in the Program Plan. There will be ample opportunity for public participation in NOAA and EPA's public review process.

The following language has been added to the *Public Participation* section of the Decision Document:

NOAA and EPA expect that the State will provide opportunities for broad public participation in the Program, as stated in the *Findings for the California Coastal Nonpoint Program (June 30, 1998)*. In the Program Plan, the State has committed to a number of public participation efforts, including but not limited to the following:

- public review of the draft enforcement guidance

- public biennial reviews and workshops
- public reviews at the end of each five-year plan implementation period
- public involvement with the Interagency Coordinating Council
- public document production by August 1 of each year, pursuant to Water Code §13369

II. Friends of the Garcia River (FROG)

Comment 14.

The State's ability to monitor agriculture and timber harvesting land use operations is many orders of magnitude below sufficiency and thus the federal response should be to withhold funding until a meaningful change takes place.

Response:

The Program Plan includes significant commitments by the State to improve water quality monitoring and assessment. These include efforts to develop mechanisms to track both MM implementation and their effectiveness in reducing nonpoint source pollution over the next 13 years. In addition, the memorandum from the Secretaries of the CalEPA and Resources referred to in *Comments 6* and *7* includes the need for State agencies to track, monitor, assess, and report on actions in the Program Plan, consistent with State law (Water Code sections 13165 and 13369 [AB227]) and in accordance with the Program Plan.

Comment 15.

California's Forest Practice Rules have been declared incapable of protecting the beneficial uses of water. Yet nothing is mentioned of the California Department of Forestry/Board of Forestry responsibility for implementation and monitoring.

Response:

NOAA and EPA recognize that the Board of Forestry (BOF) and the California Department of Forestry and Fire Protection (CDF) have an important role in successfully implementing nonpoint source MMs as formalized in an 1988 Management Agency Agreement (MAA) between the State Board and BOF/CDF. The Program Plan commits the State Board to review and as necessary update this agreement to ensure consistency with the goal of implementing the MMs by 2013 and related aspects such as monitoring and tracking implementation. As noted in the response to *Comment 14*, the Secretaries of the CalEPA and Resources have directed the State agencies under their purview, including the BOF and CDF, to undertake assessment and monitoring for Program Plan activities, pursuant to State law. Furthermore, NOAA and EPA recognize that while actions to date are sufficient to address the condition for program approval pursuant to the 6217 program, additional forestry MMs will be necessary to adequately address water quality concerns. NOAA and EPA encourage the State to adopt new Forest Practice Rules (FPRs) in order to meet water quality standards and protect anadromous salmonid populations, and to continue its efforts to improve implementation of the existing rules. To meet this need the State must continue to coordinate with the National Marine Fisheries Service (NMFS) to ensure that the FPRs meet the requirements of the federal Endangered Species Act to ensure the

July 2000

protection of salmonids consistent with the 1998 Memorandum of Agreement between the State and NMFS. The decision to approve the Program Plan pursuant to CZARA does not relieve the State of its responsibilities to comply with the federal Endangered Species Act.

III. Coast Action Group

Comment 16.

We have no science, no MMs, substandard BMPs, and no enforcement. Now, it is claimed that there is or will be some sort of process that links the implementing agency with the enforcement agency-with commitment to use existing enforcement authority. Please indicate how this is going to work. It is obvious there is a long way to go before anything is working properly with development and enforcement of BMPs and MMs.

Response:

See *Comments 2* and *5* for a discussion of NOAA and EPA's basis for program approval.

Comment 17.

Existing programs for the protection of the beneficial uses of water in California from nonpoint source pollution from agricultural and silvicultural operations are either ineffective or nonexistent. More work needs to be done by the State, including funding, staffing, and training as well as fixing inappropriate MMs and BMPs. Approval of such program must be withheld, under CZARA, until appropriate standards are met.

Response:

The Program Plan represents a significant commitment by the State to expand its efforts over the next 13 years to prevent and control nonpoint source pollution. It also provides a process for developing and implementing additional MMs in order to ensure that ultimately State water quality standards and beneficial uses will be met and maintained. Please see *Comments 2* and *14* for more information on NOAA and EPA's basis for program approval, and the State's plans to improve the tracking of agriculture and forestry measures.