FEDERAL CONSISTENCY BULLETIN

Office of Ocean and Coastal Resource Management

Issue No. 2
August 1993

The Federal Consistency Bulletin is intended to keep states, federal agencies, and other interested parties abreast of current federal consistency issues. The federal consistency provision, section 307, of the Coastal Zone Management Act of 1972 (CZMA), as amended, requires that activities performed by the federal government, that affect any land or water use or natural resource of a state's coastal zone, must be consistent, to the maximum extent practicable, with the enforceable policies of a state's federally approved coastal management program. Federally permitted and funded activities must be consistent with the enforceable policies of a state's coastal management program. The Office of Ocean and Coastal Resource Management (OCRM), National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce, administers the CZMA and federal consistency at the national level.

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The Federal Consistency Bulletin is published periodically by OCRM. Please send comments or questions or information to be included in future Bulletins to David W. Kaiser, Federal Consistency Coordinator, OCRM, N/ORM3, 1305 East-West Highway, 11th Floor, Silver Spring, MD 20910. (301) 713-3098, FAX: (301) 713-4367.

Significant State Issues

Lake Gaston Consistency Appeal Decision and Interstate Consistency Update

As reported in the Federal Consistency Bulletin, Issue No. 1, January 1993, the City of Virginia Beach, Virginia, is seeking to withdraw up to 60 million gallons of water per day from Lake Gaston, which straddles the North Carolina - Virginia border. Lake Gaston was created by a dam operated by the Virginia Electric Power Company (VEPCO). In September 1991, North Carolina formally objected to the proposed water withdrawal which requires amendment of VEPCO's Federal Energy Regulatory Commission license. VEPCO requested the Secretary of Commerce to override North Carolina's objection. On December 3, 1992, former Secretary Franklin issued a decision, based on advice from the Department of Justice (Justice), that one state may not object to a federally permitted activity which occurs entirely within another state. On February 3, 1993, the State of North Carolina and Congressmen from North Carolina and Virginia requested that Secretary Brown reconsider former Secretary Franklin's decision. On February 10, 1993, Virginia Beach and other Virginia Congressmen requested that Secretary Brown let the previous decision stand.

Because the Justice opinion on interstate consistency has such important implications for the reach of the CZMA, Department of Commerce General Counsel, on April 12, 1993, requested that Justice review its opinion. On June 29, 1993, Justice informed Secretary Brown that its position has not changed. The Secretary, on July 30, 1993, informed all parties that, based on Justice's review, the Secretary declines to reconsider Secretary Franklin's decision.

Thus, at the present time, OCRM will not be able to support states' consistency reviews of projects located totally in another state.

For additional information contact David Kaiser, OCRM Federal Consistency Coordinator, (301) 713-3098.

New York and GSA/ U.S. Marshals Service Land Disposal Update - Court Denies New York's Request for a Preliminary Injunction

As discussed in the last Bulletin, the General Services Administration (GSA) and the U.S. Marshals Service were disposing of a parcel of land that was seized by the U.S. Marshals Service. The State of New York requested to review the land sale for consistency with the New York Coastal Management Program. GSA asserts that GSA's "broker" activities for the disposal of the land is exempted from CZMA consistency requirements by federal drug statutes, that acting as a "broker" is not a federal activity under 15 C.F.R. § 930.31(a), and that a consistency determination is unnecessary when selling federal surplus real property where the sale is "environmentally neutral."

The State prepared to file for a temporary restraining order and permanent injunction against the sale of the property, but the U.S. Attorney's Office for the Northern District of New York expressed an interest in working the issue out. However, negotiations between the State and buyer regarding a public access easement failed to produce an acceptable agreement. On February 5, 1993, OCRM responded to a GSA letter to New York on the applicability of consistency to certain federal land acquisitions and disposals. OCRM's letter maintained that consistency is applicable to such land transfers. On March 8, 1993 the State sued to enjoin GSA from finalizing the sale on the grounds that GSA failed to comply with federal consistency.

On April 5, 1993 the United States District Court, Northern District New York, denied preliminary injunctive relief, finding in part that the State's injury would not be irreparable because the State's policies may still be enforced against the private landowner through the State's police power and eminent domain. While the Court confirmed that GSA activities are subject to consistency, the Court found that the State did not show how GSA's failure to observe procedural dictates of the CZMA damaged coastal environs since there was no change in the present use of the land. The Court also determined that the State would probably not succeed on the merits and that the balance of hardships, if injunctive relief were granted, would favor the property purchaser, not the State. The property was conveyed by GSA and the Marshals Service to the new property owner in mid-April 1993.

The State is currently weighing its options. For additional information call Bill Barton, N.Y. Dept. of State, (518) 474-3643, or Bryan Cullen, (518) 474-6740.

Delaware, EPA, and Superfund

The activities at the DuPont-Newport Superfund site in Delaware have prompted the Delaware Coastal Management Program (DCMP) to begin communications with EPA regarding federal consistency requirements for the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). EPA Region III questioned whether CZMA federal consistency is applicable to "on-site" activities for Superfund sites. OCRM discussed the matter with the Region and EPA Headquarters. EPA indicated that its CERCLA guidance defines whether administrative, substantive or both types of requirements of other laws apply to on-site and off-site activities. EPA guidance defines on-site activities as the areal extent of contamination and suitable areas in very close proximity to contamination. EPA asserts that on-site activities need only meet the substantive requirements of other federal law before a final EPA decision is issued. This means that for on-site activities EPA will make a determination of consistency, but will not submit the determination under federal consistency review procedures and timeframes. OCRM disagreed with this position finding no language in CERCLA that would supersede any CZMA requirements, substantive or administrative. Further the 1990 changes to the CZMA make it clear that no federal activity is exempt from the consistency requirements. OCRM expects to meet with EPA in the near future to further discuss this issue.

EPA Region III did submit, to the DCMP, a consistency determination for on-site activities at the DuPont-Newport site. They based their submission on their determination that the CZMA was a relevant and appropriate requirement for this particular site. The DCMP responded with several concerns and requested that EPA revise their consistency determination to address these concerns and additional DCMP policies. DCMP is also requesting the standard federal consistency review period. For additional information from Delaware contact Miriam Lynam, DCMP, (302) 739-4411.

Connecticut, the Coast Guard, and Security Zones

In the Spring of 1992, while investigating recent enforcement actions against Connecticut fishermen by security personnel of General Dynamics Electric Boat Division, the State discovered that the Coast Guard never submitted a consistency determination for Security Zone B, New London Harbor (established in July 1973 and expanded in 1984). The Coast Guard should have provided a consistency determination for the 1973 action, under 15 C.F.R. § 930.38(a)(for ongoing activities initiated prior to management program approval, for which the federal agency retains discretionary authority), and the 1984 expansion under regular consistency procedures, if the activities would have affected the coastal zone.

After several discussions and the exchange of correspondence among the State, Coast Guard, and OCRM, OCRM informed the Coast Guard and the State that the establishment of such security zones is not exempt from consistency, but that the consistency regulations do not provide for after-the-fact consistency determinations. OCRM recommended that the State and the Coast Guard attempt to come to an agreement regarding the current dispute outside of consistency mechanisms, and that the Coast Guard provide consistency determinations for future security zones or changes to security zones.

However, the Coast Guard's response to Connecticut's inquiry into the establishment and modification of this zone implies that the establishment of such security zones may be exempted, at the Coast Guard's discretion, from the consistency requirements. OCRM informed the Coast Guard that such an

interpretation is incorrect given the plain language of the CZMA that all federal activities are subject to consistency if they affect any land or water use or natural resource of a state's coastal zone.

For additional information from the State contact Joan Hoelzel, Connecticut CMP, (203) 566-7404.

New Jersey and OCS Policies

New Jersey proposed to amend its outer continental shelf policies (OCS) to "discourage" OCS development until a federal energy plan including viable alternative energy sources have been developed. The State's present policy generally encourages rapid OCS development. OCRM had several concerns. First, OCRM wanted to be certain that the policies could not be construed as prohibiting OCS leasing and development in such a way that they would conflict with CZMA requirements that state CMPs provide adequate consideration of the national interest in energy facility siting, and that such potential regulation of activities on the OCS is within the state's jurisdiction. Second, this policy did not adequately link OCS activities to impacts on New Jersey's coastal uses and resources within the state's jurisdiction (there are, however, numerous other specific New Jersey CMP policies that the State uses to review OCS activities). Under CZMA section 307 states may review for consistency activities seaward of the coastal zone to the extent that those activities affect any land or water use or natural resource of the coastal zone. While the rationale provided in the proposed policies briefly mentioned social, economic, and environmental impacts of OCS activities, the focus was on the benefits to New Jersey's coastal resources through limiting OCS activities, rather than on demonstrating the impacts of the actual activities.

After several discussions among OCRM and the State, the State clarified that the present policy is an advisory policy and that the changes will also be advisory. For additional information from the State contact Steven Whitney, Assistant Administrator, Office of Land and Water Planning, New Jersey Department of Environmental Protection and Energy (609) 292-1875.

New Jersey and Ocean Disposal of Dredged Material Containing Dioxin

On May 26, 1993, after three years of negotiations between Federal agencies, commercial port and shipping interests and environmental groups, the Army Corps of Engineers (Corps) approved a controversial permit for the Port Authority of New York and New Jersey to dredge 450,000 cubic yards of dioxin-tainted sediment near a former Agent Orange factory, and dump them six miles off Sandy Hook, New Jersey, in what is called the "Mud Dump." The portion of the Passaic River, in New Jersey, where the dredging will occur has been listed as a Superfund site on the National Priorities List. The Mud Dump is located near an important commercial and recreational fishing area, which also hosts three endangered species each of whales and sea turtles. The permit is the first of an anticipated 40 Corps permits for dredging in the New York/New Jersey harbor. While not all of the future dredge spoils will contain as high a level of dioxin contamination, issuance of this permit and the states' response set an important precedent.

In January, 1993 New Jersey issued a Waterfront Development Permit and Section 401 Water Quality Certification for the maintenance dredging project, and found the dredging project to be consistent with New Jersey's Coastal Management Program (NJCMP). The State's concurrence for the dumping activity at the Mud Dump was presumed. Both states are under pressure from the environmental community and NOAA to address dumping of dioxin-contaminated dredge materials through federal consistency reviews on dredging and dumping activities off the coast of New Jersey.

Addressing dioxin-tainted sediment dumping has proven difficult for states in part due to the lack of federally approved standards for ocean disposal of dioxin contaminated sediment. At the time section 401 certification for the dumping was requested by the Port Authority, dioxin guidelines were not available. For the purposes of this project, the Corps and EPA reached an agreement on proposed interim guidelines for a dioxin management approach for the sediments to be disposed of at the Mud Dump. In a letter to these two agencies, the Commissioner of the New Jersey Department of Environmental Protection and Energy (DEPE), which houses the NJCMP, wrote, "I am...concerned that the (Corps) appears to be setting standards for dioxin through its permit decisions, rather than through more accepted procedures of promulgating standards that include peer review and the opportunity for public input."

In an effort to make federal and state agencies address environmental concerns regarding ocean disposal of dioxin contaminated dredge materials, a coalition of environmental groups, including the Coastal Alliance, Clean Ocean Action, the National Resources Defense Council, the Environmental Defense Fund, and others sent a letter to Rep. Gerry Studds, Chair of the House Merchant Marine and Fisheries Committee chastising New Jersey and New York for not using the federal consistency provision as a means to review the dumping. The letter states,

> (I)t is with great concern that we have observed the unwillingness of the states of New Jersey and New York to use this hard-won provision in an issue of direct threat to their coasts and coastal resources...New Jersey and New York's refusal to use the power to carefully assess, through a consistency review, the likely impacts of this activity on their state's resources is of great concern to the environmental community.

The letter goes on to request the Merchant Marine and Fisheries Committee hold an oversight hearing on the proposed permit, including examining the states' failure to conduct consistency reviews, the impacts of the dioxin dumping on fish species, and the effect on the food chain. The environmental groups would like Congress and EPA to examine alternatives to ocean dumping for dioxin-contaminated dredge materials.

Dredging was temporarily halted by an injunction sought by Clean Ocean Action. However, on June 7, 1993, a U.S. District judge in New Jersey ruled that the project could proceed, but that the Port Authority was required within 15 days to establish that "the permit was lawfully issued." In the meantime, New Jersey has placed a "no barge overflow" restriction on the activity, and is requiring a strict research and monitoring protocol. In addition, the Commissioner of the DEPE has stated that New Jersey will insist that the federal government reconvene a special Dioxin Task Force

specifically for establishing scientific-based standards for disposing of dredge material contaminated with dioxin. The State plans to block ocean dumping of such sediments after December 31, 1995 if the Federal government does not adopt such standards. In addition, subsequent to the Port Authority dredging permit, the NJCMP has successfully negotiated a Navy dredging project using federal consistency as a tool to require additional testing for dioxin levels.

For additional information from New Jersey contact Richard Sinding, Assistant Commissioner, New Jersey Department of Environmental Protection and Energy (609) 292-1875. For additional information from New York call Bill Barton, N.Y. Dept. of State, (518) 474-3643.

Maine, the Corps, and Mitigation

The State of Maine has several Corps projects requiring mitigation under Maine's CMP. The Corps District, instead of complying with the State CMP policies, has informed the State that such mitigation requirements are a local or State responsibility, and that if the State requires the Corps to provide the mitigation, then the Corps cannot do the project. The Maine CMP, the Governor, and the State's Congressional delegation have all discussed the issue with the Corps. However, at this time, the State and local governments must pay mitigation costs.

OCRM discussed the issue with Corps Headquarters in Washington, and the Corps indicated that its policy is to mitigate all damages to the extent justified and allowed under its regulations and appropriations law. However, if a state wishes to impose mitigation requirements that go beyond Corps requirements, or Congress has not otherwise authorized the Corps to fund the mitigation, then the Corps cannot do the project. If there are important interstate or national defense issues, the Corps may do the project regardless of state concerns or objections. For additional information from Maine contact Bill LaFlamme, Maine CMP, (207) 287-2111.

California and the Closure of Fort Ord

The Corps is in the process of closing Fort Ord and reviewing alternatives for re-use of the site. Fort Ord is a large military base adjacent to Monterey Bay. The Corps issued a draft environmental impact statement (DEIS), which contained a draft consistency determination. The Corps District also informed the State that the record of decision (ROD) would be issued prior to submitting a final consistency determination stating that the ROD was not the final agency action. California notified the Corps prior and subsequent to the issuance of the DEIS of the need to make a final consistency determination before publishing the ROD, or the State would treat the draft consistency determination as final. In addition, the Corps intended to release the ROD before the State's 45 day review period (on the draft determination) was completed. As a result of the State's letters and coordination between OCRM and Corps headquarters, the Corps District office has delayed issuance of the ROD and will submit a final consistency determination.

On a general note, it is OCRM's position that a ROD is a federal agency action. Therefore, if a federal activity will affect a state's coastal uses and resources a consistency determination must be submitted to the state no later than 90 days before issuance of the ROD. If there will be other federal action decisions related to the project after the issuance of the ROD, then another consistency determination may be required. See 15 C.F.R. § 930.37(c)(phased federal projects).

California also requested information from OCRM on consistency determinations for other base closures. OCRM informed the State that the disposal and plans for re-use of military bases are subject to consistency, to the extent they affect any land or water use or natural resource of the coastal zone. There have been few instances of consistency determinations and base closures. The General Services Administration (GSA) submitted a consistency determination for the disposal of the Montauk Air Force Base to the New York CMP in 1983. New York disagreed with the determination and subsequently sued GSA. GSA eventually assigned the property to the Department of the Interior which conveyed the property to the State of New York. In two other instances, Pease Air Force Base in New Hampshire and Fort Meade in Maryland, federal consistency was not asserted by the states. However, both states negotiated for and agreed with the final disposition for both bases. For Pease Air Force Base, New Hampshire did not assert consistency because the base was, for the most part, not in the coastal zone and impacts were expected to be minimal. Negotiations between the State and the U.S. Fish and Wildlife Service, for the one strip of land in the coastal zone, resulted in the designation of a national wildlife refuge.

Given the large number of proposed base closings, states and federal agencies should be aware of consistency responsibilities for such activities.

For additional information from California on Fort Ord contact David Loomis, California Coastal Commission, (408) 427-4863.

The Mass. Bay Disposal Site

Recently EPA designated the Mass. Bay Disposal Site, under the Marine Protection, Research and Sanctuaries Act (MPRSA) section 102, after EPA included provisions that Massachusetts asserted were necessary in order to be consistent with the Massachusetts CMP. The Corps district questioned EPA's approval. The Corps asserted the record of decision (ROD) was not noticed properly and apparently EPA will re-notice the ROD. The Corps is also questioning EPA's authority to agree, at the site designation stage, to state requested and EPA approved provisions regarding use of the site. The Corps maintains that use of a site can only be authorized by the Corps under the MPRSA section 103 and that the Corps strongly objects to the section 103 type conditions agreed to by the State and EPA under the section 102 process. The Corps does agree that a state has the right, under consistency provisions, to raise those type of issues when a disposal is proposed under section 103. OCRM discussed the issue with Corps headquarters and expressed concern with the Corps view since the 1990 amendments to the CZMA allow a state to review future reasonably foreseeable cumulative effects of activities at an initial stage of an activity.

This issue is ongoing and will undoubtedly involve further discussions among the State, EPA, Corps, and OCRM. For additional information from the State contact Steve Bliven, Massachusetts CMP, (617) 727-9530 (ext 420).

Secretary's Decision in a Request to Reconsider an OCS Decision

As reported in Issue No. 1 of the Federal Consistency Bulletin, on January 8, 1993, former Secretary Franklin issued a decision in the consistency appeal of Chevron U.S.A., Inc. (Chevron Decision) from an objection by the State of Florida. On February 26, 1993, the Assistant General Counsel, Office of the Governor of the State of Florida, requested that Secretary Brown reconsider former Secretary Franklin's decision. In a letter to the Secretary dated March 8, 1993, counsel for Chevron U.S.A. Production Company urged Secretary Brown to let the decision stand. Secretary Brown's response, dated March 23, 1993, declined to reconsider former Secretary Franklin's decision. Secretary Brown stated that the Chevron appeal decision was decided on the merits and based on a completely developed record, which was weighed in light of the applicable law and regulations.

OCRM Coordination with Other Federal and Non-Federal Entities

In addition to the interaction with other federal agencies involving specific state issues noted above, OCRM recently met with the following federal and non-federal entities.

Environmental Protection Agency

On June 29, 1993 OCRM and EPA met to discuss ocean dump-site designations under section 102 of the MPRSA. Discussions centered on the relationship between the federal consistency provision of the CZMA and ocean dump-site designations under the MPRSA, and the Coastal Zone Act Reauthorization Amendments of 1990 and 1993 changes to the MPRSA section 106. OCRM and EPA preliminarily agreed to develop guidance to the states and EPA regions on consistency and ocean dump-site designations. The proposed guidance will address procedural and substantive requirements as well as the scope of consistency reviews on the designation of ocean dump-sites under the MPRSA. The development of the guidance will be closely coordinated with the state CMPs.

OCRM plans to meet, in the near future, with other EPA divisions to discuss CERCLA/Superfund, see Delaware/Superfund issue above, and possibly EPA, the Coast Guard, and the Minerals Management Service on implementing the Oil Pollution Act of 1990 (OPA). See discussion on OPA under OCRM Policy Decisions, Guidance, and Projects.

U.S. Army Corps of Engineers

On June 11, 1993, OCRM met with the Corps to begin discussions and coordination on issues related to the implementation of the CZMA, particularly federal consistency. The meeting was very useful and a good start in improving a dialogue between our offices. It was well attended by upper level Corps officials and we engaged in frank and open discussions.

Discussions centered on federal consistency procedures and the 1990 amendments to the CZMA and the need to identify and discuss areas of general CZMA policy where there is potential conflict between the Corps and OCRM and the states, identify points of contact, discuss inconsistencies among Corps districts, and initiate discussion on some substantive issues. OCRM and the Corps agreed to continue to discuss these specific issues and other issues as they arise, on a more regular basis.

The following specific issues were discussed:

Conditional permits, specifically the Corps recent regulatory guidance letter (RGL) on provisional permits. We discussed the Corps' regulatory guidance letter (RGL) on the issuance of provisional permits pending state Clean Water Act section 401 certification and Coastal Zone Management Act (CZMA) section 307 federal consistency review. According to the Corps, the provisional permit RGL is necessary because there is confusion among applicants as to who they need to see for various approvals and there is a need to document where administrative delays occur. The Corps noted that they process 70 percent of the individual permits within 120 days. Under the RGL, Corps districts will not issue a provisional permit if there are reasonable state 401 or consistency delays. However, the Corps, generally, will issue a provisional permit if the state fails to respond within 120 days.

OCRM and the Corps have discussed CZMA section 307 requirements that a federal agency may not issue a license or permit unless a state concurs with the applicant's consistency certification or the state's concurrence is conclusively presumed. OCRM has also informed the Corps of coastal states' concerns that the issuance of provisional permits may give applicants leverage against the state, thereby reducing the flexibility needed for negotiations between a state and an applicant, and that provisional approvals may give an applicant a false sense of approval. However, the Corps' May 20, 1993, RGL on provisional permits does provide clear instructions to provisional permit recipients of the need to obtain state consistency concurrence. Further, a license or permit is defined functionally in CZMA regulations as an approval. 15 C.F.R. § 930.51(c). Thus, technically the Corps' provisional permit is not a permit because it is lacking the requisite approval.

While we recognize that the Corps' provisional permits are legally permissible, we discourage them as a matter of policy. An alternative that would serve the Corps' needs to eliminate confusion and document delays, but not mislead applicants or hinder state/applicant negotiations, would be to issue a notice, i.e., a postcard, stating that the Corps has completed its review and is waiting for state consistency concurrence. Since, under the current RGL, the applicant has to come back for final Corps approval anyway, there would be no increase in administrative processing.

Federal Projects. The Corps expressed concern that the 45 day review period for federal projects was too long for some emergency situations. OCRM informed the Corps that the regulations allowed federal agencies to deviate from full consistency when required by other federal law. Also, we suggested that the Corps work closely with the states to develop expedited review procedures or general consistency determinations for emergency situations and ongoing activities. We offered OCRM assistance. It would be helpful

to OCRM and the states for states to provide OCRM with examples/experience on expedited reviews.

Consistency Among Corps Districts. While the Corps acknowledged that there was often inconsistency among Corps districts, they noted that the districts have discretion to implement Corps programs, but should not be acting contrary to other federal requirements. As examples of inconsistency among Corps districts we discussed complying with state mitigation policies when proposing a Corps project and Nationwide Permits.

We discussed the issue where the State of Maine has several Corps projects which will require mitigation under Maine's CMP. See discussion above under Significant State Issues.

We then discussed the issuance of nationwide permits (NWPs) in 1991 and that some Corps Districts refused to attach regional conditions to the NWPs, thereby effecting a state disagreement with the Corps NWP program. This resulted in some states having to process a large number of CWA section 401 and consistency certifications for relatively minor activities and defeats the purpose of the NWPs. We suggested that Corps Districts and states should be able to negotiate reasonable conditions which address state CMP requirements, but which do not place additional undue burdens on the Corps or the states. The Corps recognized this problem and directed our attention to a RGL issued September 14, 1992, encouraging the districts to take another look at incorporating regional conditions. OCRM will look at that RGL and discuss it with states that still have problems with the NWPs.

Winter Navigation in the Great Lakes. We briefly discussed the winter navigation issue in Michigan. We discussed Michigan's concern that the Corps should determine the opening and closing of the locks based on environmental criteria and not on a set date. The Corps noted attempts to reach a consensus with the State, but there were overriding interstate commerce concerns, such as the need to have a certain date for planning purposes.

Subsequent to OCRM's meeting with the Corps, the Michigan DNR met with the regional offices of the Corps, the U.S. Fish and Wildlife Service, and the U.S. Coast Guard on June 29, 1993. These agencies are currently working on an agreement that would establish a monitoring program and reduce vessel speeds during certain times of the year.

Ocean Dumping Issues. We then discussed the Corps' objections to EPA's designation of the Mass Bay Dump Site, after EPA included conditions that Massachusetts asserted were necessary in order to be consistent with the Massachusetts CMP. See discussion above under Significant State Issues.

Other Issues. We agreed to formalize points of contact, and explore the possibility of developing a joint Corps/EPA/NOAA guidance document on the steps an applicant must take for project approval (including points of contact), under the various federal/state programs.

American Association of Petroleum Landsmen - OCS Committee

On April 13, 1993, OCRM, NOAA General Counsel for Ocean Services, and the National Marine Fisheries Service (NMFS) met with the American Association of Petroleum Landsmen (AAPL) - OCS Committee. The AAPL, an oil and gas industry association, requested a meeting with OCRM to discuss various issues related to consistency and marine sanctuaries and the new administration. NMFS discussed the reauthorization of the Marine Mammal Protection Act. OCRM and NOAA General Counsel provided an update on the marine sanctuary program and recent OCS consistency issues and appeal decisions.

OCRM Policy Decisions, Guidance, and Projects

Reviewing Activities under the Oil Pollution Act of 1990

On August 13, 1993, OCRM sent general guidance to the states on coordinating state input into the Oil Pollution Act of 1990 (OPA) process. This section reiterates that guidance. Questions on opportunities for state CMP input into the OPA process should be directed to David Kaiser. OCRM is currently working with the Coast Guard, the Environmental Protection Agency (EPA), and the Minerals Management Service (MMS), to improve federal-state coordination of OPA activities.

Overview of OPA requirements

OPA addresses the matter of oil spill response planning from two perspectives. While certain vessels and facilities must plan for the possibility of spills at various locations, those plans must be consistent with plans developed by the heart of the planning effort, a broad federal/state/local community planning effort conducted by Area Committees.

OPA requires tank vessels, offshore facilities, and certain onshore facilities that could reasonably be expected to cause substantial harm to the environment by discharging oil into the navigable waters, adjoining shorelines, or the exclusive economic zone of the United States to prepare and submit plans to respond "to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of oil or a hazardous substance." 33 U.S.C. § 1321(j)(5)(OPA § 4202(a)(6)). EPA is responsible for reviewing and approving response plans for non-transportation-related onshore facilities, MMS for offshore facilities (other than deep water ports) including associated pipelines, and the Coast Guard for marine transportation-related onshore facilities, deepwater ports, and tank vessels.

All plans must be approved by August 18, 1993, or the vessel or facility may not handle, store, or transport oil. However, notwithstanding this requirement, a vessel or facility owner or operator may operate for up to two years after the plan has been submitted, but not approved, if the owner/operator certifies to the federal agency that the owner/operator has ensured by contract or other approved means the availability of private personnel and equipment necessary to respond to the maximum extent practicable, to a worst case discharge, and receives written authorization from the federal agency.

As noted above, the heart of the OPA oil pollution response planning system is the OPA requirement that Area

Committees, made up of qualified personnel from federal, state, and local agencies, develop Area Contingency Plans (ACPs) and work with state and local officials to enhance their contingency planning. Area Committees are to be established in each designated area to plan for a coordinated "community" response to oil or hazardous substance discharges. The coordinated community response includes federal, state, and local government agencies, and the individual vessels and facilities. The ACPs, when implemented, will be used in responding to an oil or hazardous substance spill. The important point is that all individual vessel and facility plans must eventually be consistent with the ACPs.

This guidance is primarily concerned with the Coast Guard's ACP planning process. OPA preserves states' authority to regulate facilities and vessels in their jurisdiction. Thus, it may be less efficient and unnecessary for state CMPs to concentrate on onshore facilities and vessels, since such facilities and vessels would have to meet any state and local requirements. State CMPs should also consider the effectiveness of concentrating on OPA plans required for offshore facilities. The plans required by MMS are modifications to existing plans which states should have already reviewed for consistency. MMS has stated that any modifications will be more stringent, per OPA. However, OCRM strongly encourages state CMPs to actively participate, at some level, in the ACP process, which is specifically concerned with assuring that response capability and protection is provided for areas within the various coastal zones.

The remainder of this guidance provides additional information on the OPA oil spill response planning process under the Coast Guard's jurisdiction and opportunity for state CMP input. A better understanding of this process should provide state CMPs with a clearer idea on integrating state concerns, including those associated with the coastal zone, into the ACP planning process.

The OPA Oil Spill Response Planning Process

State CMPs should actively participate in the National Contingency Planning process at the Area Committee level. This process can provide an effective means of federal-state coordination of activities affecting state coastal resources and uses.

OPA recognizes direct community participation as vital to the viability of the OPA planning process. Such a planning process provides a means by which affected policies of states, including state CMP policies, may be integrated. The Area Committee (AC) and Area Contingency Plan (ACP) are the critical tools for implementing this mandate.

The revised NCP and RCPs, and the ACPs recognize that the process of planning for and responding to an oil or hazardous substance spill is iterative and must involve the federal, state, and local community working together cooperatively. Provided that state CMPs play an active role, these cooperative efforts should ensure consistent application of coastal zone management policies. It is OCRM's view that state involvement in developing ACPs through the Area Committees may be the most effective way to ensure that oil spill response planning will address state concerns. The ACP process should provide a reasonable opportunity to apply state CMP policies and integrate them into the ACP. Further, the vessel and facility plans developed under OPA must be consistent with the ACPs including those state policies integrated into them. Once they are consistent with the ACPs, they should be consistent with state CMPs. Participation in this planning process does not preclude the assertion or exercise of authorities under any law.

In the coastal zone, the Coast Guard, as lead federal agency for response, has established 48 Area Committees and produced the first iteration of 48 Area Contingency Plans. Although the Area Committee in the coastal zone is chaired by the Coast Guard On Scene Coordinator, neither the AC nor the ACP belong solely to the Coast Guard or the federal government. Rather, they are community functions intended to benefit the entire community. Ideally, the ACP will be signed by all members of the Area Committee, (including interested agencies of State and local governments) and endorsed by the rest of the community (including industry, academia, environmental groups and the concerned public).

The ACP identifies (1) sensitive areas; (2) federal, state, local, and industry response organizations; (3) equipment, resources and personnel available for response; and (4) priorities for employing these resources. It examines response equipment in the Area, including equipment detailed in vessel and facility response plans as prescribed in the federal regulation. The Area Committee identifies environmentally and economically sensitive areas, devises appropriate strategies for protecting those areas, recognizes that not all areas can be equally protected simultaneously and, therefore, establishes response priorities (a hierarchy for identifying what needs to be protected first). Finally, the Area Committee looks at response resource needs and compares them to response resources availability from both public and private resources. Some response resources shortfalls may be made up by relocating some resources or though public or private acquisition. Often, however, planning strategies for employment will have to recognize that not all sensitive areas can be protected equally and simultaneously. Thus, there is significant flexibility for the Area Committees, and hence, state CMPs, to adjust each ACP to meet local concerns.

The Regional Response Team which the Coast Guard and EPA co-chair is the planning, policy and coordinating body which develops Regional Contingency Plans and provides one level of review for the Area Contingency Plans. Its members are drawn from regional representatives of the 15 federal agencies listed in the NCP and state representatives within the region. The RRT reviews the ACP for consistency with the NCP and makes recommendations on the availability of regional resources. The RRT provides another level for formalized state representation and coordination.

Vessel and Facility Response Plans (VRP/FRP) are required to be consistent with the ACPs and the NCP. Tank vessel and facility representatives are encouraged to actively participate in Area Committee activities to maximize consistency and coordination of all planning efforts. In achieving consistency, the VRP/FRP identifies (1) the plan holder response organization, as it fits into the Area Contingency Plan; and, (2) company owned/contracted resource, personnel, and equipment to be deployed in response within the Area. The number and kinds of response resources identified in these plans are based on planning factors detailed in the applicable regulations for vessels (33 CFR 155), and facilities (33 CFR 150). Most vessel and facility response plan holders are contracting for response resources from Coast Guard classified Oil Spill Response Organizations.

The first round of coastal zone ACPs being prepared by the Coast Guard were completed by July 1, 1993. The process of revision and improvement should begin almost immediately. There are several factors which will influence the next iteration. Greater community involvement, including coastal zone management agencies is a primary one. Vessel and Facility Response Plans are currently undergoing the review and certification stages; final VRP and FRP approval is expected to be completed within two years from when the plans were submitted. The details in these plans concerning response resource availability and response structure should help refine response resource inventories.

Additionally, The Preparedness For Response Exercise Program (PREP) is intended to provide ongoing assessment of the ACPs and vessel and facility response plans. The purpose of the PREP is to enhance the preparedness of the National Response System. The National Response System is a system comprised of a coalition of coordinating entities whose role is to effect response to an oil or hazardous substance spill. This coalition includes federal, state and local government and industry forces working in concert according to the applicable contingency or response plans. Each specific vessel and facility response plan and Area Contingency Plan constitutes a unit of the National Response System. The goal of the PREP is to achieve integration, cooperation and coordination of the entire response community for conducting exercises to evaluate the "real world" effectiveness of response plans to an oil or hazardous substance spill and the readiness of the plan holders, while providing an important learning opportunity for all involved. Participation in PREP will enable the response community to ensure efficient use of government and industry resources by minimizing overlapping or duplicative exercises and providing a consistent approach to conducting and evaluating required spill exercises. The lessons learned from the PREP Program will provide fundamental feedback to all plan holders concerning adequacy of existing plans and direction for future revisions.

Finally, the Oil Spill Response Organization (OSRO) classification mechanism provides a continuous mechanism for checking industry vigilance in maintaining response equipment.

The Area Committee is a standing body intended to bring it all together. It is the ACP process of discussion, negotiation and cooperation, rather than the plan itself, that is vital to the success of any future response effort. The States are strongly encouraged to participate in all levels of this dynamic, iterative process. Effective state CMP participation should ensure that oil spill contingency plans and response efforts reflect state CMP policies.

Changes to the Marine Protection, Research, and Sanctuaries Act Section 106(d) -- Ocean Dumping

In 1993 Congress amended the MPRSA section 106(d). The amendments appear to allow for state regulation regarding the dumping of material into ocean waters within the jurisdiction of a state. Previously, under MPRSA section 106(d), states were preempted from any direct state regulation of ocean dumping activities. Using federal consistency states could only address ocean dump-site designations or disposal if the activities affected the coastal zone and the state could apply enforceable CMP environmental policies. If states' policies on ocean dumping may now be included in state CMPs, then they may possibly be used for state consistency reviews for applicable activities. OCRM will further discuss, with EPA and the Corps, the implications of the 1993 changes to the MPRSA.

State Federal Consistency Procedures - Single State Agency Responsibility

Recently several states have proposed to change their consistency review procedures to involve several state agencies in either conducting consistency reviews or in issuing state permits in lieu of consistency reviews. These changes potentially could conflict with the requirement for a single state consistency agency pursuant to 15 C.F.R. § 930.18. The reasons for this requirement are clear: uniform application of a state's coastal management policies, efficient coordination of all state coastal management requirements, comprehensive coastal management review, and providing a single point of contact for federal agencies to discuss consistency issues. State CMPs should ensure that all relevant enforceable policies are considered for a federal consistency review, not just those of a particular state permit program.

Under NOAA regulations, a state must designate a single state agency to perform the consistency functions, including formally commenting on all consistency determinations or concurring or objecting to consistency certifications. 15 C.F.R. § 930.18. Further, the single consistency agency must be the lead coastal management agency, or a single state agency designated by the lead coastal management agency. Id. The single consistency agency may rely on the expertise of other state agencies, but other state agencies may not be the state lead for consistency reviews.

The requirements for state CMPs to ensure that all relevant enforceable policies are considered under state permit agency reviews is derived from the CZMA section 307(c)(3)(A) and various sections of NOAA's regulations. The CZMA section 307(c)(3)(A) requires applicants for federal licenses and permits to be consistent with the enforceable policies of a states coastal program. The CZMA section 304(12) defines "program" as comprehensive standards to guide public and private uses in the coastal zone. Thus, the CZMA requires compliance with all relevant enforceable policies of a program and not a subset thereof. This requirement for comprehensive coastal management is further defined in NOAA regulations. Enforceable policies must be sufficiently comprehensive and specific to regulate land and water uses. 15 C.F.R. § 923.40(a). Further, the major CMP approval criterion is a determination that state agencies responsible for implementing the CMP do so in conformance with the policies of the management program. 15 C.F.R. § 923.40(b). See also 15 C.F.R. § 923.41(b)(2). The regulations also require that networked states demonstrate that CMP authorities implement the full range of policies. 15 C.F.R. § 923.43(c)(1), (2). The federal consistency regulations mirror the requirement for the application of enforceable policies in a comprehensive manner. See 15 C.F.R. §§ 930.1(e)(federal and state agency consistency decisions must be directly related to the policies and standards of the program), 930.50 and 930.56(a)(activities must be conducted in a manner consistent with the program), and 930.58(a)(3)(assessment of effects to relevant elements of the management program), (4)(applicants must be consistent with enforceable policies of the management program).

If all CMP enforceable policies are part of mandatory permit programs, however, then issuance of the relevant state permits can constitute the state's consistency concurrence. Federal agencies and applicants should be notified as part of this process (that is, there are no other relevant enforceable CMP policies that are not part of required permits). On the other hand, activities affecting the coastal zone, that require federal approvals, but which do not fall under the jurisdiction of state permit authority, must be consistent with the CMP enforceable policies, and the lead CMP agency must conduct the consistency review. Moreover, if there are other enforceable CMP policies that are not part of a state permit program, then the state CMP must ensure that other relevant enforceable policies are considered. Individual projects must be reviewed in light of all relevant enforceable policies.

Since these considerations should have been addressed at the CMP approval stage, states should already have mechanisms in place to ensure that all relevant enforceable policies are considered. If a state CMP believes it has existing procedures, or proposes procedures, inconsistent with this discussion, they should notify their CPD program contact or David Kaiser.

Starting the Consistency Review Timeclock for Incomplete Consistency Applications

Recently states have requested that OCRM clarify when the state consistency review timeclock starts for federally licensed and permitted activities with incomplete consistency applications. NOAA regulations provide states with two alternative means of responding to incomplete consistency applications.

First, a state may commence its review upon receipt of a copy of the consistency certification, and the complete information and data required pursuant to 15 C.F.R. § 930.58. 15 C.F.R. § 930.60(a). Thus, when a state receives a consistency certification without the necessary data and information, the state may, in a timely fashion, notify the applicant and the federal agency that the consistency review timeclock will not start until such information is received by the state. If the State notifies the applicant and the federal agency that the necessary data and information was not received with the consistency certification and that the consistency review timeclock has not started, then the consistency review process has not begun and the federal agency cannot conclusively presume state concurrence. If a state intends to start the consistency review timeclock only when it has received a consistency certification and the necessary data and information, pursuant to 15 C.F.R. § 930.60(a), the State should so inform relevant federal agencies, and the federal agencies should inform permit applicants.

Second, NOAA regulations also allow a state to begin the consistency review timeclock when it receives the consistency certification, even if the necessary data and information are not provided. The regulations provide:

> A State agency objection may be based upon a determination that the applicant has failed, following a written State agency request, to supply the information required pursuant to § 930.58. If the State agency objects on the grounds of insufficient information, the objection must describe the nature of the information requested and the necessity of having such information to determine the consistency of the activity with the management program.

15 C.F.R. § 930.64(d).

State review of federal permit activities will, of course, be expedited if an applicant provides the necessary data and information, pursuant to 15 C.F.R. § 930.58, when an application is submitted.

Implementing the CZMA Section 306(d)(14) - Public Participation for State Reviews of Direct Federal Activities

When Congress reauthorized the CZMA in 1990, a new requirement was added, section 306(d)(14), which requires that "[t]he management program provide for public participation in permitting processes, consistency determinations, and other similar decisions." This requirement must be met by November 5, 1993 ("consistency determinations" refers to the state's review of federal agency consistency determinations for direct federal activities under CZMA section 307(c)(1) (NOAA regulations already require states to provide for public participation in the state CMP's review of consistency certifications for federally licensed and permitted activities)). OCRM contacted all states to alert them to this requirement and to determine, on a state-by-state basis, the extent to which this requirement has been met and to provide guidance on meeting the requirement.

One example of state public participation in state CMP review of consistency determinations is the State of Massachusetts' procedure for public input on direct federal activity reviews. Massachusetts provides notice of all federal activities in the State's Environmental Monitor, which provides a 21 day comment period. The Monitor is published bi-weekly with a circulation of about 1500 state-wide. Most local planning boards, conservation commissions, etc., are on the mailing list, as are federal and state agencies, environmental interest groups and members of the general public. There is no cost to be on the mailing list. The Monitor was originally established to provide public notification under the Massachusetts Environmental Policy Act - the State's version of NEPA. It is now used for a range of other notifications, including federal consistency. The Massachusetts CMP submits lists of projects to be reviewed under consistency for each Monitor. In a case of minimum State CMP review time (where a consistency determination is submitted immediately after the most recent publication of the Monitor), the State CMP would take 13 days to get the notice into the Monitor and then have a 21 day comment period - a total of 34 days out of the 45 day review period. Apparently, this has not caused any significant problems in the CMP's reviews. For additional information on Massachusetts' procedure contact Steve Bliven, Assistant Director, Massachusetts CMP, (617) 727-9530 (ext. 420).

Federal Consistency Manual

The Manual will explain existing regulations in light of the Coastal Zone Act Reauthorization Amendments of 1990, as well as clarify OCRM's interpretation of the consistency regulations. Development of the Manual is behind schedule, but we still expect to release a draft for comment sometime this fall.

Secretarial Appeal Decisions

1993 CZMA Consistency Appeal Decisions Since January 15, 1993

Under CZMA § 307(c)(3), a state's consistency objection precludes a federal agency from issuing a permit for an activity at issue unless, upon appeal by the appellant, the Secretary of Commerce finds that the activity is either consistent with the objectives of the CZMA (Ground I) or necessary in the interest of national security (Ground II). If the requirements of either Ground I or Ground II are met, the Secretary must override the state's objection. Since January 15, 1993, the Secretary has issued the following consistency appeal decision to date.

Puerto Rico - Appeal of Jorge L. Guerrero-Calderon (Guerrero-Calderon Decision), March 5, 1993.

In August of 1988, Mr. Jorge L. Guerrero-Calderon (Appellant) applied to the U.S. Army Corps of Engineers for a permit to construct a 41-foot pier to facilitate convenient water access to his property located on Culebra Island, Puerto Rico. The Commonwealth of Puerto Rico objected to the Appellant's consistency certification for the proposed project on the ground that it is inconsistent with Puerto Rico's coastal management program policies providing for the protection of sea turtle habitat. On appeal, the Secretary of Commerce found that the Appellant's proposed project failed to satisfy 15 C.F.R. § 930.121(b). The proposed project will adversely affect the natural resources of the coastal zone by leading to more boating activity in the Tamarindo Bay area which could degrade sea turtle habitat and potentially harm endangered and threatened sea turtles feeding on seagrass in the vicinity. These adverse effects upon the natural resources of the coastal zone are substantial enough to outweigh any minimal contribution of the project to the national interest. Because the Appellant failed to satisfy Ground I and did not plead Ground II, the Secretary declined to override Puerto Rico's objection.

Pending Consistency Appeals

(As of July 30, 1993)

Appellant	Activity	State
Mobil (Manteo)	NPDES discharges	NC
Mobil (Manteo)	OCS exploration plan	NC
Carlos Cruz-Colon	Construction of a dock or boardwalk	PR
Rushton/ Codd	Construction of private home in Chesapeake Bay critical area	MD
ERA, S.E. Inc.	Reconstruction of dock	PR
Mobil (Pensacola)	OCS exploration plan	FL
Olga Vélez-Lugo	Construction of a dock and placement of fill	PR
Jesse J. Floyd	Impoundment of wetlands and placement of fill	SC
William O. Bryans	Impoundment of wetlands and placement of fill	SC

For further information on appeals call Roger Eckert, NOAA Office of General Counsel for Ocean Services, (301) 713-2967.

Federal Consistency Bulletin Board

The Consistency Bulletin Board provides states, OCRM, and other parties the opportunity to alert readers to upcoming events, various issues, request information from other states on a federal consistency issue, transfer ideas, etc. Items for the Bulletin Board may also present the lighter side of federal consistency (if it exists).

OCRM has moved to Silver Spring Maryland! Our new address is

Office of Ocean and Coastal Resource Management,
NOAA
1305 East-West Highway, 11th Floor
Silver Spring, Maryland 20910

OCRM Director - (301) 713-3155
Evaluations - (301) 713-3086
Sanctuaries and Reserves - (301) 713-3125
Minerals and Energy - (301) 713-3159
CPD Chief - (301) 713-3102
Federal Consistency - (301) 713-3098
N. Atlantic - (301) 713-3105
S. Atlantic - (301) 713-3117
Great Lakes - (301) 713-3113
Gulf - (301) 713-3109
Pacific - (301) 713-3121
Fax - (301) 713-4367

NOAA has a new General Counsel.

OCRM welcomes Meredith Jones, formerly of Bechtel Financial Services, Inc., in San Francisco, Calif. She replaces Tom Campbell, NOAA General Counsel under the Bush Administration.