

# FEDERAL CONSISTENCY

IN

## NEW JERSEY

September 8, 2010

### I. INTRODUCTION

The Coastal Zone Management Act (CZMA) was enacted on October 27, 1972, to encourage coastal States, Great Lake States, and United States Territories and Commonwealths (collectively referred to as coastal States) to develop management programs to manage and balance competing uses of and impacts to coastal resources. The CZMA is an important law implementing the concept of federalism and emphasizes the primacy of State decision making regarding the coastal zone. Section 307 of the CZMA (16 USC 1456), called the Federal Consistency provision, is a major incentive for States to join the national coastal management program and is a powerful tool that States use to manage coastal uses and resources and to facilitate cooperation and coordination with Federal agencies.

Federal Consistency reviews are the responsibility of the lead State agency that implements or coordinates the State's federally approved Coastal Management Program (State CMP or CMP). At the federal level, the Office of Ocean and Coastal Resource Management (OCRM), within the National Oceanic and Atmospheric Administration's (NOAA's) National Ocean Service, among other duties and services, interprets the CZMA and oversees the application of Federal Consistency; provides management and legal assistance to coastal States, Federal agencies, Tribes and others; and mediates CZMA related disputes. NOAA's Office of General Counsel for Ocean Services assists OCRM and processes appeals to the Secretary of Commerce.

The Federal Consistency regulations and manual prepared by OCRM, and the CZMA are posted on NOAA's web site at [http://coastalmanagement.noaa.gov/czm/federal\\_consistency.html](http://coastalmanagement.noaa.gov/czm/federal_consistency.html). The information contained in this document is general guidance and does not supersede the Federal regulations.

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### II. DEFINITIONS

Federal Consistency is the CZMA requirement that *federal actions* that have reasonably foreseeable *effects* on any *land or water use* or *natural resource* of the coastal zone (also referred to as coastal uses or resources, or coastal effects) must be consistent with the *enforceable policies* of a coastal State's federally approved CMP.

**A. Federal actions:** The following are the four categories of Federal actions:

1. *Federal agency activities* -- activities and development projects performed by a Federal agency, or a contractor for the benefit of a Federal agency.

For example, Fisheries Plans by the National Marine Fisheries Service, Naval exercises, the disposal of federal land by the General Services Administration, a U.S. Army Corps of Engineers (Corps) breakwater or beach renourishment project, an outer continental shelf (OCS) oil and gas lease sale by the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEM) (formerly the Minerals Management Service (MMS)), improvements to a military base, Naval disposal of radioactive or hazardous waste performed by a private contractor, activities in National Parks such as installation of mooring buoys or road construction;

**2. *Federal license or permit activities*** – Activities performed by a non-Federal entity, requiring federal permits, licenses or other form of federal authorization.

For example, activities requiring Corps 404 permits, Corps permits for use of ocean dump sites, BOEM approvals for OCS oil and gas plans, Corps permits for use of ocean dumpsites, Nuclear Regulatory Commission licenses for nuclear power plants, licenses from the Federal Energy Regulatory Commission (FERC) for hydroelectric facilities;

**3. *OCS Plans*** -- BOEM approvals for OCS plans, pursuant to the Outer Continental Shelf Lands Act. The CZMA process is similar to federal license or permit activities.

**4. *Federal financial assistance to State and local governments.***

For example, Federal Highway Administration funds to coastal state and local governments, construction grants for wastewater treatment works, hazardous waste management trust fund, Housing and Urban Development grants, specifically Community Development Block Grants.

**B. Coastal Effects:** A federal action is subject to CZMA federal consistency requirements if the action will affect a coastal use or resource, in accordance with NOAA's regulations. Coastal effects are defined under NOAA's regulations as any reasonably foreseeable effect on any coastal use or resource resulting from a Federal agency activity or Federal license or permit activity. Effects are not just environmental effects, but also include effects on coastal uses. Effects include both *direct effects* which result from the activity and occur at the same time and place as the activity, and *indirect (cumulative and secondary) effects* which result from the activity and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects are effects resulting from the incremental impact of the Federal action when added to other past, present, and reasonably foreseeable actions, regardless of what person(s) undertake(s) such actions. Effects can be both positive and negative.

The effects test applies to activities and uses or resources that occur outside a State's coastal zone, so long as the uses or resources impacted are uses or resources of a State's coastal zone. The burden for determining or demonstrating effects is greater the farther an activity takes place outside of a State's coastal zone. The test is whether it is reasonably foreseeable that impacts that occur outside

of the coastal zone will affect uses and resources of the coastal zone. Merely showing impacts from an activity outside of the coastal zone is not sufficient by itself to demonstrate that reasonably foreseeable effects extend to uses or resources of the coastal zone.

**C. Enforceable policies:** An enforceable policy is a State policy that is legally binding under State law (e.g., through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions), and by which a State exerts control over private and public coastal uses and resources, and which are incorporated in the State's federally approved CMP.

*In New Jersey, the enforceable policies are contained in the Coastal Zone Management rules (N.J.A.C. 7:7E), the Coastal Permit Program rules, (N.J.A.C. 7:7), the Freshwater Wetlands Protection Act rules, (N.J.A.C. 7:7A), Stormwater Management rules, (N.J.A.C. 7:8), New Jersey Pollutant Discharge Elimination Systems rules, (N.J.A.C. 7:14A, Subchapters 1, 2, 5, 6, 11, 12, 13, 15, 16, 18, 19, 20, 21, 24 and 25), and the Hackensack Meadowlands District Zoning Regulations (N.J.A.C. 19:4 portions of Subchapters 2, 3, 4, 5, 7, 8 and 9 as noted below). These rules apply to decisions regarding consistency of proposed federal actions with New Jersey's Coastal Management Plan under Section 307 of the Federal Coastal Zone Management Act as well as decisions on water quality certifications under Section 401 of the Clean Water Act. Three major state laws are implemented through the Coastal Zone Management rules: the Waterfront Development Law, N.J.S.A. 12:5-3, the Wetlands Act of 1970, N.J.A.C. 13:9A, and the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19. The Hackensack Meadowlands Reclamation and Development Act, N.J.S.A. 13:17, Freshwater Wetlands Protection Act, N.J.S.A. 13:9B and the Law concerning the transportation of dredged materials containing polychlorinated biphenyls (PCBs), N.J.S.A. 13:19-33 and the Department's dredging technical manual titled, "The Management and Regulation of Dredging Activities and Dredged Material Disposal in New Jersey's Tidal Waters" are additional enforceable policies.*

**D. Coastal uses:** Coastal uses include such activities as: public access, recreation, fishing, historic or cultural preservation, development, energy infrastructure and use, hazards management, marinas, floodplain management, scenic and aesthetic enjoyment, and resource creation or restoration projects.

**E. Coastal resources:** Coastal resources include biological or physical resources that are found within a State's coastal zone on a regular or cyclical basis. Biological and physical resources include, but are not limited to, air, tidal and non-tidal wetlands, ocean waters, estuaries, rivers, streams, lakes, aquifers, submerged aquatic vegetation, land, plants, trees, minerals, fish, shellfish, invertebrates, amphibians, birds, mammals, and reptiles.

**F. Coastal zone:** The New Jersey's coastal zone is as follows:

**A. Inland coastal zone boundary**

New Jersey's inland coastal zone boundary consists of the following:

- The inland limit of the coastal area defined in the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 et seq. This area, which is referred to as the CAFRA area, includes portions of Middlesex, Monmouth, Ocean, Burlington, Atlantic, Cape May,

Cumberland and Salem Counties (see Appendix B for a listing of the municipalities located within the CAFRA area);

- The limits of the New Jersey Meadowlands District as defined by N.J.S.A. 13:17-4.
- The landward limit of the Waterfront Development area outside both the CAFRA area and the New Jersey Meadowlands District. This portion of the Waterfront Development area consists of
  1. All upland areas located within 100 feet of the mean high water line of tidal waterways; and
  2. For properties within 100 feet of the mean high water line that extend beyond 100 feet from the mean high water line, all upland areas that extend inland to the lesser of the following distances:
    - (1) 500 feet from the mean high water line; or
    - (2) The first paved public road, railroad, or surveyable property line that:
      - A. Existed on September 26, 1980; and
      - B. Generally parallels the waterway.

This area, which is referred to as the upland Waterfront Development area, includes portions of Salem, Gloucester, Camden, Burlington, Mercer, Middlesex, Monmouth, Somerset, Union, Hudson, Essex, Passaic and Bergen counties

- The landward limit of all tidal wetlands.

### **B. Seaward Coastal Zone Boundary**

New Jersey's seaward coastal zone boundary is the limit of the New Jersey territorial jurisdiction located three nautical miles from the mean high water line.

### **C. Interstate Coastal Zone Boundary**

New Jersey's interstate coastal zone boundary is the state lines shared with New York, Delaware and the Commonwealth of Pennsylvania.

The State boundary of New Jersey and Delaware is generally the center of the shipping channel of the Delaware River with the exception of the area located within the 12-mile circle. In 1681, King Charles II of England granted William Penn land north of a 12-mile circle centered on New Castle Delaware. In 1934, the Supreme Court set the New Jersey-Delaware boundary within the Twelve-Mile Circle at the mean low water line of the New Jersey shore, subject to the Compact of 1905.

In 2008, the US Supreme Court decided that in the twelve-mile circle of the Delaware River, New Jersey has exclusive state governing authority over the construction, maintenance, and use of

riparian improvements for ordinary and usual riparian activities and uses appurtenant to the eastern shore of the Delaware River extending outshore of the low-water mark. Such improvements include but are not limited to: the construction, maintenance and use of docks, piers, and wharves to provide access to navigable water, whether for the loading and unloading of goods or passengers, for fishing or for water-related recreation; and the construction, maintenance and use of water intake and outfall structures. To the extent that the construction, maintenance, and use of riparian improvements exceed ordinary and usual riparian uses, New Jersey and Delaware have overlapping jurisdiction. (*New Jersey v. Delaware, No.134 Original*)

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### III. NATIONAL INTEREST CONSIDERATION

Federal Consistency gives States substantial input into federal actions affecting the coastal zone. There are, however, provisions which balance State objectives with consideration of Federal objectives and mandates to ensure that the national interest in CZMA objectives is furthered. These include:

**A. Consistency must be based on coastal effects.** While the Federal Consistency “effects test” covers a wide range of federal actions, federal consistency review is triggered when it is reasonably foreseeable that a Federal action will have coastal effects. Again, effects can be both positive and negative. Consistency does not apply to every action or authorization of a Federal agency or of a non-Federal applicant for Federal authorizations. For Federal agency activities, the Federal agency makes the determination of whether its activity will have reasonably foreseeable coastal effects. For federal license or permit activities and federal financial assistance activities, States propose a list of activities believed to have coastal effects and OCRM makes the determination of effects by approving the *lists* of federal approvals and financial assistance programs that a State wishes to include in its CMP. In order to be on the list, the Federal license or permit activities should have reasonably foreseeable coastal effects on a regular basis. Federal agencies and other interested parties have input into OCRM’s approval of such lists and additions to the lists. If a State wishes to review an *unlisted* federal license or permit activity, it must notify the applicant and the Federal agency and seek OCRM approval to review the activity. OCRM’s decision is based on whether the unlisted activity will have reasonably foreseeable coastal effects and, again, Federal agencies and the applicant have an opportunity to comment to OCRM.

**B. Federally approved programs and State Coastal Management Office enforceable policies.** OCRM, with input from Federal agencies, local governments, industry, non-governmental organizations and the public, approves state CMPs and their enforceable policies, including subsequent changes to a State’s CMP.

**C. Consistent to the maximum extent practicable (only applies to Federal agency activities).** The CZMA at 307(c)(1) requires Federal agency activities to be fully consistent unless federal legal requirements prohibit full consistency. This ensures that Federal agencies are able to meet their legally authorized mandates, even though the activity may not be consistent with a State’s enforceable policy. If a Federal agency has the discretion to meet a State’s enforceable policy, then

it needs to be consistent with that policy. However, federal law may limit a Federal agency's discretion and, thus, a Federal agency's administrative record may dictate an action that is not fully consistent with a State's policy. Thus, for Federal agency activities under CZMA § 307(c)(1), a Federal agency may proceed with an activity over a State's objection if the Federal agency determines its activity is consistent to the maximum extent practicable with the enforceable policies of the State's CMP. A Federal agency may also deviate from full consistency due to "exigent circumstances." An exigent circumstance is an emergency or emergency-like or unexpected situation requiring the Federal agency to take quick or immediate action.

Consistent to the maximum extent practicable and exigent circumstances refers to consistency with a State CMP's substantive requirements as well as the procedural requirements of NOAA's regulations. There may be times that a federal legal requirement or an emergency situation requires a Federal agency to act sooner than the end of the 90-day consistency period. In such cases, the Federal agency needs to consult with the State CMP as early as possible.

A Federal agency cannot use a lack of funds as a basis for being consistent to the maximum extent practicable. Thus, Federal agencies are encouraged to consult early with State CMPs to ensure that the Federal agency has budgeted for meeting State CMP enforceable policies.

A Federal agency may also proceed over a State's objection when the Federal agency determines that it is *fully* consistent with the State's enforceable policies. 15 CFR 930.43(d).

**D. Appeal State objection to Secretary of Commerce (only for Non-Federal applicants).** Non-Federal applicants for Federal license or permits and State and local government applicants for Federal financial assistance may appeal a State's objection to the Secretary of Commerce. Appeals to the Secretary are not available for Federal agency activities. The Secretary overrides a State's objection if the Secretary finds that an activity is consistent with the objectives or purposes of the CZMA or is otherwise necessary in the interest of national security. If the Secretary overrides a State's objection, then the Federal agency may authorize the activity.

**E. Presidential exemption (only for Federal agency activities):** After any appealable final judgment, decree or order of any Federal court, the President may exempt from compliance the elements of a Federal agency activity that were found by a Federal court to be inconsistent with a State's CMP, if the President determines that the activity is in the paramount interest of the United States. CZMA §307(c)(1)(B).

**F. Mediation by the Secretary of Commerce or OCRM.** Mediation has been used to resolve Federal consistency disputes and allowed Federal actions to proceed. In the event of a serious disagreement between a Federal agency and a State, either party may request that the Secretary of Commerce mediate the dispute. OCRM is also available to mediate disputes between States, Federal agencies and other parties.

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## **IV. BASIC FEDERAL CONSISTENCY PROCEDURES**

For the purposes of this section, “NJCMP” means the Department of Environmental Protection. Two important things to keep in mind to facilitate consistency review is for the Federal agency, State CMP, and applicant to discuss a proposed activity as early in the process as possible; and, that state CMPs and Federal agencies can agree, at any time, to more flexible consistency review procedures (providing public participation requirements are still met). *See* Appendix A for a chart summary of the consistency requirements.

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### **A. Federal Agency Activities and Development Projects**

Federal agencies must submit a consistency determination to the NJCMP where activities and development projects have reasonably foreseeable effects on the coastal uses and resources of New Jersey’s coastal zone. This includes all functions of a federal agency performed by the agency or on its behalf, including: planning, construction, modification, or removal of public works, facilities, or other structures, and the acquisition, utilization, or disposal of land or water resources.

**Federal development projects occurring within New Jersey’s coastal zone are deemed to have coastal effects and therefore a Consistency Determination must be provided to the NJCMP.**

Federal agencies are responsible for determining if federal activity (in or outside the coastal zone) and development projects outside the coastal zone will have reasonably foreseeable coastal effects.

However, States are encouraged to list, in their approved CMPs, Federal agency activities that are expected to affect coastal uses or resources, and to monitor unlisted activities and to notify Federal agencies when an unlisted activity should undergo consistency review. Whether or not an activity is listed, it is the Federal agency’s responsibility to provide the NJCMP with Consistency Determinations for Federal agency activities affecting any coastal use or resource in New Jersey’s coastal zone.

In accordance with Federal regulations, the NJCMP has listed the following Federal agency activities and development projects that are expected to affect New Jersey’s coastal uses or resources and therefore are subject to Federal Consistency review.

**GENERAL SERVICES ADMINISTRATION:** Location and design of proposed government property acquisition and building construction. Disposal and transfer of surplus federal lands.

#### **DEPARTMENT OF DEFENSE**

ARMY CORPS OF ENGINEERS: Proposed authorization of projects for dredging, channelworks, breakwaters, other navigation works, erosion control structures, reservoirs, dams, beach nourishment and other public works projects in the coastal zone or with the potential to impact coastal lands and waters.

AIR FORCE, ARMY AND NAVY: Location, acquisition and design of new or enlarged defense

installations. Actions conducted on Federal lands with potential impact on non-Federal coastal lands and waters.

**DEPARTMENT OF ENERGY:** Management of Coal Conversion Program.

FEDERAL ENERGY REGULATORY COMMISSION: Approval of construction and operation of an interstate natural gas transmission pipeline.

**DEPARTMENT OF THE INTERIOR:**

BUREAU OF LAND MANAGEMENT: OCS Leases and pre-leasing activities.

FISH AND WILDLIFE SERVICE: Management of national wildlife refuges and proposed acquisition.

NATIONAL PARK SERVICE: National Parks and seashore management and proposed acquisition.

**DEPARTMENT OF TRANSPORTATION:**

COAST GUARD: Location, acquisition and design of new or enlarged installations.

MATERIALS TRANSPORTATION BUREAU: Formation and enforcement of minimal federal safety standards for transportation of oil, gas and pipeline facilities.

FEDERAL HIGHWAY ADMINISTRATION: Highway construction.

### **Notification and NJCMP review process**

Federal agencies must contact the NJCMP at the earliest possible moment in the planning of the activity to ensure early State-Federal coordination and consultation.

#### **Negative Determinations**

If no coastal effects are reasonably foreseeable, the Federal agency may provide a **Negative Determination**. A negative Determination is a determination by a Federal agency that a proposed activity will not have any coastal effects.

1. A Negative Determination must include a brief description of the activity, the activity's location, and basis for the Federal agency's determination that the activity will not affect any coastal resource.

2. A Negative Determination shall be provided to the NJCMP at least **90 days before final approval** of the activity unless the NJCMP and Federal agencies have agreed to an alternate notification schedule.

3. The NJCMP is not obligated to respond to a Negative Determination.

4. If the NJCMP does not respond to the Federal agency's Negative Determination within **60 days**, NJCMP concurrence is presumed.

5. NJCMP concurrence is not presumed in cases where the NJCMP, within the **60 day** period requests an extension of time to review the determination. Federal agencies shall approve one request for an extension period of **15 days** or less.

6. If the NJCMP objects to the Negative Determination and asserts that coastal effects are reasonably foreseeable, the Federal agency shall consider submitting a Consistency Determination or otherwise attempt to resolve any disagreement within the remainder of the **90 day** period as set forth in 2 above.

7. In the event of serious disagreement between the Federal and NJCMP regarding a determination related to whether a proposed activity affects any coastal use or resource, either party may seek Secretarial mediation or OCRM mediation services.

### **Consistency Determinations**

If coastal effects are reasonably foreseeable, then the Federal agency is required to submit a **Consistency Determination** to the NJCMP at least **90 days before the activity starts**.

1. A Consistency Determination must include the following:
  - i. A brief statement indicating whether the proposed activity will be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of the NJCMP;
  - ii. An evaluation of how the proposed activity is consistent with the applicable enforceable policies of NJCMP;
  - iii. A detailed description of the proposed action, its associated facilities and their combined coastal zone effects;
  - iv. Relevant, comprehensive data and information, including time schedules, sufficient to support the Federal Consistency Determination; and
  - v. A description of the legal authority that prohibits full consistency, if applicable.

## Concurrence or Objection by NJCMP

The NJCMP shall **concur with or object to** the Federal agency's consistency determination within **60 days (plus appropriate extensions)** of receipt of the Consistency Determination. Pursuant to 15 C.F.R. 930.41(b), Federal agencies shall approve one request for a **15-day extension or less**. In considering whether a longer or additional extension period is appropriate, the Federal agency should consider the magnitude and complexity of the information contained in the consistency determination. The NJCMP and Federal agency may agree to an alternative time period. Such agreement shall be set forth in writing, be signed by both parties and specify the final decision date.

The NJCMP shall provide for public comment on the State's consistency review in the form of a **15-day public comment period**. The NJCMP shall publish notice of the public comment period in the DEP Bulletin.

### NJCMP concurrence

**NJCMP concurrence is presumed if it does not meet the time frames specified above.**

If the NJCMP concurs with the Consistency Determination, then the Federal agency may immediately proceed with the activity.

### NJCMP Objection

If the NJCMP objects to the federal agency's consistency determination, the NJCMP shall notify the Federal agency and Director of the NOAA's Office of Ocean and Coastal Resource Management. The NJCMP's objection shall:

- i. Describe how the proposed activity is inconsistent with specific enforceable policies of the NJCMP;
- ii. Identify alternative measures, where feasible, which would make the proposed action consistent; and
- ii. Describe the nature and necessity of additional information that may be required for making a consistency determination if the objection is based on insufficient information.

Where the NJCMP objects to a Federal agency's Consistency Determination, the NJCMP and Federal agency should attempt to resolve any differences during the remainder of the **90 day period**.

If resolution has not been reached at the end of the **90 day period** the Federal agency should consider postponing final federal action until the problems have been resolved. However, at the end of the **90 day period** the Federal agency may, notwithstanding NJCMP objection, proceed with the activity only if the Federal agency clearly describes, in writing, to the NJCMP how the activity is consistent to the maximum extent practicable with its enforceable policies.

If there is a dispute between a Federal agency and the NJCMP, either party may seek mediation by OCRM or the Secretary of Commerce (the Secretary's mediation is more formal).

## **B. Federal License or Permit Activities**

A private individual or business, or a state or local government agency, or any other type of non-federal entity, applying to the federal government for a required permit or license or any other type of authorization, is subject to the requirements of the CZMA.

Many of the federal permit or license activities will also require a coastal permit from the State of New Jersey. Consistency for these activities may be demonstrated by receipt of an approved State coastal permit. Prior to or concurrent with the Federal review process described below, the appropriate State permit application shall be submitted to the NJCMP. Should the NJCMP receive a consistency certification for an activity that requires a State coastal permit, but for which no application has been submitted, the agency or person proposing to conduct the activity shall be advised that such a permit is required. Such activities will thereafter be reviewed under the State's regulatory authority and not under the Federal Consistency provision of the CZMA. The NJCMP shall issue within the time limit relevant to the category of federal activity, a determination stating that the decisions to grant or deny the State coastal permit shall constitute a consistency determination. Applications for State coastal permits will follow relevant State procedures.

### **Listed vs. unlisted activities**

#### **Listed Activities**

For a *listed* activity occurring *in New Jersey's coastal zone*, the applicant must submit a Consistency Certification to the approving Federal agency and the NJCMP. In addition to the Certification, the applicant must provide the State with the *necessary data and information* (15 C.F.R. § 930.58) to allow the State to assess the project's effects as set forth below.

New Jersey has not listed Federal activities in Federal waters. Therefore, any Federal activity that the State intends to review under the Federal Consistency provision of the CZMA that is located in the Atlantic Ocean greater than three miles is considered an unlisted activity and shall be reviewed accordingly.

The NJCMP has listed the following federal license or permitting activities occurring within New Jersey's coastal zone as having coastal effects on New Jersey's coastal uses or resources.

#### **ARMY CORPS OF ENGINEERS**

Permits to regulate construction of any dam or dike across any navigable water of the United States under Section 9 of the Rivers and Harbors Act of 1899.

Permits to regulate the obstruction or alteration of, the construction of any structure in or over, and the excavation from or depositing of material in any navigable water of the United States under Section 10 of the Rivers and Harbors Act of 1899. (Exception: placement of bulkheads and other retaining structures, construction of docks, piers and boat ramps, or excavation from or depositing material within a man-made lagoon).

Permits and licenses to regulate transportation of dredged material for the purpose of dumping it in ocean waters under Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972.

Permits and licenses for the discharge of dredge or fill materials into the waters and adjacent wetlands of the United States at specified disposal sites under Section 404 of the Federal Water Pollution Control Act of 1972 and amendments unless such permitting activity has been delegated to the State.

#### **FEDERAL ENERGY REGULATORY COMMISSION**

Licenses required for non-Federal hydroelectric projects and primary transmission lines under sections 3(11), 4(e) and 15 of the Federal Power Act (16 U.S.C. 796(11), 797(e), and 808).

Orders for interconnection of electric transmission facilities under section 202(b) of the Federal Power Act (16U.S.C. 824a(b)).

Certificates of public convenience and necessity for the construction and operation of natural gas pipeline facilities including both interstate pipelines and LNG terminal facilities under Section 7(c) of the Natural Gas Act (15 U.S.C. 717f(c)).

Permission and approval for the abandonment of natural gas pipeline facilities under Section 7(b) of the Natural Gas Act (15 U.S.C. 717f(b)).

#### **U.S. COAST GUARD**

Permits for construction and operation of deepwater ports under the Deepwater Port Act of 1974.

Permits for construction of bridges under 33 U.S.C. 401, 491, and 525.

#### **FEDERAL AVIATION ADMINISTRATION**

Permits and licenses for the construction, operation, or alteration of airports.

#### **ENVIRONMENTAL PROTECTION AGENCY**

National Pollutant Discharge Elimination System (NPDES) permits under the Federal Water Pollution Control Act of 1972, unless such permitting authority is delegated to the State.

Decisions under Prevention of Significant Deterioration (PD) regulations under the Clean Air Act of 1976.

#### **NUCLEAR REGULATORY COMMISSION**

Permits and licenses required for the construction and operation of nuclear facilities under the Atomic Energy Act of 1954, Sections 6, 7, 8 and 10.

#### **ECONOMIC REGULATORY ADMINISTRATION**

Opinions and orders for permission for delivery of imported LNG.

### **Unlisted Activities**

For *unlisted* activities, in or outside New Jersey's coastal zone, the NJCMP must notify the applicant, the relevant Federal agency, and OCRM that it intends to review the activity on a case-by-case basis. This notification must be provided to the applicant, relevant Federal agency and OCRM **within 30 days of receiving notice of the application** to the Federal agency for an activity; otherwise the NJCMP waives its consistency rights. The waiver does not apply where the NJCMP does not receive notice (notice may be actual or constructive). Notice must contain sufficient information for the NJCMP to learn of the application for the activity, determine the activity's geographic location, and determine whether coastal effects are reasonably foreseeable. The applicant and the Federal agency have **15 days from receipt** of the NJCMP's request to provide comments to OCRM. OCRM will make a decision usually within **30 days of receipt** of the request. The basis for OCRM's decision is whether the proposed activity will have reasonably foreseeable coastal effects. The Federal agency may not authorize the activity until the consistency process is complete. If an applicant of its own accord provides the NJCMP with a consistency certification for an unlisted activity, then OCRM's approval is deemed and the applicant is subject to all the relevant provisions of the regulations and the NJCMP does not need to seek OCRM's approval.

### **Notification and NJCMP review process**

All applicants for required Federal licenses or permits subject to NJCMP review shall provide in the application to the Federal licensing or permitting agency a certification that the proposed activity complies with and will be conducted in a manner consistent with the NJCMP. At the same time, the applicant shall submit to the NJCMP a copy of the certification and *necessary data and information* (15 C.F.R. § 930.58).

The NJCMP has **30 days** to notify the applicant and Federal agency that the submission does not include the necessary data and information identified in item ii below. If the NJCMP does not respond within the 30-day period, the 6-month review period begins when the NJCMP received the applicant's initial consistency submission, regardless of whether the submission contained all necessary data and information. The six-month review period can *only* begin if an applicant has filed a formal application with a licensing Federal agency *and* has submitted a Consistency Certification to the NJCMP.

The NJCMP has identified the following as *necessary data and information*:

- i. A copy of the Federal permit, license or other authorization application;
- ii. A copy of all supporting documentation submitted with the Federal application, including a detailed description of the proposed activity, its associated facilities and coastal effects, map(s) showing the geographic location of the proposed activity, site map(s) and diagrams showing all components of the activity and their location on the site, recent color photographs of the site, a written statement on the purpose and need for the activity and the identification of property owners abutting the site;
- iii. A copy of the final Environmental Impact Statement, if required by the Federal agency or by a State agency having jurisdiction over the proposed activity; and
- iv. An evaluation that includes a set of findings relating the coastal effects of the proposed

activity to the NJCMP's enforceable policies. Applicants shall demonstrate that the activity is consistent with New Jersey's enforceable policies.

The NJCMP has **six months to respond**, but **must notify the applicant if review will go beyond three months**.

The applicant and NJCMP may agree to stay the 6-month review period. A stay "tolls" the running of the 6-month review period for an agreed upon time ending on a specific date after which the remainder of the 6-month review period would continue. Such agreement shall be set forth in writing, be signed by both parties and specify the following five dates:

- i. Date the NJCMP 6-month review period commenced;
- ii. Date the 6-month period was to end;
- iii. Date during the 6-month review period that the stay begins;
- iv. Date the stay ends; and
- v. Date the NJCMP's decision is due.

The NJCMP shall provide for public comment on the State's consistency review in the form of a **15-day public comment period**. The NJCMP shall publish notice of the public comment period in the DEP Bulletin.

### **Concurrence or Objection by NJCMP**

#### **NJCMP concurrence**

NJCMP concurrence is presumed if it does not meet the 6-month time frame.

If the NJCMP concurs with the Consistency Determination, then the Federal agency may issue its authorization for the activity.

#### **NJCMP objection**

If NJCMP objects, the Federal agency cannot issue its authorization for the activity. If the NJCMP issues a **conditional concurrence** and the applicant does not amend its Federal application to include the NJCMP's condition(s), the NJCMP's conditional concurrence automatically becomes an objection.

In the event the NJCMP objects to the federal agency's consistency determination, the NJCMP shall notify the applicant, Federal agency and Director of OCRM. The NJCMP's objection shall:

- i. Describe how the proposed action is inconsistent with specific enforceable policies of the NJCMP;
- ii. Identify alternative measures, where feasible, which would make the proposed action consistent;
- iii. Describe the nature and necessity of additional information that may be required for making a consistency determination if the objection is based on insufficient information; and
- iv. Describe the applicant's right to appeal to the Secretary of Commerce.

An applicant may appeal the NJCMP's objection to the Secretary of Commerce within **30 days of**

**the objection.** If the Secretary overrides the NJCMP's objection, the Federal agency may authorize the project. The Secretary's decision is the final federal agency action for the purposes of the Administrative Procedures Act. An applicant may also negotiate with the NJCMP to remove its objection.

### **C. OCS Plans**

A private person or business applying to the US Department of Interior's Bureau of Ocean Energy Management, Regulation and Enforcement (BOEM) (formerly the Minerals Management Service (MMS)) for outer continental shelf (OCS) exploration, development and production activities is subject to the requirements of the CZMA. This listing does not include alternative energy facilities.

The NJCMP has listed any Federal licensed or permitted activity described in any OCS Plan for all lease sales on the OCS under which New Jersey is identified as an affected state as having coastal effects on the uses and resources of New Jersey's coastal zone.

A certification of consistency for each activity described in detail in the OCS plan shall be attached to the OCS plan at the time it is submitted to the Secretary of the Interior. No federal official or agency shall grant any license or permit for any activity described in detail in the plan until the NJCMP has received such certification and plan together and until the NJCMP has concurred or conclusive concurrence is presumed.

OCS plan license and permit actions not described in detail in the OCS plan are subject to the provisions for federal licenses and permits.

### **Notification and NJCMP review process**

Any person submitting to the U.S. Secretary of the Interior any OCS plan must provide the NJCMP with a copy of the OCS plan certification.

The NJCMP has identified the following as necessary data and information for the review of an OCS Plan:

- i. The comprehensive offshore, nearshore and onshore data and material required by the Department of Interior's operating regulations governing exploration, development and production operations on the OCS (30 CFR 250).
- ii. A detailed description of the proposed activities and their associated facilities which is adequate to permit an assessment of their probable effects on the uses and resources of New Jersey's coastal zone;
- iii. A list identifying all Federal, State and local actions subject to the consistency determination and required for the proposed activities and their associated facilities;
- iv. A brief assessment relating the probable effects of the activities and their associated facilities on the uses and resources of New Jersey's coastal zone to the relevant enforceable policies of the NJCMP;
- v. A brief set of findings, derived from the assessment, indicating that federal actions

authorizing each of the proposed activities and associated facilities, and their effects are consistent with the enforceable policies of the NJCMP.

In order to ensure that all levels of government and the public are aware of and had the opportunity to comment on OCS plans, the NJCMP will provide public notice of such a plan, the procedures for comments, and the review closing date.

At the earliest practicable time, the NJCMP will notify the applicant, Secretary of Interior, and the Director of OCRM whether it concurs with or objects to the consistency certification.

The NJCMP shall notify the applicant if State review will extend beyond 3 months; otherwise NJCMP concurrence is presumed.

### **Concurrence or Objection by NJCMP**

#### **NJCMP concurrence**

Concurrence by the NJCMP shall be presumed in the absence of an objection within 6-months of receipt of the necessary data and information identified above.

If the NJCMP issues a concurrence the OCS lessee or operator will not be required to submit additional certifications and supporting information for NJCMP review at the time federal applications are actually filed for the federal permit activities described in detail in the OCS plan. However, the lessee or operator must supply the NJCMP with copies of permit applications to allow the NJCMP to monitor the approved OCS activities.

#### **NJCMP objection**

If the NJCMP objects, the Federal agency cannot issue any of the licenses or permits for activities described in detail in the OCS plan.

Where the NJCMP objects to the OCS plan certification, the NJCMP shall notify the applicant, Federal agency and Director of OCRM. The NJCMP's objection shall for each activity which it finds to be inconsistent with the management program:

- i. Describe how the proposed action is inconsistent with specific enforceable policies of the NJCMP;
- ii. Identify alternative measures, where feasible, which would make the proposed action consistent;
- iii. Describe the nature and necessity of additional information that may be required for making a consistency determination if the objection is based on insufficient information; and
- iv. In addition, the NJCMP's objection will describe the applicant's right to appeal to the Secretary of Commerce.

#### **D. Federal Financial Assistance Activities**

State agency and local governments submitting applications for federal assistance are subject to the requirements of the CZMA. Federal assistance means assistance projects that are under a Federal program to an applicant agency through grant or contractual arrangements, loans, subsidies, guarantees, insurance, or other forms of financial aid. An applicant agency means any unit of state or local government that submits an application for federal assistance.

The NJCMP has listed the following federal financial activities occurring within New Jersey's coastal zone as having coastal effects on New Jersey's coastal uses or resources.

#### **DEPARTMENT OF AGRICULTURE**

Irrigation, Drainage and other Soil and Water Conservation Loans (10.409)

Resource Conservation and Development Loans (10.414)

(Exception: small projects costing under \$7500 for erosion and sediment control and land stabilization for rehabilitation and coordination of existing irrigation systems).

Water and Waste Disposal Systems for Rural Communities (10.418)

Watershed Protection and Flood Prevention Loans (10.419)

Community Facilities Loans (10.423)

#### **DEPARTMENT OF COMMERCE**

Economic Development: Grants and Loans for Public Works and Development Facilities (11.300)

Economic Development: Public Works Impact Projects (11.304)

Grants to States for Supplemental and Basic Funding if Title I, II, and IV Activities (basic grants only) (11.308)

National Oceanic and Atmospheric Administration-Sea Grants

#### **DEPARTMENT OF ENERGY**

State Energy Conservation Program

#### **DEPARTMENT OF INTERIOR**

Heritage Conservation and Recreation Service: Outdoor Recreation-Acquisition, Development and Planning Grants (15.400)

#### **US FISH AND WILDLIFE SERVICE**

Rare and Endangered Species Conservation (15.612)

#### **DEPARTMENT OF TRANSPORTATION**

Federal Aviation Administration: Airport Development Aid Program (20.102)

Federal Highway Administration: Highway Research, Planning and Construction (20.205)

Urban Mass Transportation Administration: Urban Mass Transportation Capital Improvement Grants (planning and construction only) (20.205); Urban Mass Transportation Capital Improvement Loans (planning and construction only) (20.501); Urban Mass Transportation Demonstration Grants (50.506); and Urban Mass Transportation Capital and Operating Assistance Formula Grants (20.507)

#### **ENVIRONMENTAL PROTECTION AGENCY**

Construction grants for Wastewater Treatment Works (66.418)

While the NJCMP has listed the above federal financial assistance activities as having coastal effects, should the NJCMP determine that an unlisted activity has coastal effects, the NJCMP shall notify the Federal agency and applicant that it intends to review the action. OCRM approval is not required.

#### **Notification and NJCMP review process**

NOAA regulations allow State CMPs to develop flexible procedures for reviewing and concurring with federal assistance activities. State CMP review of the activities is normally conducted through procedures established by States pursuant to Executive Order 12372 -- intergovernmental review of federal programs, or through State clearinghouse procedures. New Jersey does not have a State Clearinghouse. All federal financial assistance activities subject to consistency will be subject to a 60 day review time frame unless the applicant for the federal financial assistance and the NJCMP agree to an alternate timeframe. Federal financial assistance consistency determinations shall be submitted to the Department by the applicant.

#### **Concurrence or Objection with NJCMP**

##### **NJCMP Concurrence**

Federal agency cannot issue the Federal funding until the NJCMP has concurred.

##### **NJCMP objection**

If the NJCMP objects, the Federal agency cannot approve assistance for the proposed activity.

Where the NJCMP objects to the issuance of Federal financial assistance, the NJCMP shall notify the applicant, Federal agency and Director of OCRM. The NJCMP's objection shall:

- i. Describe how the proposed action is inconsistent with specific enforceable policies of the NJCMP;
- ii. Identify alternative measures, where feasible, which would make the proposed action

consistent; and

iii. Describe the nature and necessity of additional information that may be required for making a consistency determination if the objection is based on insufficient information; and

iv. Describe the applicant's right to appeal to the Secretary of Commerce.

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## V. INTERSTATE CONSISTENCY

Interstate consistency refers to: a) instances where a federal action occurring exclusively in one state (State "B") will have effects on the uses or resources of another state's coastal zone (State "A"); and b) the ability of State A to review the action under the Coastal Zone Management Act and NOAA's interstate consistency regulations.

***"Interstate coastal effects"*** means any reasonably foreseeable effect resulting from a Federal action occurring in one state of the United States on any coastal use or resource of another state that has a Federally approved coastal management program.

- Effects are not limited to environmental effects, but also include effects on coastal uses; and
- Interstate coastal effects include both direct and indirect effects:
  - Direct effects are those that occur at the same time and in the same location as the activity;
  - Indirect effects are cumulative and secondary.

### Federal Licenses, Permits and Other Regulatory Approvals Delaware Estuary Interstate Listings for the States of Pennsylvania and Delaware

The following is a list of Federal actions that have a reasonably foreseeable effect on a land or water use or natural resource of New Jersey's coastal zone. This list pertains to a private individual or business, or a state or local government agency, or any other type of nonfederal entity, applying to the federal government for a required permit or license or any other type of an approval or authorization.

#### FEDERAL AGENCY: DEPARTMENT OF DEFENSE, ARMY CORPS OF ENGINEERS

| Federal actions affecting New Jersey's coastal zone                              | Legal Authority   | Location of Federal action in PA that may effect New Jersey's coastal zone                           | Location of Federal action in DE that may effect New Jersey's coastal zone                    |
|--|---|--|---|
| Construction of structures such as dams or dikes, bulkheads, revetments, groins, | Sections 9 and 10 of the Rivers and Harbors Act (33 U.S.C. 410 et seq.) | Dredging 50,000 or more cubic yards of material below the high tide line in the Delaware River up to | Dredging 50,000 or more cubic yards of material below the high tide line in the Delaware Bay. |

|   |  |                            |   |
|---|--|----------------------------|---|
| jetties, piers, docks, artificial reefs, pipelines, cables and wind turbines and islands or activities such as dredging, filling, mining, |  | the “Trenton Makes” Bridge | <b>Note:</b> This listing does not include the mining of sand for beach nourishment projects. |
|---|--|----------------------------|---|

| Federal actions affecting New Jersey's coastal zone   | Legal Authority                                     | Location of Federal action in PA that may effect New Jersey's coastal zone   | Location of Federal action in DE that may effect New Jersey's coastal zone  |
|---|---|--|---|
| excavation and mooring of vessels in navigable waters, creation of artificial islands                               |   | Subaqueous disposal of 50,000 or more cubic yards of dredged material below the mean high tide line in Delaware River up to the "Trenton Makes" bridge   | Subaqueous disposal of 50,000 or more cubic yards of dredged material below the high tide line in the Delaware Bay  |
| Discharge of dredged and fill materials and other activities in the waters of the United States, including wetlands | Section 404 of the Clean Water Act (33 U.S.C. 1344) | <p>Subsurface (in water) disposal, or relocation or redistribution of sediments below the high tide line in the Delaware river up to the "Trenton Makes" Bridge</p> <p>Confined upland disposal facilities with capacity to handle at least 50,000 cubic yards of dredged material that discharge directly into the Delaware River up to the "Trenton Makes" Bridge.</p> | <p>Subsurface (in water) disposal, or relocation or redistribution of sediments below the high tide line in the Delaware Bay.</p> <p>Confined upland disposal facilities with capacity to handle at least 50,000 cubic yards of dredged material that discharge directly into the Delaware Bay.</p> |

**Notification and NJCMP review process**

Applicants proposing one of the activities listed above shall submit a consistency certification to the NJCMP, along with the necessary data and information..

To review a listed interstate activity, the NJCMP must:

Within 30 days of receipt of an interstate consistency certification and necessary data and information, notify the applicant, the Federal agency, the Coastal Management Program of the State in which the activity will occur, and the Director of OCRM whether it intends to review the activity.

- The NJCMP’s notice to the applicant, the Federal agency, the Coastal Management Program of the State in which the activity will occur must be **received** by the applicant, Federal agency, Coastal Management Program of the State in which the activity will occur, and the Director of OCRM by the **30<sup>th</sup> day after receipt of the consistency determination or certification**.
- If the NJCMP does not notify the above parties within 30 days, then the NJCMP waives its right to review the activity for consistency. The waiver does not apply where the NJCMP intending to review the activity does not receive notice of the activity

The review process and time frames follow the applicable requirements for Federal license or permit activities set forth at 15 C.F.R. 930, subpart D.

Federal agencies or applicants are encouraged to prepare one consistency determination or certification that will satisfy the requirements of all affected States.

### **Mediation**

The relevant provisions contained in 15 C.F.R. 930, subpart G (Secretarial Mediation) are available for the resolution of disputes between affected States, Federal agencies, and applicants. OCRM is available to assist the parties in resolution of disputes.

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## **VI. MEDIATION OF DISPUTES**

In the event of a serious disagreement between the NJCMP and a Federal agency, either party may request that the Secretary of Commerce mediate the dispute. All parties agree to participate, agreement to participate is non-binding, and either party may withdraw the mediation at any time. Secretarial mediation is a formal process that includes a public hearing, submission of written briefs, and meetings between the parties. A hearing officer, appointed by the Secretary, will propose a solution. Secretarial mediation is only for States and Federal agencies. Exhaustion of the mediation process is not a prerequisite to judicial review.

The availability of Secretarial mediation or litigation does not preclude the parties from informally mediating the dispute through OCRM or another facilitator. Either party may request OCRM involvement. Participation is non-binding.

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## **VII. APPEALS TO THE SECRETARY OF COMMERCE**

The CZMA provides an administrative appeal to the Secretary of Commerce from a consistency objection by a coastal State. In the case of a federal license or permit, or an application for federal financial assistance, the applicant may request that the Secretary override the State’s consistency objection if the activity is consistent with the objectives of the CZMA (Ground I), or is otherwise necessary in the interest of national security (Ground II). 16 USC § 1456(c)(3)(A),(B), and (d). Secretary appeals are not available for Federal agency activities. The requirements for appeals are found at 15 CFR part 930, subpart H, as revised by 65 Fed. Reg. 77123-77175 (December 8, 2000).

If the requirements of either Ground I or Ground II are met, the Secretary overrides the State's objection. The Secretary's inquiry into whether the grounds for an override have been met is based upon an administrative record developed for the appeal. While the Secretary will review the State objection for CZMA compliance, e.g., whether the objection is based on enforceable policies, the Secretary does not review the objection for compliance with State laws and policies.

If the Secretary overrides the State's objection the authorizing Federal agency may authorize the permit or funding that was subject of the objection. A secretarial override does not obviate the need for an applicant to obtain any State permits or authorizations. If the Secretary does not override the NJCMP's objection, the authorizing Federal agency cannot authorize the permit or funding that was subject of the objection.

The Secretarial appeal process is final Federal agency action under the Administrative Procedure Act and is a necessary administrative action prior to litigation. Factors influencing the appeal process time include: nature and complexity of the dispute, stays agreed to by the parties, public hearings, and briefing schedules. The Energy Policy Act of 2005 amended the CZMA mandating specific deadlines for the Secretary. The revised timeframes follow.

Coastal Zone Management Act Federal Consistency Appeal Procedures  
 Required by the Energy Policy Act of 2005 and NOAA Regulations  
 (See 15 C.F.R. Part 930, subpart H for further details)

|  |  |                 |  |
|--|--|-----------------|--|
| Day(s) after receipt of Notice of Appeal | Action Required (some actions not available for appeals of energy projects)  |                 |  |
| 0  | • Notice of Appeal received  |                 |  |
| 30                                       | <ul style="list-style-type: none"> <li>• Publish Federal Register Notice of Appeal and newspaper notices. Notice must be published by day 30</li> <li>• Public Comment Period and Federal Agency Comment Period opens</li> <li>• Receipt of Appellant's Reply Brief</li> </ul>                             |                 |  |
| 60                                       | <ul style="list-style-type: none"> <li>• Receipt of State's brief and Supplemental Appendix</li> <li>• Public and Federal Agency Comment Periods close unless Public Hearing Request granted</li> <li>• Request for Public Hearing must be received (within 30 days of Federal Register Notice)</li> </ul> |                 |  |
| 80                                       | • Receipt of Appellant's Reply Brief   |                 |  |
| 60-Day Stay Granted                      |  | No Stay granted |  |
| 250                                      | • Publish Notice closing Record; Record <i>must</i> be closed on day 250   | 190             | <ul style="list-style-type: none"> <li>• Day 190 is end of 160-day decision record period without stay</li> <li>• Publish Notice closing record</li> </ul> |
| 310                                      | • Secretary issues Decision or publishes FR Notice re: Decision-take additional 15 days  | 250             | • Secretary issues Decision or publishes FR Notice re: No Decision-take additional 15 days   |
| 325                                      | • Secretary issues Decision  | 265             | • Secretary issues Decision  |

*Appendix A* contains a chart summarizing the consistency requirements.

**Appendix A: Summary of Federal Consistency Provisions**

|                                       | Federal Agency Activities & Development Projects  | Federal License or Permit Activities                                  | OCS Plans: Exploration Development & Production                       | Federal Assistance to State and Local Govts.                          |
|---------------------------------------|---|---|---|---|
| CZMA Section 307                      | (c)(1)&(2)  | (c)(3)(A)   | (c)(3)(B)   | (d)   |
| Activity subject to review, if it ... | Affects any land or water use or natural resource of the coastal zone                                   | Affects any land or water use or natural resource of the coastal zone | Affects any land or water use or natural resource of the coastal zone | Affects any land or water use or natural resource of the coastal zone |
| Consistency requirement               | Consistent to maximum extent practicable with state CMP enforceable policies                            | Consistent with state CMP enforceable policies                        | Consistent with state CMP enforceable policies                        | Consistent with state CMP enforceable policies                        |
| Who decides effects?                  | Federal agency  | State CMP and OCRM  | State CMP and OCRM  | State CMP and OCRM  |
| Time limit                            | 60 days, plus 15 day extension  | 6 months  | 3 months - state may extend to 6 months                               | Clearinghouse schedule  |
| Impact of State Objection             | Federal agency may proceed only if cite legal authority as to why it must proceed despite inconsistency | Federal agency may not issue permit, license, or other approval       | Federal agency may not approve plan or issue permits                  | Federal agency may not grant assistance                               |
| Administrative conflict resolution    | Mediation by the Secretary of Commerce or OCRM (voluntary, non-binding)                                 | Appeal to the Secretary to override State objection                   | Appeal to the Secretary to override State objection                   | Appeal to the Secretary to override State objection                   |