

PROCEDURES GUIDE FOR ACHIEVING FEDERAL CONSISTENCY WITH THE GUAM COASTAL MANAGEMENT PROGRAM

**BUREAU OF STATISTICS AND PLANS
GOVERNMENT OF GUAM**

Cover photo by Dave Burdick

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FOR ACHIEVING FEDERAL CONSISTENCY
WITH THE
GUAM COASTAL MANAGEMENT PROGRAM**

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ABBREVIATIONS

BSP	Bureau of Statistics and Plans
CFR	Code of Federal Regulations
CZMA	Coastal Zone Management Act
DP	Development Policies
E.O.	Executive Order
F.R.	Federal Register
GCMP	Guam Coastal Management Program
GovGuam	Government of Guam
OCRM	Ocean and Coastal Resource Management
OCZM	Office of Coastal Zone Management
OCS	Outer Continental Shelf
P.L.	Public Law
RS	Resource Policies
SECRETARY	Secretary of Commerce
USC	United States Code
CFDA	Code of Federal Domestic Assistance

INTRODUCTION

The Guam Coastal Management Program (GCMP) is an expression of Guam policy to guide the use, protection, and development of land and ocean resources within Guam's coastal zone. The "coastal zone" of Guam includes all non-federal property on the island, including offshore islands and the submerged lands and waters extending seaward to a distance of three (3) nautical miles.

The entire island of Guam has been designated a "coastal zone" in the context of the CZMA and all offshore islands in their entirety, including Cocos Island, under Section 923.31(a)(7) of the 306 regulations. Most of the submerged lands surrounding Guam out to the Territorial sea limit of three miles were conveyed to Guam in 1974 under Public Law 93-435.

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In accordance with the Coastal Zone Management Act of 1972 (P.L.92-583), as amended (P.L. 94-370), the Bureau of Statistics and Plans (BSP), as the lead agency of the GCMP, is responsible for conducting federal consistency review for the following:

- Federal Agency Activities
- Activities Requiring a Federal License or Permit
- Federal Assistance to Local Governments

The review to establish consistency with GCMP policies as stated in E.O. 78-37, is conducted as specified in 15 CFR Part 930.

This guide has been designed to:

- assist agencies and individuals to determine whether their proposed actions are subject to federal consistency review;
- establish guidelines for applying for federal consistency review.

HOW TO USE THE GUIDE

1 – Determine the review category applicable to the proposed activity

Federal regulations specify activities subject to BSP review for consistency with the Guam Coastal Management Program (GCMP). They are grouped into the three major categories, as follows:

- I. Federal Agency Activities
- II. Activities Requiring a Federal License or Permit
- III. Federal Assistance to Local Governments

The following is a general description of activities within each category.

I. Federal Agency Activities

- a. Any activity “affecting any coastal use or resource” which is to be performed by or conducted on behalf of a Federal agency.
- b. Any Federal activity, regardless of location, affecting any land or water use or natural resource of the coastal zone. No Federal agency activities are categorically exempt from this requirement, in accordance with Coastal Zone Act Reauthorization Amendments (CZARA) (P.L. 101-508), 15 CFR Part 930, Conference Report, page 77124.
- c. Any Federal development projects within the coastal zone
- d. Any Federally conducted or supported activity or development project on federally controlled lands excluded from the coastal zone are also subject to Federal consistency review if the Federal agency determines they will affect any coastal use or resource in the coastal zone (15 CFR Part 930.33). If it is found that such activities will not have an effect, a negative determination must be submitted to inform Guam of the proposed activity thus assuring review of borderline cases, (15 CFR Section 930.35).

The exclusion of Federal lands does not remove Federal agencies from the obligation of complying with the consistency provisions of section 307 of the Act when Federal actions on these excluded lands have spillover impacts that affect any land or water use or natural resource of the coastal zone within the purview of a state's management program. In excluding Federal lands from a State's coastal zone for the purposes of this Act, a State does not impair any rights or authorities that it may have over Federal lands that exist separate from this program.(CZMA Regulations, 15 CFR Part 923 Subpart D, 923.33 Excluded lands

Exceptions to this category are those activities which are covered by categories II and III. However, if one Federal agency is seeking permission of another Federal agency, or if a Federal agency will be providing assistance to entities other than local government, those are category I activities (15 CFR Section 930.31).

II. Activities Requiring a Federal License or Permit

Activities affecting land or water or natural resource uses in the coastal zone which require a Federal license, permit or other form of Federal authorization, certification, approval, lease, or other form of Federal permission.

III. Federal Assistance to State and Local Governments

- a. Applications for Federal assistance under Federal programs affecting any land or water use or natural resource of the coastal zone submitted by local government.
- b. Under all categories, associated facilities, as defined in Section 930.11(d) of the Regulations, must also be considered by the proponent of Federal action, when addressing the inter-related activities' effect on the coastal zone.

2 – Read the descriptive section for the category applicable to the proposed activity.

Each section describes what you need to prepare for submission to the BSP, gives you an idea of how long BSP's review may take, and indicates generally when other agencies or individuals may be involved. Information is organized to correlate with the four basic steps of the review process listed in this guide.

3 – Prepare and submit materials necessary for BSP review.

If you have any questions or want more detailed information, reference should first be made to the Coastal Zone Management Act of 1972 and the Regulations. Citations of major sections are listed in Appendix D. Applicants are also encouraged to consult with BSP.

Inquiries may be directed to:

Bureau of Statistics and Plans
Attn: Administrator, Guam Coastal Management Program
P.O. Box 2950
Hagatna, Guam 96932
Tel: (671) 472-4201/3
Fax: (671)477-1812

I. FEDERAL AGENCY ACTIVITIES

I. FEDERAL AGENCY ACTIVITIES

STEP 1 - Federal agency determines if the proposed activity and development projects (in or outside coastal zone) will have foreseeable coastal effects.

Any Federal agency proposing to conduct or support an activity within or outside the coastal zone that will affect any land or water use or natural resource of the coastal zone is required to do so in a manner consistent with the Coastal Management Program (CMP) to the maximum extent practicable. (Subsection 307(c) (1), National CZM Act).

A Federal agency activity is any function performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities. (15 CFR, Part 930.31). Since this definition encompasses an extremely broad range of Federal actions, early consultation with the BSP is recommended to resolve any questions regarding the application of the Federal consistency review process to a specific type of activity.

It is the Federal agency's responsibility to determine if a particular activity affects any coastal use or resource (any land or water use or natural resource of Guam). Some guidance in this regard is provided by the Regulations, Subpart C, 15 CFR Part 930.33(b). Any development project within the Guam's coastal zone is considered to have an effect and is therefore subject to BSP review for consistency.

A Federal agency may use its National Environmental Policy Act (NEPA) documents as a vehicle for its consistency determination or negative determination. However, a Federal agency's federal consistency obligations under the CZM Act are independent of those required under NEPA and are not necessarily fulfilled by the submission of a NEPA document. If the consistency determination or negative determination is included in a NEPA document, the Federal agency shall ensure that the NEPA document includes the information and adheres to the required timeframes. Federal agencies and BSP should mutually agree on how to best coordinate the requirements of NEPA and the CZM Act. 15 CFR Part 930.37.

If a Federal agency decides subsequent to its initial assessment of coastal effects that a consistency determination is not required, it still must notify the BSP prior to final approval of the proposed activity briefly setting forth the reasons for its negative determination. 15 CFR Part 930.3

STEP 2 - Federal Agency submits materials to the BSP

Materials to be submitted to BSP review include:

1. a letter setting forth the statement of determination;
2. a detailed description of the proposed activity;
3. an assessment of the proposed activity's impact with respect to the enforceable policies of the GCMP; and
4. comprehensive data and information sufficient to support the agency's determination.

A letter describing the proposed activity and a consistency determination asserting that it "is consistent with and will be conducted (or supported) in a manner consistent with the Guam Coastal Management Program to the maximum extent practicable" should be submitted to the BSP at least ninety (90) days before final approval of the federal activity. The Federal agency's determination can probably be adequately made when sufficient information has been developed to reasonably determine the consistency of the activity with the GCMP, but before the Federal agency reaches a significant point in decision-making, (5 CFR Section 930.34).

Federal agencies applying for a federal license or permit should submit a consistency determination on the proposed activity at least 90 days before applying for the permit. Similarly, agencies proposing to grant financial assistance to other than local agencies should submit consistency determination at least 90 days prior to making a final decision on the grant application.

The basis for determining a proposed activity's consistency with the GCMP is an assessment of its conformance with the CZM objectives, policies, and management network. The sample format found in Appendix A may be used to present the agency's evaluation of the proposed activity's coastal zone effects relative to the GCMP enforceable policies. This assessment is the most important part of the consistency submission.

Additional detailed information which describes the proposed activity, its associated facilities, and their coastal zone effects should also be submitted to support the consistency determination, (15 CFR Section 930.39). This may be a draft Environmental Impact Statement, Environmental Impact Assessment, or material submitted to Guam State Clearinghouse.

Federal agencies have the option of submitting negative determinations, general consistency statements, or assertions of non-consistency for activities in this category. The time frame and types of information noted above are generally applicable to these options. Please refer to the Regulations, Subpart C, for guidance.

STEP 3 - BSP conducts review

The BSP will initially review the submitted materials for completeness and will notify the Federal agency of any deficiencies. At this time, conferences may be arranged with the agency to clarify information submitted to resolve potential issues related to the proposed activity, or to discuss possible alternatives to assure consistency with the GCMP to the maximum extent practicable.

Other Government of Guam (GovGuam) agencies may be asked by the BSP to review the determination and may participate in conferences. Their comments will be considered by the BSP in preparing an official response to the consistency determination, (15 CFR Section 930.34).

STEP 4 - BSP Action

The BSP will complete its review as expeditiously as possible within the time frame established by the Regulations, (15 CFR Section 930.41). If it agrees with the Federal agency's determination and conflicts have been resolved, the BSP will state its agreement with the determination.

In cases where conflicts have not been resolved, the BSP may formally disagree with the determination. The agency and the U.S. Office of Coastal Zone Management will be notified in writing of such disagreement. The National CZM Act and the Regulations establish formal mediation procedures which may be used when serious disagreements between the BSP and Federal agencies arise, (15 CFR Subpart G).

FEDERAL CONSISTENCY DETERMINATION OUTLINE

This document is an outline for federal agencies to use when making a Consistency Determination under the Coastal Zone Management Act section 307(c) (1) & (2).

Coastal Zone Management Act (CZMA) Consistency Determination

This document provides the Guam Coastal Management Program with the [name of federal agency's] Consistency Determination under CZMA § 307(c) (1) [or (2)] and 15 CFR part 930, subpart C, for the [name of Federal activity]. The information in this Consistency Determination is provided pursuant to 15 CFR § 930.39. This activity includes:

[Describe the Federal agency activity or reference relevant pages of NEPA document]

The [name of Federal agency] has determined that the [activity] affects the land or water uses or natural resources of Guam in the following manner:

[provide analysis of effects or reference relevant pages of NEPA document].

The Guam Coastal Management Program contains the following applicable enforceable policies:

[list and/or briefly describe the Guam's applicable enforceable policies]

Based upon the following information, data and analysis the [name of Federal agency] finds that the [activity] is consistent to the maximum extent practicable with the enforceable policies of the Guam Coastal Management Program. [provide information, data and analysis supporting the determination of consistency with the applicable enforceable policies].

Pursuant to 15 CFR § 930.41, the Guam Coastal Management Program has 60 days from the receipt of this letter in which to concur with or object to this Consistency Determination, or to request an extension under 15 CFR §930.41(b). The State's concurrence will be presumed if the State's response is not received by the [name of Federal agency] on the 60th day from receipt of this determination.

The Guam Coastal Management Program response should be sent to:
[provide Federal agency contact information]

**II. ACTIVITIES REQUIRING A FEDERAL
LICENSE OR PERMIT**

II. ACTIVITIES REQUIRING A FEDERAL LICENSE OR PERMIT

STEP 1 - Applicant determines if the proposed activity will affect any land or water use or natural resource of the coastal zone.

The list of Federal permits and licenses for activities which are likely to affect land or water uses in the coastal zone have been included in the approved GCMP. If the proposed activity requires any of the permits and/or licenses found in Appendix B, the Federal agency will inform the applicant that the permit or license cannot be issued until the BSP has concurred with a CZM consistency certification (Subsection 307(c)(3)(A), National CZM Act).

Other forms of federal permission such as leases, permit or license renewals, or major amendments to permits or licenses, are included within this category (15 Code of Federal Regulations, Section 930.51). If such activities will affect land or water use or natural resource in the coastal zone they are subject to the consistency review process.

Findings regarding the extent to which a proposed activity will affect any land or water use or natural resource of the coastal zone will be determined by applicants for permits and licenses listed in Appendix B and for other forms of federal permissions (15 CFR Section 930.58).

STEP 2 - Applicant submits materials to the BSP

Materials to be submitted for BSP review include:

1. A consistency certification statement;
2. A detailed description of the proposed activity and its associated facilities including a copy of the Federal applications; and
3. An assessment of the proposed activity's impacts with respect to the enforceable policies of the Guam Coastal Management Program with findings indicating that the proposed activity, its associated facilities, and their effects are all consistent with the provisions of the management program.

A letter describing the proposed activity and certifying that it "complies with Guam's approved coastal management program and will be conducted in a manner consistent with such program" should be submitted to the Federal agency at the time of application for the license or permit. At the same time, a copy of this letter is to be sent to the BSP.

The basis for determining a proposed activity's consistency with the GCMP is an assessment of its conformance with the CZM objectives, policies and management network. The sample format found in Appendix A may be used to present the applicant's evaluation of the proposed activities' coastal zone effects relative to the GCMP enforceable policies. This assessment is the most important part of the consistency submission.

Additional detailed information which describes the proposed activity, its associated facilities and their coastal zone effects are to be submitted in support of the consistency statement (15 CFR Section 930.58). This may be a draft Environmental Impact Statement, Environmental Impact Assessment, or material submitted to the Guam State Clearinghouse and should include a copy of the application to the Federal agency.

STEP 3 - BSP conducts review

The BSP will initially review the submitted materials for completeness and will notify the applicant of any deficiencies. At this time conferences may be arranged with the applicant to clarify information submitted, to resolve potential issues related to the proposed activity, or to discuss possible alternatives to assure consistency with GCMP.

Other GovGuam agencies may be asked by the BSP to review the submitted materials and may participate in conferences. Their comments will be considered by the BSP in preparing an official response to the consistency certification (15 CFR Section 930.18).

Notice announcing the availability of the consistency certification and materials for public review will be given in accordance with the Regulations. Whenever possible, the BSP will issue joint public notice with the Federal permitting or licensing agency to minimize duplication of efforts and to avoid unnecessary delays (15 CFR Section 930.61).

STEP 4 - BSP Action

Although the BSP under the National CZM Act has six (6) months to review the submitted materials, it will at the earliest practicable time, notify the applicant and the Federal agency of the results of its review. If it agrees with the consistency statement and conflicts have been resolved, the BSP will state its concurrence with the applicant's certification.

In cases where conflicts have not been resolved, the BSP may declare a formal objection to the certification. The applicant, Federal agency, and U.S. Office of CZM will be notified in writing of such an objection. The National Act and the Regulations establish formal appeal and mediation procedures which may be used when serious disagreements arise. The grounds for appeal of a BSP objection are limited, however. (15 CFR Subpart G, H).

Unlisted Federal License and Permit Activities

The Bureau of Statistics and Plans will monitor Federal license and permit activities. Should it be determined that a Federal license or permit activity requiring a permit not listed in Appendix B will affect any land or water use or natural resources of the coastal zone, the Bureau will notify the Federal agencies and applicants of the need for a review for consistency with the GCMP. Notification shall occur within 30 days from notice of the license or permit application; otherwise the Bureau waives its right to review the unlisted

activity. This waiver, however, shall not apply in cases where the Bureau does not receive notice of the Federal license or permit activity.

In most cases, it will be sufficient for the concerned parties to consider whether or not the proposed activity, assuming it would affect any land or water use or natural resources in the coastal zone, will be conducted in a manner consistent with the GCMP. If the Bureau of Statistics and Plans determine that a consistency review is required, it will notify the Assistant Administrator for Coastal Zone Management of the unlisted Federal license or permit activity which it believes should be subject to Guam review.

Following the Bureau of Statistics and Plans notification to the Federal agency, applicant and the Assistant Administrator, the Federal agency may not issue the license or permit until the following requirements are satisfied, unless the Assistant Administrator disapproves the Bureau's decision to review the activity:

1. The Federal agency and the applicant shall provide comments to the Assistant Administrator regarding the Bureau of Statistics and Plans' decision to review the activity within 15 days from the receipt of the notice that a consistency review is required.
2. The Assistant Administrator shall issue a decision approving or disapproving the Bureau of Statistics and Plans' request for a review within 30 days of the receipt of the Bureau's notice. The sole basis for this decision will be whether the proposed activity can be reasonably expected to affect any land or water use or natural resource of the coastal zone.
3. In the event of disapproval by the Assistant Administrator, the Federal agency may approve the license or permit application and no further action is required on the part of the applicant.

FEDERAL CONSISTENCY CERTIFICATION OUTLINE

This document is an outline for non-Federal applications to use when making a consistency certification under the Coastal Zone Management Act section 307(c) (3)(a) and (d).

Coastal Zone Management Act (CZMA) Consistency Certification

This document provides the Guam Coastal Management Program with the [name of Applicant's] Consistency and necessary data and information under CZMA 307(c)(3)(A), and 15 CFR part 930, subpart D, for the [name of activity].

Certification:

[name of applicant] certifies that the proposed activity complies with the enforceable policies of Guam approved management program and will be conducted in a manner consistent with such program.

Necessary Data and Information:

1. [describe the Federal license or permit activity or reference relevant pages of the Federal application, any associated facilities and coastal effects. Provide materials which will facilitate evaluation of coastal effects]
2. [provide additional information required by the state pursuant to 15 CFR 930.58 (a)(2)]
3. [provide an evaluation that includes a set of findings relating the probable coastal effects of the proposed project and its associated facilities to the relevant enforceable policies of the Guam Coastal Management Program]

[contact Guam Coastal Management Program to help determine relevant enforceable policies].

By this certification that the [project] is consistent with the Guam Coastal Management Program, is notified that it has six months from the receipt of this letter and accompanying information in which to concur with or object to [applicant's name] certification. Pursuant to 15 CFR 930.63(b), if Guam's Bureau of Statistics and Plans has not issued a decision within three months following commencement of the Guam Coastal Management program review, it shall notify [name of applicant] and the Federal agency of the status of the matter and the basis for further delay. The Bureau's Guam Coastal Management Program concurrence, objection, or notification of review status shall be sent to [provide applicant and Federal agency's contact information]

III. FEDERAL ASSISTANCE TO LOCAL GOVERNMENTS

III. FEDERAL ASSISTANCE TO LOCAL GOVERNMENTS

STEP 1- Applicant determines if the proposed activity will affect any land or water use or natural resource of the coastal zone.

A list of Federal assistance programs which fund activities likely to affect land or water use or natural resources of the coastal zone have been included in the approved GCMP. If a local agency is applying for funds under any of the programs listed in Appendix C, the notice of application must be reviewed by the BSP. Should any inconsistencies with the GCMP be identified and the BSP formally objects to the application, the Federal agency is prohibited from approving the proposed project (Section 307(d), National CZM Act).

The local agency is to express its views concerning the relationship of the proposed activity to the GCMP including the extent to which it will affect any land or water use or natural resources of the coastal zone (Section 307(d), National CZM Act).

STEP 2 - Applicant submits materials to the Guam State Clearinghouse (GSC)

Materials to be submitted to the Guam State Clearinghouse (GSC) must include an expression of the applicant's views concerning the relationship of the proposed activity to the GCMP including the extent to which it will affect any land, water use or natural resource of the coastal zone, 15 CFR Part 930 subpart F.

All federal assistance programs or projects must be submitted for review to the Guam State Clearinghouse in accordance with Presidential Executive Order 12372 and Governor of Guam Public Law 26-169, Executive Order 2007-04.

Guam State Clearinghouse Circulars 2007-1, 2008-1 & 2, and 2009-1 shall be followed by all government of Guam agencies, departments, commissions, boards, autonomous agencies and other instrumentalities of government except, the University of Guam (UOG) and Guam Community College (GCC). However, UOG and GCC are required to forward copy of each federal grant/project application to the GSC as part of their internal clearinghouse procedure.

In preparing the Clearinghouse application for submission, the relationship of the proposed activity to the GCMP should be discussed. The relationship may best be discussed in terms of the CZM objective and policy categories as listed in Appendix A.

Once the forms are completed, they are submitted along with required information to the Clearinghouse, such as: SF 424 Form, including Catalog of Federal Domestic Assistance (CFDA number, completed copy of GSC for 0101 and 01-2 (Notification of Intent to Apply for Federal Assistance Form, Budget Information (SF 4234A Form, 424C form, or 524 Form) including budget summary, budget narrative and funding source, program narrative or executive summary or abstract (grant/project application justification), maps or pertinent project/application illustrations and graphics which show project activity location(s) within Guam.

The Guam State Clearinghouse Office is responsible for ensuring that Clearinghouse notification for activities and programs which are likely to affect any land or water use or natural resources of the coastal zone (as listed in Appendix C), are reviewed by the BSP for consistency with the management program (15 Code of Federal Regulations, Section 930.95).

STEP 3 - BSP conducts review

The BSP will review the proposed project application for consistency with the GCMP. At this time, conferences may be arranged with the applicant to clarify information submitted to resolve potential issues related to the proposed project, or to discuss possible alternatives to assure consistency with the GCMP.

STEP 4 - BSP action

The BSP is not required to formally concur with each notice of funding application under this consistency review category. It will, within the clearinghouse review period, however, respond to the Clearinghouse request for review comments.

If any inconsistencies are identified and conflicts have not been resolved, the BSP will notify the Clearinghouse of its formal objection to the application. The applicant, the Federal agency, and U.S. Office of Coastal Zone Management will in turn be notified by the Clearinghouse. (15CFR Section 930.96).

The National Act and the Regulations establish formal appeal and mediation procedures which may be used when serious disagreements over an objection arise. The grounds for appeal of a BSP objection are limited, however. (15 CFR Subparts G, H)

APPENDIX A

**GUAM COASTAL MANAGEMENT PROGRAM
OBJECTIVES AND POLICIES
ASSESSMENT FORMAT**

INSTRUCTIONS FOR PREPARING AN ASSESSMENT

1. Review of GCMP Objectives and Policies

The Guam Coastal Management Program (GCMP) objectives and policies established by E.O. 78-37, are listed on the sample assessment format. They are the primary enforceable, mandatory policies of the GCMP.

2. Identify the objectives and policies relevant to the proposed activity

If a particular category does not appear to be relevant, the applicant should indicate "not applicable" in the discussion section for that category.

3. Prepare Discussion

The proposed activity's effects upon Guam's coastal uses or resources are to be discussed in terms of how they either further or conflict with the objectives and policies. It is most important that all applicable objectives and policies within a category be covered by the discussion.

Section of an Environmental Impact Statement, Environmental Impact Assessment, or other supplementary material which provide supporting data and information may be cited in the discussion, and provided as an attachment.

Management Network Supporting Policies and Mandates

The GCMP is a networked program. That is, a network of authorities, e.g. statutes, ordinances, rules, and regulations, have been incorporated into the program as the primary means of carrying out the CZM objectives and policies.

They are utilized to administer and enforce land or water use regulations in conformance with the CZM objectives and policies; to control use areas and developments subject to the management program; and to resolve conflicts among competing uses. An assessment of a proposed activity's consistency with the GCMP should include a discussion of the relevant network authorities cited in the approved Guam Coastal Management Program and Final Environmental Impact Statement.

First, if any land or water use or natural resources use permission which implements the CZM objectives and policies is required for a proposed activity, information regarding the status of the application for the permission should be provided on the supplemental form at the end of Appendix A.

For example, if a critical or pristine wildlife habitat area will be affected, the discussion under "Fragile Areas" would include information on any consultation efforts with the Department of Agriculture, Division of Aquatic and Wildlife Resources.

Since the Federal consistency review process is intended to serve as a mechanism to ensure continued coordination of Guam and Federal interests and to allow early consultation on activities, incorporating this type of information will assist in minimizing and resolving conflicts.

4. Submit completed forms with other required information

The GCMP Assessment Format and Supplemental Information Form may be reproduced and submitted along with other required information to the BSP.

GUAM COASTAL MANAGEMENT PROGRAM ASSESSMENT FORMAT

DATE OF APPLICATION: _____

NAME OF APPLICANT: _____

ADDRESS: _____

TELEPHONE NO. _____ Fax No. _____ Cell No: _____

E-MAIL ADDRESS: _____

TITLE OF PROPOSED PROJECT:

COMPLETE FOLLOWING PAGES

FOR BUREAU OF STATISTICS AND PLANS ONLY:

DATE APPLICATION RECEIVED: _____

OCRM NOTIFIED: _____ LIC. AGENCY NOTIFIED: _____

APPLICANT NOTIFIED: _____ PUBLIC NOTICE GIVEN: _____

OTHER AGENCY REVIEW

REQUESTED: _____

DETERMINATION:

CONSISTENT NON-CONSISTENT FURTHER INFORMATION REQUESTED

OCRM NOTIFIED: _____ LIC. AGENCY NOTIFIED: _____

APPLICANT NOTIFIED: _____

ACTION LOG:

1. _____

2. _____

3. _____

4. _____

5. _____

6. _____

DATE REVIEW COMPLETED: _____

DEVELOPMENT POLICIES (DP):

DP 1. Shore Area Development

Intent: To ensure environmental and aesthetic compatibility of shore area land uses.

Policy: Only those uses shall be located within the Seashore Reserve which:

- enhance, are compatible with or do not generally detract from the surrounding coastal area's aesthetic and environmental quality and beach accessibility; or
- can demonstrate dependence on such a location and the lack of feasible alternative sites.

Discussion:

DP 2. Urban Development

Intent: To cluster high impact uses such that coherent community design, function, infrastructure support and environmental compatibility are assured.

Policy: Commercial, multi-family, industrial and resort-hotel zone uses and uses requiring high levels of support facilities shall be concentrated within appropriate zone as outlined on the Guam Zoning Code.

Discussion:

DP 3. Rural Development

Intent: To provide a development pattern compatible with environmental and infrastructure support suitability and which can permit traditional lifestyle patterns to continue to the extent practicable.

Policy: Rural districts shall be designated in which only low density residential and agricultural uses will be acceptable. Minimum lot size for these uses should be one-half acre until adequate infrastructure including functional sewerage is provided.

Discussion:

DP 4. Major Facility Siting

Intent: To include the national interest in analyzing the siting proposals for major utilities, fuel and transport facilities.

Policy: In evaluating the consistency of proposed major facilities with the goals, policies, and standards of the Comprehensive Development and Coastal Management Plans, Guam shall recognize the national interest in the siting of such facilities, including those associated with electric power production and transmission, petroleum refining and transmission, port and air installations, solid waste disposal, sewage treatment, and major reservoir sites.

Discussion:

DP 5. Hazardous Areas

Intent: Development in hazardous areas will be governed by the degree of hazard and the land use regulations.

Policy: Identified hazardous lands, including flood plains, erosion-prone areas, air installations' crash and sound zones and major fault lines shall be developed only to the extent that such development does not pose unreasonable risks to the health, safety or welfare of the people of Guam, and complies with the land use regulations.

Discussion:

DP 6. Housing

Intent: To promote efficient community design placed where the resources can support it.

Policy: The government shall encourage efficient design of residential areas, restrict such development in areas highly susceptible to natural and manmade hazards, and recognize the limitations of the island's resources to support historical patterns of residential development.

Discussion:

DP 7. Transportation

Intent: To provide transportation systems while protecting potentially impacted resources.

Policy: Guam shall develop an efficient and safe transportation system, while limiting adverse environmental impacts on primary aquifers, beaches, estuaries, coral reefs and other coastal resources.

Discussion:

DP 8. Erosion and Siltation

Intent: To control development where erosion and siltation damage is likely to occur.

Policy: Development shall be limited in areas of 15% or greater slope by requiring strict compliance with erosion, sedimentation, and land use regulations, as well as other related land use guidelines for such areas.

Discussion:

RESOURCES POLICIES (RP):

RP 1. Air Quality

Intent: To control activities to insure good air quality.

Policy: All activities and uses shall comply with all local air pollution regulations and all appropriate Federal air quality standards in order to ensure the maintenance of Guam's relatively high air quality.

Discussion:

RP 2. Water Quality

Intent: To control activities that may degrade Guam's drinking, recreational, and ecologically sensitive waters.

Policy: Safe drinking water shall be assured and aquatic recreation sites shall be protected through the regulation of uses and discharges that pose a pollution threat to Guam's waters, particularly in estuaries, reef and aquifer areas.

Discussion:

RP 3. Fragile Areas

Intent: To protect significant cultural areas, and natural marine and terrestrial wildlife and plant habitats.

Policy: Development in the following types of fragile areas including Guam's Marine Protected Areas (MPA) shall be regulated to protect their unique character.

- historical and archeological sites
- wildlife habitats
- pristine marine and terrestrial communities
- limestone forests
- mangrove stands and other wetlands
- coral reefs

Discussion:

RP 4. Living Marine Resources

Intent: To protect marine resources in Guam's waters.

Policy: All living resources within the waters of Guam, particularly fish, shall be protected from over harvesting and, in the case of corals, sea turtles and marine mammals, from any taking whatsoever.

Discussion:

RP 5. Visual Quality

Intent: To protect the quality of Guam's natural scenic beauty

Policy: Preservation and enhancement of, and respect for the island's scenic resources shall be encouraged through increased enforcement of and compliance with sign, litter, zoning, subdivision, building and related land-use laws. Visually objectionable uses shall be located to the maximum extent practicable so as not to degrade significant views from scenic overlooks, highways and trails.

Discussion:

RP6. Recreation Areas

Intent: To encourage environmentally compatible recreational development.

Policy: The Government of Guam shall encourage development of varied types of recreational facilities located and maintained so as to be compatible with the surrounding environment and land uses, adequately serve community centers and urban areas and protect beaches and such passive recreational areas as wildlife, marine conservation and marine protected areas, scenic overlooks, parks, and historical sites.

Developments, activities and uses shall comply with the Guam Recreational Water Use Management Plan (RWUMP).

Discussion:

RP 7. Public Access

Intent: To ensure the right of public access.

Policy: The public's right of unrestricted access shall be ensured to all non-federally owned beach areas and all Guam recreation areas, parks, scenic overlooks, designated conservation areas and their public lands. Agreements shall be encouraged with the owners of private and federal property for the provision of releasable access to and use of resources of public nature located on such land.

Discussion:

RP 8. Agricultural Lands

Intent: To stop urban types of development on agricultural land.

Policy: Critical agricultural land shall be preserved and maintained for agricultural use.

Discussion:

**FEDERAL CONSISTENCY
SUPPLEMENTAL INFORMATION FORM**

Date: _____

Project/Activity Title or
Description _____

Location: _____

Other applicable area(s) affected, if appropriate:

Est. Start Date: _____ Est. Duration: _____

APPLICANT

Name & Title _____

Agency/Organization _____

Address _____

_____ Zip Code _____

Telephone No. during business hours:

A/C (___) _____

A/C (___) _____

Fax (___) _____

E-mail Address: _____

AGENT

Name & Title _____

Agency/Organization Address _____ Zip Code _____

Telephone No. during business hours:

A/C (___) _____

A/C (___) _____

Fax (___) _____

E-mail Address: _____

CATEGORY OF APPLICATION (check one only)

- I - Federal Agency Activity
- II - Federal Permit or License
- III - Federal Grants & Assistance

TYPE OF STATEMENT (check one only)

- Consistency
- General Consistency (Category I only)
- Negative Determination (Category I only)
- Non-Consistency (Category I only)

APPROVING FEDERAL AGENCY (Categories II & III only)

Agency _____

Contact Person _____

Telephone No. during business hours:

Area Code () _____

Area Code () _____

FEDERAL AUTHORITY FOR ACTIVITY

Title of Law _____

Section _____

OTHER GUAM APPROVALS REQUIRED:

Agency	Type of Approval	Date of Application	Status
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

APPENDIX B

**FEDERAL LICENSES AND PERMITS
SUBJECT TO CERTIFICATION FOR CONSISTENCY**

FEDERAL LICENSES/PERMITS SUBJECT TO CERTIFICATION FOR CONSISTENCY

Within Guam, the following Federal agency licenses and permits are subject to the certification process for consistency with the Management Program under Section 306 (c)(3), if the activity being licensed or permitted affects land or water uses or natural resources in the coastal zone.

Department of Defense-U.S. Army Corps of Engineers:

- Permits and licenses required under Section 9, 10, and 11 of the Rivers and Harbors Act of 1899, 33 U.S.C. 401, 403, 404.
- Permits and licenses required under Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. 1413.
- Permits and licenses required under Section 404 of the Federal Clean Water Act of 1977, 33 U.S.C. 1344.

Environmental Protection Agency:

- Permits for underground injection under the Safe Drinking Water Act, 42 U.S.C. 300h.
- Permit to operate underground injection wells in designated areas under Safe Drinking Water Act, 42 U.S.C. 300h-3.
- Permits for handling and disposal of hazardous substances under Resources Conservation and Recovery Act of 1976, 42 U.S.C. 6925.
- Approvals under Prevention of Significant Deterioration (PSD) regulations under the Clean Air Act Section 110, 42 U.S.C. 7410.
- New source construction/operations permits under the Clean Air Act Section 112, 42 U.S.C. 411.
- Approvals under National Emission Standards for Hazardous Air Pollutants (NESHAPS) Regulations under the Clean Air Act Section 112, 42 U.S.C. 7412.
- National Pollutant Discharge Elimination System (NPDES) permits for Federal installations under the Federal Water Pollution Control Act of 1972 Section 401 and 402, 33 U.S.C. 1341, 1342.
- NPDES permits for discharges into the contiguous zone and ocean waters, Federal Water Pollution Control Act of 1972, Sections 402 and 403, 33 U.S.C. 1342, 1343.
- Sludge run-off permits under the Federal Water Pollution Control Act of 1972, Section 405, 33 U.S.C. 1342, 1343.

Department of Transportation-U.S. Coast Guard

- Permits for construction of bridges under 33 U.S.C. 401, 491-507 and 525-534.
- Permits for private aids to navigation, 14 U.S.C. 83.
- Deep water port permits under the Deep Water Ports Act of 1974, 33 U.S.C. 1501.

Department of Transportation-Federal Aviation Administration:

- Permits for construction and operation of airports, 49 U.S.C. 1716.

Department of Commerce-Office of Ocean Management and National Marine Fisheries Services:

- Permits within Marine Sanctuaries under 33 U.S.C. 1401-1444.
- Permits for taking or importing marine mammals under 16 U.S.C. 1361-1407.
- Permits, licenses, and approvals issued pursuant to the Fishery Conservation and Management Act of 1976, 16 U.S.C. 1801-1882.

Department of the Interior Bureau of Land Management-U.S. Geological Survey:

- Permits and approvals of exploration and operating plans pertaining to the extraction of leasable minerals (USGS).
- Permits, licenses, and approvals relating to viable coral communities pursuant to 43 CFR 6224.

Department of Energy-Federal Energy Regulatory Commission:

- Licenses required for non-Federal hydroelectric projects and associated transmission lines under Section 202(b) of the Federal Power Act (16 U.S.C. 824a (b)).
- Certificates required for the construction and operation of natural gas pipeline facilities, defined to include both interstate pipeline and terminal facilities under Section 7(c) of the Natural Gas Act (15 U.S.C. 717(c)).

Department of the Interior Fish & Wildlife Services:

- Endangered species permits under the Endangered Species Act, 16 U.S.C. 1531-1543.

Department of the Interior National Park Service:

- Federal activities on National Park Service land. 16 U.S.C. 3, 4, 5, 7a, 8.

APPENDIX C

**FEDERAL FINANCIAL ASSISTANCE PROGRAMS
SUBJECT TO REVIEW FOR CONSISTENCY**

Federal Financial Assistance Programs Subject to Review for Consistency Review Include:

Department of Agriculture

Federal Catalog No.	Program Title
10.025	Plant and Animal Disease, Pest Control, and Animal Care
10.028	Wildlife Services
10.307	Organic Agriculture Research and Extension Initiative
10.664	Cooperative Forestry Assistance
10.675	Urban and Community Forestry Program
10.679	Collaborative Forest Restoration
10.680	Forest Health Protection
10.760	Water and Waste Disposal Systems for Rural Communities
10.768	Business and Industry Loans
10.770	Water and Waste Disposal Loans and Grants (Section 306C)
10.901	Resource Conservation and Development
10.904	Watershed Protection and Flood Prevention
10.906	Watershed Surveys and Planning

Department of Commerce

11.300	Grants for Public Works and Economic Development Facilities
11.419	Coastal Zone Management Administration Awards
11.420	Coastal Zone Management Estuarine Research Reserves
11.463	Habitat Conservation

Department of Defense - ACOE

12.101	Beach Erosion Control Projects
12.104	Flood Plain Management Services
12.105	Protection of Essential Highways, Highway Bridge Approaches, and Public Works
12.106	Flood Control Projects
12.108	Snagging and Clearing for Flood Control
12.110	Planning Assistance to States
12.607	Community Economic Adjustment Planning Assistance
12.613	Growth Management Planning Assistance

Housing and Urban Development

14.231	Emergency Shelter Grants Program
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Department of Interior

15.605	Sport Fish Restoration
15.611	Wildlife Restoration
15.614	Coastal Wetlands Planning, Protection and Restoration Act
15.615	Cooperative Endangered Species Conservation Fund
15.616	Clean Vessel Act

15.622 Sportfishing and Boating Safety Act
15.904 Historic Preservation Fund Grants-In-Aid
15.916 Outdoor Recreation Acquisition, Development and Planning
15.926 American Battlefield Protection

Department of Justice

16.578 Federal Surplus Property Transfer Program

Department of Transportation

20.106 Airport Improvement Program
20.205 Highway Planning and Construction
20.600 State and Community Highway Safety
20.603 Federal Highway Safety Data Improvements Incentive Grants
20.604 Safety Incentive Grants for Use of Seatbelts
20.605 Safety Incentives to Prevent Operation of Motor Vehicles by Intoxicated Persons
20.703 Interagency Hazardous Materials Public Sector Training and Planning Grants
20.801 Development and Promotion of Ports and Intermodal Transportation
20.932 Transportation Planning, Research and Education

Environmental Protection Agency

66.001 Air Pollution Control Program Support
66.032 State Indoor Radon Grants
66.418 Construction Grants for Wastewater Treatment Works
66.419 Water Pollution Control State and Interstate Program Support
66.424 Surveys, Studies, Demonstrations and Special Purpose Grants- §1442 of Safe Drinking Water Act
66.432 State Public Water System Supervision
66.433 State Underground Water Source Protection
66.436 Surveys, Studies, Investigations, Demonstrations, and Training Grants and Cooperative Agreements - Section 104(b) (3) of the Clean Water Act
66.439 Targeted Watershed Grants
66.454 Water Quality Management Planning
66.456 National Estuary Program
66.460 Nonpoint Source Implementation Grants
66.461 Regional Wetland Program Development Grants
66.467 Wastewater Operator Training Grant Program (Technical Assistance)
66.468 Capitalization Grants for Drinking Water State Revolving Funds
66.471 State Grants to Reimburse Operators of Small Water Systems for Training and Certification Costs
66.472 Beach Monitoring and Notification Program Implementation Grants
66.474 Water Protection Grants to the States
66.480 Assessment and Watershed Protection Program Grants
66.510 Surveys, Studies, Investigations and Special Purpose Grants within the Office of Research and Development.
66.511 Office of Research and Development Consolidated Research/Training
66.512 Regional Environmental Monitoring and Assessment Program (REMAP) Research Projects
66.600 Environmental Protection Consolidated Grants-Program Support

66.605	Performance Partnership Grants
66.606	Surveys, Studies, Investigations and Special Purpose Grants
66.610	Surveys, Studies, Investigations and Special Purpose Grants within the Office of the Administrator
66.611	Environmental Policy and Innovation Grants
66.700	Consolidated Pesticide Enforcement Cooperative Agreements
66.701	Toxic Substances Compliance Monitoring Cooperative Agreements
66.707	TSCA Title IV State Lead Grants Certification of Lead-Based Paint Professionals
66.708	Pollution Prevention Grants Program
66.709	Multi-Media Capacity Building Grants for States and Tribes
66.714	Pesticide Environmental Stewardship Regional Grants
66.716	Surveys, Studies, Investigations, Training Demonstrations and Educational Outreach
66.801	Hazardous Waste Management State Program Support
66.802	Superfund State, Political Subdivision, and Indian Tribe Site-specific Cooperative Agreements
66.804	State and Tribal Underground Storage Tanks Program
66.805	Leaking Underground Storage Tank Trust Fund Program
66.806	Superfund Technical Assistance Grants for Community Groups at National Priority List sites
66.808	Solid Waste Management Assistance Grants
66.809	Superfund State and Indian Tribe Core Program Cooperative Agreements
66.810	Chemical Emergency Preparedness and Prevention (CEPP) Technical Assistance Grants Program
66.813	Alternative or Innovative Treatment Technology Research, Demonstration, Training, and Hazardous Substance Research Grants
66.816	Headquarters and Regional Underground Storage Tanks Program
66.817	State and Tribal Response Program Grants
66.940	Environmental Policy and State Innovation Grants

Department of Education

84.002	Adult Education State Grant Program
84.027	Special Education Grants to States
84.031	Higher Education Institutional Aid
84.041	Services Client Assistance Program
84.169	Independent Living State Grants
84.173	Special Education Preschool Grants
84.177	Rehabilitation Services Independent Living Services for Older Individuals Who are Blind
84.181	Special Education Grants for Infants and Families with Disabilities
84.184	Safe and Drug-Free Schools and Communities National Programs
84.186	Safe and Drug-Free Schools and Communities State Grants
84.187	Supported Employment Services for Individuals with Severe Disabilities

Department of Energy

81.104	Office of Environmental Clean-up Acceleration
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Health and Human Services

93.392	Cancer Construction
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National Archives and Records Administration

89.003 National Historical Publications and Records Grants

Homeland Security

97.012 Boating Safety Financial Assistance
97.013 State Access to the Oil Spill Liability Trust Fund
97.029 Flood Mitigation Assistance
97.036 Public Assistance Grants
97.042 Emergency Management Performance Grants
97.047 Pre-Disaster Mitigation
97.055 Interoperable Communications Equipment
97.067 Homeland Security Grant Program
97.068 Competitive Training Grants
97.070 Map Modernization Management Support
97.071 Metropolitan Medical Response System
97.073 State Homeland Security Program (SHSP)
97.078 Buffer Zone Protection Plan (BZPP)

APPENDIX D

NATIONAL CZM ACT & FEDERAL REGULATIONS GOVERNING FEDERAL CONSISTENCY WITH APPROVED COASTAL MANAGEMENT PROGRAMS CITATIONS

**National CZM Act & Federal Regulations Governing
Federal Consistency With Approved
Coastal Management Programs Citations**

National CZM Act (16 U.S.C. 1451 et. seq.)

Section:

- 307(c) (1) Consistency of Federal agency activities
- 307(c) (2) Consistency of Federal development projects
- 307(c) (3) (A) Consistency of activities requiring a Federal license or permit. Appeal to Secretary of Commerce
- 307(c) (3) (B) Consistency of Outer Continental Shelf (OCS) exploration, development, and production activities. Appeal to Secretary of Commerce
- 307(d) Consistency of applications for Federal assistance submitted by State and local governments. Appeal to Secretary of Commerce
- 307(f) Consideration of Federal Water Pollution Control Act, as amended, and the Federal Clean Air Act, as amended
- 307(h) Secretarial mediation

15 Code of Federal Regulations, Part 930, "Federal Consistency with Approved Coastal Management Programs"

Section:

Subpart A-General Information

- 930.1 Overall objectives.
- 930.2 Public participation.
- 930.3 Review of the implementation of the federal consistency requirement.
- 930.4 Conditional concurrences.
- 930.5 State enforcement action.
- 930.6 State agency responsibility.

Subpart B-General Definitions

- 930.10 Index to definitions for terms defined in part 930.
- 930.11 Definitions.

Subpart C-Consistency for Federal Agency Activities

- 930.30 Objectives.
- 930.31 Federal agency activity.
- 930.32 Consistent to the maximum extent practicable.
- 930.33 Identifying Federal agency activities affecting any coastal use or resource.
- 930.34 Federal and State agency coordination.

- 930.35 Negative determinations for proposed activities.
- 930.36 Consistency determinations for proposed activities.
- 930.37 Consistency determinations and National Environmental Policy Act (NEPA) requirements.
- 930.38 Consistency determinations for activities initiated prior to management program approval.
- 930.39 Content of a consistency determination.
- 930.40 Multiple Federal agency participation.
- 930.41 State agency response.
- 930.42 Public participation.
- 930.43 State agency objection.
- 930.44 Availability of mediation for disputes concerning proposed activities.
- 930.45 Availability of mediation for previously reviewed activities.
- 930.46 Supplemental coordination for proposed activities.

Subpart D-Consistency for Activities Requiring a Federal License or Permit

- 930.50 Objectives.
- 930.51 Federal license or permit.
- 930.52 Applicant.
- 930.53 Listed federal license or permit activities.
- 930.54 Unlisted federal license or permit activities.
- 930.55 Availability of mediation for license or permit disputes.
- 930.56 State agency guidance and assistance to applicants.
- 930.57 Consistency certifications.
- 930.58 Necessary data and information.
- 930.59 Multiple permit review.
- 930.60 Commencement of State agency review.
- 930.61 Public participation.
- 930.62 State agency concurrence with a consistency certification.
- 930.63 State agency objection to a consistency certification.
- 930.64 Federal permitting agency responsibility.
- 930.65 Remedial action for previously reviewed activities.
- 930.66 Supplemental coordination for proposed activities.

Subpart E-Consistency for Outer Continental Shelf (OCS) Exploration, Development and Production Activities

- 930.70 Objectives.
- 930.71 Federal license or permit activity described in detail.
- 930.72 Person.
- 930.73 OCS plan.
- 930.74 OCS activities subject to State agency review.
- 930.75 State agency assistance to persons.
- 930.76 Submission of an OCS plan, necessary data and information and consistency certification.

- 930.77 Commencement of State agency review and public notice.
- 930.78 State agency concurrence or objection.
- 930.79 Effect of State agency concurrence.
- 930.80 Federal permitting agency responsibility.
- 930.81 Multiple permit review.
- 930.82 Amended OCS plans.
- 930.83 Review of amended OCS plans; public notice.
- 930.84 Continuing State agency objections.
- 930.85 Failure to comply substantially with an approved OCS plan.

Subpart F-Consistency for Federal Assistance to State and Local Governments

- 930.90 Objectives.
- 930.91 Federal assistance.
- 930.92 Applicant agency.
- 930.93 Intergovernmental review process.
- 930.94 State review process for consistency.
- 930.95 Guidance provided by the State agency.
- 930.96 Consistency review.
- 930.97 Federal assisting agency responsibility.
- 930.98 Federally assisted activities outside of the coastal zone or the described geographic area.
- 930.99 Availability of mediation for federal assistance disputes.
- 930.100 Remedial action for previously reviewed activities.
- 930.101 Supplemental coordination for proposed activities.

Subpart G-Secretarial Mediation

- 930.110 Objectives.
- 930.111 OCRM mediation.
- 930.112 Request for Secretarial mediation.
- 930.113 Public hearings.
- 930.114 Secretarial mediation efforts.
- 930.115 Termination of mediation.
- 930.116 Judicial review.

Subpart H-Appeal to the Secretary for Review Related to the Objectives of the Act and National Security Interests

- 930.120 Objectives.
- 930.121 Consistent with the objectives or purposes of the Act.
- 930.122 Necessary in the interest of national security.
- 930.123 Appellant and Federal agency.
- 930.124 Computation of time.
- 930.125 Notice of appeal and application fee to the Secretary.
- 930.126 Consistency appeal processing fees.
- 930.127 Briefs and supporting materials.

- 930.128 Public notice, comment period, and public hearing.
- 930.129 Dismissal, remand, stay and procedural override.
- 930.130 Closure of the decision record and issuance of decision.
- 930.131 Review initiated by the Secretary.

Subpart I-Consistency of Federal Activities Having Interstate Coastal Effects

- 930.150 Objectives.
- 930.151 Interstate coastal effect.
- 930.152 Application.
- 930.153 Coordination between States in developing coastal management policies.
- 930.154 Listing activities subject to interstate consistency review.
- 930.155 Federal and State agency coordination.
- 930.156 Content of a consistency determination or certification and State agency response.
- 930.157 Mediation and informal negotiations.

Authority: 16 U.S.C. 1451 et seq.

[Source: 65 FR 77154, Dec. 8, 2000, as amended at 71 FR 826, Jan 5, 2006]

Sections. 307. 316. and 317, Coastal Zone Management Act of 1972, Pub. Law 92-583, 88 Sta. 1280 (16 U.S.C. 1451 et seq.) as amended by Pub. Law 94-370, 90 Sta. 1013, Coastal Zone Act Reauthorization Amendment (P.L. 101-508, Coastal Zone Protection Act (P.L. 104-150). (15 CFR Part 921 – CZMA Regulations).

APPENDIX E

**SUMMARY OF CHANGES TO FEDERAL CONSISTENCY
REGULATIONS 15 CFR PART 930**

**GUAM COASTAL MANAGEMENT PROGRAM
SUMMARY OF CHANGES TO
FEDERAL CONSISTENCY REGULATIONS, 15 CFR Part 930**

The National Oceanic and Atmospheric Administration (NOAA) revises the regulations implementing the Federal Consistency provision of the Coastal Zone Management Act of 1972 (CZMA). The Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) and the Coastal Zone Protection Act of 1996 (CZPA), enacted June 3, 1996 amended and reauthorized the CZMA. Among the amendments were revisions to the federal consistency requirement contained in section 307 of the CZMA, 15 CFR Part 930, December 8, 2000. The Final Rule is issued under the authority of the CZMA, 16 USC 1451 et seq. Effective: January 8, 2001. (Refer to 15 CFR Part 930 for complete changes).

SECTION	TITLE	CHANGES
Subpart A	General Information	
930.2	Public Participation	State Management Programs shall provide an opportunity for public participation in the State agency's review of a Federal agency's consistency determination or an applicant's or person's consistency certification.
930.4	Conditional Concurrences	States can conditionally concur with Federal agencies, applicants, consistency submittal and should cooperate with State agencies to develop conditions that would allow the State agency to concur with the federal action. This rule only allows conditional concurrences pursuant to the following criteria: 1) Conditions must be based on specific enforceable policies, 2) The applicant must amend its federal application, and The federal agency approves the application as amended with the state conditions. If all of these requirements are <u>not met</u> , the State agency's conditional concurrence shall be treated an objection.
930.6	State Agency Responsibility	State agency either officially objects to or concurs with a consistency determination or negative determination, a consistency certification or determine the consistency of a proposed federal assistance activity. Issuance or denial of relevant State permits can constitute the State agency's consistency concurrence or objection if the State agency ensures that the State permitting agencies or the Stage agency review individual projects to ensure consistency with all applicable State Management program policies and that applicable public participation requirements are met. Only the State agency is authorized to comment officially on or concur with or object to a federal consistency determination or negative determination, a consistency certification or determine the consistency of a proposed federal assistance activity.

Subpart B	General Definitions	
930.11	Definitions: Refer to Federal Register/Vol.65 No. 237 Rules and Regulations	The phrase “Any Coastal Use or Resource” means any land or water use or natural resource of the Coastal zone, defined in sections 304(10) and (18) of the act, respectively, and include, but are not limited to; public access, recreation, fishing, historic or cultural preservation, development, hazards management, marinas and flood plain management, scenic and aesthetic enjoyment, and resource creation or restoration projects. Natural resources include biological or physical resources, etc.
Subpart C	Federal Agency Activities and Development Projects	The phrase “directly affecting the coastal zone” has been changed to read “affecting any coastal use or resource.” This codifies changes made to the CZMA by CZARA and includes reasonably foreseeable effects on any land or water use or natural resource of the coastal zone. The application of consistency is not limited by the geographic location of a federal action; consistency applies if there are reasonably foreseeable coastal effects resulting from the activity. A federal action occurring outside the coastal zone may cause effects felt within the coastal zone (regardless of the location of the affected coastal use or resource).
930.31	Federal Activity and Federal Development Project	<ol style="list-style-type: none"> 1) Federal agency activities include any activity that initiates an event or series of events where coastal effects are reasonably foreseeable, e.g., rulemaking, planning, physical alteration, and exclusion of uses. 2) The Federal agency activity category is a residual category for federal actions that are not covered under subpart D, E, or F Part 930. 3) General Permits (e.g. ACOE nationwide or EPA General NPDES permits) are not covered under subpart D, E, or F part 930. 4) Modifications to existing activities or development projects may require consistency review.
930.32	Consistent to the Maximum Extent Practicable	<ol style="list-style-type: none"> 1) Lack of funding does not qualify for maximum extent practicable exemption. 2) Sets up standards of Emergency or other similar unforeseen circumstances. Federal agency may deviate from consistency if deviation is justified and shall be the minimum necessary to address the exigent circumstance which presents the Federal agency with a substantial obstacle that prevents complete adherence to the approved program. Shall seek State agencies concurrence prior to addressing the exigent circumstance. 3) Classified activities that affects any coastal use or resource is not exempt from the requirements of this subpart, <u>unless the activity is exempted by the President</u> under section 307(c)1(B) of the Act.

930.33	Identifying Federal Agency Activities	Provides a process whereby State and Federal agencies can more efficiently address <i>de minimis</i> activities, which cannot be excluded from the Federal consistency requirement. Clarification was made that <i>de minimis</i> activities apply to activities with insignificant direct and indirect effects.
930.34	Federal and State Coordination	Federal agencies shall provide State agencies with consistency determinations for all their activities affecting any coastal use or resource.
930.35	Negative Determinations	<p>If a Federal agency determines that there will not be coastal effects, they shall provide the State agencies with a negative determination. (Public notice is not required)</p> <p>1) Review period is 60 days (with a possible 15 day additional extension) <u>to disagree</u> with a negative determination.</p> <p>2) Consistency determination is required if state and federal agency agrees that there are reasonable foreseeable effects.</p>
930.36	National and Regional Consistency Determinations	<p>Allows Federal agencies to review their proposed activities which affect any coastal use or resource in order to developed consistency determinations which indicate whether such activities will be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of the State's approved management program.</p> <p>1) Consistency determination should be provided to State agencies at least 90 days before final approval of the Federal agency activity.</p> <p>2) The Federal and State agencies may mutually agree upon procedures for extending the notification requirement beyond the 90 days for activities requiring a substantial review period, and for shortening the notification period for less extensive review period, provided that public participation requirements are met.</p> <p>3) A Federal agency may provide a State agency with a <u>general consistency determination</u> only in situations where the incremental actions are repetitive and <u>do not affect any coastal use or resource</u> when performed separately.</p>

930.37	NEPA and Consistency Determinations	<p>Federal agency's obligations under the CZMA are independent of those required under NEPA and are not necessarily fulfilled by the submission of a NEPA document. Federal and State agencies should mutually agree on how to best coordinate the requirements of NEPA and the CZMA.</p> <p>Final Environmental Impact Statement's (EIS) can be used as consistency determinations</p>
930.39	Content of a Consistency Determination	<p>The Federal agency may submit the necessary information in any manner it chooses so long as the requirements of this subpart are satisfied.</p> <ol style="list-style-type: none"> 1) Maximum extent arguments must be included in the consistency determination 2) Maximum Extent Practicable arguments can be made after submittal of consistency determination 3) Federal law, other than the CZMA, may require a Federal agency to obtain a State permit. Even when Federal agencies are not required to obtain State permits, they shall still be consistent to the maximum extent practicable with the enforceable policies that are contained in such State permit programs that are part of a management program.
930.41	State Agency Response	<ol style="list-style-type: none"> 1) Review period is extended from 45 days to 60 days, with 15-day extension, for a total of 75 days, if required information is not included with the determination. 2) The 60-day review period does not start unless the state receives all the necessary data and information required by §930.39. State must immediately notify the federal agency that the review period has not begun and that the 60 day review period will begin when the missing information is received by the State Agency. 3) Final Federal agency action shall not be taken sooner than 90 days from the receipt by the State agency of the consistency determination unless the State concurs or concurrence is presumed pursuant to paragraphs (a) and (b) or unless both agree to an alternative period. 4) States cannot require processing fees from Federal agencies unless payment of such fees is required by other Federal law or otherwise agreed to by the Federal agency and allowed by the Comptroller General of the United States. In no case may a State agency stay the consistency review period or base its objection on the failure of a Federal agency to pay a fee.

930.42	Public Participation	Public participation is required for State’s review of consistency determination, except in cases where earlier public notice on the consistency determination by the Federal agency or the State agency meets the requirements of this section. See 940.42(c) for content of public notice.
930.43	State Objections	<ol style="list-style-type: none"> 1) Must cite enforceable policies 2) Must explain how project is inconsistent with enforceable policies. 3) Identification of alternatives is optional 4) Federal agency can proceed despite an objection for two reasons: <ol style="list-style-type: none"> a) Federal agency maintains that the project is consistent to the maximum extent practicable; b) Federal agency maintains project is fully consistent. 5) Federal agency must notify State of its decision to proceed despite an objection before the project commences.
930.44	Availability of Mediation for Disputes concerning proposed activities	In the event of serious disagreement between the Federal and State agencies regarding the proposed federal activity affecting any coastal use or resource, either party may request the Secretarial mediation or OCRM mediation services provided for in subpart G.
930.46	Supplemental Coordination for proposed activities	<p>Federal Agencies shall further coordinate with State agency and prepare supplemental consistency determination if the proposed activity will affect any coastal use or resource substantially different than originally described.</p> <ol style="list-style-type: none"> 1) Required if the Federal Agency makes substantial changes in proposed project that are relevant to management program enforceable policies; or 2) Required if there are significant new circumstances or information relevant to proposed activity and its effect on any coastal use or resource. <p>State agency may notify the Federal agency and request for modifications to the proposed activity (if any) that would allow the federal agency to implement the proposed activity consistent with the enforceable policies of the management program.</p>

Subpart D	Consistency for Activities Requiring a Federal License or Permit	
930.50	Objectives	Provisions are intended to ensure that any required federal license or permit activity affecting any coastal use or resource is conducted in a manner consistent with approved management programs.
930.51	Federal License or Permit	<p>Means any “required” authorization, certification, approval, lease, or other form of permission which any Federal agency is empowered to issue to an applicant. A required Federal approval means that the activity could not be performed without the approval or permission of the Federal agency. The approval does not have to be mandated by federal law; it only has to be a requirement to perform the activity.</p> <p><u>Lease</u> means a lease issued by a Federal agency to a non-federal entity that authorizes or approves the use of federal property for a non-federal activity. This does not include leases issued to lease sales conducted by a Federal agency (e.g., outer continental shelf (OCS) oil and gas lease, etc.).</p> <p>The term also includes renewals and major amendments which affect any coastal use or resource: Renewals include re-approvals and extensions, including administrative extensions; Withdrawal of a Federal application results in withdrawal of consistency certification.</p> <p>If an applicant withdraws its application to the Federal agency, then the consistency process is terminated. If the applicant reapplies, then a new consistency review process will start. <i>If the Federal agency stops or stays the Federal license or permit application process, the consistency review period will be stopped or stayed for the same amount of time as for the Federal application process.</i></p>
930.52	Applicant	Applicants include person or group existing under any nation, state, local, or regional government who files a consistency certification for a required general federal license or permit under §930.31(d) to conduct an activity affecting any coastal use or resource. <u>It does not include Federal agencies</u> applying for Federal licenses or permits. Federal agency activities requiring federal licenses or permits are subject to subpart C of this part.

930.53	Listed Federal License or Permit Activities	<p>States shall develop a list of Federal activities, including development projects, which are likely to significantly affect the coastal zone and thereby will require a Federal agency consistency determination. Federal lands located within the boundaries of State's coastal zone are automatically included within the geographic location description; States do not have to describe these areas but need to describe the geographic location of listed activities occurring on federal lands located beyond the boundaries of a State's coastal zone.</p> <p>Requires OCRM permission to review areas outside of the coastal zone in absence of or outside of the geographic description.</p>
930.54	Unlisted Activities	<p>1) Clarifies that notice triggering approval process for review of unlisted activities is of actual submittal of the application.</p> <p>2) States and applicants can agree to forego the unlisted procedures.</p>
930.57	Consistency Certification	<p>1) All applicants for required Federal Licenses or permits subject to State agency 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 management program. The applicant shall furnish to the State agency a copy of the certification and necessary data and information.</p> <p>2) Certification shall be in the following form: <i>"The proposed activity complies with the enforceable policies of the Guam Coastal Management Program and will be conducted in a manner consistent with such Program."</i></p>

930.58	Necessary data & Information	<p>Applicant shall furnished the State with the needed information and data along with the Consistency Certification. Such information and data shall include:</p> <ol style="list-style-type: none"> 1) Detailed description of the proposed activity. Its associated facilities, the coastal effects, data and information sufficient to support the certification. Maps, diagram, technical data and other information relevant to the proposed activity shall be with the copy of the application submitted to the Federal Agency shall be submitted to the State Agency. 2) An assessment of the proposed activity’s impacts with respect to the enforceable policies of the State’s approved management program with findings indicating that the proposed activity, its associated facilities and its effects will be conducted consistent with such program.
930.60	Commencement of State Agency Review	<ol style="list-style-type: none"> 1) Review period does not begin until State receives consistency certification and all the necessary data and information. 2) State must inform an applicant for a Federal permit that the review period has not begun within 30 days after receiving <u>an incomplete</u> consistency certification, notify the applicant and the Federal agency of the missing certification or information. State review will commence once the necessary certification or information deficiencies have been corrected. 3) Applicants and the State can mutually agree to stay the consistency time clock or extend the six month review period. Such an agreement shall be in writing and shall be provided to the Federal agency. Federal agency shall not presume State concurrence with an activity where such agreement exist or where State agency review has not begun.
930.61	Public Participation	<p>Public Notice shall be provided for the area(s) of the coastal zone likely to be affected by the proposed activity, as determined by the State Agency.</p>
930.62(a)	State Agency Concurrence	<p>Amended to clarify that a State agency’s objection must be received before or on the last day of the six-month review period.</p>

930.63	State Agency Objection	<p>If the State agency objects to the applicant's consistency certification within six months following commencement of review, it shall notify the applicant, Federal agency and Director of the objection. State agency objection may be based upon a determination that the applicant failed to supply the required information, following a written request, and may assert alternative bases for its objection which, if adopted by the applicant, may permit the proposed activity to be conducted in a manner consistent with the enforceable policies of the management program.</p> <p>Conditional concurrence, like an objection, can be appealed to the Secretary of commerce (930.4).</p>
930.64	Federal Permitting Agency Responsibility	<p>Following receipt of State agency objection to a consistency certification, the Federal agency shall not issue the Federal license or permit except as provided in subpart H of this part.</p>
930.65	Remedial Action For Previously Reviewed Activities	<p>Allows the State to request OCRM to require a new or amended consistency certification if the following has occurred:</p> <ul style="list-style-type: none"> a) State finds that the previously approved project is conducted in a manner other than is approved or has new coastal zone effects; b) State finds that the performance deviation or new effects makes the project no longer consistent with the coastal management program. <p>OCRM (Director) may make a finding that an applicant is conducting an activity substantially different from the approved activity only after providing 15 days for the applicant and the Federal agency to review the State Agency objection and to submit comments for the Director's consideration.</p>
930.66	Supplemental Coordination For Proposed Activities	<ul style="list-style-type: none"> a) Applicants for Federal license or permit that were previously determined to be consistent with management program, but which have not yet began, shall further coordinate with State agency and prepare supplemental consistency certification if the proposed activity will affect any coastal use or resource substantially different than originally described. b) State agency may notify the applicant, the Federal agency and the Director of proposed activities which the State agency believes should be subject to supplemental coordination and request for modifications to the proposed activity (if any) that would allow the federal agency to implement the proposed activity consistent with the enforceable policies of the management program.

Subpart F	FEDERAL ASSISTANCE TO STATE AND LOCAL GOVERNMENTS	
930.94	State Review Process for Consistency	Amended to clarify that all federal assistance activities that affect any coastal use or resource are subject to the consistency requirement. All Federal assistance projects are subject to consistency even if they are not processed through the intergovernmental review process. Section 930.94(c) is added to conform to the statutory requirement that the applicant agency provide an evaluation of consistency with enforceable policies. See CZMA §307(d).
930.95	Guidance Provided by State Agency	<ol style="list-style-type: none"> 1) Gives States an option to list assistance activities. 2) General Geographic description to review activities outside the coastal zone. 3) Makes unlisted activities subject to a requirement to notify the applicant agency, federal agency, and OCRM.
930.96	Consistency Review	<p>If the State agency does not object to the proposed activity, the Federal agency may grant the federal assistance to the applicant agency. Notwithstanding State agency consistency approval for the proposed project, the Federal agency may deny assistance to the applicant agency.</p> <p>Federal agencies should not delay processing (so long as they do not approve) the application for Federal assistance.</p>
930.100	Remedial Review	No Federal agency may issue a license or permit for an activity until an affected coastal State has concurred that the activity will be conducted in a manner consistent with the management program unless the Secretary, on his own initiative or on appeal by the applicant, finds that the activity is consistent with the objectives of the Act or is otherwise necessary in the interest of national security. See 930.65.
930.101	Supplemental Review	See 930.46 Supplemental coordination for proposed activities.
Subpart G	SECRETARIAL MEDIATION	Allows for informal mediation by OCRM to attempt to resolve serious disagreements which arise during the administration of approved management programs.

930.120	Appeal to the Secretary Related to the Objectives of the Act and National Security	Federal Assistance activity which a State agency found to be inconsistent with the enforceable policies of the management program may be federally approved because the activity is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security.
930.121	Consistent with the objectives	A Federal license or permit activity, or a federal assistance activity, is “consistent with the objectives or purposes of the Act” if it satisfies each of the following three requirements: 1) Secretary overrides objection only where an activity significantly and substantially furthers the national interests. 2) National interests must outweigh adverse coastal zone effects. 3) Secretary may consider but is not limited to considering, previous appeal decisions, alternatives described in objection letters and alternatives and other new information described during the appeal.
930.125	FEES	Secretary may require or may waive fees for appeals.
930.127	Briefs and Supporting Material	Secretary may consider an appeal of a lack of information objection, but is limited to the information provided to the state at the time of its review.
930.129	Dismissal, Remand, Stay, and Procedural override	Secretary may override objection if it finds that the objection was not properly issued. Secretary may require State to re-review an activity if there is significant new information.
930.130	Closure of the Decision Record and Issuance of Decision	No sooner than 30 days after the close of public comment period, the Secretary shall publish a notice in the Fed. Register stating that the decision record is closed and that no further information, briefs or comments will be considered in deciding the appeal.

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APPENDIX F

CZMA FEDERAL CONSISTENCY OVERVIEW

CZMA

FEDERAL CONSISTENCY

OVERVIEW

SECTION 307 OF THE
COASTAL ZONE MANAGEMENT ACT OF 1972

FEBRUARY 20, 2009

OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL OCEAN SERVICE
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT
1305 East-West Hwy. (N/ORM), Silver Spring, Maryland 20910

FEDERAL CONSISTENCY OVERVIEW*

February 20, 2009

Office of Ocean and Coastal Resource Management (OCRM)

National Ocean Service (NOS)

National Oceanic and Atmospheric Administration (NOAA)

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I. INTRODUCTION

This document is an overview of the Coastal Zone Management Act (CZMA) federal consistency provision and is the principal educational material used in OCRM's Federal Consistency Workshops. This overview is for general information and educational purposes only; it is not an enforceable document or intended to establish policy and should not be cited to for CZMA compliance purposes. The CZMA and National Oceanic and Atmospheric Administration (NOAA) regulations contain the information needed for CZMA compliance, *see* **CZMA § 307 (16 U.S.C. § 1456)** and NOAA's **federal consistency regulations, 15 C.F.R. part 930**. This Federal Consistency Overview, the statute, the regulations, state and federal contacts and other information are located on OCRM's Federal Consistency web page at:

<http://coastalmanagement.noaa.gov/consistency/welcome.html>

The CZMA was enacted on October 27, 1972, to encourage coastal states, Great Lake states, and U.S. Territories and Commonwealths (collectively referred to as "coastal states" or "states") to be proactive in managing natural resources for their benefit and the benefit of the Nation. The CZMA recognizes a national interest in the resources of the coastal zone and in the importance of balancing the competing uses of those resources. The CZMA is a voluntary program for states. If a state elects to participate it develops and implements a coastal management program (CMP) pursuant to federal requirements. *See* CZMA § 306(d); 15 C.F.R. part 923. State CMPs are comprehensive management plans that describe the uses subject to the management program, the authorities and enforceable policies of the management program, the boundaries of the state's coastal zone, the organization of the management program, and related state coastal management concerns. The state CMPs are developed with the participation of Federal agencies, state and local agencies, industry, other interested groups and the public. Thirty-five coastal states are eligible to participate in the federal coastal management program. Thirty-four of the eligible states have federally approved CMPs. Illinois is currently developing a CMP.

The CZMA federal consistency provision is a cornerstone of the CZMA program and a primary incentive for states' participation. Federal consistency provides states with an important tool to manage coastal uses and resources and to facilitate cooperation and coordination with Federal agencies. Under the CZMA Federal agency activities that have coastal effects are consistent to the maximum extent practicable with federally approved enforceable policies of a state's CMP. In addition, the statute requires non-federal applicants for federal authorizations and funding to be consistent with enforceable policies of state CMPs.

A lead state agency coordinates a state's federally approved CMP and federal consistency reviews. At the federal level, OCRM, within NOAA/NOS, among other duties and services, 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.

NOAA's federal consistency regulations were first issued in 1979. The regulations were substantially revised in 2000. *See* 65 Fed. Reg. 77123-77175 (Dec. 8, 2000). The 2000 revisions were largely in response to the 1990 amendments to the CZMA, *see* Pub. L. No. 101-508 and related Conference Report, H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess., 970-972 (Conference Report). The regulations were further revised in 2006 in response to *The National Energy Policy Development Group's Report* (May 2001) (Energy Report) and the *Energy Policy Act of 2005* (Pub. L. No. 109-58) (EPA Act). *See* 71 Fed. Reg. 787-831 (Jan. 5, 2006) and 71 Fed. Reg. 75864-75865 (Dec. 19, 2006).

II. DEFINITION

Federal consistency is the CZMA provision 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) should be consistent with the *enforceable policies* of a coastal state's federally approved CMP. These terms are described below.

A. Federal actions: There are four types of federal actions: Federal agency activities, federal license or permit activities, outer continental shelf (OCS) plans, and federal assistance to state and local governments.

1. ***Federal agency activities*** — activities and development projects performed by a Federal agency, or a contractor for the benefit of a Federal agency. 15 C.F.R. part 930, subpart C.

E.g., 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 OCS oil and gas lease sale by 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. 15 C.F.R. part 930, subpart D.

E.g., activities requiring Corps 404 permits, Corps permits for use of ocean dump-sites, Nuclear Regulatory Commission licenses for nuclear power plants, licenses from the Federal Energy Regulatory Commission (FERC) for hydroelectric facilities;

3. ***OCS plans*** — MMS approvals for OCS plans, pursuant to the Outer Continental Shelf Lands Act. The CZMA process is similar to federal license or permit activities. 15 C.F.R. part 930, subpart E.

4. ***Federal assistance to state and local governments.*** 15 C.F.R. part 930, subpart F.

E.g., 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.

B. Coastal Effects:

At the heart of federal consistency is the “effects test.” 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. NOAA's regulations, 15 C.F.R. § 930.11(g), define coastal effects as:

The term “effect on any coastal use or resource” means any reasonably foreseeable effect on any coastal use or resource resulting from a Federal agency activity or federal license or permit activity (including all types of activities subject to the federal consistency requirement under subparts C, D, E, F and I of this part.) Effects are not just environmental effects, but 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.

As described in the preamble to the 2000 revisions to NOAA's consistency regulations, the definition of the effects test is from the 1990 amendments to the CZMA. These amendments, in part, replaced the phrase "directly affecting the coastal zone," reflecting Congressional intent to overturn the effect of *Secretary of the Interior v. California*, 464 U.S. 312 (1984). See 136 Cong. Rec. H 8076 (Sep. 26, 1990). The 1990 CZMA amendments also clarified that all federal agency activities meeting the "effects" standard are subject to CZMA consistency and that there are no exceptions, exclusions or categorical exemptions from the requirement. Conference Report at 970-71; 136 Cong. Rec. H 8076 (Sep. 26, 1990). The Conference Report further informed NOAA's 2000 regulatory revisions by stating that:

The question of whether a specific federal agency activity may affect any natural resource, land use, or water use in the coastal zone is determined by the federal agency. The conferees intend this determination to include effects in the coastal zone which the federal agency may reasonably anticipate as a result of its action, including cumulative and secondary effects. Therefore, the term "affecting" is to be construed broadly, including direct effects which are caused by the activity and occur at the same time and place, and indirect effects which may be caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.

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, in fact, uses or resources of a state's coastal zone. The burden for determining or demonstrating effects is greater the farther removed 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 should not be sufficient by itself to demonstrate that reasonably foreseeable effects extend to uses or resources of the coastal zone. As NOAA explained in its 2000 Final Rule amending the federal consistency regulations (65 Fed. Reg. 77130 (Dec. 8, 2000)):

[T]he effect on a resource or use while that resource or use is outside of the coastal zone could result in effects felt within the coastal zone. However, it is possible that a federal action could temporarily affect a coastal resource while that resource is outside of the coastal zone, e.g., temporary harassment of a marine mammal, such that resource impacts are not felt within 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 a state's federally approved CMP. CZMA § 304(6a) and 15 C.F.R. § 930.11(h). OCRM has informed states that enforceable policies are given legal effect by state law and do not apply to federal lands, federal waters, federal agencies or other areas or entities outside a state's jurisdiction, unless authorized by federal law (the CZMA does not confer such authorization).

Early coordination and identification of applicable state CMP enforceable policies is key to ensuring that Federal agencies and applicants address state policies and issues. Early coordination will also help determine what measures, if any, need to be taken so that the activity is consistent with the state policies.

OCRM approves the incorporation of enforceable policies, and changes to enforceable policies, into state CMPs. *See* CZMA §§ 306(d) and 306(e). The program change process serves an important notice and review purpose in the CZMA state-federal partnership. In return for the federal consistency authority granted to states, federal agencies are provided with an opportunity to review and comment on the development of a state's CMP and on subsequent changes to the CMP. This also means that a policy should not become an enforceable policy of a state's CMP by "incorporation by reference." For example, OCRM has approved the incorporation of enforceable policy "A" into a state's CMP. Policy A references another policy "B" that has not been submitted to OCRM for approval. Policy B, even though it is referenced in policy A is *not* an enforceable policy of the state's federally approved CMP, because policy B has not gone through the program change approval process, giving OCRM, Federal agencies and the public an opportunity to comment. The incorporation of policy B into a state's CMP would have to be approved by OCRM to become an enforceable policy of a state's federally approved CMP. OCRM, using its program change regulations (15 C.F.R. part 923, subpart H) and *Program Change Guidance* (July 1996), evaluates states' proposed enforceable policies as described below.

1. Policies are legally binding under state law and apply only to areas and entities within the state's jurisdiction. CZMA § 304(6a).

Approval Consideration: (1) A wetlands protection policy in a state statute, regulation or in a state's CMP program document is an enforceable policy if the statute or regulation contains a mechanism that imposes the policy on the public and private uses within the state's jurisdiction. This could be a state permit program or a provision in state law that requires all state agencies to apply the policy in their permit and enforcement actions. A policy in a state's CMP program document should also be linked to such a statutory or regulatory enforceable mechanism.

(2) The CZMA does not authorize states to establish regulatory standards for Federal agencies. A state policy that would regulate or otherwise establish standards for Federal agencies or federal lands or waters would not meet the CZMA's definition of "enforceable policy" (i.e., legally binding under state law). CZMA § 304(6a). States apply their federally approved enforceable policies through CZMA federal consistency reviews. Federal agencies are consistent to the maximum extent practicable and non-Federal applicants for federal authorizations are fully consistent with the enforceable policies.

Applicability Consideration: Some state CMP consistency decisions are made by issuance or denial of state permits (the states' enforceable policies are contained within the standards of the states' permit programs). However, a state should not determine consistency by issuance of a state permit for Federal agency activities under CZMA § 307(c)(1). Under NOAA's regulations, neither the CZMA nor OCRM's approval of a state's enforceable policy or permit program authorize the application of state permit requirements to Federal agencies. The Federal agencies are consistent to the maximum extent practicable with the underlying enforceable policies of the state permit program, but do not have to apply for or obtain the state permit (unless another federal law requires the federal agency to obtain the permit). Non-federal applicants for federal license or permit activities would have to apply for and obtain the applicable state permit for state CZMA concurrence where the proposed activity is located within the state's jurisdiction.

2. Policies are not preempted by Federal law. *See* OCRM's *Program Change Guidance*, section II.D.

Approval Consideration: Federal preemption is the principle, derived from the Supremacy Clause of the Constitution, that a federal law can supersede or supplant any inconsistent state law or regulation. Preemption applies to state law and not other federal law. OCRM's long-standing interpretation of the

definition of “enforceable policy” under the CZMA (16 U.S.C. § 1453(6a)) is that if a state policy specifically seeks to regulate an activity where state regulation is preempted by federal law, it is not legally binding under state law and would not be an enforceable policy under the CZMA. For example, North Carolina sought to regulate low level aircraft in flight by adopting policies that imposed minimum altitude and decibel levels, and other overflight restrictions. OCRM denied the state’s request to incorporate these policies into the North Carolina CMP because the policies were, on their face, preempted by federal law administered by the Federal Aviation Administration.

Applicability Consideration: Under the federal consistency authority, states apply NOAA-approved enforceable policies to federal actions. If a state’s enforceable policies, as specifically described or applied, are not preempted, the state may apply them through CZMA federal consistency to a preempted field. It should be noted that whether state action is preempted is a fact-specific inquiry.

3. Policies should be applied to all relevant public and private entities and would not discriminate against a particular type of activity, or, even if neutrally written, against a particular Federal agency. *Id.*

Approval Consideration: State policies should be based on effects to coastal uses or resources and not on a particular type of activity. This ensures that the policy is applicable to any type of activity that has coastal effects and will not discriminate against a particular user group. For example, a state was concerned with possible impacts from offshore oil and gas development on specific fishing areas and on discharges that might follow ocean currents and eddies into the state’s estuarine areas. The state proposed oil and gas specific energy policies. OCRM did not approve the policies because they imposed requirements on one user group, when other types of activities might have the same coastal impacts. The state re-wrote the policies to be based on coastal impacts and information needs to assess such impacts. Now the policies are applicable to all OCS energy projects and other activities having similar effects.

4. Policies are consistent with CZMA federal consistency requirements. OCRM’s *Program Change Guidance*, section II.D; *see also id.* at Appendix B.5. (federal consistency procedures).

Approval Consideration: When state policies are proposed to be incorporated into a CMP, a state should ensure that the CMP continues to balance the objectives of the CZMA and continue to give priority consideration to coastal-dependent uses and orderly processes for siting major facilities related to national defense, energy, fisheries development, recreation, ports and transportation. *See CZMA § 303(2)(D)*. Policies affecting these “national interests” have implications for federal consistency. For example, a state has a policy that opposes all offshore oil and gas development. OCRM did not approve the incorporation of the policy into the state’s federally approved CMP, because OCRM determined the policy would affect the state’s obligation to consider the national interest in energy facility siting.

Applicability Consideration: States should not require a Federal agency to redefine an activity proposed by a Federal agency. For Federal agency activities under CZMA § 307(c)(1), states review activities and development projects that are *proposed* by a Federal agency. 15 C.F.R. § 930.36(a). *See also, e.g.,* 15 C.F.R. §§ 930.35, .39(a), .46(a), .1(c), .11(d); 65 Fed. Reg. 77130, Col. 2-3 (December 8, 2000) (preamble to final 2000 rule). For example, a state proposed a policy that, when dredged material is not suitable for beach renourishment, would require a dredger to obtain suitable material from a location not related to the dredging to renourish the beaches. OCRM did not approve the policy as written because it would redefine, in part, an Army Corps of Engineers dredging project to a beach renourishment project that is not related to the dredging. The policy was re-written to tie beach renourishment and the alternate source of material to mitigate impacts to coastal uses or resources resulting from proposed dredging.

D. Coastal uses: Some examples of 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.

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 nontidal wetlands, ocean waters, estuaries, rivers, streams, lakes, aquifers, submerged aquatic vegetation, land, plants, trees, minerals, fish, shellfish, invertebrates, amphibians, birds, mammals, and reptiles, etc.

III. BENEFITS

Federal consistency is an important mandatory, but flexible mechanism to foster consultation, cooperation, and coordination between states and Federal agencies. Federal consistency is more than just a procedural dictate; it helps ensure the balanced use and protection of coastal resources through state CMP policies.

To maximize the benefits of federal consistency, Federal agencies should provide routine notification to coastal states of actions affecting the coastal zone, and coastal states should pay attention to proposed federal actions, develop adequate consistency procedures, and notify Federal agencies, other state agencies, and others of a state's assertion of consistency. For example, states could make connections with the Federal agencies, inform them of the federal consistency requirements, possibly develop memoranda of understanding (MOUs), ensure that the CMP obtains notice, and respond when the CMP does receive notice. In summary, Federal agencies and others have an affirmative duty to comply with the federal consistency requirements, but states should take consistent and assertive steps.

Federal consistency provides Federal agencies with an effective mechanism to document coastal effects and to address state coastal management concerns. Moreover, compliance with the consistency requirement complements National Environmental Policy Act (NEPA) compliance. Even though the CZMA effects test is different than NEPA investigations and the CZMA requires Federal agencies to alter projects to be consistent with state CMP policies, NEPA is an effective delivery mechanism for federal consistency. (States do not review NEPA documents for consistency – they review the federal action a NEPA document evaluates, but NEPA documents often provide necessary background information.)

Early attention to federal consistency can provide the Federal agency with state CMP and public support and a smoother and expeditious federal consistency review. Early consultation and cooperation between Federal agencies and state CMPs can help Federal agencies avoid costly last minute changes to projects in order to comply with state CMP policies.

States concur with approximately 93-95% of all federal actions reviewed. Maintaining this percentage means that states and Federal agencies should know their consistency responsibilities and develop cooperative relationships to foster effective coordination and consultation.

IV. NATIONAL INTEREST CONSIDERATIONS

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

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, referred to as the “effects test.” 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, a Federal agency makes this determination of whether its activity will have coastal effects. Under NOAA’s regulations, a “function” by a Federal agency refers to a *proposal for action* that has reasonably foreseeable coastal effects, and not to all tasks, ministerial activities, meetings, discussions, exchanges of views, and interim or preliminary activities incidental or related to a proposed action. For federal license or permit activities and federal assistance activities, state CMPs propose to review activities that will have coastal effects and OCRM makes the determination of effects by approving the *lists* of federal authorizations and financial assistance programs that a state wishes to include in its CMP. In order to be on the list, the types of activities covered by the federal authorization or funding program 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 notifies the applicant and the Federal agency and seeks OCRM approval to review the activity. OCRM’s decision is based on whether the state has shown that an unlisted activity will have reasonably foreseeable coastal effects and, again, Federal agencies and the applicant have an opportunity to comment to OCRM.

Federally approved programs and state CMP enforceable policies. OCRM, with the opportunity for 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.

Consistent to the maximum extent practicable (only applies to Federal agency activities). NOAA’s regulations define “consistent to the maximum extent practicable” to mean a Federal agency activity is fully consistent with the enforceable policies of a state’s CMP 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 should be consistent with that policy. However, a Federal agency’s administrative record applying its legal mandates 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.

For example, this means that even if a state objects, the Minerals Management Service (MMS) may proceed with an OCS lease sale when MMS provides the state with the reasons why the Outer Continental Shelf Lands Act (OCSLA) and MMS’s administrative record supporting the lease sale decision prohibits MMS from fully complying with the state’s enforceable policies.

Under NOAA’s regulations, the consistent to the maximum extent practicable standard also allows Federal agencies to deviate from State enforceable policies and CZMA procedures due to “exigent circumstances.” An exigent circumstance is an emergency or unexpected situation requiring a Federal agency to take quick or immediate action.

In addition, as part of its consistent to the maximum extent practicable argument, MMS could proceed if it determined that its activity was *fully* consistent with the State’s enforceable policies. *See* 15 C.F.R. § 930.43(d). In either case, the Federal agency provides the state CMP agency with a written notice that it is proceeding over the state’s objection and explains why the activity is consistent to the maximum extent practicable.

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 should consult with the state CMP as early as possible.

A Federal agency should not 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.

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. The Secretarial appeal process is discussed in more detail later in this document. There is also a database of all appeals filed with the Secretary on OCRM's Federal Consistency web page.

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 are 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). This exemption was added to the statute in 1990 and has been used once. In 2007, the California Coastal Commission (CCC) objected to Navy's use of Mid-Frequency Active (MFA) sonar asserting Navy's mitigation measures were not adequate to protect marine mammals. This eventually resulted in President Bush, on January 15, 2008, using his statutory authority under the CZMA to exempt from compliance certain MFA sonar activities by the Navy that a federal court determined were not consistent with the State of California's federally-approved CZMA program.

Mediation by the Secretary 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.

V. BASIC FEDERAL CONSISTENCY PROCEDURES

Two important things to keep in mind to facilitate consistency reviews 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, and Appendices B and C for flow charts for Federal agency activities and Federal license or permit activities.

A. Federal Agency Activities and Development Projects

Federal agencies proposing an activity should follow the requirements of CZMA § 307(c)(1), (2)(16) U.S.C. § 1456(c)(1), (2)) and 15 C.F.R. part 930, subparts A, B and C. For example:

1. Federal “development projects” *inside* the boundaries of a state’s coastal zone are deemed to have coastal effects and a Consistency Determination should be submitted to the state CMP.
2. Federal agency determines if a federal activity (in or outside coastal zone) (and development projects outside the coastal zone) will have reasonably foreseeable coastal effects. States are encouraged to list Federal agency activities that are expected to affect coastal uses or resources in their approved CMPs, and to monitor unlisted activities and to notify Federal agencies when an unlisted activity should undergo consistency review.

For Federal agency activities, the listed/unlisted provisions in NOAA’s regulations are recommended procedures for facilitating state-federal coordination. Whether or not an activity is listed, Federal agencies provide state CMPs with Consistency Determinations (CDs) for Federal agency activities affecting any coastal use or resource. Because Federal agencies have an affirmative statutory duty to provide states with CDs for activities with reasonably foreseeable coastal effects and because the statute requires state CMP agencies to provide an opportunity for public input into a state’s consistency decision, a state should not relieve the Federal agency or itself of consistency obligations by listing or not listing a Federal agency activity. If a state and/or a Federal agency believe that a type of Federal agency activity should not be subject to federal consistency, then they may use the applicable provisions provided in NOAA’s regulations: general permits (§930.31(d)); *de minimis* activities (§930.33(a)(3)); environmentally beneficial activities (§930.33(a)(4)); general consistency determinations (§930.36(c)); negative determinations and general negative determinations (§930.35).

3. The Federal agency should contact the state CMP at the earliest possible moment in the planning of the activity to ensure early state-Federal coordination and consultation.
4. If coastal effects are reasonably foreseeable, then the Federal agency submits a Consistency Determination (CD) to a state CMP at least 90 days before activity starts. A CD should include a detailed description of the proposed activity, its expected coastal effects, and an evaluation of how the proposed activity is consistent with applicable enforceable policies in the state’s CMP. The Federal agency does not need to submit anything beyond that described in 15 C.F.R. § 930.39 and may submit that information in any manner it chooses. Finally, Federal agencies provide, and states review, CDs only for the Federal agency’s proposed action for consistency — Federal agencies should not provide, and states should not review, CDs for NEPA documents, ESA consultations, federal permits the federal agency may need, etc., that are related to the proposed activity. These items may, of course be useful to the Federal agency and state as part of the background information the Federal agency may provide with its CD, but they should not be the subject of a separate CZMA review.

Once a complete CD has been received by a state CMP, the state should not delay the start of the 90-day CZMA review period by requiring information that is in addition to the information required by §930.39 or that the Federal agency apply for or obtain a state permit. If the state CMP agency believes that the information required by §930.39 has not been submitted, it should immediately notify the Federal agency.

5. If no coastal effects, a Federal agency may provide a Negative Determination. *See* 15 C.F.R. § 930.35.
6. State CMP has 60 days (plus appropriate extensions) to concur with or object to a Federal agency’s CD. State CMP agency and Federal agency may agree to alternative time period. Any such agreement should be set forth in writing so that it is clear there is a meeting-of-the-minds between a state and

Federal agency. Ideally, the written agreement should be one document that both parties sign. The written agreement should refer to a specific end date and should not be written to require a later event or condition to be satisfied.

7. State CMP should provide for public comment on the state's consistency review. A state should not rely on a Federal agency notice, unless the Federal agency notice specifically says that comments on the *state CMP's consistency review* should be sent to the state CMP agency.
8. State concurrence is presumed if the state does not meet time frames.
9. If a state CMP agrees with a CD, then the Federal agency may immediately proceed with the activity. If a state objects, then the state's objection should describe how the proposed activity is inconsistent with specific enforceable policies of the federally approved CMP. In the event of an objection, a state CMP 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 conflicts have been resolved. However, at the end of the 90-day period a Federal agency may, notwithstanding state CMP objection, proceed with the activity if the Federal agency clearly describes, in writing, to the state CMP how the activity is consistent to the maximum extent practicable.
10. If there is a dispute between a Federal agency and state CMP, either party may seek mediation by OCRM or the Secretary of Commerce (the Secretary's mediation is a more formal process).

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 CZMA § 307(c)(3)(A) (16 U.S.C. § 1456(c)(3)(A)) and 15 C.F.R. part 930, subparts A, B and D. This includes American Indian and Alaska Native entities applying for federal authorizations.¹

There are essentially four elements for determining that an authorization from a Federal agency is a "federal license or permit" subject to federal consistency review. First, federal law requires that an applicant obtain a federal authorization. Second, the purpose of the federal authorization is to allow a non-federal applicant to conduct a proposed activity. Third, the activity proposed has reasonably foreseeable effects on a state's coastal uses or resources, and fourth, the proposed activity was not previously reviewed for federal consistency by the state CMP agency (unless the authorization is a renewal or major amendment pursuant to §930.51(b)). These four elements are embodied in NOAA's regulations as discussed below:

1. State CMP, with OCRM approval, determines effects:
 - a. listed v. unlisted activity; and b. inside v. outside coastal zone.

¹ NOAA's regulations do not specifically include American Indians and Alaska Natives in the definition of applicant, *see* 15 C.F.R. § 930.52. However, the statute has been interpreted by OCRM and federal courts to apply to American Indians and Alaska Natives. *See Narragansett Indian Tribe of Rhode Island v. The Narragansett Electric Comp.*, 878 F. Supp. 349, 362-365 (D. RI 1995), *upheld on other grounds*, 89 F.3d 908 (1st Cir. 1996).

All federal license or permit activities occurring in the coastal zone are deemed to affect coastal uses or resources if the state CMP has *listed* the particular federal license, permit or authorization in its federally approved CMP. The lists may be updated through OCRM's program change process. Prior to submitting the updated list to OCRM the state should consult with the relevant Federal agency.

For a *listed* activity occurring *in the coastal zone*, the applicant submits a Consistency Certification to the authorizing Federal agency and the affected state CMP(s). In addition to the Certification, the applicant provides the state with the *necessary data and information* required by NOAA's regulations at 15 C.F.R. § 930.58. This information will usually be contained in the application to the Federal agency, but may include other information described by a state CMP, if the information is *specifically included in the state's federally approved CMP document and identified as "necessary data and information."* If a state wants to require information needed to commence the six-month review period in addition to that described by NOAA in §930.58(a), the state should amend its CMP to identify specific "necessary data and information" pursuant to §930.58(a)(2).

For *listed* activities *outside the coastal zone*, an applicant submits a Consistency Certification to the state CMP and the Federal agency if the activity falls within a *geographic location* described in a state's CMP for listed activities outside the coastal zone. For listed activities outside the coastal zone where a state has *not* described a geographic location, a state CMP may follow the unlisted activity procedure described below, if it wants to review the activity.

For unlisted activities, in or outside the coastal zone, a state CMP may notify the applicant, the relevant Federal agency, and OCRM that it intends to review an unlisted activity on a case-by-case basis. The state CMP makes this notification within 30 days of receiving notice of the application to the Federal agency for an activity; otherwise the state waives its consistency rights. The waiver does not apply where the state CMP does not receive notice (notice may be actual or constructive).² OCRM may approve the state's consistency review. The applicant and the Federal agency have 15 days from receipt of a state CMP's request to provide comments to OCRM. OCRM makes a decision usually within 30 days of receipt of a state's 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. The unlisted activity procedure is available for active applications. If an applicant, of its own accord, provides a state CMP with a consistency certification for an unlisted activity, then OCRM's

² For example, constructive notice may be provided if it is published in an official federal public notification document or through an official state clearinghouse. For either form of notice, the notices contain sufficient information for a state CMP agency to learn of the application for the activity, determine the activity's geographic location, and determine whether coastal effects are reasonably foreseeable.

A newspaper article containing the information required by 15 C.F.R. § 930.54(a)(2) may provide notice. However, even assuming a newspaper article, or other similar form of notice, describes the activity and its location with sufficient specificity for a state to determine whether coastal effects are reasonably foreseeable, such notice should verify that an application was received by a Federal agency. For example, receipt of an application may be verified if a Federal agency spokesperson was quoted in the article stating that the agency had received the application for the federal authorization. Statements by other sources as to whether a Federal agency received the application could be speculative. If a statement by a Federal official is not in the article, then once the state CMP agency read the article, it could seek to verify whether the Federal agency received an application. The 30-day notification period could begin when a state CMP agency verified that a federal application was filed.

approval is deemed and the applicant is subject to all the relevant provisions of the regulations and the state CMP need not seek OCRM's approval. (The authorizing federal agency should not require an applicant to provide a consistency certification if the applicant is not otherwise required to by NOAA's regulations.)

2. Applicant for any required federal authorization submits a Consistency Certification and necessary data and information to the state CMP. State CMP agency should document when this date occurs. State CMP agency has 30 days to notify the applicant and Federal agency that the submission does not include the necessary data and information. If a state CMP agency does not respond within the 30-day period, the six-month review period begins when the state CMP agency received the applicant's initial CZMA submission, regardless of whether the submission contained all necessary data and information.
3. 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 state CMP agency. When an applicant should submit its Consistency Certification and necessary data and information may vary depending on when information is available. For instance, an applicant may choose not to submit its Consistency Certification at the same time it files its application with the licensing federal agency, but will submit the Consistency Certification after filing the federal application later to ensure information the state needs is included (otherwise a state may choose to object for lack of information if the Consistency Certification is filed too soon). Under the CZMA, a Project applicant must provide the state with a Consistency Certification *within its application* for a Federal license or permit. 16 U.S.C. § 1456(c)(3)(A). At the same time the applicant includes the consistency certification in its application, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data. *Id.* The phrase, "within its application" does not mean that the Consistency Certification must be filed at the time the application is filed; rather that the application must at some time "include" the certification and shall provide the certification to the state "at the same time." This has been long-standing practice by states and applicants. Once the consistency certification and necessary data and information are received by a state, a state then has six months in which to review the Project for consistency with its coastal management program. *Id.*
4. State CMP has six months to respond, but notifies applicant if review will go beyond three months.
5. Applicant and state CMP agency may agree to stay the six-month review period. A stay "tolls" the running of the six-month review period for an agreed upon time ending on a specific date, after which the remainder of the six-month review period would continue. Such agreements are set forth in writing so that it is clear there is a meeting-of-the-minds between the state and the applicant. Ideally, the written agreement should be one document that both parties sign. The written agreement for a stay should specify five (5) dates:
 1. Date the state's 6-month review period commenced;
 2. Date the 6-month period was to end;
 3. Date during the 6-month review period that the stay begins;
 4. Date that the stay ends; and
 5. Date the state's decision is due. For example, the 6-month period was to end June 30 and a stay was executed beginning on June 1 and ending on September 1. There are 30 days left in the 6-month review period. Therefore, the state's decision would now be due September 30 (30 days after the ends). Stays should not be written to require a later event or condition to be satisfied to end the stay. If a state objects to an applicant's project and the applicant appeals to the Secretary of Commerce, failure to follow these instructions could result in the Secretary

overriding the state's objection because the state's objection was issued after the six-month review period due to an unsupportable stay agreement.

6. The state should provide for public comment (state can require applicant to publish notice or may combine notice with Federal agency, if Federal agency agrees).
7. State concurrence presumed if state does not meet six-month time frame.
8. If state objects, Federal agency does not authorize the activity to commence. If a state issues a conditional concurrence and the applicant does not amend its federal application to include a state's conditions, a state's conditional concurrence automatically becomes an objection. (State conditions of concurrence are linked to the need to be consistent with specific state enforceable policies.)
9. Applicant may appeal a state's objection to the Secretary of Commerce within 30 days of the objection. If the Secretary overrides a state's objection, the Federal agency may authorize the project. If the Secretary does not override a state's objection, the Federal agency does not authorize the project. The Secretary's decision is final federal agency action for purposes of the Administrative Procedure Act. An applicant may also negotiate with a state to remove the state's objection.

C. OCS Plans

A private person or business applying to the U.S. Department of the Interior's Minerals Management Service (MMS) for outer continental shelf (OCS) exploration, and development and production activities follows the requirements of CZMA § 307(c)(3)(B)(16 U.S.C. § 1456(c)(3)(B)) and 15 C.F.R. part 930, subparts A, B and E. For example:

1. Any person who submits to MMS an OCS plan for the exploration of, or development and production of, any area leased under the Outer Continental Shelf Lands Act, certifies that any activities described in detail in such OCS plans will be conducted in a manner consistent with the state CMPs. MMS then sends the plan and consistency certification to the applicable state(s).
2. The process and requirements for this section generally mirror those of federal license or permit activities. State should notify applicant if state review will extend beyond three months, otherwise state's concurrence is presumed.
3. Determining whether a particular OCS oil and gas plan is subject to state CZMA review differs somewhat from federal license or permit activities in that, generally, states have not had to describe geographic areas in federal waters where OCS oil and gas plans would be subject to state CZMA review. This is because the CZMA mandates such reviews and initially OCS oil and gas projects were not far offshore. As the industry moves farther offshore, whether a state should have CZMA review may not be as easily determined. As described in the preamble to NOAA's Final Rule for the 2006 amendments to the regulations (71 Fed. Reg. 790 (Jan. 5, 2006)):

For OCS EP's and DPP's the CZMA mandates State consistency review. However, as with Federal agency activities, a coastal State's ability to review the Plans stops at the point where coastal effects are not reasonably foreseeable. Whether coastal effects are reasonably foreseeable is a factual matter to be determined by the State, the applicant and MMS on a case-by-case basis. If a State wanted to ensure that OCS EP's and DPP's located in a particular offshore area would be subject to State CZMA review automatically, a State could, if NOAA

approved, amend its CMP to specifically describe a geographic location outside the State's coastal zone where such plans would be presumed to affect State coastal uses or resources. *See* 15 CFR § 930.53. Or, if a State wanted to review an EP or DPP where the applicant and/or MMS have asserted that coastal effects are not reasonably foreseeable, the State could request approval from NOAA to review such plans on a case-by-case basis. *See* 15 CFR § 930.54 (unlisted activities). In both situations, NOAA would approve only if the State made a factual demonstration that effects on its coastal uses or resources are reasonably foreseeable as a result of activities authorized by a particular EP or DPP. Similarly, where the applicant or FERC has asserted that a proposed project located outside the coastal zone or outside a geographic location described in a state's management program pursuant to 15 CFR § 930.53, will not have reasonably foreseeable coastal effects, NOAA would not approve a State request to review the project unless the State made a factual demonstration that the project has reasonably foreseeable coastal effects.

D. Federal Assistance Activities

A state agency or local government applying for federal financial assistance follows the requirements of CZMA § 307(d)(16 U.S.C. § 1456(d)) and 15 C.F.R. part 930, subparts A, B and F. For example:

1. States list in their CMPs the federal assistance activities subject to review. The state CMP may also notify an applicant agency and Federal agency that it will review an unlisted activity. OCRM approval is not required for the review of unlisted federal assistance activities.
2. 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.
3. Federal agency does not authorize the use of federal funds until state CMP has concurred.
4. State or local government applicant agency may appeal a state objection to the Secretary of Commerce who may override the state's objection.

E. Other Federal Actions

The Federal agency activity category, 15 C.F.R. part 930, subpart C, is a "residual" category. A federal action that will have reasonably foreseeable coastal effects, but which does not fall under 15 C.F.R. part 930, subpart D (federal license or permit), subpart E (OCS plans), or subpart F (federal assistance to state agency or local government), is a Federal agency activity under subpart C. For example, if a Federal agency is providing funds to a private citizen for disaster relief from a hurricane, and the funds will be used for an activity with coastal effects, then the Federal agency follows the requirements for Federal agency activities and provides the state CMP with a Consistency Determination.

F. Mediation of Disputes

In the event of a serious disagreement between a state CMP 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 from 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 a dispute through OCRM or another facilitator. OCRM has successfully mediated disputes and offers its good offices to resolve conflicts between states, federal agencies, tribes and others. Most disputes are addressed through this informal method. Both parties may request OCRM involvement, and participation is non-binding.

G. Appeals to the Secretary of Commerce

The CZMA provides an administrative appeal to the Secretary of Commerce (Secretary) from a consistency objection by a coastal state. In the case of a federal license or permit, an OCS plan, or an application for federal financial assistance, an applicant may request that the Secretary override a state's objection if the activity is consistent with the objectives of the CZMA (Ground I), and/or is otherwise necessary in the interest of national security (Ground II). 16 U.S.C. §§ 1456(c)(3)(A),(B), and (d). Secretarial appeals are not available for Federal agency activities. The requirements for appeals are found at 15 C.F.R. part 930, subpart H. Both states and applicants should pay close attention to the consistency review time periods, six-month stay provisions, objection requirements and appeal procedures in the regulations; otherwise, the Secretary or NOAA may override a state's objection on procedural grounds or dismiss an appellant's appeal for failure to follow the appeal procedures.

If the requirements of either Ground I or Ground II are met, the Secretary overrides a 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 a state objection for CZMA compliance, e.g., whether the objection is based on enforceable policies or the state issued its objection within the six-month review period, the Secretary does not review the objection for compliance with state laws and policies.

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

The Secretary appeal process is final Federal agency action under the Administrative Procedure Act and is a necessary administrative action prior to litigation. See OCRM's Federal Consistency web page at: <http://coastalmanagement.noaa.gov/consistency/welcome.html> for a list of all CZMA appeals filed with the Secretary. In addition, the NOAA Office of General Counsel has a separate website containing Decisions of the Secretary and the administrative records of ongoing appeals: www.ogc.doc.gov/czma.htm

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. As a result, in 2006 NOAA amended 15 C.F.R. part 930, subpart H to allow the Secretary to meet the deadlines.

**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	<ul style="list-style-type: none"> • Notice of Appeal received 		
30	<ul style="list-style-type: none"> • Publish Federal Register (FR) Notice of Appeal and newspaper notices. Notice <i>must</i> be published by day 30. • Public Comment Period and Federal Agency Comment Period opens. • Receipt of Appellant’s Brief and Appendix. 		
60	<ul style="list-style-type: none"> • Receipt of State’s Brief and Supplemental Appendix. • Public and Federal Agency Comment periods close unless Public Hearing Request granted. • Request for Public Hearing must be received (within 30 days of FR Notice). 		
80	<ul style="list-style-type: none"> • Receipt of Appellant’s Reply Brief. 		
60-Day Stay Granted		No Stay Granted	
250	<ul style="list-style-type: none"> • Publish Notice closing Record; Record <i>must</i> be closed on day 250 	190	<ul style="list-style-type: none"> • Day 190 is end of 160-day decision record period without stay. • Publish Notice closing Record.
310	<ul style="list-style-type: none"> • Secretary issues Decision or publishes FR Notice re: No Decision–take additional 15 days. 	250	<ul style="list-style-type: none"> • Secretary issues Decision or publishes FR Notice re: No Decision – take additional 15 days.
325	<ul style="list-style-type: none"> • Secretary issues Decision 	265	<ul style="list-style-type: none"> • Secretary issues Decision

H. 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. State A may review an action in State B if previously authorized by NOAA. Under NOAA’s regulations, states may submit to NOAA a list of those activities occurring in specific areas within State B that the state believes will result in coastal effects. NOAA may approve such activities for interstate consistency review, if it concludes such actions will have reasonably foreseeable effects on State A’s coastal uses and resources. *Interstate consistency* does not give State A authority to review the application of the laws or policies of State B. It only allows State A to review the *federal authorization* of an activity. The interstate consistency requirements combine with the requirements under the various types of federal actions. The interstate regulations are found at 15 C.F.R. part 930, subpart I.

OCRM’s interstate consistency regulations were established to provide a process for reviewing federal actions in another state that would involve greater coordination and consultation between states and Federal agencies, as well as provide notice to neighboring states and Federal agencies and applicants proposing federal actions in nearby states.

However, State A may, but is not required to, describe geographic areas within State B for the review of *Federal agency activities* under 15 C.F.R. part 930, subpart C in their CMPs. This is because, even if not described, a Federal agency has a statutory responsibility to provide State A with a CZMA review for *Federal agency activities* with coastal effects, regardless of location (including within the boundaries of State B). See 15 C.F.R. §§ 930.33(c)(1), (d) and 930.155(a). Over the years, federal agencies have provided consistency determinations to states for *Federal agency activities* occurring wholly within the boundary of another state.

See OCRM’s Federal Consistency web page for a short history of interstate consistency as well as the status of interstate proposals submitted to and approved by OCRM.

I. Information in State Objection and Conditional Concurrence Letters

State objection and conditional concurrence letters issued under the CZMA federal consistency provision should include the following information:

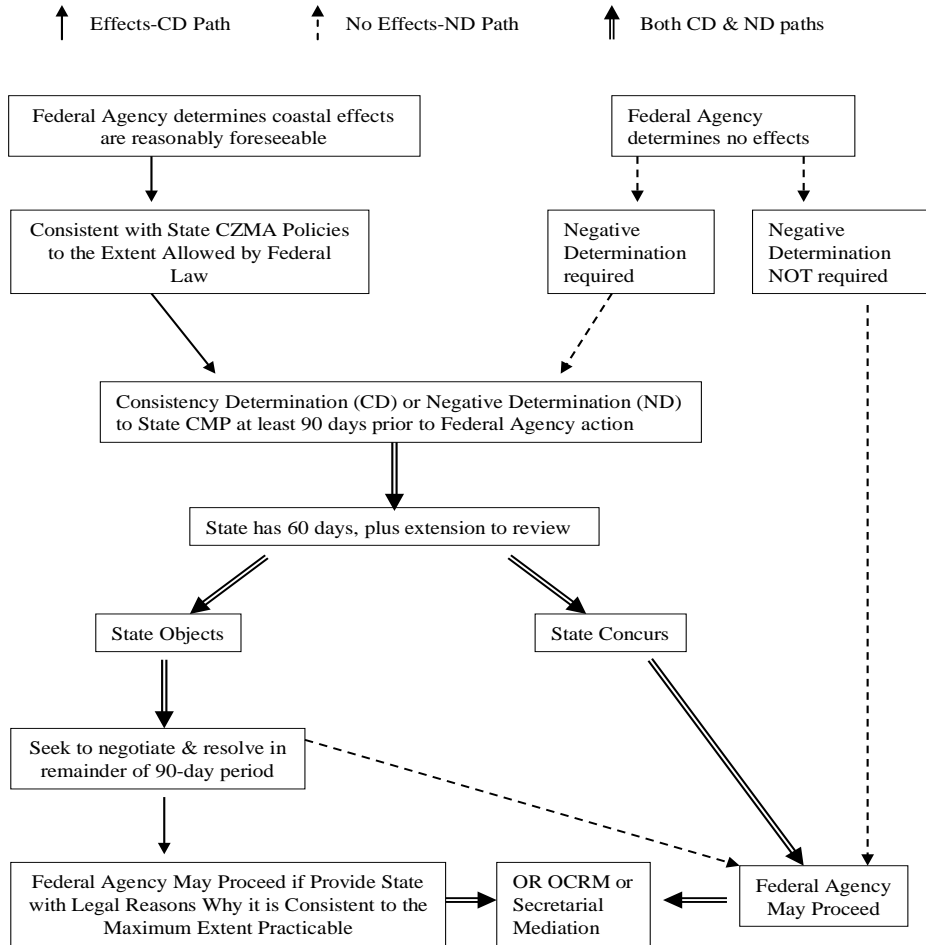
1. An opening paragraph that clearly states whether the state “objects” to the federal action or is issuing a “conditional concurrence.”
2. A description of *how* the activity is inconsistent with specific enforceable policies that are part of the state’s federally approved CMP. Conditions of concurrence should also be directly tied to the need to be consistent with a specific enforceable policy.
3. The objection/conditional concurrence should be received by the federal agency or applicant within the statutory/regulatory time frames. For example, an objection/conditional concurrence letter should document the following dates:
 - Date the complete Consistency Certification (CC) or Consistency Determination (CD) and necessary information was received by the state;
 - Date the state’s review period commenced (should be same date as receipt of the complete CC or CD unless alternative agreement);

- For federal license or permit activities and OCS plans, the date the state provided the 30-day “completeness” finding under 15 C.F.R. § 930.60(a), if applicable;
 - Date the state’s original CZMA decision is due and the revised date, if applicable, based on an agreed-to extension (for Federal agency activities) or stay (for federal license or permit activities);
 - Date that the state provided a three-month notice to the applicant for a federal license or permit activity or OCS plan describing the status of the state’s review; and
 - If an objection is based on a lack of information, the date(s) of the state’s written requests for the information made during the state’s CZMA review period.
4. For federal license or permit activities, OCS oil and gas plans, or financial assistance activities, an objection or conditional concurrence letter should advise the applicant, person or applicant agency, of the right to appeal the state’s objection to the U.S. Secretary of Commerce (with a copy to NOAA’s Office of General Counsel for Ocean Services) within 30 days of receipt of the letter and should provide the addresses for the Secretary and NOAA General Counsel that are described in NOAA’s regulations at 15 C.F.R. § 930.125(d).
 5. If an objection is based on insufficient information, the objection letter describes the nature of the information needed, the necessity of having that information to determine consistency and the date this information was requested, in writing, during the state’s CZMA review period.
 6. An objection letter may include alternatives that would be consistent with the state’s CMP enforceable policies. Consistent alternatives should be described with as much specificity as possible to allow the applicant, or the Secretary of Commerce, to determine if the alternatives are available and reasonable.
 7. A conditional concurrence letter should state that if the conditions are not agreed to, pursuant to 15 C.F.R. § 930.4, then the conditional concurrence automatically becomes an objection.
 8. An objection or conditional concurrence letter should be sent to the applicant, the appropriate Federal agency, and the Director of OCRM.

Appendix A: Summary of CZMA Federal Consistency Provisions

	Federal Agency Activities & Development Projects	Federal License or Permit Activities	OCS Plans	Federal Assistance Activities (State & Local Governments)
CZMA § 307 (16 U.S.C. § 1456)	(c)(1) & (2)	(c)(3)(A)	(c)(3)(B)	(d)
15 C.F.R. part 930	Subpart C §§ 930.30 – 930.46	Subpart D §§ 930.50 – 930.66	Subpart E §§ 930.70 – 930.85	Subpart F §§ 930.90 – 930.101
Activity Subject to State Review if it . . .	Affects any land or water use or natural resource of state coastal zone, regardless of location of activity	Affects any land or water use or natural resource of state coastal zone, and activity is listed in state’s CMP or OCRM approves review of unlisted review	Affects any land or water use or natural resource of state coastal zone	Affects any land or water use or natural resource of state coastal zone, and activity is listed in state’s CMP or state reviews unlisted activity
Consistency Requirement	Consistent to the 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
State Review Period	60 days, plus 15 day extension (or alternative period agreed to by state and federal agency)	6 months	3 months – state may extend to 6 months	State clearinghouse schedule
Impact of State Objection	Federal agency may proceed only if provide legal basis for being consistent to the maximum extent practicable	Federal agency may not authorize activity to commence	Federal agency may not authorize activity to commence	Federal agency may not authorize activity to commence
Administrative Conflict Resolution	Mediation by Secretary of Commerce or OCRM (voluntary, non-binding)	Applicant may appeal to Secretary of Commerce to override state objection	Applicant may appeal to Secretary of Commerce to override state objection	Applicant may appeal to Secretary of Commerce to override state objection

**Appendix B: Federal Agency Activities Flow Chart
(CZMA § 307(c)(1); 15 C.F.R. part 930, subpart C)**



**Appendix C: Federal License or Permit Activities Flow Chart
(CZMA § 307(c)(3)(A); 15 C.F.R. part 930, subpart D)**

