

Secretary's Order No.: **2009-S-0047**

RE: Approving Amendments to
7 DE Admin. Code 5103:

Delaware Coastal Management Program Federal Consistency Policies and Procedures

Date of Issuance: December 15, 2009

Effective Date: January 11, 2010

I. Background:

A public hearing was held on Wednesday, October 28, 2009, at 6:00 p.m. at the DNREC St Jones Reserve, 818 Kitts Hummock Road, Dover, Delaware, in order for the Department of Natural Resources and Environmental Control, Division of Soil and Water Conservation (hereinafter referred to as "DNREC" and/or "Department") to receive comment on the proposed Comprehensive Update and Routine Program Implementation to the *Delaware Coastal Management Program Federal Consistency Policies and Procedures*. The *Delaware Coastal Management Program* (hereinafter referred to as "DCMP"), as dictated by the National Oceanic and Atmospheric Administration (hereinafter referred to as "NOAA") must routinely update its policies to maintain the authority to manage the coastal resources of Delaware and evaluate federal activities, permits and plans to the maximum extent to ensure practicable consistency by those pursuing these actions.

The Coastal Zone Management Act (hereinafter referred to as "CZMA") was signed in 1972 (P.L. 92-583). In response to the CZMA of 1972, Delaware prepared a Final Environmental Impact Statement (hereinafter referred to as "FEIS") for the development of a coastal program and submitted it to NOAA. In 1979, the CZMA was approved by NOAA under authority of the CZMA (15 CFR 923). The FEIS established

the DCMP, as well as its goals and policies, and became Delaware's Program Document. DNREC is the State agency responsible for the administration of the State's Coastal Management Program.

Section 306 of the CZMA provides states with approved coastal management programs the authority to review federal activities (direct actions, licenses or permits, financial assistance, and Outer Continental Shelf exploration) for consistency with State Coastal Management Policies. Section 306 further provides states with a means to update their coastal programs with approval from NOAA. This procedure is called a Routine Program Change.

Many of Delaware's environmental laws and regulations have been amended and/or new ones established since the last Routine Program Change in 2004. As a result, DCMP proposes to update and/or delete existing 2004 policies accordingly at this time. This proposed Routine Program Change updates and revises the DCMP policies, and clarifies Delaware's Federal Consistency Procedures. The result is a new working document containing policies and procedures for utilization during federal consistency reviews, to wit: the 2009 DCMP Policy Document, as set forth by this proposed promulgation.

The CZMA provides that each federal agency conducting or supporting activities, whether within or outside the coastal zone, affecting any land or water use or natural resource of the coastal zone, must do so in a manner which is, to the maximum extent practicable, consistent with DCMP. Additionally, federal permits and licenses, outer continental shelf plans, and grants-in-aid which may affect Delaware's coastal zone management area must be consistent with the DCMP. The federal consistency provisions

are intended to provide a means for improved federal-local coordination regarding important federal actions which could affect the coastal resources of Delaware.

Consistency reviews enable the State of Delaware to (1) plan for and manage impacts resulting from a federal project, permit or program; (2) provide for analysis of the effects of federal actions; (3) Identify federal actions that could adversely affect coastal resources, general land use patterns, or public investment requirements; and (4) provide for an examination of federal actions in the context of the goals, objectives, and policy network contained in the DCMP. Consistency offers Delaware's state agencies, through the DCMP within DNREC's Division of Soil and Water Conservation, an opportunity for a positive voice in federal actions. Additionally, it ensures that state concerns and policies will be considered by federal agencies in federal development projects, the issuance of federal licenses and permits, the approval of outer continental shelf plans and programs, and the award of federal grants, loans, subsidies, insurance, or other various forms of federal aid.

The proposed changes to the existing *Federal Consistency Policies and Procedures* (hereinafter referred to as "FCPP") reflect recently updated or newly promulgated regulations and statutes of the State of Delaware (subsequent to 2004). The policies added, modified, or removed from this FCPP document were selected for their ability to protect, preserve, restore and develop Delaware's coastal resources in the most environmentally sensitive manner. All of the policies contained within the FCPP document have already been promulgated and adopted (i.e., they are existing regulations, statutes, and/or Executive Orders). There are no new regulations being introduced through this process. These proposed updates and changes to Delaware's FCPP are

considered a Routine Program Change under the NOAA Statute, 15 CFR 923.84(a), as these changes are not considered substantial, pursuant to 15 CFR 923.809(d).

The Department has the statutory authority to act with regard to this proposed promulgation, pursuant to 7 Del.C.,§6010, as well as 15 CFR Part 930 (Federal Consistency with Approved Coastal Management Programs) and 15 CFR 923.84(a) (Routine Program Changes to the Coastal Management Program). It should be noted that the Department received no public comments, either prior to or at the time of the public hearing held on October 28, 2009 with regard to this promulgation. Proper notice of the hearing was provided as required by law.

After the hearing, the Hearing Officer prepared her report and recommendation in the form of a Hearing Officer's Memorandum to the Secretary dated December 3, 2009, and that Report in its entirety is expressly incorporated herein by reference.

II. Findings:

The Department has provided sound reasoning with regard to the proposed amendments to the *Delaware Coastal Management Program Federal Consistency Policies and Procedures*, as reflected in the Hearing Officer's Memorandum of December 3, 2009, which is attached hereto and expressly incorporated into this Order in its entirety. Moreover, the following findings and conclusions are entered at this time:

1. The Department has jurisdiction under its statutory authority, 7 Del.C., Chapter 60, specifically, 7 Del.C.,§6010, as well as 15 CFR Part 930 (Federal Consistency with Approved Coastal Management Programs) and 15 CFR 923.84(a) (Routine Program Changes to the Coastal Management Program) to make a determination in this proceeding;

2. The Department provided adequate public notice of the proceeding and the public hearing in a manner required by the law and regulations;
3. The Department held a public hearing in a manner required by the law and regulations;
4. The Department received no public comment whatsoever with regard to this proposed promulgation;
5. The Department has reviewed this proposed amendment in the light of the Regulatory Flexibility Act, and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;
6. Promulgation of these proposed amendments will incorporate two new enforceable policies into the DCMP FCPP Document, thereby updating this program to reflect recent regulatory changes within the Department's programs, to wit: (1) that no person shall construct, install, modify, rehabilitate or replace an on-site wastewater treatment and disposal system, or construct or place any dwelling, building, mobile home, manufactured home, or other structure capable of discharging wastewater on-site unless such person has a valid license and permit issued by DNREC; and (2) water quality in the Inland Bays watershed shall be protected and improved through (1) a reduction of point sources; (2) establishment of riparian buffers; (3) use of sediment and storm water controls; and (4) proper design, installation, operation, maintenance and inspection of on-site wastewater treatment and disposal systems;

7. In addition to the two new enforceable policies, promulgation of these proposed amendments will also incorporate a new advisory policy into the DCMP FCPP Document, to wit: that the DCMP supports the establishment and the maintenance of efficient public transit systems in order to reduce impacts to air quality and natural resources of the State of Delaware;
8. Furthermore, in addition to the above new policies being incorporated into the DCMP FCPP Document, this promulgation will eliminate existing duplicative and vague language, and will provide better clarity of intent for policies presently contained within this Policy Document for both the general public and the regulated community;
9. The Department has an adequate record for its decision, and no further public hearing is appropriate or necessary;
10. The Department's proposed regulation, as published in the October 1, 2009 *Delaware Register of Regulations* and set forth within Attachment "A" of the Hearing Officer's Memorandum and attached hereto, is adequately supported, not arbitrary or capricious, and is consistent with the applicable laws and regulations. Consequently, it should be approved as a final regulation, which shall go into effect ten days after its publication in the next available issue of the *Delaware Register of Regulations*;
11. The Department shall submit the proposed regulation as a final regulation to the Delaware Register of Regulation for publication in its next available issue, and shall provide written notice to the persons affected by the Order.

III. Order:

Based on the record developed, as reviewed in the Hearing Officer's Memorandum dated December 3, 2009 and expressly incorporated herein, it is hereby ordered that the proposed amendments to the *Delaware Coastal Management Program Federal Consistency Policies and Procedures* be promulgated in final form in the customary manner and established rule-making procedure required by law.

IV. Reasons:

The promulgation of the amendments to the *Delaware Coastal Management Program Federal Consistency Policies and Procedures* will incorporate two new enforceable policies into the DCMP FCPP Document, thereby updating this program to reflect recent regulatory changes within the Department's programs. It will also incorporate a new advisory policy into the DCMP FCPP Document, namely, that the DCMP supports the establishment and the maintenance of efficient public transit systems in order to reduce impacts to air quality and natural resources of the State of Delaware. Lastly, in addition to the above new policies being incorporated into the DCMP, this promulgation will eliminate existing duplicative and vague language, and will provide better clarity of intent for policies presently contained within said Policy Document for both the general public and the regulated community.

This promulgation offers Delaware's state agencies, through the DCMP within DNREC's Division of Soil and Water Conservation, an opportunity for a positive voice in federal actions. Additionally, it ensures that state concerns and policies will be considered by federal agencies in federal development projects, the issuance of federal licenses and permits, the approval of outer continental shelf plans and programs, and the

award of federal grants, loans, subsidies, insurance, or other various forms of federal aid,
all in furtherance of the policy and purposes of 7 Del. C., Chapter 60.

/s/ Collin P. O'Mara

Collin P. O'Mara
Secretary

Ahear\DCMP.Amdmts.2009.Ord.

MEMORANDUM

TO: The Honorable Collin P. O'Mara
Cabinet Secretary, Dept. of Natural Resources and Environmental Control

FROM: Lisa A. Vest
Public Hearing Officer, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: Proposed Comprehensive Update and Routine Program Implementation to 7 DE Admin. Code 5103: *Delaware Coastal Management Program Federal Consistency Policies and Procedures (2009)*, pursuant to the authority of the National Oceanic and Atmospheric Administration – Federal Coastal Zone Management Act, 15 CFR 923.84(a)

DATE: December 3, 2009

I. Background:

A public hearing was held on Wednesday, October 28, 2009, at 6:00 p.m. at the DNREC St Jones Reserve, 818 Kitts Hummock Road, Dover, Delaware, in order for the Department of Natural Resources and Environmental Control, Division of Soil and Water Conservation (hereinafter referred to as “DNREC” and/or “Department”) to receive comment on the proposed Comprehensive Update and Routine Program Implementation to the *Delaware Coastal Management Program Federal Consistency Policies and Procedures*. The *Delaware Coastal Management Program* (hereinafter referred to as “DCMP”), as dictated by the National Oceanic and Atmospheric Administration (hereinafter referred to as “NOAA”) must routinely update its policies to maintain the authority to manage the coastal resources of Delaware and evaluate federal activities, permits and plans to the maximum extent to ensure practicable consistency by those pursuing these actions.

The Coastal Zone Management Act (hereinafter referred to as “CZMA”) was signed in 1972 (P.L. 92-583). The CZMA, along with its subsequent amendments, affirmed a national interest in the effective protection and development of the coastal zone. It should be noted that Delaware has defined its Coastal Management Area as the entire state for the purposes of the federally approved coastal management program. This should not be confused with the state coastal zone, which is a geographic area along the Delaware Bay and Atlantic Ocean Coastlines, as defined by the State of Delaware’s Coastal Zone Act.¹ The CZMA authorized the Federal Grant-in-aid program to be administered by the Secretary of Commerce. They, in turn, appointed NOAA as the responsible authority for the federal CZMA.

In response to the CZMA of 1972, Delaware prepared a Final Environmental Impact Statement (hereinafter referred to as “FEIS”) for the development of a coastal program and submitted it to NOAA. In 1979, the CZMA was approved by NOAA under authority of the CZMA (15 CFR 923). The FEIS established the DCMP, as well as its goals and policies, and became Delaware’s Program Document. DNREC is the State agency responsible for the administration of the State’s Coastal Management Program.

¹ The State of Delaware promulgated the Delaware Coastal Zone Act, or, “CZA” (7 Del.C., Ch. 70), in the early 1970’s. This State law allows DNREC to regulate industry in the Coastal Strip of Delaware. The Coastal Strip is defined in the statute as any lands and waters east of State Routes 13, 113, and 1 (north-south corridors), and an area on the north and south of the Chesapeake and Delaware Canal. The Delaware CZA is incorporated into the DCMP Policy Document, and all industrial development activities within the Coastal Zone Strip require a permit under the CZA from DNREC.

Section 306 of the CZMA provides states with approved coastal management programs the authority to review federal activities (direct actions, licenses or permits, financial assistance, and Outer Continental Shelf exploration) for consistency with State Coastal Management Policies. Section 306 further provides states with a means to update their coastal programs with approval from NOAA. This procedure is called a Routine Program Change.

Many of Delaware's environmental laws and regulations have been amended and/or new ones established since the last Routine Program Change in 2004. As a result, DCMP proposes to update and/or delete existing 2004 policies accordingly at this time. This proposed Routine Program Change updates and revises the DCMP policies, and clarifies Delaware's Federal Consistency Procedures. The result is a new working document containing policies and procedures for utilization during federal consistency reviews, to wit: the 2009 DCMP Policy Document, as set forth by this proposed promulgation.

The CZMA provides that each federal agency conducting or supporting activities, whether within or outside the coastal zone, affecting any land or water use or natural resource of the coastal zone, must do so in a manner which is, to the maximum extent practicable, consistent with DCMP. Additionally, federal permits and licenses, outer continental shelf plans, and grants-in-aid which may affect Delaware's coastal zone management area must be consistent with the DCMP. The federal consistency provisions are intended to provide a means for improved federal-local coordination regarding important federal actions which could affect the coastal resources of Delaware.

Consistency reviews enable the State of Delaware to (1) plan for and manage impacts resulting from a federal project, permit or program; (2) provide for analysis of the effects of federal actions; (3) Identify federal actions that could adversely affect coastal resources, general land use patterns, or public investment requirements; and (4) provide for an examination of federal actions in the context of the goals, objectives, and policy network contained in the DCMP. Consistency offers Delaware's state agencies, through the DCMP within DNREC's Division of Soil and Water Conservation, an opportunity for a positive voice in federal actions. Additionally, it ensures that state concerns and policies will be considered by federal agencies in federal development projects, the issuance of federal licenses and permits, the approval of outer continental shelf plans and programs, and the award of federal grants, loans, subsidies, insurance, or other various forms of federal aid.

The proposed changes to the existing *Federal Consistency Policies and Procedures* (hereinafter referred to as "FCPP") reflect recently updated or newly promulgated regulations and statutes of the State of Delaware (subsequent to 2004). The policies added, modified, or removed from this FCPP document were selected for their ability to protect, preserve, restore and develop Delaware's coastal resources in the most environmentally sensitive manner. All of the policies contained within the FCPP document have already been promulgated and adopted (i.e., they are existing regulations, statutes, and/or Executive Orders). There are no new regulations being introduced through this process. These proposed updates and changes to Delaware's FCPP are considered a Routine Program Change under the NOAA Statute, 15 CFR 923.84(a), as these changes are not considered substantial, pursuant to 15 CFR 923.809(d).

The Department has the statutory authority to act with regard to this proposed promulgation, pursuant to 7 Del.C.,§6010, as well as 15 CFR Part 930 (Federal Consistency with Approved Coastal Management Programs) and 15 CFR 923.84(a) (Routine Program Changes to the Coastal Management Program). It should be noted that the Department received no public comments prior to the time of the public hearing on October 28, 2009. There were two members of the public that attended said public hearing, however, only clarifying questions were asked by those in attendance at that time, and Department personnel answered all questions at the hearing to the full satisfaction of all those involved. Proper notice of the hearing was provided as required by law.

II. Summary of Hearing Record:

At the time of the hearing on October 28, 2009, Bonnie Arvay, Environmental Scientist of the Department's Division of Soil and Water Conservation, offered the Department's 29 exhibits (consisting of 4 large binder notebooks) pertaining to these proposed amendments, and the Hearing Officer entered them into the formal hearing record developed in this matter. Ms. Arvay then proceeded to offer a brief presentation regarding this proposed promulgation.

Ms. Arvay began the Department's presentation by explaining that the CZMA, enacted in 1972, regulated the development of coastal management programs. This is a voluntary program in which states are allowed to participate, should they choose to do so. Those states which participate are then able to obtain federal funding, as well as the right to regulate federal activities within their states which would have an effect on their coastal resources. Delaware's program was approved in 1979. One of the requirements

through the enactment of this program is for Delaware to conduct federal consistency reviews. Federal consistency is an important tool in the management, protection and preservation of natural resources in Delaware. Through federal consistency, the DCMP reviews any federal action² that may affect a land or water use or natural resource of the state within the federal coastal zone. All such actions must be consistent with the Department's enforceable policies, which in turn are all based on existing regulations, statutes, executive orders and court cases within the State of Delaware. Any private resident of the state or municipality that would like to do a project which requires a federal license or permit must also have a federal consistency determination for that project.

Ms. Arvey continued by explaining that the DCMP policies that were originally developed and approved in 1979 were based upon existing laws and statutes of that time. Thus, as goals, missions, resource areas of focus and/or laws in general change, these policies must be updated to reflect the same. The most recent update of the DCMP policies occurred in 2004. Some of these policies are categorized as "enforceable policy", while others are termed "advisory policy".

An enforceable policy is a state policy which is legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, judicial or administrative decisions, through which a state exerts control over private and public land and water uses and natural resources in the federal coastal zone. These policies all have enforceable mechanisms, which are the authorities to the policies (i.e., existing laws,

² Federal actions are those activities which are carried out directly by federal agencies, to wit: (1) Federal Agency Activities & Development Projects, CZMA 307©(1),(2), 15 CFR part 930, subpart C; (2) Federal License or Permit Activities (non-federal applicants), CZMA 307(c)(3)(A), 15 CFR part 930, subpart D; (3) Outer Continental Shelf Oil and Gas Plans, CZMA 307(c)(3)(B), 15 CFR part 930, subpart E, and/or (4) Federal Financial Assistance to State or Local Agencies, CZMA 307(d), 15 CFR part 930, subpart F.

regulations, etc.). Advisory policies, on the other hand, do not have enforceable mechanisms, and are therefore not enforceable. However, due to existing federal regulations for activities conducted directly by federal agencies, these advisory policies are strongly recommended by the Delaware Coastal Programs, and thus the federal agencies must give them consideration.

In this proposed promulgation, the Department is proposing two new enforceable policies, as well as one new advisory policy. The first new enforceable policy concerns construction modification to onsite wastewater disposal systems, specifically, that no person shall construct, install, modify, rehabilitate or replace an on-site wastewater treatment and disposal system, or construct or place any dwelling, building, mobile home, manufactured home, or other structure capable of discharging wastewater on-site unless such person has a valid license and permit issued by DNREC. The second new enforceable policy concerns the protection of water quality in the Inland Bays watershed, namely, that said water quality shall be protected and improved through (1) a reduction of point sources; (2) establishment of riparian buffers; (3) use of sediment and storm water controls; and (4) proper design, installation, operation, maintenance and inspection of on-site wastewater treatment and disposal systems. The new advisory policy states that the DCMP supports the establishment and maintenance of efficient public transit systems in order to reduce impacts to air quality and natural resources of the State.

In addition to the three policies listed above, there are numerous policies already contained with the DCMP's Policy Document which are either being modified or deleted at this time. The Department has conducted numerous updates over the years since 1979 with regard to these matters, the most recent of which occurred in 2004. Unfortunately,

many items were overlooked in the course and scope of general housekeeping during this time period. Thus, the Department is modifying numerous existing policies to (1) clarify the intent of the language and correct various clerical errors and/or references; (2) combine various policies for clarification; (3) add enforceable mechanisms; (4) reflect revision or reorganization of statutory and/or regulatory authority; and (5) correct improper citations with regard to enforceable mechanisms. Additionally, there are other policies which are being deleted at this time, due to their (1) duplicity or redundancy issues; (2) reference to a federal law or requirement; (3) not being enforceable through the federal consistency process; or (4) being pre-empted by federal law.

For the Secretary's review, and in order for the Secretary to gain a thorough understanding of these proposed updates and revisions, copies of the actual proposed amendments to the *Delaware Coastal Management Program Federal Consistency Policies and Procedures* are attached hereto as Attachment "A", and the same are expressly incorporated into this Hearing Officer's memorandum. It should be noted that the Department adhered to all appropriate Delaware statutes and the regulatory development process in this matter, and that the Department has met the standard required public noticing obligations regarding these proposed amendments. It should also be noted that the Department has reviewed this proposed amendment in the light of the Regulatory Flexibility Act, and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally.

III. Conclusions and Recommendations:

Based on the above discussion, I conclude that the Department has provided appropriate reasoning regarding the need for these proposed changes to the *Delaware Coastal Management Program Federal Consistency Policies and Procedures*. Accordingly, I recommend promulgation of these proposed amendments in the customary manner provided by law.

Further, I recommend the following findings:

12. The Department has jurisdiction under its statutory authority, 7 Del.C., Chapter 60, specifically, 7 Del.C.§6010, as well as 15 CFR Part 930 (Federal Consistency with Approved Coastal Management Programs) and 15 CFR 923.84(a) (Routine Program Changes to the Coastal Management Program) to make a determination in this proceeding;
13. The Department provided adequate public notice of the proceeding and the public hearing in a manner required by the law and regulations;
14. The Department held a public hearing in a manner required by the law and regulations;
15. The Department received no public comment whatsoever with regard to this proposed promulgation;
16. The Department has reviewed this proposed amendment in the light of the Regulatory Flexibility Act, and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;

17. Promulgation of these proposed amendments will incorporate two new enforceable policies, into the DCMP FCPP Document, thereby updating this program to reflect recent regulatory changes within the Department's programs, to wit: (1) that no person shall construct, install, modify, rehabilitate or replace an on-site wastewater treatment and disposal system, or construct or place any dwelling, building, mobile home, manufactured home, or other structure capable of discharging wastewater on-site unless such person has a valid license and permit issued by DNREC; and (2) water quality in the Inland Bays watershed shall be protected and improved through (1) a reduction of point sources; (2) establishment of riparian buffers; (3) use of sediment and storm water controls; and (4) proper design, installation, operation, maintenance and inspection of on-site wastewater treatment and disposal systems;
18. In addition to the two new enforceable policies, promulgation of these proposed amendments will also incorporate a new advisory policy into the DCMP FCPP Document, to wit: that the DCMP supports the establishment and the maintenance of efficient public transit systems in order to reduce impacts to air quality and natural resources of the State of Delaware;
19. Furthermore, in addition to the above new policies being incorporated into the DCMP FCPP Document, this promulgation will eliminate existing duplicative and vague language, and will provide better clarity of intent for policies presently contained within this Policy Document for both the general public and the regulated community;

20. The Department has an adequate record for its decision, and no further public hearing is appropriate or necessary;
21. The Department's proposed regulation, as published in the October 1, 2009 *Delaware Register of Regulations* and set forth within Attachment "A" hereto, is adequately supported, not arbitrary or capricious, and is consistent with the applicable laws and regulations. Consequently, it should be approved as a final regulation, which shall go into effect ten days after its publication in the next available issue of the *Delaware Register of Regulations*;
22. The Department shall submit the proposed regulation as a final regulation to the Delaware Register of Regulation for publication in its next available issue, and shall provide written notice to the persons affected by the Order.

 /s/ Lisa A. Vest
LISA A. VEST
Public Hearing Officer