

# A GUIDE TO MARYLAND'S COASTAL ZONE MANAGEMENT PROGRAM FEDERAL CONSISTENCY PROCESS





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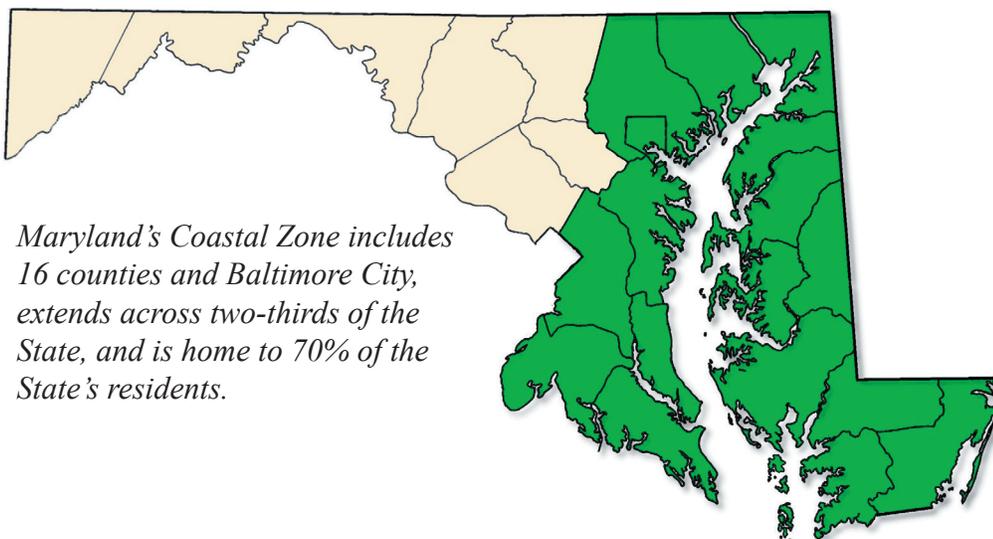


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## MARYLAND'S COASTAL ZONE



*Maryland's Coastal Zone includes 16 counties and Baltimore City, extends across two-thirds of the State, and is home to 70% of the State's residents.*

This guide has been prepared to provide assistance in understanding the federal consistency requirements established by the federal Coastal Zone Management Act and how those requirements are administered through the Maryland Coastal Zone Management Program. Any person who believes that they may be subject to these requirements should consult the federal consistency regulations issued by the National Oceanic and Atmospheric Administration which supercede and provide additional details and clarifications to this guidance.

# BACKGROUND

The term “federal consistency” refers to the review process mandated by Section 307 of the Federal Coastal Zone Management Act of 1972, as amended (CZMA), and National Oceanic and Atmospheric Administration (NOAA) regulations (15 CFR part 930). The CZMA requires that federal actions which are reasonably likely to affect any land or water use, or natural resource of a state’s coastal zone be conducted in a manner that is consistent with a state’s federally approved Coastal Zone Management Program (CZMP). The procedures used by the State of Maryland to implement the federal consistency requirement are discussed on the following pages.

The Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) amended the CZMA to clarify that federal consistency requirements apply when any federal activity, regardless of location, affects any land or water use or natural resource of the coastal zone. The CZARA also clarified that coastal effects include 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.” (H.R. Conference Report No. 964, 101<sup>st</sup> Congress, 2<sup>nd</sup> Session, 970-72)

## List of Acronyms and Abbreviations

CFR	Codified Federal Register
CORPS	U.S. Army Corps of Engineers
CZARA	Coastal Zone Act Reauthorization Amendments of 1990
CZMA	Coastal Zone Management Act of 1972, as amended
CZMP	Coastal Zone Management Program
DNR	Department of Natural Resources
MDP	Department of Planning
EA	Environmental Assessment
MDE	Maryland Department of the Environment
MMS	Minerals Management Service
NOAA	National Oceanic and Atmospheric Administration
OCS	Outer Continental Shelf
WMA	Water Management Administration

# ACTIONS SUBJECT TO FEDERAL CONSISTENCY

The CZMA federal consistency requirement applies to the following federal actions.

- **Direct federal activities, including federal development projects [§307(c)(1) and (2) and 15 CFR part 930, subpart C]**

Direct federal activities and development projects are activities performed by a federal agency, or a contractor for the benefit of a federal agency. Examples include, but are not limited to, the installation of mooring buoys or road construction in National Parks; Fisheries Management Plans developed by the National Marine Fisheries Service; Naval exercises; the disposal of surplus federal land by the General Services Administration; the maintenance of federal navigation channels, construction of a breakwater or beach renourishment project by the U.S. Army Corps of Engineers (Corps); an outer continental shelf oil and gas lease sale by the Minerals Management Service (MMS); improvements to a military base; and the disposal of radioactive or hazardous waste performed by a contractor for a federal agency.

Federal agencies are required to determine whether their activities are reasonably likely to affect any coastal use or resource and to conduct such activities in a manner that is consistent to the maximum extent practicable with the enforceable policies of approved state programs. A consistency determination and supporting materials must be provided to the state CZMP agency at least 90 days prior to the start of the proposed activity unless a different arrangement has previously been made between the federal agency and the authorized state agency. A state has 60 days (plus a 15-day extension) to “concur with” or “object to” the federal agency’s consistency determination. If the state does not respond within 60 days of the federal agency’s notification, it waives its consistency rights. If the state objects, the federal agency may only proceed if federal law prohibits the agency from being fully consistent. If there is a dispute between the federal agency and the state, either party may seek mediation through the Secretary of the U.S. Department of Commerce or informal negotiations through the Office of Ocean and Coastal Resource Management in NOAA.

- **Federal licenses or permits [§307(c)(3)(A) and 15 CFR part 930, subpart D] and Outer Continental Shelf (OCS) exploration, development, and production activities [§307(c)(3)(B) and 15 CFR part 930, subpart E]**

Federal license or permit activities, including OCS oil and gas licenses, are not performed by a federal agency, but require federal permits or licenses or other forms of federal approval. Examples of federal approvals include, but are not limited to, Corps' Section 10 and Section 404 permits; U.S. Coast Guard bridge permits; MMS licenses for OCS exploration, development and production; and Nuclear Regulatory Commission licenses for nuclear power plants.

Applicants for federal licenses or permits including OCS-related permits or approvals, must certify that their proposed activity will be conducted in a manner consistent with the state's CZMP. A state has six months to respond, but must notify the applicant if its review will go beyond three months. In the case of OCS-related permits, the time limit is three months with a three-month extension. It is the state's responsibility to either "concur with" or "object to" the applicant's certification. The federal agency cannot issue an approval until the state concurs. If a state objects to the applicant's certification, the applicant can appeal the state's objection to the Secretary of Commerce on the grounds described in 15 CFR part 930, subpart H.

- **Federal assistance to state and local governments [Section 307(d) and 15 CFR part 930, subpart F]**

This category covers federal financial assistance to states and local governments. Examples include, but are not limited to, Federal Highway Administration funds to states; construction grants for wastewater treatment facilities; hazardous waste management funds; and Housing and Urban Development community development block grants.

The CZMA requires that state and local governments submitting applications for federal assistance document that their application has been reviewed for consistency by the state's CZMP. If the state CZMP agency does not object to the proposed activity, the federal agency may grant the assistance. The applicant agency can appeal a state's objection to the Secretary of Commerce on the grounds described in 15 CFR part 930, subpart H.

# MARYLAND'S CONSISTENCY IMPLEMENTATION PROCESS

Maryland's CZMP is a comprehensive and coordinated program, based on existing laws and authorities, for the protection, preservation, and orderly development of the State's coastal resources. Specific goals, objectives, and policies were developed for the management of uses and activities which have a direct, and potentially significant, effect on coastal resources. Overall management is achieved through the use of existing state regulatory programs, an Executive Order mandating the Program, and Memoranda of Understanding between appropriate state departments. The federal consistency review is based on the enforceable policies of the CZMP.

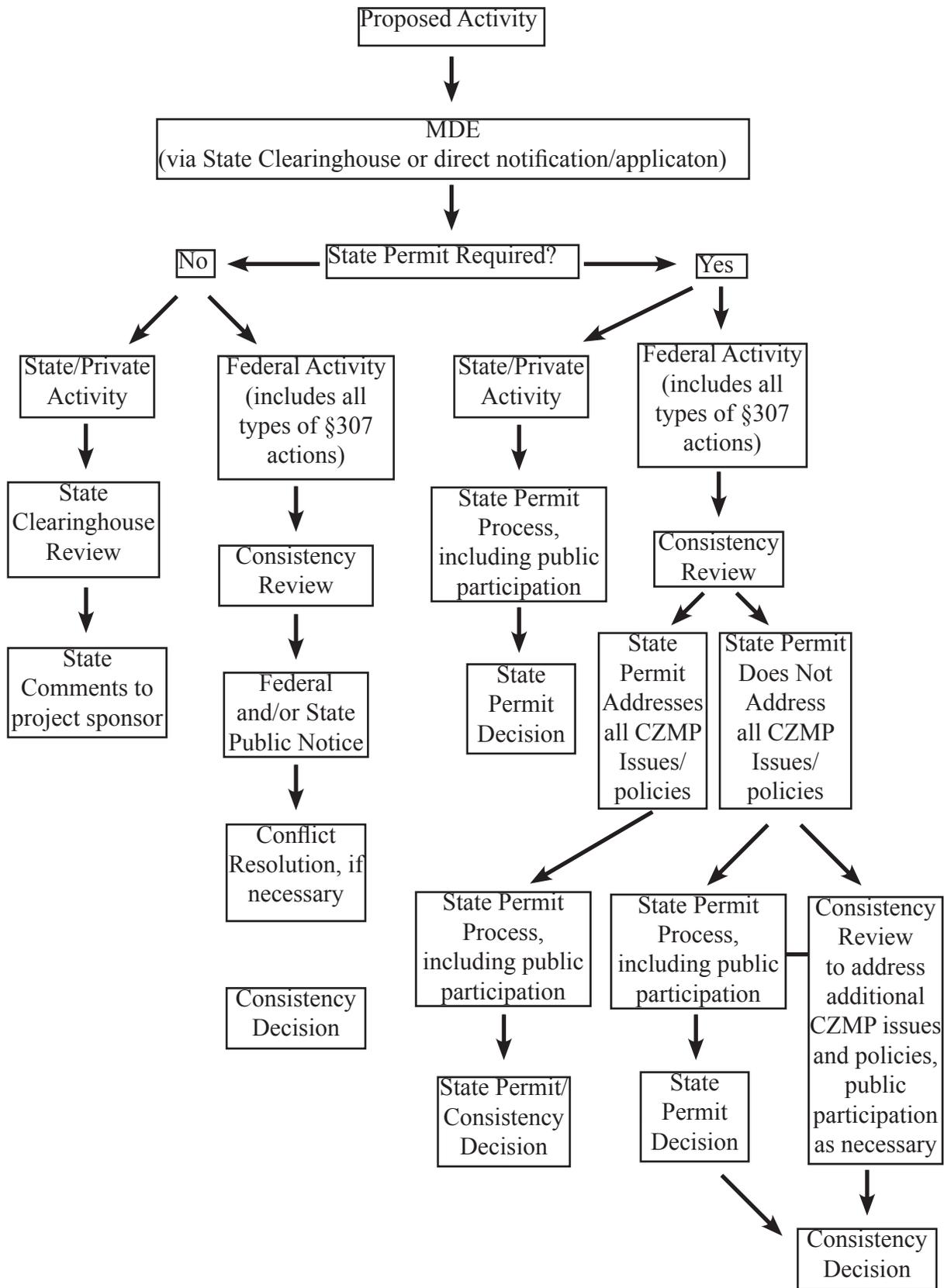
The Department of Natural Resources (DNR) is the lead agency for the State's CZMP. Within DNR, the Coastal Zone Management Division of the Watershed Services Unit is the lead agency for the CZMP. The federal consistency requirements are carried out by the Coastal Zone Consistency Division in the Wetlands and Waterways Program of the Water Management Administration (WMA) in the Maryland Department of the Environment (MDE). Coastal Zone Consistency evaluates proposed federal activities affecting the State's coastal zone to ensure consistency with the enforceable policies of the State's CZMP. Although WMA is responsible for the official federal consistency decision, the decision is often based partially or entirely upon the findings of a variety of agencies within the CZMP network, depending upon the nature of the proposed activity.

## **General Review Procedures**

The general administrative framework for making the State's federal consistency decision is summarized below. This is followed by a discussion of Maryland's review procedures specific to each category of federal activities in Section 307 of the CZMA. The flow chart in Figure 1 shows the overall review process.

If the federal action is subject to the provisions of Section 307 of CZMA, the State's federal consistency decision is coordinated through the Coastal Zone Consistency Division in WMA. WMA is responsible for coordinating the review with appropriate state agencies, consolidating the state's comments, and forwarding the state's response and decision to the appropriate federal agency or applicant. In the case of a federal permit action where a state permit is also required, the state's permit decision constitutes the federal consistency decision. This eliminates unnecessary duplication. It is WMA's responsibility to ensure that the permit decision (s) addresses all consistency issues and relevant CZMP enforceable policies.

**Figure 1: Overall Consistency Review Process**



## **Review Procedures For Specific Activities**

### Direct Federal Activities [§307(c)(1) and (2)]

The Maryland Department of Environment is notified of these activities directly from the federal agency and/or through the Maryland State Clearinghouse which is located in the Maryland Department of Planning. Often, the federal agency submits the project information directly to both MDE and the State Clearinghouse. The purpose of the State Clearinghouse is to provide the federal agency or project sponsor with a consolidated set of state comments based on a review of the proposed activity by appropriate state agencies.

The Water Management Administration coordinates the consistency review with appropriate state agencies and will issue a public notice for the project, as necessary, advertising the State's federal consistency review. Upon receipt of any state agency and public comments on the proposed activity, WMA transmits the state's response to the federal agency, including action on the federal agency's consistency determination.

### Federal License or Permit Activities [§307(c)(3)]

For federal permit activities, the state is notified directly by the federal agency, generally through required public notice action or direct correspondence, or by the applicant. WMA coordinates with appropriate agencies to develop the state's position, including ruling on the applicant's consistency certification. The state regulatory/permitting programs involved depend upon the nature of the proposed activity and associated impacts. These factors dictate which state approvals, aside from the federal consistency decision, will be necessary for the activity.

The state CZMP federal consistency decision may be based on positions taken by other agencies, particularly when state permits are involved. In formulating the federal consistency decision, close coordination is maintained with other state regulatory programs. Table 1 lists examples of state approvals and other state agency actions related to the federal consistency decision. Any differences in position among state permitting and/or review agencies are resolved prior to forwarding the official federal consistency decision to the federal permitting agency. In those cases where a state permit(s) is required, the permit decision constitutes the consistency decision if the state permit review addresses all of the CZMP issues of concern. If the federal consistency decision involves additional issues outside the permitting program's jurisdiction, the permit decision becomes one part of the overall federal consistency decision.

U.S. Army Corps of Engineers' (Corps) permits authorized pursuant to Section 10 of the River and Harbor Act of 1899 and Section 404 of the Clean Water Act constitute over 95% of the federal permit actions reviewed for consistency with the CZMP. These activities also require tidal or nontidal wetlands and waterways authorization from the

**Table 1: Activities Within the Coastal Zone in Maryland**

<b>Permit/Approval</b>	<b>Issuing Agency</b>	<b>Circumstance</b>	<b>Related Approvals</b>
Air Quality Permit	Air Quality Permits Program, Air and Radiation Management Administration, MDE	Proposal to construct and operate an activity that discharges emissions to the outside air	Local Zoning
Aquaculture Permit	Fisheries Service, DNR	Proposal to engage in aquaculture or related activities	Corps Wetlands Permit, Nontidal Wetlands and Waterways Permit, Tidal Wetlands Permit, Water Quality Certification
Chesapeake and Atlantic Coastal Bays Critical Area Approval	Critical Area Commission for the Chesapeake and Atlantic Coastal Bays	Proposal to conduct various activities within the Chesapeake and Atlantic Coastal Bays Critical Area	Local Critical Area Program, Tidal Wetlands Permit, Nontidal Wetlands and Waterways Permit, Corps Wetlands Permit, Water Quality Certification, Sediment and Erosion Control, Stormwater Management
Controlled Hazardous Substances Facility Permit	Hazardous Waste Program, Waste Management Administration, MDE	Proposal to treat, store, or dispose of hazardous waste.	Local Zoning, EPA Corrective Action Permit
Erosion and Sediment Control and Stormwater Management Plan	Nonpoint Source Program, Water Management Administration, MDE	Proposal by State or Federal agency for construction that disturbs 5000 square feet or more of land or results in 100 cubic yards or more of earth movement.	Local Zoning, Nontidal Wetlands and Waterways Permit, Tidal Wetlands Permit, Corps Wetlands Permit
Nontidal Wetlands and Waterways Permit	Wetlands and Waterways Program, Water Management Administration, MDE	Proposal for work in a nontidal stream, 100-year floodplain, or nontidal wetland, including a 25 foot buffer.	Local Zoning, Corps Wetlands Permit, Soil Conservation District Water Quality certification
Oil and Gas Exploration and Production	Mining Program, Water Management Administration, MDE	Proposal to drill and operate a gas or oil well.	Local Zoning, Soil Conservation District
Oil Operations Permit	Oil Control Program, Waste Management Administration, MDE	Proposal to store more than 10,000 gallons of oil in above-ground tanks, transport oil, or operate oil transfer facilities.	Local Zoning, Air Quality Permit, Water Discharge Permit

**Table 1: Activities Within the Coastal Zone in Maryland (cont.)**

<b>Permit/Approval</b>	<b>Issuing Agency</b>	<b>Circumstance</b>	<b>Related Approvals</b>
Refuse Disposal Permit	Solid Waste Program, Waste Management Administration, MDE	Proposal to install, alter, or extend a refuse disposal system.	Local Zoning, Local Solid Waste Management Plan, Water Discharge Permit, Air Quality Permit, Nontidal Wetlands and Waterways Permit
Tidal Wetlands License or Permit	Wetlands and Waterways Program, Water Management Administration, MDE	Proposal for any work that may change a tidal wetland.	Corps Wetlands Permit, Nontidal Wetlands and Waterways Permit, Water Quality Certification
Water Appropriation and Use Permit	Water Supply Program, Water Management Administration, MDE	Proposal to appropriate or use any of the State's surface and/or underground waters.	Local Zoning, Local Water and Sewer Plan, Nontidal Wetlands Permit, Tidal Wetlands Permit
Water Quality Certification	Wetlands and Waterways Program, Water Management Administration, MDE	Proposal to place fill or discharge pollutants in waters of the U.S. (including adjacent wetlands).	Corps Section 404 permit, Nontidal Wetlands and Waterways Permit, Tidal Wetlands Permit, Soil Conservation District
Water Discharge Permit	Wastewater Permits Program, Water Management Administration, MDE	Proposal to dispose of wastewater into the State's groundwater or surface waters.	Local Zoning
Wetlands Mitigation Plan	Wetlands and Waterways Program, Water Management Administration, MDE	Accompanies Nontidal Wetlands and Waterways Permits and Tidal Wetlands Permits	Corps Wetlands Permit, Water Quality Certification

state. WMA is notified of these activities through the submission of the Joint State/Federal Permit Application for proposed activities in jurisdictional wetlands and waterways. The applicant's required certification that the proposed activity will be conducted in a manner consistent with the Maryland CZMP is contained in the application. Due to the large number of Corps' authorizations and the fact that many are routine, the State has established procedures whereby the Corps may presume consistency in the absence of an objection from the State by the deadline date for comments on the project public notice. The State may waive presumption by notifying the Corps that it has not completed its review. This opens the six-month time frame allowed under the Federal CZMA. Generally, the State's wetlands permit review addresses all of the CZMP issues and policies of concern for an activity requiring Corps' authorization. Accordingly, the State wetlands permit decision constitutes the federal consistency decision for the majority of activities requiring a Corps permit, and the State wetlands authorization includes the State's concurrence with the applicant's consistency certification.

These coordination procedures ensure a uniform, comprehensive and consistent State review of a federal permit action that also involves one or more State regulatory approvals. In those cases in which there is no required State permit, WMA assumes the lead role in developing the State's position on any CZMP issues of concern, and forwards the federal consistency decision to the federal permitting agency and the applicant.

#### Federal Assistance to State and Local Governments [§307(d)]

MDE is notified of applications for federal assistance through the State Clearinghouse process or directly by the agency applying for the federal funds. The federal granting agency requires that the applicant coordinate the proposed use of the funds with appropriate state environmental review agencies. The applicant must document that the action has received an acceptable review, including a sign-off for consistency with the State's CZMP. The applicant submits the grant application and supporting materials to the State Clearinghouse within the Maryland Department of Planning (MDP). The State Clearinghouse distributes the project information to appropriate State departments for review. The results of each review are submitted to MDP for compilation and transmittal of the overall State position back to the applicant.

If the federal funds are to be used for a specific individual project, the applicant will often hire a consultant to prepare an Environmental Assessment (EA) and to design the project. On behalf of the applicant, the consultant coordinates preparation of the EA with MDE. Based on the draft EA, MDE comments, including the federal consistency decision, are forwarded to the applicant for inclusion in the environmental documentation for the federal granting agency.

# PUBLIC PARTICIPATION IN THE FEDERAL CONSISTENCY DECISION

The federal Coastal Zone Management Act (CZMA), Section 306(d)(14), as amended by Public Law 101-508, the Coastal Zone Act Reauthorization Amendments of 1990, requires that the Secretary of Commerce, prior to approving a coastal state's management program, find that "the management program provides for public participation in permitting processes, consistency determinations, and other similar decisions." This mandate extends to all activities that require specific or general authorization through permitting, consistency reviews, or other means pursuant to the enforceable policies of the State's CZMP and applicable state law.

In its Policy Guidance on Public Participation under Section 306(d)(14) of the CZMA, the National Oceanic and Atmospheric Administration (NOAA) determined that existing public participation procedures under state law satisfy the public participation requirement under Section 306(d)(14) for activities requiring state permits. This finding also applies to applications under state general permits, as NOAA concluded that public participation in the review of administrative procedures or regulations allowing for a general determination of consistency with the CZMP satisfies the Section 306(d)(14) requirements.

Because NOAA's regulations already required public participation in Federal Consistency reviews of federally permitted or licensed activities, NOAA concluded that the CZARA imposed a new requirement for public participation on the state's review of proposed direct federal activities under §307(c)(1) of the CZMA. For these activities, a public notice is required which (1) specifies that the proposed activity is subject to review for consistency with the policies of the State's CZMP; (2) provides sufficient information to serve as a basis for meaningful comment; (3) specifies a source for additional information; and (4) specifies a contact for submitting comments to the State's CZMP.

Generally, this public participation requirement is achieved through the federal agency public notice of the proposed activity. However, if the federal agency does not issue a written public notice, or if the notice does not contain the required information on the State's federal consistency review, the state will provide a written public notice on the proposed federal activity. The public notice will be issued upon receipt of the federal agency's consistency determination and supporting information, and will solicit comments on the state's consistency review within a designated comment period.

# FREQUENTLY ASKED QUESTIONS

## **What is federal consistency?**

Federal consistency is the CZMA requirement that federal actions that have reasonably foreseeable effects on any land or water use or natural resource of the coastal zone (also referred to as coastal use or resources, or coastal effects) must be consistent with the enforceable policies of a coastal state's federally approved Coastal Zone Management Plan (CZMP).

## **How do I initiate the State's federal consistency review process? Do I have to file an application?**

There is no standard application form that must be filled out to initiate the review process. If you are a federal agency or a consultant working for a federal agency on a proposed project, you should submit a federal consistency determination, based on the goals and objectives of the State's Coastal Zone Management Program, to the Maryland Department of the Environment, Wetlands and Waterways Program. The Department will review the proposed project and concur or object to the federal consistency determination.

If you are an applicant for a federal license or permit, you must certify that your proposed activity is consistent with the Maryland CZMP. The vast majority of federal permits and licenses reviewed for consistency with the CZMP are U.S. Army Corps of Engineers' Section 10 and Section 404 activities. The Joint Federal/State Permit Application for these activities contains the required certification. The State's permit authorization for these activities will include the required federal consistency decision.

If you are a state or local agency applying for federal assistance, your application will be reviewed through the State's Clearinghouse review process. You may also send the project information directly to the Wetlands and Waterways Program, MDE, for a direct response.

## **How long does the federal consistency review take?**

Generally, the federal consistency review will be completed well within the timeframes established in federal regulations. For direct federal actions, the

review is generally completed in 30-45 days. Federal assistance to state and local governments is generally reviewed through the State's Clearinghouse process which takes approximately 30-days. The review time for federal licenses and permits, particularly Corps of Engineers' permits, is dependent on the nature of the project and the magnitude of impacts. Minor activities are usually completed with 30-90 days. Major projects may take 120-180 days.

### **What happens if I do not initiate the federal consistency review process?**

For Corps of Engineers' permits, the process is automatically initiated by the submission of the permit application. The required consistency certification is contained in the application. For direct federal activities, it is the responsibility of the federal agency to submit a consistency determination to the state for its review and concurrence or objection. Regarding federal assistance to state and local government agencies, the Federal agency providing the assistance will require documentation that the federal consistency requirements have been satisfied for the proposed activity.

### **What is Secretarial Mediation and how do I initiate that process?**

In the event of a serious disagreement between the state and a federal agency over any aspect of the federal consistency requirement, either party may request that the Secretary of Commerce mediate the dispute. All parties must agree to participate in the mediation, but 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 information, and meetings between the parties, upon which a hearing officer, appointed by the Secretary, will propose a solution. The request for Secretarial Mediation can only be made by the head of a federal agency or the Governor of a state or the designated state CZMP agency. Exhaustion of the mediation process is not a prerequisite to judicial review.

### **What happens in the event of a state objection to a proposed federal activity?**

If the state objects to a proposed federal activity, it must describe how the activity is inconsistent with enforceable CZMP policies, and any alternative measures, if available, that would allow the activity to be conducted in a manner consistent to the maximum extent practicable. In the event of a disagreement with regard to a direct federal activity, the state and the federal agency will attempt to resolve any differences during the review period. If resolution cannot be reached, the federal agency should consider postponing final federal action until the problems have been resolved. However, at the end of the 90-day period preceding the final federal action, the federal agency, notwithstanding the State CZMP objection, may proceed with the activity, but must clearly describe to the State CZMP the specific legal authority which prohibits the federal agency from fully complying.

with the State's CZMP enforceable policies.

Regarding all other federal activities, including federal licenses and permits; Outer Continental Shelf Plans for exploration, development, and production; and federal assistance to state and local governments; if the State CZMP objects to the proposed activity, the federal agency may not issue the permit, license or other approval, and may not grant the assistance. In such cases, the applicant may appeal the state's decision to the Secretary of Commerce requesting the Secretary to override the state objection.

### **What is the basis of the appeal process?**

The federal consistency provisions provide an administrative appeal to the Secretary of Commerce from a consistency objection by a coastal state. In the case of a federal license or permit, an outer continental shelf exploration or development plan, or an application for federal assistance, the applicant may request that the Secretary override the state's consistency objection if the activity is consistent with the objectives of the Federal Coastal Zone Management Act (CZMA) (Ground I), or is otherwise necessary in the interest of national security (Ground II).

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

If the Secretary overrides the state's objection the authorizing federal agency may permit or fund the activity. A secretarial override does not obviate the need for an applicant to obtain any state required permits or authorizations.

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# NOTES



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