

# FEDERAL CONSISTENCY BULLETIN



Office of Ocean and  
Coastal Resource  
Management

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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

### Interstate Consistency Update

As reported in Federal Consistency Bulletins, Issue No. 1, January 1993, and Issue No. 2, August 1993, the North Carolina and Virginia Beach dispute over the Lake Gaston water withdrawal continues to drive the interstate consistency issue. On May 19, 1994, the Secretary of Commerce, while overriding North Carolina's objection to the project, enabling federal agencies to issue necessary approvals to Virginia Beach, formally sanctioned interstate consistency. An executive summary of the decision follows:

#### Introduction

The Virginia Electric and Power Company (VEPCO), on behalf of the City of Virginia Beach, Virginia, (City), appealed to the Secretary of Commerce to override the State of North Carolina's objection to the City's proposal to withdraw water from Lake Gaston for the City's water supply needs. This issue has had a long and contentious history, and the decision was reached only after a thorough consideration of all the evidence in the record. As explained in more detail below, the Secretary overrode North Carolina's objection, thereby allowing the City to obtain federal permits to build a pipeline for the withdrawal of up to 60 million gallons a day (mgd) of water from Lake Gaston.

VEPCO's appeal arose under the Coastal Zone Management Act (CZMA), an act administered by the National Oceanic and Atmospheric Administration (NOAA), an agency within the Department of Commerce. Section 307 of the CZMA provides that any applicant for a required federal license to conduct an activity affecting any land or water use or natural resource of the coastal zone, shall provide to the permitting agency a certification that the proposed activity complies with the enforceable policies of a state's coastal zone management program.

VEPCO requested approval from the Federal Energy Regulatory Commission (FERC) for the City's project. Because North Carolina objected to the project, FERC could not grant a license or permit, unless the Secretary of Commerce found that the activity is consistent with the objectives of the CZMA or is otherwise necessary in the interest of national security.

### Background

The City, located on the coast of southeastern Virginia, is the largest city in Virginia, with more than 400,000 residents. The City has no water supply of its own and, historically, has purchased all of its water from the adjacent city of Norfolk. A series of droughts plaguing southeastern Virginia over the past 15 years has caused water shortages throughout the area. In response, the City adopted mandatory year round water restrictions and imposed a moratorium on extensions of its water system. Numerous water studies have shown that southeastern Virginia will need at least an additional 60 mgd of water by the year 2030.

More than a decade ago, after several years of study, the City embarked upon a project to withdraw potable water from Lake Gaston for the consumption of its residents and those of neighboring cities. Lake Gaston, which lies approximately 100 miles west-southwest of the City, is a man-made lake formed by damming a portion of the Roanoke River. Lake Gaston is part of a hydroelectric project constructed in the 1950s by VEPCO, under a license granted by FERC. Lake Gaston lies partly in Virginia and partly in North Carolina. The proposed project involves the permanent, consumptive withdrawal of up to 60 mgd of water from Lake Gaston, which is the equivalent of 22 billion gallons per year.

To gain access to Lake Gaston, the City proposes to construct a pipeline. The proposed pipeline would originate in a branch of Lake Gaston in Brunswick County, Virginia, at a location approximately 400 yards north of the Virginia-North Carolina border, run 76 miles across southeastern Virginia, and end at Lake Prince in Isle of Wight County, Virginia. The proposed pipeline would be located entirely within Virginia.

In 1983, in order to construct the pipeline, the City applied to the U.S. Army Corps of Engineers (Corps) for a permit under two federal statutes, the Clean Water Act and the Rivers and Harbors Act. The Norfolk District Corps of Engineers issued the permit after conducting an environmental assessment pursuant to the National Environmental Policy Act (NEPA), and concluded that the project would have no significant environmental effects.

The State of North Carolina (State) challenged the adequacy of the Corps' NEPA review in the federal courts. A decision issued in July 1991, ultimately upheld the issuance of the Corps permit.

To install and operate its water intake facility for Lake Gaston, the City must also obtain permission from VEPCO, and VEPCO, in turn, must obtain approval from FERC. VEPCO applied to FERC on February 20, 1991, to obtain the necessary permit approval for the pipeline project. The State of North Carolina requested a certification that the proposed project was consistent with North Carolina's coastal management program, a program which had been approved under the CZMA. The City and VEPCO jointly submitted such a

certification.

On September 9, 1991, the State objected to the City's and VEPCO's consistency certification on the ground that the proposed project is inconsistent with several enforceable policies contained in the State's coastal management program. Specifically, the State alleged that the project is not consistent with its guidelines for estuarine waters and public trust areas because the proposed withdrawal of water would significantly increase the number of low flow days experienced by the lower Roanoke River system in coastal North Carolina. This increase, the State asserted, would cause significant adverse effects on its coastal zone, including the Roanoke River striped bass fishery.

Under the CZMA, the State's consistency objection precludes any federal agency from issuing any license or permit necessary for the City's proposed project, unless the Secretary of Commerce (Secretary) finds that the activity is either consistent with the objectives or purposes of the CZMA (Ground I) or is necessary in the interest of national security (Ground II).

On October 3, 1991, VEPCO, on behalf of the City, filed with the Secretary a notice of appeal from the State's objection to the City's proposed project. The City argued that the project satisfies both Ground I and Ground II and raised several threshold issues. On December 3, 1992, then-Secretary of Commerce Barbara Franklin, relying on a Department of Justice opinion, terminated the appeal on the basis that North Carolina lacked the authority under the CZMA to review a proposed project that would occur wholly within Virginia. In February, 1993, the Department of Justice was asked again whether its previous opinion still represented its view, and Justice responded affirmatively. Subsequently, the Department of Justice withdrew its opinion, and on January 7, 1994, the Department of Commerce reopened the appeal.

Upon consideration of the entire record, which included submittals by the City and North Carolina, written information from federal agencies and the public, and views given during a public hearing, the Secretary made the following findings.

### Threshold Issues

#### A. Compliance With the CZMA and its Implementing Regulations

First, the City argued that the CZMA's consistency review provisions do not apply because VEPCO has not applied for a required federal license or permit. According to the CZMA, the City must first have applied for a federal license or permit in order to trigger the State's right to lodge a consistency objection. The Secretary found that because the regulatory definition of the term "license or permit" includes federal agency approvals, and because FERC approval is required for the project, VEPCO has applied for a required federal license or permit.

Second, the City argued that the CZMA's consistency review provisions do not apply because the proposed project is not an activity "affecting any land or water use or natural resource of the coastal zone." The Secretary found that there was enough evidence in the administrative record to establish that the State had

made a prima facie showing of effects on the coastal zone.

Third, the City argued that the consistency review provisions of the CZMA do not apply because the policies cited by the State in its objection letter do not constitute "enforceable policies." The Secretary found that because the policies cited by the State are legally binding and provide the State with the authority to control land and water uses and natural resources in its coastal zone, they are enforceable policies as defined in the CZMA.

#### B. Interstate Consistency

The CZMA encourages coastal states to establish management plans for protecting their coasts from environmental damage. A threshold issue raised by the City is whether, under the CZMA, a state (North Carolina) has a right to review, i.e., comment on and possibly object to, a federally licensed or permitted activity occurring totally within another state (the Lake Gaston project in Virginia). The purpose of the review would be to determine if the activity has negative effects on the coastal environment of the reviewing state (North Carolina). This issue is referred to as "interstate consistency."

First, the City argued that the Corps of Engineers previously decided, in a 1984 application for a permit related to the proposed project, that the CZMA does not allow one state to review activities in another state, and that the Secretary is therefore precluded from considering this issue. The Secretary found that because the Corps' permit findings did not include a decision on whether the CZMA authorizes interstate review, he was not precluded from considering the issue.

Second, the State argued that the project partially occurs in North Carolina, and thus does not involve interstate consistency. The Secretary concurred with former Secretary Franklin's decision that this project occurs wholly in the Commonwealth of Virginia, where the pipeline will be built and where the extraction of the water will occur.

Third, the City argued that interstate consistency review is not authorized pursuant to the CZMA. Based upon the plain language of the CZMA and its legislative history, the Secretary found that the CZMA authorizes one state to review for consistency with its federally approved coastal management program activities which, although occurring totally within the boundaries of another state, affect any land or water use or natural resource of the coastal zone of the reviewing state.

#### C. Conclusions Regarding Threshold Issues

The Secretary determined that threshold issues raised by Virginia Beach and the State of North Carolina did not preclude him from considering the merits of this case.

To find that the proposed activity satisfies Ground I, the Secretary must determine that the project satisfies all four of the elements specified in the regulations implementing the CZMA (15 CFR § 930.121). If the project fails to satisfy any one of the four elements, it is not consistent with the objectives or purposes of the CZMA and federal licenses or permits may not be granted. The four elements of Ground I are:

1. The proposed activity promotes one or more of the competing national objectives or purposes contained in the CZMA.
2. The proposed activity's individual and cumulative adverse effects on the coastal zone are outweighed by its contribution to the national interest.
3. The proposed activity will not violate any requirements of the Clean Water Act or the Clean Air Act.
4. There is no reasonable alternative available that would provide the 60 mgd of water needed in southeastern Virginia in a manner consistent with the State's coastal management program.

The Secretary made the following findings with regard to Ground I:

1. The proposed project will foster development of the coastal zone and coastal zone resources, and thus furthers more than one of the objectives or purposes of the CZMA.
2. The proposed project's individual and cumulative adverse effects on the coastal zone are outweighed by its contribution to the national interest.

While the record shows that the project's effects on water flow in the Roanoke River will have individual and cumulative adverse effects on striped bass, those effects will likely be small. The record shows that the project's effects on water quality will be minimal, and will minimally affect striped bass. The record shows that the project's effects on coastal wetlands and on other coastal resources and uses will be minimal.

The proposed project will contribute significantly to the national interest because it will allow the beneficial use of water resources of the coastal zone. Providing potable water for human consumption to a major metropolitan area constitutes a very high priority use among all beneficial uses of water. The record shows that the project will contribute significantly to the national interest because of the extent to which it will further and support economic development in the coastal zone, and the extent to which it will alleviate southeastern Virginia's projected water deficit.

In sum, although the project will affect the Roanoke River striped bass fishery, as well as other coastal resources and uses, the evidence shows that the individual and cumulative adverse effects of the project are outweighed by the national interest contribution of alleviating the City's water supply shortage and encouraging economic development.

#### Ground I: Consistent with the Objectives or Purposes of the CZMA

3. The proposed project will not violate the Clean Water Act or the Clean Air Act.

4. There are no reasonable alternatives available which would permit the project to be conducted in a manner consistent with the State of North Carolina's coastal management program. The proposed alternatives failed for one or more reasons. The State failed to describe some alternatives with sufficient specificity. Some alternatives were unreasonable, i.e., environmental advantages of the alternative did not outweigh the increased cost of the alternative over the proposed project. Finally, some alternatives were found to be unavailable either because of technical or legal barriers or because an alternative did not meet the primary purpose of the project, which is to provide up to 60 mgd of additional water to southeastern Virginia.

#### Ground II: Necessary in the Interest of National Security

Although southeastern Virginia is home to the largest naval complex in the world, the record demonstrates that there would be no significant impairment to a national defense or other national security interest if the City's project is not allowed to go forward as proposed. Therefore, the Secretary found that the requirements of Ground II have not been met.

#### Conclusion

The Secretary found that the proposed project is consistent with the objectives or purposes of the CZMA (Ground I). Accordingly, the proposed project may be issued the necessary permits by federal agencies.

If a coastal state determines that an activity occurring in another state could be reasonably expected to affect their coastal zone and intends to review the activity for consistency, it should contact OCRM, the activity proponent, and the state in which the activity will occur, at the earliest time practicable. Early coordination helps alleviate potential conflicts and will ensure adherence to proper procedures.

NOAA regulations and practice establish a procedure for interstate reviews. States can define the geographic scope of listed activities to be reviewed outside the coastal zone, under 15 C.F.R. § 930.53(b), or if no geographic scope is defined or it is an unlisted activity, then the state must obtain OCRM approval to review the activity as an unlisted activity, under 15 C.F.R. § 930.54.

## **California and the Closure of Fort Ord**

As reported in the previous Bulletin, the Army Corps of Engineers (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. Prior misunderstandings regarding consistency determinations, the state's 45 day review, and the record of decision, have been resolved. The Corps issued a final consistency determination and the state agreed with the determination. The California Coastal Commission remained concerned over reuse decisions outside Corps control. However, the Commission decided that the commitments given by the Corps and by area local governments would provide for continued Commission involvement in the planning and reuse of Fort Ord. In concluding its analysis, the Commission found:

[G]iven the measures provided in this consistency determination, an understanding of the limitations to the Commission's jurisdiction in reviewing this consistency determination, and, to the extent they exist, the opportunities for continuing Commission involvement in the planning for this vital coastal region, the proposed disposal and reuse of Fort Ord is consistent with the California Coastal Management Program.

The state's agreement was based on the following disposition of Fort Ord.

The disposal and reuse have been planned to provide for the transfer of most sensitive environmental areas to other federal agencies and state agencies that are able to manage the lands without significant environmental impacts. Transfer of portions of Fort Ord to local agencies is intended to allow for development of educational, recreational, airport business, and institutional uses to offset the economic effects to the region of the closure of Fort Ord.

All areas in the coastal zone will be transferred to the California Department of Parks and Recreation, to be managed for public access and visitor-serving uses, and habitat preservation. Other major uses may include University science offices, State University campus, County agricultural center, youth camp, airport, retail centers, light industrial development, resort hotels, residential development, etc.

For additional information from California contact Mark Delaplaine at (415) 904-5280.

## **New Jersey Unlisted Activity Request for Shipment of Spent Nuclear Fuel**

New Jersey sought OCRM's permission to review Long Island Power Authority's (LIPA's) transportation of irradiated nuclear fuel from the former Shoreham Nuclear Power Station in New York, through New Jersey waters, to Philadelphia Electric Company's Limerick Generating Station in Eddystone, Pennsylvania, and the Coast Guard's involvement in that transport.

New Jersey asserted that Coast Guard approval of LIPA's transportation plan was a listed Federal license or permit activity in the New Jersey Coastal Management Program (NJCMP) requiring that LIPA submit a consistency certification to New Jersey. Alternatively, New Jersey requested OCRM approval to review the activity as an unlisted activity under 15 C.F.R. § 930.54.

OCRM found that the activity was not listed. Additions to the NJCMP list of federal licenses or permits in New Jersey's Federal Consistency Guidelines (Guidelines) were not submitted by the State for incorporation into the NJCMP, pursuant to 15 C.F.R. § 930.53(d) and 15 C.F.R. Part 923, Subpart I. OCRM could not approve New Jersey's request to review the activity as an unlisted activity. OCRM determined that the proposed shipment by LIPA does not involve the issuance of a required license or permit by the Coast Guard as defined in CZMA section 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart D, based on the information provided by the State, and comments by LIPA and the Coast Guard. Therefore, the activity was not subject to consistency review under the CZMA.

OCRM informed New Jersey that OCRM is committed to fully supporting the coastal states' use of the federal consistency provision, and ensuring that federal agencies and applicants for federal approvals comply with consistency requirements. As such, OCRM gives a broad meaning to the definition of "federal license or permit" in 15 C.F.R. § 930.51(a). However, in this case, LIPA did not apply for a federal license or permit, and moreover, the Coast Guard had not proposed any activities concerning the shipment. LIPA was not legally required to present the Coast Guard with its operation plan for review, but elected to do so on a voluntary basis. Although the Coast Guard could have exercised its statutory authority to control the shipment, no such control was asserted in this case. Absent this control, LIPA could proceed with the shipment without Coast Guard review or approval.

New Jersey filed suit against NOAA, the Coast Guard, and the NRC, but the courts found for the federal government on all counts. For more information from New Jersey call Steve Whitney at (609) 292-1875.

## **BCDC Unlisted Activity Request for Airport Expansion**

The San Francisco Bay Conservation and Development Commission (BCDC) sought OCRM approval to review the San Francisco International Airport's (SFIA's) airport layout plan (ALP) submitted to the Federal Aviation Administration (FAA), for consistency with BCDC's coastal management program. SFIA objected to BCDC's request and raised several procedural and substantive issues. At one point BCDC had initiated discussions with SFIA to withdraw BCDC's request if FAA and SFIA would agree not to require SFIA to expand in size in the reasonably foreseeable future. BCDC also wanted written notification of all future ALPs. However, that effort stalled, and SFIA asserted that BCDC had waived its federal consistency rights by not notifying all parties within the timeframe required by NOAA regulations. After many discussions with the parties, OCRM believed that the parties could settle their differences without further administrative processes. Therefore, rather than ruling on the timeliness issue, OCRM encouraged the parties to discuss their substantive concerns. They agreed to do so and resolved their differences without further administrative proceedings.

SFIA will provide BCDC with all future revised ALPs and will obtain required BCDC permits. FAA has assured BCDC, in writing, that FAA will not approve ALPs or financial grants to SFIA that would require SFIA to expand its runways (and, therefore, require filling of San Francisco Bay). As a result BCDC withdrew its request to review this ALP for consistency.

For more information from BCDC contact Alan Pendleton at (415) 557-3686.

## **California Unlisted Activity Request for ICC Water Carrier License**

No state lists Interstate Commerce Commission (ICC) water carrier licenses in their state CMPs. However, the ICC requires all applicants to notify relevant coastal states of applications made to the ICC. The ICC does this to ensure that coastal states receive adequate notice of an unlisted activity. If the ICC does not receive notification from a state within 30 days (pursuant to 15 C.F.R. § 930.54(a)) that the

state intends to review the activity for consistency, then consistency review has been waived and the ICC may issue the permit. This process has run relatively smoothly and consistency review has been asserted by states in only a few instances.

In one case, California received notice from an ICC applicant. California did not assert consistency because the shipper indicated that petroleum products or hazardous substances were not involved, and that the vessels would use established navigation routes. The 30 days lapsed in which California could assert consistency. However, a short time after, California received an environmental report from the ICC that indicated that the shipper would be transporting petroleum products.

California notified ICC and the applicant that they intended to review the license for consistency, even though they had previously declined to review. OCRM supported California on the ground that the state in fact had not waived its consistency rights, because the state had never received notice that the license included petroleum transport. The ICC agreed with OCRM and encouraged the applicant to discuss the matter with California. The applicant agreed to remove petroleum product transportation from the application and California withdrew its unlisted activity request.

For more information from California call Mark Delaplaine at (415) 904-5280.

## **California Unlisted Activity Request - Commercial Spaceflights**

The California Commercial Spaceport, Inc. (CCSI) proposes to establish a commercial space launch complex at Vandenberg Air Force Base. CCSI will be responsible for the construction and operation of the facility, but the Air Force must lease land to CCSI and may have to issue some form of approval. Because of potential effects to coastal uses and resources, California notified CCSI and the Air Force of its intent to review the activity, as an unlisted activity, for consistency with California's CMP.

If Air Force approval is required for the spaceport, the approval is not a "listed activity" in California's federally-approved coastal management program, and OCRM must approve California's request to review (California does not need OCRM approval to review a direct federal activity under section 307(c)(1) of the CZMA).

OCRM must approve or disapprove California's request to review based on whether the spaceport can be reasonably expected to affect any land or water use or natural resource of California's coastal zone. Both CCSI and the Air Force have agreed with California that the spaceport can be reasonably expected to affect the coastal zone.

However, the Air Force asserts that California should not be allowed to review the activity under section 307(c)(3) of the CZMA (federally licensed or permitted activity), stating that the activity is a direct federal activity under section 307(c)(1) or (2) of the CZMA.

Despite the Air Force's position, California intends to review the consistency determination under CZMA section 307(c)(3). However, as noted above, California cannot review the activity

under section 307(c)(3) without OCRM approval. OCRM has not determined whether the Air Force involvement is a direct federal activity or a required federal approval. However, all parties wish to facilitate review of the consistency determination.

The State, CCSI, and the Air Force, agreed that OCRM should make a determination of effects and that the remaining issues will be addressed through informal negotiations. Therefore, OCRM determined that, based on the information provided by the parties, the construction and operation of the spaceport can be reasonably expected to affect the coastal zone. Therefore, California may begin its review of the activity. OCRM's approval does not determine whether the State may use the review standard of (c)(3) or the review standard of (c)(1) or (2). The State, CCSI, and the Air Force, agreed that, if OCRM determines that the Air Force involvement is a required federal approval under CZMA section 307(c)(3), the State may complete its review pursuant to the requirements of 15 C.F.R. Part 930, Subpart D. If OCRM determines that the Air Force involvement is a direct federal activity under CZMA section 307(c)(1) or (2), the State should complete its review pursuant to the requirements of 15 C.F.R. Part 930, Subpart C.

Negotiations are currently underway and OCRM is deliberating the issue of which standard of review the State may apply. For more information from California call Mark Delaplaine at (415) 904-5280.

## **California Unlisted Activity Request and Hawaii's Review of the Acoustic Thermometry of Ocean Climate (ATOC) Project**

The purpose of the ATOC project is to study global warming by measuring underwater sound waves to detect temperature variations in the deep ocean. Scripps Institution of Oceanography proposes to transmit underwater sound waves from sources off Kauai, Hawaii and Pt. Sur, California to 18 receivers scattered throughout the Pacific Ocean. The acoustic source equipment would be placed at water depths of 850 meters. Because ATOC has the potential to harass marine mammals while performing the research, Scripps has applied to NOAA's National Marine Fisheries Service (NMFS) to "take" marine mammals for scientific research. Both California and Hawaii have asserted consistency on ATOC.

Hawaii and California are concerned that the noise generated by ATOC could affect marine mammals, some of which are considered coastal zone resources, and commercial fishing. Further the states are concerned with the lack of data on effects to these coastal resources.

Hawaii lists NMFS marine mammal permits in its coastal management program. Therefore, Scripps is required to submit a consistency certification to Hawaii. Hawaii has notified Scripps and NMFS of this requirement. California does not list the NMFS permits and, therefore, requested OCRM approval to review the permit as an unlisted activity. Both Scripps and NMFS requested that OCRM deny California's request because ATOC would not affect California's coastal resources and because California did not meet the procedural requirement for timeliness under CZMA regulations.

At OCRM's encouragement, California and Scripps discussed

California's concerns. OCRM stayed its decision on the timeliness matter to give everyone time to negotiate. As a result of the discussions between California and Scripps, California withdrew its intent to review the NMFS permit application as an unlisted activity. California reserved its rights to future federal consistency reviews for other federal approvals for ATOC.

For more information from California call Mark Delaplaine at (415) 904-5280. For more information from Hawaii call Doug Tom at (808) 587-2875.

## **Wisconsin Federal Consistency Manual**

For several years OCRM has been working with Wisconsin on federal consistency issues. Wisconsin's implementation of federal consistency has been an issue in previous program evaluation (CZMA section 312) findings. As a result, Wisconsin produced a draft Wisconsin federal consistency manual. However, OCRM had some remaining concerns on the implementation of federal consistency in Wisconsin. OCRM's primary concerns have been ensuring that a single state agency has the federal consistency authority and that all relevant Wisconsin coastal management program (WCMP) enforceable policies are considered when reviewing an activity for consistency.

To better understand how the WCMP implements federal consistency, OCRM's Federal Consistency Coordinator, David Kaiser, and OCRM Program Specialist, Neil Christerson, spent a day with WCMP staff in Wisconsin. OCRM learned that Wisconsin appears to make effective use of federal consistency, but that the current draft WCMP Manual does not adequately describe the actual federal consistency procedures the WCMP uses that would address OCRM concerns. Wisconsin is in the process of revising the manual to more clearly describe how consistency decisions are made in Wisconsin and how WCMP coordinates federal consistency decisions with other WCMP networked agencies.

For more information from Wisconsin call Mary Frazer, WCMP Federal Consistency Coordinator, at (608) 266-8269.

## **Alaska - MOU with Minerals Management Service**

In 1992, the Alaska Coastal Management Program (ACMP) initiated a project to analyze and resolve both procedural and substantive issues surrounding state review of federal Outer Continental Shelf (OCS) lease sales. These issues were brought to light during the state review of OCS Lease Sale 124 in the Beaufort Sea. This was the first sale since the 1990 amendments to the Coastal Zone Management Act clarified that OCS lease sales were subject to federal consistency review.

A major product from this effort is a comprehensive report that discusses state and federal roles in the OCS leasing process and includes recommendations for improvements. One of the central recommendations was that the ACMP enter into a Memorandum of Understanding (MOU) with the U.S. Minerals Management Service (MMS). Both parties have been working diligently on the MOU, and it should be completed this summer. The MOU will facilitate early consultation and information exchange and reconcile procedural issues between the ACMP review process and the

federal Outer Continental Shelf Lands Act process.

For more information from Alaska call Beth Kerttula at (907) 465-6713.

## **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 has met with the following federal and non-federal entities.

### **Federal Energy Regulatory Commission (FERC)**

At FERC's request, OCRM and FERC met to discuss federal consistency procedures. FERC wanted to ensure that it fully complied with federal consistency requirements as it goes through the lengthy process of re-licensing numerous hydro-electric power licenses. OCRM provided extensive comments on FERC's federal consistency guidance to its field staff and stressed the need for FERC to coordinate closely and early with state coastal management programs.

For more information from FERC call Rich McGuire, Division of Project Review, Office of Hydropower Licensing, FERC, at (202) 219-3084.

### **Federal Agency Workgroup on the Dredging Process**

The Interagency Workgroup on the Dredging Process (Workgroup) was convened by Secretary of Transportation Peña in November 1993. The Workgroup consists of representatives from the Environmental Protection Agency, the Fish and Wildlife Service, NOAA's National Marine Fisheries Service, OCRM, the Army Corps of Engineers, and the Maritime Administration (MARAD). The Workgroup's mission is to review the existing dredging and disposal process and identify ways to improve it at both a national and a local level. As part of this effort, the Workgroup has conducted outreach meetings in ten important port cities to solicit information about problems, issues, and solutions on the dredging process from the public including port, shipping, and environmental interests.

Two rounds of outreach meetings were planned. The first round, held in January and February 1994, resulted in the identification of issues and potential solutions to problems associated with the dredging process. The Workgroup used the information from the first round of outreach meetings to develop an "Options Paper." The second round of outreach meetings were held in early June 1994. The focus of the second round of outreach meetings was to elicit comments on the Options Paper. The Workgroup is now taking the input from the second round to develop final recommendations. MARAD's plan is to have final recommendations by the end of July 1994.

The Options Paper identified three overarching themes: 1) both short-term and long-term management and planning

strategies are needed; 2) the role of Federal, state, and local government must be clearly defined and implemented; and 3) adequate and appropriate funding is critical to achieve the goals of the process. The 28 options are then divided into five issue areas: 1) Federal interagency and external coordination; 2) proactive local planning and coordination; 3) dredged material disposal; 4) dredging policy; and 5) Funding and Project Development.

OCRM has had extensive input into this process and federal consistency (as well as other CZMA issues) is one of many important topics addressed. For more information from OCRM contact John King, Assistant Regional Manager, Pacific Region, CPD, at (301) 713-3121. For more information from MARAD contact Carl Sobremisana, Outreach Coordinator, at (202) 366-1765/5471.

### **Department of Justice**

In the past, the Department of Justice (Justice) had not always taken positions on CZMA issues that were aligned with those of OCRM and the states. With the goal of trying to work through those often conflicting positions, OCRM and the NOAA General Counsel for Ocean Services initiated an effort to more closely coordinate with Justice. As a result OCRM and the NOAA General Counsel regularly discuss consistency issues with Justice, both generally and in response to specific state CZMA litigation against NOAA or other federal agencies. This coordination has led to a better understanding of federal consistency, not only between OCRM and Justice, but also between OCRM and other federal agencies, through Justice's assistance. As a result, a greater opportunity for more efficient and effective resolutions of CZMA disputes now exists.

### **Corps of Engineers**

As a result of OCRM's participation on the Interagency Workgroup on the Dredging Process, Jeff Benoit, OCRM Director, met with Morgan Rees, Deputy Assistant Secretary of the Army, to discuss issues of mutual concern. Issues included who pays when state coastal management programs require beneficial use of dredged material disposal or mitigation requirements for Corps projects. While this issue was the catalyst for the meeting, the primary concern was coordination between OCRM and the Corps to develop a federal position on these issues and to avoid conflicts with state programs by addressing state concerns as early as possible. OCRM and the Corps will continue to work on these issues in the coming months.

### **Department of the Air Force**

As a result of California's request to review a commercial spaceport project at Vandenberg Air Force Base, OCRM and the NOAA General Counsel for Ocean Services met with Vandenberg and Air Force Headquarters personnel in Washington, D.C. While the discussions centered on the Spaceport issue, the meeting gave OCRM and the Air Force the opportunity to learn more of each other's mission and viewpoints on consistency issues. OCRM expects to work more closely with the Air Force on these issues in the future.

## OCRM Policy Decisions, Guidance, and Projects

### 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 was to be met by November 5, 1993. OCRM provided proposed guidance on meeting this requirement on November 4, 1993, 58 Fed. Reg. 58840. Final guidance was published on June 13, 1994. 59 Fed. Reg. 30339. States will have one year to comply with the Guidance. Based on draft submissions by a few states, OCRM offers the following additional guidance. First, the CZMA section 306(d)(14) requires the state CMP to provide adequate public comment, not the federal agency. The purpose of the requirement is to provide the public with an opportunity to comment to the CMP on the CMP's review for consistency of a federal activity with the enforceable policies of a CMP, in addition to commenting on the activity itself. Therefore, a federal agency cannot be required to publish or pay for the notice (a federal agency could agree to do it voluntarily). Second, while meeting public participation requirements within the states' 45-day review period (plus appropriate extensions) for consistency determinations may be troublesome, it is unlikely the 45 days will be increased. Therefore, states should be developing procedures that fit within current regulatory timeframes. As discussed in previous Bulletins, some states, such as Massachusetts, have used a publication that circulates state-wide to most local planning boards, conservation commissions, state and local agencies, and other interested parties to notify them of activities that the state will be reviewing for consistency. Other states, such as California, have published state-wide notice of the opportunity to comment at monthly meetings of the Coastal Commission on activities that the state will review for consistency.

### State CMP Objection Letters

There have been several instances where state objection letters have not contained all required information or have not adequately notified applicants of their right to appeal the objection to the Secretary of Commerce. Defective letters could cause problems for the state if the applicant appeals the objection. The CZMA regulations provide for two types of state objections. Depending on the type of objection, an objection letter should include the following information:

1. **The objection must be based on enforceable policies.** Only enforceable policies incorporated into a state's approved coastal management program may be used to object to a proposed activity. The objection letter should describe the applicable enforceable policies and cite the enforceable policies. 16 U.S.C. § 1456(c)(3); 15 C.F.R. § 930.64(b).
2. **The objection letter must describe how the activity is inconsistent.** There must be a complete

description of how a project is inconsistent with enforceable policies. 15 C.F.R. § 930.64(b).

3. **The objection must be timely.** An objection letter should include the date the complete consistency certification (or determination) and necessary information was received by the state and the consistency review period began. A decision on a consistency certification must be made within six months from the date the certification and necessary information was received. If a consistency review of a federally permitted activity is to extend beyond three months the applicant must be notified in writing. The date the applicant was notified of this should also be included in the objection letter. 15 C.F.R. § 930.63.
4. **The applicant must be advised of appeal rights (except for 307(c)(1) and (2)).** There must be a paragraph in the objection letter advising the applicant of the right to appeal the state's objection to the U.S. Secretary of Commerce within 30 days of receipt of the letter. This paragraph should also note that the appeal must be based on the two grounds for a state override: consistent with the purposes and objectives of the CZMA, or necessary for national security. 15 C.F.R. § 930.64(e).
5. **If the objection is based on insufficient information, the objection letter must describe the information needed and why it is needed.** A state may object to a project based on insufficient information if the applicant has failed, following a written request, to supply the required information. If an objection is based on insufficient information the objection letter must describe the nature of the information requested and the necessity of having that information to determine consistency. 15 C.F.R. § 930.64(d).
6. **Consistent alternatives must be identified and discussed.** An objection letter must include alternatives that would be consistent. 15 C.F.R. § 930.64(b). While a state is not required to include consistent alternatives for objections based on insufficient information, see 15 C.F.R. § 930.64(d), because alternatives are a factor considered on appeal states should still include some discussion of alternatives. Consistent alternatives should be described with as much specificity as possible to allow the applicant, but especially the Secretary of Commerce, to determine if the alternatives are available and reasonable.
7. **The objection letters must be sent to the applicant, the appropriate federal agency, and the Director of OCRM (Jeffrey R. Benoit).** 15 C.F.R. § 930.64(a).

### Applicability of Federal Consistency to State-Issued NPDES Permits

Recently, a question was raised as to whether state-issued Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permits, where the state NPDES program has been authorized by EPA, are subject to federal consistency review. The Delaware coastal management



program has specifically asked for a NOAA legal opinion. After review of the CZMA, CWA, and case law, NOAA has determined that federal consistency does not apply to NPDES permits issued by a state.

When EPA approves a state NPDES permitting program, the NPDES permit becomes a state permit. The NPDES permit is no longer a federal permit issued by EPA. While EPA retains some control over the program -- EPA may revoke its approval of the state NPDES program and may veto a state decision -- EPA does not retain sufficient control over the issuance of a state NPDES permit to implicate federal consistency.

This may not be the case for all federal permit programs transferred to states. In addition, it is possible that some actions taken by EPA under CWA section 402(b) may be "federal" and subject to consistency, even after EPA has approved a state NPDES permitting program. For instance, consistency may be implicated where EPA has vetoed a state permit, and consistency is implicated where EPA, after objecting to a state NPDES permit, issues the permit where the state fails to resubmit a permit revised to meet EPA's objections, see 33 U.S.C. § 1342(d)(4).

## Imposing Time Limits on State Federal Consistency Agreements and Concurrences

Periodically, a state asks if it can place a time limit on a consistency agreement or concurrence. OCRM has never directly answered this question. OCRM's position on this question is that a state cannot unilaterally place a time limit on its agreement or concurrence. It has long been NOAA's view that the consistency regulations do not allow "conditional concurrences." The regulations require a state to either agree or disagree (a federal agency or a private applicant, however, can agree to any conditions). A time limit should be viewed like any other condition. Thus, if a state, during consistency negotiations, asserts that the state could only find the activity consistent for five years (because of the nature of the project, developing state policies, developing understanding of effects to resources, etc.), there would be an incentive for a federal agency or applicant to agree to a time limit.

In considering time limits, states and federal agencies should, where appropriate, make full use of phased review. See 15 C.F.R. § 930.37(c). In addition, the regulations provide for remedial action by a federal agency for ongoing activities where the State previously determined an activity to be consistent but which the State agency later maintains is being conducted or is having a coastal zone effect substantially different than originally proposed and, as a result, is no longer consistent with the State's management program. See 15 C.F.R. §§ 930.44, 930.66, 930.86, 930.100.

NOAA regulations do not specifically address activities not yet begun where the State previously determined an activity to be consistent but which the State agency later maintains will be conducted or will have a coastal zone effect substantially different than originally proposed. Neither do NOAA regulations specifically address the situation where a previously reviewed activity not yet begun should undergo consistency review again when the effects of the activity have substantially changed. OCRM will address this issue in the revised consistency regulations. In the meantime, the State should work with the project proponent or federal agency to

address any new consistency concerns.

## Federal Consistency Manual and Revised Regulations

As discussed in previous Bulletins, OCRM was preparing a Federal Consistency Manual that would 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. Unfortunately, due to OCRM resource limitations, development of the Manual has been delayed. Originally, OCRM's intent was to complete the Manual and eventually revise the consistency regulations. At this time, OCRM believes that the regulations should be revised first, and then a Manual based on the new regulations may be needed. OCRM hopes to have proposed regulations late this summer. In the meantime any comments or suggestions (general or specific) on revisions to the consistency regulations are encouraged. Comments should be sent to David Kaiser, OCRM Federal Consistency Coordinator, at (301) 713-3098. Fax - (301) 713-4367.

## Secretarial Appeal Decisions

### 1993 CZMA Consistency Appeal Decisions Since August 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 August 1993, the Secretary has issued the following consistency appeal decisions to date.

**North Carolina/Virginia - Appeal of Virginia Electric and Power Company (Lake Gaston).** See lead article, p. 1.

**Puerto Rico - Appeal of Carlos A. Cruz-Colón.** Mr. Carlos A. Cruz Colón (Appellant) is the owner of an improved lot located adjacent to the Torrecillas Lagoon in Carolina, Puerto Rico. The Appellant proposed constructing an "L"-shaped wood pier that would be used by him for private recreational purposes. The Puerto Rico Planning Board (PRPB), the Commonwealth of Puerto Rico's coastal management agency, objected to the Appellant's project on the ground that it would violate Puerto Rico's Coastal Management Program (CMP) policies which provide for the protection of natural resources from irreparable damage, and the avoidance of activities which could cause the deterioration of natural systems, including mangroves. The PRPB recommended as an alternative that the Appellant construct a public facility for the use of area residents. The Secretary found that the alternative identified by the PRPB in its consistency objection was both an available and reasonable alternative that would be consistent with Puerto Rico's CMP. Accordingly, the Secretary held that the fourth element of Ground I was not satisfied. Because the Appellant's proposed project failed to satisfy all of the requirements of Ground I, the Secretary did not override the PRPB's objection to the Appellant's proposed project, which may not be permitted by Federal agencies.

## Pending Consistency Appeals

(As of June 30, 1994)

<u>Appellant</u>	<u>Activity</u>	<u>State</u>
Mobil (Manteo)	NPDES discharges	NC
Mobil (Manteo)	OCS exploration plan	NC
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
Joseph Mattone	Construction of seawall and Placement of fill	NY

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 A NEW DIRECTOR** -- As many of you are aware, Jeffrey R. Benoit was appointed by the Clinton Administration as the Director of OCRM. Jeff was the Program Manager for the Massachusetts coastal management program for several years. Jeff brings leadership, experience, knowledge, initiative, and motivation to OCRM. Jeff is also well versed in federal consistency issues and is committed to maximizing the benefits of federal consistency.

**FEDERAL CONSISTENCY COORDINATOR PLAYS HOOKEY THIS SUMMER** -- OCRM's Federal Consistency Coordinator, David Kaiser, will only be available on a part time basis for June and July, 1994. Unfortunately, he will not be enjoying himself, but will be preparing to take the Bar exam in late July (after graduating from the George Washington University Law School in May). David will focus on revised regulations and especially controversial or difficult consistency issues.

**OCRM COASTAL PROGRAM DIVISION (CPD) STAFF** -- Several new staff have joined CPD over the past year or so. To keep everyone up to date here is a list of CPD staff, responsibilities, and phone numbers:

<u>Name</u>	<u>State/ Responsibility</u>	<u>Phone No.</u>
Clement Lewsey	Chief	301-713-3102
Debra Walker-Smith	Administrative Assistant	301-713-3102
Sonja Taylor	Support Staff	301-713-3102
David Kaiser	Federal Consistency	301-713-3098
Marcella Jansen	Nonpoint Source/6217	301-713-3098
Peyton Robertson	Nonpoint Source/6217	301-713-3098
Ruth Best	CEIP Loans	301-713-3098
Laurie McGilvray	N. Atlantic Regional Mgr.	301-713-3105
Helen Farr	New York, New Jersey	301-713-3105
Pat Scott	Mass., Maine, Rhode Island	301-713-3105
Dwight Reynolds	Connecticut, New Hampshire	301-713-3105
Raquel Roundtree	Support Staff	301-713-3105
Ed Kruse	S. Atlantic Regional Mgr.	301-713-3117
Joshua Lott	Maryland, Georgia	301-713-3117
Joelle Gore	North and South Carolina	301-713-3117
Jim Mills	Delaware, Virginia	301-713-3117
Bill O'Beirne	Acting Gulf & Caribbean Regional Mgr. and Texas	301-713-3109
Nathalie Peter	Virgin Islands, Puerto Rico and Alabama	301-713-3109
Jewel Griffin	Louisiana, Mississippi	301-713-3109
Jeanine Stevens	Florida	301-713-3109
Ellen Brody	Acting Great Lakes Regional Mgr.	301-713-3113
Neil Christerson	Pennsylvania, Minnesota	301-713-3113
Kenneth Walker	Michigan, Indiana	301-713-3113
Diana Olinger	Wisconsin, Ohio	301-713-3113
Bill Millhouser	Pacific Regional Mgr.	301-713-3121
John King	Alaska, California, BCDC	301-713-3121
Masi Okasaki	Washington, Hawaii	301-713-3121
Patty Dornbusch	Oregon, Am. Samoa	301-713-3121
Matt Arnn	Guam, N. Marianas	301-713-3121
Deborah Jefferson	Support Staff	301-713-3121
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