

CHAPTER 5

IMPLEMENTATION OF THE MASSACHUSETTS COASTAL ZONE MANAGEMENT PROGRAM – FEDERAL CONSISTENCY REVIEW

A fundamental component of a state's coastal zone management program is the authority granted by the CZMA to review any federal activity that may reasonably be expected to affect the land or water uses of the coastal zone for consistency with a state's enforceable program policies.

Federal Consistency and the Coastal Zone Management Act

Section 307 (c)(3)(A) of the Coastal Zone Management Act (CZMA) provides that "... any applicant for a required Federal license or permit to conduct an activity, in or outside the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide ... a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program." Similar requirements are included for activities conducted by or funded by a federal agency.

The CZMA defines "enforceable program policies" as "[s]tate policies which are legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions, by which a State exerts control over private and public land and waters uses and natural resources in the coastal zone." This provision ensures that, while implementing its federal consistency authority, a coastal zone management program cannot exceed the authority given to it under the existing laws of the state.

Massachusetts Federal Consistency Review

As applied in Massachusetts, the federal consistency process is described in state regulations at 301 CMR 21.00: Coastal Zone Management Program: Federal Consistency Review Procedures (Appendix D – 301 CMR 21.00). CZM's enforceable program policies and their implementing authorities are found within this document in Chapter 4 – CZM Program Policies and at 301 CMR 21.98: Policy Appendix (Appendix D). Copies of implementing statutes and regulations may be obtained for a small fee from the State House Bookstore, located in the Massachusetts State House in Boston (telephone 617-727-2834), or through the appropriate agency web site which can be located through the Commonwealth's web site at www.mass.gov.

CZM has entered into Memoranda of Understanding (MOUs) with other state environmental agencies including DEP, DEM, DFWELE, MDC, DFA, EFSB, and EOTC which ensure that each of these agencies will implement state coastal policy through its regulations, permits, and development activities. Copies of these MOUs are found at Appendix E.

Activities Subject to Federal Consistency Review

Federal consistency review is required for project proposals that are:

In or can reasonably be expected to affect the resources or land or water uses of the Massachusetts coastal zone.

Require a federal license or permit, are federally funded or are a direct activity of a federal agency.

The Massachusetts coastal zone is a defined area extending landward 100 feet from certain specified roads or transportation lines and seaward to the extent of the Commonwealth's territorial sea (generally, but not always, three miles from shore) plus all of Barnstable County and the Islands. The coastal zone is mapped in the *Coastal Atlas*, copies of which are available at public libraries in coastal cities and towns, at CZM's regional offices, and at the CZM Office at 251 Causeway Street, 8th floor, Boston, Massachusetts. CZM's regulation at 301 CMR 21.99: Boundary Appendix (Appendix D) provides a verbal description of the Massachusetts coastal zone. Projects that are physically outside of the coastal zone, but may affect the land or water uses or natural resources of the coastal zone, may be subject to federal consistency review.

Direct federal activities include such undertakings as dredging of federal navigation channels by the U.S. Army Corps of Engineers and off-shore oil and gas leasing by the Department of the Interior. Federal activities subject to CZM review are found at 301 CMR 21.06 and 21.08. Federal licenses or permits include any that govern the use of land and water resources of the coastal zone. Examples include the Corps' Section 10/404 permits and EPA's NPDES permits. A complete list of federal licenses and permits reviewed by CZM is found at 301 CMR 21.07. Federally funded projects include those proposed in or near the coastal zone that may affect its resources. U.S. Department of Housing and Urban Development funding for a community center in the coastal zone is an example of a project subject to federal consistency review. Federally funded projects reviewed by CZM are listed at 301 CMR 21.09.

CZM looks to established environmental review thresholds to gauge when projects may significantly affect the coastal zone. In many instances, projects that are below the thresholds of the Massachusetts Environmental Policy Act (see 301 CMR 11.25-27: Review Thresholds) have been determined to have minimal effects on the resources of the coast and are not reviewed by CZM. Point-source discharges to coastal waters, disposal of any amount of dredged material at the Massachusetts Bay Disposal Site, and exempt bridge projects are examples of activities not subject to MEPA, but subject to CZM federal consistency review. Upon request, CZM will make a determination of its jurisdiction over specific activities.

CZM has worked closely with federal resource agencies to limit the regulatory burden for projects of minimal environmental impact. Both the Army Corps of Engineers and the

Environmental Protection Agency have, with the advice of Massachusetts regulatory agencies, developed general permits that seek to limit duplicate state and federal reviews for projects that have no significant impacts on natural resources. CZM has participated in the development of these general permits and has found the permits to be consistent with state coastal policies, and therefore projects that qualify for these permits are not usually subject to additional federal consistency review, unless the proposed activity is not one foreseen in the development of the general permits. CZM also participates in the federal Joint Processing Committee, through which federal resource agencies determine projects' eligibility for general permits.

CZM's Review Procedures

There are no specific application forms or fees for federal consistency review.

If the proposed project is to undergo federal consistency review, the process is initiated by sending the documents specified in appropriate sections of CZM's regulations to:

Project Review Coordinator
Massachusetts Office of Coastal Zone Management
251 Causeway Street, Suite 900
Boston, Massachusetts 02114

Specific application requirements and review timetables for the various federal actions that make a project proposal subject to review are contained in CZM's federal consistency regulations (Appendix D)

Upon receipt of a complete application, the federal consistency review can begin. A project review schedule is sent to the applicant or his or her agent, and a public notice of the proposed project is published in the next available *Environmental Monitor*, a publication of the MEPA Unit in the Executive Office of Environmental Affairs. A 21-day comment period begins on the day that the *Monitor* is published.

When all technical and public policy questions raised by the project have been resolved, and all other state licenses and permits have been obtained, CZM may concur with or object to the applicant's federal consistency certification. This may occur any time from immediately following the close of the public comment period to the end of a period defined by federal regulation. CZM makes every effort to render a decision at the earliest possible time.

Massachusetts chose to develop and implement a "networking" coastal management program. Under this approach, CZM has entered into Memoranda of Understanding with the state agencies that issue environmental licenses, permits and certifications to implement CZM's enforceable program policies through their regulatory processes. To ensure that all of CZM's interests are addressed, federal consistency review cannot be completed until copies of all relevant state environmental licenses and certifications have been received by CZM.

CZM will notify the applicant in writing of its concurrence with or objection to the applicant's federal consistency certification. When CZM concurs, the applicant may complete the federal review process and begin the proposed activity.

If technical or policy questions remain, or there are outstanding state licenses or permits at the end of the defined review period, CZM will object to the consistency certification. If CZM objects to a consistency certification, either for lack of information (requisite state environmental licenses and permits have not yet been issued) or for cause (CZM disagrees with the applicant's assertion that the project is consistent with its enforceable program policies) the applicant may restart the federal consistency review process by sending a written request to the Project Review Coordinator.

An applicant may also request mediation from the NOAA Office of Coast and Ocean Resource Management or appeal CZM's denial of federal consistency to the U.S. Secretary of Commerce by filing a notice with the Secretary within 30 days of receipt of CZM's denial. Copies of the appeal and any accompanying information must also be filed with all of the state and federal agencies involved with the proposed project. Complete information on the appeal process may be found in federal regulation 15 CFR 930 Subpart H: Appeal to the Secretary for Review Related to the Objectives or Purposes of the Act and National Security Interests.

Additional Federal Consistency Provisions

Project Modifications: CZM must be notified of any modification to a project that has previously been reviewed and approved. Based on the significance of the proposed modification, CZM may determine that no further review is required, or may require the proponent to reopen the federal consistency process.

Emergency Certifications: Following a catastrophic event, such as a hurricane, there will be repairs that require emergency certification from local, state and federal agencies to mitigate damage in an accelerated time frame. The federal consistency process recognizes such situations and provides for emergency certifications. The action proposed for emergency certification must be one that is necessary to avoid or eliminate imminent threat to public health and safety, and is limited to what is necessary to abate the emergency. Full compliance with all pertinent state licensing procedures, including CZM federal consistency review, is required when the immediate need for undertaking the emergency action no longer exists.

Assistance to Applicants: The CZM Project Review Coordinator is available to assist applicants in determining the applicability of the federal consistency review process to a proposed project, and to answer questions that may develop during the preparation of a request for such a review. The Project Review Coordinator can be reached at 617-626-1219 or at the Massachusetts Office of Coastal Zone Management, 251 Causeway Street, Suite 900, Boston, Massachusetts 02114

