Coastal Zone Management Act
Federal Consistency

Discussion with
Washington State Coastal Management Program
and Pacific County
January 13, 2016

NOAA Office for Coastal Management
Federal Consistency Discussion

We are here to

- Provide a basic understanding of the rules
- Discuss enforceable policies
- Answer your questions
Coastal Zone Management Act of 1972

Three primary objectives

1. Balance resource protection with economic, recreational, and cultural needs
2. Emphasize the primacy of state decisions
3. Encourage participation by all levels of government and the public
State and Territorial Coastal Zone Management Programs

- Federally Approved - 34
- Not Participating - 1
Coastal Zone Management Act
Incentives for Participation

• Voluntary participation
• Two incentives
  • Federal financial assistance
  • Federal consistency review authority
What is “Federal Consistency?”

Federal actions, in or outside the coastal zone, that affect any land or water use or natural resource of a state’s coastal zone must be consistent with the enforceable policies of the state Coastal Zone Management Act programs.

See CZMA § 307 (16 U.S.C. § 1456)

• Terms can have a unique meaning within the CZMA context. E.g., “enforceable policies,” “coastal effects”
Coastal Zone Management Act
Benefits

Powerful tool for states
• Applies state policies to federal actions
  o Based on effects not location
  o No categorical limitations
• State-federal coordination and cooperation
  o Avoids costly “last minute” changes
• Can build state and public support for federal actions
• Results in state concurrence for 95 percent of reviews
Coastal Zone Management Act
National Interest Balance

• States may review, not manage, federal actions
• Only applies if there are effects and enforceable policies
• NOAA approval of state coastal zone management policies required
Coastal Zone Management Act
National Interest Balance

States do not have the last word

Federal Agency Activities
• Effects determination made by federal agencies
• Federal agencies may proceed over state’s objection
• Presidential exemption available

Federal Authorizations
• Secretary of Commerce can override state’s objection
Remember to Ask

1. Is there a federal action?
2. Are there reasonably foreseeable coastal effects?
3. Is the federal action consistent with enforceable policies of the state’s approved coastal zone management program?
Federal Actions: Types

Is there a “federal action?”

• Federal agency activities and development projects
  CZMA § 307(c)(1), (2), 15 C.F.R. 930, subpart C

• Federal licenses or permits (non-federal applicants)
  CZMA § 307(c)(3)(A), 15 C.F.R. 930, subpart D

• Outer Continental Shelf plans
  CZMA § 307(c)(3)(B), 15 C.F.R. 930, subpart E

• Federal financial assistance to state or local agencies
  CZMA § 307(d), 15 C.F.R. 930, subpart F
Coastal Effects

“Any reasonably foreseeable effect on any coastal use or resource of the state”

15 C.F.R. § 930.11(g)

• Not always easy to determine.
• Not every impact is a coastal effect.
• Fact and case specific.
• Causal connection from activity to effect on coastal use or resource.
Coastal Uses and Resources

• **Uses** – Public access, recreation, fishing, historic, cultural, development, hazards management, marinas, and resource creation or restoration

• **Resources** – Air, wetlands and water bodies, aquifers, aquatic vegetation, plants, animals, land, minerals, and coastal resources of national significance

• Can include uses and resources outside of the coastal zone
Enforceable Policies

- Enforceable policies are the key to implementing federal consistency

- An objection must be based on NOAA-approved enforceable policies

- The Coastal Zone Management Act term “enforceable policy” has a unique meaning
Enforceable Policies: Three Elements

Enforceable policies must

1. Be based on a legally binding state authority (enforceable mechanism)
2. Contain a definable standard
3. Be approved by NOAA
Enforceable Policies

Enforceable policies must **not**:

- Be preempted by federal law
- Discriminate against a particular group or activity
- Assert jurisdiction over federal agencies, lands or waters
- Be superseded by subsequent state law
- Merely be a directive to develop regulations
- Incorporate other policies by reference
Enforceable Policies: Preemption

Military training flights

• Low level flights in North Carolina
• Impacts to wildlife and public enjoyment
• State proposes noise and minimum altitude policies to apply through federal consistency
• NOAA denies state request to incorporate enforceable policies
• States are preempted from regulating aircraft in flight
Enforceable Policies: Preemption

Liquefied natural gas siting

- New Jersey then submits revised siting policies to NOAA
- NOAA denies New Jersey’s program change request
- Previously approved liquid natural gas policies now are also non-enforceable
Enforceable Policies: Discriminatory

What’s wrong?

“No electrical transmission facilities may be sited on the waterfront unless the source is from renewable energy.”

• Effects are the same regardless of the source
• Also need to consider regional and national interests
• Enforceable policies should, if possible, be effects-based and not type-of-activity-based
Federal Actions: Outside Coastal Zone

Can states review federal actions outside of the coastal zone?

Yes

• If a federal agency conducts an activity with effects
• If authorized by a federal agency
  o state must have an approved geographic location description of listed activities occurring outside of the coastal zone, or
  o request NOAA approval to review the unlisted activity
## Procedures: Subparts C and D

<table>
<thead>
<tr>
<th>Activities Undertaken by a Federal Agency (Subpart C)</th>
<th>Federal Licenses and Permits (Subpart D)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal agency submits consistency determination (CD)</td>
<td>Applicant submits consistency certification (CC)</td>
</tr>
<tr>
<td>Federal agency decides whether there are coastal effects</td>
<td>State decides whether there are coastal effects</td>
</tr>
<tr>
<td>Submitted at least 90 days before final action</td>
<td>Submitted with or after license or permit application</td>
</tr>
<tr>
<td>State has 60 (plus 15) days to review</td>
<td>State has 6 months to review</td>
</tr>
<tr>
<td>Review starts when CD received (if complete)</td>
<td>Review starts when CC and necessary data and information submitted</td>
</tr>
<tr>
<td>“Consistent to the maximum extent practicable”</td>
<td>Fully consistent</td>
</tr>
<tr>
<td>Federal agency can proceed over objection</td>
<td>If objection, federal agency may not authorize the activity – applicant may appeal state objection to Secretary of Commerce</td>
</tr>
<tr>
<td>State can bring suit in court to enforce objection and/or seek mediation</td>
<td>Either or both parties can bring suit in court only after a decision issued by the Secretary of Commerce on appeal by the license or permit applicant</td>
</tr>
</tbody>
</table>
Subpart H: Appeals

Only for Subpart D, E or F objections
• No appeals by federal agencies or third parties

**De novo review**
• Override decision based on CZMA appeal criteria, based on the balance of CZMA objectives or national security, not whether state made correct decision

If overridden
• Federal agency may approve or fund activity

Build record in anticipation of appeals
Subpart H: Appeals Criteria

Consistent with the objectives of the act
• Furthers the national interest in significant or substantial manner
• National interest outweighs adverse coastal effects
• No reasonable alternative available

Necessary in the interest of national security
Ocean Planning and Management

Federal consistency

• State ocean planning and management
• Coastal and marine spatial plans
• Review of offshore regional projects
State Ocean Plans

State ocean plans
• Examples: Massachusetts, Oregon, and Rhode Island

Some states have geographic location descriptions
• Examples: Connecticut, Delaware, Oregon, and Rhode Island
State Ocean Plans

Even with a NOAA-approved ocean plan, to review activities in federal waters states need

Enforceable policies

• Cannot assert jurisdiction over federal agencies or waters

Geographic location description for activities to be reviewed in contiguous federal waters
How Do I Learn More?

NOAA federal consistency website:
http://coast.noaa.gov/czm/consistency/

- Coastal Zone Management Act
- Federal consistency regulations, 15 C.F.R. Part 930
- Preambles to 2000 and 2006 regulations
- Federal consistency overview
- State federal consistency Lists
- Federal consistency appeals
NOAA Office for Coastal Management
National Interest Team:

David Kaiser, Senior Policy Analyst
• David.Kaiser@noaa.gov  (603) 862-2719

Kerry Kehoe, Federal Consistency Specialist
• Kerry.Kehoe@noaa.gov  (240) 533-0782

West Coast Region:

Kris Wall, Regional Coastal Management Specialist
• Kris.wall@noaa.gov  (503) 231-2221

Rebecca Smyth, West Coast Director
• Rebecca.Smyth@noaa.gov  (510) 637-3791