



NOV 30 2012

**To All Interested Government Agencies and Public Groups:**

Under the National Environmental Policy Act, an environmental review has been performed on the following action.

**TITLE:** Finding of No Significant Impact for the Environmental Assessment (FONSI) for the Approval of the New York Coastal Management Program's Program Change Request to Incorporate Hudson River Significant Coastal Fish and Wildlife Habitats

**LOCATION:** New York Coastal Management Program

**SUMMARY:**

The New York management program was approved in 1982 and includes coastal areas along the Atlantic Ocean and Long Island Sound, the Hudson River, and the Great Lakes and St. Lawrence River. The original management program included 44 Coastal Policies, which address development, fish and wildlife, flooding and erosion, public access, recreation, historic and scenic resources, agricultural lands, energy and ice, water and air resources, and wetlands. These policies are still in effect and have not been revised since they were originally approved. The State applies the policies through federal consistency reviews as well as state consistency reviews. Similar to federal consistency, the State has a law that requires state and local agency actions to be consistent with the policies ("state consistency").

In accordance with the requirements of the Coastal Zone Management Act, the NY Coastal Management Program (CMP) has submitted to NOAA a request for approval of a Routine Program Change (RPC) to its Significant Coastal Fish and Wildlife Habitat (SCFWH) designations along the Hudson River from below the Troy Dam to just above the Tappan Zee Bridge.

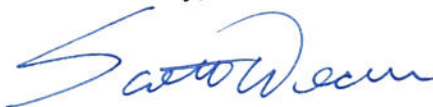
NOAA has prepared an Environmental Assessment on its action to approve the RPC request for the Hudson River. NOAA does not believe that approval of the RPC request will have a significant impact to the environment for several reasons. First, the SCFWH changes do not include new or revised enforceable policies that address coastal uses or resources not previously managed. Second, the SCFWH changes do not have a substantial impact on the national interest.



**RESPONSIBLE OFFICIAL:** David M. Kennedy, Assistant Administrator for Ocean Services and Coastal Zone Management, NOAA, 1305 East-West Highway, 13<sup>th</sup> Floor, Silver Spring, MD 20910, 301-713-3074.

The environmental review process led us to conclude that this action will not have a significant effect on the human environment. Therefore, an environmental impact statement will not be prepared. A copy of the finding of no significant impact including the supporting environmental assessment is enclosed for your information. Although NOAA is not soliciting comments on this completed EA/FONSI we will consider any comments submitted that would assist us in preparing future NEPA documents. Please submit any written comments to the responsible official named above.

Sincerely,

A handwritten signature in blue ink, appearing to read "Patricia A. Montanio".

*FOR* Patricia A. Montanio  
NOAA NEPA Coordinator

Enclosure

**Environmental Assessment  
for the Approval of a Routine Program Change to Incorporate  
New and Revised Significant Coastal Fish and Wildlife Habitats  
into the New York Management Program**

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## **I. Introduction**

### **A. Coastal Zone Management Act**

Recognizing the need for a coordinated effort in managing the nation's coastal uses and resources, in 1972, Congress passed the Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451-1466. The Act seeks to encourage states to exercise more fully their authorities and responsibilities over coastal resources and uses through the voluntary development of comprehensive state coastal management programs (management programs) that balance resource protection, use, and development. The primary incentives for states to develop management programs are the receipt of federal funds to develop and implement the programs and the requirement that federal actions must be consistent with the enforceable policies of approved programs (referred to as "federal consistency").

The Office of Ocean and Coastal Resource Management (OCRM) within the National Oceanic and Atmospheric Administration (NOAA) administers the CZMA and is responsible for approving management programs and program changes.

To receive federal approval, a management program must satisfy the program approval criteria in 16 U.S.C. § 1455(d) and the requirements in the implementing regulations at 15 C.F.R. part 923, subparts B-F. In general, management programs must address five program areas: 1) uses subject to management, 2) special management areas, 3) boundaries of the state's coastal zone, 4) authorities and organization, and 5) coordination, public involvement and national interest. *See* 15 C.F.R. part 923, subparts B-F.

#### ***1. Program Changes***

The CZMA recognizes that states may need to modify their approved management programs. *See* 16 U.S.C. § 1455(e). Any change to one of a management program's five program areas is a "program change." Program changes must be submitted to and approved by OCRM if: 1) the change pertains to an approved element of the management program; or 2) the state wishes to use the change for federal consistency.<sup>1</sup> Program changes must be submitted either as a routine program change (RPC) or an amendment. *See* 15 C.F.R. part 923, subpart H. A routine program change is a further detailing of the state management program while an amendment is a substantial change to one of the five program areas. *See id.*

OCRM's review of program changes is limited to two elements. First, OCRM determines whether the change would cause the management program to no longer satisfy the program approval criteria and requirements in 16 U.S.C. § 1455(d) and 15 C.F.R. part 923, subparts B-F. Second, OCRM evaluates whether the change raises other approvability issues such as the enforceability of policies for federal consistency review purposes. OCRM does not consider whether the change is "good" or "bad." Thus, OCRM must approve the program change, whether an RPC or an amendment, unless the change 1) causes the management program to no

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<sup>1</sup> OCRM, *Program Change Guidance* (1996), 2, <http://coastalmanagement.noaa.gov/consistency/media/guidanceappendices.pdf>.

longer satisfy the program approval criteria and requirements, or 2) raises other approvability issues.

OCRM's approval or denial of a program change does not affect the implementation or enforceability of the policies as a matter of state law. Changes to statutes, regulations, and other requirements that are legally binding under state law are effective regardless of whether they are approved by OCRM. OCRM's approval only supplements the state's existing authority by giving the changes effect for federal consistency purposes.

## **2. Federal Consistency**

Federal consistency is a CZMA requirement that federal actions that have reasonably foreseeable effects on any coastal uses or resources be consistent with the enforceable policies of a state's federally-approved management program. *See* 15 C.F.R. part 930. The essence of the federal consistency requirement is that, if a state chooses to develop a comprehensive management program that meets the requirements of the CZMA, federal actions are required to be consistent with the policies of the management program. Although a state may have authority over most activities independent of the federal consistency review process, states ordinarily do not have authority over federal actions except under those circumstances where Congress has acceded to state review. The federal consistency provisions of the CZMA extend the reach of states by giving them the ability to review federal agency activities, authorizations, and financial assistance that may have reasonably foreseeable effects on coastal resources or uses.

Federal agency activities, such as federal construction projects, must be consistent to the maximum extent practicable with a state's enforceable policies. Activities that require a federal authorization, such as a license or permit, must be fully consistent with a state's enforceable policies in order for a federal agency to approve the activity. Federal financial assistance to state and local governments must also be fully consistent with a state's enforceable policies.

If a state finds that an activity is not consistent with its federally-approved enforceable policies, the state may object to the activity. In the case of activities that require a federal authorization, such as a license or permit, a state objection means that the federal agency cannot authorize the activity, unless the state's objection is overridden on appeal to the U.S. Secretary of Commerce. One of the limitations on states' federal consistency authority is that state review and objection can only be based on federally-approved enforceable policies. Thus, any new or revised enforceable policy must be submitted to and approved by OCRM as a program change before the state can use the policy to determine federal consistency.

### **B. New York Management Program & Significant Coastal Fish and Wildlife Habitats**

The New York management program was approved in 1982 and includes coastal areas along the Atlantic Ocean and Long Island Sound, the Hudson River, and the Great Lakes and St. Lawrence River. The original management program included 44 Coastal Policies, which address development, fish and wildlife, flooding and erosion, public access, recreation, historic and scenic resources, agricultural lands, energy and ice, water and air resources, and wetlands. These policies are still in effect and have not been revised since they were originally approved. The

State applies the policies through federal consistency reviews as well as state consistency reviews. Similar to federal consistency, the State has a law that requires state and local agency actions to be consistent with the policies (“state consistency”).<sup>2</sup>

For the purposes of this EA, the primary relevant policy is Coastal Policy 7, which provides that “significant coastal fish and wildlife habitats [(SCFWHs)] will be protected, preserved, and where practical, restored so as to maintain their viability as habitats.”<sup>3</sup> An action is inconsistent with this policy if it will impair the habitat based on a variety of physical, biological, and chemical parameters. Each SCFWH has a narrative, which includes a description of fish and wildlife values, an impact assessment, and habitat impairment test, that provides a more detailed guide for federal and state consistency reviews.

To implement Coastal Policy 7, the State has designated over 250 SCFWHs throughout the coastal area that have been approved by OCRM as part of New York’s management program. The Hudson River SCFWHs, which are the focus of this EA, were first designated by the State in 1987 and approved by OCRM in 1990. In recent years, the State has undertaken a statewide effort to update the SCFWH designations based on new scientific data and information.<sup>4</sup> As a result of this effort, the State adopted the new and revised Hudson River SCFWHs on July 19, 2012, after which they became binding under state law.

## **II. Purpose and Need**

On August 2, 2012, New York submitted a request to incorporate the Hudson River SCFWH changes into the New York management program as a routine program change request pursuant to 15 C.F.R. § 923.84 and OCRM’s 1996 Program Change Guidance.<sup>5</sup> In response, OCRM’s proposed action is to approve the SCFWH changes.<sup>6</sup> The purpose of OCRM’s action is to fulfill its responsibility under the CZMA to review and respond to the State’s program change request. OCRM’s approval is needed to allow the State to use the changes for federal consistency.

## **III. Description of Proposed Action and Alternatives**

The proposed federal action is OCRM’s approval of the incorporation of changes to the Hudson River SCFWHs into the New York management program as an RPC pursuant to 15 C.F.R. § 923.84. OCRM has preliminarily determined that the SCFWH changes constitute an RPC

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<sup>2</sup> See 19 NYCRR part 600.

<sup>3</sup> U.S. Department of Commerce, NOAA, Office of Coastal Zone Management, *State of New York Coastal Management Program and Final Environmental Impact Statement* (1982), II-6-36, <http://www.gpo.gov/fdsys/search/pagedetails.action?browsePath=1982&granuleId=&packageId=CZIC-td194-56-n7-n37-1982-v-1&fromBrowse=true>. An excerpt of the Coastal Policies is available at <http://www.dos.ny.gov/communitieswaterfronts/pdfs/CoastalPolicies.pdf>

<sup>4</sup> The first phase of this effort was the update of the Long Island Sound SCFWHs, which was completed and approved by OCRM as a program change in 2009.

<sup>5</sup> New York’s routine program change submission is available at [http://www.dos.ny.gov/communitieswaterfronts/newsEvents/program\\_change.html](http://www.dos.ny.gov/communitieswaterfronts/newsEvents/program_change.html).

<sup>6</sup> OCRM’s original decision deadline was August 30, 2012. Pursuant to 16 U.S.C. § 1455(e), on August 15, 2012, OCRM extended its decision deadline to September 30, 2012, and on September 4, 2012, OCRM extended its decision deadline to November 30, 2012.



because they are a further detailing of provisions that have already been approved and implemented as part of the State's management program. *See* 15 C.F.R. § 923.84(a). Consequently, approval of the SCFWHs changes as an RPC is OCRM's preferred alternative (other alternatives considered are discussed in more detail below). The original New York management program, which NOAA approved in 1982, recognized SCFWHs and their supporting narratives as an integral part of Coastal Policy 7.<sup>7</sup> The designation of SCFWHs was also a basis for NOAA's finding that the New York management program satisfied the program approval requirement for areas for preservation or restoration under 15 C.F.R. § 923.22.<sup>8</sup> Thus, the current SCFWH changes are a further detailing of the State's approved management program.

In addition, the SCFWH changes likely constitute an RPC because they are not a substantial change to one of the five program areas (i.e., uses subject to management; special management areas; boundaries; authorities and organization; and coordination, public involvement, and the national interest). *See* 15 C.F.R. §§ 923.84(a) & 923.80(d). The SCFWH changes do not have any of the three indicators of a substantial change provided in OCRM's 1996 Program Change Guidance.

First, the SCFWH changes do not include new or revised enforceable policies that address coastal uses or resources not previously managed. The SCFWHs by themselves cannot be relied upon as enforceable policies. They are applied through Coastal Policy 7, which has not been revised since it was originally approved. In addition, the State has not modified the procedures or criteria that it uses to designate SCFWHs. The State has only updated the SCFWHs to reflect new scientific data and information. Finally, regardless of the SCFWH changes, the uses and resources found within the SCFWHs are already subject to management by the State.

Second, the SCFWH changes do not have a substantial impact on the national interest. The CZMA recognizes numerous national interests, including national defense, ports and transportation, fisheries, recreation, and energy. *See* 16 U.S.C. § 1452(2)(D). The CZMA regulations further recognize the national interest in energy facilities by requiring management programs to have an energy facility planning process and to provide for adequate consideration of the national interest in the siting of facilities which are of greater than local significance. *See* 15 C.F.R. §§ 923.12 & 923.52. Recognition of a national interest in energy facilities does not mean that states cannot have energy-specific policies or policies that affect energy facility siting. In fact, states must have an energy facility planning process to have an approvable management program.<sup>9</sup> The potential for a change to constitute a substantial change to the national interest could arise if a state revises or adopts a policy that prohibits or greatly restricts the siting of particular energy facilities on a statewide basis. The SCFWH changes do not prohibit or directly regulate energy facilities. They apply to all activities that may impair SCFWHs. As discussed in section IV.B, the SCFWH changes do not retroactively apply to existing activities and the result

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<sup>7</sup> *State of New York Coastal Management Program and Final Environmental Impact Statement*, II-6-35 – II-6-37.

<sup>8</sup> *Findings of William Matuszeski Acting Assistant Administrator for Coastal Zone Management National Oceanic and Atmospheric Administration Regarding Approval of the New York Coastal Management Program* (1982), 22-23.

<sup>9</sup> 15 C.F.R. § 923.13.

of their application during future federal consistency reviews is uncertain. Therefore, the SCFWH changes do not have a substantial impact on the national interest in energy facilities.

Third, previous SCFWH changes have not been treated as amendments. OCRM has approved all of the new and revised SCFWHs as RPCs, for a total of nine RPCs since 1987.

OCRМ considered the following four alternatives:

***Alternative 1: Approve the SCFWH Changes as an RPC (preferred alternative)***

OCRМ's proposed action and preferred alternative is to approve the SCFWH changes as an RPC. As discussed above, OCRM has preliminarily determined that the changes constitute an RPC. As a result of OCRM's approval, the State would be able to use the SCFWHs during its federal consistency review of applications for federal authorizations filed after OCRM's approval.

***Alternative 2: Deny the SCFWH Changes as an RPC and Advise the State to Resubmit the Changes as an Amendment***

OCRМ could deny the SCFWH changes as an RPC if they are substantial changes that constitute an amendment. In such a situation, OCRM would advise the State to resubmit the changes as an amendment. As a result of OCRM's denial, the State would not be able to use the SCFWHs during its federal consistency review until OCRM approves the amendment. In the interim, the SCFWHs would still have effect under state law and be applicable for the state consistency review.

For the reasons discussed above, however, the changes are likely not substantial. Even if OCRM determined that the changes are substantial, the substantive result would likely be the same as that under the first alternative (although the timing of OCRM's decision might be different). In response to the State's request to incorporate the SCFWH changes as an amendment, OCRM would likely make a preliminary determination that the New York management program still constitutes an approvable program because the State has satisfied the program approval criteria in 16 U.S.C. § 1455(d) and requirements in 15 C.F.R. part 923, subparts B-F. *See* 15 C.F.R. § 923.82(a). As discussed above, SCFWHs were included in the original program and a basis for its approval. Changes to the SCFWHs do not call into question the program's approvability. Having preliminarily determined that the New York management program still constitutes an approvable program, OCRM would prepare an EA proposing to approve the changes. *See* 15 C.F.R. § 923.82(c). Thus, the end result likely would be the same as the preferred alternative, although the timing of OCRM's approval decision would be later in time.

***Alternative 3: Deny the SCFWH Changes***

OCRМ could deny the SCFWH changes if they raise program approvability concerns. In such a situation, the State would have to revise the changes to address the approvability issues before seeking OCRM's approval of the changes as an RPC or an amendment. As a result of OCRM's denial, the State would not be able to use the SCFWHs during its federal consistency review, but

the SCFWHs would still have effect under state law and be applicable for the state consistency review.

The SCFWH changes likely do not raise any approvability issues, however. The SCFWH changes are not preempted by federal law, do not regulate a federal agency or federal lands, are not arbitrarily discriminatory, and are not inconsistent with the CZMA national interests. In addition, as explained above, the New York management program would continue to constitute an approvable program as a result of the SCFWH changes. Therefore, OCRM likely has no basis for outright denial of the SCFWH changes.

#### ***Alternative 4: No Action***

OCRMs could take no action to either approve or deny the SCFWH changes. Under the CZMA, if OCRM fails to respond to a state's RPC request, the changes are deemed approved. *See* 16 U.S.C. § 1455(e) and 15 C.F.R. § 923.84(b)(3). Therefore, this alternative would have the same effect as approving the changes under the preferred alternative.

### **IV. Affected Environment and Environmental Consequences**

#### **A. Affected Environment**

Forty SCFWHs are located along the Hudson River south of the Troy Dam, in the counties of Albany, Rensselaer, Greene, Columbia, Ulster, Dutchess, Orange, Putnam, Rockland, and Westchester.<sup>10</sup> The size of the SCFWHs range from approximately 30 acres to 8,000 acres, and reach inland from approximately 0.5 miles to 25 miles.

The following documents and sources provide more thorough descriptions of the Hudson River, and are incorporated by reference as permitted by 40 C.F.R. § 1502.21:

1. State of New York Coastal Management Program and Final Environmental Impact Statement  
(<http://www.gpo.gov/fdsys/search/pagedetails.action?browsePath=1982&granuleId=&packageId=CZIC-td194-56-n7-n37-1982-v-1&fromBrowse=true>)
2. Hudson River National Estuarine Research Reserve  
(<http://www.dec.ny.gov/lands/4915.html>;  
[http://www.nerrs.noaa.gov/Doc/PDF/Reserve/HUD\\_SiteProfile.pdf](http://www.nerrs.noaa.gov/Doc/PDF/Reserve/HUD_SiteProfile.pdf))
3. Hudson River Valley National Heritage Area Management Plan  
([http://www.hudsongreenway.ny.gov/Libraries/PDF\\_s/NHAManagementPlan.sflb.ashx](http://www.hudsongreenway.ny.gov/Libraries/PDF_s/NHAManagementPlan.sflb.ashx))
4. Technical Memorandum: Procedures Used To Identify, Evaluate and Recommend Areas For Designation As "Significant Coastal Fish And Wildlife Habitats"

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<sup>10</sup> *See* Appendix A for a map of the Hudson River. Maps of the 40 SCFWHs can be found under "Final Habitat Narrative" at [http://www.dos.ny.gov/communitieswaterfronts/newsEvents/program\\_change.html](http://www.dos.ny.gov/communitieswaterfronts/newsEvents/program_change.html), and are incorporated by reference.

([http://www.dos.ny.gov/communitieswaterfronts/pdfs/1984\\_SCFWH\\_technical\\_memorandum.pdf](http://www.dos.ny.gov/communitieswaterfronts/pdfs/1984_SCFWH_technical_memorandum.pdf))

5. Final Environmental Impact Statement for the Hudson River Estuary Action Agenda 2005-2009 ([http://www.dec.ny.gov/docs/remediation\\_hudson\\_pdf/aa05geis.pdf](http://www.dec.ny.gov/docs/remediation_hudson_pdf/aa05geis.pdf))
6. Hudson River Salt Front Data ([http://ny.water.usgs.gov/projects/dialer\\_plots/saltfront.html](http://ny.water.usgs.gov/projects/dialer_plots/saltfront.html))
7. Hudson River PCBs Superfund Site (<http://www.epa.gov/superfund/accomp/success/udson.htm>)

New York has modified the narratives of 18 existing SCFWHs, modified both the boundaries and narratives of 13 existing SCFWHs, combined 4 previously designated SCFWHs into 2 SCFWHs, and designated 7 new SCFWHs, for a new total of 40 designated SCFWHs in the Hudson River area. The State made these changes because new and updated scientific information became available to replace the information upon which the original designations were based in 1987. In addition to the narratives and boundaries, the “habitat index” and “significant value” scores for each SCFWH have also been modified accordingly. Altogether the changes constitute an increase in size of about 22%, from 37,877 acres to 46,350 acres.<sup>11</sup> The full list of changes submitted to OCRM for review is below, and detailed descriptions of each of the 40 SCFWHs can be found at the link in the footnote.<sup>12</sup> These detailed descriptions are incorporated by reference.

*Updated the narratives for 18 existing SCFWHs:*

1. Catskill Creek (Town of Catskill)
2. Constitution Marsh (Town of Philipstown)
3. Cocksackie Creek (Town of New Baltimore)
4. Esopus Meadows (Town of Esopus)
5. Fishkill Creek (Towns of Fishkill, Beacon)
6. Germantown-Clermont Flats (Towns of Germantown, Clermont)
7. Haverstraw Bay (Towns of Clarkstown, Haverstraw, Stoney Point)
8. Hook Mountain (Town of Clarkstown)
9. Iona Island Marsh (Town of Stoney Point)
10. Mill Creek Wetlands (Town of Stuyvesant)
11. Moodna Creek (Towns of Cornwall, New Windsor)
12. Normans Kill (Town of Bethlehem)
13. Papscaanee Creek and Marsh (Towns of East Greenbush, Schodack)
14. Piermont Marsh (Town of Orangetown)
15. Rondout Creek (Towns of Esopus, Kingston, Ulster)
16. Schodack and Houghtaling Islands and Schodack Creek (Towns of Schodack, Stuyvesant, New Baltimore)
17. Vosburgh Swamp and Middle Ground Flats (Towns of Cocksackie, Athens)
18. Wappinger Creek (Towns of Poughkeepsie, Wappinger)

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<sup>11</sup> *Short Environmental Assessment Form* (signed June 1, 2012).

<sup>12</sup> Detailed descriptions of each of the 40 SCFWHs can be found under “Final Habitat Narrative” at [http://www.dos.ny.gov/communitieswaterfronts/newsEvents/program\\_change.html](http://www.dos.ny.gov/communitieswaterfronts/newsEvents/program_change.html).

*Expanded the boundaries of and updated the narratives for 13 existing SCFWHs:*

19. Coxsackie Island Backwater (Towns of Coxsackie, New Baltimore)
20. Croton River and Bay (Towns of Cortland, Ossining)
21. Esopus Estuary (Towns of Saugerties, Red Hook)
22. Hudson Highlands (Towns of Fishkill, New Windsor, Cornwall)
23. Inbocht Bay and Duck Cove (Town of Catskill)
24. North and South Tivoli Bays (Town of Red Hook)
25. Ramshorn Marsh (Town of Catskill)
26. Roeliff-Jansen Kill (Towns of Germantown, Livingston, Clermont)
27. Roger's Island (Town of Greenport)
28. Shad and Schermerhorn Islands (Towns of Bethlehem, Coeymans)
29. Stockport Creek and Flats (Towns of Stuyvesant, Stockport, Greenport)
30. The Flats (Towns of Ulster, Kingston, Red Hook)
31. Vanderburgh Cove and Shallows (Towns of Rhinebeck, Hyde Park)

*Combined 4 existing SCFWHs into 2 SCFWHs:*

32. Coeymans and Hannacroix Creeks Complex (formerly Coeymans Creek, Hannacroix Creek)
33. Kingston-Poughkeepsie Deepwater (formerly Kingston Deepwater, Poughkeepsie Deepwater)

*Designated 7 new SCFWHs:*

34. Black Creek (Town of Esopus)
35. Brandow Point Marsh and Flats (Town of Athens)
36. Catskill Deepwater (Town of Catskill)
37. Manitou Marsh (Town of Philipstown)
38. Smith's Landing (Town of Catskill)
39. South Bay Creek and Marsh (Town of Hudson)
40. Stuyvesant Marsh (Town of Stuyvesant)

The 40 Hudson River SCFWHs include various tributaries, creeks, streams, islands, and bays of the Hudson River, and consist of habitat types such as wetlands, marshes, mudflats, swamps, forests, open water, shallows, submerged aquatic vegetation beds, floodplain forests, cliffs, brushlands, and gorges. The SCFWHs are key habitats for a wide variety of wildlife (fish, birds, waterfowl, turtles, muskrat, beaver, others) including several species protected under state and federal laws, such as the endangered Shortnose Sturgeon and Atlantic Sturgeon. Invasive plant species and impassable fish barriers (dams) are present in some areas.

Some SCFWHs include large watersheds with drainage areas of up to 1,000+ square miles, which influence the water quality and biological health of the Hudson River ecosystem, and impact residents of towns whose drinking water supply comes from the river.

The SCFWHs include active agricultural lands, undeveloped lands, developed lands (commercial, residential, industrial), federal lands, private lands, and protected parklands and other designated conservation areas administered by various state, county, and nonprofit authorities.

The National Estuarine Research Reserve (NERR) System has four sites in New York, collectively known as the Hudson River NERR. The four sites are used for education, outreach, and stewardship and are located in Stockport Flats, Tivoli Bays, Piermont Marsh, and Iona Island.

Residents and nonresidents use SCFWHs for recreational fishing, birdwatching, hiking, boating, waterfowl hunting, education, and outreach. These activities support many local businesses and services related to tourism and outdoor recreation. Proximity to the Hudson River and its scenic and recreational opportunities make it a desirable place to live. Real estate is expensive and in high demand. These human uses generate local profits and drive local economies, such as the \$4.3 billion tourism economy within the Hudson River Valley National Heritage Area.<sup>13</sup>

Infrastructure and facilities located in or near SCFWHs include wastewater treatment plants, commercial, industrial and residential buildings and facilities, bridges, docks, marinas, dams, roads and railroad crossings/causeways, bulkheads, and military reservations. Energy generation facilities along the Hudson River include one nuclear and three petroleum-based power plants.<sup>14</sup> There are seven ports and a federally maintained navigation channel south of the Troy Dam.<sup>15</sup>

Disturbance from human activities include remnant impacts from historic industrial and dredging and fill activities, contaminated soils, the construction of dams, bulkheads, railroad and road causeways and crossings, piers, docks and marinas, commercial, industrial and residential development, dredging to alter flows and create channels, maintenance dredging to maintain a federal navigation channel, invasive species, impacts from wetland filling, and runoff from industrial, wastewater, stormwater and agricultural sources.

## **B. Environmental Consequences**

### ***1. Known, Direct Consequence of the Preferred Alternative***

The only direct consequence of OCRM's approval of the SCFWH changes would be that the State could apply the changes through Coastal Policy 7 during its federal consistency review of federal actions that have reasonably foreseeable effects on any coastal use or resource. Activities conducted by a federal agency, such as federal construction projects, must be consistent to the maximum extent practicable with Coastal Policy 7. Activities that require a federal license or permit and federal financial assistance activities must be fully consistent with Coastal Policy 7 before a federal agency can issue the permit or provide the financial assistance.

The State has had federal consistency authority since the New York management program was approved in 1982 and has used the Hudson River SCFWHs in federal consistency reviews since 1990, when the SCFWHs were first approved. Thus, OCRM's approval of the SCFWH changes would not grant the State any new authority. Approval by OCRM would only modify the State's

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<sup>13</sup> Scenic Hudson, Letters to Joelle Gore, Acting Chief of OCRM, Sept. 13, 2012 and Oct. 17, 2012.

<sup>14</sup> New York Department of State, Letter to Kerry Kehoe, OCRM, Sept. 28, 2012, 5-6.

<sup>15</sup> "Waterways: Hudson River Port Map," World Port Source, accessed Oct. 24, 2012, [http://www.worldportsource.com/waterways/Hudson\\_River\\_231.php](http://www.worldportsource.com/waterways/Hudson_River_231.php).

application of its existing federal consistency authority by allowing the State to use the SCFWH changes, which are a result of new and updated scientific data and information, in federal consistency reviews.

OCRM's approval of the SCFWH changes would not affect the application of the changes under state law. The State formally adopted the SCFWH changes on July 19, 2012, after which they became effective for state consistency and binding on state agencies.<sup>16</sup> The SCFWH changes are legally binding under state law regardless of OCRM's approval or denial. Therefore, OCRM's approval or denial has no state law consequences.

OCRM has limited discretion to alter this consequence. As discussed in the Introduction, OCRM's review is limited to two elements, and OCRM must approve program changes unless 1) the changes cause the management program to no longer satisfy the program approval criteria and requirements in 16 U.S.C. § 1455(d) and 15 C.F.R. part 923, subparts B-F, or 2) the changes raise other approvability issues. OCRM cannot use the program change review process to set state policy or to challenge state criteria or procedures. Thus, for purposes of its review OCRM assumes that the State has relied on valid scientific information and properly applied state criteria and procedures when making the SCFWH changes. OCRM's review of the SCFWH changes is limited to the two elements.

## **2. *Potential, Indirect Consequences of the Preferred Alternative***

Any additional consequences or cumulative impacts from OCRM's approval of the SCFWH changes are uncertain and speculative at this time. The potential consequences of the SCFWH changes are limited to future federal actions. Therefore, OCRM's approval of the SCFWH changes has no immediate consequences for existing activities. The State could apply the SCFWH changes to an existing activity in the future if the activity requires a new federal authorization or renewal of a federal permit. Even assuming the State's federal consistency review is triggered, the consequences and cumulative impacts are uncertain because the outcome of the State's application of the SCFWHs will vary with the particular circumstances of the activities reviewed. The purpose of federal consistency is to facilitate cooperation and coordination between state and federal agencies to reach an agreeable solution, not to set a predetermined outcome.

The State applies the SCFWHs through Coastal Policy 7 and relies on a habitat impairment test to determine if an activity is consistent with the policy. This test requires a case-by-case analysis of whether an activity impairs the habitat within that specific context. There is no predetermined list of activities that are prohibited or deemed inconsistent with the policy because they would impair the habitat. The State's determination as to whether an activity is consistent with the policy depends on a variety of factors, including the nature and location of the activity, the environmental conditions existing at the time, and the potential mitigation options. Therefore, until the State applies the SCFWHs to a specific activity and fully analyzes the activity's potential habitat impacts, the consequences of the SCFWH changes on whether a given activity will be determined to be consistent with Coastal Policy 7 cannot be known.

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<sup>16</sup> State agencies must comply with the updated SCFWHs pursuant to 19 NYCRR part 600, which requires state agencies to be consistent with the State's 44 Coastal Policies, including Coastal Policy 7.

In addition to Coastal Policy 7, the State applies 43 other Coastal Policies as part of its federal consistency review. Although these policies have varying goals, they are all part of the approved management program and do not directly conflict with each other.<sup>17</sup> An activity must be consistent with all of the policies. Because an activity may be consistent with Coastal Policy 7, but inconsistent with another policy, the SCFWHs are not determinative of the State's final finding of consistency. Therefore, the consequences OCRM's potential approval of the SCFWH changes in the broader context of the State's federal consistency review are also uncertain.

Finally, even if the State objects to an activity because it is inconsistent with Coastal Policy 7 or another policy, the ultimate consequence is uncertain because a federal license or permit applicant may appeal the State's objection to the U.S. Secretary of Commerce. *See* 15 C.F.R. part 930, subpart H. The Secretary may override the State's objection if the activity is necessary in the interest of national security or is consistent with the objectives or purposes of the CZMA, which include national interest considerations. Specifically, the Secretary may approve an activity if it furthers the national interest, including in energy facilities, in a significant or substantial matter; the national interest outweighs the adverse coastal effects; and there is no reasonable alternative that would allow the activity to be consistent with the management program's enforceable policies. *See* 15 C.F.R. § 930.121. The outcome of the Secretary's review is activity-specific, creating additional uncertainty about the consequences of OCRM's approval of the SCFWH changes.

Although the consequences of the SCFWH changes are uncertain and speculative, some potential consequences are discussed below. Several of the consequences were raised in comments OCRM received in response to the public comment period required for program changes and the Notice of Intent to Prepare an Environmental Assessment.

*a. Biological, Physical, and Chemical Consequences*

As applied to activities undertaken by or contingent upon approval by federal agencies, the SCFWH changes could enhance resource protection and management by giving the state an additional tool (*i.e.*, federal consistency) to affect activities that could impair the habitats. The changes, which incorporate updated scientific information about the resources and impacts, could improve management by providing a better understanding of what types of activities raise concerns and what their potential impacts are. The changes could also better protect more habitats because they include new and expanded SCFWHs. The merging of several SCFWHs could enhance the ecological health of the area by enabling a more comprehensive approach to resource management. In addition to protecting habitats by preventing their impairment, the SCFWH changes could protect water quality and various aquatic and wildlife species that rely on the habitats. For example, the SCFWHs are critically important nurseries, nesting, feeding, and spawning grounds for commercially and recreationally harvested fish, birds, and other wildlife in the region. Several SCFWHs are also home to two federally endangered species, the Shortnose Sturgeon and Atlantic Sturgeon.

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<sup>17</sup> The SCFWH changes, which implement Coastal Policy 7, also do not conflict with other policies.



If the SCFWH changes lead to the closure of federally-permitted energy facilities (based on the state's future application of its federal consistency authority), some commenters indicated that air quality could be diminished if fossil fuel-based facilities are used to offset the energy loss.<sup>18</sup>

### *b. Social and Economic Consequences*

If the State uses its federal consistency authority to review federal actions to ensure that those actions are consistent with habitat protection, the SCFWH changes could provide several social and economic benefits. The changes could enhance tourism and recreational activities, such as fishing, birdwatching, hiking, boating, and waterfowl hunting, as well as enhance public access to these areas. Similarly, the changes could improve opportunities for education, outreach, and scientific research.

On the other hand, the State's use of its federal consistency authority based on the SCFWH changes also could have potential negative economic consequences. Some commenters expressed concern that the changes could be used to jeopardize existing water-dependent industrial, commercial, and energy production activities in or near the SCFWHs. For example, a potential negative consequence could be restrictions on the use of causeways or ports that may impair SCFWHs.<sup>19</sup> Other potential negative economic and social consequences could result if energy facilities, such as the Indian Point nuclear power plant, are shut down because they impair SCFWHs. The closure of energy facilities could decrease energy supply and reliability, increase electricity prices, cause a loss of jobs, and create environmental justice issues.<sup>20</sup> As discussed above, the approval of the SCFWH changes as an RPC has no direct consequences for existing activities, and SCFWHs are only one of several factors that would determine the outcome of the State's federal consistency review of proposed activities.

### **3. Consequences of Other Alternatives**

Alternatives two (Deny the SCFWH Changes as an RPC and Advise the State to Resubmit the Changes as an Amendment) and four (No Action) would ultimately result in approval of the SCFWH changes. Therefore, these alternatives would have the same consequences as the preferred alternative discussed above, although the timing of approval could vary.

Alternative three (Deny the SCFWH Changes) would result in different consequences, but the ultimate consequences are uncertain. The direct consequence of this alternative is that the State could not use the SCFWH changes for federal consistency. The State would still be able to apply the SCFWH changes to activities through the state consistency review required under state law. The State would also still have federal consistency authority and could object to an activity if it is inconsistent with other policies. Thus, any additional consequences would be activity-specific and are uncertain at this time. In order to deny the SCFWH changes, OCRM would need to

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<sup>18</sup> Goodwin Procter, Letters to Joelle Gore, Acting Chief of OCRM, Aug. 14, 2012 and Oct. 12, 2012; New York Affordable Reliable Electricity Alliance, Letter to Joelle Gore, Acting Chief of OCRM, Oct. 12, 2012.

<sup>19</sup> Gilberti Stinziano Heintz & Smith, P.C., Letter to Joelle Gore, Acting Chief of OCRM, Aug. 15, 2012.

<sup>20</sup> Goodwin Procter, Letters to Joelle Gore, Acting Chief of OCRM, Aug. 14, 2012 and Oct. 12, 2012; New York Affordable Reliable Electricity Alliance, Letter to Joelle Gore, Acting Chief of OCRM, Oct. 12, 2012.

determine that the changes would affect the underlying approvability of New York's management program.

#### **4. Conclusion**

For the reasons described above, OCRM's approval of the Hudson River SCFWH changes is not anticipated to result in a significant effect on the human environment. SCFWHs have been a component of the New York management program since it was approved in 1982. SCFWHs were designated in the Hudson River, Long Island Sound, and Great Lakes regions in 1987 and in the St. Lawrence River region in 1994. The State recently undertook an effort to update the SCFWHs in all of the regions based on new scientific data and information. The State has not modified the procedures or criteria used to designate SCFWHs. The Hudson River SCFWH changes are part of this statewide effort and appear to be a further detailing of the existing management program.

As described above, the only known consequence of OCRM's potential approval of the SCFWH changes is that the State would be able to apply the changes during its federal consistency review process. OCRM's approval has no effect on the application of the SCFWH changes under state law. The State has had the authority to use SCFWHs in its federal consistency review since 1990 so OCRM's approval of the SCFWH changes would only have a minor effect on how the State applies its existing authority. Any potential consequences and cumulative impacts that may result from the State's application of the SCFWH changes during its federal consistency review are uncertain because the State's federal consistency review is only triggered by future federal actions. The SCFWHs are not outcome-determinative. The outcome of the State's federal consistency review varies by activity and depends on whether the activity is consistent with all of the State's coastal policies and whether the State's decision is appealed to the Secretary. For these reasons, the consequences of OCRM's approval of the SCFWH changes would not have a significant effect on the human environment.

#### **V. Compliance with Other Environmental and Administrative Review Requirements**

##### **Anadromous Fish Conservation Act**

The Anadromous Fish Conservation Act (16 U.S.C. § 757a, *et seq.*) provides authority to conserve, develop, and enhance anadromous fishery resources.

**Compliance:** The preferred alternative will have no impact on anadromous fishery resources.

##### **Clean Air Act**

The Clean Air Act (42 U.S.C. § 7401, *et seq.*) directs the U.S. Environmental Protection Agency to set limits on air emissions to ensure basic protection of health and the environment. The fundamental goal is the nationwide attainment and maintenance of the National Ambient Air Quality Standards (NAAQS). Primary NAAQS are designed to protect human health. Secondary NAAQS are designed to protect the public welfare (for example, to prevent damage to soils, crops, vegetation, water, visibility and property).

**Compliance:** The preferred alternative will have no impact.

##### **Clean Water Act**

The Clean Water Act (33 U.S.C. § 1251, *et seq.*) is the principal law governing pollution control and water quality of the Nation's waterways. Section 404 of the law authorizes a permit program for the beneficial uses of dredged or fill material in navigable waters. The U.S. Army Corps of Engineers (USACE) administers the program.

**Compliance:** The preferred alternative will have no impact.

### **Coastal Zone Management Act (CZMA)**

The goal of the federal Coastal Zone Management Act (16 U.S.C. § 1451, *et seq.*; 15 C.F.R. part 923) is to preserve, protect, develop and, where possible, restore and enhance the Nation's coastal resources. The federal government provides grants to states with federally approved coastal management programs. The State of New York has a federally approved program. Section 1456 of the CZMA requires any federal action inside or outside of the coastal zone that affects any land or water use or natural resources of the coastal zone to be consistent, to the maximum extent practicable, with the enforceable policies of approved state management programs. It states that no federal license or permit may be granted without giving the State the opportunity to concur that the project is consistent with the State's coastal policies. The regulations outline the consistency procedures.

**Compliance:** The preferred alternative will benefit New York's management program by allowing the State to use the SCFWH changes for federal consistency.

### **The Coastal Barrier Resources Act (CBRA)**

Originally passed in 1982 and reauthorized in 2005 (16 U.S.C. § 3501 *et seq.*; 12 U.S.C. § 1441 *et seq.*), CBRA was enacted to protect coastal barrier islands and their resources. Under CBRA, there are limitations on federal expenditures in designated CBRA units, however there are certain project specific allowances on a project by project basis.

**Compliance:** The preferred alternative will have no impact.

### **Endangered Species Act**

The federal Endangered Species Act (16 U.S.C. § 1531, *et seq.*; 50 C.F.R. parts 17, 222, 224) directs all federal agencies to conserve endangered and threatened species and their habitats and encourages such agencies to utilize their authority to further these purposes. Under the Act, NOAA's National Marine Fisheries Service and the U.S. Fish and Wildlife Service (USFWS) publish lists of endangered and threatened species. Section 7 of the Act requires that federal agencies consult with these two agencies to minimize the effects of federal actions on endangered and threatened species.

**Compliance:** OCRM determined that "No Effect" to endangered species is appropriate for this action so formal consultation under section 7 consultation was not required.

### **Estuaries Protection Act**

The Estuary Protection Act (16 U.S.C. §§ 1221-1226) highlights the values of estuaries and the need to conserve natural resources. It authorizes the Secretary of the Interior, in cooperation with other federal agencies and the states, to study and inventory estuaries of the United States, to determine whether such areas should be acquired by the federal government for protection, to assess impacts of commercial and industrial developments on estuaries, to enter into cost-sharing agreements with states and subdivisions for permanent management of estuarine areas in their possession, and to encourage state and local governments to consider the importance of estuaries

in their planning activities related to federal natural resource grants.

**Compliance:** The preferred alternative will have no impact.

#### **Fish and Wildlife Conservation Act**

The Fish and Wildlife Conservation Act of 1980 (16 U.S.C. § 2901; 50 C.F.R. § 83) provides for the consideration of impacts on wetlands, protected habitats and fisheries.

**Compliance:** The preferred alternative will have no impact.

#### **Magnuson-Stevens Fishery Conservation and Management Act**

The Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. § 1801, *et seq.*) as amended and reauthorized by the Sustainable Fisheries Act (Public Law 104297), established a program to promote the protection of essential fish habitat (EFH) in the review of projects conducted under federal permits, licenses, or other authorities that affect or have the potential to affect such habitat. After EFH has been described and identified in fishery management plans by the regional fishery management councils, federal agencies are obligated to consult with the Secretary of the U.S. Department of Commerce with respect to any action authorized, funded, or undertaken or proposed to be authorized, funded, or undertaken, by such agency that may adversely affect any EFH.

**Compliance:** The preferred alternative will have no impact on EFH.

#### **Marine Mammal Protection Act**

The Marine Mammal Protection Act (16 U.S.C. § 1361, *et seq.*) establishes a moratorium on the taking and importation of marine mammals and marine mammal products, with exceptions for scientific research, allowable incidental taking, subsistence activities by Alaskan natives, and hardship. The Act provides authority to manage and protect marine mammals, including maintenance of the ecosystem.

**Compliance:** The preferred alternative will have no impact on marine mammals.

#### **Migratory Bird Treaty Act**

The Migratory Bird Treaty Act (16 U.S.C. § 715, *et seq.*) provides for the protection of migratory birds. The Act does not specifically protect the habitat of these birds but may be used to consider time of year restrictions for remedial activities on sites where it is likely migratory birds may be nesting and/or to stipulate maintenance schedules that would avoid the nesting seasons of migratory birds.

**Compliance:** The preferred alternative will have no impact on migratory birds.

#### **National Historic Preservation Act**

The purpose of the National Historic Preservation Act (16 U.S.C. § 470, *et seq.*) is to provide for the preservation of historic American sites, buildings, objects and antiquities of national significance, and for other purposes by specifically providing for the preservation of historical of archeological data which might otherwise be lost or destroyed.

**Compliance:** A section 106 consultation was completed. The preferred alternative will have no adverse effect to historic properties.

#### **Rivers and Harbors Act**

The federal Rivers and Harbors Act (33 U.S.C. § 401, *et seq.*) regulates development and use of the Nation's navigable waterways. Section 10 of the Act prohibits unauthorized obstruction or

alteration of navigable waters and vests the USACE with authority to regulate discharges of fill and other materials into such waters.

**Compliance:** The preferred alternative will have no impact.

#### **Executive Order 11990 Protection of Wetlands**

Executive Order 11990 (40 C.F.R. § 6392 (a) and Appendix A) requires federal agencies to avoid the adverse impacts associated with the destruction or loss of wetlands, to avoid new construction in wetlands if alternatives exist, and to develop mitigative measures if adverse impacts are unavoidable.

**Compliance:** The preferred alternative will likely benefit wetlands by providing increased protection of wetlands. Specific impacts will depend on how the State applies the SCFWH changes to future federal actions through its federal consistency review.

#### **Executive Order 12898 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 12948 Amendment to Executive Order No. 12898**

Executive Orders 12898 and 12948 require each federal agency to identify and address, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority and low-income populations.

**Compliance:** No low income or ethnic minority communities would be adversely affected by the preferred alternative.

#### **Executive Order Number 13112 Invasive Species**

The purpose of Executive Order 13112 is to prevent the introduction of invasive species and provide for their control, and to minimize the economic, ecological, and human health impacts that invasive species cause.

**Compliance:** The preferred alternative will have no impact.

## **VI. Conclusion: Finding of No Significant Impact**

The National Oceanic and Atmospheric Administration proposes to approve the incorporation of the Hudson River SCFWH changes into the New York management program as an RPC. Four alternatives were considered for the proposed project: approve the SCFWH changes as an RPC, deny the SCFWH changes as an RPC and advise the State to resubmit the changes as an amendment, deny the SCFWHs, or take no action.

Significant individual and/or cumulative environmental effects would not result from implementation of the preferred alternative, and preparation of a Finding of No Significant Impact (FONSI) is warranted. NOAA Administrative Order (NAO) 216-6 (revised June 20, 1999) provides eleven criteria for determining the significance of the impacts of a proposed action. These criteria are discussed below as they relate to the proposed project.

### **a. Has the agency considered both beneficial and adverse effects (A significant effect may exist even if the Federal agency believes on balance the effect will be beneficial)?**

The agency has considered both beneficial and adverse effects and no significant effects are anticipated. The only direct effect is that the State could apply the SCFWH changes during its

federal consistency review, which is beneficial for the State. Any potential beneficial or adverse effects would only result from the application of the SCFWH changes during the State's review of federal actions for consistency with the State's enforceable policies. Thus, the potential beneficial or adverse effects are speculative at this time. The agency, however, has recognized the potential consequences of the State's future actions in the EA. The potential beneficial effects are improved resource protection and management, including protection of habitat, wildlife, and water quality. In addition, tourism and recreational activities and opportunities for education, outreach, and scientific research could be enhanced. The potential adverse effects are restrictions on the use of causeways or ports and the closure of energy facilities that could decrease energy supply and reliability, increase electricity prices, cause a loss of jobs, create environmental justice issues, and diminish air quality. The occurrence of these effects depends on the State's federal consistency review being triggered and then a future chain of events with uncertain outcomes.

**b. To what degree would the proposed action affect public health and safety?**

The proposed action is not anticipated to affect public health and safety in any significant way. As indicated above, the potential indirect consequences of the action include protection of water quality and diminished air quality, but these effects are speculative.

**c. To what degree would the proposed action affect unique characteristics of the geographic area in which the proposed action is to take place?**

The proposed action is not anticipated to affect the unique characteristics of the geographic area in any significant way. As indicated above, the potential indirect consequences include the protection of habitats and wildlife, but these effects are speculative.

**d. To what degree would the proposed action have effects on the human environment that are likely to be highly controversial?**

The direct effect of the proposed action is not highly controversial, as there is no substantial debate over the proposed action's size, nature, or effect. The only direct consequence of OCRM's approval of the SCFWH changes would be that the State could apply the changes through Coastal Policy 7 during its federal consistency review of federal actions that have reasonably foreseeable effects on any coastal use or resource. The potential future closure of an energy facility may be controversial, but depends on a chain of events that does not have a predetermined outcome.

**e. What is the degree to which effects are highly uncertain or involve unique or unknown risks?**

The direct effect of the action is certain and known. As a result of the proposed action, the State can apply the SCFWH changes through Coastal Policy 7 during its federal consistency review of federal actions that have reasonably foreseeable effects on any coastal use or resource. This effect does not involve unique or unknown risks because the agency has undertaken similar actions in the past. The manner in which the State will choose to exercise its federal consistency authority in the future is unknown as described elsewhere in this analysis.

**f. What is the degree to which the action establishes a precedent for future actions with significant effects or represents a decision in principle about a future consideration?**

The action is consistent with similar past actions. On nine previous occasions, the agency approved new SCFWHs or SCFWH changes as routine program changes (RPCs). These past actions support the agency's decision to treat the proposed action as an RPC rather than an amendment. Although the proposed action could influence similar future actions and decisions, it does not establish a new or controlling precedent. Similar future actions will still be subject to an independent review.

**g. Does the proposed action have individually insignificant but cumulatively significant impacts?**

No. SCFWHs have existed in the Hudson River since 1987 and have been used in federal consistency reviews since 1990. In addition, over 200 SCFWHs exist in other regions of the State and are used in federal consistency reviews. NOAA has approved all of these SCFWHs and SCFWH changes, and these past actions have not had cumulatively significant impacts. Thus, NOAA's proposed action to approve the Hudson River SCFWHs is unlikely to have cumulatively significant impacts.

**h. What is the degree to which the action adversely affects entities listed in or eligible for listing in the National Register of Historic Places, or may cause loss or destruction of significant scientific, cultural, or historic resources?**

NOAA determined that the proposed action would have no adverse effects on historic properties, and submitted this finding to the New York State Historic Preservation Office (SHPO). The SHPO concurred with this determination on November 14, 2012.

**i. What is the degree to which endangered or threatened species, or their critical habitat as defined under the Endangered Species Act of 1973, are adversely affected?**

Endangered and threatened species and their critical habitat would not be adversely affected by the proposed action. OCRM determined that the proposed action will have "no effect" on listed species or designated critical habitat, and no formal consultation is required.

**j. Does the proposed action have a potential to violate Federal, state, or local law for environmental protection?**

No. The proposed action is in compliance with all of the federal statutes noted in Section V of the Environmental Assessment. The proposed action has been reviewed at the state and local level and it does not have a potential to violate state or local law for environmental protection.

**k. Will the proposed action result in the introduction or spread of a nonindigenous species?**

No. The proposed action will not result in the introduction or spread of nonindigenous species.

**Finding of No Significant Impact (FONSI) for the Approval of a Routine Program Change to Incorporate New and Revised Significant Coastal Fish and Wildlife Habitats into the New York Management Program**

NOAA has prepared the attached Environmental Assessment (EA) for the Coastal Zone Management Program, which conforms to the procedural and technical requirements set forth in NOAA Administrative Order 216-6, Environmental Review Procedures for Implementing the National Environmental Policy Act, and NEPA. The proposed action and preferred alternative is to approve the incorporation of changes to the Hudson River SCFWHs into the New York management program as an RPC. Having reviewed the EA, I have determined that the project assessed within will not have a significant impact on the quality of the human environment. Therefore, the preparation of an Environmental Impact Statement for the proposed action is not required by Section 102(2)(c) of the National Environmental Policy Act or its implementing regulations.



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David M. Kennedy  
Assistant Administrator for  
Ocean Services and Coastal Zone Management

11/29/12  
\_\_\_\_\_  
Date



**Appendix A: Map of the Hudson River**



<http://www.hvnet.com/>

## **Appendix B: List of Preparers**

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## Appendix C: Public Comments and Responses

OCRM solicited comments regarding potential effects to the environment resulting from any action that NOAA may take in response to the State's request for approval through October 15, 2012, and comments on the Draft EA through November 16, 2012. A summary of the key comments and OCRM's responses are below.

**Comment: Purpose and Need** -- *NOAA must address the general purposes and need for the SCFWH changes. Under state law, the purpose of SCFWHs is "to conserve and protect fish and wildlife habitats identified by the department of environmental conservation as critical to the maintenance or re-establishment of species of fish or wildlife."*

**Response 1:** Under the Coastal Zone Management Act (CZMA), NOAA must review and respond to state program change requests, and NOAA must approve program changes in order for states to use the changes during federal consistency reviews. The purpose of NOAA's action is to fulfill its responsibility under the CZMA, that is, to determine if the SCFWH changes are approvable and therefore can be used by the State during federal consistency reviews. NOAA's action is independent of the State's action, and has a different purpose. NOAA's purpose is not to evaluate whether habitat protection is needed.

**Comment 2: Alternatives** -- *The EA must consider a reasonable range of alternatives. The State may achieve its purpose and need without significant adverse consequences through alternatives that would amend the habitat impairment test or adjust the SCFWH boundaries. The fact that these alternatives would need to be implemented by the State does not mean that NOAA need not consider them.*

**Response 2:** The EA considers a reasonable range of alternatives that NOAA can take to fulfill the requirements of the purpose and need statement. As explained above, the EA's focus is alternatives that would fulfill the purpose and need of NOAA's action. The EA does not need to evaluate alternatives that would fulfill the purpose and need of the State's action.

**Comment 3: Reasonably Foreseeable Impacts** -- *NEPA explicitly requires the draft EA to address the cumulative environmental impacts of the changes in land use patterns that the SCFWH designations will induce. The State's intent to eliminate economically and socially important existing commercial, industrial, residential, and recreational land uses and activities—and the environmental and social impacts of eliminating those land uses and activities—needs to be considered. The "SCFWH Expansion" on its face will displace all land uses and activities that fail the habitat impairment test. The socioeconomic and environmental impacts of closing Indian Point are a reasonably foreseeable consequence of the SCFWH changes, and a significant consequence that requires the preparation of an environmental impact statement (EIS). Environmental justice impacts must also be evaluated. The draft EA provides little more than a passing reference to those impacts, dismissing them without merit.*

**Response 3:** New York has revised existing and established new SCFWHs in the Hudson River. SCFWH designations are applicable through the policies of the State as a matter of state law independent of the CZMA or any other federal law. The State has requested that NOAA approve

the new and revised SCFWHs as part of the New York management program. Once approved by NOAA, the State is authorized under the CZMA to use the SCFWHs in the review of activities that are conducted or authorized by federal agencies to ensure that those activities are consistent with the policies of the NY management program. Those policies include a requirement that activities not be conducted in a manner that would impair SCFWHs.

NOAA has considered past, present, and reasonably foreseeable future actions that will combine with the proposed action and cumulatively may cause significant environmental impacts. As recognized in the EA, the designation of SCFWHs by the State has been on-going since 1987.

The SCFWH designations do not establish exclusion zones for any uses and do not categorically prohibit any land use activity. So long as an activity can be conducted in a manner that does not impair SCFWHs, such as through siting, design, or operation, it may be conducted. Furthermore, the EA explains that the SCFWH changes have no immediate consequences for existing uses and activities. The SCFWH changes would only have potential consequences for existing uses if a future federal action triggers the State's federal consistency review. The State cannot otherwise subject existing uses to new federal consistency reviews as a result of the SCFWH changes. As discussed in the EA, the ultimate consequences of the State's federal consistency review are unknown. NOAA has considered potential environmental justice impacts and found them to be remote and speculative.

The assertions by the commenter that the purpose of SCFWH designations is to induce changes in "the pattern of land use" and that the designations have deleterious cumulative effects are not supported by the record. NOAA has considered potential cumulative deleterious effects resulting from SCFWH designations and found none. NOAA has found nothing to support the assertion that SCFWHs have resulted in or contributed to "changes in land use patterns" or "related effects on air," as alleged by the commenter. Given the experience over the past 25 years since the State first designated SCFWHs, the cumulative impacts that the commenter asserts are not evident. In addition, no basis has been established for finding that existing commercial, industrial, residential, and recreational land uses will be displaced by the SCFWH designations to an extent that rises to the level of a significant environmental impact.

Federal agencies are not required to consider speculative, hypothetical impacts or actions under NEPA, or to speculate about the possible effects of future actions that may or may not occur. *See, e.g., Wyoming v. USDA*, 661 F.3d 1209, 1253 (10th Cir. 2011). For NEPA reviews of federal actions that are administrative in nature, such as this program change approval request, a generic analysis is required of the overall environmental impacts of the application of the rules. For this NEPA review, NOAA has done that analysis. Agencies cannot and are not required to forecast the outcomes of each and every application of the rules.

**Comment 4: Uncertainty** -- *The uncertainty of environmental impacts calls for preparation of an EIS. NOAA's logic in the draft EA would shield all state program changes from NEPA and CZMA review since a change to one policy can only have speculative environmental effects. The draft EA's reasoning that impacts are uncertain could be applied to any program change.*

**Response 4:** There are no unique or unknown risks associated with the preferred alternative. The only direct consequence of OCRM's approval of the SCFWH changes would be that the State could apply the changes through Coastal Policy 7 during its federal consistency review of federal actions that have reasonably foreseeable effects on any coastal use or resource. The review of activities conducted or authorized by federal agencies has been on-going in New York since the State's management program was approved in 1982. The application of SCFWHs through the federal consistency review process has been on-going since 1987.

It is speculative to forecast the outcome of the application of the SCFWH changes to any particular activity since the SCFWHs do not categorically exclude any type of activity, and the CZMA does not prescribe how the State chooses to exercise its Federal consistency authority with respect to any particular action. There is no requirement that a federal agency prepare an EIS, rather than an EA, based solely upon speculative impacts. *See, e.g., Sierra Club v. Forest Service*, 46 F.3d 835, 839 (8<sup>th</sup> Cir. 1995).

**Comment 5: Balance of Uses and Protection of the National Interest** -- *The SCFWH changes significantly alter the balance of land uses and the protection of the national interests and conflicts with other provisions of the New York management program.*

**Response 5:** SCFWHs were included in the balancing of diverse interests and competing uses in the original New York management program. The original Hudson River SCFWHs were based on the State's 1984 Technical Memorandum. The memorandum, which has not been revised, continues to serve as the basis for establishing new and revising existing SCFWHs. The Hudson River SCFWH changes are based on new data and information rather than a change in criteria or procedures. As a result of the SCFWH changes, some areas with water-dependent commercial and industrial activities are now within SCFWHs. The inclusion of these areas, however, does not substantially alter the balance among competing uses because the SCFWHs do not prohibit any activities.

The New York management program continues to provide adequate consideration of the national interest involved in planning for and in the siting of energy facilities. The SCFWH changes do not prohibit national interest activities. Additional consideration of the effect of the SCFWH changes on the national interest can occur during the appeal of the State's objection to the U.S. Secretary of Commerce.

As discussed in Response 7, the SCFWH changes do not conflict with other provisions of the New York management program.

**Comment 6: National Interest** -- *The draft EA implies that existing energy facilities are not a matter of national interest. According to the draft EA, States need only provide a process for siting energy facilities on a statewide basis. Does that mean a State can amend its program to shut down existing energy facilities? Does that mean that energy facilities specifically identified as an element of the approved program can be eliminated without affecting the national interest?*

**Response 6:** Existing energy facilities are a matter of national interest. As stated in the EA, policies that prohibit or directly regulate energy facilities could constitute a substantial change to

the national interest. A policy that mandated the closure of existing energy facilities would require a thorough analysis of the effect on the national interest, but that issue is not presently before NOAA.

**Comment 7: Policy Conflicts** -- *The EA should assess the degree to which the proposed action conflicts with applicable federal, state, and local policy.*

*(a) The SCFWH changes conflict with the New York management program. The SCFWH changes conflict with the approved program, in which Indian Point is an explicit component. The SCFWH changes conflict with other policies.*

*(b) The SCFWH changes conflict with federal policy in the CZMA. The CZMA requires programs to provide for adequate consideration of the national interest involved in the siting of energy facilities and a method of assuring that local land and water use regulations do not unreasonably restrict or exclude land and water uses of regional benefit. The CZMA also directs states to consider national energy plans such as the Blueprint for a Secure Energy Future.*

*(c) The SCFWH changes conflict with the U.S. Coast Guard Safety and Security Zone.*

**Response 7:**

(a) The SCFWH changes do not conflict with the New York management program. Indian Point was not explicitly recognized in the program, and it was not required for program approval. See Response 9.

The SCFWH changes do not conflict with other policies in the New York management program. The approved New York management program has a range of policies, including a SCFWH policy. When the program was approved, the policies were not found to be in conflict, and the SCFWH changes do not revise any of the policies.

(b) The SCFWH changes do not conflict with the CZMA program approval requirements that the commenter identified. SCFWHs were included in the New York management program to satisfy the program approval requirement for areas for preservation or restoration under 15 C.F.R. § 923.22. NOAA's 1982 approval findings identify three authorities on which the New York management program would rely to address uses of regional benefit. The SCFWH changes do not revise or conflict with any of these three authorities. How the New York management program satisfied the energy-related program approval requirements is explained in Response 9. The SCFWH changes do not revise or conflict with the energy requirements.

The SCFWH changes do not conflict with federal energy policies in national energy plans such as the Blueprint. The Blueprint calls for the expansion of cleaner energy sources, including nuclear. The SCFWH changes do not conflict with this policy or other federal energy policies because the changes make no reference to nuclear power plants or any other energy facilities and do not alter the State's energy policies.

(c) The SCFWH changes do not conflict with the U.S. Coast Guard Safety and Security Zone. The zone prohibits unauthorized entry. Entry into the area may be within the sole discretion of the Coast Guard, but that does not prevent the State from otherwise regulating activities that may affect the area. The SCFWH changes prevent the impairment of habitat. They do not grant or

restrict entry into the area. Furthermore, the U.S. Coast Guard has not provided any comments regarding the SCFWH changes.

**Comment 8: Controversy** -- *The “controversy” about possible environmental impacts associated with the potential closure of the Indian Head nuclear facility calls for preparation of an EIS.*

**Response 8:** The direct effect of the proposed action - the proposed incorporation of SCFWH changes into the New York management program - is not highly controversial, as there is no substantial debate over the proposed action’s size, nature, or effect. On at least nine other occasions, NOAA has reviewed and approved new or revised SCFWHs. Controversy surrounding any potential, future outcome of the relicensing proceeding for the Indian Head nuclear power facility is not attributable to NOAA’s current action. That controversy existed prior to the submission of the SCFWH changes for approval and will remain regardless of the outcome of NOAA’s review.

**Comment 9: Indian Point is a Component of the NY Management Program** -- *The draft EA does not consider that the existing New York management program explicitly calls out Indian Point as a fundamental component of the New York management program that makes it compatible with the purposes of the CZMA.*

**Response 9:** The State did not explicitly identify Indian Point as a component of the New York management program, and the continued authorization of Indian Point was not a basis for NOAA’s approval of the program. To receive federal approval, the New York management program had to satisfy two energy-related requirements: 1) adequate consideration of the national interest involved in planning for and in the siting of energy facilities; and 2) a planning process for energy facilities. The New York management program continues to satisfy these approval requirements.

New York satisfied the first requirement through a discussion of the National Energy Plan, Article 5 of the State’s Energy Law, the State Energy Master Plan, interstate agreements, and a general listing of the State’s existing energy facilities (158 total facilities). The reference to five nuclear units was included to illustrate the number and scope of facilities in the State. It was not a commitment to maintain all of those facilities, and NOAA did not require that as part of the program’s approval. New York was only required to demonstrate the various ways in which it considers the national interest in energy facilities.

The State satisfied the second requirement by discussing numerous activity-specific planning processes and identifying the State Energy Master Plan as a general planning process and source of energy policies. The discussion demonstrates that the State has a planning process in place and the authority to manage energy facilities and their impacts. It does not commit the State to specific outcomes. In addition, although the New York management program refers to the State Energy Master Plan, the plan was not submitted as part of the program, indicating that only the portions of the plan that were included in the management program were relevant to program approval. Program approval was not dependent on the specific contents of the plan.

**Comment 10: Lack of State Authority to Adopt** -- *NYDOS lacks authority to adopt the SCFWH regulations. How can NOAA assure that policies are enforceable unless it examines the underlying state laws, and assures itself that program changes are adopted in accordance with the underlying state law? Isn't NOAA supposed to review the scientific information relied on by the state?*

**Response 10:** NOAA reviews policies to determine if they are binding and enforceable under state law. The NY Secretary of State's findings, dated July 19, 2012, adopted the SCFWH changes pursuant to Executive Law sections 912 and 913 and 19 NYCRR parts 600 and 602. The SCFWH changes became effective and binding under state law on August 15, 2012. Executive Law sections 912 and 913 and 19 NYCRR part 600 were included in the original approval of the New York management program. 19 NYCRR part 602 is consistent with the designation procedure described in the original New York management program and NOAA's 1982 approval findings. Any further evaluation of the State's legal authority is beyond the scope of NOAA's program change review. If a future determination is made that NYDOS lacks authority or the SCFWH changes are otherwise invalid, the changes would no longer be enforceable under state law and could not be applied for federal consistency purposes.

The State's decision about what data is appropriate to use and how to interpret it when applying the designation criteria are factual determinations best made by the State. NOAA's review is focused on the continuing approvability of the program based on the CZMA program approval criteria and requirements and whether the changes raise any other approvability issues. An evaluation of the scientific information typically does not fall within the scope of this review.

**Comment 11: NOAA Has Authority to Review as an Amendment** -- *NOAA has ample authority to consider the SCFWH changes an amendment and to disapprove the changes as not compliant with the CZMA and NEPA. The draft EA implies that NOAA's judgment on this matter has been pre-determined whether or not NOAA prepares an EIS.*

**Response 11:** NOAA has authority to consider whether the SCFWH changes are an amendment, but NOAA has determined that the changes constitute a routine program change, and not an amendment. In addition, as explained under Alternative 2, the result of NOAA's review of the amendment would be the same. NOAA also has authority to deny the SCFWH changes, but there is no basis for denying them as explained in Alternative 3.

Based on its evaluations under the CZMA and NEPA, NOAA identified Alternative 1, approve the SCFWH changes as a routine program change, as the preferred alternative. The EA found no significant impacts and thus an EIS does not need to be prepared.

**Comment 12: NOAA's Involvement with SCFWH Designations** -- *NOAA's history of deep involvement in the original 1987 SCFWH designations conflicts with the depiction of NOAA's role as hands off in the draft EA.*

**Response 12:** NOAA's review of all program changes is based on two elements: 1) does the management program still satisfy the program approval criteria and requirements, and 2) does the change raise other approvability issues. When either of these elements is implicated, NOAA



provides specific comments to the State and works to resolve the issue, if possible. When the two review elements are not implicated, NOAA does not insert itself into state law changes unless the State asks for NOAA's assistance. Although NOAA encourages States to submit draft changes for a preliminary review, the focus of NOAA's review is still the two elements described above.

NOAA's comments on the 1987 SCFWH designations indicate a concern about the lack of a clear standard for applicants and the potential for arbitrary and capricious decisions by the State. NOAA has reviewed the current SCFWH changes and did not find similar approvability concerns.

**Comment 13: Past Approvals Not Dispositive** -- *The fact that the initial 1987 SCFWHs were approved as a routine program change is not dispositive.*

**Response 13:** NOAA agrees. Although past practice is relevant to whether a change is a routine program change or an amendment, it is not dispositive. NOAA completes an independent review of each program change submission.

**Comment 14: Support NOAA's Preferred Alternative** – *NOAA should approved the SCFWH changes as a routine program change.*

**Response 14:** NOAA acknowledges the comments supporting NOAA's preferred alternative (Approve the SCFWH Changes as an RPC).