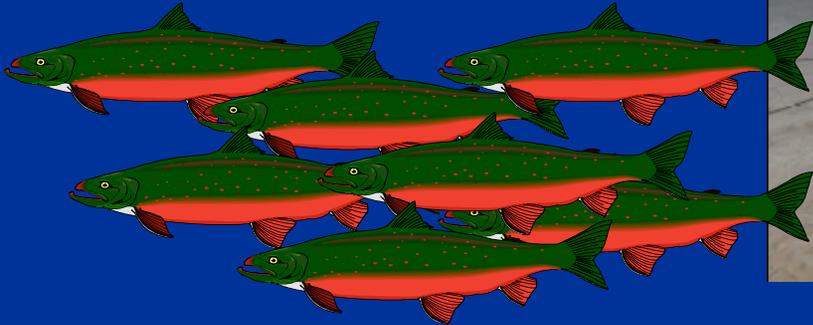
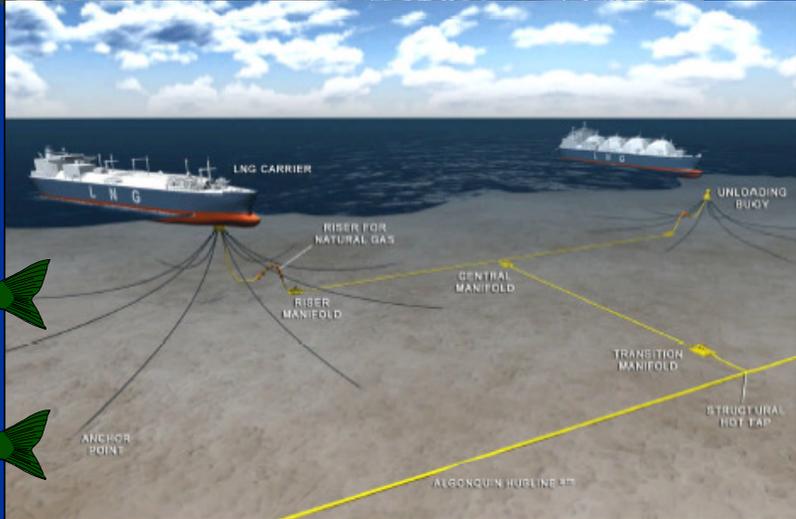
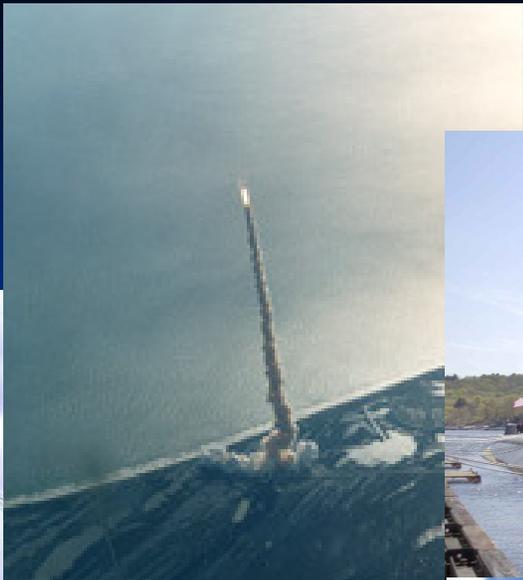


# Federal Consistency Workshop



**David Kaiser, Senior Policy Analyst**  
**Office of Ocean and Coastal Resource Management**  
**National Ocean Service**  
**National Oceanic and Atmospheric Administration**





# Coastal Zone Management Act

October 27, 1972

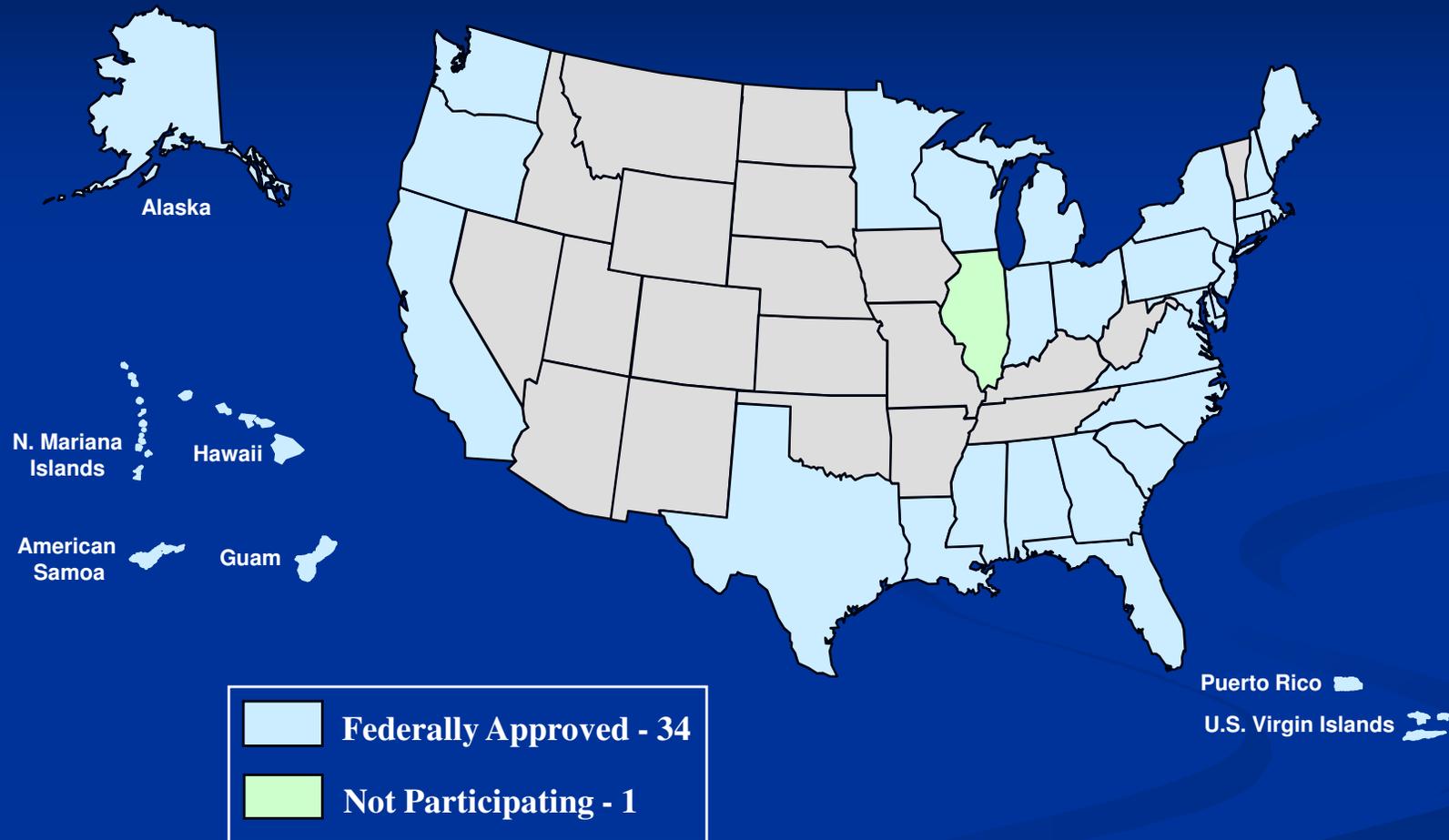
## Three Primary Objectives of the CZMA:

1. *It's a Balancing Act.* Balance resource protection with economic, recreational and cultural needs
2. *Emphasizes Primacy of State decisions.* States address local issues, but must consider national interests: defense, energy, fisheries, recreation, ports, transportation
3. *Participatory.* Encourage participation of all levels of government, from local to federal, and the public, to carry out the purposes of the Act

# Participation and Incentives

- Both Coastal Management and National Estuarine Research Reserves (NERR) programs are voluntary—NOAA approval required
- Two Incentives: Federal funds and Federal Consistency

# State & Territorial CZMA Programs



# Office of Ocean & Coastal Resource Management

(within NOAA's National Ocean Service)

- Administers the National Coastal Management Program and the National Estuarine Research Reserve System
- Approve State Programs and Changes to the Programs
- Evaluate State CZMA and NERRS programs
- Formulate National Coastal and Ocean Policy
- Provide Management & Technical Assistance to all CZMA Stakeholders

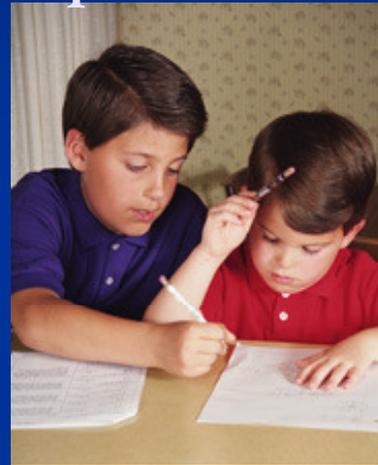
**Better  
Communication**

**Achieve Mutual Goals**

**Same Language**



**Help Each Other**



**Right Tools**



**Answer Questions**



**Partnership**



# Workshop Agenda

- What Federal Consistency is and Basic Procedures
- Federal Consistency Examples
- Round Table Discussion

# It's An "Effects Test"...

Federal Consistency is the requirement that *Federal actions*, in or outside the coastal zone, that *affect* any land or water *use* or natural *resource* of a State's coastal zone must be consistent with the *enforceable policies* of State Coastal Management Programs.

(CZMA Section 307 (16 U.S.C. § 1456))

# “Federal Actions”

- *Federal Agency Activities & Development Projects*  
CZMA 307(c)(1), (2), 15 CFR part 930, subpart C
- *Federal License or Permit Activities*(non-federal applicants)  
CZMA 307(c)(3)(A), 15 CFR part 930, subpart D
- *Outer Continental Shelf Oil and Gas Plans*  
CZMA 307(c)(3)(B), 15 CFR part 930, subpart E
- *Federal Financial Assistance to State or Local Agencies*  
CZMA 307(d), 15 CFR part 930, subpart F

# Coastal Effects

*(adverse, beneficial, direct, indirect, cumulative, secondary)*

## Federal Agency Activities

## Federal Approval Activities



# Enforceable Policies

- Legally binding under State Law
  - Apply to State Jurisdiction and not Federal areas or agencies
  - Not Preempted by Federal Law
  - Do not discriminate against a particular group or activity
  - Consistent with CZMA requirements
  - Once superceded by other State law, no longer enforceable
- Approved by NOAA
  - Input by Federal agencies and the public
  - No incorporation by reference

# Benefits

## Powerful Tool for States

- Application of State Policies to Federal Actions
- No Geographical Boundaries
- No Categorical Exemptions -- Apply Effects Test

## State-Federal Coordination

- Cooperation, Early Coordination, Negotiation
- Helps Federal Agencies and States to Address Coastal Effects
- States Concur with Approximately 95% of Reviewed Actions

## Public Input

Can Build State and Public Support for Federal Actions

Avoids Costly Last Minute Changes to Federal Projects

# National Interest Safeguards: Checks and Balances

- Primacy of State CZMA decisions and federal consistency review is balanced with national interest components.
- State CZMA programs must address national interest areas to benefit nation, not just local interests and must give priority consideration to coastal dependent national interest activities: defense, energy, ports, transportation.

# National Interest Considerations: Checks and Balances

- Consistency Triggered Only if Coastal Effects
- NOAA Approves State Programs & Changes – With Input from Federal Agencies, Industry and Public
- Federal Agency Activities:
  - Federal Agency May Proceed Over State's Objection if Consistent to the Maximum Extent Practicable (including being Fully Consistent)
  - Presidential exemption
- Appeal State Objection to Secretary of Commerce (Non-Federal)
- Mediation by the Secretary or OCRM

# Procedures: Federal Agency Activities

- Federal agency determines coastal effects
- Consistency or Negative Determination and *supporting information* to State 90 days before activity begins – *CD/ND Requirements*
  - When is a ND required (930.35(a))
  - States/Federal agencies may agree to exclude *de minimis* and environmentally beneficial activities from CZMA review
  - CD required for activity on federal land is coastal effects
- State has 60+ days to review
- Consistent to the maximum extent practicable
- Mediation

# Consistent to the Maximum Extent Practicable

- Fully consistent unless legally prohibited (substance and procedure). Explain to State.
- Lack of funding not a basis for CMEP
- Classified activities not exempt
- Exigent circumstances: emergency or unexpected conditions call for quick or immediate action
- Federal agency can proceed over State objection if *CMEP (either fully consistent or legally prohibited)*.

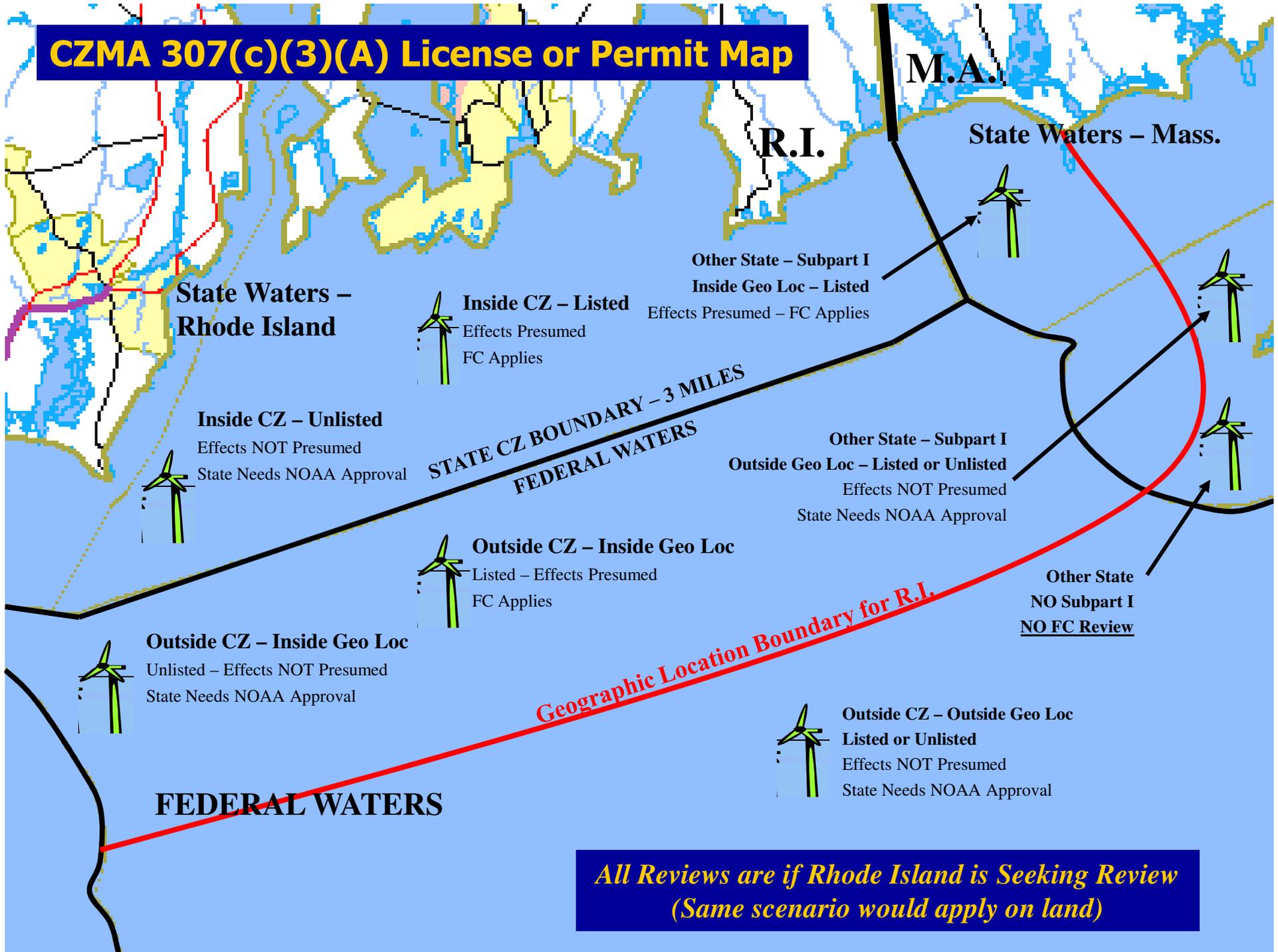
# EMERGENCY!!!??



# License or Permit Activities

- Non-Federal Applicants
- Listed or unlisted in State program
- Inside or Outside Coastal Zone
- Consistency certification to State
- Project must be fully consistent
- State review up to 6 months
- State objection = Federal agency cannot approve
- Applicant may appeal objection to Secretary

# CZMA 307(c)(3)(A) License or Permit Map



# Running of the 6-Month Review

- Must be active application and a Consistency Certification (CC) to start
- Starts on date State receives the CC and “necessary data and information” (ND&I) – *NOT* date State determines complete
- ND&I is described in 930.58 and in State’s CMP *IF* State amends program to specifically describe ND&I
- State needs to pay close attention to start of 6-month period, 30-day completeness notice, and end of the 6 months
- 6-month period can *ONLY* be altered/stayed by *WRITTEN* agreement between State and applicant – Needs to be clear “meeting of the minds” and for a specified period

# OCS Oil & Gas Plans

- Specifically provided for in the CZMA
- Mostly like license or permit activities
- Coordination between CZMA and OCSLA

# Financial Assistance Activities

- State and Local Government Agencies
- State procedures under intergovernmental review process for Federal Programs (E.O. 12372), or other State clearinghouse process

# Appeals to the Secretary

- ONLY for Non-Federal Applicants – NOT for Federal Agencies or Third Parties
- Two Grounds for Secretary Override:
  1. Consistent with CZMA Objectives
  2. National Security
- If Secretary overrides State objection, Federal agency may approve or fund the activity
- States need to consider appeal criteria *during State's CZMA review* and *before* State issues objection.

# Appeal Deadlines

**General Coastal Zone Management Act Federal Consistency Appeal Procedures  
Required by the Energy Policy Act of 2005 and NOAA Regulations**  
(See 15 CFR part 930, subpart H for further details)

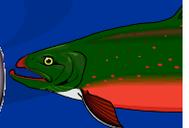
Day(s) After Receipt of Notice of Appeal	Action Required	
0	<ul style="list-style-type: none"> <li>• Notice of Appeal received</li> </ul>	
30	<ul style="list-style-type: none"> <li>• Publish Federal Register (FR) Notice of Appeal and newspaper notices. Notice <i>must</i> be published by day 30.</li> <li>• Public Comment Period and Federal Agency Comment Period opens.</li> <li>• Receipt of Appellant's Brief and Appendix.</li> </ul>	
60	<ul style="list-style-type: none"> <li>• Receipt of State's Brief and Supplemental Appendix.</li> <li>• Public and Federal Agency Comment periods close unless Public Hearing Request granted.</li> <li>• Request for Public Hearing must be received (within 30 days of FR Notice).</li> </ul>	
80	<ul style="list-style-type: none"> <li>• Receipt of Appellant's Reply Brief.</li> </ul>	
60-Day Stay Granted		No Stay Granted
250	<ul style="list-style-type: none"> <li>• Publish Notice closing Record; Record <i>must</i> be closed on day 250</li> </ul>	190 <ul style="list-style-type: none"> <li>• Day 190 is end of 160-day decision record period without stay.</li> <li>• Publish Notice closing Record.</li> </ul>
310	<ul style="list-style-type: none"> <li>• Secretary issues Decision or publishes FR Notice re: No Decision—take additional 15 days.</li> </ul>	250 <ul style="list-style-type: none"> <li>• Secretary issues Decision or publishes FR Notice re: No Decision – take additional 15 days.</li> </ul>
325	<ul style="list-style-type: none"> <li>• Secretary issues Decision</li> </ul>	265 <ul style="list-style-type: none"> <li>• Secretary issues Decision</li> </ul>

<b>SUMMARY &amp; NUMBERS OF CZMA SECRETARIAL APPEALS — April 13, 2009</b>	
<b>SUMMARY</b>	<b># OF APPEALS</b>
<b>CZMA Secretarial Appeal Decisions</b> 14 Decisions to Override State Objection / 30 Decisions NOT to Override State	44
<b>CZMA Secretarial Appeal Decisions on Energy Activities (subset of the 44)</b>  14 of the 44 were OCS Oil & Gas Plans 7 Decisions to Override State Objection 7 Decisions NOT to Override State 2 of the 44 were Natural Gas Pipelines 1 Decision to Override State Objection 1 Decision NOT to Override State 2 of the 44 were Liquefied Natural Gas (LNG) Terminals/Pipelines 1 Decision to Override State Objection 2 Decisions NOT to Override State	19 (of the 44)
<b>CZMA Secretarial Appeals Dismissed or State Objections Overridden on Procedural Grounds</b>	32
<b>CZMA Secretarial Appeals Withdrawn and/or Settled</b>	62
<b>CZMA Secretarial Appeals Pending</b>	0
<b>TOTAL APPEALS FILED as of March 27, 2009</b>	138

<http://coastalmanagement.noaa.gov/consistency/welcome.html>



# Federal Consistency Case Studies

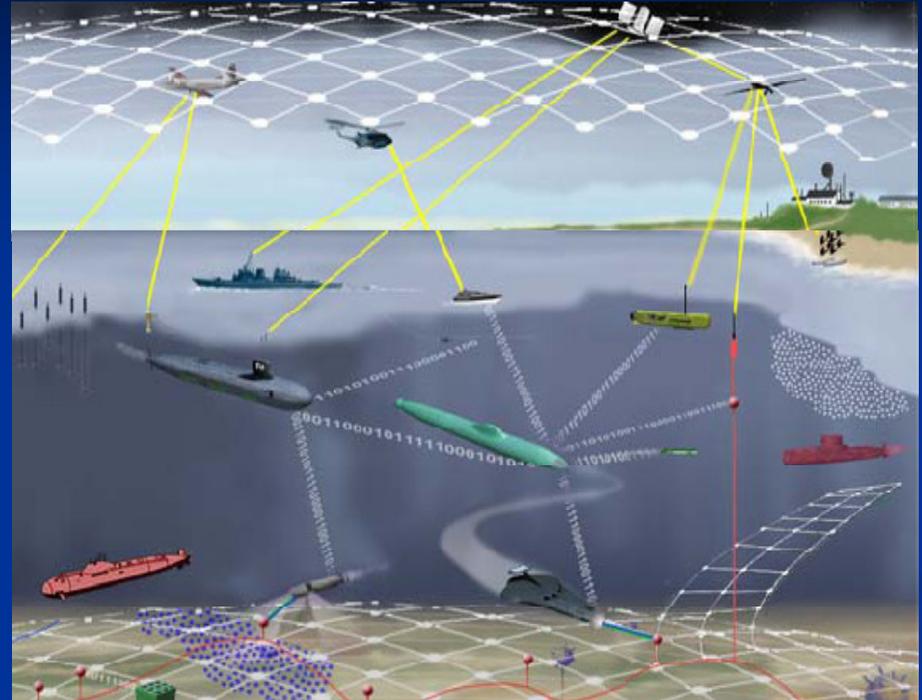


# Coastal Effects

- Scripps – Acoustic Thermometry of Ocean Climate (ATOC) Project
  - Various Federal Authorizations
  - Scripps Claimed no CZMA Review - “outside the coastal zone”
  - OCRM clarified that CZ boundary not relevant in determining coastal effects
  - Reasonably foreseeable effects – resources affected outside the CZ were resources of CA’s CZ.
- Application to NMFS for “Exempted Fishing Permit” for exploratory longline fishing in EEZ off Calif.
  - Unlisted Activity – OCRM Denied CA’s Review.
  - CA did not demonstrate reasonably foreseeable coastal effects from *this particular EFP* – could not show resources were resources of CA’s CZ.

# Effects - Navy Sonar

- Complex Integrated Training – Strike Force Certification
- Anti-Submarine Warfare (ASW)
- Mid-Frequency Active (MFA) Sonar
- NOAA/NMFS MMPA Mitigation
- California and Hawaii CZMA Review
- Disagreement on Impacts to Whales - Preemption



- Mediation and Litigation
- CZMA Presidential Exemption
- NEPA CEQ “Alternative Arrangements.”
  - Supreme Court Decision

# Consistent to the Maximum Extent Practicable (CMEP)

- NOAA National Marine Fisheries Service (NMFS) – Approval of Fishery Management Plan (FMP)
- State Objects – Wants Changes in Size Limit, Gear Restrictions or Season Closings
- NMFS Proceeds over State’s Objection – CMEP
- Legally Prohibited from Complying with State’s Policies?
  - NMFS must Balance Various Magnuson-Stevens Act (MSA) Requirements
  - Applying MSA Objectives to NMFS’ Administrative Record for *this* FMP prohibit compliance with State’s policies.
- State can seek mediation or litigate.

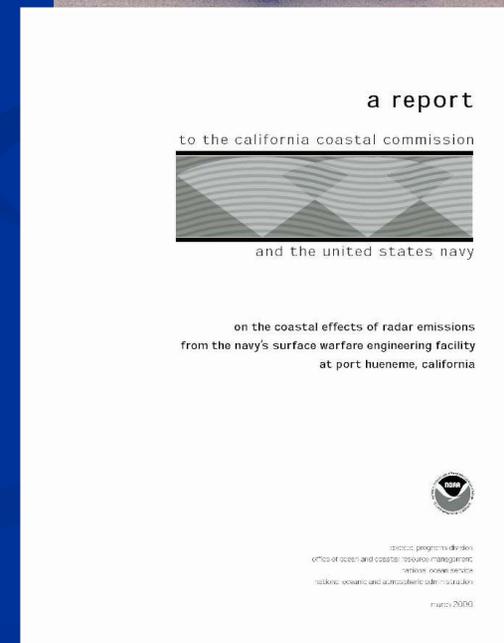
# Consistent to the Maximum Extent Practicable (CMEP)

- Navy Homeport Dredging – San Diego Channel  
– U.S.S. Stennis Carrier Group
- CZMA Agreement – Put the Sand on the Beaches
- LIVE ORDNANCE!
- Sift Sand or Dump Offshore?
- Navy, State, OCRM Discussions
- Litigation – Injunction (*Calif. Coastal Comm. v. Navy*, F. Supp 2d 1106 (S.D. Cal 1998))
- Settlement – Navy agrees to find other source of sand for beach renourishment



# Mediation: Surface Warfare Engineering Facility (SWEF)

- Primary Navy radar testing facility – High Frequency radar emissions
- State & Community human health concerns and impacts to marine mammals and birds
- Negative Determination - Dispute
- OCRM mediation
- OCRM establishes technical review panel.
- OCRM report to State and Navy
- Navy agrees with all but one recommendation in OCRM report and State is satisfied - resolved



# Federal Preemption

## Military Training Flights

- Low Level Flights in North Carolina
- Impacts to Wildlife and Public Enjoyment of Beaches?
- State Proposes Noise and Minimum Altitude Policies to Apply Through Federal Consistency
- NOAA Denies State request to Incorporate into State CZMA Program
  - States are preempted from regulating aircraft in flight.

## LNG Siting

- Energy Policy Act of 2005 (EPAAct) – Amends NGA – Preemption
- New Jersey Submits Revised LNG Siting Policies to NOAA
- NOAA Denies State request to Incorporate into State CZMA Program
  - States are NOW preempted from regulating LNG siting

**Policies could not be “enforceable” under the CZMA; including previously approved LNG policies**

# Interstate Consistency

- Drinking water for City of Virginia Beach, VA
- 90 mile pipeline from Lake Gaston – Project Wholly in Virginia
- 60 million gallons of water per day to be piped to City
- FERC Authorization
- NC CZMA review because effects in NC: striped bass
- NC objects under CZMA
- City wins appeal to Secretary: national interest outweighs effects and no reasonable alternative available



# Enforceable Policies: No Discrimination

- Mobil proposal for Oil & Gas drilling off Cape Hatteras.
- North Carolina objected and its objection sustained by the secretary.
- NC then proposed new energy policies specifically targeting O&G.
- OCRM would not approve and NC developed general energy policies based on effects and information needs – OCRM approved.
- Included prohibition on O&G in Dare County – consistent with CZMA national interest

- Florida statute prohibits offshore O&G.
- OCRM will not approve.
- Only addresses one industry and not similar effects from other industries.
- Complete prohibition also inconsistent with CZMA national interest.

# Resolving Long-Term Dispute: Long Island Sound Dredging

- EPA designation of open water disposal sites in Long Island Sound (LIS): Connecticut wants the sites designated.
- New York objects under CZMA – wants upland disposal/beneficial use.
- Long standing issue – OCRM brings together NY, CT, EPA and Corps to finally resolve matter. Governors sign joint letter of intent/objectives.
- Army Corps initiates LIS Dredged Material Management Plan (DMMP) process: Steering Team, Product Delivery Team, Regional Dredging Team. Goal is to eliminate open water disposal.
- New York withdraws CZMA objection; allowing EPA designation to proceed meeting CT's short term disposal needs.
- States and Federal agencies actively working on the LISDMMP.

**Better  
Communication**

**Achieve Mutual Goals**

**Same Language**



**New Friends**



**Right Tools**



**Help Each Other**

**Answer Questions**

