

Coastal and Estuarine Land Conservation Program (CELCP) Grants and Federal Consistency (August 20, 2004): The State of Connecticut's coastal management program asked several questions regarding the review of CELCP grants under the Coastal Zone Management Act (CZMA) federal consistency provision. Below is the Office of Ocean and Coastal Resource Management's (OCRM's) response.

CELCP grants are for land acquisition in the coastal zone. Usually, the CELCP grants are Congressional "earmarks." (Congressional earmarks are appropriations for identified projects and, usually, awarded to specific grantees.) The appropriations and CELCP grant applications are processed by OCRM. OCRM's CELCP guidelines note that awards of financial assistance are a federal action that is subject to the consistency provisions of the CZMA. OCRM's CELCP project checklist requires the applicant (state agency, local government or non-profit organization) to certify that the project is consistent with the applicable state's CZMA program. OCRM must approve the CELCP project checklist before funds can spent.

Each CELCP grant contains the following special award condition:

The Recipient will need to prepare a consistency certification when the complete and signed Project Checklist (and any another other required information) for each project is submitted to NOAA. The Recipient shall provide this information to the state agency responsible for Federal consistency reviews at the same time it is submitted to NOAA. At that time, if the state agency responsible for Federal consistency reviews intends to review the activity, it is obligated to notify the Recipient and NOAA. Also if the state agency responsible for Federal consistency reviews intends to review the activity, NOAA will not approve the release of Federal funds until the state agency concurs that the activity is consistent with the enforceable policies of the state's Coastal Management Program.

This gives rise to the following two scenarios for processing the grant and complying with the CZMA consistency requirement. In both cases, but particularly the first case, applicants, OCRM and the NOAA Grants Office need to make sure that the CZMA consistency requirement has been complied with before authorizing use of the funds.

If an applicant submits its grant application to OCRM with a completed project checklist, then the applicant must submit the grant application and the project checklist to the state CZMA agency. If the state CZMA agency decides to review the project for consistency it must so notify the applicant and OCRM and NOAA will not release the federal funds or approve the project checklist until the state CZMA agency finds the project consistent. The state's review must be completed within the time frames established by the state through their intergovernmental review process, see 15 CFR § 930.94. (This is 30-60 days for most states.) If the state CZMA agency decides not to review the project, NOAA may release the funds and approve the project checklist.

If an applicant submits its grant application without the project checklist, NOAA may issue the grant, but the funds will not be released until the applicant submits a completed project checklist to both OCRM and the state CZMA agency. If the state CZMA agency declines to review for consistency, OCRM may approve the checklist and NOAA may release the funds. If the state CZMA agency decides to review the activity, OCRM may not approve the project checklist and NOAA may not release the funds until the state CZMA agency finds the project consistent with its CZMA program.

Connecticut's Questions and OCRM's Responses:

Question 1: Does the origin of these CELCP grants in Congressional earmarks somehow exempt them from the CZMA consistency process in whole or in part? Or do we treat them as federal assistance to state and local governments under Subpart F of the consistency regulations?

OCRM's Response: Congressional earmarks are not exempt from the CZMA. If the intended recipient of a CECLP grant is a state agency or local government, then the requirements of 15 CFR part 930, subpart F apply (Consistency for Federal Assistance to State and Local Governments). If the intended recipient is a non-profit organization, then the project becomes a Federal agency activity under 15 CFR part 930, subpart C, because subpart C is a residual category for federal actions that do not fit under the other subparts. See 15 CFR § 930.31(c). In the latter case, OCRM would determine whether coastal effects were reasonably foreseeable and provide the state CZMA agency with either a consistency determination or a negative determination at least 90 days before releasing the funds.

Question 2: Section 930.94 suggests that we are supposed to review applications for federal assistance before the assistance is provided, which could not be done in this case. (In fact, the first time we heard about these two projects was when Congress appropriated the money). Also, CELCP as a new program is necessarily not a listed federal assistance activity, so presumably section 930.94(d) sends us to the process of section 930.98. Do we need to officially notify the towns and OCRM that we intend to review the grants for consistency? Or does the fact that OCRM told the towns to contact us indicate the Director's approval of our review of the activity under section 930.98?

OCRM's Response: Congressional laws authorizing and/or appropriating funds are not subject to CZMA federal consistency review, so there would not be an opportunity to review the projects under the CZMA until the applicants apply to the awarding federal agency for the funds. In the case of the CELCP projects, possible state CZMA federal consistency review would occur as described above in the two scenarios under the general note. By virtue of the CZMA special award condition on the CELCP grants, OCRM has given its approval for states to review the CELCP projects, pursuant to 15 CFR § 930.98, if the state CZMA agency chooses to review the project and notifies the applicant and NOAA. States may choose not to review the projects and should so notify NOAA. See the general note above.

Question 3: Do you know how other states have approached federal consistency for CELCP grants?

OCRM's Response: Not at this time.