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Federal Consistency in New Jersey

*A discussion paper prepared as part of a focus group on the topic
scheduled for 20 November 2002.*

*Prepared by the Urban Harbors Institute
of the University of Massachusetts Boston
under a contract with the New Jersey Coastal Management Program*

In 1972, the U. S. Congress passed the Coastal Zone Management Act (CZMA), designed to “preserve, protect, develop, and where possible, to restore and enhance the resources of the nation's coastal zone.” The CZMA encouraged coastal states to develop and implement comprehensive management programs that balance the need for coastal resource protection with the need for economic growth and development within the coastal zone.

In the latter portion of the 1970s New Jersey developed a coastal management plan that was fully approved by the National Oceanic and Atmospheric Administration in 1980. The plan defined specific boundaries for the state’s coastal zone and established *enforceable policies* that ensured that the state plan had a statutory and regulatory basis. These enforceable policies are the state’s Coastal Zone Management Rules (N.J.A.C. 7:7E *et seq.*).

The CZMA empowered states with approved plans to review federal actions that have a reasonably foreseeable effect on any land or water use or natural resources of the state’s coastal zone in order to ensure that such activities are consistent *to the maximum extent practicable* with those plans.

The authority to review federal actions to determine their compliance with the state's approved management program is referred to as *federal consistency*. The federal consistency process allows New Jersey to review the following actions for compliance with the requirements of its approved management program:

1. Federal licenses, permits or other regulatory approvals;
2. Federal activities; and
3. Federal financial assistance to state and local governments.

If the state determines that a proposed federal action is *inconsistent* (*i.e.*, fails to comply) with the requirements of its approved program, the applicant/federal agency is prohibited from conducting the activity. If the applicant/federal agency appeals or requests mediation from the U.S. Department of Commerce, the final determination is made by the Secretary of Commerce.

The requirements of the CZMA for federal agencies and state and local governments seeking federal financial assistance and applicants for federal licenses vary depending on the type of federal action, and whether or not a state coastal management program plan has listed the specific federal action as subject to federal consistency review. The state must be provided with the information needed to determine whether federal actions conducted in or affecting the state’s coastal zone are consistent with the program’s enforceable policies. The information provided must include all information reasonably required by the state to determine the project’s consistency with the Coastal Management Program.

Information on direct federal activities must be received by the state at least 90 days prior to the initiation of the proposed federal action (15 CFR 930, Subparts C and F). The CZMA requires that the state complete its review and provide the federal agency with its concurrence within 60 days following the receipt of the required information. If the state does not provide the federal agency with its concurrence

or objection within 60 days, the federal action is presumed to be consistent with the Coastal Management Plan and therefore may proceed. The state may request additional information and, if that information is not forthcoming within the allotted time for review, the state may find the action inconsistent based on a lack of information.

In the case of activities requiring federal licenses or permits, the CZMA requires the state to notify the applicant and the federal agency if the consistency review will take more than three months. Following such notification, the state is automatically provided with an additional 90 days to complete its review. The CZMA requires the state to complete its review and provide the applicant with its federal consistency concurrence or finding of inconsistency within six months following the receipt of the required information. If concurrence or a finding of inconsistency is not issued within six months, federal consistency concurrence can be presumed. As above, the state may find the activity inconsistent with the Coastal Management Plan if sufficient information is not provided.

The original New Jersey Coastal Management Plan was designed to be implemented through a Division of Coastal Resources within the Department of Environmental Protection (DEP). This Division generally included all of the state's activities related to coastal management; planning/policy development; technical and financial assistance; and regulatory actions. At that time, the federal consistency review process was conducted within the Division of Coastal Resources. When the DEP was reorganized according to function, these coastal zone management functions were separated. The federal consistency review is currently conducted by the DEP Land Use Regulation Program (LURP) and the Office of Dredging and Sediment Technology.

In 1980, the Department listed federal actions subject to federal consistency. Recent changes in NOAA regulations have established a process to clarify which federal actions proposed to take place outside of New Jersey's coastal zone (*i.e.*, those actions in another state, in federal waters, or in New Jersey but outside the coastal zone) may have a reasonably foreseeable effect on any land or water use or natural resources of New Jersey's coastal zone and thus may be subject to federal consistency review. This process requires identification of the geographical location where the federal action would occur and the foreseeable effects on the coastal zone. The Coastal Program Office is presently working to update its list of federal actions and areas subject to federal consistency. This list will ultimately be submitted to NOAA for review and approval.

Discussion Topics

Over the past year the New Jersey Department of Environmental Protection and the Urban Harbors Institute of the University of Massachusetts Boston have been evaluating New Jersey's Coastal Management Program. The evaluation has included interviews with federal, state, and local government agencies as well as representatives of private sector and non-governmental organizations. As a result of this evaluation, the New Jersey Coastal Management Program decided that there is a need to review its federal consistency process. The following discussion topics arose from the evaluation. Issues of concern from the evaluation and possible solutions for each are discussed below. The possible solutions are presented for discussion purposes only—the Coastal Management Program is interested in discussing any other ideas that are permissible under the CZMA.

TOPIC 1: Are there organizational or procedural aspects of the New Jersey federal consistency review process that should be changed to make the process more effective?

1. **Issue of Concern:** For federal projects, some federal agencies contact the Coastal Management Program too far into the design or planning process, so that it is more difficult for the federal

agency to revise the project to accommodate the concerns of the Coastal Management Program. Another aspect of this issue is that some federal agencies seek federal consistency approval on draft environmental impact statements, rather than after issues have been resolved and the design completed in a final EIS. Improvements in the coordination process as well as timing are being considered.

Potential Solutions:

As noted above, time frames are provided within the CZMA for filing a federal consistency determination with the state Coastal Management Program. The determination must include “all information reasonably required by the state” to reach a decision. If the state finds a project to be inconsistent, either because of conflicts with its Coastal Management Program or because there is insufficient information to make a decision, the project may not legally proceed.

Many other states have established formal or informal coordination processes with federal agencies to ensure that the concerns of the Coastal Management Program are incorporated into the project design at the conceptual stage. Projects can then be planned to alleviate these concerns “to the maximum extent practicable.” This coordination effort, however, requires a significant amount of time by the staff of the Coastal Management Program and that of the federal agency. Most state programs, however, seem to feel that it minimizes redesign and/or legal costs caused by a finding of inconsistency.

In other states, this coordination effort includes a review of draft plans and Draft Environmental Impact Statements (EIS) with comments on how the project may be revised so as to make it consistent. Delaware issues a “conditional consistency determination” to indicate that a project, if it reaches its final design state with the same level and type of impacts to the coastal zone, will be found consistent. Other states provide this assurance in less formal ways. However, with very few exceptions, states do not issue a final statement of consistency until all design issues have been resolved and a Final EIS has been produced.

2. **Issue of Concern:** Federal agencies sometimes seek federal consistency determinations in a time frame that is too short to accommodate the necessary public notice and input.

Potential Solutions:

Similar to the discussion above, time frames for filing a consistency determination and its review are clearly established under the provisions of the CZMA. In some other states, the Coastal Program staff reviews such things as the Federal Register, state clearing-house publications, etc. to become aware of impending projects. They then contact the federal agency to remind it of the process and the timelines.

3. **Issue of Concern:** Federal agencies sometimes seek federal consistency determinations for a federal action which they have already agreed to in settlement of a legal matter, and therefore have no flexibility to address the concerns of the Coastal Management Program.

Potential Solutions :

In general, Coastal Management Programs have the authority to find an action inconsistent even if it is part of a legal settlement. Some states file *amicus* briefs in legal actions that may result in court-mandated settlements advising of the nature and standards of the Coastal Program and its authorities under the CZMA. Some have become parties to the court case as a means of coordinating Coastal Program standards with the court’s findings.

This effort may require a considerable amount of time as well as legal and technical skills. Additionally, states may not be aware of the legal action. Because of the time requirements, most states will choose cases for their involvement with care.

Another alternative is for the federal agency to acknowledge, in the settlement agreement, the need for federal consistency concurrence, such that the settlement would not take effect until concurrence had been issued.

TOPIC 2: How can federal consistency review in NJ be made more effective?

1. **Issue of Concern:** Are there other regulatory authorities that should be incorporated into federal consistency review to make federal consistency more effective?

The principal program authorities of New Jersey's currently approved Coastal Management Plan are:

- The Waterfront Development Law (N.J.S.A. 12:5-3)
- The Coastal Area Facility Review Act (CAFRA) (N.J.S.A. 13:19-1 et seq.)
- The Wetlands Act of 1970 (N.J.S.A. 13:9A-1 et seq.)
- The Tidelands Management Program
- The Hackensack Meadowlands District authorities

Potential Solutions:

Two principal environmental regulatory programs in effect within the coastal zone may be appropriate for consideration for incorporation into the Coastal Management Program and therefore eligible for use in reviews under the federal consistency process:

- The Freshwater Wetlands Protection Act (N.J.S.A. 13:9B)
- The Flood Hazard Area Control Act (Stream Encroachment) (N.J.S.A. 58:16A-50 et seq.)

Freshwater wetlands and streams are regulated by the state in many areas of the New Jersey coastal zone to protect these resources.

In order to incorporate these programs, the New Jersey Coastal Zone Management Plan would need to be changed and approval from NOAA would be required. NOAA cannot require changes in the statutes or related rules; it can only decide whether the statutes/rules are appropriate for inclusion into the Plan.

Almost all other states with analogous programs have incorporated them into their Coastal Management Plans. They feel that this provides an additional source of protection to these coastal resources.

2. **Issue of Concern:** Are there other administrative programs or adopted plans that should be incorporated into federal consistency review to make federal consistency more effective?

The approved Coastal Management Program includes several state administrative or funding programs, including:

- Green Acres funding
- Funding for shore protection

- Planning of energy facilities
- The Wild and Scenic Rivers program

Potential Solutions:

New Jersey is involved in three National Estuary Programs (NEPs),

- The Delaware Estuary (Delaware Bay) Program
- The Barnegat Bay Estuary Program
- The Harbor Estuary Program (New York–New Jersey Harbor)

Each of these programs has produced a Comprehensive Conservation and Management Plan (CCMP) for the estuary and its watershed. These plans provide a wide range of options for meeting water quality, habitat protection, and other resource-related goals. These could be incorporated into the Coastal Management Program as a way to build on the efforts of the NEPs

The CCMPs typically do not include new regulatory or statutory authorities and consequently may not be able to be utilized as enforceable policies. As administrative guidelines, however, they may provide added benefits as to how the state intends to manage its resources by establishing priorities for funding, land acquisition and management, or other actions.

Several other states manage the NEPs through their Coastal Management Program but, to this point, few, if any have incorporated the CCMPs into their NOAA-approved Coastal Management Program.

Addition of these programs to the Coastal Management Plan would require a Program Change and approval from NOAA.

3. **Issue of Concern:** To ensure that the NJ Coastal Management Program is effectively protecting coastal resources and uses, what federal actions are appropriate for federal consistency review?

Potential Solutions:

The approved Coastal Management Plan includes a list of federal actions subject to federal consistency review. In the 20+ years since this document was created and approved, many new issues have arisen related to coastal management and there are new and different federal actions being proposed. Incorporation of additional federal actions into New Jersey’s Coastal Management Plan may make the Coastal Management Program more effective.

As with 1. and 2. above, any modification to the list of federal actions subject to federal consistency would require approval from NOAA.

4. **Issue of Concern:** To ensure that the NJ Coastal Management Program is effectively protecting coastal resources and uses, what is the appropriate geographical location within which to review federal actions for consistency?

The landward boundary of the New Jersey coastal zone is coincident with the CAFRA boundary, the areas subject to the Waterfront Development Law, the Wetlands Act of 1970, and the New Jersey Meadowlands District. The seaward boundary is three-mile limit of state waters and the interstate boundaries with New York, Delaware, and Pennsylvania. In much of Salem County, the Delaware–New Jersey state boundary is the mean low water line on the New Jersey shore of the Delaware River.

New Jersey's current list of federal actions subject to federal consistency review does not specifically include any areas in other states. The list describes federal consistency as applying to federal actions wholly or in part within the coastal zone and includes federal actions that occur only in the Atlantic Ocean. However, the current list does not identify geographical areas of applicability outside the coastal zone for each individual federal action listed.

There have been a limited number of attempts by states to assert federal consistency jurisdiction in other states. Massachusetts, for example, was successful in asserting its right to review a wastewater treatment outfall pipe in New Hampshire that would affect shellfishing. However, in January 2001, new federal consistency regulations took effect that include specific provisions for review of federal actions in other states. These regulations require that the federal actions be listed with specific geographic locations and foreseeable effects identified.

Potential Solutions:

Listing additional federal actions and areas outside the coastal zone boundary where the state will exert jurisdiction based on foreseeable effects on land or water uses or natural resources of the state's coastal zone may make the Coastal Management Program more effective.

Another option would be to amend the landward side of the boundary of the coastal zone within New Jersey. This could be done to coincide with either political boundaries (municipalities or counties) or natural resource features such as watersheds. This would expand the coastal zone beyond the jurisdiction of the regulatory programs such as CAFRA, the Waterfront Development Law and the Wetlands Act of 1970. As these are the current enforceable policies of the Coastal Management Plan, there would be little, if any, additional capability under the federal consistency review process unless the regulatory boundaries were also expanded. (Expansion of the boundary landward might be beneficial for planning or funding purposes; there is another focus group that will review this issue in greater detail.)

Changes in the boundary or list of federal actions would require approval from NOAA.