Questions for Discussion on OSDS
6217 Work Group Call – February 2013

1. What are the basic program components that NOAA/EPA require for a Coastal Programs-based "OSDS Program", including operation, maintenance and inspection"?
    a. Note: Many State's CZMPs do not have direct regulatory authority over the management of this land use, until it becomes a NPS issue.
    b. Note: many states are also working in a climate that is not conducive to further regulation.
    c. Note: a discussion of this as part of the 3-part test to use voluntary approaches (2001 Memo from NOAA and EPA, "Enforceable Policies and Mechanisms for State Coastal Nonpoint Source Programs") would be useful.

There are two management measures (MMs) that address OSDS: one for new OSDS and another for operating OSDS (i.e., not new systems).

The "New OSDS MM" includes 5 separate components, or elements. In general, EPA and NOAA have placed the most scrutiny on siting systems away from unsuitable areas, establishing protective setbacks and separation distances, and controlling nitrogen loadings from N-limited waters. In general, most states have not had much problem meeting this management measure, although some states have struggled with the vertical separation distance element.

The "Operating OSDS MM" includes 3 separate elements. The first element has not really been subject to much discussion over the years since phosphate-free detergents and low-flow plumbing are more widespread now than 20 years ago. Generally, the third element—to address nitrogen loadings in N-limited waters has not been difficult for most states to address. It is the second element in the Operating OSDS MM that has hung up more states than any other element or condition: "Inspect OSDS at a frequency adequate to ascertain whether OSDS are failing." With regard to this, NOAA and EPA have accepted a wide variety of approaches from the 22 states that have already met conditions for this element. See responses to the other questions for more specific detail regarding our expectations on how to meet this condition.

Regarding Notes (a) & (b), all states already have rules on their books regarding regulation of OSDS, which cover siting, etc., most of which have been updated multiple times and which have become more restrictive over time. Some states just go farther than others with regard to the maintenance component. EPA and NOAA are sensitive to these differences and varying political climates and have accepted a wide variety of regulatory and voluntary strategies.

Per Note (c): "a discussion of this as part of the 3-part test to use voluntary approaches would be useful." See response to 3. (b) & (c) at the end.

2. What are the basic elements required for this "OSDS inspection" and what are some different ways that a State can meet them through their CZMP?

"Inspect OSDS at a frequency adequate to ascertain whether OSDS are failing."

The "Applicability" section makes it clear that the management measure applies to "all operating OSDS", except for extremely isolated conventional systems (density of 1 system per 20 acres and at least 1250 feet from water). The goal of this MM is to "minimize pollutant loadings from operating OSDS" and "requires that OSDS be modified, operated, repaired, and maintained to reduce nutrient and pathogen loadings." The "Description" section makes it clear that this element is intended to reduce groundwater contamination, as well as surface water protection. The (g) guidance states that "Failure occurs when a system does not provide the level of treatment that is expected from the specific OSDS design."

The (g) guidance lists several strategies in the "Description" section as options for meeting this element:

- Require scheduled pump-outs and regular maintenance;
- Inspections upon resale or change of ownership of properties, with corrective action taken prior to change of ownership (This is noted as a minimum requirement.);
- Establishing wastewater management utilities or districts, a.k.a Responsible Management Entities (RMEs) (This strategy keeps costs down to state and local governments. EPA has provided extensive guidance on RMEs. See, for example: http://water.epa.gov/scitech/wastetech/upload/septic_guidelines.pdf).

Other strategies include:

- Electrical permits for new owners and renters are tied to inspection-based certification that OSDS is in good working order;

Bottom Line:
NOAA and EPA will accept a program that either inspects systems at the time of sale of the property or that focuses inspections on identified problem areas (e.g., lots with older OSDS, known high failure rates, or known OSDS-induced water quality problems), consistent with available resources, if there is sufficient commitment on the part of the state to implement (e.g., commitment to provide staff/resources to all problem areas in the 6217 management area over time). Identification of all potential problem areas is critical for this second approach. Has the state gone through the necessary assessment to determine the full extent of where OSDS are contributing to water quality problems?

a. Three or four examples would be helpful (such as a comparison of examples from 'Home rule' states vs. 'non-home-rule' states).

Home rule is the ability for local governments to pass laws without "enabling legislation" from the state that clearly confers such authority in prescribed areas of governance. Ideally, states that do not grant home rule to their localities (so-called Dillon Rule states) should seek enabling legislation on behalf of local governments to allow for more protective OSDS regulations than the minimum state requirements. For Dillon Rule states that have not passed such enabling legislation, sole responsibility for passing more protective OSDS maintenance rules lies with the state itself, and the state should take this responsibility to protect its environment, human health, and the long-term functionality of a home's wastewater system very seriously. Dillon Rule states that choose to neither exercise their authority to pass protective regulations nor pass enabling legislation can still meet the management measure by relying on voluntary approaches, provided the necessary

commitment and resources are applied to meet the intent of the management measure. For instance, a state can rely on a combination of the following:

- Demonstrate that lending institutions require point-of-sale inspections;
- Commit to funding state staff to inspect all OSDS in problem areas over a 15-year implementation period. Ideally, these inspections should be repeated periodically.

Note that EPA and NOAA will provide some credit for states that have protective practices, such as:

- Requirements for effluent filters and a fact-based statement that a significant percentage of septic systems have these filters in place;
- Requirements for flow diversion valves and alternating drainfields.

With regard to examples from specific states, rationales for the full suite of management measures, including the inspections element of Operating OSDS, for the 22 fully approved states are available online here: http://coastalmanagement.noaa.gov/nonpoint/pro_approve.html

b. Subquestion: How much leeway is there to incorporate traditional methods of inspection that may be based on visual walk-around methods for signs of obvious dysfunction?

NOAA and EPA do not support visual walk-around methods that do not inspect inside septic tanks as complete inspections, even when applied wholesale across high risk areas. However, such surveys can be helpful if used to augment more robust strategies (e.g., point-of-sale inspections for all systems + visual inspections for all systems in high risk areas). These visual inspections only help identify failures that have already occurred, and only a subset of those, as they do not provide information regarding subsurface failure or maintenance factors. Visual walk-around inspections miss certain types of failures such as cracked, rusting, or otherwise leaking septic tanks, broken, damaged, or misaligned inlet or outlet tees, and can even miss more obvious types of failures if observed during dry weather conditions. They are more reactive rather than preventative, and are therefore insufficient for meeting the intent of this management measure.

3. Discussion of program elements/state examples.
   a. If the federal partners can share examples of successful program elements from other states, that would be most useful.

- Network of inspection programs backed by enforceable authorities;
- Mandatory pump-outs;
- Establishment of Responsible Management Entities for OSDS maintenance;
- Regulatory point of sale inspections;
- Lending institutions requires inspection for mortgage approval;
- Voluntary inspections backed by enforceable authorities, subject to the 3-pronged "Enforceable Policies and Mechanisms" requirements presented in EPA/NOAA's 1998 "Final Administrative Changes".

b. For Georgia, a pressing question is: how can the program provide reasonable and acceptable documentation of the inspections of systems that the state considers to be occurring in its high priority areas and how would tracking of it

ideally mesh with the new 319 nonpoint source program 5 year plans?

c. For Texas, a pressing question is: how have approved states tracked and documented success in implementing their strategies?

Parts (b) and (c) are really the same question: what level of documentation is needed to track implementation?

It has varied from state to state. The level of tracking (and documentation of this tracking) depends on the degree to which the state is relying on voluntary approaches. States that are relying on a rule for time-of-transfer inspections need not provide a commitment to track. Likewise, if the state has demonstrated that mortgage lending institutions require time-of-transfer inspections for nearly all of their property transactions, states do not need to track this. If a state is relying on education and outreach (e.g., mailing out a reminder once every 3 years to homeowners or tenants to get their OSDS inspected voluntarily), such a strategy would necessitate a greater need for tracking and documentation to ascertain whether the strategy is achieving the desired success. This overlaps with the Monitoring and Tracking component of CZARA, which is the subject of Chapter 8. This also relates to EPA/NOAA's 3-pronged Enforceable Policies & Mechanisms guidance issued in 1998. The guidance reads:
"NOAA and EPA will approve those program elements for which states have proposed voluntary or incentive-based programs, backed by existing state enforcement authorities, if the following is provided:

1. … [legal opinion]
2. a description of the voluntary or incentive-based programs, including the methods for tracking and evaluating those programs, the states will use to encourage implementation of the management measures; and
3. … [description of link between implementing agency and enforcement agency & commitment to enforce when needed]

While NOAA and EPA generally do not see the results of this tracking (which often occurs after full program approval), we need to see the description of how the tracking will occur. This description should include who will implement the activity (e.g., which agency) and how, what and where the state will track implementation to enable an evaluation of the program's success. A submittal with this information should generally not be more than one or two pages long.