

**MEDIATION UNDER THE COASTAL ZONE MANAGEMENT ACT
16 U.S.C. § 1456(h) and 15 CFR Part 930, Subpart G**

**National Interest Team — Stewardship Division
Office for Coastal Management
National Oceanic and Atmospheric Administration
February 22, 2018**

I. Background

Under the Coastal Zone Management Act (CZMA) the Secretary of Commerce (Secretary) may mediate a serious dispute between a coastal state and a federal agency. National Oceanic and Atmospheric Administration (NOAA) regulations at 15 CFR §§ 930.110-116 describe the Secretarial mediation requirements. Section II summarizes the key parts of the Secretarial mediation process.

If the parties do not agree to Secretarial mediation or want a less formal mediation process, the parties can agree to mediation by the Office for Coastal Management, within NOAA's National Ocean Service (NOS) (15 CFR § 930.111). Described below are mediations conducted by the Office for Coastal Management.

There has been only one instance of a Secretarial mediation. In 1979, the Secretary of Commerce mediated a serious dispute between the California Coastal Commission and the Department of the Interior on whether oil and gas lease sale 48 under the Outer Continental Shelf Lands Act “directly affected” the state coastal zone under NOAA's federal consistency regulations. There was agreement to mediate and a public hearing held in California in September 1979.¹ At that time, the Department of Justice believed that Interior needed to provide a consistency determination to affected states for outer continental shelf (OCS) oil and gas lease sales. Interior disagreed. The parties could not agree or reach a compromise on whether lease sales were subject to CZMA review and the mediation was not successful.²

There have been several other requests for Secretarial mediation (usually requested by a state), but the federal agency has declined to participate. The last time Secretarial mediation was requested was in 2010, 2013, and 2014, when Louisiana objected to the U.S. Army Corps of Engineers (USACE) proposal for the disposal of dredged material from maintenance dredging of the lower Mississippi River and requested that the Secretary mediate the dispute. The USACE declined all requests for both Secretarial and Office for Coastal Management mediation.

¹ This Secretarial mediation was discovered in 2018 when California Coastal Commission staff found in its files state and U.S. Department of Commerce documents from 1979 and early 1980 describing the mediation. Prior to this discovery, neither NOAA nor California Coastal Commission staff knew that this mediation attempt occurred.

² This dispute eventually led to a lawsuit by the California Coastal Commission and the U.S. Supreme Court decision in *Secretary of the Interior v. California*, 464 U.S. 312 (1984), where the court found that OCS oil and gas lease sales did not directly affect the coastal zone and were not subject to state CZMA review. Congress overturned the effect of the Supreme Court decision when it amended and reauthorized the CZMA in 1990.

In several instances where Secretarial mediation was declined, and in instances where Secretarial mediation was not requested, the state and federal agency agreed to Office for Coastal Management mediation. The Office for Coastal Management mediation is a less formal process providing parties with the flexibility to define the mediation process they would like to use, how long the mediation will occur, what role the Office for Coastal Management will play as mediator and whether mediation discussions will be confidential or include public participation.

CZMA mediation examples by the Office for Coastal Management include the following. (Except for the one 1979 Secretarial mediation noted above; there have only been Secretarial mediation requests, which have not gone forward. Some of the Office for Coastal Management mediations below started out as Secretarial mediation requests.)

1. North Carolina and Marine Corps (Mid-Atlantic Electronic Warfare Range (MAEWR)) – successful resolution.
2. New York and General Services Administration (disposal of federal land) – successful resolution.
3. California and Navy (Surface Warfare Engineering Facility (SWEF); high-frequency radar emissions) – successful resolution (this mediation was the most robust, formal mediation the Office for Coastal Management conducted).
4. Connecticut and Navy (submarine base exclusion zone) – successful resolution.
5. California and Navy (San Diego channel dredging for U.S.S. Stennis, beneficial use of dredged material and discovery of unexploded ordnance) – mediation helped focus issues, but litigation led to resolution in California’s favor.
6. Puerto Rico and Navy (Vieques Island training facility) – mediated meeting helped start dialogue that led to eventual resolution of Navy abandoning Vieques Island.
7. Rhode Island and Narragansett Indian Tribe (land use) – mediated meeting helped to substantially improve dialogue between parties.
8. Pennsylvania and Army Corps of Engineers (beneficial use of dredged material from harbor in Ohio) – successful resolution.
9. New Jersey and Nuclear Regulatory Commission (NRC) and AmerGen (Re-licensing of Oyster Creek Nuclear Power Plant) – successful resolution.
10. New York and Environmental Protection Agency (Long Island Sound Dredged Material Management Plan (LIS DMMP) – successful resolution. The Office for Coastal Management’s efforts between New York and EPA led to bringing New York, Connecticut, EPA and the Corps together to resolve long-standing issues between the states regarding dredged material disposal in Long Island Sound. This effort has taken a life of its own under the LIS DMMP process agreed to by New York and Connecticut Governors and the federal agencies. However, in 2016, New York was not satisfied with the final LIS DMMP or EPA’s designation of open water disposal sites in eastern Long Island Sound.
11. California and Navy – Presidential Exemption (Mid-Frequency Active Sonar) – mediation helpful, but not successful.
12. Rhode Island and Narragansett Indian Tribe (RI Ocean Special Area Management Plan (Ocean SAMP) – Offshore Wind Energy) – successful resolution.

II. Secretarial Mediation Process

1. Federal agency or state requests in writing that the Secretary mediate a serious dispute arising out of the CZMA.
2. Within 15 days of initial mediation notice by the state or federal agency the disagreeing federal or state agency transmits written response to the Secretary and other party indicating whether it wishes to participate in the mediation process. If the disagreeing agency declines the offer to enter into mediation efforts, it must indicate the basis for its refusal in its response.
3. Upon receipt of a refusal to participate in mediation efforts, the Secretary shall seek to persuade the disagreeing agency to reconsider its decision and agree to mediation efforts. (Secretary sends letter to disagreeing agency.)
4. If the disagreeing agencies still do not all agree to participate, the Secretary will cease efforts to provide mediation assistance. (Secretary sends letter to parties.)
5. If the parties agree to mediation, the Secretary shall appoint a hearing officer who shall schedule a hearing in the local area concerned. The hearing officer shall give the parties at least 30 days notice of the time and place set for the hearing and shall provide timely public notice of the hearing.
6. At the time public notice is provided, the federal and state agencies shall provide the public with convenient access to public data and information related to the serious disagreement.
7. Hearings shall be informal and shall be conducted by the hearing officer with the objective of securing in timely fashion information related to the disagreement. The federal and state agencies, as well as other interested parties, may offer information at the hearing subject to the hearing officer's supervision as to the extent and manner of presentation. A party may also provide the hearing officer with written comments. Hearings will be recorded and the hearing officer shall provide transcripts and copies of written information offered at the hearing to the federal and state agency parties. The public may inspect and copy the transcripts and written information provided to these agencies.
8. Following the close of the hearing, the hearing officer shall transmit the hearing record to the Secretary. Upon receipt of the hearing record, the Secretary shall schedule a mediation conference to be attended by representatives from the Office of the Secretary, the disagreeing federal and state agencies, and any other interested parties whose participation is deemed necessary by the Secretary. The Secretary shall provide the parties at least 10 days notice of the time and place set for the mediation conference.
9. Secretarial mediation efforts shall last only so long as the federal and state agencies agree to participate. The Secretary shall confer with the Executive Office of the President, as necessary, during the mediation process.

10. Mediation shall terminate:

- a. At any time the federal and state agencies agree to a resolution of the serious disagreement;
- b. If one of the agencies withdraws from mediation;
- c. In the event the agencies fail to reach a resolution of the disagreement within 15 days following Secretarial conference efforts, and the agencies do not agree to extend mediation beyond that period; or
- d. For other good cause.

11. The availability of Secretarial or Office for Coastal Management mediation services are not intended expressly or implicitly to limit the parties' use of alternate forums to resolve disputes. Specifically, judicial review where otherwise available by law may be sought by any party to a serious disagreement without first having exhausted the mediation process provided for in this subpart.