



STATE OF DELAWARE  
**DEPARTMENT OF NATURAL RESOURCES  
AND ENVIRONMENTAL CONTROL**  
89 KINGS HIGHWAY  
DOVER, DELAWARE 19901

Office of the  
Secretary

Phone: (302) 739-9000  
Fax: (302) 739-6242

**Secretary's Order No.: 2011-S-0028**

**RE: Approval of Final Regulation for Routine Program Change to *Delaware Coastal Management Programs Federal Consistency Policies and Procedures, 7 DE Admin. Code 5104***

Date of Issuance: May 13, 2011

Effective Date: June 11, 2011

**I. BACKGROUND**

The Department of Natural Resources and Environmental Control's (DNREC or Department) Delaware Coastal Management Program (DCMP) within the Office of the Secretary commenced the proposed regulation procedure on September 11, 2009, when Start Action Notice #2009-20 was approved. The proposed regulation was to issue a Routine Program Change required by Section 306 of the Coastal Zone Management Act (CZMA) and the National Oceanic and Atmospheric Administration's (NOAA) regulations issued thereunder. NOAA also delegated to the Department certain federal authority under the CZMA to administer federal regulatory authority in Delaware subject to NOAA's oversight.

On October 18, 2010, DCMP submitted to NOAA its proposed Routine Program Change, which NOAA approved in a February 3, 2011 letter. The Department published the proposed regulation in the March 1, 2011 *Delaware Register of Regulations*. The Department held a public hearing on March 22, 2011, at DNREC's Delaware National Estuarine Research Reserve facility, 818 Kitts Hummock Road, Dover, Delaware. The

public comment period for written comments remained opened until March 30, 2011, but no one attended the public hearing or submitted written public comments.

## **II. FINDINGS AND REASONS**

The Routine Program Change amends the *Delaware Coastal Management Program Federal Consistency Policies and Procedures. 7 DE Admin. Code 5104* (Regulations), which was the subject of the last Routine Program Change authorized by Secretary's Order No. 2009-S-0047 issued December 15, 2009. NOAA established the Routine Program Change procedure under its Regulations, 15 CFR 923.84(a), in order to provide a routine update process by States of their state regulations for regulatory changes not considered substantial, as defined by NOAA regulation at 15 CFR 923.80 (d).

In this case there were no public comments and no one attended the public hearing. The Department's Tricia Arndt from DCMP developed the record with documents, which established that NOAA approved the Routine Program Change. The Routine Program Change adopted by this Order reflects the following changes: 1) modifying the procedures for submittal of federal consistency certifications and supporting documents; 2) modifying the document to include a description of the interstate consistency review process; 3) modification for the geographic location description for the review of authorizations of alternative energy projects in federal waters, and 4) modification for the geographic location descriptions for the review of federal authorization in interstate waters for dredging and dredged material disposal, offshore alternative energy development and the placement of fill for purposes of introducing non-native shellfish. 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). The Routine Program Change does not reflect any new change to state regulation that is different from that already required under federal law and regulation.

I find that the record supports adopting the Routine Program Change, which is also required under the federal regulatory authority. Should the DCMP decide to amend its Regulations in the future for a Routine Program Change, then the Department may elect to do so by using the informal process provided in the Administrative Procedures Act by the Department issuing a Secretary's Order with the final regulation amendment, which will be published in the *Delaware Register of Regulations*. This process was recommended by the presiding hearing officer to avoid the time and expense of a public hearing when the change merely reflects a Routine Program Change and is required to be made under the federal authority.

I find that the proposed regulation is properly a Routine Program Change and that the proposed regulation is not substantial, as defined by the NOAA regulation. I have reviewed the presiding Hearing Officer's Report and agree that this and subsequent Routine Program Change proposed regulations should be exempt from the public hearing process under the Administrative Procedures Act, which allows an informal regulation promulgation process for "amendments to existing regulations to make them consistent with changes in basic law but which do not otherwise alter the substance of the regulations." 29 Del. C. §10113(5). Moreover, the changes are required by NOAA, the federal agency that has federal preemption in this area, and that the Routine Program Change may also qualify for the public hearing exemption for codification of existing

agency decisions such as NOAA's approval of the Routine Program Change. Thus, even if there were any public comments, the federal laws and regulations require that the Department reflect the changes as part of the Routine Program Change.

### **III. Order**

The Department has the statutory authority to promulgate regulations under the delegated federal authority in the CZMA and the Department's authority in *7 Del. C. Chap. 60*, requires that the Department to revise its regulations as part of the Routine Program Change procedure. I agree that the Routine Program Change adopted by this Order is appropriate and based upon the record developed and the recommendations of the Department's DCMP and the Report. 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 on the proposed regulation;

5. The Routine Program Change has been reviewed under the Regulatory Flexibility Act, and the Department finds that it will not have any impact on small businesses that would warrant not promulgating the regulation;
6. The Department has an adequate record for its decision, and no further public hearing is appropriate or necessary and that future Routine Program Changes may be promulgated using the informal rulemaking procedure allowed under Delaware law;
7. The Department's proposed regulation, as published in the *Delaware Register of Regulations* and attached to the Report 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*;
8. The Department shall submit the proposed regulation as a final regulation to the *Delaware Register of Regulations* for publication in its next available issue, and shall provide written notice to the persons affected by the Order.

*s/Collin P. O'Mara*  
Collin P. O'Mara  
Secretary

## HEARING OFFICER'S REPORT

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

FROM: Robert P. Haynes, Esquire  
Senior Hearing Officer, Office of the Secretary  
Department of Natural Resources and Environmental Control

RE: Proposed Regulation Amending Delaware Coastal Management Program Federal Consistency Policies and Procedures for Required Routine Program Change under federal Coastal Zone Management Act.

DATE: May 3, 2011

### I. PROCEDURAL HISTORY

This Report considers the administrative record and makes recommendations to the Secretary of the Department of Natural Resources and Environmental Control (DNREC or Department) concerning the above-referenced proposed regulation. On September 11, 2009 the Department approved Start Action Notice #2009-20, which proposed to amend the Delaware Coastal Management Program (DCMP) Federal Consistency Policies and Procedures. *7 DE Admin. Code 5104.*

The proposed regulation would be a Routine Program Change, which is required by Section 306 of the Coastal Zone Management Act (CZMA), *16 U.S.C §1451 et seq.* and the National Oceanic and Atmospheric Administration's (NOAA) regulations issued thereunder, *15 CFR §930.1 et seq.* NOAA also delegated to the Department certain federal authority under the CZMA to administer federal regulatory authority in Delaware, subject to NOAA's ongoing oversight.

On October 18, 2010, NOAA received the Department's proposed Routine Program Change as prepared by DCMP. NOAA approved in a February 3, 2011 letter. The Department published the Routine Program Change as a proposed regulation in the March 1, 2011 *Delaware Register of Regulations*. The Department held a public hearing on March 22, 2011, at DNREC's

Delaware National Estuarine Research Reserve facility, 818 Kitts Hummock Road, Dover, Delaware. The public comment period for written comments remained opened until March 30, 2011, but no one attended the public hearing or submitted written public comments.

## **II. SUMMARY OF THE RECORD**

I find and recommend adoption of the record, consisting of the verbatim transcript of the public hearing and the documents introduced as exhibits at the public hearing and in this Report.

The Department provided for the record at the public hearing: Ex. 1-theStart Action Notice for the Delaware Register, Ex 2- the March 1, 2011 publication of the proposed regulation amendment, Ex 3- the summary of changes to the current regulation, Ex 4-the power point for the public hearing, Ex 5-the signed start action notice, Ex 6-the NOAA approval letter, Ex 7-the federal consistency regulations, Ex 8-the routine program changes, and Ex 9- the regulatory flexibility act analysis.

## **III. RECOMMENDED FINDINGS AND DISCUSSION OF REASONS**

I recommend a finding that the Department's DCMP has adequately supported the proposed regulation and recommend adoption of the proposed regulation as a final regulation without any modification. The record adequately supports the proposed amendment as appropriate and indeed necessary under the CZMA and NOAA's regulations thereunder. The Department is acting under federal authority and is required to make a Routine Program Change periodically to remain in compliance with the administration of the federal authority as delegated to the Department's DCMP.

The Routine Program Change recommended to be adopted would make the following changes: 1) modifying the procedures for submittal of federal consistency certifications and supporting documents; 2) modifying the document to include a description of the interstate consistency review process; 3) modification for the geographic location description for the

review of authorizations of alternative energy projects in federal waters, and 4) modification for the geographic location descriptions for the review of federal authorization in interstate waters for dredging and dredged material disposal, offshore alternative energy development and the placement of fill for purposes of introducing non-native shellfish. All of the policies contained within the proposed Routine Program Change amendment to the Department's Regulations have already been promulgated and adopted (i.e., they are existing regulations, statutes, and/or Executive Orders). The Routine Program Change does not reflect any new change to state regulation that is different from that already required under federal law and regulation.

Given the nature of this and likely other Routine Program Changes in the future, I also recommend that the Department consider use of the Administrative Procedures Act's informal process in the future when it needs to undertake a Routine Program Change. This will reduce the cost to implement any future Routine Program Change by avoiding the substantial expense of a court reporter and eliminate the staff time preparing for and attending a public hearing. The Routine Program Change qualifies for an informal regulation promulgation process without a public hearing because a Routine Program Change is: 1) not a substantial change in the Regulations, 2) reflects changes already approved by NOAA, 3) the NOAA changes are required to be reflected in the Department's Regulations, and 4) the regulation changes also are procedural in nature for implementing the federal consistency policies. Under the Administrative Procedures Act, state administrative agencies may promulgate regulations without a public hearing under certain exemptions by use of an informal regulation promulgation process. The Routine Program Change would qualify for such an exemption because it is an amendment "to existing regulations to make them consistent with changes in basic law but which do not otherwise alter the substance of the regulations." *29 Del. C. §10113(5)*. The exemption also applies because this Routine Program Change is to rules of practice and procedure. Finally,

this Routine Program Change reflects codification of existing agency decision by NOAA, which requires and has approved this Routine Program Change, which consequently may qualify for the exemption for “codifications of existing agency decisions.” Thus, I recommend the Department consider use of the informal procedure in the future, which would allow a Routine Program Change to become a final regulation without a public hearing but instead by a Secretary’s Order adopting a final regulation for publication in the *Delaware Register of Regulations*.

#### **IV. RECOMMENDED CONCLUSIONS**

Based on the record developed, I conclude that the record supports approval of the Routine Program Change as a final regulation and I recommend that the Secretary adopt the following findings and conclusions:

1. The Department has jurisdiction under its statutory authority 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 considered all timely and relevant public comments in making its determination;
5. The Department’s proposed regulation, as published in the *Delaware Register of Regulations* and attached to the Report 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*; and

6. The Department shall submit the proposed regulation as a final regulation to the *Delaware Register of Regulations* for publication in its next available issue, and shall provide written notice to the persons affected by the Order.

*s/Robert P. Haynes*  
Robert P. Haynes, Esquire  
Senior Hearing Officer