

## CHAPTER 28

### COASTAL ZONE MANAGEMENT

#### 28-1 Scope

The Coastal Zone Management Act (CZMA) establishes National policy to protect resources in the coastal zone. To this end, the CZMA imparts an obligation upon Federal agencies whose activities affect any land or water use or natural resource of the coastal zone to be consistent to the maximum extent practicable with the enforceable policies of Federally approved State Coastal Management Programs (CMPs). This chapter contains policy and guidance to ensure that Navy activities with the potential to affect coastal uses or resources are in full compliance with the Federal consistency provisions of CZMA.

#### 28-1 References. Relevant references are:

- a. 16 U.S.C. Sections 1451 to 1464, Coastal Zone Management Act (CZMA) of 1972, as amended;
- b. 15 C.F.R. Part 923, Coastal Zone Management Program Regulations; and
- c. 15 C.F.R. Part 930, Coastal Zone Management Act Federal Consistency Regulations.

**28-2 Legislation.** The purpose of the Coastal Zone Management Act (CZMA) is to "preserve, protect, develop, and where possible, restore and enhance the resources of the Nation's coastal zone for this and succeeding generations." The Act encourages coastal States to properly manage use of their coasts and coastal resources, prepare CMPs for areas requiring special attention, and provide for public and governmental participation in decisions affecting the coastal zone.

**28-3 Terms and Definitions.** Unless otherwise specified, the term "Navy" means "Department of the Navy."

**28-3.1 Action Proponent.** The commander, commanding officer, or civilian director of a unit, activity or organization that is responsible for initiating and/or carrying out a proposed action. In general, the action proponent should be at the lowest level in the chain of command that "owns" the entire action being proposed.

**28-3.2 Any Coastal Use or Resource.** Any land or water use or natural resource of the coastal zone. Coastal uses include, but are not limited to: public access, recreation, fishing, historic or cultural preservation, development, hazards management, marinas and floodplain management, scenic and aesthetic enjoyment, and resource creation or restoration projects. Natural resources include biological or physical resources that are found permanently or cyclically within a State's coastal zone. Biological and physical resources include, but are not limited to: air, tidal and non-tidal wetlands, ocean waters, estuaries, rivers, streams, lakes, aquifers, submerged aquatic vegetation, land, plants, trees, minerals, fish, shellfish, invertebrates, amphibians, birds, mammals, reptiles, and coastal resources of national significance. Coastal uses and resources also include uses and resources described in the State's CMP.

**28-3.3 Associated Facilities.** All proposed facilities which are specifically designed, located, constructed, operated, adapted, or otherwise used, in full or in major part, to meet the needs of a Navy

action proponent (e.g., activity, development project, licensee, permittee, or assistance recipient) and without which the action, as proposed, could not be conducted.

**28-3.4 Classified Activity.** Any action for which a Navy action proponent is required to protect from disclosure national security information concerning the national defense or foreign policy, provided it has been properly classified in accordance with the substantive and procedural requirements of an executive order. Even when an action is classified, the Navy action proponent shall conduct the action consistent to the maximum extent practicable with the enforceable policies of a State's CMP, unless exempted by the President. The Navy action proponent shall provide to the cognizant State agency a description of the action and coastal effects that the action proponent is legally permitted to release and does not otherwise breach the classified nature of the activity.

**28-3.5 Coastal Management Program (CMP).** The program of a coastal State or Territory, which has been approved by the National Oceanic and Atmospheric Administration (NOAA) pursuant to CZMA Section 306, and which includes, but is not limited to, a comprehensive statement in words, maps, illustrations, or other media of communication, prepared and adopted by the State, that sets forth objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone.

**28-3.6 Coastal States.** States of the U.S. bordering on the Atlantic, Pacific, or Arctic Oceans, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes. The term also includes Puerto Rico; the Virgin Islands; Guam; the Commonwealth of the Northern Mariana Islands; the Trust Territories of the Pacific Islands; and American Samoa.

**28-3.7 Coastal Zone.** Coastal waters (including lands lying in coastal waters and submerged there under and adjacent shore lands within the meaning of Section 304(1) of the CZMA and as more fully defined and described in each coastal State's Federally-approved CMP. Excluded from the coastal zone is any Navy facility or real estate owned, held in trust, or exclusively used by the Navy in performance of its mission.

**28-3.8 Consistent to the Maximum Extent Practicable.** The requirement for Navy activities affecting any coastal use or resource of States with approved CMPs to be fully consistent with the enforceable policies of such programs unless full consistency is prohibited by existing law applicable to the Navy. The Navy action proponent will not use a general claim of lack of funding or insufficient funds or failure to include the cost of being fully consistent in the federal budget and planning process as a basis for not being consistent to the maximum extent practicable with an enforceable policy of a Federally-approved State CMP. The only circumstances where the Navy action proponent may rely on a lack of funding as a limitation on full consistency with such an enforceable policy is the Presidential exemption described in the CZMA.

**28-3.9 De minimis Activities.** Activities that are expected to have insignificant direct or indirect (cumulative and secondary) effects and for which a mutual agreement exists between the Navy and a State agency that the action is not subject to further State agency review. The Navy shall document its decision to proceed with an action listed as a de minimis activity in a Memorandum to Record.

**28-3.10 Effect on any Coastal Use or Resource.** Any reasonably foreseeable effect on coastal uses or resources resulting from a Navy action or activity. These reasonably foreseeable effects can take the form of:

a. Direct effects - effects that occur at the same time or place as the Navy action.

b. Indirect effects - secondary and cumulative effects that result from the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects are effects resulting from the incremental impact of the Navy action when added to other past, present, and reasonably foreseeable actions, regardless of what agency or individual undertakes such actions. This definition is consistent with the Council on Environmental Quality's definition of cumulative effects (40 CFR 1508.7).

**28-3.11 Effects Test.** Test by which the Navy action proponent factually determines compliance with the Federal consistency requirements of CZMA Section 307 and the implementing regulations set forth at 15 CFR Part 930.

**28-3.12 Enforceable Policies of a State CMP.** State policies that 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 water uses and natural resources in the coastal zone and which are incorporated in a Federally-approved State CMP. An enforceable policy contains standards of sufficient specificity to guide public and private uses, but need not establish detailed criteria, such that an action proponent is capable of determining the consistency of an activity without interaction with the State agency.

**28-3.13 Land Use.** A use or activity conducted in, or on, the shore lands within the coastal zone.

**28-3.14 Listed Activities.** Activities or actions listed by State agencies in their CMPs that, in the opinion of the State agency, will have reasonably foreseeable coastal effects.

**28-3.15 Navy Action or Activity.** Any function performed by or on behalf of the Navy action proponent in the exercise of its statutory responsibilities (e.g., facilities development, tests, or exercises). The term "action" is used interchangeably with the term "activity" in this instruction.

**28-3.16 Navy Development Project.** A Navy action that involves: (a) the planning, construction, modification, or removal of public works facilities or other structures within the coastal zone or occurring outside the coastal zone but that could result in effects being felt within the coastal zone; and (b) includes the acquisition, use, or disposal of any coastal use or resource. All Navy development projects within the coastal zone shall be deemed to cause coastal effects unless excluded from State agency review as de minimis activities.

**28-3.17 Thorough Consistency Assessment.** An assessment of coastal effects fully meeting the requirements of CZMA Section 307 and the implementing regulations set forth at 15 CFR Part 930. Navy policy is that an EA or EIS prepared by the Navy action proponent pursuant to the requirements of NEPA constitutes a "thorough consistency assessment."

**28-3.18 Unlisted Activities.** Activities or actions not specifically listed in a State's CMP, but which may have reasonably foreseeable coastal effects and for which a State may advise the Navy action proponent that a consistency review is required.

**28-3.19 Water Use.** A use or activity conducted in or on waters within the coastal zone.

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## **28-4 Requirements**

**28-4.1 Consistency Review Process** CZMA and the regulations implementing Federal consistency requirements require the Navy and other Federal agencies proposing actions, whether within or outside of a State's coastal zone, to determine if the action is reasonably likely to directly or indirectly (cumulatively or secondarily) affect any land or water use or natural resource within that coastal zone. A consistency review should result in one of the following actions: preparation of a Consistency Determination; preparation of a Negative Determination; or a determination that no further action is necessary (see Figure 28-1). During consistency review, the Navy action proponent may conduct a thorough consistency assessment in the context of preparing an Environmental Assessment (EA) or Environmental Impact Statement (EIS), as required to comply with the National Environmental Policy Act (NEPA).

**28-4.2 Determining Effects.** The proponent of the Navy action shall conduct an effects test to factually determine whether an action will affect any coastal use or resource in a coastal State. The effects test shall be undertaken regardless of whether or not the action will be conducted within the coastal zone, as defined in the State's Federally-approved CMP. If an action initiates a series of events where direct and/or indirect effects on a coastal use or resource are reasonably foreseeable, the Navy action shall be consistent to the maximum extent practicable with the enforceable policies of a State's Federally-approved CMP. In carrying out its effects test, the Navy action proponent shall:

- a. Review the Federally-approved State CMP's relevant enforceable policies for compliance, keeping in mind the definitions of coastal uses and resources;
- b. Consider the definition of effects as identified in paragraph 28-1.3.10; and
- c. Assess whether the effects of the action taking place outside of a State's coastal zone will be felt by: (1) a State's coastal uses or resources within the coastal zone; and/or (2) coastal resources that may occur (e.g., migrate) outside the State coastal zone.

**28-4.3 Documentation Requirements.** Figure 28-1 provides a flowchart for determining documentation requirements for Navy actions under this instruction. The Navy action proponent is responsible for preparing the appropriate documentation necessary to satisfy the Federal consistency provisions of the CZMA and implementing regulations. See paragraphs 28-1.4.2.1(e) and 28-1.4.2.2(b) for more detailed discussion of the contents of Consistency and Negative Determinations. Some States (e.g., Puerto Rico) require Consistency Determinations and Negative Determinations be documented using specific State forms. Federal regulations do not require that Consistency Determinations and Negative Determinations be provided on the State form, as long as such determinations comply with the requirements of the CZMA regulations, but using such forms, where practical, is recommended to avoid unnecessary conflict.

### **28-4.3.1 Navy Activities Where Coastal Effects are Reasonably Foreseeable**

#### **a. Consistency Determination**

(1) A Consistency Determination must be submitted to each affected coastal State when an action may have a reasonably foreseeable effect(s) on any coastal use or resource.

(2) A Consistency Determination shall be submitted for all Navy development projects occurring within the coastal zone (e.g., Navy housing development occurring outside Navy or Federal lands but within the defined State coastal zone).

b. **General Consistency Determinations.** A General Consistency Determination may be prepared in cases where the Navy action proponent will be performing a repeated action (other than a development project), which cumulatively has an effect upon any coastal use or resource.

(1) A General Consistency Determination may only be used in situations where the incremental actions are repetitive and do not affect any coastal use or resource when performed independently.

(2) Navy and State agencies may mutually agree on a General Consistency Determination for de minimis activities or any other repetitive activity or category of activities.

(3) If a General Consistency Determination is issued, the Navy action proponent shall thereafter periodically consult with the State agency to discuss the manner in which the incremental actions are being undertaken.

c. **Phased Consistency Determinations.** A Phased Consistency Determinations may be provided in cases where the decisions of the Navy action proponent related to a proposed development project or other action will be made in phases based upon developing information that may not be available at the time of the original Consistency Determination. In this case, a Consistency Determination will be required for each major decision.

d. **National or Regional Consistency Determinations.** The Navy action proponent may provide coastal States with Consistency Determinations for activities that are national or regional in scope and that affect any coastal use or resource of more than one State. Single Consistency Determinations may be prepared that address common State coastal management issues and enforceable policies. Where coastal effects and enforceable policies are unique to particular States, the Consistency Determination shall contain separate sections addressing these unique effects and policies.

National Consistency Determinations shall be approved by and coordinated with the Director, Environmental Protection, Safety, and Occupational Health Division, CNO (N45). Regional Consistency Determinations shall be approved by and coordinated with the Area Environmental Coordinators.

e. **Content of a Consistency Determination.** The level of detail and information provided in a Navy Consistency Determination shall be commensurate with the expected effects of the action on the coastal zone. At a minimum, the Consistency Determination shall include the following elements:

(1) A brief introductory statement indicating whether or not the proposed action will be undertaken in a manner consistent, to the maximum extent practicable, with the enforceable policies of the relevant Federally-approved State CMP;

(2) A detailed description of the action and its associated facilities, and reasonably foreseeable coastal effects;

(3) Comprehensive data and information sufficient to support Navy's Consistency Determination. Where practicable, language contained in related documentation prepared pursuant to NEPA may be directly incorporated into the Consistency Determination;

(4) An evaluation of each relevant State enforceable policy and how the Navy action is or is not consistent to the maximum extent practicable (the Navy action proponent should give consideration to State CMP provisions that are in the nature of recommendations). If the Navy action proponent asserts that full consistency with the enforceable policies of the State CMP is prohibited, the Navy action proponent must clearly describe to the State agency the statutory provisions, legislative history, or other legal authority that limits the Navy action proponent's discretion to be fully consistent. In addition, CNO (N45) must be notified regarding assertions that full consistency with the enforceable policies of a State CMP is prohibited; and

(5) In the case of a classified activity or action, the Navy action proponent is required only to provide to a State a description of the action and effects that will not breach the classified nature of the activity. However, the Navy action proponent must conduct the classified activity consistent to the maximum extent practicable with the State CMP.

f. **Consistency Determinations in Emergency or Similar Unforeseen Circumstances.** In the event of an emergency or similar unforeseen circumstances (i.e., increased threat conditions requiring immediate action), the Navy action proponent may deviate from full consistency with the enforceable policies of the State CMP. However, to the extent that the emergency or unforeseen circumstance allows, the action proponent shall attempt to seek State agency concurrence prior to taking action. Upon addressing exigent circumstances or completing emergency response activities, the Navy action proponent shall provide the State agency with a description of its actions and impacts to the coastal zone.

g. **Timing of Consistency Determination Submission and State Concurrence**

(1) Submission of a Consistency Determination by the Navy action proponent must be no later than 90 days before final Navy action is taken on the proposed action, unless both the Navy action proponent and the State agency agree to an alternative notification schedule.

(2) The Navy action proponent may presume State agency concurrence if a response is not received within 60 days from receipt of the Navy action proponent determination. However, State agency concurrence shall not be presumed when an extension of time is requested to review the matter.

(3) The Navy action proponent must approve at least one State agency request for an extension period of 15 days or less.

**28-4.3.2 Documentation Requirements for Navy Activities that Do Not Have Coastal Effects**

a. **Negative Determination.** A Negative Determination must be submitted to an affected State(s) when a Navy action proponent determines an action does not have an effect(s) on any coastal use or resource, and:

(1) The action or activity is identified as a "Listed Activity" by a State agency; or

(2) The State has notified the Navy action proponent that as a result of its case-by-case monitoring of Unlisted Activities that a Navy action may have reasonably foreseeable coastal effects and that the Federal consistency provisions of CZMA Section 307 apply; or

(3) The action is the same as, or similar to, actions for which Consistency Determinations have been prepared in the past; or

(4) The action was the subject of a "thorough consistency assessment" (see paragraph 28-1.3.17) that was undertaken by the Navy action proponent and resulted in initial findings that the action has no coastal effects.

b. **Content of a Negative Determination.** Navy Negative Determinations shall contain the following information:

(1) A brief description of the action including its location;

(2) The basis for the Navy action proponent's determination that the action will not affect any coastal use or resource; and

(3) A discussion of the relevant enforceable policies reviewed by the Navy action proponent when making its Negative Determination.

c. **Timing of Negative Determination Submission and State Concurrence**

(1) Submission of a Negative Determination by the Navy action proponent must be no later than 90 days before final Navy approval of the proposed action, unless both the Navy action proponent and the State agency agree to an alternative notification schedule.

(2) A State is not obligated to respond to a Negative Determination. Consequently, the Navy action proponent may presume State agency concurrence if a response is not received within 60 days from receipt of the Navy determination. However, State agency concurrence shall not be presumed when an extension of time is requested to review the matter.

(3) The Navy action proponent shall approve at least one State agency request for an extension period of 15 days or less.

**28-4.3.3 No Documentation Required.** No documentation is required pursuant to CZMA Section 307 if there are no effects on any coastal use or resource and none of the provisions of paragraphs 28-1.4.2.2(a)(1)-(4) are triggered.

**28-4.4 Relationship Between Consistency and Negative Determinations and NEPA Documentation.** Consistency Determinations and Negative Determinations shall be prepared as stand-alone documents. Such stand-alone determinations may be incorporated, as an appendix, into documentation prepared pursuant to NEPA. The Navy action proponent and the relevant State agencies should mutually agree on how best to coordinate the requirements of CZMA and NEPA.

**28-4.5 State Agency Objections and Notification**

**28-4.5.1 Proceeding with an Action.** If a State agency objects to a Navy Consistency or Negative Determination, the action proponent shall not proceed with the action over those objections unless the action proponent provides written notification to:

- a. CNO (N45) for review and coordination; and
- b. The State agency objecting to the action. Such notification shall state that the:

(1) Navy action proponent has concluded that under existing law, it is prohibited from the standard of being fully “consistent to the maximum extent practicable” with a Federally-approved State CMP (see paragraph 28-1.4.2.1(e)) and clearly describe the legal impediments to full consistency; or

(2) Navy action proponent has concluded that its action is fully consistent with the enforceable policies of the State CMP.

**28-4.5.2 Serious Disagreements.** In the event of a serious disagreement between the Navy action proponent and a State agency regarding the consistency of a proposed Navy action affecting any coastal use or resource, either party may request mediation from the NOAA’s Office of Ocean and Coastal Resource Management or the Secretary of Commerce. In such cases, the action proponent shall notify CNO (N45) prior to requesting or accepting mediation.

## **28-5 Navy Policy**

### **28-5.1 State Coastal Non-point Pollution Control Programs**

The Navy shall support the development and implementation of State coastal non-point pollution control programs on Navy lands by identifying non-point sources, specifying corrective measures, and coordinating non-point source compliance efforts with State programs. The Navy shall also identify areas of sensitive natural resources of the coastal zone, minimize the loss or degradation of coastal wetlands, enhance the natural value of wetlands, and protect water quality. The Navy shall encourage research and development efforts to address non-point sources of pollution in order to identify and understand Navy impacts on the coastal and marine environment.

## **28-6 Responsibilities**

**28-6.1 Director, Environmental Protection, Safety, and Occupational Health Division, CNO (N45)** shall:

- a. Develop and implement Navy policy regarding CZMA compliance;
- b. Advise commands of the requirement for submitting Consistency Determinations or Negative Determinations;
- c. Coordinate with NOAA, the Office of the Secretary of Defense, ASN (I&E), and other Department of Defense components and Federal agencies concerned with coastal zone matters; and
- d. Provide Navy representation, along with the Major Claimant, when NOAA has been asked to mediate differences between the Navy action proponent and State CMP agencies.

**28-6.2 Major Claimants, Regional Commanders, Commanding Officers of Shore Activities, Training and Operations Planners, Weapons Systems Acquisition Program Managers, and Science and Technology Program Managers shall:**

- a. Ensure that all appropriate instructions, including those requiring written justification for actions, collectively or separately, involving research, development, test, and evaluation (RDT&E), military construction (MILCON), operations and maintenance, Navy working capital fund, urgent minor construction, land acquisitions, natural resources management, weapons and support system procurement, and special projects, include the requirements for funding and scheduling for CZMA documentation, as necessary; and
- b. Participate in the formulation of, and ensure commitment to, any mitigation and monitoring requirements established in a Consistency or Negative Determination.

**28-6.3 Area and Regional Environmental Coordinators shall:**

- a. Participate in the preparation of Consistency and Negative Determinations for proposed activities that affect areas of their concern or cognizance;
- b. Provide Navy representation, along with the action proponent, at any formal hearings/meetings of State CMP agencies where the proposed Navy action proponent is on the agenda for discussion and approval;
- c. Actively participate in the review process of proposed changes to State CMPs to ensure that the Navy's interests are protected; and
- d. Identify and negotiate de minimis and General Consistency Determinations for Navy activities with State CMP agencies.

**28-6.4 Activity or Action Proponents shall:**

- a. Prepare and submit Consistency and Negative Determinations for Navy activities as provided in paragraphs 28-1.4.2.1(a) and 28-1.4.2.2(a);
- b. Provide Navy representation, along with the Area or Regional Environmental Coordinator, at any formal hearings/meetings of State CMP agencies where the proposed Navy action is on the agenda for discussion and/or approval; and
- c. Provide notification to CNO (N45) in the event of a serious disagreement between the Navy action proponent and a State agency regarding the consistency of a proposed Navy action or when the action proponent elects to proceed with an action over the objection of a State agency.