

FEDERAL CONSISTENCY BULLETIN



Office of Ocean and
Coastal Resource
Management

Number 4
February 1996

The Federal Consistency Bulletin is intended to keep states, federal agencies, and other interested parties abreast of current federal consistency issues. The federal consistency requirement, 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 approved 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.

Table of Contents

Significant State Issues	1
OCRM Coordination with Other Federal and Non-Federal Agencies . .	4
OCRM Policy Decisions, Guidance, and Projects	5
Secretarial Appeal Decisions	9
Bulletin Board	10

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, x 144
FAX: (301) 713-4367, or 4012
dkaiser@coasts.nos.noaa.gov

Significant State Issues

New York and the Navy: Dredge Material Disposal for SEAWOLF Submarine

The Navy will homeport a Seawolf Class Submarine at the Naval Submarine Base at New London, Connecticut. As part of the activity, the Navy is dredging the Thames River and disposing the dredged material at the New London Disposal Site (NLDS) in Long Island Sound. The NLDS is both in Connecticut and New York waters, although the dredged material for this activity will be placed in Connecticut waters. The Navy, in its draft environmental impact statement (DEIS), determined that disposal activities at the NLDS would not affect New York coastal resources, and provided New York with a negative determination. New York replied that the disposal would affect New York resources and that the Navy should provide the State with a consistency determination. The Navy maintained its negative determination and asserted that New York did not respond within 90 days of receiving the Navy's negative determination, as provided by 15 C.F.R. § 930.35(d).

On October 2, 1995, New York sued the Navy, in the U.S. District Court for the Northern District of New York, to obtain a declaratory judgement and a permanent injunction restraining the Navy from starting the dredging until the 90-day no action period required by the CZMA had passed. On October 12, New York issued its decision, concluding that the Navy's dredge disposal project was not consistent with the New York coastal management program.

On December 20, 1995, the General Counsel of the Navy sent a letter to the New York Secretary of State agreeing to modify the project to alleviate New York's concerns. The Navy agreed to provide New York with barge reports indicating the actual sites of disposal and containment, as well as providing state observers full access to the site. This will assure long term effectiveness of the material that will cover the contaminated sediments.

In accordance with the agreement, New York and the Navy will develop a biological monitoring project which will assess the toxic and bioaccumulative effects of the disposal activity upon fish, shellfish and other organisms commonly found near Fishers Island, New York. As a result of the agreement, on December 22, 1995, the case was dismissed.

In addition, the State of Connecticut is presently working with New York on revising the interim Long Island Sound Dredged Material Management Plan which includes an evaluation of open water disposal of dredged sediments as related to state and federal water quality criteria. For more information, contact William Barton in the New York Department of State's Consistency Bureau at (518) 474-6000.

California and the Air Force: Unlisted Activities and Commercial Space Launches

As reported in Federal Consistency Bulletin, Number 3, the California Commercial Spaceport, Inc. (CCSI) proposed to establish a commercial space launch complex at Vandenberg Air Force Base (Vandenberg AFB). The California Coastal Commission (Commission) notified CCSI and the Air Force of its intent to review the activity, as an unlisted activity, for consistency with California's CMP. OCRM approved the Commission's request and the Commission found the activity to be consistent with California's coastal management program. A remaining issue was whether the proposed commercial launches at Vandenberg AFB are subject to CZMA section 307(c)(3) (federal license or permit activity) or CZMA section 307(c)(1) (direct federal activity).

In this case, OCRM concluded that, it does not matter whether the activity is a CZMA section 307(c)(1) or (c)(3) activity. The activities proposed by the Air Force in conjunction with the CCSI activity are not legally required, and therefore, must be fully consistent with the state's coastal management program. These direct federal activities include procurement and management of fuels and design and operational decisions. As for the proposed lease of federal property, generally, leases are a federal approval for a private activity and are CZMA section 307(c)(3) activities. However, in a particular case, a lease, like any other federal action, may be a (c)(1) activity. It depends in part on who is conducting the activity and who benefits from the activity. In the CCSI case, CCSI's spaceport project appeared

to be a federal license or permit activity under CZMA section 307(c)(3). CCSI is the primary beneficiary of the spaceport: the primary purpose of the project is commercial and not military. CCSI is, for the most part, conducting the activity: the project is being constructed under the authority of the Western Commercial Space Center, a not-for-profit corporation, and operated by CCSI. Vandenberg AFB is not contracting for the activity to benefit the federal government (in fact, the Air Force provided a grant to CCSI indicating assistance for a private activity).

OCRM is still discussing the issue with the Commission and the Air Force. There may be launch activities or launches that will be direct federal activities. Recently, McDonnell Douglas proposed to launch up to 10 rockets a year. Some of the payloads will be commercial and some will be for the federal government. The Commission intends to review this activity as an unlisted federal license or permit activity as well. The Commission and Vandenberg AFB are discussing how best to address the Commission's concerns. For more information from the Commission call Jim Raives at (415) 904-5292.

North Carolina and Virginia Beach: Lake Gaston Update

On May 19, 1994, the Secretary of Commerce overrode North Carolina's objection to a proposed water supply project by the City of Virginia Beach, Virginia. See Federal Consistency Bulletin No. 3 for more information on the Secretary's decision. Since then, North Carolina challenged the Secretary's Lake Gaston decision in a federal district court. As a part of that litigation, North Carolina and the City of Virginia Beach unsuccessfully attempted to mediate their differences. On September 28, 1995, the federal district court upheld the Secretary's decision. North Carolina has decided not to appeal the court's decision. Also, the Federal Energy Regulatory Commission (FERC) approved the City's water supply project, and North Carolina has sought judicial review of FERC's decision.

California and Southern Pacific Railroad: Unlisted Activity Request

The Commission requested OCRM approval to review, as an unlisted activity, Southern Pacific Transportation Company's (SPTCo) request of Vandenberg AFB for permission to keep a gate erected by SPTCo on Vandenberg AFB property. The purpose of the gate is to prohibit pedestrian and vehicular traffic across SPTCo's railroad right-of-way to access the beach. The beach is part of or adjacent to Ocean Beach County Park, Santa Barbara County, less than one mile north of the access way. SPTCo urged OCRM to deny the Commission's request on the grounds that SPTCo was prohibiting an illegal activity (trespassing) and an illegal activity cannot be protected under the CZMA.

OCRM found that, the CZMA requires that CMPs identify and manage *permissible* uses, 16 U.S.C. § 1455(d)(2)(B) and (D)(emphasis added), and that prohibiting an illegal activity could not affect a coastal use since illegal activities are not permissible uses subject to the CZMA. However, in this case the Commission and SPTCo take issue on whether the use is permissible. OCRM is not the body to interpret state law. Thus, OCRM did not decide the issue of whether a permissible use was involved, but made its decision based only on whether the activity can be reasonably expected to affect any land or water use or natural resource of the coastal zone.

OCRM approved the Commission's request finding that SPTCo's gate can be reasonably expected to affect public access to the beach. Public access to the beach in this area of California is limited. Despite the existence of another access point less than a mile away, the gate is reasonably likely to block access to the beach. For more information from the Commission call Jim Raives at (415) 904-5292.

Alaska and the Forest Service MOU

Alaska is improving the efficiency and effectiveness of federal consistency reviews by developing memoranda of understanding (MOU) with federal agencies. An MOU with the Minerals Management Service was signed this past year, see below, and work has begun on an MOU with the Corps. Currently, Alaska and the U.S. Forest Service are developing an MOU. Issues center on the timing of consistency reviews with the NEPA process, the content of a consistency determination, adequate information, and identification of Alaska's forestry enforceable policies. see below, Timing of Consistency with NEPA under OCRM Policy Decisions, Guidance and Projects, OCRM has provided substantial input into this MOU and believes the end result will greatly improve Forest Service consistency determinations and the State's review and the relationship between Alaska and the Forest Service. For more information from Alaska call Lisa Weissler at (907) 465-3529.

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

As discussed in Federal Consistency Bulletin, Number 3, 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 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 applied to NOAA's National Marine Fisheries Service (NMFS) to "take"

marine mammals for scientific research. Scripps also applied for a permit from OCRM (Monterey Bay National Marine Sanctuary). Both California and Hawaii asserted consistency on ATOC.

The states are concerned that the ATOC project could affect marine mammals and commercial fishing. The states are also concerned with the lack of data on effects to these coastal resources. The California portion of the ATOC project was modified in response to concerns. After substantial analysis, public input, and discussions with Scripps, both states found the ATOC project consistent. For more information from California call Mark Delaplaine at (415) 904-5280. For more information from Hawaii call John Nakagawa at (808) 587-2878.

Alaska - MOU with Minerals Management Service

As reported in Bulletin Number 3, 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. This project resulted in the development of an MOU with the Minerals Management Service. The MOU was completed and signed by the State and MMS this past year. 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 Kerry Howard at (907) 465-3562.

Nationwide Permit 29 (Small Landowners)

In March 1995, the Army Corps of Engineers (Corps) announced a small landowner relief package consisting of (1) a new nationwide permit (NWP 29) allowing the alteration of up to one-half acre of non-tidal wetlands for single-family homes, driveways, septic systems, etc.; and (2) a policy statement that an off-site alternatives analysis will not be required for alteration of up to two acres of non-tidal wetlands for single-family homes, expansion of small businesses, etc.

OCRM supported the concept of the NWP to reduce the regulatory burden on small landowners while maintaining environmental safeguards, but were concerned that the NWP goes too far. OCRM's concerns centered on cumulative impacts on a regional or nation wide basis; the NWP might encourage avoidable or unnecessary filling of wetlands; the NWP might apply to large landowners, developers, and speculators, as well as small landowners; and the NWP may encourage the siting of on-site septic systems in inappropriate areas.

State CMPs also expressed concern with NWP 29. The Corps, in its Federal Register notice and individual letters to state

CMPs, provided state CMPs with a consistency determination. Several states have objected to NWP 29 while a few states may find the NWP consistent providing certain conditions are met. Where a state CMP has disagreed with the Corps' consistency determination, work cannot proceed until the applicant has obtained consistency concurrence from the state CMP.

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 Consistency Workshops

Since September 1994, OCRM has held six regional federal consistency workshops around the country (Virgin Islands, Gulf & Caribbean region, two in Alaska, Great Lakes region, and the Pacific Islands). Over 275 state, local and federal agency representatives participated in the workshops. OCRM has received very favorable comments on the workshops. The workshops appear to have greatly improved communication and helped everyone understand the requirements and benefits of federal consistency. The workshops were also very helpful to OCRM by making connections with many regional offices of federal agencies.

Workshops may also be held in the Northeast, Northwest, and mid-Atlantic states next year, but are dependent on available funding. In the coming months OCRM will also hold a workshop in Washington, D.C. for the headquarter offices of the federal agencies.

If funds allow we will also conduct issue-specific workshops for individual states or regions. An example is the workshop held in Juneau Alaska for Forest Service issues. The workshops can be tailored to meet the specific issue and level of understanding of the participants. For the issue-specific workshops OCRM expects to pay only for OCRM travel. States (or federal agencies) would provide meeting facilities. If a workshop is requested that involves more than one state, the states will be responsible for their travel and per diem costs. If funds become available, we will send out a notification of availability for these workshops. Priority will be given to (1) those states or regions that have not had a general workshop (and one is not planned for 1996); (2) first come-first serve; and (3) application of the issue to more than one state or region.

Department of Justice

OCRM and the NOAA General Counsel for Ocean Services

continued to work closely with the Department of Justice (Justice). Our improved relationship with Justice continues to lead 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.

Corps of Engineers

OCRM, on several occasions, met with the Corps to discuss consistency issues. In November 1994, OCRM, NOAA General Counsel for Ocean Services, and the Corps met to discuss several issues raised by the Corps. One outcome of the meeting was a recognition that Corps districts often lacked adequate knowledge of federal consistency requirements. To address this we worked with Corps headquarters and the states to ensure that local Corps offices were well represented at the consistency workshops. Other issues and OCRM's response included:

Paying for State Beneficial Use/Mitigation Requirements

This has been a longstanding issue: who pays for mitigation or beneficial use of dredged material when required by a state CMP's enforceable policies. The Corps does not necessarily object to federally approved state mitigation and beneficial use requirements, but does not believe the Corps should pay the cost to comply with such requirements.

For example, the Corps believes that state mitigation and beneficial use requirements are unrelated to the impacts of dredging and dredged disposal and are unnecessary to meet requirements of the Clean Water Act and other environmental statutes. The Corps has authorities to cost share beneficial uses of dredged material for placement of material on beaches (Water Resources Development Act of 1986 (WRDA) section 933), and for protection, restoration, and creation of aquatic habitat and wetlands (WRDA of 1992 section 204). These authorities are funded separately from the operation and maintenance of navigation projects.

OCRM disagrees with the Corps' view that state mitigation and beneficial use requirements are unrelated to the impacts of dredging and disposal. OCRM considers federally approved state CMP enforceable policies to be requirements for federal agencies to follow, to the maximum extent practicable, and federal agencies should address such requirements, as they would any other Clean Water Act requirement.

Options discussed for resolving the issue included: Memoranda of agreements; earlier coordination between states and federal agencies; changes to WRDA. Proposed changes to WRDA that may be helpful include cost sharing for environmental projects and a greater federal share.

State Requires Extensive Design Specs for Corps Projects

OCRM believes that if design specifications are reasonably obtainable, then the Corps should provide the state with the information. If not, then the Corps should provide phased consistency determinations. If the Corps cannot reasonably provide all project information at one time, the Corps should identify distinct project phases (for the entire project) and submit consistency determinations for the phases as the information becomes available. See also below Timing of Consistency with NEPA under OCRM Policy Decisions, Guidance, and Projects.

Processing Fees

OCRM has already provided guidance on this. See Bulletin Number 1, at 8. While state agencies can assess federal agencies user or processing fees for reviewing consistency determinations, the assessed federal agency must determine if such a fee is allowable or required under federal law applicable to that agency's actions. Therefore, state agencies should complete their consistency reviews regardless as to whether or not a federal agency has paid an assessed processing fee.

Meeting Adjacent State Requirements

Each affected state's enforceable policies must be complied with to the maximum extent practicable. If there are conflicting state requirements efforts should be made to comply with both. The most useful resolution is to coordinate early with all affected states, identify conflicting policies, and work out a solution among all the parties.

State Consistency Reviews at Final Stage of Process

State consistency reviews should occur at the earliest practicable stage. This requires that the federal agency provide the state with sufficient information early, e.g., at the draft EIS stage (while the federal agency still has discretion to change the project). See below Timing of Consistency with NEPA under OCRM Policy Decisions, Guidance, and Projects.

Project in Coastal Zone, But Disposal Beyond State Waters

States may review for consistency the designation of an offshore dump-site (in or outside state waters) (as a direct federal activity that is reasonably likely to affect the coastal zone) and the subsequent use of an approved dumpsite (either as a direct federal activity if the Corps is conducting the activity, or as a federal license or permit activity if a non-federal applicant is conducting the activity).

Different State Agencies Involved in Consistency Process

For purposes of consistency, the Corps is only responsible to the designated state federal consistency agency (usually the lead CMP agency).

Timely State Review

The time frames, especially for direct federal activities, are not long. Many states have instituted procedures to further reduce state response times. For state responses that are toward the end of the regulatory time frames, the problem is usually lack of early coordination or complexity of the project. The earlier the state CMP is brought into the process, the quicker its concerns can be addressed, and the earlier state concurrence can be obtained.

OCRM Policy Decisions, Guidance, and Projects

Federal Consistency Workbook

The Federal Consistency Workbook is designed to be both an education aid as well as a day-to-day resource document for complying with the federal consistency requirements, understanding the benefits of federal consistency, and improving coordination and communication between states and federal agencies. The Workbook has already received wide acclaim from the coastal management community.

The Workbook evolved through the Federal Consistency Regional Workshops. The workbooks were used at the workshops and will be updated as requirements and information changes. The current distribution of the Workbook is 415 state, local, federal, academic, and private individuals. This Bulletin should be included in your Workbook under tab 17.

Consistency Internet Bulletin Board.

OCRM plans to develop an Internet consistency bulletin board. The bulletin board will allow OCRM to quickly, and briefly, notify the coastal management community of current federal consistency issues as well as allow others to place items on the bulletin board. This should be up and running sometime in March or April 1996. Issues will not be discussed in as in-depth a manner as the Federal Consistency Bulletins. Especially complex questions will be pulled from the bulletin board and addressed in more detail by OCRM with the state or federal agency.

Coordinating Federal Consistency and Disposal of Federal Land by the General Services Administration (GSA)

OCRM is developing guidance on coordinating federal consistency and the disposal of federal land by GSA. The guidance is necessary due to recent misunderstandings and conflict between GSA, OCRM, and New York over the need of

GSA to adequately consider the effects of the disposal of federal property on state coastal uses or resources, the process for doing so, GSA's mission to dispose of federal property, and GSA's regulations governing the disposal of federal property.

NOAA and Justice are developing draft guidance, which will be provided to GSA and the New York CMP for their input. Following this, OCRM will finalize the guidance. The guidance will be our recommendation for coordinating the two programs. If followed by states and regional offices of GSA, a structure will be in place to address state CMP concerns, allow GSA to proceed in a timely fashion, and resolve most potential conflicts.

State Assumption of the Clean Water Act Section 404 Permit Program

Several states and the U.S. Environmental Protection Agency (EPA) have raised questions regarding the application of federal consistency to a state's assumption of the Clean Water Act section 404 program. See Bulletin Number 3, at 10 for the applicability of consistency to state issued NPDES permits. Consistency applies to 404 assumptions in the following manner:

1. A question has been raised as to whether EPA's decision to approve or deny a state request to assume the section 404 permit program requires EPA to prepare a consistency determination. OCRM and EPA are currently discussing the issue.
2. Once a state has assumed the 404 authority, 404 permits issued by the state are state permits. There is no requirement for a permit applicant to submit a consistency certification. (This of course only applies to those 404 activities assumed by the state. Consistency will, of course, continue to apply to 404 activities retained by the Corps or EPA.)
3. EPA can object to the issuance of a particular state 404 permit. If EPA objects the state must either adopt permit conditions to satisfy EPA's objections or deny the permit. If the state does not adopt EPA's concerns EPA's objection stands, and the permit application is referred to the Corps for processing.
4. The referred application to the Corps is a federal license or permit (307(c)(3)) activity.

Revised Program Change Regulations and Guidance

Over the years OCRM has provided guidance on requirements and submission procedures for changes made to state CMPs. OCRM has developed new draft guidance which will consolidate and replace all previous program change guidance.

The draft guidance will be sent to state CMPs for their comment.

The new guidance clarifies information requirements for program change requests. The focus of the guidance is to explain the difference between procedures for the two types of program changes: routine program changes and program amendments. The guidance also explains a proposed update of the program change regulations (also provided to state CMPs for comment). The regulations are being changed in response to President Clinton's Regulatory Reform Initiative. The change in the regulations will be published shortly (for further comment) as proposed regulations in the Federal Register.

In the regulation update, OCRM will propose to replace the four criteria by which program change requests were evaluated with a reference to the five program areas identified in the program development regulations: (1) uses subject to management, (2) special management areas, (3) boundaries, (4) authorities and organization, and (5) coordination, public involvement and national interest. The regulations would also require states to identify any enforceable policies to be added or changed by the program change.

Federal Consistency and Activities on Native American Lands

The application of federal consistency to federal actions regarding Indian tribes or on Indian lands has been recently raised in several instances. In Rhode Island, a federal district court found that a proposed Narragansett Indian tribe activity was subject to the federal consistency requirement (but not necessarily all enforceable policies). In Connecticut, the State is concerned with the purchase of land by the Bureau of Indian Affairs (BIA). BIA will hold the property in trust for the Mohican Tribe. The Tribe plans to build a casino on the property. Connecticut believes that the purchase of the land by BIA is a direct federal activity (BIA included a consistency determination in its EIS and Connecticut, after some negotiations, agreed with the determination). Alaska is concerned about the use of a Native American allotment for cutting trees and whether there is a direct federal activity or federal license or permit activity involved. In Wisconsin, a developer (a non-Native American) proposes to build a golf course and condos on private land that is within the Oneida Indian Reservation. How does Indian law and federal consistency apply?

There is no one answer for all of these questions. Due to the unique nature of Indian tribes and Indian sovereignty, and applicable settlement acts or treaties, each instance must be examined on a case-by-case basis to determine to what extent Native American activities or activities within Native American lands are subject to state CMP policies. Recent guidance is contained in Narragansett Indian Tribe v. The Narragansett Electric Co., et al., No. 93-667-T (D.R.I. Feb. 21, 1995). The

Rhode Island case shows that Native American activities can be subject to consistency requirements. However, as the court found, the extent of state jurisdiction depends on:

whether the kind of state regulation being asserted would interfere with federal or tribal interests reflected in the applicable federal statutes when they are read against the backdrop of Indian sovereignty and, if so, whether the state interests served are sufficiently compelling to justify the exercise of state authority.

Slip Op. at 23. In other words, applicable federal law may preempt state regulatory authority over the Tribe. However, the court found that the Rhode Island Coastal Resources Management Plan (CRMP) serves rather than conflicts with federal interests, the CRMP is not preempted by federal law, and the CRMP is applicable to the proposed housing activity, at least as a general matter. See id. at 28, 33-34. Furthermore, unlike the provision in the Clean Water Act allowing tribes to assume the role of states for purposes of the statute, the CZMA does not allow tribes to function as states. See id. at 28-29. C.f. Rhode Island v. Narragansett Indian Tribe, 19 F.3d at 703.

The court found, that strict compliance with every provision of the CRMP may not be required, and that certain policies may be preempted. See id. at 34. The court stated: "Without some indication that exemption from the otherwise plain requirements of the CZMA is 'necessary to protect tribal self-government or to control internal relations' no such exemption should be inferred." Id. at 32. The court also found that the presumption against extending state regulatory authority to the proposed activity is considerably weakened because of the likelihood of adverse coastal effects from the project, and the important state interest at stake. See id. at 32-33. The Rhode Island District Court case also states that the farther removed a proposed activity on Indian lands or by a Native American is from self-government or internal relations the more it is potentially subject to state jurisdiction. See id. at 14, 20-22.

In summary, the court found that the Tribe is subject to federal consistency and the CRMP as a general matter. Depending on the nature of a proposed activity, however, particular CRMP policies may be preempted.

Specifying Alternatives for State Objections for CZMA § 307(c)(3) Activities

State CMP objection letters must describe alternative measures (if they exist) which, if adopted by the applicant, would permit the proposed activity to be conducted in a manner consistent with the CMP. 15 C.F.R. § 930.64(b)(2). See Federal Consistency Workbook, Tab 13, or Bulletin Number 3, at 10, for other information that should be in state objection letters. Identifying alternatives is important since the identification of

alternatives by the CMP is one of the four factors the Secretary considers when an applicant appeals a state's objection. See 15 C.F.R. § 930.121(d).

The Secretary has determined that for an alternative to satisfy 15 C.F.R. § 930.121(d), the alternative must be (1) stated by the state to be consistent with the CMP; (2) described by the state with sufficient specificity; (3) reasonable; and (4) available. See Secretary of Commerce, Decision and Findings in the Consistency Appeal of the Virginia Electric and Power Company, (Lake Gaston Decision), May 19, 1994, at 38. These criteria are applied on a case-by-case basis.

Consistent with the CMP means that the state CMP has asserted that the alternative *is* consistent (not *may* be consistent or consistent if well-designed, etc).

Sufficient specificity means that a proposed alternative is specific enough if it can be implemented and conducted in a manner consistent with the CMP. Application of the specificity requirement demands a case specific approach. More complicated projects or alternatives generally require more information than less-complicated projects. In the Lake Gaston case, the project and the alternatives addressed a large-scale water supply problem and the Secretary found that some alternatives were not described with sufficient specificity. Also, if a state CMP requires a "well-designed" alternative, but does not elaborate on what a well-designed alternative is, then the alternative would most likely not be described with sufficient specificity.

A proposed alternative is *reasonable* if the environmental advantages of the alternative outweigh the increased cost of the alternative over the proposed project.

Finally, a proposed alternative is *available* if the proponent of the proposed project can implement the alternative and the alternative achieves the primary purpose or essential purpose of the project.

Reviewing Classified Activities

States have recently asked about asserting consistency over classified military projects. OCRM is not aware of a state's review of a classified activity, but we offer the following guidance.

The 1990 changes to the CZMA make it clear that no federal activity is exempt from the consistency requirement. Thus, a classified activity that is reasonably likely to affect coastal uses or resources is not exempt from consistency (the activity could be exempted by the President under CZMA section 307(c)(1)(B)). However, under the consistent to the maximum extent practicable standard, the federal agency could only provide project details and effects that it is legally permitted to release. Despite the fact that a federal agency may not be able

to disclose certain project details and effects, the federal agency should still *conduct* the classified activity consistent to the maximum extent practicable with the state CMP. Concerned state CMPs may want to consider developing general consistency agreements with relevant federal agencies for classified activities.

Timing of Consistency with NEPA

Coordinating consistency reviews with NEPA draft and final environmental impact statements (DEIS and FEIS) is becoming more and more of an issue. OCRM believes that the following guidance on the timing of federal consistency and development of NEPA documents will provide needed flexibility for both states and federal agencies and still ensure adequate consistency review by the state.

CZMA regulations require that federal agencies shall provide states CMPs with a consistency determination at the earliest practicable time in the planning of an activity. 15 C.F.R. § 930.34(b). A determination should be prepared following the development of sufficient information to determine reasonably the consistency of an activity, but before the federal agency reaches a significant point of decision-making. *Id.*

If a negative determination is required, it too shall be provided at the earliest practicable time. 15 C.F.R. § 930.34(d).

An FEIS is not usually the earliest practicable time for a determination and it is a significant point in a federal agency's decision-making process. Consistency and negative determinations, and the state CMP's review of the determinations, should be completed before the FEIS is published, if possible. The ideal location for a consistency determination is in the DEIS. (States should provide federal agencies with their concerns and relevant enforceable policies during the scoping process.) Information used to prepare the DEIS may also be useful in determining effects and consistency, e.g., substantiating reports, technical data.

The CMP would then conduct its consistency review of the preferred alternative in the DEIS, and issue a consistency decision. If the preferred alternative and the FEIS have not substantially changed, then the consistency decision would become final. The federal agency should notify the state CMP prior to completing the FEIS as to whether the FEIS will be substantially different than the DEIS. If the FEIS will be substantially different, the federal agency should provide the state with a revised consistency determination 90 days before completion of the FEIS (states and federal agencies are encouraged to agree to a shorter notification and review time for the revised consistency determination).

If the state CMP disagrees with the federal agency's finding that the activity has not substantially changed, the state should immediately notify the federal agency and provide the federal

agency with the state's reasons. If a disagreement persists, the state and the federal agency should attempt to resolve their differences before publication of the FEIS. OCRM will be available to facilitate negotiations.

State CMPs should base their reviews, to the extent possible, on the information provided in the DEIS, and on information used to prepare the DEIS. Federal agencies should make every effort to provide sufficient information. If there is not enough information for the state to determine consistency (or if there will be later phases of the project for which information is not readily available at the time of the DEIS) the federal agency should provide the CMP with phased determinations. State CMPs may also, pursuant to 15 C.F.R. § 930.42(b), disagree with the consistency determination for lack of information.

If a federal agency provides a consistency determination in a DEIS, the state CMP must agree or disagree within 45 days (or request an extension), otherwise the state CMP's agreement will be presumed. Likewise, if a DEIS contains a negative determination, the state CMP must notify the federal agency of a disagreement with the negative determination within 90 days.

Ocean Management and Federal Consistency

At the South Atlantic Ocean Management Workshop, held in Wilmington, North Carolina, May 7-9, 1995, OCRM discussed ocean management, state jurisdiction and federal consistency.

There are many possibilities for state ocean management: agreements with other states and federal agencies, interstate compacts, partnerships with National Marine Sanctuaries and National Estuary Programs, etc. These partnerships are important as state authority to directly regulate activities in the ocean is limited to the area of state jurisdiction. Thus, state ocean management efforts should maximize the authority granted by federal law, using these authorities to augment ocean management planning efforts and agreements with federal agencies.

Federal laws, such as the Outer Continental Shelf Lands Act and the Abandoned Shipwreck Act, provide for some state authority. However, these laws only provide state input into specific issues. Neither of these, nor other federal laws, provide states with the authority and the comprehensive ocean management potential granted by the Coastal Zone Management Act (CZMA).

The CZMA federal consistency requirement is an existing state ocean management tool. While states cannot directly regulate federal actions outside of state jurisdiction, federal consistency requires federal actions to be consistent with state policies.

Through federal consistency states address, or can address, ocean management issues, such as: offshore oil and gas

planning, exploration, development, and production; fisheries management; endangered species protection; recreation; historic preservation; ocean dumping; sand mining; and any other activities that are reasonably likely to affect any coastal use or resource.

In order for state CMP enforceable policies to apply to ocean issues they must be tied to affected uses or resources of the coastal zone. For example, if a state wants to minimize effects to offshore fish spawning areas from outer continental shelf (OCS) oil and gas activities, the state should first develop policies that protect fish spawning areas within the state's jurisdiction from any activity. The ocean management plan should then identify fisheries that are coastal resources. These could be fish that spend time in both the coastal zone and on the OCS (resources that are both of the coastal zone and the OCS are coastal resources). Fishing for non-coastal resources (fishery that spends all of its time on the OCS) may also be a coastal use which can be addressed in program policies. Once this is done, the state, through federal consistency, could apply the enforceable policy to any federal action affecting the OCS fishery.

Federal consistency and state CMP enforceable policies could be incorporated into a state ocean management plan in the following way:

1. Identify state coastal uses and resources of the ocean.
2. Identify federal actions that are reasonably likely to affect coastal uses and resources.
3. Describe forms of state authority and input into ocean issues.
4. Describe the enforceable policies and enforceable mechanism for the policies.
5. Coordinate and cooperate closely with federal agencies.

Update on CZMA Section 306(d)(14): Public Participation for State Reviews of Direct Federal Activities

As reported in previous Bulletins, state CMPs must now provide for public participation in permitting processes, consistency determinations, and other similar decisions. Many states have submitted proposed public participation procedures for OCRM review. Most have been approved. Others still need minor revisions. States that have not submitted their procedures to OCRM should do so as soon as possible.

Approved state procedures include publication in local newspapers, state environmental mailings to interested parties (state and local government agencies and other interest groups), including the items on the agenda of state coastal commissions, etc. In all cases the public notice makes it clear that the public is invited to comment on the state CMP's review of whether a

federal activity is consistent with the state CMP.

Revised Federal Consistency Regulations

As discussed in previous Bulletins, OCRM is revising the federal consistency regulations. OCRM plans to provide copies of the changes to the recipients of the Bulletins. OCRM will then publish proposed regulations in the Federal Register.

Providing Details to OCRM When Requesting Consistency Guidance

On several occasions states have requested OCRM guidance on the application of consistency to a particular case where OCRM could either not provide a definitive answer or had to later alter its guidance. States requesting OCRM guidance on a specific issue or case should disclose all available details of the issue to OCRM, regardless of whether or not the state believes the information to be detrimental to the state's position. OCRM guidance has limited value if it is not based on all the relevant facts.

Secretarial Appeal Decisions

CZMA Consistency Appeal Decisions Since June 1994

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 June 1994, the Secretary has issued the following consistency appeal decisions to date.

Florida - Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S. Inc., (Mobil Pensacola Decision), June 20, 1995.

On June 20, 1995, the Secretary overrode Florida's objection to Mobil's plan to drill an exploratory well on Pensacola Block 889, located about 13.5 miles from Pensacola, Florida, and 74 miles from Theodore, Alabama. Mobil's plan was submitted as a supplement to a plan of exploration to drill six wells on the Pensacola lease blocks. Florida had not objected to Mobil's plan of exploration for the original six wells. The Secretary found that the supplemental plan of exploration was consistent with the objectives of the CZMA.

Puerto Rico - Decision and Findings in the Consistency Appeal of Olga Vélez Lugo, (Vélez Lugo Decision), September 9, 1994.

On September 9, 1994, the Secretary declined to override the Commonwealth of Puerto Rico's objection to a proposal by Ms. Olga Vélez Lugo (Appellant) to construct a wood dock, restore a boat ramp and level a wetland/mudflat area by depositing fill. The dock and boat ramp would be used by the Appellant for private recreational purposes. The Secretary found that the proposed project's minimal, at best, contribution to the national interest did not outweigh the substantial, cumulative adverse effects the activity would have on the natural resources of the coastal zone.

North Carolina - Decision and Findings in the Plan of Exploration Consistency Appeal of Mobil Oil Exploration & Producing Southeast, Inc., (Mobil Manteo POE Decision), September 2, 1994,

and

North Carolina - Decision and Findings in the Drilling Discharge Consistency Appeal of Mobil Oil Exploration & Producing Southeast, Inc., (Mobil Manteo Drilling Discharge Decision), September 2, 1994.

On September 2, 1994, the Secretary declined to override North Carolina's objections to Mobil's proposed discharge of drilling wastes and overall plan of exploration for Manteo Block 467, located about 39 miles offshore North Carolina. Mobil proposed to drill in an area known as "The Point," a prime fishing area for North Carolina fishermen. North Carolina's objections were based on lack of necessary information. 15 C.F.R. § 930.64(d). The Secretary found that the information in the administrative records was inadequate to determine whether the national interest benefits of Mobil's proposed activities outweigh the proposed activities' adverse coastal effects. Accordingly, Mobil failed to demonstrate that its proposed activities were consistent with the objectives of the CZMA. Mobil also failed to demonstrate that its activities were necessary in the interest of national security. Mobil is challenging the two Mobil Manteo decisions in a federal court.

Pending Consistency Appeals

(As of January 31, 1996)

<u>Appellant</u>	<u>Activity</u>	<u>State</u>
Texasgulf	Phosphate Mining	NC
Joseph Mattone	Construction of seawall and Placement of fill	NY
Vieques Marine Laboratories	Mariculture Shrimp Farm	PR

For further information on appeals call Roger Eckert, NOAA Office of General Counsel for Ocean Services, (301) 713-2967, x 213.

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).

After reading this Bulletin, include it in your Federal Consistency Workbook with the other Bulletins

OCRM bids farewell to Ellen Brody. Ellen was with OCRM's Coastal Programs Division for 8 ½ years as a program specialist, assistant regional manager and acting regional manager for the Great Lakes region. Ellen worked on a host of coastal management issues and was invaluable to our office. She was very active in federal consistency and will be sorely missed. Ellen and her husband Michael have moved to Michigan where Michael will be teaching at the University of Michigan. Ellen will undoubtedly continue to stay involved in coastal and other natural resource management issues.

Federal Consistency Bulletin Index

The Federal Consistency Bulletins have reported on numerous state and federal agency issues and provided substantial guidance on the implementation of consistency. Following is an index of all items included in the first four Bulletins:

Significant State Issues:

Alaska - MOU with Minerals Management Service. Bulletin No. 3, at 8.

Alaska - MOU with Minerals Management Service. Bulletin No. 4 at 3.

Alaska and the Forest Service MOU. Bulletin No. 4, at 3.

BCDC Unlisted Activity Request for Airport Expansion. Bulletin No. 3, at 6.

- California and the Transportation Corridor Agencies. Bulletin No. 1, at 4.
- California and the Closure of Fort Ord. Bulletin No. 2, at 4.
- California and the Closure of Fort Ord. Bulletin No. 3, at 5.
- California Unlisted Activity Request for ICC Water Carrier License. Bulletin No. 3, at 6.
- California Unlisted Activity Request - Commercial Spaceflights. Bulletin No. 3, at 6.
- California and the Air Force: Unlisted Activities and Commercial Space Launches. Bulletin No. 4, at 2.
- California Unlisted Activity Request and Hawaii's Review of the Acoustic Thermometry of Ocean Climate (ATOC) Project. Bulletin No. 3, at 7.
- California Unlisted Activity Request and Hawaii's Review of the Acoustic Thermometry of Ocean Climate (ATOC) Project. Bulletin No. 4, at 3.
- California and Southern Pacific Railroad: Unlisted Activity Request. Bulletin No. 4, at 2.
- Connecticut, the Coast Guard, and Security Zones. Bulletin No. 2, at 2.
- Delaware, EPA, and Superfund. Bulletin No. 2, at 2.
- Hawaii, American Samoa, and Guam and Japanese Plutonium Shipments. Bulletin No. 1, at 3.
- Interstate Consistency Update. Bulletin No. 3, at 1.
- Lake Gaston Consistency Appeal -- Interstate Consistency Dealt a Setback. Bulletin No. 1, at 1.
- Lake Gaston Consistency Appeal Decision and Interstate Consistency Update. Bulletin No. 2, at 1.
- Louisiana and Consistency User Fees. Bulletin No. 1, at 4.
- Maine, the Corps, and Mitigation. Bulletin No. 2, at 4.
- Massachusetts, EPA and Ocean Dump Site Designation. Bulletin No. 1, at 5.
- Massachusetts, New Hampshire and Interstate Consistency. Bulletin No. 1, at 5.
- Mass. and GSA Land Acquisition. Bulletin No. 1, at 6.
- The Mass Bay Disposal Site. Bulletin No. 2, at 5.
- Nationwide Permit 29 (Small Landowners). Bulletin No. 4, at 4.
- New Jersey and OCS Policies. Bulletin No. 2, at 3.
- New Jersey and Ocean Disposal of Dredged Material Containing Dioxin. Bulletin No. 2, at 3.
- New Jersey Unlisted Activity Request for Shipment of Spent Nuclear Fuel. Bulletin No. 3, at 5.
- New York and GSA/ U.S. Marshals Service Land Disposal. Bulletin No. 1, at 2.
- New York and GSA/U.S. Marshals Service Land Disposal Update - Court Denies New York's Request for a Preliminary Injunction. Bulletin No. 2, at 2.
- New York and the Navy: Dredge Material Disposal for SEAWOLF Submarine. Bulletin No. 4, at 1.
- North Carolina and Virginia Beach: Lake Gaston Update. Bulletin No. 4, at 2.
- Pennsylvania, the Corps, & Nationwide Permits. Bulletin No. 1, at 2.
- Secretary's Decision in a Request to reconsider an OCS Decision. Bulletin No. 2, at 5.
- Wisconsin Federal Consistency Manual. Bulletin No. 3, at 7.

OCRM Coordination with Other Federal and Non-Federal Entities:

- American Association of Petroleum Landmen - OCS Committee. Bulletin No. 1, at 7.
- Army Corps of Engineers. Bulletin No. 2, at 6.
- Army Corps of Engineers. Bulletin No. 3, at 9.
- Army Corps of Engineers. Bulletin No. 4, at 4.
- Department of Justice. Bulletin No. 3, at 9.
- Department of Justice. Bulletin No. 4, at 4.
- Department of the Air Force. Bulletin No. 3, at 9.
- Environmental Protection Agency. Bulletin No. 2, at 6.
- Federal Agency Workgroup on the Dredging Process. Bulletin No. 3, at 8.

Federal Energy Regulatory Commission. Bulletin No. 3, at 8.

Federal Consistency Workshops. Bulletin No. 4, at 4.

Minerals Management Service. Bulletin No. 1, at 7.

U.S. Coast Guard. Bulletin No. 1, at 7.

OCRM Policy Decisions, Guidance, and Projects

Applicability of Federal Consistency to State-Issued NPDES Permits. Bulletin No. 3, at 10.

Changes to the Marine Protection, Research, and Sanctuaries Act Section 106(d) -- Ocean Dumping. Bulletin No. 2, at 10.

Charging User Fees for Federal Agency Consistency Determinations. Bulletin No. 1, at 8.

Consistency Internet Bulletin Board. Bulletin No. 4, at 6.

Coordinating Federal Consistency and Disposal of Federal Land by the General Services Administration (GSA). Bulletin No. 4, at 6.

Federal Agency Contact List. Bulletin No. 1, at 9.

Federal Consistency and Activities on Native American Lands. Bulletin No. 4, at 7.

Federal Consistency Manual. Bulletin No. 1, at 9.

Federal Consistency Manual. Bulletin No. 2, at 11.

Federal Consistency Manual and Revised Regulations. Bulletin No. 3, at 11.

Federal Consistency Workbook. Bulletin No. 4, at 5.

Implementing the CZMA Section 306(d)(14) - Public Participation for State Reviews of Direct Federal Activities. Bulletin No. 2, at 11.

Implementing the CZMA Section 306(d)(14) - Public Participation for State Reviews of Direct Federal Activities. Bulletin No. 3, at 9.

Imposing Time Limits on State Federal Consistency Agreements and Concurrences. Bulletin No. 3, at 11.

Ocean Management and Federal Consistency. Bulletin No. 4, at 9.

Providing Details to OCRM When Requesting Consistency Guidance. Bulletin No. 4, at 10.

Review of Activities Outside the Coastal Zone: Unlisted Activities and Geographic Scope. Bulletin No. 1, at 8.

Revised Federal Consistency Regulations. Bulletin No. 4, at 10.

Revised Program Change Regulations and Guidance. Bulletin No. 4, at 6.

Reviewing Activities Under the Oil Pollution Act of 1990. Bulletin No. 2, at 7.

Reviewing Classified Activities. Bulletin No. 4, at 8.

Specifying Alternatives for State Objections for CZMA § 307(c)(3) Activities. Bulletin No. 4, at 7.

Starting the Consistency Review Time clock for Incomplete Consistency Applications. Bulletin No. 2, at 11.

State Assumption of the Clean Water Act Section 404 Permit Program. Bulletin No. 4, at 6.

State CMP Objection Letters. Bulletin No. 3, at 10.

State Federal Consistency Procedures - Single State Agency Responsibility. Bulletin No. 2, at 10.

State Permit Requirements for Federal Agencies. Bulletin No. 1, at 8.

Timing of Consistency with NEPA. Bulletin No. 4, at 8.

Update on CZMA Section 306(d)(14): Public Participation for State Reviews of Direct Federal Activities. Bulletin No. 4, at 9.

Secretarial Appeal Decisions:

1992 and 1993 CZMA Consistency Appeal Decisions to Date. Bulletin No. 1, at 9.

1993 CZMA Consistency Appeal Decisions Since January 15, 1993. Bulletin No. 2, at 12.

1993 CZMA Consistency Appeal Decisions Since August 1993. Bulletin No. 3, at 11.

All Consistency Appeal Decisions. Bulletin No. 1, at 12.

CZMA Consistency Appeal Decisions Since June 1994. Bulletin No. 4, at 10.

Pending Consistency Appeals. Bulletin No. 1, at 12.

Pending Consistency Appeals. Bulletin No. 2, at 12.

Pending Consistency Appeals. Bulletin No. 3, at 12.

Pending Consistency Appeals. Bulletin No. 4, at 11.

Federal Consistency Bulletin Board:

BLM Regional Plan Information Requested by Oregon.
Bulletin No. 1, at 14.

Federal Consistency Coordinator Plays Hookey. Bulletin No. 3,
at 13.

Mitigation Information Requested by Maine. Bulletin No. 1, at
14.

New NOAA General Counsel. Bulletin No. 2, at 13.

New OCRM Address. Bulletin No. 2, at 13.

OCRM Bids Farewell to Ellen Brody. Bulletin No. 4, at 11.

OCRM Coastal Program Division Staff Positions and Phone
Numbers. Bulletin No. 3, at 13.

OCRM Has a New Director. Bulletin No. 3, at 13.

Upcoming Events. Bulletin No. 1, at 14.
