

THE COASTAL ZONE MANAGEMENT ACT AND REGIONAL OCEAN PLANS — A DISCUSSION PAPER

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This paper was prepared to enhance Regional Planning Body discussions as they prepare regional ocean plans under the Ocean Policy Executive Order

This paper provides information from NOAA’s perspective and is intended solely to support and enhance discussions by Regional Planning Bodies as they explore options for effective decision making under the Coastal Zone Management Act and regional ocean plans – this paper does not represent the viewpoint of any other federal agency, state agency or tribal government.

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SUMMARY

The Northeast and Mid-Atlantic Regional Planning Bodies are evaluating the potential synergy between the Coastal Zone Management Act (CZMA) and regional ocean plans as tools to make CZMA decisions in a more efficient, streamlined and coordinated manner.

1. ENHANCING FEDERAL NOTICE TO STATES and TRIBES

A regional ocean plan can improve coordination and communication between federal agencies, states and tribes and enhance effective decision making for CZMA review purposes state-by-state and regionally. The earlier a federal agency can provide notice of a proposed federal action, the more time states and tribes will have to mobilize resources and efficiently and effectively alert a federal agency or applicant of the potential issues that should be addressed. In addition, enhanced notice could help states identify “unlisted activities” that states may want to seek NOAA approval to review for CZMA federal consistency purposes. Some proposed options that could be RPB recommendations include:

- Locate a “proposed federal action” notification site on the Regional Planning Body Data Portal and the Data Portal could be set up so that an automatic email is sent to state and tribal contacts when a notice is placed on the Data Portal; or
- A list serve of state and tribal contacts federal agencies could use for direct notification.

Two primary operational issues to consider are:

1. What federal actions would be included for early notification list and when could a federal agency issue notification?
2. Who would be responsible to ensure the early notification is used, contacts kept up to date, etc.?

2. CZMA COASTAL EFFECTS DETERMINATIONS

Under the Coastal Zone Management Act and National Oceanic and Atmospheric Administration (NOAA) regulations there are times when states, federal agencies and applicants for federal authorizations need to evaluate potential coastal effects for a proposed federal action. A particular issue is when states need to make a coastal effect analysis to show that there is a **causal connection** between an activity and coastal effects.

The information and data in a regional ocean plan and its related Data Portal could be used to show where state coastal uses are occurring, e.g., commercial or recreational fishing effort for certain species at different time of the year. This available spatial and temporal information, which can be displayed in an effective visual manner, should be useful and persuasive when evaluating coastal effects. In addition, a regional ocean plan and its related Data Portal should contribute to effective and efficient decisions for the location of new uses and activities.

3. CZMA FEDERAL CONSISTENCY AGREEMENTS

The Coastal Zone Management Act regulations contain provisions that may be used to facilitate and streamline federal consistency reviews and these provisions could be used to support

regional ocean plans. The efficiencies that can be built into a regional ocean plan using the CZMA regulations include: (1) developing effects-based thresholds for state CZMA reviews; (2) developing a “general consistency determination” to cover multiple occurrences of a federal action; and (3) exclusion of specific federal actions from CZMA consistency reviews (e.g., where beneficial coastal effects or de minimis coastal effects are determined through ocean planning and supported by information in the Data Portal). A Regional Planning Body could develop and include CZMA state-federal agreements, federal agency consistency determinations and state concurrences in a regional ocean plan or agree with the objective and develop the CZMA documents, determinations and concurrences state-by-state.

NOAA, after discussions with the federal agencies, identified three federal agencies’ activities to illustrate this option. These are the Federal Emergency Management Agency (FEMA), the U.S. Coast Guard (USCG) and the U.S. Navy. The material in this discussion paper could form an outline for general consistency determinations for 15 C.F.R. Part 930, Subpart C or general consistency concurrences for Subpart D, E and F. The Data Portal and state enforceable policies would then provide the details for effects, thresholds, etc. Regional Planning Bodies may agree to some, all, none or a modification of these activities.

For each agency there are paragraphs where additional detail can be provided: Categories Exempted from Future CZMA Review; Thresholds or Triggers for State Review; Notification (to alert states when a federal agency is undertaking an exempted activity); Coastal Effects; and Consistency with State Enforceable Policies.

Examples of activities proposed for CZMA review thresholds or exemption from CZMA review	
FEMA	<p>FEMA-Funded Emergency Work:</p> <ul style="list-style-type: none"> A. Debris Removal B. Emergency Protective Measures <p>FEMA-Funded Permanent Work:</p> <ul style="list-style-type: none"> C. Roads and Bridges D. Water Control Facilities E. Buildings and Equipment F. Utilities G. Parks, Recreational Facilities, and Other Items
USCG	<p>Excluded federal agency activities:</p> <ol style="list-style-type: none"> 1. Regulated navigation areas pursuant to 33 C.F.R. § 110, excluding changes to vessel traffic services pursuant to 33 U.S.C. § 1223; 2. Drawbridge operation regulations pursuant to 33 C.F.R. §117; 3. Establishment and maintenance of public (federal) aids to navigation; 4. Temporary speed zones or navigation modifications due to marine mammals; and 5. Temporary federal mooring or anchorage areas, excluding permanent areas pursuant to 33 U.S.C. § 471. <p>Excluded federal licenses and permits:</p> <ol style="list-style-type: none"> 1. Regattas and marine parades pursuant to 33 C.F.R. § 100 ; 2. Establishment of private aids to navigation; and 3. Scientific sampling (benthic, pelagic, and water column)
NAVY	Surface and submerged military training and testing exercises

PURPOSE

The Northeast Regional Planning Body (RPB) and the Mid-Atlantic RPB are each developing a regional ocean plan pursuant to President Obama's Ocean Policy Executive Order 13547.¹ The ocean planning "framework" in the *Final Recommendations of the Interagency Ocean Policy Task Force* (July 19, 2010)² describe regional planning objectives and provides the blueprint for RPBs to develop a regional ocean plan.

This paper provides the Northeast RPB, through its Regulatory Work Group, and the Mid-Atlantic RPB, through its Inter-Jurisdictional Coordination Workgroup, a discussion of how the Coastal Zone Management Act (CZMA) could be used to meet, in part, the Northeast RPB's effective decision making objective and the Mid-Atlantic RPB's sustainable ocean uses goal.

Regional ocean plans are non-regulatory, non-zoning, and operate exclusively under existing authorities. Regional ocean plans do not require a particular outcome in any one proposed action. A regional ocean plan does not exclude any coastal or ocean activity; rather it addresses current and emerging conditions and uses. The objective of a regional ocean plan is a more proactive, integrated and ecosystem-based approach to managing our ocean and Great Lakes uses, resources and ecological functions by improving federal, state and tribal decision-making under existing authorities through the use of data and other baseline information, interagency coordination, and enhanced public and stakeholder participation. Moreover, the Ocean Policy and objectives for regional ocean plans contain many important goals related to the health, sustainability and use of the oceans; the success and usefulness of a regional ocean plan will be largely based on how it supports:

- Better informed policy and project-specific decisions; and
- Project and policy decisions being made in a more efficient, streamlined and coordinated manner.

The RPBs have similar objectives that address the Ocean Policy's call for ocean health, ecosystem-based management, sustainable ocean uses, resilient coastal communities and improved and streamlined decision making. The Northeast RPB has established several working groups to develop plan components around the following three overarching goals for its regional ocean plan:

1. Healthy ocean ecosystems;
2. Effective decision making; and
3. Compatibility among past, current, and future ocean uses.

¹ 75 Fed. Reg. 43022-43027 (July 22, 2010).

² https://www.whitehouse.gov/files/documents/OPTF_FinalRecs.pdf. Implementation of the ocean policy by federal agencies is further described in the National Ocean Council's *National Ocean Policy Implementation Plan* (April 2013).
https://www.whitehouse.gov/sites/default/files/national_ocean_policy_implementation_plan.pdf

The Mid-Atlantic RPB has also established working groups around the following similar goals for its regional ocean plan:

1. Promote ocean ecosystem health, functionality, and integrity through conservation, protection, enhancement, and restoration; and
2. Plan and provide for existing and emerging ocean uses in a sustainable manner that minimizes conflicts, improves effectiveness and regulatory predictability, and supports economic growth.

This paper builds on previous discussions and documents. The paper is also intended to present options for discussion of CZMA federal consistency agreements as tools for streamlining procedures and improving decision making while preserving transparency to the public.³ These CZMA options include the following.

Coastal Zone Management Act — Investigate opportunities to apply ocean plan data and guidance to inform implementation of the CZMA and enhance the efficiency of CZMA consultation with federal agencies on ocean activities by:

1. Enhancing federal notice to states of federal actions;
2. Improving the ability of states and others to determine CZMA coastal effects for federal consistency purposes through the use of spatial data and other information that could be included in a regional ocean plan, including the development of geographic location descriptions for federal consistency review of specific activities; and
3. Minimizing routine CZMA reviews by identifying routine or emergency-type federal actions, the use of general consistency determinations and supporting the development of agreements addressing review of minor or de minimis and repetitive federal actions.

If an RPB decides to pursue any of these options it does not mean all details for an option must be worked out within a regional ocean plan or any action-related document. Rather, an RPB could decide that an option is an objective or action item of the RPB and that the federal agencies and states will work out the details with NOAA assistance. If an RPB needs a lead or “champion” for any of the CZMA federal consistency related options, NOAA’s Office for Coastal Management can be identified as the lead.

³ These CZMA objectives for regional ocean plans were foreseen from the beginning of the Ocean Policy through discussions with the Ocean Policy Task Force and were briefly described in the *Final Recommendations of the Interagency Ocean Policy Task Force* (July 19, 2010). NOAA expanded on the CZMA objectives in *STATE JURISDICTION AND FEDERAL WATERS: State Coastal Management Programs, Ocean Management and Coastal and Marine Spatial Planning*, (October 6, 2011). This 2011 document was produced by NOAA, in coordination with the National Ocean Council, to respond to questions by coastal states on how CZMA federal consistency might apply to regional ocean plans.

CZMA FEDERAL CONSISTENCY PROVISION

Before discussing the three CZMA options, it is important to have a basic understanding of federal consistency.⁴ Federal consistency requires that federal actions that have reasonably foreseeable effects on any land or water use or natural resource of a state's coastal zone (also referred to as coastal uses or resources, or coastal effects) be consistent with the enforceable policies of a state's federally approved coastal management program. 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 must be consistent to the maximum extent practicable with the enforceable policies of a state's federally approved coastal management program. In addition, the CZMA requires non-federal applicants for federal authorizations and federal funding to be consistent with enforceable policies of state coastal management programs.⁵ There are four types of federal actions under the CZMA:

1. ***Federal agency activities*** — activities and development projects performed by a federal agency, or a contractor for the benefit of a federal agency. 16 U.S.C. § 1456(c)(1) – (2) and 15 C.F.R. Part 930, **Subpart C**.
2. ***Federal license or permit activities*** — activities performed by a non-federal entity requiring federal permits, licenses or other form of federal authorization. 16 U.S.C. § 1456(c)(3)(A) and 15 C.F.R. Part 930, **Subpart D**.
3. ***OCS plans*** — Department of the Interior/Bureau of Ocean Energy Management approvals for outer continental shelf plans (oil and gas exploration plans and development and production plans and also some authorizations for renewable energy, pursuant to the Outer Continental Shelf Lands Act). 16 U.S.C. § 1456(c)(3)(B) and 15 C.F.R. Part 930, **Subpart E**.
4. ***Federal assistance to state and local governments*** — Federal funding for activities with coastal effects to a state or local government entity. 16 U.S.C. § 1456(d) and 15 C.F.R. Part 930, **Subpart F**. (Tribal governments, private entities or other groups not part of state or local government would be covered as a federal agency activity under Subpart C.)

A lead state agency coordinates a state's coastal management program and state federal consistency reviews. At the federal level, NOAA's Office for Coastal Management, among other duties and services, oversees the application of federal consistency; provides management and

⁴ CZMA § 307 (16 U.S.C. § 1456) and NOAA's regulations (15 C.F.R. Part 930).

⁵ None of the CZMA options discussed in this paper alter the process or the manner in which federal agencies and applicants for federal authorizations and funding submit consistency determinations or consistency certifications to states.

policy assistance to coastal states, federal agencies, tribes and others; and mediates CZMA related disputes. NOAA's Office of General Counsel Oceans and Coasts Section assists the Office for Coastal Management and processes CZMA appeals to the Secretary of Commerce.

The CZMA Federal Consistency Effects Test

At the heart of federal consistency is the "effects test." A federal action is subject to CZMA federal consistency requirements if the action will have reasonably foreseeable effects on a state coastal use or resource (in accordance with NOAA's regulations). The effects test applies to activities and uses or resources that occur outside a state's coastal zone, as long as the uses or resources impacted are, in fact, uses or resources of a state's coastal zone.

Federal Agency Activities and the Effects Test — For federal agency activities under Subpart C, regardless of the location of the activity or where the coastal effects occur (within the coastal zone, in federal waters, or in another state), a federal agency provides a state(s) with a consistency determination if the activity will have reasonably foreseeable coastal effects. The federal agency determines whether its activity will have coastal effects. Federal agency activities under Subpart C must be "consistent to the maximum extent practicable," which means "fully consistent with the enforceable policies of management programs unless full consistency is prohibited by existing law applicable to the Federal agency."⁶ If a state objects to a federal agency's consistency determination, NOAA's regulations encourage the state and federal agency to attempt to resolve disagreements. Mediation by NOAA's Office for Coastal Management is available if the parties agree to mediation.⁷

For federal agency activities under Subpart C a federal agency can proceed over a state's objection if the federal agency notifies the state that it is consistent to the maximum extent practicable because (1) application of other federal law prohibits full consistency, or (2) the federal agency determines it is fully consistent with the state's enforceable policies.⁸

If a federal agency determines its proposed activity will not have reasonably foreseeable coastal effects, the federal agency may need to provide states with a "negative determination."⁹ States can disagree with a federal agency's finding of no coastal effects, but if the federal agency does not agree with the state it can proceed with its activity.

Federal License or Permit Activities and the Effects Test — For federal agency activities under Subpart C, described above, the initial determination of coastal effects is made by the federal agency. For federal license or permit activities under Subpart D, the initial determination of coastal effects is made by NOAA when NOAA approves a state's list of federal license or permit

⁶ 15 C.F.R. § 930.32(a)(1).

⁷ There is also more formal mediation by the Secretary of Commerce and while there have been state requests for Secretarial mediation, federal agencies have never agreed to mediation by the Secretary of Commerce under the CZMA.

⁸ See 15 C.F.R. § 930.43(d) and (e).

⁹ See 15 C.F.R. § 930.35.

activities subject to state CZMA review, when approving a state’s unlisted activity request, when approving a state’s request to include a “geographic location description” in its coastal management program (see description of geographic location descriptions below), and when evaluating an appeal by an applicant to the Secretary of Commerce for a state’s CZMA objection under Subparts D, E, or F.

States are required to have in their coastal management programs “lists” of federal license or permit activities subject to state CZMA review.¹⁰ If an activity is listed and would occur within the state’s coastal zone, coastal effects are assumed and the applicant must submit a consistency certification and necessary data and information to the state for review. If the federal license or permit is not listed and a state wants to review the activity, the state must seek NOAA approval to review the “unlisted activity” on a case-by-case basis.¹¹

To review listed federal license or permit activities outside the coastal zone, a state must describe in its coastal management program a geographic location of such activities (Geographic Location Descriptions or GLDs).¹² A GLD must be based on a showing of reasonably foreseeable coastal effects from the listed federal license or permit activity that would occur within the proposed GLD. If NOAA approves a GLD then listed federal license or permit activities that would occur within the GLD would be automatically subject to state CZMA review.¹³

Proposed GLDs must be geographically specific, apply to specific listed federal license or permit activities, and based on an analysis showing that effects on the state’s coastal uses or resources are reasonably foreseeable. NOAA has stated that the state’s effects analysis does not have to show proof of coastal effects, but must show a reasonable causal connection; the effects analysis cannot be based on speculation or conclusory statements. A GLD does not need to delineate the boundary of where effects are reasonably foreseeable and where they are not; it only needs to show that within the area proposed for a GLD coastal effects are reasonably foreseeable.

If a GLD is not included in a state’s coastal management program for a specific listed federal license or permit activity, a state may request NOAA approval to review a listed activity outside the coastal zone on a case-by-case basis as an unlisted activity under § 930.54.

¹⁰ 15 C.F.R. § 930.53.

¹¹ 15 C.F.R. §§ 930.53 and 930.54.

¹² 15 C.F.R. § 930.53.

¹³ Federal lands, or lands held in trust by a federal agency, within a state’s coastal zone boundary are automatically GLDs. 15 C.F.R. § 930.53(a)(1). States generally do not describe GLDs for federal agency activities under Subpart C outside of the coastal zone as federal agencies must provide a state with a consistency determination if there are reasonably foreseeable coastal effects regardless of the location of the federal agency activity or whether a state has a GLD.

CZMA REGIONAL PLANNING BODY OPTIONS

1. ENHANCING FEDERAL NOTICE TO STATES and TRIBES

Notice of proposed federal actions for Coastal Zone Management Act purposes is provided to states in various ways. If states have listed specific federal actions under the subparts of NOAA's CZMA federal consistency regulations, federal agencies or applicants for federal authorizations or funding must provide direct notice to the states. These notice requirements are the minimum statutory and regulatory mandated notice procedures. States can also review *Federal Register* notices, federal agency websites and public notices issued by federal agencies; however, states do not have the resources to regularly peruse these forms of notice to determine what a state might be interested in.

While the initial focus for enhanced CZMA federal consistency notification is on states and federal agencies, a regional ocean plan can be a platform to include tribal contacts so that affected tribes are also aware of proposed federal actions. A regional ocean plan could be used to improve coordination and communication between federal agencies, states and tribes and enhance effective decision making for CZMA review purposes state-by-state and regionally. A regional ocean plan could provide for additional means of direct notification to states and tribes. Early notice of a proposed federal action would not necessarily trigger a statutory or regulatory review period or public notice or comment periods for federal agencies, states or tribes; instead it would alert states and tribes to activities in which they may have interest.

Early and informal notice of proposed federal actions might be limited depending on each federal agency's ability to provide public notice of a proposed activity. Likewise, for non-federal applications for federal agency authorization, a federal agency may not be able to provide notice until an application is complete, depending on the regulatory provisions for each type of federal authorization.

Generally, the earlier a federal agency can provide notice of a proposed federal action the more effective states and tribes will be when formal review is initiated because they will have had more time to identify and mobilize the necessary resources for an efficient and effective process. For federal agency activities under Subpart C of NOAA's CZMA regulations, federal agencies provide notice to states through a "consistency determination" or "negative determination" at least 90 days before final federal agency action. Sometimes states prefer to be notified earlier. States may learn of a proposed federal agency activity through several vehicles: a *Federal Register* notice; a National Environmental Policy Act (NEPA) environmental impact statement (EIS); or other federal agency notice. A regional plan could establish a more formal or regular means of direct notice to states of upcoming proposed actions.

Likewise, for federal license or permit activities, OCS plans or federal funding, there are times when states are notified late in the process of applications for federal authorization or funding, even when the activity is listed in the state's coastal management program. A specific issue

identified for federal license or permit activities and federal assistance to state agencies under Subparts D and F of NOAA’s regulations is notice to states of “unlisted activities.”¹⁴

In order for states to review an unlisted activity under Subparts D and F, a state must file a request with NOAA for approval to review the activity within 30 days of receiving notice of the application (and the state’s request must also be received by the applicant and federal agency within the 30 days).¹⁵ The 30-day time period for a state to request NOAA approval starts when the state receives notice of the application, not when the application is filed with the federal agency.¹⁶

Notice can be actual notice (direct notification to the state coastal management program) or constructive notice (the state coastal management program should have known about the application via a Federal Register notice or other form of notice). Sometimes, it is not clear whether a notice suffices for actual or constructive notice or on what date the state received the notice starting the 30-day time period.

Enhancing direct notice to states of applications to federal agencies for federal authorizations and funding through a regional ocean plan would help remove some of the uncertainty of what constitutes notice and the date received. Moreover, states, federal agencies and NOAA’s Office for Coastal Management could agree, as part of the regional ocean plan or in subsequent discussions, what types of applications federal agencies would provide notice for and when the 30-day time period would begin.

Options for Enhanced Notification

Data Portal. The RPB Data Portal is a possible mechanism for direct notification to states and tribes. The Data Portal could include a location where notices of proposed federal actions could be placed. The Data Portal could then be set up so that an automatic email is sent to state and tribal contacts when a notice is placed on the Data Portal.¹⁷

List Serve. To provide more consistent notice to states and tribes, a regional ocean plan could create a state CZMA federal consistency contact list serve, and a tribal contact list serve, for each region. Federal agencies would use the list serve to directly notify the state coastal

¹⁴ See discussion above under the Federal Consistency Effects Test for listed and unlisted activities.

¹⁵ See 15 C.F.R. § 930.54 for the unlisted activity requirements.

¹⁶ It is important to note that even if a state receives early notification of a proposed federal license or permit or funding activity under Subparts D or F, the 30-day response period for states cannot begin until there is an actual application filed with the licensing or funding federal agency; federal consistency review only applies to active applications. See 15 C.F.R. § 930.51(f).

¹⁷ Informal discussion with Data Portal expert Daniel Martin on September 10, 2015.

management program manager and federal consistency contact and tribal contact when a federal action is proposed, even if the CZMA federal consistency review process might start at a later date.¹⁸ There may be other electronic means to accomplish this depending on a federal agency's capacity for electronic notification.

Operational Considerations

In addition to the technical component of establishing a direct notification process through the Data Portal, a list serve, or other means, there are two primary operational issues an RPB should consider:

1. The proposed federal actions that would be included on an early notification list. Would this include a specific list of federal actions by each federal agency or be done on an ad hoc basis depending on a federal agency's ability to provide early notification? Note that currently there is no mechanism, ad hoc or otherwise, for early notification other than the notice required by NOAA's CZMA regulations. In addition, there may need to be discussion of the form of the notification – what would be included?
2. Maintenance of the early notification process. Who would be responsible to ensure the early notification is used, contacts kept up to date, making sure the Data Portal is operating correctly, etc.?

¹⁸ NOAA's Office for Coastal Management maintains a table of state CZMA program managers and federal consistency contacts on its website.

<http://www.coast.noaa.gov/czm/consistency/media/StateFCcontacts-Jan2015.pdf>

2. CZMA COASTAL EFFECTS DETERMINATIONS

Under the Coastal Zone Management Act and NOAA's regulations there are times when states, federal agencies and applicants for federal authorizations need to evaluate coastal effects.

These occur when:

- A state is reviewing a federal agency's consistency determination or negative determination under 15 C.F.R. Part 930, Subpart C;
- A state is reviewing a consistency certification under Subparts D, E and F;
- A state is adding an activity to its "list" of federal actions subject to federal consistency review and must obtain NOAA's approval based on whether a new activity will have reasonably foreseeable coastal effects;
- A state requests NOAA approval to review an unlisted activity on a case-by-case basis based on whether the state has shown that the unlisted activity will have reasonably foreseeable coastal effects;
- A state requests NOAA approval for a geographic location description (GLD) to review on a routine basis, specific listed federal authorization activities under Subparts D and E in federal waters, where the size and scope of the GLD is based on whether the state can demonstrate reasonably foreseeable coastal effects of the listed activities within the GLD;
- A federal agency is making its coastal effects determination in order to provide a state with a consistency determination or negative determination for a federal agency activity under Subpart C, whether the activity is within or outside the coastal zone; or
- An entity is preparing a consistency certification for a state under Subpart D, E or F.

NOAA has previously determined that a state's assertion that an activity in federal waters will have an "impact" on a coastal use or resource is insufficient to make a finding of reasonably foreseeable "coastal effects" under the CZMA. A state's effects analysis must provide more than general assertions of impacts or that resources or uses are important, or should be reviewed because of the proximity of an activity to state coastal uses or resources. A state must show there is a **causal connection** between the activity and effects on that state's coastal uses or resources. To make this **causal connection** a state needs to show that:

1. It has a **specific interest** in a coastal use or resource (e.g., commercial fishing or a coastal resource occurring in federal waters is in fact a resource of the state's coastal zone);
2. The specific interest actually **occurs in the area** proposed for an activity (e.g., a particular area where the state fleet fishes); and
3. Any impacts from the proposed activity **would have reasonably foreseeable effects** on the specific interest (not all impacts to a coastal use or resource result in a coastal effect).

Sometimes states can make this causal connection using existing and readily available information from state, federal, academic or other sources. In other instances, however, there

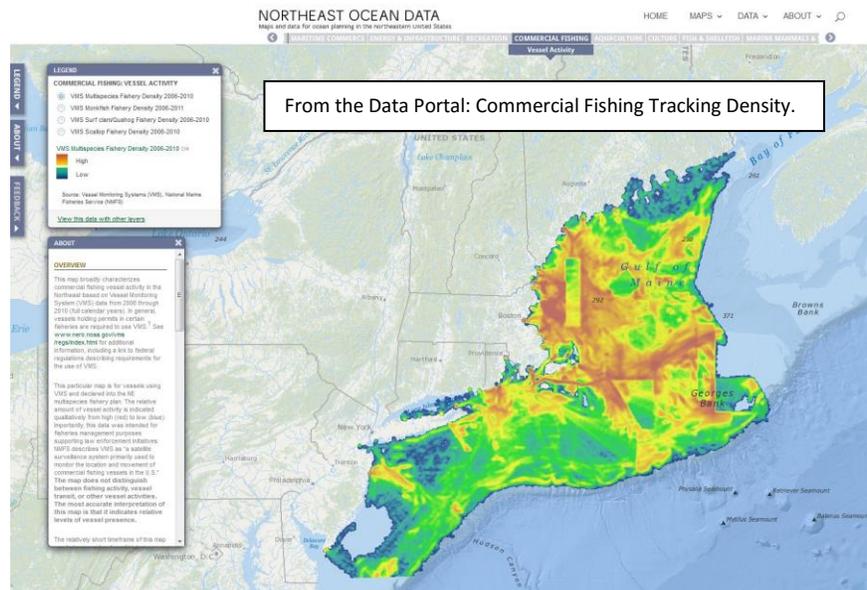
may not be information available to show a causal connection or there may be disagreement that available information demonstrates coastal effects.

The data and information in a regional ocean plan and its accompanying Data Portal could be used to support coastal effects evaluations by states, federal agencies, tribes and applicants for federal authorizations. The Data Portal can be a useful tool to locate a coastal use or resource. More importantly, the Data Portal can be used to show where state coastal uses or resources occur, e.g., commercial or recreational fishing effort for certain species at different time of the year. Nevertheless, states may need to generate additional information demonstrating the causal connection between the impact of a proposed activity and effects on state coastal resources and uses under the CZMA.

A regional ocean plan may include analysis of impacts to uses or resources if an RPB evaluates compatible uses. This information may help to make casual connections between resource impacts and coastal effects as viewed under the CZMA.

The regional ocean plan data and information may help determine what federal actions would be included in any CZMA agreements or to determine if there should be thresholds for when state CZMA review would occur.

Other information that may be developed as part of a regional ocean plan or RPB-initiated discussions may also inform coastal effects evaluations by states, federal agencies, tribes, applicants and others. For example, NOAA is proposing that it explore the importance of recreational fishing as part of regional ocean plans. If these activities are done, the outcomes from any one of these efforts could be useful when determining coastal effects from various activities or proposing GLDs for state CZMA purposes. Some proposed activities include the following.



- Improve understanding of and preparation for climate change impacts on fishing, e.g., *could include predictions about the movement of fish stocks and discussions of management implications of shifting populations.*
- Work with applicable Fishery Management Councils to identify and monitor *fishing impacts on the environment and the impacts of other human activities on fishing.*

- Improve *understanding of recreational fishing effort and impacts* in the region by convening at least two workshops by the end of 2017 for leaders of recreational fishing groups.

Regional Geographic Location Description.¹⁹ In discussions with both the Northeast RPB and Mid-Atlantic RPB, one issue raised was whether an RPB could agree to establish a regional GLD for CZMA federal consistency review purposes. It may be possible for states and federal agencies to agree through a regional ocean plan that there should be a regional GLD where specified listed federal license or permit activities would be subject to state CZMA federal consistency review. The establishment of a GLD would still need to be supported by a coastal effects analysis, which could be strengthened by a justification of why the GLD is important from a regional perspective. Any regional GLD would also need to establish the north-south extent of each state's review area within the GLD.

Each state would still need to adopt the GLD as part of its individual coastal management program through the CZMA program change process.

¹⁹ See previous discussion of the federal consistency provision and effects test for description of GLDs and how GLDs are used.

3. CZMA FEDERAL CONSISTENCY AGREEMENTS

The Coastal Zone Management Act regulations contain provisions that may be used to facilitate and streamline federal consistency reviews and these provisions could be used to support regional ocean plans. The CZMA regulations that may enhance the efficiencies in a regional ocean plan include: (1) developing thresholds of effects triggering state CZMA reviews; (2) developing a “general consistency determination” to cover multiple occurrences of a federal action; and (3) exclusion of specific federal actions from CZMA consistency reviews (e.g., where beneficial coastal effects or de minimis coastal effects are determined through ocean planning and supported by information in the Data Portal). These state and federal agency agreements could be time-limited, be revisited at established intervals, or allow a state to conduct an individual review.

The proposal to exclude certain federal actions from future consistency review or to establish thresholds where federal actions would or would not be reviewed for consistency is addressed in various sections of NOAA’s regulations depending on the type of federal action. For federal agency activities (15 C.F.R. Part 930, Subpart C) this would be done through a general consistency determination (15 C.F.R. § 930.36(c)) or agreements between states and federal agencies for activities with de minimis or beneficial coastal effects (15 C.F.R. § 930.33(a)(3) and (4)). For federal license or permit activities (Subpart D) or federal financial assistance activities (Subpart F) this would be done through a general consistency concurrence (15 C.F.R. § 930.53(b)).

An RPB could develop and include these CZMA state-federal agreements, federal agency consistency determinations and state concurrences in a regional ocean plan or identify the CZMA agreements objective in the plan and then develop the CZMA documents, determinations and concurrences separately state-by-state.

One state suggested looking to see if some form of the U.S. Army Corps of Engineers (USACE) model, called a Programmatic General Permit, could be adopted by the RPB. The USACE uses a three-tier review system whereby the states issue USACE permits for listed activities in Tier 1; states meet with the USACE for Tier 2 activities and issue USACE permit after states have worked out any issues if any; and, for activities in Tier 3 the USACE handles those as Individual permits.

NOAA, after discussions with the federal agencies, identified three federal agencies’ activities to illustrate this option. The activities proposed were provided to NOAA by the federal agencies for discussion purposes. RPBs may agree to some, all, none or a modification of these activities; these activities are presented for illustration and discussion purposes to determine whether or how this option might work. The agencies are the Federal Emergency Management Agency (FEMA), the U.S. Coast Guard (USCG) and the U.S. Navy.

While these discussions and agreements may be developed through the RPB and the regional ocean plan, each state will need to determine if it can concur with the proposals. The material in this discussion paper could form an outline for general consistency determinations for 15 C.F.R. Part 930, Subpart C or general consistency concurrences for Subpart D, E and F. The Data Portal and state enforceable policies would then provide the details for effects, thresholds, etc. Regional Planning Bodies may agree to some, all, none or a modification of these activities.

EXAMPLE 1 — FEDERAL EMERGENCY MANAGEMENT AGENCY

States and the Federal Emergency Management Agency could propose to exclude the following FEMA disaster relief (response and recovery) efforts from state CZMA federal consistency review. These FEMA activities are relief efforts that would be generally concurred with prior to a disaster and that would not require additional state review when the relief is provided. Under the effects thresholds section, specified relief efforts could require CZMA review, but states could expedite its review at the time relief is provided. In addition, the effects thresholds section describes whether and how longer term relief actions could be reviewed under the CZMA.

The following types of federal agency activities and federal licenses or permit activities are proposed to be *excluded* from federal consistency review as having either no reasonably foreseeable coastal effect, insignificant or de minimis effects, environmentally beneficial effects, or are activities that may have reasonably foreseeable coastal effects that a state agrees do not warrant further federal consistency review.

FEMA Public Assistance Categories Exempted from Future CZMA Review:

FEMA-Funded Emergency Work – Immediate Response:

A. Debris Removal - Includes clearance of trees and woody debris; building components or contents; sand, mud, silt, and gravel; wreckage produced during conduct of emergency protective measures (e.g., drywall); and other disaster-related wreckage.

B. Emergency Protective Measures – Includes those activities undertaken by a community before, during, and following a disaster that are necessary to do one of the following:

1. Eliminate or reduce an immediate threat to life, public health, or safety; or
2. Eliminate or reduce an immediate threat of significant damage to improved public or private property through cost-effective measures.

Generally, prudent actions to warn residents, reduce disaster damage, ensure continuation of public services, and protect lives and public health or safety are eligible for assistance. Examples include but are not limited to warning of risks and hazards, search and rescue, emergency medical facilities, some facility costs, security, provision of food and water essentials, temporary generators, temporary schools, demolition and removal of damaged public and private buildings and structures that pose an immediate threat to the safety of the public, removal of health and safety hazards, and construction of levees, berms, dikes and other protective measures to protect lives or improved property, and placement of sand on a beach to serve as protection of improved property from waves and flooding.

FEMA-Funded Permanent Work – Longer Term Recovery: Permanent work is that which is required to restore a damaged facility, through repair or restoration, to its pre-disaster design, function, and capacity in accordance with applicable codes or standards. [THIS MAY NEED SOME CAVEATS REGARDING EXISTING STRUCTURES, PRE-CONSULTATION WITH STATE FOR OPPORTUNITY FOR STATE TO SAY OK OR REQUIRE INDIVIDUAL CZMA REVIEW]

C. Roads and Bridges – This category includes but is not limited to roads, bridges, and associated facilities (e.g., auxiliary structures, lighting, and signage). For roads, activities include surfaces, bases, shoulders, ditches, drainage structures, and low water crossings. Bridge activities include decking and pavement, piers, girders, abutments, slope protection, and approaches.

D. Water Control Facilities – These activities include but are not limited to dams and reservoirs, levees, lined and unlined engineered drainage channels, canals, aqueducts, sediment basins, shore protective devices, irrigation facilities, and pumping facilities.

E. Buildings and Equipment – Activities include but are not limited to buildings, structural components, interior systems such as electrical or mechanical work, equipment, and contents including furnishings. Removal of mud, silt, or other accumulated debris is eligible as permanent work if the debris does not pose an immediate threat but its removal, along with any cleaning and painting, is necessary to restore the building. If the work meets the immediate threat criteria, removal of disaster-related debris and treatment of spreading mold (in the immediate aftermath of the disaster) may be eligible as emergency work.

F. Utilities – These include but are not limited to water treatment plants and delivery systems, power generation and distribution facilities (including natural gas systems, wind turbines, generators, substations, and power lines), sewage collection systems and treatment plants, and communications.

G. Parks, Recreational Facilities, and Other Items – Includes but is not limited to mass transit facilities such as railways; playground equipment; swimming pools; bath houses; tennis courts; boat docks; piers; picnic tables; golf courses; fish hatcheries; and facilities that do not fit Categories C-F. Emergency placement of sand on a natural or engineered beach may be eligible when necessary to protect improved property from an immediate threat. Protection may be to a 5-year storm profile or to its pre-storm profile, whichever is less costly.

FEMA Hazard Mitigation Assistance Programs Exempted from Future CZMA Review:[THESE MAY NEED SOME CAVEATS REGARDING EXISTING STRUCTURES, PRE-CONSULTATION WITH STATE FOR OPPORTUNITY FOR STATE TO SAY OK OR REQUIRE INDIVIDUAL CZMA REVIEW]

This includes FEMA-funded work to reduce or eliminate long-term risk to people and property from natural hazards and their effects, particularly:

The Hazard Mitigation Grant Program (HMGP), the Pre-Disaster Mitigation (PDM), and the Flood Mitigation Assistance (FMA) Programs provide grants to states, territories, tribes, and local governments to implement long-term hazard mitigation measures prior to or after a disaster declaration or to assist in their efforts to reduce or eliminate the risk of repetitive flood damage to buildings and structures insurable under the National Flood Insurance Program (NFIP). Activities may include property acquisition, structure demolition, mitigation reconstruction, retrofits, relocations, elevations, flood risk reduction projects, soil stabilization, and wildfire mitigation.

Thresholds or Triggers for State Review: If the following effects thresholds are reached or events occur, then the proposed activity will be subject to individual state CZMA review.

- To Be Determined after further discussion with states and federal agencies.

Notification: Even if these activities are exempted from future state CZMA federal consistency review, in accordance with this agreement, states may still want to know that an activity will occur and the federal agency could notify the state coastal management agency that it intends to undertake the proposed activity.

Coastal Effects: These activities are expected to have either no reasonably foreseeable effects to the uses or resources of a state’s coastal zone or would have only de minimis, minor coastal effects. [ADDITIONAL LANGUAGE SHOULD BE INSERTED HERE BY FEDERAL AGENCIES, STATES AND TRIBES ON WHAT THE COASTAL EFFECTS MIGHT BE]

Consistency with State Enforceable Policies: In all expected instances when the described activities may occur, the activities should be fully consistent with all applicable enforceable policies of state coastal management programs. Even for those activities that are federal agency activities under Subpart C of NOAA’s regulations, these activities are expected to be not only “consistent to the maximum extent practicable,”²⁰ but fully consistent with state enforceable policies. State enforceable policies that apply to the described activities are:

[STATES SHOULD INCLUDE HERE THE ENFORCEABLE POLICIES MOST APPLICABLE TO THE DESCRIBED ACTIVITY]

²⁰ See 15 C.F.R. § 930.32 (consistent to the maximum extent practicable).

EXAMPLE 2 — UNITED STATES COAST GUARD

The following types of federal agency activities and federal licenses or permit activities are proposed to be *excluded* from federal consistency review as having either no reasonably foreseeable coastal effect, insignificant or de minimis effects, environmentally beneficial effects, or are activities that may have reasonably foreseeable coastal effects that a state agrees do not warrant further federal consistency review.

USCG Categories Exempted from Future CZMA Review:

Excluded federal agency activities:

1. Regulated navigation areas pursuant to 33 C.F.R. § 110, excluding changes to vessel traffic services pursuant to 33 U.S.C. § 1223 (may need to distinguish between permanent, long term and temporary regulated navigation areas);
2. Drawbridge operation regulations pursuant to 33 C.F.R. §117;
3. Establishment and maintenance of public (federal) aids to navigation;
4. Temporary speed zones or navigation modifications due to marine mammals; and
5. Temporary federal mooring or anchorage areas, excluding permanent anchorage areas pursuant to 33 U.S.C. § 471.

Excluded federal licenses and permits:

6. Regattas and marine parades pursuant to 33 C.F.R. § 100 (may need to qualify for Marine Events of National Significance);
7. Establishment of private aids to navigation; and
8. Scientific sampling (benthic, pelagic, and water column)

Thresholds or Triggers for State Review: If the following effects thresholds are reached or events occur, then the proposed activity will be subject to individual state CZMA review.

- To Be Determined after further discussion with states and federal agencies.

Notification: Even if these activities are exempted from future state CZMA federal consistency review, in accordance with this agreement, states may still want to know that an activity will occur and the federal agency could notify the state coastal management agency that it intends to undertake the proposed activity.

Coastal Effects: These activities are expected to have either no reasonably foreseeable effects to the uses or resources of a state's coastal zone or would have only de minimis, minor coastal effects. [ADDITIONAL LANGUAGE SHOULD BE INSERTED HERE BY FEDERAL AGENCIES, STATES AND TRIBES ON WHAT THE COASTAL EFFECTS MIGHT BE]

Consistency with State Enforceable Policies: In all expected instances when the described activities may occur, the activities should be fully consistent with all applicable enforceable policies of state coastal management programs. Even for those activities that are federal

agency activities under Subpart C of NOAA’s regulations, these activities are expected to be not only “consistent to the maximum extent practicable,”²¹ but fully consistent with state enforceable policies. State enforceable policies that apply to the described activities are:

[STATES SHOULD INCLUDE HERE THE ENFORCEABLE POLICIES MOST APPLICABLE TO THE DESCRIBED ACTIVITY]

²¹ See 15 C.F.R. § 930.32 (consistent to the maximum extent practicable).

EXAMPLE 3 — U.S. NAVY

The following types of federal agency activities and federal licenses or permit activities are proposed to be *excluded* from federal consistency review as having either no reasonably foreseeable coastal effect, insignificant or de minimis effects, environmentally beneficial effects, or are activities that may have reasonably foreseeable coastal effects that a state agrees do not warrant further federal consistency review.

Navy Categories Exempted from Future CZMA Review:

1. Surface and submerged military training exercises.
2. Surface, submerged, and aerial testing activities.

Thresholds or Triggers for State Review: If the following effects thresholds are reached or events occur, then the proposed activity will be subject to individual state CZMA review.

- To Be Determined after further discussion with states and federal agencies.

Notification: Even if these activities are exempted from future state CZMA federal consistency review, in accordance with this agreement, states may still want to know that an activity will occur and the federal agency could notify the state coastal management agency that it intends to undertake the proposed activity.

Coastal Effects: These activities are expected to have either no reasonably foreseeable effects to the uses or resources of a state's coastal zone or would have only de minimis, minor coastal effects. [ADDITIONAL LANGUAGE SHOULD BE INSERTED HERE BY FEDERAL AGENCIES, STATES AND TRIBES ON WHAT THE COASTAL EFFECTS MIGHT BE]

[NAVY TO PROVIDE INFO ON: training and testing activities and the required mitigations and thresholds documented in Navy EIS and permit documents.]

NOAA Note on Marine Mammals: The use of mid-frequency active sonar by the Navy for training exercises has been a controversial issue involving many states, interest groups, other federal agencies including several offices within NOAA, particularly NOAA's National Marine Fisheries Service (NMFS), Office of National Marine Sanctuaries (ONMS) and the Office for Coastal Management. To the extent there are agreements reached by an RPB or states related to Navy training and testing exercises and sonar, such agreements would not affect the consultations and coordination between Navy and the other federal agencies, including agencies within NOAA. Impacts to marine mammals would be mitigated as determined by NMFS under the Marine Mammal Protection Act (MMPA) and Endangered Species Act (ESA) and ONMS under the National Marine Sanctuaries Act.

NOAA notes that there is disagreement between some states and Navy on whether impacts to marine mammals from Navy training exercises, especially the use of sonar, result in an effect to a state's coastal uses or resource. For example, if the impact to a marine mammal, or "take," as authorized by NMFS is the mere occurrence of marine mammals in the vicinity of an activity or that the impact is expected to be temporary behavioral modifications, e.g., a marine mammal may alter course or avoid an area of the ocean for a short period of time, those would likely not be coastal effects for CZMA purposes. In addition, NMFS mitigation measures usually include observers on the vessels, course alterations to avoid any observed animals, or cessation of operations when observed animals are too close to the activity.

Consistency with State Enforceable Policies: In all expected instances when the described activities may occur, the activities should be fully consistent with all applicable enforceable policies of state coastal management programs. Even for those activities that are federal agency activities under Subpart C of NOAA's regulations, these activities are expected to be not only "consistent to the maximum extent practicable,"²² but fully consistent with state enforceable policies. State enforceable policies that apply to the described activities are:

[STATES SHOULD INCLUDE HERE THE ENFORCEABLE POLICIES MOST APPLICABLE TO THE DESCRIBED ACTIVITY]

²² See 15 C.F.R. § 930.32 (consistent to the maximum extent practicable).