

The following is an excerpted from the New York State Coastal Management Program, as revised effective July 3, 2001.

Federal Consistency Procedures

Federal agencies are responsible for many activities which can affect the policies and overall intent of New York State's Coastal Management Program (CMP). In recognition of their potential effect, Congress in passing the Coastal Zone Management Act of 1972, as amended, required that the activities of federal agencies occurring within or outside the State's coastal zone and which affect land and water uses and natural resources in that zone must be consistent with New York's federally approved coastal management program. The federal activities that must comply with this requirement are:

- Federal agency activities (i.e. performed by or on behalf of a federal agency);
- Activities requiring federal licenses, permits and other regulatory approvals;
- Federal financial assistance to state and local governments; and,
- Outer Continental Shelf exploration, development and production activities.

New York State must ensure that the above federal activities are consistent with its CMP. To that end, the Department of State (DOS) has been designated as the State's agency responsible for reviewing federal activities as to their consistency with the CMP. The bases for the consistency reviews conducted by DOS are: the enforceable policies in Part II, Section 6 of the CMP document; the guidelines found in the explanations of those policies; and the management programs for Special Management Areas, such as local waterfront revitalization programs, which have been approved and incorporated into the State's CMP. If an activity, other than one performed by or on behalf of a federal agency*, is found by DOS to be inconsistent with New York's CMP, the federal agency cannot proceed to authorize or financially assist that activity. DOS' consistency decision may be appealed to the U.S. Secretary of Commerce. If DOS' decision is appealed, the federal agency may only approve the activity after the Secretary determines that the activity is consistent with the objectives and purposes of the Coastal Zone Management Act or necessary in the interest of national security.

DOS will carry out its federal consistency review responsibilities in full compliance with the requirements of the Coastal Zone Management Act and 15 CFR Part 930. The Department will also strive to expeditiously review all federal activities that affect uses and resources in the State's coastal zone. To help DOS meet that objective, the following procedures supplement those contained in 15 CFR Part 930 and will apply to the federal activities reviewed by the Department.

General Elements of the Procedures

The following describes general elements of the federal consistency process. Specific procedures for each type of federal activity are described following this section and at 15 CFR Part 930.

1. *Early Consultation.* Federal agencies and applicants should consult with DOS early in the planning stages of a proposed activity. This consultation should be considered as a necessary first step for all major, unique or potentially controversial activities. The purpose of this early consultation is to provide DOS the opportunity to advise federal agencies and applicants of: (a) general and, where possible, specific coastal management concerns raised by the proposed activities; (b) the coastal policies and other components of the State's CMP that are relevant to the proposed activities; (c) how to assess the

*These activities must also be consistent but the procedures differ.

consistency of the activities with the applicable policies; and, (d) the types of information and data that are essential for review purposes. This step will allow federal agencies and applicants the time to adequately address DOS' CMP concerns and/or obtain necessary information, before the proposed activities are reviewed for consistency with the CMP. All federal agencies and applicants should consult with DOS to: determine if their activities would be subject to consistency review requirements; obtain information on the review process; and receive general guidance on how to proceed with their planned activities.

2. *Information Needs.* Whenever possible, the Department of State will base its consistency determination on documents normally required for compliance with federal regulations or approval. Generally, this documentation includes environmental assessments, environmental impact statements, permit and license applications, financial assistance applications and supporting information, as well as, the documentation required by 15 CFR Part 930.

DOS may request a federal agency or applicant to submit additional information for consistency review purposes. When this information is necessary, DOS will promptly notify the agency or applicant of this need, specify the type of information required, and state the reason(s) for the additional information. Request of this information does not alter the time period for DOS review.

3. *Coordinated Review.* When an activity is subject to both federal and state consistency review requirements, DOS and the other involved state agency will strive to concurrently conduct their respective reviews. This objective is possible only if the federal agency or applicant provides the required documentation submitted to another state agency to DOS as well.

DOS will coordinate its review of federal activities for consistency with New York's CMP with other state agencies and local governments with approved Local Waterfront Revitalization Programs.

4. *Public Notice.* DOS is required by 15 CFR Part 930 to issue public notice for federal agency activities and federal permits, licenses and other regulatory approvals that are subject to consistency review. To comply with that requirement, DOS will issue such notice in the State Register and may, at its discretion, also publish notice in newspapers having general circulation in the geographic areas of the proposed activities. All public notices issued by DOS will also be placed on the Department's website. DOS may, at its discretion, issue public notice for proposed federal financial assistance activities. The public review comment period will normally be 30 days, but no less than 15 days.

5. *Interagency Agreements.* DOS may, consistent with the requirements of 15 CFR Part 930, enter into formal and informal agreements with federal agencies to further define the types of activities that would require consistency review, the timing of that review, joint public notification of proposed activities and other procedures that would expedite the review process and reduce regulatory burdens upon federal agencies and applicants.

Procedures for Federal Agency Activities

All federal agency activities affecting any coastal use or resource are to be undertaken in a manner that is consistent to the maximum extent practicable with the enforceable policies of the New York State Coastal Management Program. The enforceable policies of the New York Coastal Management Program include the policies and purposes of approved Local Waterfront Revitalization Program's. The specific procedures to assure this consistency are spelled out in 15 CFR Part 930.30 through 930.46.

The consistency determination must contain the following:

- a statement indicating whether the proposed activity will be undertaken in a manner consistent to the maximum extent practicable with enforceable policies of the New York State Coastal Management Program;
- a description of the evaluation of the effects of the activity on the relevant enforceable policies of the state's coastal management program;
- a detailed description (including, as appropriate, maps, site plans, photos and the timing of the activity), its associated facilities and their coastal effects; and
- comprehensive data and information sufficient to support the federal agency's consistency statement.

The amount of detail in the evaluation of enforceable policies, activity description and supporting documentation shall be commensurate with the expected coastal effects of the activity. This information must be available to the DOS in order for the time period specified in the regulations to commence.

In order to help the DOS understand the proposed federal agency activity and its effects and thus facilitate and expedite the DOS review, DOS recommends that the following information be included, as appropriate, with their consistency determination.

- the purpose and need for the activity
- alternatives to the activity considered by the federal agency
- identification of other approvals and funding needs from federal and state agencies (including copies of documentation submitted to those other agencies), e.g., water quality certifications, correspondence with the State Historic Preservation Officer, and ACOE permit applications).
- required NEPA documentation (Environmental Assessment or Environmental Impact Statement, Finding of No Significant Impact, draft Record of Decision)

A federal agency should consult with DOS at an early stage in the planning of a proposed activity. This consultation should occur at the time the agency begins to identify alternatives for the proposed activity. DOS involvement at this juncture in the federal agency's planning process will ensure that all applicable coastal policies are factored into the identification and analysis of alternatives, and thereby increase the likelihood that the selected or preferred alternative will be found consistent with New York's CMP.

DOS will issue public notice on all federal agency activities that are subject to consistency review. This notice will be given in the State Register and may also be published in a newspaper having general circulation in the area(s) where a proposed activity will occur. The public review period will normally be for 30 but not less than 15 days. DOS will either concur, concur with conditions or object after public review and within the 60 day or extended time period allowable under 15 CFR Part 930, Subpart C.

If a federal agency determines that a proposed activity will not affect any coastal use or resource in the State's coastal zone, the agency may have to submit a negative determination to DOS. If a negative determination is required pursuant to 15 CFR Section 930.35, this determination must describe the activity, its location and the basis for this finding, which is to include an evaluation of the activity and the enforceable policies of the CMP. DOS will object to a negative determination, within the 60 day or extended time period allowable under 15 CFR Part 930, Subpart C, if the coastal effects of the proposed

activity are reasonably foreseeable.

DOS will also monitor federal agency activities that are not listed in Part I of Table 2. DOS will notify a federal agency and request the submission of a consistency determination, if the agency's proposed activity will have reasonably foreseeable effects on the State's coastal zone.

Federal agencies, which are proposing activities which meet the Criteria for General Concurrence listed on page II-9-27 may request concurrence from DOS that certain activities, other than development projects as defined in 930.31b, should not be subject to further DOS review because the activities will have de minimis effects.

Procedures for Activities Requiring Federal Permits, Licenses and Other Regulatory Approvals

Activities in or outside of New York's coastal zone, which require federal permits, licenses and other regulatory authorizations and affect land and water uses and natural resources in the coastal zone, are subject to review by DOS for their consistency with the State's CMP. This requirement also applies to renewals and major amendments to such regulatory approvals.

A federal agency may not issue a permit, license or other authorization for an activity occurring in or outside and affecting the coastal zone unless: (a) DOS concurs or concurs with conditions with the applicant's consistency certification; (b) DOS' concurrence is conclusively presumed; or (c) the U.S. Secretary of Commerce overrides DOS' objection to the applicant's consistency certification.

An applicant seeking a federal permit, license or other authorization is responsible for submitting all of the documentation needed by DOS for its review of the proposed activity. This documentation is to be submitted at the time that an application for a permit, license, etc. is filed with the federal agency. DOS will commence its consistency review of a proposed activity upon receipt of all necessary data and information, which consists of the following items:

1. Copy of the federal permit, license, etc. application.
2. Copy of the completed Federal Consistency Assessment Form, which includes a signed consistency certification and written analysis of the proposed activity's consistency with the policies of the State's CMP.
3. Copy of all supporting documentation submitted with the federal application, including a detailed description of the proposed activity, its associated facilities and coastal effects, map(s) showing the geographic location of the proposed activity, site map(s) and diagram(s) drawn to scale showing all components of the activity and their location on the site, recent color photographs of the site, written statement on the purpose and need for the activity, identification of the owners of the abutting upland properties and underwater lands, and written analysis of alternatives to the proposed activity considered by the applicant.
4. Copy of the final Environmental Impact Statement, if required by the federal agency or by a state agency having jurisdiction over the proposed activity.
5. Copies of permit, license, etc. applications and related correspondence submitted to involved state agencies (eg. DEC, OGS, SHPO, NYPA, PSC).

6. For energy facilities subject to Articles VII or X of the New York State Public Service Law all documentation submitted to the Siting Board for its consideration through to the conclusion of its public hearing process. Energy facilities undergo an extensive review by the State's Siting Board. DOS will participate in the review process when appropriate and advise the Siting Board of coastal policy concerns applicable to the proposed energy facility. DOS will coordinate its federal consistency review of major energy facilities with the Siting Board and other agencies involved in the Article VII or X processes.

The specific federal regulatory activities subject to consistency review by DOS, including those that may occur outside of the State's coastal zone and have reasonably foreseeable coastal effects, are listed in Part II of Table 1. DOS will review these activities for their consistency with New York's CMP in accordance with the procedural requirements of 15 CFR Part 930, Subpart D (or Subpart I for federal regulatory activities having interstate coastal effects). DOS will also monitor activities requiring federal regulatory approval that are not listed in Part II of Table 1 to determine if the activities may affect land and water uses and natural resources in the State's coastal zone. If DOS determines that an unlisted activity will affect coastal uses or resources, then DOS will advise the applicant, federal agency and OCRM that a consistency review of the activity will be required. As part of this notification, DOS will request OCRM's approval to review the unlisted activity.

DOS will issue public notice on those activities requiring federal regulatory approvals that are subject to consistency review. This notice will be given in the State Register. Notice may also be published in a newspaper having general circulation in the area(s) where a proposed activity will occur. The public review period will normally be 30 but no less than 15 days. If DOS decides to hold a public hearing on a proposed activity, notice will be given and indicate the purpose, date, time and place of the hearing. When acceptable to the federal agency and DOS, a joint public notice procedure may be established to meet both agencies' public review obligations.

Following public review and within the six month time period allowable under 15 CFR Part 930, Subpart D, DOS will either concur, concur with conditions or object to an applicant's consistency certification. If the conditions in a DOS conditional concurrence are not acceptable to the applicant or the involved federal agency, then the Department's decision must be treated as an objection to the applicant's consistency certification.

The Corps of Engineers may authorize activities by nationwide and general (regional and statewide) permits or by Letters of Permission. Whenever the U.S. Army Corps of Engineers proposes to issue or revise a nationwide or general permit, the DOS will review the proposed nationwide or general permit. For nationwide or general permits to which DOS objects to the consistency determination or concurs with conditions, activities which would otherwise have been eligible for one of these permits will be reviewed as follows. When the Corps of Engineers notifies DOS of an activity which would have been authorized by a nationwide or general permit but for DOS's objection or concurrence with conditions to that permit, DOS will advise the applicant and the ACOE within 30 days whether a consistency review is necessary. If a consistency review is necessary, the activity will be reviewed by DOS for consistency with the New York's Coastal Management Program. Activities that may be authorized by Letter of Permission will be subject to consistency review by DOS regardless of their location in the State's coastal zone. If a proposed activity may be authorized by a Letter of Permission and is determined by DOS that it does not significantly affect coastal uses or resources, DOS' concurrence with the applicant's consistency certification will not be necessary. DOS will advise the applicant and the federal agency of its determination within 30 days of the receipt of notification from the Corps of Engineers that the activity may be authorized by a nationwide or general permit or Letter of Permission. Under this variance, the applicant is still responsible for submitting all of the above identified necessary data and information to DOS at the time it is filed with the federal agency.

In addition to the above variances to procedures in 15 CFR Part 930 Subpart D, DOS is providing a general concurrence to minor activities whose characteristics are such that they would not affect the achievement of the coastal policies or special management area plans either individually or when cumulative effects are considered. This general concurrence will apply to activities which meet the following criteria.

Criteria for General Concurrence

Activities will not require further DOS review and separate concurrences with consistency certifications if all of the following relevant criteria are met:

- The activity involves a use that is the same as, or similar to, adjacent or nearby uses;
- The activity is compatible with community character in design, size, and materials;
- If the activity would be in an area covered by an approved LWRP, the community advises that it is consistent with the community's land and water use controls for the area;
- The activity is identified in an approved LWRP as one that should be undertaken to advance the policies and purposes of the approved LWRP and the community so advises;
- The activity involves reconstruction, replacement, maintenance or repair of lawful structures, in-kind and in-place, and where applicable a community advises that it complies with an approved LWRP and DOS determines it complies with any applicable Special Management Area Plan;
- Other than for the exercise of riparian or littoral rights (see below), the activity is entirely on property owned or otherwise authorized by the owner for use by the proponent of the activity;
- The activity involves the exercise of riparian or littoral rights that
 - is typical of lawful riparian or littoral access traditionally exercised in the area;
 - complies with any applicable local standards; and
 - avoids any unnecessary interference with navigation and other public uses of the water;
- The activity would not significantly impair the rights and interests of the public regarding the use of public lands or waters;
- The activity does not disrupt existing lawful water-dependent uses;
- Other than for the exercise of riparian or littoral rights or the reconstruction, replacement, maintenance or repair of lawful structures (see above), the activity would not be undertaken in a vegetated wetland or natural protective feature;
- The activity would not generate or discharge non-point source pollution to coastal waters, or would provide a means of adequately treating non-point sources of pollution using accepted best management practices.

In order to monitor adherence to the criteria required for this general concurrence, applicants must submit

all required necessary data and information listed above to DOS. If DOS determines that the activity meets the criteria for general concurrence, the applicant and federal agency will be notified within 30 days of receipt of the requisite data and information that the activity does not require a consistency review by DOS. If DOS determines that the activity does not meet the criteria, then the activity will be reviewed for consistency with New York's Coastal Management Program. The time period for this review would begin when the proposal was initially submitted assuming all the necessary information and data was also submitted at that time.

Procedures for Federal Financial Assistance to State and Local Governments

Applications for federal financial assistance (eg. grants, loans, subsidies, guarantees, insurance, etc.) submitted by New York State agencies, local governments and related public entities (eg. special purpose districts, authorities, etc.) to federal agencies for activities that occur within or outside the State's coastal zone and affect land and water uses and natural resources in the zone will be reviewed by DOS for consistency with the CMP. These activities include, but are not limited to, the planning, design and construction of new structures and facilities, alteration or demolition of existing structures and facilities, and the development of land and water use and resource management plans. The specific federal financial assistance activities subject to consistency review by DOS are listed in Part III of Table 1.

In accordance with the provisions of 15 CFR Part 930, Subpart F (or Subpart I in the case of a financial assistance activity having interstate coastal effects), an applicant for a listed federal financial activity should submit to DOS, at the time of filing an application with a federal agency, the following documentation to commence consistency review of the proposed activity:

1. Copy of the federal financial assistance application.
2. Detailed written description of the proposed activity.
3. Written evaluation on the relationship of the proposed activity and its reasonably foreseeable coastal effects to the applicable CMP policies.
4. Copy of all supporting documentation submitted with the federal application, including map(s) showing the geographic location of the proposed activity, and site map(s) and diagram(s) drawn to scale showing all components of the proposed activity and their location on the site.
5. Copy of the final EIS, if required by the federal agency or by the state or local agency having jurisdiction over the proposed activity.
6. Copies of state permit applications, if required, and related correspondence submitted to the involved state agencies.

New York State does not have a state clearinghouse established pursuant to Executive Order 12372. Therefore, DOS will monitor federal financial assistance activities not listed in Table 1 that occur within and all activities occurring outside of the State's coastal zone through notices published in the Federal Register, individual public notices issued by the federal agencies, and NEPA documents. If an unlisted activity or one occurring outside of the State's coastal zone is determined by DOS to have reasonably foreseeable effects upon the coastal zone, DOS will, within 15 days of the receipt of notification, inform the applicant, the involved federal agency and OCRM that the proposed activity will be reviewed for consistency with the State's CMP.

DOS will, after the receipt of all of the above listed information, review minor federal financial assistance activities in 45 days or less. Major activities which involve NEPA or SEQRA documentation will be reviewed within 90 days of the receipt of all required documentation. This review period may be extended up to 45 days to provide additional time to evaluate a complex activity or to permit DOS the opportunity seek public comment on a proposed activity. DOS is not required by 15 CFR Part 930, Subparts For I to issue public notice for federal financial assistance activities that are reviewed by the Department for consistency with the CMP. DOS may, however, determine that public review of a federal financial assistance activity is warranted. If so determined, notice will be given in the State Register and may be published in a newspaper having general circulation in the area(s) where a proposed activity will occur. The public review period will normally be 30 but no less than 15 days.

During its review, DOS may consult with an applicant on conditions that would allow the Department to concur with the proposed activity. Upon completion of its consistency review, DOS will either concur , concur with conditions or object to the proposed activity. If the conditions in a DOS conditional concurrence are not acceptable to the applicant or the federal agency, then the Department's decision must be treated as an objection to the proposed activity.

Applicants for federal financial assistance which DOS determines meet the Criteria for General Concurrence listed above will be notified within 30 days that DOS does not object to the proposed activity.

Procedures for Outer Continental Shelf Exploration, Development and Production Activities

Activities, which are described in Outer Continental Shelf (OCS) plans as requiring federal permits and licenses and affect land and water uses and natural resources in New York's coastal zone, are subject to review by DOS for consistency with the State's CMP. This requirement also applies to the activities described in amended OCS plans.

An involved federal agency may not issue the requested permit or license for an activity affecting the coastal zone unless: (a) DOS concurs or concurs with conditions with the person's consistency certification; (b) DOS' concurrence is conclusively presumed; or (c) the U.S. Secretary of Commerce overrides DOS' objection to a person's consistency certification.

A person (eg. individual, corporation, partnership, government agency) seeking U.S. Department of Interior approval of a proposed OCS plan is responsible for submitting all of the documentation needed by DOS for its review of the federal permit and license activities described in the plan. This documentation is to be provided to DOS by the U.S. Department of Interior. DOS will commence its consistency review of the proposed federal permit and license activities upon receipt of all necessary data and information, which consists of the following items:

1. Copy of the proposed OCS plan, which identifies and describes the activities requiring federal permits and licenses and the reasonably foreseeable effects that those activities will have on land and water uses and natural resources of the State's coastal zone. The description of the proposed activities must include an evaluation of the activities' coastal effects and demonstrate how those effects would be consistent with the enforceable policies of the CMP, map(s) showing the geographic location of the proposed activities, site map(s) and diagram(s) drawn to scale showing all components of the proposed activities and their location on the site, and map(s) showing the location of commercial shipping lanes, existing oil and gas exploration, development and production activities and potential land bases for the proposed oil and gas activity.
2. Copy of required NEPA documentation (EA or final EIS).

3. Copy of the person's consistency certification.

DOS will commence its consistency review of the federal permit and license activities described in the OCS plan upon receipt of the above listed necessary data and information. During the course of its review, DOS may request the submission of additional information on the proposed permit and license activities. The Department will also coordinate its review with the Department of Environmental Conversation.

DOS will issue public notice on the federal permit and license activities described in the OCS plan that are subject to consistency review. This notice will be given in the State Register. Notice may also be published in a newspaper having general circulation in the coastal region(s) which may be affected by the proposed activities. The public review period will be at least 30 days. If DOS decides to hold a public hearing on the proposed activities, notice will be given and indicate the purpose, date, time and place of the hearing.

DOS will review federal permit and license activities described in the OCS plan as expeditiously as possible and strive to issue its concurrence, conditional concurrence or objection to a person's consistency certification within three months of commencing its review. If DOS cannot complete its consistency review in the three month period, the Department will notify the person, U.S. Department of Interior and OCRM of the reason(s) for the delay. This notification will be given prior to the end of the three month period. DOS must conclude its review of the proposed activities within six months from the receipt of all necessary data and information or its concurrence may be presumed.