

NEW YORK COASTAL MANAGEMENT PROGRAM

CONSISTENCY MANUAL

A Practitioner's Guide To Implementing New York's Coastal Management Program
Through Federal, State and Municipal Consistency Provisions

Steven C. Resler
New York Coastal Management Program
Department of State
Office of Coastal, Local Government, and Community Sustainability
Albany, New York

April, 2010



The New York Coastal Management Program Consistency Manual was prepared using financial assistance provided through a grant from the U.S. Department of Commerce, National Oceanic and Atmospheric Administration, Office of Ocean and Coastal Resources Management, in accordance with the Coastal Zone Management Act of 1972, as amended.

The New York Coastal Management Program is administered by the New York State Department of State, Office of Coastal, Local Government and Community Sustainability, 99 Washington Ave., Suite 1010, Albany, New York 12231-0001.

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DEDICATION AND THANK YOU

This manual is dedicated to Bryan Cullen, Esq., formerly with Counsel's Office of the New York State Department of State. Bryan was a brilliant "coastal" colleague and friend. Bryan was the most learned and probing attorney I've known regarding the legislative history, intent, and implementation of the consistency provisions of the federal Coastal Zone Management Act (CZMA) and New York's Coastal Management Program (CMP). We spent countless hours over more than 15 years discussing and debating elements and interpretations of and means of advancing the national and State coastal management programs through their respective federal, State and municipal consistency provisions. Bryan was an ardent defender of the public's rights of access to and uses of public coastal and inland waterway resources. His commitments to these matters are reflected in his contributions to improvements in the CZMA consistency provisions and implementing regulations, State and municipal laws, many regulatory and other decisions including administrative and judicial case law decisions involving New York's coastal and inland waterway areas, and through his contributions to the Coastal States Organization publication entitled "Putting The Public Trust Doctrine To Work". He is dearly missed by me and many others in the New York and national coastal management communities.

Many thanks to Elizabeth Shepherd, current Co-Chair of the Villages of Head-of-the-Harbor and Nissequogue Coastal Commission on Long Island, NY, author of *Arms of the Sea*, and sharp-eyed and thoughtful editor for her commitments to the coastal environment and her excellent editorial skills. Shortcomings in this document are all mine, not hers.

Lastly, as there is little today that is truly original, I can think of no better original or paraphrased words for coastal colleagues than a paraphrased version of Charles McCaffrey's description of our own working relationships during our careers with the CMP. These words are for the many colleagues and friends who have contributed greatly to advancing the national and New York State CMP and inland waterways programs through the New York State Department of State, the Office of Ocean and Coastal Resources Management in the U.S. Department of Commerce's National Oceanic and Atmospheric Administration, and the many other federal, state and municipal entities involved in implementing various elements of the CMP and New York's inland waterways programs:

"ET QUIDEM NATVRALI IVRE COMMVUNIA OMNIVM HAEC AER ET AQVA PROFLEVENS ET MARE ET PER HOC LITTORA MARIS (Indeed by the law of nature all these are common: the air; flowing waters; and the sea; and by means of this the shore of the sea)

The Code of Emperor Justinian, 529 CE

It [is] the sharing of a strong commitment to this principal that has been the basis of the close working relationship I have had... A sharing that led to a personal friendship as well... Passion for the coast and...idealism [are] reflected in...high level commitment to the Coastal Management Program. I urge you all to emulate this commitment, for the problems that face the coast today are as great or greater in number, scale, and complexity than those we have so far addressed. They will require...passion, knowledge and commitment...if they are to be solved."

Thank you, all of you, past, present and future, for sharing the passion, knowledge, commitment, and successes. Excelsior!

Steven C. Resler
April, 2010

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PURPOSES OF THIS MANUAL

This manual is intended to be used as guidance in meeting procedural and substantive coastal management and local waterfront revitalization program consistency obligations, thereby advancing Federal, State, and municipal coastal management and inland waterway objectives.

There are three parts to this manual:

Part I is a summary of basic federal coastal and State coastal and inland waterway consistency provisions and requirements;

Part II provides more detailed guidance to assist in understanding and meeting the requirements in Part I, and ensuring that activities comply with and are undertaken in a manner consistent with the enforceable policies of the State of New York's Federally approved Coastal Management Program (NYCMP) and approved Local Waterfront Revitalization Programs (LWRPs);

Part III is comprised of appendices such as the federal Coastal Zone Management Act (CZMA) and its implementing regulations, Article 42 of the State Executive Law and its implementing regulations, examples of consistency decisions of the New York State Department of State (DOS), examples of decisions and findings in response to appeals of the Department's decisions, and other information helpful in understanding procedural and substantive consistency provisions of the NYCMP.

The manual will be amended when necessary to reflect changes in federal or State requirements, and to include other useful coastal and inland waterway consistency information.

LIST OF ACRONYMS

CFR	Code of Federal Regulations
NYCMP	New York Coastal Management Program
CZMA	Federal Coastal Zone Management Act
DOS	New York State Department of State
HMP	Harbor Management Plan
LISCMP	Long Island Sound Coastal Management Program
LWRP	Local Waterfront Revitalization Program
NEPA	National Environmental Policy Act
NYCRR	New York Codes, Rules and Regulations
OCRM	Office of Ocean and Coastal Resource Management in the National Oceanic and Atmospheric Administration, U.S. Department of Commerce
SASS	Scenic Area of Statewide Significance
SCFWH	Significant Coastal Fish and Wildlife Habitat
SEQRA	State Environmental Quality Review Act

PART I - THE BASICS

I.1 WHAT IS "CONSISTENCY"?

Government at all levels, through its direct, regulatory, and financial assistance activities, greatly affects how land and water resources are developed, used, or protected. Nowhere is this influence greater than along the coast and waterways, where both population and natural resources are concentrated.

Recognizing this, Congress and the New York State Legislature included in their respective coastal management and waterfront acts important provisions to insure greater coordination of governmental decision-making that affects the achievement of the policies they established to promote the appropriate use and protection of coasts and waterways. These provisions include decision-making standards and procedures, known as "consistency" provisions.

Through these provisions, public agency decisions - whether involving activities undertaken directly by agencies, involving funding or financial assistance from agencies, or involving permits and other forms of agency authorizations - are to result in activities that are "consistent" with the State's coastal policies. These "consistency" provisions are procedural and substantive requirements of the federal Coastal Zone Management Act (CZMA) and the New York Coastal Management Program (NYCMP), the New York State Waterfront Revitalization of Coastal Areas and Inland Waterways Act, and Local Waterfront Revitalization Programs (LWRP). "Consistency" distinguishes the benefits of the Coastal Management Program from other comprehensive planning, regulatory, and other decision-making programs. Consistency with the enforceable policies of the NYCMP is intended to significantly affect how federal, State and certain municipal agencies make decisions affecting coastal or inland waterway areas.

Federal, State, and municipal consistency provisions are a central element of the NYCMP and LWRP, and are a powerful and effective means of implementing and advancing the comprehensive objectives of the programs. Meeting procedural and substantive consistency provisions and ensuring that public and private activities are consistent with the NYCMP or an LWRP provides an effective and defensible means of achieving the wide range of government and private decision-making objectives that achieve economic development and resource protection efforts. Through the consistency process, competing governmental objectives are advanced and conflicts between them are avoided or minimized.

The comprehensive objectives of the NYCMP are reflected in coastal policies. These policies address the full range of issues affecting coastal and inland waterway areas. They are grouped to cover the following:

- Waterfront Redevelopment
- Water Dependent Uses
- Port and Harbor Management
- Growth Management
- Significant Habitats
- Commercial and Recreational Fisheries
- Flooding and Erosion Hazards
- Public Access and Recreation
- Agriculture
- Historic Resources
- Scenic Quality
- Water Quality
- Air Quality
- Wetlands

The comprehensive approach described above provides a framework to better identify and manage the cumulative and secondary effects of activities, whether these effect are positive or adverse, and whether they

are to be pursued or avoided. For example, the inclusion of an open space wetland buffer area and public access way along the shoreline, as part of a large scale development project, would advance multiple policy objectives relating to redevelopment, the protection of wetlands, water quality, habitats, and public access to and recreational uses of coastal resources. Conversely, the denial of agency authorizations for a relatively small private dock, accessory to the private residential use of upland property, might be appropriate if it would be in an area where no such structures have existed, the area is characterized by a relatively undeveloped shoreline with high value natural resource values, and the general public has access to and uses the shoreline for shellfishing, strolling, or swimming. The values and uses of the shoreline would be lost by the approval of the individual dock, setting a precedent for multiple structures in the area.

Examples of how this may be accomplished are included in the Appendices to this manual.

CONSISTENCY IS UNIQUE

Consistency is different than other decision-making processes and requirements. The consistency provisions of the NYCMP and the Department of State's consistency decision-making in accordance with the CZMA and NYCMP are often misinterpreted as regulatory provisions requiring the issuance of some form of license, permit, certification, or other form of authorization by the Department of State.

Unlike the traditional issuance or denial of authorizations by agencies, the Department has no authority to issue or deny nor does it issue or deny any form of authorization or certification through its consistency review and decision-making responsibilities. The Department reviews activities being contemplated or considered by other agencies, determines whether the activity being considered by another agency is consistent or inconsistent with the enforceable policies of the CMP, and, depending on whether the Department is conducting a formal consistency review and rendering a formal consistency decision in accordance with the CZMA, or advising agencies and other entities of the consistency of activities with the CMP, either:

1. for activities that would be undertaken directly by a federal agency the Department concurs with or objects to a consistency determination of a federal agency;
2. for activities that require authorization from a federal agency the Department concurs with or objects to a consistency certification submitted to Department by an applicant for federal agency authorization (the procedures for this differ when an application involves outer continental shelf exploration, development and production activities in accordance with the Outer Continental Shelf Lands Act - see 15 CFR 930, Subpart E);
3. for activities involving financial assistance from federal agencies the Department indicates whether it has no objection to or objects to the use of federal funds for the activity being considered; or
4. for State agency actions, certain municipal agency actions, and other activities including those considered by private entities the Department provides its opinion or advice regarding the consistency of activities or actions of agencies with the CMP or Local Waterfront Revitalization Programs.

When the Department makes its consistency decisions regarding federal activities, it has a controlling effect on the regulatory decisions of federal agencies. For example, if the Department objects to a consistency certification for an activity requiring a permit from the U.S. Army Corps of Engineers, the Corps is precluded from issuing the permit.

Government agencies are assigned disparate responsibilities and programs. Prior to the enactment of federal and State coastal management legislation and the CMP, and except for specific limited actions in accordance with SEQRA, agencies were not required to coordinate their various activities, and as a result, decisions affecting **appropriate uses** of the State's coastal resources often conflicted and were inconsistent with State policy objectives. Obviously there was a need to coordinate decision-making within and between levels of

government. With the passage of the Article 42 of the State Executive Law, that Act provided the authority to strengthen coordination and solve this problem in New York.

One of its important purposes, and that which most distinguishes the consistency provisions of the NYCMP from traditional regulatory and other decision-making standards, is the requirement that activities comply with and be conducted in a manner consistent with all applicable coastal policies. **This is to ensure that multiple coastal policy objectives are advanced to achieve comprehensive benefits, rather than advancing one or more policies or objectives to the detriment of others.** For example, while several coastal policies compete with others and competing policies often apply in a wide range of circumstances, the objective through consistency is to ensure that multiple coastal policies are advanced by avoiding conflicts between individual policies. This is different than traditional single purpose environmental or development permit programs, because it is comprehensive and all applicable policies are required to be adhered to.

The preceding consistency requirement is different from the more traditional "balancing" provided for in NEPA and SEQRA. It is different because the more traditional application of NEPA and SEQRA provides for the "balancing" of the beneficial effects of an activity against its adverse effects, allowing activities to proceed when individual beneficial effects "outweigh" certain adverse effects. The concept of "balancing" associated with consistency is not part of the decision-making associated with a specific project, but from a coast-wide application of coastal policies. One applicable policy is not to be advanced to the detriment of other applicable policies. A fuller discussion of this "balancing" is discussed in the "How To" section of this manual.

While a comprehensiveness analysis of effects is common to both consistency and SEQRA or NEPA processes, the comprehensive analysis associated with the consistency process is applicable to all decisions involving activities of all scales, not just larger scale activities associated with the requirements for environmental impact statements.

Another distinction between the consistency provisions of the CZMA and NYCMP involves the implementation and advancement of the NYCMP and its enforceable coastal policies by advocating for specific, desired activities in the coastal area. The NYCMP and its consistency processes are designed to actively advance coastal policy objectives through the promotion and coordination of existing State programs, activities, and decisions affecting the coastal area. The need for this became clear during the development of the NYCMP and through an analysis of the State's coastal area and the identification of issues that were not adequately addressed by existing State law or regulations.

Similar to federal CZMA and NYCMP provisions, and in accordance with State coastal consistency provisions, State agencies are required to advance toward their logical conclusion all coastal policies that apply in given circumstances, not allowing one policy to override another. The use of the coastal policies requires agencies to take into account the interrelationships that exist or should exist in the coastal area - - not just interrelationships evident in a single ecosystem, i.e., wetlands, but the coastal area as a whole. This approach assures that future actions will, at a minimum, not interfere with the State's long term commitment to achieving for society the most beneficial use of coastal resources.

Federal and State consistency provisions encourage early consultation, coordination, and consideration of NYCMP concerns. Encouraging early consultation, coordination, and consideration of NYCMP concerns and consistency requirements these provisions were developed and are intended to cause substantive changes in agency decision-making within the context of discretionary powers residing in agencies. The greater discretionary authority an agency has in its decision-making the more the agency is required to consider and undertake its activities in a manner consistent with State coastal policies. These requirements are significant and are to be adhered to in addition to other statutory mandates.

Consideration and application of the State's coastal policies provides an effective means addressing direct and indirect cumulative and secondary effects of activities, both beneficial and adverse, and targeting efforts to achieve multiple objectives through the advancement of legislative policies.

I.2 SUMMARY OF FEDERAL AND STATE COASTAL AND INLAND WATERWAY CONSISTENCY PROVISIONS

To best understand coastal and inland waterway consistency requirements and their benefits, it is necessary to understand the basic provisions and purposes of the CZMA, NYCMP, and LWRPs, respectively, the coastal management programs of the Federal, State and local governments.

Federal Coastal Zone Management Act (CZMA)

The CZMA was enacted on October 27, 1972. In addition to legislative findings and objectives, it includes provisions encouraging coastal states to develop Coastal Management Programs

"to achieve wise use of the land and water resources of the coastal zone, giving full consideration to the ecological, cultural, historic, and esthetic values as well as the needs for compatible economic development..."

and providing for the consultation and coordination of Federal and State agency decision-making affecting the coastal zone (see Summary of CZMA in Part II of this manual).

Government at all levels, through direct, regulatory, and financial assistance activities, greatly affects how land and water resources are developed, used, or protected. Nowhere is this influence greater than along our coasts and waterways where the competing demands of increasing population and development, natural resources, and conflicts between uses and resources are concentrated. Recognizing this, Congress included important provisions in the Federal Coastal Zone Management Act (CZMA- 16 U.S.C.A. Sections 1451 through 1465) to insure greater coordination of governmental decision-making affecting the achievement of policies to promote the appropriate use, development, and protection of coastal and inland waterway areas. This federal legislation providing for improved coordination of government decision-making is referred to as the "consistency provisions" of the CZMA.

The federal consistency provisions of Section 307 of the CZMA require that

"each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs".

When a state's coastal management program receives federal approval, as is the case for New York, the consistency provisions of the CZMA are a waiver of the federal government's sovereign right to undertake its own activities without interference from the states. These provisions are at the heart of the CZMA, are a primary incentive for the development of a state's coastal management program, and are a means of achieving and advancing major objectives in a state's coastal area.

New York Coastal Management Program (CMP) and Local Waterfront Revitalization Programs

Recognizing the benefits of the CZMA and its consistency provisions, the NYCMP was developed over a period of several years, culminating local, State, and federal government efforts, as well as those of groups representing civic, environmental, development, and other interests. It is described in a document entitled "State of New York Coastal Management Program and Final Environmental Impact Statement", and was approved by the U.S.

Secretary of Commerce, in accordance with the CZMA, in 1982. The NYCMP has been and is either amended or undergoes routine program changes from time to time to reflect changes in legislation and other means of implementing the program. These amendments and routine program changes include the development, approval, and incorporation of special management area plans such as LWRPs, Harbor Management Plans (HMPs), and a Long Island Sound Regional Coastal Management Program into the NYCMP, and through State designation of Significant Coastal Fish and Wildlife Habitats and Scenic Areas of Statewide Significance. The NYCMP document also describes its purposes and how it is to be implemented and advanced.

The principal function of the NYCMP is to provide a framework for government decision-making in the coastal area. The CZMA requires and the NYCMP includes enforceable policies to guide those decisions. The enforceable policies of the CMP, as enforceable policies are defined in the CZMA, are State 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 water uses and natural resources in the coastal zone. All of the policies of the NYCMP are enforceable as enforceability is defined in the CZMA. More specifically, the enforceability of the State's coastal policies is as follows:

1. State direct and funding actions are required by Statute (Section 919.1 of Article 42 of the State Executive Law) and by regulation (19 NYCRR Part 600 and 6 NYCRR Part 617.11(e)) to be consistent with the State's coastal policies.
2. State permit actions subject to SEQRA (Article 8 of the State Environmental Conservation Law) are required to be consistent with the coastal policies found in 19 NYCRR Part 600. The determination whether an action will have a significant adverse effect on the environment and whether an EIS will be prepared must be based on an analysis of the effects of the action on the coastal policies (6 NYCRR Part 617.6(5) and 19 NYCRR Part 600.4).
3. State permit actions affecting coastal area policies but not the subject of an EIS or not subject to SEQRA (certain minor or ministerial actions) must be consistent with the coastal policies they are most likely to affect. This is accomplished through the application of the standards of several permit programs, notably wetland permits, erosion hazard area permits, dock permits, and water quality permits. For example, the State's Tidal Wetlands Act (Article 25 of the Environmental Conservation Law), through its broad purposes and performance standards, provides not just enforceable standards regarding the State's coastal policy regarding wetlands protection, but also, in part, enforceable coastal policies regarding public access and scenic quality. These several permit programs also provide the means of enforcing the relevant policies in the NYCMP.
4. Other enforcement mechanisms apply to specific policies and are identified in the federally approved NYCMP document, under each policy statement in the section entitled State Means For Implementing The Policy. For example, the State's Public Lands Law, through codification of the Public Trust Doctrine, provides a primary means of enforcing NYCMP Policy #20 and aspects of NYCMP Policy #9.

The enforceable policies of New York's approved CMP that federal agency activities are required to be consistent with are:

- the forty-four (44) coastal policies contained in the State of New York Coastal Management Program and Final Environmental Impact Statement document, and subsequent amendments to it, including;
- the policies and purposes of any LWRP incorporated into the CMP after approval by the New York Secretary of State, and concurrence with that approval by the National Oceanic and Atmospheric Administration's Office of Ocean and Coastal Resources Management;

- the enforceable policies of approved regional coastal management programs, such as the Long Island Sound Coastal Management Program, or other special area management plans, such as Harbor Management Plans, that are amendments to and incorporated into New York State's approved CMP.

As the legal basis for and to implement the NYCMP and LWRPs at the State level, the State Legislature enacted Article 42 of the State Executive Law in 1981. Like the CZMA, Article 42 of the State Executive Law includes legislative findings, policies (these policies are objectives, similar to legislative objectives in the CZMA), and a requirement, similar to that applying to federal agencies in the CZMA, that State agencies undertake their own actions in a manner consistent with State coastal policy, or an LWRP that has been approved by New York's Secretary of State. As the CZMA provides for and encourages the development of a NYCMP, Article 42 encourages and provides for the development and implementation of LWRPs that advance coastal policy objectives through comprehensive municipal land and water use plans. Article 42 also states that it is the policy of the State

"to assure consistency of state actions and where appropriate federal actions, with policies of the coastal area and inland waterways, and with accepted waterfront revitalization programs of the area defined or addressed by such programs." (Section 912.9 of Article 42, NYS Executive Law)

Article 42 also encourages the development of Harbor Management Plans (HMPs), and requires certain State agency actions to be consistent with them (see Article 42, Section 922.5). A HMP is a detailed plan for the use of harbors and other waterway areas in and adjacent to a municipality, with consistency requirements similar but different than those involving an LWRP (see Article 42, Section 922.5 of the Executive Law and Article 15-0503 of the Environmental Conservation Law).

To implement the policies and purposes of an LWRP and HMP at the municipal level, cities, towns, or villages often enact new or amend existing laws or ordinances, including municipal consistency provisions binding their own agency decision-making to the achievement of the policies and purposes of their LWRP, or HMP. The policies and purposes of LWRPs and HMPs are included in State approved LWRP and HMP documents, and include maps or other visual depictions of comprehensive land and water use or harbor management plans. Those land and water use plans are implemented in large part at the municipal level through local laws or ordinances and through a range of State and federal regulatory and other decision-making authorities, including State and federal consistency provisions requiring activities to be consistent with an LWRP or HMP.

Federal, State, and municipal consistency provisions share common objectives. In effect, in exchange for the development and approval of the CMP and an LWRP and the means to implement them, consistency provisions at each level of government bind each level of government to consistency with and the achievement of common national coastal objectives that are refined to achieve NYCMP and municipal coastal and inland waterway objectives. However, while having common objectives, the consistency procedures or rules for achieving those common objectives are different, at each level of government, as the result of being based in distinct pieces of federal, State, or local legislation and regulation. The following section of this manual summarizes those procedures. More detailed information regarding the legislative history and consistency provisions and benefits of the CZMA, NYCMP, and LWRP, and how the NYCMP and an approved LWRP are used to ensure activities are consistent with State coastal policy, or an approved LWRP, is also included in Part II of this manual.

I.3 WHEN CONSISTENCY REQUIREMENTS APPLY

Consistency requirements apply in the following circumstances:

- For **Federal consistency**: 1) when activities would be undertaken directly by or on behalf of a federal agency; 2) when activities require authorizations or other forms of approval from federal agencies; and 3) for activities involving financial assistance from federal agencies (see the CMP document for a

listing of federal activities always subject to consistency with the CMP and requiring review by the Department of State. Copies of the CMP document have been provided to State and Federal agencies and their regional offices, and are often available in municipal offices and local libraries);

- For **State consistency**: when State agencies are considering undertaking their own direct, approval, and funding actions; and
- For **municipal consistency**: when agencies of cities, towns, and villages with approved LWRPs are considering their own direct actions, funding actions, and approval actions such as permits and other forms of authorization.

I.4 FEDERAL COASTAL CONSISTENCY

A. SUMMARY OF FEDERAL COASTAL CONSISTENCY PROVISIONS

Federal agencies are responsible for many activities that affect development and uses of the coastal area and its resources, thereby affecting the achievement of the State's coastal policies. Recognizing this, and emphasizing the primacy of State coastal zone decision-making, Congress in passing the Coastal Zone Management Act required the activities of federal agencies, affecting land and water uses and natural resources in the coastal zone, to be consistent with a state's federally approved coastal management program.

The Federal regulations that implement the consistency provisions of the CZMA are found at 15CFR Part 930. These regulations establish the procedures to be followed in order to assure that federal agency activities undertaken within the State's coastal area, and outside of the coastal area and affecting any coastal use or resource, are consistent with the enforceable policies of the New York State Coastal Management Program. No federal agency activities are exempt from the consistency provisions of the CZMA when they would be undertaken within New York's coastal area, or outside of the coastal area and having any reasonably foreseeable affecting any coastal use or resource (see 15 CFR 930.11(b) and 15 CFR 930.11(g)). The reasonably foreseeable "effects test" relating to any coastal use or resources is important, and is discussed in greater detail in Appendix B of this manual (see in Appendix B: 1) NOAA explanation of 15 CFR Part 930 regulations, sections III and IV on pages 77124 and 77125, and the Subpart B-General Definitions discussion on pages 77129 and 77130 of the December 8, 2000 Federal Register, and; 2) 15 CFR 930.11(b) definition of "Any coastal use or resource" and 15 CFR 930.11(g) definition of "Effect on any coastal use or resource (coastal effect)").

The types of activities that are subject to consistency with the CMP and covered by the 15 CFR Part 930 regulations are:

- **activities directly undertaken by federal agencies** (see 15 CFR Part 930, Subpart C). These activities are required to be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of the CMP. The term "consistent to the maximum extent practicable" means fully consistent with the enforceable policies of the CMP, unless full compliance is prohibited by existing law applicable to the Federal agency - see discussion in Section I.4.C, Consistent To The Maximum Extent Practicable Standard, on page 24, and 15 CFR 930.3);
- **activities requiring federal agency licenses, permits, or other forms of approval** (see 15 CFR Part 930, Subpart D. These activities are required to comply with and be undertaken in a manner consistent with the CMP;
- **outer continental shelf exploration, development and production activities** (see 15 CFR Part 930, Subpart E); and
- **activities involving financial assistance from federal agencies**, through grant or contractual arrangements, loans, subsidies, guarantees, insurance, or other form of financial aid (see 15 CFR Part 930, Subpart F).

This financial assistance may only be granted when the activities they would be used for are consistent with the CMP.

The federal consistency procedures that are required to be followed vary depending on the type of federal activity being considered, and are described in the following section of this manual, in 15 CFR Part 930 (see Appendix B), and the State's approved CMP.

B. GENERAL ELEMENTS OF THE FEDERAL CONSISTENCY PROCEDURES

New York State must ensure that federal activities are consistent with its CMP. As the State's designated coastal management agency, the Department of State is the State agency responsible for reviewing federal activities for their consistency with the CMP. In this regard the Department reviews and makes consistency decisions for activities: 1) proposed to be undertaken directly by or on behalf of federal agencies; 2) proposed to be undertaken by individuals or entities other than federal agencies, that require licenses, permits, or other forms of authorization from federal agencies; and 3) activities involving financial assistance from federal agencies. The bases for the Department's consistency reviews are: the enforceable policies in Part II, Section 6 of the CMP document and federally approved amendments to it; the guidelines found in the explanations of those policies; and management programs for special management areas, such as local waterfront revitalization programs, which have been approved and incorporated into the State's CMP.

If the Department of State determines that an activity, other than one performed by or on behalf of a federal agency*, is or would be inconsistent with the CMP, the federal agency is precluded from authorizing or releasing financial assistance for that activity. The Department's consistency decision may, however, be appealed to the U.S. Secretary of Commerce. Such an appeal must be based on one or both of the grounds that the proposed activity is consistent with the objectives and purposes of the CZMA, or is necessary in the interest of national security. If the U.S. Secretary of Commerce considers an appeal, an important element of that consideration is whether one or more national CZMA interests or objectives would be so significantly advanced that the State's objection and its results, which preclude involved federal agencies from authorizing or funding the proposed activity, should be overridden. If the U.S. Secretary of Commerce does not override the State's objection, the involved federal agency is precluded from authorizing or funding the activity. If the U.S. Secretary of Commerce overrides the Department's objection (note this is an override, not an overrule - see Part II of this manual regarding appeals), the federal agency may authorize or fund the activity.

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

Early Consultation

Federal agencies and applicants should consult with the Department of State (DOS) early in the planning stages of a proposed activity. This consultation should be considered 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:

1. general and, where possible, specific coastal management concerns raised by the proposed activities;
2. the coastal policies and other components of the State's CMP that are relevant to the proposed activities;
3. how to assess the consistency of the activities with the applicable policies; and

* Activities undertaken directly by or on behalf of a federal agency must also be consistent with the CMP, but the procedures differ.

4. the types of information and data that are essential for review purposes.

This early consultation should allow federal agencies and applicants the time to obtain necessary information and adequately address CMP concerns early in the planning, design, and budgeting of a proposal, rather than after the Department's formal review and consistency decision-making process begins. If a federal agency or applicant is not sure whether and activity is subject to consistency review, is unfamiliar with consistency review processes, or needs guidance interpreting and applying CMP policy in particular circumstances, the federal agency or applicant should consult with DOS to: determine if their proposed activities would be subject to consistency review requirements; obtain information regarding the federal consistency review and decision-making processes; and receive general guidance on how to proceed with their proposed activities.

Necessary Data and Information

Whenever possible, the Department bases its consistency decision on documents that contain data and information normally required for compliance with federal regulations or approvals. This documentation generally includes environmental assessments or environmental impact statements (*see discussions of NEPA and SEQRA EISs generally immediately following this section, and: 1) for activities undertaken by federal agencies, see Other Recommended Information on page 25 and NEPA Documents on page 26; 2) for activities requiring federal agency authorizations see Necessary Data and Information on pages 32 and 33; 3) for Outer Continental Shelf activities page 41; and 4) for activities involving financial assistance from federal agencies, see list of documentation on page 43 of this manual regarding State Environmental Quality Review Act or National Environmental Policy Act environmental impact statements and related analyses and documentation*), permit and license applications or applications for other forms of federal agency approval, and applications for financial assistance and supporting information as well as the documentation required by federal regulations in 15 CFR Part 930 and the CMP document.

NEPA and SEQRA Environmental Impacts Statements and Assessments

Except for those activities undertaken directly by or on behalf of federal agencies, when an activity is subject to consistency review by the Department of State in accordance with federal consistency provisions and is the subject of an environmental impact statement (EIS), a copy of the final EIS is part of the necessary information and data that is required to be submitted to the Department of State. This applies whether an EIS is required in accordance either with the State Environmental Quality Review Act (SEQRA) and SEQRA regulations in 6 NYCRR Part 617, or the National Environmental Policy Act (NEPA). With regard to NEPA and an EIS, it is important to note that federal coastal consistency obligations are independent of NEPA requirements and are not fulfilled by submission of a NEPA document. However, federal agencies are encouraged to include relevant coastal effects and coastal policy analysis information in NEPA processes and documents. If a federal agency includes a consistency determination in a NEPA document, the federal agency must ensure the document includes the relevant information and adheres to time frames in 15 CFR 930, Subpart C (see also 15 CFR 930.37).

Further information and guidance regarding coastal policy assessments and an EIS is included in the State Consistency Section beginning on pages 47 through 50, and on pages 85 and 86 in Part II of this manual.

Initiation of Department of State Review and Requests for Additional Information

If a federal agency or applicant submits complete consistency review materials to the Department (see later section of this manual and 15 CFR 930.36 and 15 CFR 930.39 for required elements of a federal agency consistency determination and necessary data and information; and later section of this manual and 15 CFR 930.57 and 15 CFR 930.58, and the CMP document, for consistency certifications and necessary data and information required from applicants for federal agency authorizations), the Department initiates its formal

review and decision-making processes (see below for detail). If the Department has initiated its review and during the course of the review determines that additional data and information is necessary to assess the coastal effects of an activity, the Department will inform the federal agency or applicant of the need for additional data or information. A request for this data and information does not alter the Department's review and decision-making time frames unless the Department and federal agency or applicant agree to alternative schedules (see below and 15 CFR 930.36 and 930.41 for activities undertaken by federal agencies, and 15 CFR 930.60 and 15 CFR 930.62 for activities requiring federal agency authorizations).

The Department must be provided with sufficient information to assess the effects of an activity on and its consistency with all applicable coastal policies. To assess the effects of activities on and their consistency with coastal policies, information must be available that enables an assessment of the effects of an activity on uses of the coastal area and its resources, and the effects of an activity on coastal resources. These assessments are key exercises that should be undertaken for a consistency certification by an applicant, and a consistency determination by a federal agency. It is those assessments that underlie the basis for a consistency certification by an applicant and consistency determination by a federal agency. It is also in large part to provide the Department with relevant information in its own assessment of an activity and its effects, and as part of the basis for the Department of State's decision to concur with or object to an applicant's consistency certification, or to concur with or object to a federal agency's consistency determination.

If the Department is not provided with sufficient information enabling it to assess the effects of a proposed activity on coastal uses and resources and, based on that assessment, to assess the consistency of the activity with applicable CMP policies, its review cannot begin until the federal agency or applicant provides that information. When this information is necessary, the Department promptly notifies the federal agency or applicant of this need, specifying the information required and the reason(s) why the information is necessary.

Coordinated Review

When activities are subject to both federal and state consistency requirements (for example, when authorization is required from a federal agency and a State agency, or when an activity involves federal financial assistance and would be undertaken directly by a State agency, or involves State agency funding and also requires authorization or funding from a federal agency), the Department of State and the other involved state agency (a State agency considering its own direct, funding, or approval action) should coordinate and concurrently conduct their respective reviews. This is especially important to ensure that all applicable State coastal policies, including those implemented in whole and part through various State authorities and agencies, are fully and properly considered and reflected in Department of State consistency decisions that affect federal agency reviews and decision-making, and in the decisions of State agencies responsible for implementing State coastal policies either in whole or in part (see also State Consistency Section of this manual). This objective is possible only if the federal agency or applicant for federal and State agency authorization also provides copies of the documentation submitted to another state agency, to the Department of State. An example would be an activity requiring authorizations from both the U.S. Army Corps of Engineers pursuant to the federal Rivers and Harbors or Clean Waters Acts, and from the New York State Department of Environmental Conservation pursuant to the State Protection of Waters, Tidal or Freshwater Wetlands, or Coastal Erosion Hazard Areas Acts. To ensure all of the involved agencies and applicants are considering the same information, and to help avoid unnecessary changes and delays later, the Department of State recommends that written or other communications between and among agencies and applicants be conveyed among all of the involved and interested agencies and applicants.

The Department of State also coordinates its consistency review of federal activities with municipalities having a State and federally approved LWRP. As with the Department's coordination with State agencies, when the Department of State notifies a municipality with an approved LWRP that the Department is reviewing a proposed activity for its consistency with the CMP or approved LWRP, it is especially important that the

municipality inform the Department of State as soon as possible whether the proposed activity appears to meet or to be consistent with, or might involve any actual or potential conflicts between policies or be inconsistent with the applicable policies and purposes of the municipality's approved LWRP. It is often helpful to make initial assessments regarding the consistency of an activity by comparing the activity to the land and water use plan reflected in the Policy section (Section III of most LWRPs) and/or the Proposed Land and Water Uses and Proposed Zoning section (Section IV of most LWRPs) of an LWRP. It is also helpful to consider a municipality's zoning or certain other special purpose laws or ordinances because those laws or ordinances often reflect and implement, in whole or in part, the comprehensive Policies and purposes and Land and Water Use Plan of an LWRP, and for SEQRA and related decision-making purposes, those elements of an LWRP have usually been subjected to the SEQRA process (see State Consistency beginning on page 47 in Part I of this manual and pages 85 and 86 and question #7 on page 92 in Part II of this manual for more information regarding SEQRA and consistency decision-making).

The Department of State includes and considers in its reviews and consistency decision-making any comments or communications it may receive from federal, State, and municipal agencies, as well as the general public, special interest groups, and other entities.

Public Notice

The Department of State is required by 15 CFR Part 930 to issue public notices for federal agency activities and federal permit, license, and other regulatory approval activities that are subject to review for consistency with the CMP. To comply with that requirement, the Department issues public notices 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 or where the activities would affect any coastal use or resource. All public notices issued by the Department are placed on the Department's internet website. The Department may, at its discretion, issue public notices for activities involving applications for federal financial assistance activities. The public notice review and comment period is normally 30 days, but not less than 15 days. To avoid duplicate federal agency and Department of State notices, the Department and federal agencies may also issue joint public notices. The timing of such notices is important to ensure that they are issued and their comments periods close within appropriate Department of State and federal agency review and decision-making time frames.

Interagency Agreements

The Department may, in accordance with 15 CFR Part 930, formally and informally agree with federal agencies to further define types of activities requiring consistency reviews, the timing of reviews, joint public notification of proposed activities and other procedures that expedite review processes and reduce federal applicant, federal agency, and Department of State regulatory burdens. One example of this is through the Department's "General Concurrences" for certain activities requiring federal agency licenses or permits and involving financial assistance from federal agencies, which are described on pages 35 and 36 of this manual.

C. ACTIVITIES DIRECTLY UNDERTAKEN BY OR ON BEHALF OF FEDERAL AGENCIES

The types of activities directly undertaken by federal agencies that are subject to consistency with the CMP include a wide range of activities, including the following examples: any federal agency development in the State's coastal area; fisheries plans by the National Marine Fisheries Service; Naval exercises; improvements to a military base; the sale or other disposition of federal land by the U.S. General Services Administration; dredging and the disposal or beneficial reuse of dredged materials, the construction of breakwaters, beach nourishment, or other activities of the U.S. Army Corps of Engineers; and activities in National Parks and

Refuges such as the installation of mooring buoys, road or building construction, and physical modifications to or wetland or other natural resource restoration activities.

Preliminary Consultation

As an important preliminary matter when a federal agency is considering undertaking an activity, the federal agency should consult with the Department of State at an early stage in the development of the activity to help in assessing the affects of the activity on coastal uses and resources, and as a result of those effects, the effects of the activity on and its consistency with applicable NYCMP policies. This early consultation helps ensure that the activity is initially planned, designed, and fully funded so that it is conducted or undertaken in a manner consistent to the maximum extent practicable with the NYCMP. The effects and consistency of a federal agency activity should not be considered as an afterthought or simply procedural matter to be dispensed with later in federal planning, budgeting, and associated review and decision-making processes.

Early consultation does not constitute or replace the more formal consistency review and decision-making process that begins after the Department of State receives a consistency determination from a federal agency. Rather, it is to provide the federal agency and the Department of State with the opportunity to identify relevant coastal policy issues so the activity is planned, designed, and budgeted for so that it would be "undertaken in a manner consistent to the maximum extent practicable" with the NYCMP. (see 15 CFR 930.34(a)(1) and 930.34(a)(d) regarding coordination and early consultation, and definition of the term "consistent to the maximum extent practicable" in 15 CFR 930.32 and discussion of this standard on page 77124 under "II Background" and pages 77133 and 77134 in the December 8, 200 Federal Register Notice in Appendix B of this manual)

Consistent To The Maximum Extent Practicable Standard

The "consistent to the maximum extent practicable" standard is an important substantive standard. The CZMA and NYCMP requirement that a federal agency activity is to be undertaken in a manner consistent to the maximum extent practicable with all applicable NYCMP policies is a requirement to be adhered to in addition to other existing federal agency statutory mandates, and is intended to cause substantive changes in federal agency decision-making, so that multiple CZMA and State NYCMP policy objectives are met, and advanced. Except in very specific circumstances, such as certain limited activities necessary in the interest of national security, or when a federal agency is prohibited from undertaking an activity in a manner fully consistent with the NYCMP because doing so is prohibited in accordance with existing federal law, the CZMA "consistent to the maximum extent practicable" and NYCMP standards do not provide or allow for activities that are consistent with one or more NYCMP policies to override an activity's inconsistency with one or more other NYCMP policies. Doing so undermines the basic purposes and objectives of the CZMA and NYCMP (see discussion of this standard on page 28 and in the second half of page 60 in Section II.1.A, the discussion of CMP Policies in Section II.3 beginning on page 69, the discussion Congressional and State Legislative findings on page 73 in Section II.4, and Frequently Asked Question #1 on page 89 in Section II.5 in Part II of this manual regarding NYCMP policies and their application).

Submission of Consistency Determination and Timing of Submission

To comply with CZMA and NYCMP consistency provisions and initiate the Department of State's review of a federal agency activity for consistency with the NYCMP, federal agencies are required to submit a consistency determination and supporting data and information regarding their activities to the Department of State at the earliest practicable time during the federal agency's consideration of the activity (Note that a federal agency's consistency **determination** is made pursuant to 15 CFR Part 930, Subpart C. It should not be confused with a consistency **certification** by an applicant for federal agency authorization, pursuant to 15 CFR Part 930, Subpart D). Unless an alternative schedule is agreed to by the Department of State and the federal agency, a

federal agency's consistency determination is required to be submitted to the Department of State at least ninety days (90) prior to final approval of the federal agency activity (see 15 CFR Part 930.36). Final federal agency action regarding an activity (meaning a federal agency's final decision determining whether the agency will proceed with and undertake an activity) is not to be taken sooner than 90 days from the Department's receipt of the federal agency's consistency determination unless the Department concurs with the consistency determination, or unless the Department's concurrence is presumed (see discussion of concurrences with federal agency consistency determinations on page 27 and 15 CFR 930.41(b)).

Content of Consistency Determination and Supporting Information

A federal agency's consistency determination must include a brief statement by the federal agency indicating whether a proposed activity will be undertaken in a manner consistent to the maximum extent practicable with the State's coastal policies (see 15 CFR 930.32 for explanation of the term "consistent to the maximum extent practicable"). The consistency determination must be based on an evaluation of relevant NYCMP policies, and must include a detailed description of the activity, its associated facilities, and their coastal effects, and comprehensive data and information to support the federal agency's consistency statement (see 15 CFR Part 930, Subpart C generally, and 15 CFR Part 930.).

Other Recommended Information

When submitting a consistency determination and supporting information to the Department of State, the information should include appropriate maps, site plans, photographs, and if appropriate information indicating when the activity would be conducted. For example, if an activity would be undertaken within or near or in a manner that would affect a Significant Coastal Fish and Wildlife Habitat or a public park or harbor area where activities might affect important seasonal functions, values, or uses of an area, the information should clearly indicate where the activity would be undertaken and when it would be undertaken. (see for example the discussion of the timing of dredging in a designated habitat on pages 82 and 83 in Section II.4 of this manual for additional information regarding the importance of timing, and related matters).

The Department of State and the NYCMP document recommend including the following information with a federal agency's consistency determination:

1. the purpose and need for the activity;
2. alternatives to the activity that were considered by the federal agency;
3. an 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 or determinations of the State Historic Preservation Officer, and applications for authorization from the U.S. Army Corps of Engineers; and
4. required NEPA documentation (Environmental Assessment or Environmental Impact Statement, Finding of No Significant Impact, draft Record of Decision).

Including the preceding information with a consistency determination helps provide the evaluation of relevant enforceable policies of the NYCMP supporting a consistency determination. This is important because it helps the federal agency meet the substantive evaluations of an activity's effects on coastal uses and resources (see 15 CFR 930.39 regarding the content of a consistency determination), and its consistency with the enforceable policies of the NYCMP. It also helps the Department of State understand all the relevant elements and effects of an activity, and the Department's coordination of its review with other appropriate agencies and the public, in accordance with 15 CFR Part 930 and the NYCMP.

Negative Determinations

No federal agency activity, including an activity that is defined as "categorically exempt" pursuant to NEPA, is exempt from the consistency provisions of the CZMA. However, there are circumstances when a federal agency activity will not affect any coastal use or resource. In those circumstances, when it is clear that the activity being considered will not have any reasonably foreseeable direct or indirect effects on any coastal use or resource, a federal agency may submit a negative determination to the Department of State in accordance with 15 CFR 930.35. A federal agency's negative determination may be submitted to the Department of State in any written form so long as it contains a brief description of the activity, the activity's location and the basis for the federal agency's determination that the activity will not affect any coastal use or resource.

In determining effects, federal agencies are required to follow 15 CFR 930.33(a)(1) relating to reasonably foreseeable direct and indirect effects, no matter whether those effects are minimal, positive, adverse, or have no traditional physical "environmental" effects. For example, an activity landward of mean high or spring high water and wetlands might not have a significant adverse direct or indirect "environmental" effect on the biological functions or integrity of a wetland, water quality, or navigation, but could adversely affect public access and recreation, the protection of historic property, or a coastal resource such as publicly owned lands, an important vista, or the natural or developed aesthetic character and values of an area. It is important to understand such effects fully and based on them to include an evaluation of the results of the activity on the relevant enforceable policies of the NYCMP. That evaluation must be included in a federal agency's negative determination.

NEPA Documents

It is important to note and it should be understood that a federal agency's negative determination pursuant to 15 CFR 930.35 is independent of and not the same as or similar to a negative declaration or finding of no significant impact pursuant to the New York State Environmental Quality Review Act (SEQRA) or National Environmental Policy Act (NEPA). A federal agency may, however, use SEQRA or NEPA documents as a vehicle for its consistency determination or negative determination. In such circumstances, the federal agency must ensure that the NEPA document includes the information and adheres to the time frames required by 15 CFR Part 930, Subpart D (see also 15 CFR 930.37 for additional information).

General Department of State Review Processes

Upon receipt of a federal agency's consistency determination and supporting information required by 15 CFR 930.39(a), the Department of State initiates its review of a federal agency's proposed activity and consistency determination, renders its own decision regarding the consistency of the activity with the NYCMP, and either concurs with or objects to the federal agency's consistency determination. If the Department's concurrence or objection is not received by the federal agency within sixty (60) days of the start of the Department's review, the Department's concurrence with a federal agency's consistency determination is automatically presumed pursuant to 15 CFR 930.41.

While the Department has at least sixty (60) days to review and issue its decision concurring with or objecting to a federal agency's consistency determination, the Department may request up to a fifteen (15) day extension of time for its review. Federal agencies are required to approve one such request if that request is made during the Department's 60-day review period. Longer or additional extensions of time may also be agreed to by a federal agency and the Department. Except in instances involving complex activities or those that occasionally undergo changes during the Department's review, the Department of State completes its review and provides the federal agency with its decision within sixty (60) to seventy five (75) days of receipt of a consistency determination and required supporting information.

Public Notice

During its review of a federal agency's consistency determination the Department of State issues public notices regarding the activity and the federal agency's consistency determination in the State Register, and may at its discretion publish notice in a newspaper having general circulation in the area where the activity is proposed or would affect coastal uses or resources. The public notice review and comment period is usually for thirty (30) days, but not less than fifteen (days). The Department considers comments, concerns, and issues raised, if any, that relate to the enforceable policies of the NYCMP, or NYCMP policies in NYCMP special management areas covered by regional coastal management programs such as the Long Island Sound Regional Coastal Management Program, State and federally approved LWRPs, HMPs, State designated Significant Coastal Fish and Wildlife Habitats, and Scenic Areas of Statewide Significance (see Section II.2 beginning on page 62 regarding NYCMP special management areas).

Department of State General Concurrences

Other than for development projects as defined in 15 CFR 930.31(b) (a federal agency activity involving planning, construction, modification, or removal of public works, facilities, or other structures, and including the acquisition, use, or disposal of any coastal use or resource), federal agencies proposing activities that meet the following Criteria for General Concurrence may request the Department of State's concurrence that the activities meeting the general concurrence criteria should not be subject to further review by the Department because the activities would have *de minimis* effects:

- 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 municipality 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 next "bullet"), 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.

Department of State Concurrence With a Federal Agency Consistency Determination

When the Department of State concurs with a consistency determination, the federal agency may take its final action and immediately proceed with the activity (see 15 CFR 930.41)).

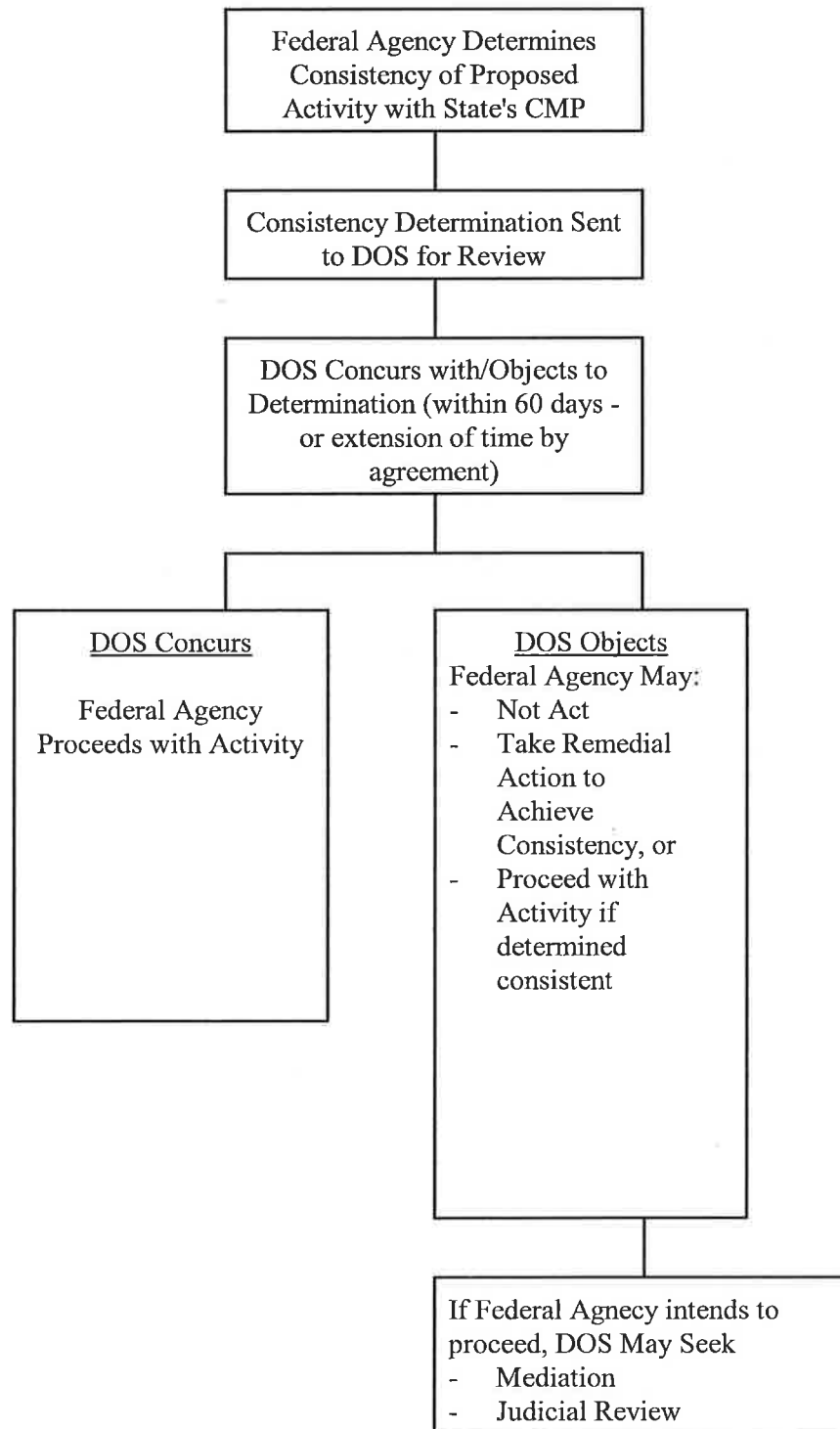
Department of State Objection to Federal Agency Consistency Determination

If the Department of State objects to a federal agency's consistency determination within the prescribed time frames, the federal agency and the Department of State should use the remaining portion of the 90 day time period (see 15 CFR 930.36(b)) to attempt to resolve the federal agency and State differences. If the differences are not resolved at the end of the 90 day period, federal agencies should consider using dispute resolution mechanisms in 15 CFR 930.44 and 15 CFR Part 930, Subpart G. The federal agency is not to proceed with the activity unless it can be determined:

- the "consistent to the maximum extent practicable" standard described in 15 CFR 930.32 is prohibited by existing law applicable to the federal agency, and the federal agency has clearly described to the Department of State, in writing, the legal impediments to full consistency with all applicable enforceable policies of the NYCMP (see 15 CFR 930.32.(a) and 15 CFR 930.39(a)), or
- the federal agency has concluded that its proposed action is fully consistent with the enforceable policies of the NYCMP even though the Department of State objects.

In no circumstance is a federal agency to undertake an activity that is not fully consistent with the NYCMP in accordance with the CZMA. If a federal agency decides to proceed with an activity objected to by the Department of State, or decides to follow an alternative suggested by the Department of State, the federal agency must notify the Department of State of the federal agency's decision to proceed before the project commences. This accords the Department of State the opportunity to pursue judicial or other options to ensure the federal agency comports with the consistency requirements of the CZMA and NYCMP.

**Flow Chart For Federally Conducted and Supported Activities
15 CFR Part 930, Subpart C**



D. ACTIVITIES REQUIRING FEDERAL AGENCY AUTHORIZATIONS OR 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 the Department of State for their consistency with the NYCMP. This requirement also applies to renewals and major amendments to such regulatory approvals.

The CZMA and its implementing regulations in 15 CFR 930.64 preclude federal agencies from issuing permits, licenses or other authorizations for activities in the coastal area, and outside of the coastal and affecting any coastal use or resource, unless:

1. the Department concurs or concurs with conditions with a consistency certification by an applicant;
2. the Department's concurrence is conclusively presumed pursuant to 15 CFR 930.62(a) ; or
3. in accordance with the CZMA and 15 CFR 930, Subpart H, the U.S. Secretary of Commerce overrides the Department's objection to the applicant's consistency certification.

The specific federal regulatory activities subject to consistency review by the Department, including those that may occur outside of the State's coastal zone and have reasonably foreseeable coastal effects, are listed in the CMP. The Department reviews those activities for their consistency with the NYCMP in accordance with the procedural requirements of 15 CFR Part 930, Subpart D (or Subpart I for federal regulatory activities having interstate coastal effects). The Department also monitors and is often notified of activities requiring federal regulatory approval that are not listed in Part II of Table 1 ("unlisted" activities) to determine if the activities would affect coastal land and water uses and natural resources, and if necessary subject them to review for their consistency with the NYCMP.

In accordance with 15 CFR 930.53(d), federal agencies are required to inform applicants of the consistency requirements of 15 CFR Part 930, Subpart D, which include the following requirements.

Submission of Consistency Certification

Federal regulations in 15 CFR Part 930.57 and the NYCMP require applicants seeking federal agency authorizations for activities in the coastal area, such as but not limited to licenses and permits, to provide a certification, submitted with the application, to the federal agency from which authorization is requested, that the activity that authorization is requested for complies with and will be conducted in a manner consistent with the NYCMP. (See Section E of Federal Consistency Assessment Form in Appendix D of this manual) This certification is provided in the form of a completed and signed Federal Consistency Assessment Form with all other necessary information and data. This certification is to be submitted in the application to the federal agency, and applicants are required to submit a copy of the federal application, the consistency certification, and the other necessary information and data to the Department of State at the same time it is submitted to the federal agency.

Copies of consistency certifications and all other relevant data, information, and other materials are to be submitted directly to Department's Division of Coastal Resources (see address on Federal Consistency Assessment Form). While certain State statutes and agency regulations require the official filing of certain materials with the New York Secretary of State as procedural and other filing and record-keeping requirements, those requirements are for purposes unrelated to the review of activities for consistency with the NYCMP, and they neither suffice for nor replace the submission of a consistency certification to the Department in accordance with the CZMA, 15 CFR Part 930, Subpart D, or the NYCMP.

Content of a Consistency Certification

In New York the basic elements of a consistency certification in accordance with 15 CFR Part 930, Subpart D consist of:

1. a completed and signed Federal Consistency Assessment Form;
2. an identification of applicable NYCMP policies affected by an applicant's proposed activity;
3. a brief assessment of the effects of the proposed activity on the applicable NYCMP policies (see note below); and,
4. a statement indicating how the activity is or would be consistent with each applicable NYCMP policy (also see note below and 15 CFR 930, Subpart D, and instructions in Federal Consistency Assessment Form in Appendix C).

Note: It is important to include a brief and clear assessment of the **effects** of an activity on NYCMP policy and a statement indicating **how** an activity is or would be consistent with the applicable NYCMP policies. For example, it is not sufficient to state that "because an activity such as the construction of a dock or bulkhead in an open water or intertidal wetland area involves a water dependent structure or use and the construction of the dock or bulkhead is identified as a generally compatible use in the State's tidal wetlands regulations, the activity is therefore consistent with or is required to be consistent with NYCMP Policy 2 relating to water dependent uses and Policy 44 relating to the protection of tidal wetlands and the benefits derived from them." While the State's tidal wetland regulations include a list of activities that have been determined to be "generally compatible" activities in a tidal wetland area, permits are required for many generally compatible activities, and there are specific tidal wetland standards that must be met in determining whether the activity may be authorized by a permit. Since any structure placed in a wetland or open water area will always affect wetlands, open water areas, and human uses and values associated with those areas to varying degrees, the effects on resources and human uses need to be understood and described. Based on the effect of the activity on those resources and uses, a brief narrative should be provided indicating how the activity would affect the relevant policies, and based on those effects, include information leading to a rational conclusion indicating whether and how the activity would be consistent with the relevant policies. (See Sections II.2 and II.4 of this manual for examples of appropriate assessments and statements).

Necessary Data and Information

The Department of State commences its formal review of a proposed activity and a consistency certification for it upon receipt of all necessary data and information describing the proposed activity and supporting the certification. The necessary data and information that is to be submitted to the Department of State to initiate the Department's formal review and decision-making, in addition to a consistency certification, consists of:

- a copy of the federal application for a permit, license, or other form of authorization or approval;
- a 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, a written statement of the purpose and need for the activity, an identification of the owners of the abutting upland properties and underwater lands, and a written analysis of alternatives to the proposed activity considered by the applicant;

- a copy of a final Environmental Impact Statement if one is required by a federal or State agency in accordance with the National Environmental Policy Act (NEPA) or State Environmental Quality Review Act (SEQRA);
- a copy of applications for permits, licenses, or other forms of authorization or approval from State agencies (e.g., the State Department of Environmental Conservation; Office of General Services; Office of Parks, Recreation and Historic Preservation and State Historic Preservation Officer, Public Service Commission) and related correspondence submitted to them;
- 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.

Department of State Review of an Applicant's Consistency Certification

Except for activities that the Department of State determines meet NYCMP General Concurrence Criteria (see discussion of General Concurrences on pages 35 and 36), the Department's full consistency review of a proposed activity and a consistency certification for it, coordinated with other federal, State, and certain municipalities such as those in areas covered by approved LWRPs, generally takes between thirty (30) to ninety (90) days, and may take up to six (6) months, in accordance with 15 CFR Part 930, Subpart D. Most reviews and consistency decisions by the Department are completed in less than one month, and many of those, usually meeting General Concurrence criteria, are completed within two weeks of the Department's receipt of a complete consistency certification and all necessary data and information providing for the Department's assessment of the affects of activities on coastal uses and resources, and consistency with applicable NYCMP policies.

The Department has no authority to review and render a formal consistency decision in accordance with 15 CFR Part 930, Subpart D unless the activity for which the consistency certification is submitted is actively undergoing federal agency review and decision-making processes. If a federal agency has not started its review because it has not received a complete application, or if a federal agency after starting its processing of an application stops its active review because either the federal agency or an applicant has temporarily or otherwise withdrawn or stayed the processing and consideration of an application, the Department of State's review of the activity either does not begin until the application to the federal agency is actively being processed and considered by the federal agency, or terminates when the federal agency's active processing or consideration of an application stops (see 15 CFR Part 930.51(f)).

Public Notice

The Department issues public notices in the *State Register* for consistency certifications and activities that are subject to consistency review by the Department. Notices may also be published in a newspaper having general circulation in the area(s) where an activity is proposed to be undertaken. The public notice and comment period is normally 30 but no less than 15 days. If the Department decides to hold a public hearing regarding an activity, notice is published indicating the purpose, date, time and place of the hearing. The Department and federal agencies may also use joint public notices and hearings that meet both the Department and federal agency public notice and review obligations.

Department of State Consistency Decisions

Following interagency coordination and public notice review, and within the time frames provided for in 15 CFR Part 930, Subpart D, the Department of State either concurs with or objects to an applicant's consistency certification. The Department's concurrence with or objection to a consistency certification is provided in writing to the applicant for federal agency authorization or the applicant's agent, and to the involved federal and often other agencies.

Department of State Concurrence With an Applicant's Consistency Certification

If the Department of State concurs with an applicant's consistency certification in accordance with 15 CFR 930.62, the involved federal agency may authorize an applicant's proposed activity.

The activity authorized by the involved federal agency must be the same activity that is reviewed by the Department of State. Because a federal agency is precluded from authorizing an activity different than one for which a consistency certification was reviewed and concurred with by the Department of State, it is very important to ensure that any changes in design, location, or timing of the activity are provided to the involved federal agency and the Department of State at the same time. To help coordinate State, federal and, in areas covered by approved LWRPs, municipal reviews and decision-making, and to avoid the need for later design, location, or other changes to an activity (including subsequent amendments to authorizations), the Department of State recommends that an applicant provide copies of any and all modifications to a proposed activity and correspondence regarding an activity to all of the involved municipal, State, and federal agencies. This should be accomplished during the concurrent reviews by all of the involved agencies.

Department of State Objection To An Applicant's Consistency Certification

If the Department of State objects to an applicant's consistency certification in accordance with 15 CFR 930.63, the consistency provisions of the CZMA and implementing regulations in 15 CFR 930.64 prohibit the involved federal agency from issuing its authorization for the activity, except in accordance with a Secretarial override of the Department's objection through an appeal, in accordance with the CZMA and 15 CFR Part 930, Subpart H. Such an appeal must be based on one or both of the grounds that the proposed activity is necessary in the interest of national security, or will advance one or more of the national objectives of the CZMA (see 15 CFR Part 930, Subpart H in Appendix B).

Department of State Conditional Concurrences

There are occasions when the Department of State, a federal agency, and an applicant may agree with certain conditions to ensure an activity would comply with and be undertaken in a manner consistent with the NYCMP. The Department of State cannot unilaterally impose and enforce conditions for federal authorizations. Therefore, the Department of State ordinarily encourages an applicant to formally modify a federal application and consistency certification to ensure that the activity that an applicant proposes and a federal agency is considering and may authorize is fully consistent with the NYCMP. In certain circumstances conditions can be agreed upon, which, if met by an applicant, would permit the Department of State to concur with an applicant's consistency certification. In those circumstances an applicant, the involved federal agency, and the Department of State must agree to enforceable conditions, in accordance with 15 CFR 930.4 and 930.62(d), that would ensure that an activity that would otherwise not be consistent with the NYCMP, would be consistent with the NYCMP with the agreed-to conditions. When such conditions are not agreed to by the Department of State, the applicant, and the involved federal agency, the Department's conditional concurrence with an applicant's consistency certification is treated as an objection to the applicant's consistency certification, in accordance with 15 CFR 930.4(b), 930.63, and 930.64, and the federal agency is prohibited from authorizing the activity, except in accordance with the Secretarial appeal override standards in 15 CFR Part 930, Subpart H.

Department of State General Concurrences

To simplify and expedite federal consistency reviews and decision-making, the Department of State has developed variances to the procedures in 15 CFR Part 930 Subpart D, through amendments to the NYCMP. The Department of State has developed general concurrence criteria for activities whose characteristics are such that they would neither individually, nor when cumulative and secondary effects are considered, significantly affect in an adverse manner the achievement of, or otherwise be inconsistent with NYCMP policies or special management area plans. When the Department of State determines those general concurrence criteria are met, the Department issues a General Concurrence letter indicating:

1. the Department has determined the activity meets the Department's general consistency concurrence criteria;
2. further review of the activity by the Department is not required; and
3. the Department's concurrence with the individual consistency certification for the activity is not required.

In the preceding circumstances, if what has been reviewed by the Department is not modified, further action on the part of the Department of State is not required prior to the federal agency's authorization of the proposed activity. However, if the activity reviewed by the Department is modified either prior to or after authorization by a federal agency, its effects on coastal uses or resources may be different than those originally reviewed and considered by the Department. Therefore, if a proposed activity is modified after the Department's initial review of it, the modified proposal must be reviewed by the Department. In such circumstances the Department will indicate either:

- (1) the effects of the modified activity would be substantially different than those originally reviewed by the Department, therefore requiring further review of the modified activity. In these circumstances, when an activity has been modified such that it does not meet the Department's general concurrence criteria, the modified activity may be required to undergo a full consistency review and receive the Department's concurrence with an individual consistency certification for the modified activity. If the effects of the modified activity would be substantially different from those originally reviewed and considered by the Department, but the modified activity meets the Department's general concurrence criteria, the Department may also use option 3), below; or
- (2) the effects of the modified activity would not be substantially different than those originally reviewed and considered by the Department, therefore further review by the Department is not required; or
- (3) the modified activity meets the Department's general concurrence criteria, therefore further review of the proposed activity by the Department is not required, nor is the Department's concurrence with an individual consistency certification for the proposed activity.

General Concurrence Criteria

The Department of State's criteria for general concurrences are:

- 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 municipality with the approved LWRP advises the Department of State that the activity 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 municipality with the approved LWRP so advises the Department of State;
- The activity involves reconstruction, replacement, maintenance or repair of lawful structures, in-kind and in-place, and where applicable the municipality with an approved LWRP advises the Department of State that it complies with the approved LWRP, and the Department of State determines it complies with any applicable Special Management Area Plan;
- Other than for the exercise of riparian or littoral rights (see next "bullet"), the activity is entirely on property owned by the applicant, or otherwise authorized by the owner of the property, for the use proposed by the applicant or 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, 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.

Submission requirements for activities that meet or appear to meet the preceding general concurrence criteria are the same as for any other activity requiring authorization from a federal agency.

If the Department of State determines, during its initial review of a consistency certification and the activity for which the consistency certification was submitted, that the activity meets the Department's general concurrence criteria, the applicant and federal agency will be notified within 30 days of receipt of the requisite data and information that the activity meets the Department's general concurrence criteria, that further review by the Department is not required, and that the Department's concurrence with the individual consistency certification submitted for the proposed activity is not required. If the Department of State determines that an activity does not meet the Department's general concurrence criteria, then the activity an applicant submits a consistency certification for undergoes the full consistency review process described previously in this manual, and the Department's concurrence with the applicant's consistency certification is required.

U.S. Army Corps of Engineers Individual, Nationwide and Regional and Statewide General Permits and Letters of Permission

The Corps has developed different types of authorizations for activities that it regulates. In addition to individual permits, the Corps' regulations provide for Corps authorization of certain activities by nationwide and regional and statewide general permits, or by letters of permission. These forms of authorization, meant primarily for smaller rather than larger scale activities that meet certain design or size thresholds, also involve different Corps review and approval processes. With minor procedural differences the preceding information describing General Concurrences is also applicable to Nationwide and Regional and Statewide General Permits and Letters of Permission issued by the U.S. Army Corps of Engineers.

The majority of the Department of State's consistency reviews and decisions involve activities regulated by the U.S. Army Corps of Engineers (Corps) pursuant to Section 10 of the federal Rivers and Harbors Act, regulating the construction or placement of structures in navigable waters, and Section 401 of the federal Clean Water Act, regulating the discharge of fill or other materials in navigable waters, including federally defined and regulated

wetlands. (Note: the federal definition and spatial extent of wetlands are different from New York's definition of wetlands. As a result, there are instances where an activity is not regulated by the State Department of Environmental Conservation in accordance with the State Tidal or Freshwater Wetlands Acts, but is regulated by the Corps in federally defined wetlands in accordance with the federal Clean Water Act, and vice versa. However, in accordance with the federal Clean Water Act, certain activities regulated by the Corps in federally defined wetlands, that are not regulated by the State in accordance with the State wetlands regulations, also require the issuance of a Water Quality Certification by the State Department of Environmental Conservation as part of the Corps regulatory process. The issuance of certain Tidal or Freshwater Wetlands permits and Water Quality Certifications by the State Department of Environmental Conservation in areas covered by and affecting the policies and purposes of a State-approved LWRP is subject to State consistency requirements. (See the State Consistency section of this manual for State agency consistency obligations) As with all activities involving federal agency authorizations, activities involving Corps authorizations are subject to consistency with the NYCMP and a federally approved LWRP that has been incorporated into the NYCMP.

When the Corps considers issuing or revising its nationwide and general permits, it submits to the Department of State a description of its proposed permits and manner in which the permit program would be conducted, along with its own consistency determination regarding the consistency of the Corps' proposed activity with the NYCMP. (That is a direct activity) The Department reviews that proposed activity for its consistency with the NYCMP and the Corps' consistency determination in accordance with 15 CFR Part 930, Subpart C. To ensure that the Corps' issuance of those forms of authorization is consistent with the NYCMP in accordance with 15 CFR Part 930, Subpart C, and to ensure that individual activities subsequently proposed to be undertaken in accordance with those forms of authorization are and would be consistent with the NYCMP, the Corps and the Department of State have modified or developed conditions for Corps nationwide, regional, and statewide general permit and letter of permission activities. In this regard certain activities are authorized by certain Corps nationwide, regional, and statewide general permits. Others may be authorized by those permits or by a Corps Letter of Permission only after the activity for which Corps authorization is required has been reviewed by the Department of State for its consistency with the NYCMP, and the Department has rendered a consistency decision regarding the activity in accordance with 15 CFR Part 930, Subpart D.

For the Corps's consistency determinations for the issuance of nationwide or general permits that the Department of State has objected to, the Department of State and the Corps agreed to conditions that are alternatives for ensuring that activities that would ordinarily be eligible for authorization by those permits are consistent with the NYCMP. In this regard activities that would be eligible for Corps authorization under one of those Corps permits are reviewed as follows:

- The Department of State advises both an applicant for Corps authorization and the Corps whether a full review of the activity and the consistency certification for it is necessary, within 30 days of the Department of State's receipt of: 1) a complete Corp's application for authorization to undertake an activity; and 2) a consistency certification for it, along with all other necessary data and information (see Content of an Applicant's Consistency Certification on page 32 and Necessary Data and Information beginning on page 32, describing a complete consistency certification and necessary data and information); and 3) notification from the Corps that an activity would be eligible for authorization by a Corps nationwide or regional or statewide general permit, but the activity is not automatically authorized under that Corps authorization because the activity is not eligible for Corps authorizations without review and a consistency decision by the Department of State.
- If the Department of State determines that a full review of the proposed activity for its consistency with the NYCMP is necessary, the proposed activity for which the consistency certification is submitted undergoes a full consistency review by the Department of State. In this instance, the Department's concurrence with an applicant's consistency certification is required as it is for activities requiring federal agency authorizations, unless the Department of State determines during its review that the proposed activity meets NYCMP general concurrence criteria (see General Concurrences on pages 35

and 36). If the Department of State determines during and as part of its review that the activity meets NYCMP general concurrence criteria, the Department terminates its review through the issuance of a general concurrence letter indicating:

1. the Department has determined the activity meets the Department's general consistency concurrence criteria;
2. further review of the activity by the Department is not required; and
3. the Department's concurrence with the individual consistency certification for the activity is not required.

The proposed activity may be authorized by the involved federal agency when the Department of State issues its general concurrence letter.

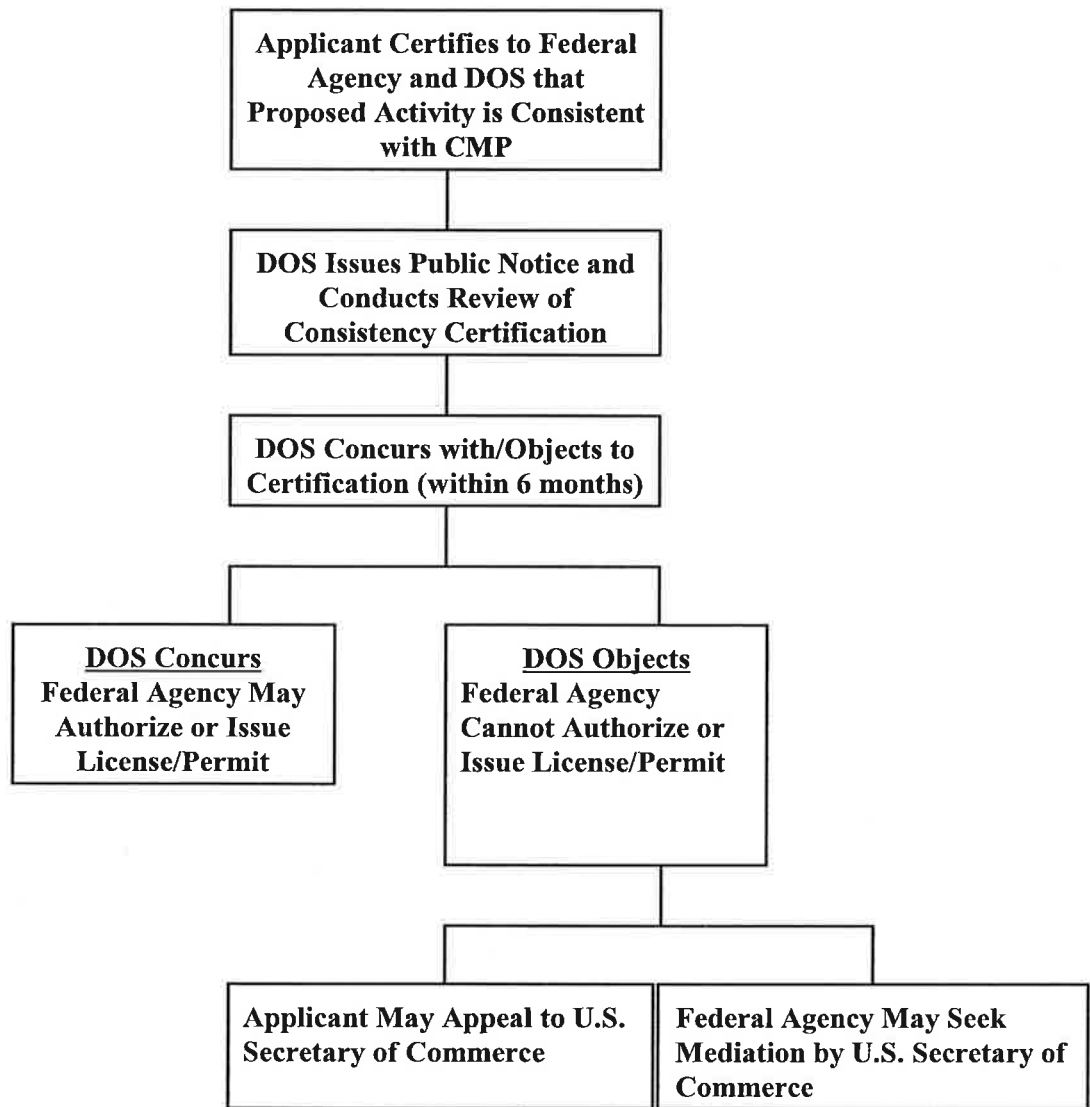
U.S. Army Corps of Engineers Letters of Permission

Activities that may be authorized by a Corps Letter of Permission are subject to consistency review by the Department of State regardless of their location in the State's coastal zone. If the Corps determines that an applicant's proposed activity may be authorized by a Corps Letter of Permission, and the Department of State determines that the proposed activity does not or would not have a significant adverse affect on coastal uses or resources or otherwise be inconsistent with the NYCMP, the Department of State's concurrence with an applicant's consistency certification is not necessary. In these circumstances, and within 30 days of the receipt of notification from the Corps of Engineers that the activity may be authorized by a Corps Letter of Permission, the Department of State advises the applicant and the federal agency of the Department's determination, indicating:

- the Department has no objection to authorization of the activity by Corps Letter of Permission;
- that it objects to Corps authorization of the activity by Letter of Permission without a more thorough consistency review by the Department of State and the Department's concurrence with an individual consistency certification; or
- the Department's concurrence is not required because the activity meets the Department's general concurrence criteria. Under this variance from more routine and full consistency review processes, the applicant is still responsible for submitting all of the previously identified necessary data and information to the Department of State at the time of submission to the involved federal agency.

(Reminder note: the Department of State's general concurrence criteria for all of the preceding forms of authorization are described under "Department of State General Concurrences" and "General Concurrence Criteria" beginning on pages 34 and 35).

**Flow Chart For Activities Requiring Federal Permits, Licenses, Other
Authorizations
15 CFR Part 930, Subpart D**



E. OUTER CONTINENTAL SHELF EXPLORATION, DEVELOPMENT AND PRODUCTION ACTIVITIES

Federal consistency procedures differ from others for this relatively uncommon activity (see 15 CFR 930, Subpart E). While this manual was being written the National Oceanic and Atmospheric Administration was considering procedural and substantive changes to the federal consistency regulations relating to outer continental shelf exploration, development, and production activities and other energy related activities. If necessary, additional information will be included in or this manual will be amended to reflect changes to the federal consistency regulations.

Activities described in Outer Continental Shelf (OCS) plans as requiring federal permits and licenses and affecting land and water uses and natural resources in New York's coastal area are required to be consistent with the NYCMP, and are subject to review by the Department of State for consistency with the NYCMP. This requirement also applies to the activities described in amended OCS plans.

As in other federal consistency provisions, an involved federal agency is precluded from issuing a requested permit or license for an activity affecting the coastal zone unless: (a) the Department of State concurs with an applicant's consistency certification; (b) the Department of State's concurrence is conclusively presumed as a result of the State not rendering its consistency decision within a specific time frame; or (c) the U.S. Secretary of Commerce overrides the Department of State's objection to a consistency certification.

A person or an entity (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 the Department of State for its review of the federal permit and license activities described in the plan. This documentation is to be provided to the Department of State by the U.S. Department of Interior. The Department of State commences its consistency review of the proposed federal permit and license activities upon receipt of all necessary data and information, which minimally consists of the following:

- A 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 NYCMP, 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;
- A copy of required NEPA documentation (such as an Environmental Assessment or final Environmental Impact Statement); and
- A copy of the applicant's consistency certification.

In accordance with 15 CFR Part 930, Subpart E, the Department's consistency review of the OCS plan, and federal permit and license activities described in it, begins upon receipt by the Department of State of the preceding necessary data and information. During its review the Department of State may request additional information regarding the proposed permit and license activities if necessary data and information is not included in the initial submission to the Department. The Department closely coordinates its review of these activities with the State Department of Environmental Conservation and others.

The Department issues public notices regarding OCS plans and federal permit and license activities described in them. This notice is given in the State Register, and 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 and

comment period is at least 30 days. If the Department decides to hold a public hearing regarding the proposed activities, notice will be given indicating the purpose, date, time and place of the hearing.

The Department's review of federal permit and license activities described in the OCS plan are to be undertaken as expeditiously as possible, striving to render its concurrence with a consistency certification, its concurrence with a consistency certification based on specific agreed upon conditions, or its objection to a consistency certification, within three months of receipt of all necessary data and information and commencing its review. As with federal license and permit activities reviewed by the Department of State in accordance with 15 CFR Part 930, Subpart D, the Department may take up to six months to review and render its consistency decision. If the Department of State cannot complete and render its consistency review decision in the three month period, the Department notifies the applicant, the U.S. Department of Interior, and the federal Office of Ocean and Coastal Resources Management of the reason(s) for the delay. This notification is to be given prior to the end of the three month period. The Department must conclude its review of the proposed activities within six months from the receipt of all necessary data and information and initiation of the Department's review or its concurrence with a consistency certification is presumed, in accordance with 15 CFR 930.78(b).

If the Department of State concurs with an applicant's consistency certification, the Department notifies the applicant, the U.S. Secretary of the Interior, and the Director of the federal Office of Ocean and Coastal Resources Management. In that instance the activity may be authorized by U.S. Department of the Interior and other involved federal agencies (see 15 CFR 930.78).

If the Department of State objects to an applicant's consistency certification related to federal license and permit activities in an OCS plan, the involved federal agency is precluded from issuing the licenses or permits, unless the Department of State's objection is overridden on appeal to the U.S. Secretary of Commerce (see 15 CFR 930.80 and 15 CFR Part 930, Subpart H).

F. ACTIVITIES INVOLVING FINANCIAL ASSISTANCE FROM FEDERAL AGENCIES

State and Local Agency Applicants

Applications for federal financial assistance (eg. grants, loans, subsidies, guarantees, insurance, etc.) submitted by New York State agencies, local governments and related public entities (e.g., special purpose districts, authorities, etc.) to federal agencies, for activities in the coastal area, or outside the State's coastal area and affecting land and water uses and natural resources in the coastal area, are reviewed by the Department for consistency with the NYCMP. 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. Specific federal financial assistance activities subject to consistency review by the Department are listed in the CMP document.

State and local agency applicants for federal financial assistance are required to submit a copy of a federal agency application for financial assistance, to the Department of State, at the time it is submitted to a federal agency. Federal regulations in 15 CFR 930, Subpart F require the information submitted to the Department of State to include an evaluation, of the relationship of the proposed activity and its reasonably foreseeable effects, on coastal land and water uses or resources, to the State's coastal policies.

The Department of State is required to review the information provided by an applicant and render a consistency decision, indicating whether or not the Department objects to the activity.

For applications involving financial assistance to State or local agencies, federal regulations in 15 CFR Part 930, Subpart F do not require the Department of State to make its consistency decision within any specific time frame. However, the Department makes every effort to conduct its reviews and render its decisions for these

activities within 30 days. There may be longer review and decision-making periods for activities that are more complicated, involve more coordinated public and interagency reviews, or are the subject of environmental impacts statements.

Unlike other federal activities, the federal consistency regulations do not require the Department to issue public notices for these activities; however, the Department may choose to issue such notices to help ensure that all relevant issues and concerns are considered and addressed in its consistency reviews and evaluation of these financial assistance activities.

To initiate the Department of State's review 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 the following documentation to the Department of State, at the time of filing an application with a federal agency:

- A copy of the federal financial assistance application;
- A detailed written description of the proposed activity;
- A written evaluation on the relationship of the proposed activity and its reasonably foreseeable coastal effects to the applicable NYCMP policies;
- A 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;
- A copy of the final EIS, if required by the federal agency or by the state or local agency having jurisdiction over the proposed activity; and
- Copies of state permit applications, if required, and related correspondence submitted to the involved state agencies.

The federal regulations in 15 CFR 930.93 and 930.94 refer to the state clearinghouse "Intergovernmental review process" and procedures established pursuant to Executive Order 12372. New York State does not have a state clearinghouse established pursuant to Executive Order 12372. Therefore, the Department of State monitors federal financial assistance activities not specifically listed in the CMP document 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 the Department to have reasonably foreseeable effects upon the coastal zone, the Department within 15 days of its receipt of notification informs the applicant, the involved federal agency, and the federal Office of Ocean and Coastal Resources Management that the proposed activity must be reviewed for consistency with the NYCMP.

After the receipt of all of the above listed information, the Department reviews most relatively minor federal financial assistance activities within 30 to 45 days or less.

In many cases the Department may determine that an activity meets the Department's general concurrence criteria and render its consistency decision in less than thirty days, which is most often the case (see General Concurrence Criteria - Activities Requiring Federal Agency Authorizations, on pages 35 and 36). Other activities, such as those involving NEPA or SEQRA documentation, are reviewed within 90 days of receipt of all required documentation, which includes any necessary environmental impact statements or assessments. This review period may be extended another 45 days to provide additional time to evaluate a complex activity or to provide the Department the opportunity to seek public comment regarding a proposed activity. While the Department is not required by 15 CFR Part 930, Subparts F or I to issue public notices for federal financial assistance activities that are reviewed by the Department for consistency with the NYCMP, the Department may determine that public review of a federal financial assistance activity is warranted, and if so determined, notice is provided in the *State Register*, and may be published in a newspaper having general circulation in the area(s)

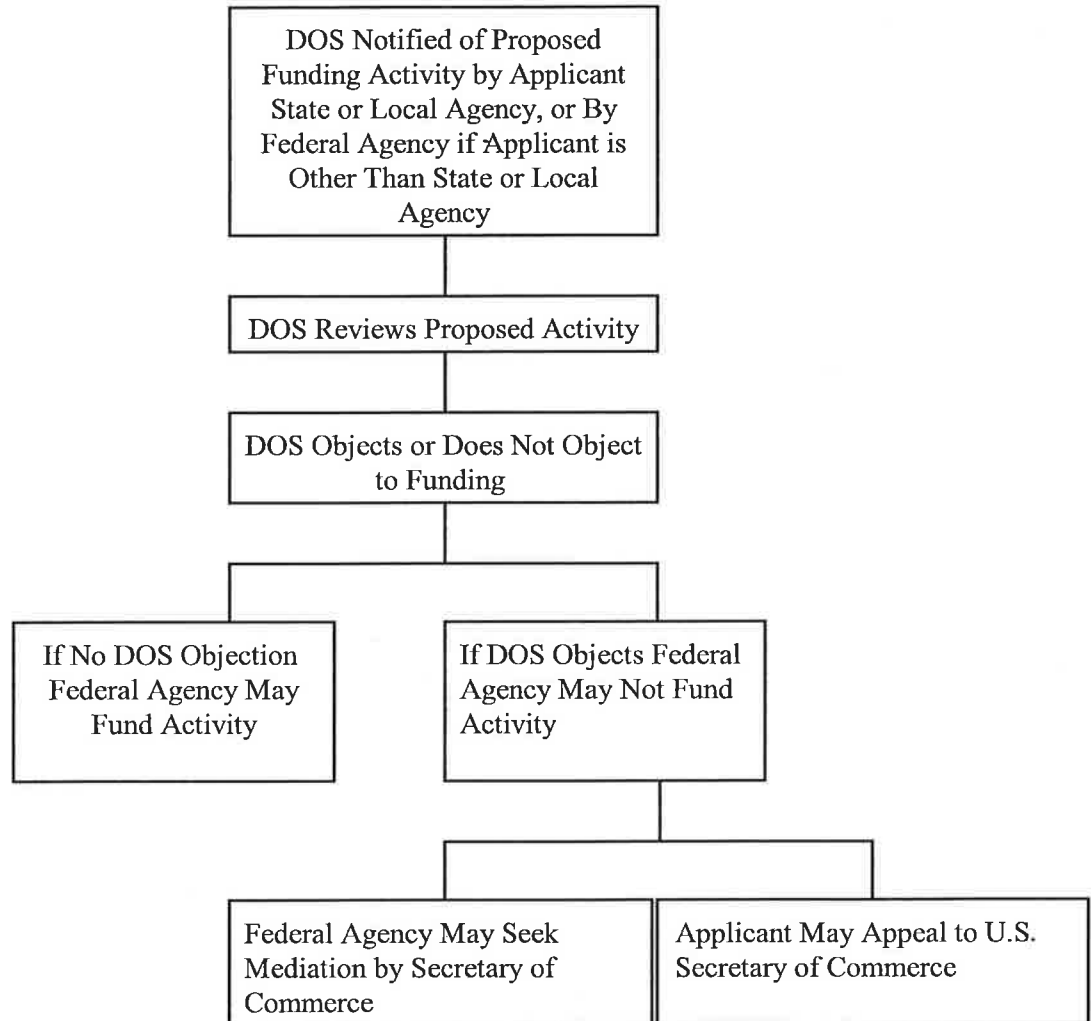
where a proposed activity will occur. The public notice and comment period will normally be 30 but no less than 15 days.

During its review, the Department may consult with an applicant on modifications that might be made to an activity to ensure it is consistent with the NYCMP or to agree on conditions that would allow the Department to concur with the proposed activity. Upon completion of its review, the Department indicates whether or not it objects to the proposed activity. If the Department indicates it has no objection to the use of federal funds for the proposed activity or does not object to the activity based on conditions that an applicant, the Department, and the involved federal agency mutually agree to, the involved federal agency may fund the proposed activity. If the Department objects to the use of federal financial assistance for the activity or indicates it has no objection to the funding of the activity provided conditions identified by the Department are adhered to, but the involved federal agency or applicant do not agree to the conditions or conduct the activity in a manner that comports with the identified conditions, the Department's decision is considered an objection in accordance with 15 CFR 930.97, and the involved federal agency is precluded from approving the financial assistance.

Applicants Other Than State and Local Agencies

Consistency procedures are different for activities involving federal agency financial assistance to applicants other than State and local government agencies. These activities, which include financial assistance directly from a federal agency to a profit or non-profit entity, are reviewed as federal agency activities in accordance with 15 CFR Part 930, Subpart C, rather than as above in accordance with 15 CFR Part 930, Subpart F. In this regard, the federal agency considering the funding of an activity is required to provide a consistency determination to the Department of State in accordance with 15 CFR 930, Subpart C and the NYCMP. The Department of State reviews and renders its consistency decision for these activities as described in the preceding Section I.4.C regarding Activities Directly Undertaken By or On Behalf of Federal Agencies, beginning on page 23.

Flow Chart For Federal Assistance to State and Local Governments
15 CFR Part 930, Subpart F (Financial Assistance to State and Local Agencies)
15 CFR Part 930, Subpart C (Financial Assistance to Others)



L5 STATE COASTAL AND INLAND WATERWAYS CONSISTENCY

As the consistency provisions of the CZMA require activities undertaken by, requiring authorizations from, or involving financial assistance from federal agencies to be consistent with the NYCMP, State consistency provisions require the actions of State agencies to be consistent with State coastal policies, or the policies and purposes of a State approved LWRP.

In accordance with the NYCMP and Article 42 of the State Executive Law and implementing regulations in 19 NYCRR Part 600, the Department of State monitors and reviews the actions of State agencies and advises and provides other technical assistance to them regarding consistency procedural matters. The Department also advises State agencies regarding the consistency of their actions with State coastal policies, approved Local Waterfront Revitalization Programs and other NYCMP special management area plans. Given the Department of State's Federal consistency decision-making authorities, this role of the Department is especially important when State agency actions also involve Federal agency activities.

State consistency provisions in Article 42 of the State Executive Law and implementing regulations in 19 NYCRR Part 600 and State Environmental Quality Review Act (SEQRA) regulations in 6 NYCRR Part 617 apply to the direct, funding, and approval actions of State agencies. State agency actions are required to be consistent to the maximum extent practicable with either: 1) State coastal and inland waterway policies in Section 912 of the State Executive Law and Department of State implementing regulations in 19 NYCRR Part 600 and coastal policies in 19 NYCRR Part 600.5; 2) Long Island Sound coastal policies in 19 NYCRR Part 600.6; or 3) the policies and purposes of a State-approved LWRP (Note: Subsequent to 1992, State-approved LWRPs include Harbor Management Plans developed and approved in accordance with Article 42 of the State Executive Law and 19 NYCRR Part 603. As with an LWRP, State agency actions are required to be consistent with approved Harbor Management Plans.) In this respect State agency actions that are consistent with and advance applicable State coastal policies or the policies and purposes of a State-approved LWRP should be expedited. State agency actions that affect and are not consistent with State coastal policies or a State-approved LWRP are not to be undertaken by State agencies.

Procedural and substantive State consistency provisions of Article 42 of the Executive Law and 19 NYCRR Part 600.3 provide that State agencies involved in an action are not to carry out, fund, or approve their actions unless and until the State agency has complied with the consistency provisions of Article 42 of the State Executive Law and implementing regulations in 19 NYCRR Part 600, and 6 NYCRR Part 617.

Procedurally, in accordance with 19 NYCRR Part 600.4 and 6 NYCRR Part 617.6(a)(5), State agencies are required to determine, as early as possible, whether their own SEQRA Type I or Unlisted actions are located within the coastal area (State coastal area boundary maps, and amendments to the coastal area boundary through State approval of LWRPs and designations of NYCMP special management areas, have been provided and should be available at regional offices of the State Department of Environmental Conservation and other State agencies, and federal agencies and coastal municipalities. These boundaries are also available through the Department's web site under the heading "Maps".) If a State agency contemplates undertaking an action in the coastal area, and the State agency action is a SEQRA Type I or Unlisted action, the State agency is directed to the Department of State's consistency regulations (19 NYCRR Part 600), which require State agencies to evaluate the possible effects of the State agency's action on and its consistency with State coastal policies or the policies and purposes of State approved LWRPs. This requirement applies to all State agencies whether they act as SEQRA lead or involved agencies (see 6 NYCRR Part 617.6(a)(5)).

At the time a State agency determines its action is within the coastal area, and during its initial review of its action pursuant to SEQRA, State agencies are required to complete a Coastal Assessment Form, or CAF (not to be confused with a Federal Consistency Assessment Form, or FCAF, which is required to be completed by applicants for federal agency authorizations and submitted to federal agencies and the Department of State in

accordance with federal consistency requirements and the NYCMP). A CAF is required to be completed by State agencies prior to making a determination of significance pursuant to SEQRA. This is to assist the State agency in making a determination of significance pursuant to SEQRA, and to assist the State agency in making a determination regarding the effects of the State agency's action on and the consistency of the State agency's action with applicable State coastal policies, or the applicable policies and purposes of a State-approved LWRP (see 19 NYCRR Part 600 and 6 NYCRR Part 617.6(a)(5)).

The information requested in a CAF generally pertains to whether a State agency action might have a significant effect on State coastal policies relating to: development and uses of the shoreline or underwater lands; recreational opportunities; flooding or erosion hazards and natural protective features; public access or visual quality and scenic areas of Statewide significance; commercial or recreational fishing; designated significant coastal fish and wildlife habitats; historic or archeological resources; water-dependent uses; water and air quality; wetlands; or LWRPs and other NYCMP special management areas. If, as a foreseeable result of a State agency action, any of those resources or uses are affected, the State agency action is likely to affect relevant coastal policies in Article 42 of the Executive Law, 19 NYCRR Parts 600.5 and 600.6, the NYCMP document, or the policies and purposes of an approved LWRP. Therefore, when completing the CAF, State agencies should also consider and be guided by the State coastal policies in the NYCMP document or the applicable policies and purposes of any applicable State-approved LWRP. If any question on the CAF is answered "yes", a brief and concise description of the nature and extent of the State agency's action must be provided on the CAF, and a copy of the CAF must be forwarded to the Department of State. This is so the Department of State can monitor State agency actions and coordinate them with Department of State federal consistency reviews (see Federal Coastal Consistency in Section I.4 beginning on page 19), and assist and advise State agencies regarding the consistency of their actions with State coastal and inland waterway policies and approved LWRPs. If, however, the State agency's action is one involving a State agency permit, and the permit action does not involve federal review, funding, or approval, the CAF is not required to be submitted to the Department of State.

Once a State agency completes a CAF, the information in it may or may not provide sufficient information for the State agency to determine the effects of the State agency's action on and its consistency with applicable coastal and policies or the policies and purposes of an approved LWRP. If sufficient information is not provided or available to assess the effects of the State agency action on and its consistency with applicable coastal policies or the applicable policies and purposes of any applicable approved LWRP, the State agency should obtain the information necessary to make such assessments and conclusions. This includes contacting a municipality with an approved LWRP as soon as possible when the agency is contemplating an action in an area where there is a State approved LWRP, so that the municipality is provided the opportunity to identify relevant issues, to identify potential conflicts between what is being considered and the municipality's LWRP, and to help ensure that the State agency action does not conflict with the policies and purposes of an approved LWRP (see State Agency Actions and Conflicts Identified By A Municipality With An Approved LWRP on page 50). State agencies are encouraged to consult with the Department of State to obtain such information and to enlist the Department of State's assistance regarding such information and assessments. A determination whether an action will have a significant adverse effect on the environment and whether an EIS is necessary must be based on an analysis of the effects. If such information is not readily available, an environmental impact statement (EIS) may be required to obtain that information.

If a positive declaration is issued and an EIS is required pursuant to SEQRA, and a State agency is acting as either the SEQRA lead or an involved agency, the draft EIS is required to include an identification of the applicable state coastal policies and a discussion of the effects of the potential effects of an action on coastal policies (see 6 NYCRR Part 617.9(b)(5)(vi)). The SEQRA regulations in 6 NYCRR 617.11(e) provide that no state agency shall make a final decision to undertake its action unless and until the State agency has made a

written finding that its action is consistent with the State coastal policies in 19 NYCRR Part 600.5^{*}; or, when an LWRP has been approved by the Secretary of State, no State agency may make a final decision on an action that is likely to affect the achievement of the policies and purposes of the LWRP unless and until the agency has made a written finding that the action is consistent to the maximum extent practicable with the LWRP. If the agency cannot make such a finding, it may not undertake the action.

When considering whether a State agency action might affect the policies or purposes of an approved LWRP, State agencies are to contact the LWRP municipality directly following the State agency notification procedures summarized in approved LWRPs. This is to provide municipalities with the opportunity to identify and avoid any potential conflicts between a State agency action and an LWRP (see State Agency Actions and Conflicts Between Approved LWRPs on page 50), to ensure that State agencies consider the policies and purposes of an LWRP, and to insure their actions are consistent with State coastal and inland waterway policies and approved LWRPs. (See the following section for the procedures that are to be followed in an area covered by a State approved LWRP.) The list of State agency actions subject to consistency with an LWRP is included in Section VI of approved LWRPs.

The following standards for State agency consistency decision-making are included in 19 NYCRR Part 600.4(a), (b), and (c):

- (a) Where a determination is made pursuant to 6 NYCRR Part 617 that an action may have significant effect on the environment, the State agency shall comply with the requirements of 6 NYCRR 617.9(b)(5)(vi) and 617.11(e). These SEQRA requirements are:
- A draft environmental impact statement include, for a State agency action in the coastal area, the consistency of the State agency's action with the applicable coastal policies in 19 NYCRR Part 600.5, or when the action is in an area covered by an approved LWRP, with the policies of the approved LWRP (**see footnote regarding Long Island Sound coastal policies in 19 in NYCRR Part 600**); and
 - No State agency may make a final decision on an action in the coastal area that has been the subject of a final EIS until the State agency has made a written finding that the State agency action is consistent with the applicable coastal policies in 19 NYCRR Part 600.5, and that no State agency may make a final decision on an action that is likely to affect the achievement of the policies and purposes of an approved LWRP until the agency has made a written finding that the action is consistent to eh maximum extent practicable with the LWRP (**also see footnote regarding Long Island Sound coastal policies in 19 NYCRR Part 600**);
- (b) Where a determination is made pursuant to 6 NYCRR Part 617 that an action will not have a significant effect on the environment, and where a State agency is undertaking a direct or funding action, other than rulemaking, the State agency shall, at the time it makes its decision, file with Secretary of State a certification that such action will not substantially hinder the achievement of and coastal policies in 19 NYCRR Part 600, and whenever practicable will advance one or more of such policies (also see footnote regarding Long Island Sound coastal policies). If the State agency action will substantially hinder the achievement of any coastal policy, the State agency must instead be able to certify that **all four** (bold added for emphasis) of the following four requirements are satisfied in order for the State agency to proceed with the action:

* Amendments to the 19 NYCRR Part 600 regulations, effective October, 2001, included new Long Island Sound Coastal Policies.

- (1) no reasonable alternatives exist which would permit action to be taken in a manner which would not substantially hinder the achievement of such policy;
- (2) the action taken will minimize all adverse effects on such policies to the maximum extent practicable;
- (3) the action will advance one or more of the other coastal policies; and
- (4) the action will result in an overriding regional or statewide public benefit.

If a State agency is able to make the preceding certification, that certification constitutes the State agency's a determination of consistency as required by Article 42 of the Executive Law.

(c) Where a determination is made pursuant to 6 NYCRR Part 617 that action will not have significant effect on environment, and where the State agency action is in the coastal area within boundaries of an approved LWRP, and the action is one identified in the LWRP, the State agency is required to submit to the municipality with the approved LWRP information regarding the proposed State agency action, and, at the time of making its decision regarding the action, file with the Secretary of State a certification that the action will not substantially hinder the achievement of any policies and purposes of the approved LWRP and whenever practicable will advance one or more of such policies. If the State agency action will substantially hinder the achievement of any policy or purpose of the approved LWRP, the State agency must be able to certify to the following:

- (1) no reasonable alternatives exist which would permit action to be taken in a manner which would not hinder the achievement of any policy or purpose of the approved LWRP;
- (2) the action taken will minimize all adverse effects on the local policy and purpose to the maximum extent practicable; and
- (3) the action will result in an overriding regional or Statewide public benefit.

If a State agency is able to make such a certification, that certification constitutes a determination by the State agency that its action is consistent to the maximum extent practicable with an approved LWRP, as required by Article 42 of the Sate Executive Law. In that instance the State agency may proceed with and undertake its action.

Examples of activities that are consistent with State coastal policies and the policies and purposes of approved LWRPs are included in Appendix M, and activities that are not consistent with State coastal policies and the policies and purposes of approved LWRPs are included in Appendix N.

State Agency Actions and Conflicts Identified By A Municipality With An Approved LWRP

As explained in the previous section, State agencies should communicate and consult with a municipality with an approved LWRP. If the municipality identifies potential conflicts between an action being considered by a State agency and the municipality's approved LWRP, the municipality is to inform the State agency of such conflicts and so notify the Secretary of State. Upon notification of the conflict, the Secretary of State, or a representative of the Department of State on behalf of the Secretary, confers with the State agency and municipality to ensure the activity is consistent with the LWRP. Since State agency actions that are not consistent with an LWRP or State coastal policy are required to be modified to be consistent with an approved LWRP, the Secretary's conferring with the State agency is to ensure that the involved State agency modifies its action, if necessary and appropriate, so that it is consistent with and does not hinder the achievement of the

policies and purposes of the LWRP. Guidelines for required State agency notification to municipalities with approved LWRPs are included Appendix P.

An example of appropriate State and municipal consistency coordination is also in Appendix P. In that instance neither the activity for which State agency authorization was requested, nor State agency authorization of the activity would have been consistent with the policies and purposes of an approved LWRP. As a result, the State agency did not authorize that activity.

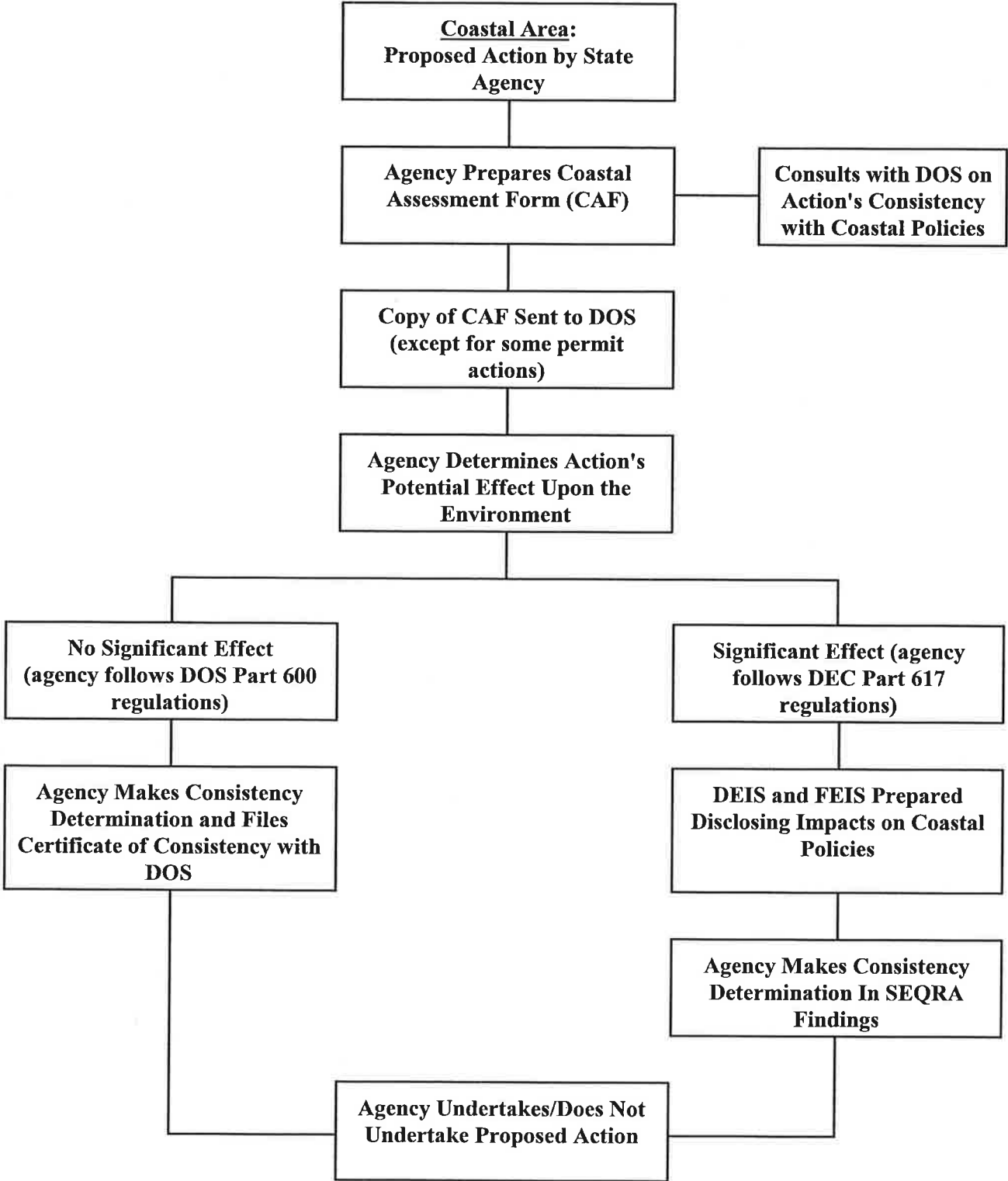
As noted previously, DOS may mediate disputes between State agencies and municipalities to resolve identified conflicts. In such instances, DOS may make formal findings to help resolve conflicts. An example of such findings is in Appendix Q of this manual.

Important Elements of State Agency Consistency Decision-making

Important elements of State agency consistency decision-making involve:

- Assessing the effects of an action on applicable coastal policies or the applicable policies and purposes of an LWRP approved by the Secretary of State. This is dependent on an understanding and assessment of effects on relevant coastal resources and uses;
- Based on an assessment of the effects of an action on applicable coastal policies or applicable policies and purposes of an approved LWRP, an assessment of the consistency of the action with those coastal policies, or policies and purposes of the LWRP (see example in Appendix O);
- Based on the preceding assessment, making a written determination indicating how the action is either consistent with or is not consistent with applicable coastal policies (see example regarding sand bypassing project in Appendix O); and
- If the State agency has determined that its action is consistent with applicable coastal policies or the applicable policies and purposes of an approved LWRP, certifying that the agency action is consistent with those coastal policies, or the policies and purposes of the LWRP;
- If a State agency determines that its action would not be consistent with coastal policies or the policies and purpose of an approved LWRP, the State agency is not to undertake the action.

**State Consistency Process
(DOS Part 600 and DEC Part 617 Regulations)**



I.6 MUNICIPAL CONSISTENCY

To implement an LWRP at the municipal level, cities, towns, and villages that adopt an LWRP also adopt their own laws or ordinances, requiring that their own municipal agency actions are consistent with the policies and purposes of their adopted LWRP. These include both procedural and substantive consistency requirements that apply to municipal agency reviews and decision-making, usually involving activities such as zoning changes, subdivision approvals, site plans, special use permits, municipal construction projects, and municipal funding activities.

Some municipalities require only that SEQRA Type I and Unlisted actions undergo municipal review and decision-making for consistency with their LWRP. Others do not limit actions that are required to be consistent with their LWRP to SEQRA Type I and Unlisted actions, and subject a wider range of activities to consistency with their LWRP. For example, while some municipal consistency laws require all SEQRA Type I and Unlisted actions to be consistent with the policies and purposes of their LWRP, they also list other specific actions that are subject to municipal review for and consistency with their LWRP. These listed actions may include SEQRA Type II actions.

While municipalities with an LWRP adopt local laws or ordinances requiring their own agency actions to be consistent with their LWRP by prohibiting agency actions that are inconsistent with it, some also adopt local consistency laws or ordinances that prohibit private entities from undertaking physical projects that have not undergone and been determined to be consistent with an LWRP. While these and other municipal LWRP consistency requirements share objectives common to federal and State coastal and inland waterway objectives, they also reflect the highly diverse characteristics and values of New York's Long Island Sound and Atlantic Ocean, New York City Metropolitan, Hudson and St. Lawrence Rivers, and Great Lakes coastal and Inland Waterway regions. Because municipal consistency requirements differ among municipalities, municipalities that have adopted an LWRP should be contacted directly regarding their LWRP consistency requirements.

Municipal vs. State and Federal Consistency Requirements

While municipal, State, and federal consistency requirements share the common objectives of ensuring that agency actions at each level of government are consistent with and advance applicable policy objectives, municipal procedural and substantive consistency requirements should not be confused with State and federal procedural and substantive consistency requirements. Each level of government has separate procedural requirements to help ensure the actions or activities of its agencies meet relevant consistency obligations. For example, for federal purposes, only the Department of State has the authority to make consistency decisions concurring with or objecting to an applicant's consistency certification or a federal agency's consistency determination. In accordance with CZMA, its implementing regulations, and the NYCMP, that authority cannot be subsumed, preempted, or abrogated by any federal, other State, or local agency. Likewise, in accordance with State consistency provisions, State agencies contemplating their own actions are required to make their own determinations regarding the consistency of their actions with State coastal policy and approved LWRPs.

To help coordinate municipal, State, and federal decision-making and avoid conflicting decisions between agencies at different levels of government, as part of the Department of State's review of federal activities, municipalities with approved LWRPs are notified by the Department of State of the proposed activities and provided the opportunity to inform the Department of State and other agencies of actual or potential conflicts between activities being considered and the policies and purposes of their approved LWRPs. This notification and consultation process is to help ensure the Department of State and other State agencies are provided with relevant information when assessing and considering the consistency of an activity with an approved LWRP. A municipality's detailed "on-the-ground, "in-the-trenches", and "in-the-water" knowledge of local circumstances often results in the identification of key information that is not otherwise available to or known by the Department and other State and federal agencies when assessing and considering activities and their

effects. Given their detailed knowledge of local circumstances, the policies and purposes of their LWRPS and of local laws and other standards that implement their LWRPs, municipalities are also often able to quickly identify conflicts and the means to avoid or resolve them that State and federal agencies would not otherwise be aware of.

PART II - BACKGROUND INFORMATION AND GUIDANCE

II.1 FEDERAL COASTAL ZONE MANAGEMENT ACT, NEW YORK COASTAL MANAGEMENT PROGRAM, AND LOCAL WATERFRONT REVITALIZATION PROGRAM

A. FEDERAL COASTAL ZONE MANAGEMENT ACT

The CZMA was enacted in 1972. In enacting the CZMA in 1972, Congress recognized, among other legislative findings, that the nation's coastal zone and resources were subject to:

- increasingly competing demands of population growth and development;
- the need to protect important natural resources; and
- the need to comprehensively plan for and manage the wise use, development, and protection of coastal areas and resources.

Congress recognized that the means for managing and balancing these competing demands is best accomplished through state Coastal Management Programs, and by ensuring that activities comply with and are undertaken in a manner consistent with them. These and other congressional findings are embodied in the CZMA. They also include the following:

- a national interest in the effective management, beneficial use, protection, and development of the coastal zone;
- the coastal zone is rich in a variety of natural, commercial, recreational, ecological, industrial and aesthetic resources of immediate and potential value to the present and future well-being of the Nation;
- increasing and competing demands for industry, commerce, residential development, recreation, extraction of mineral resources and fossil fuels, transportation and navigation, waste disposal, and the harvesting of living marine resources have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion;
- habitat areas of the coastal zone and living marine resources and wildlife therein are ecologically fragile and consequently extremely vulnerable to destruction by human alterations;
- important ecological, cultural, historic, and esthetic value in the coastal zone which are essential to the well-being of citizens are being irretrievably damaged or lost;
- new and expanding demands for food, energy, minerals, defense needs, recreation, waste disposal, transportation, and industrial activities are placing stress on coastal areas and creating the need for resolution of serious conflicts among important and competing uses and values in coastal and ocean waters;
- special natural and scenic characteristics are being damaged by ill-planned development that threatens these values;
- land uses in the coastal zone and the uses of adjacent lands draining into the coastal zone may significantly affect the quality of coastal waters and habitats, and efforts to control coastal water pollution from land use activities must be improved;
- because global warming may result in a substantial sea level rise with serious adverse effects in the coastal area, coastal states must anticipate and plan for such an occurrence; and
- in light of competing demands and the urgent need to protect and give high priority to natural systems in the coastal zone, and inadequate institutional arrangements for planning and regulating land and water uses in such areas, the key to more effective protection and use of the land and water resources of the coastal zone is by encouraging states to exercise their full authority over coastal lands and waters, through coastal management programs that include unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance.

Congress also found and declared in the CZMA that it is the national policy to preserve, protect, develop, and where possible, restore or enhance the resources of the coastal zone for present and future generations, and

accomplish this by encouraging and assisting states to exercise effectively their responsibilities in the coastal zone through coastal management programs, which should provide at least for:

- the protection of natural resources, including coastal wetlands, floodplains, estuaries, beaches, dunes, barrier islands, and fish and wildlife habitats;
- the management of coastal development to minimize loss of life and property caused by improper development in flood prone, storm surge, geological hazard, and erosion-prone areas and areas likely to be affected by or vulnerable to sea level rise, land subsidence, saltwater intrusion, and by the destruction of natural protective features such as beaches, dunes, wetlands, and barrier islands;
- the management of coastal development to improve, safeguard, and restore the quality of coastal waters, and protect natural resources and existing uses of those waters;
- priority consideration to coastal-dependent uses and orderly processes for siting major facilities related to national defense, energy, fisheries development, recreation, ports and transportation, and the location of new commercial and industrial developments in or adjacent to areas where such development already exists;
- public access to the coast for recreation;
- assistance in the redevelopment of deteriorating urban waterfronts and ports, and sensitive preservation and restoration of historic, cultural, and esthetic coastal features;
- the coordination and simplification of procedures to ensure expedited governmental decision-making for the management of coastal resources;
- consultation and coordination with and giving adequate consideration to the views of affected Federal agencies;

The CZMA created and provides for a unique partnership between the coastal states and the federal government for the management and balancing of development, natural resource protection, and appropriate uses of coastal areas. To achieve these overall objectives the CZMA encourages states to develop Coastal Management Programs and to adopt sufficient legal authority to implement them.

In return for the development of Coastal Management Programs, the federal government agreed, through the CZMA, to waive its sovereign right to take its own actions in the coastal area without interference from the states. This is embodied in CZMA consistency provisions and implementing regulations providing that upon approval of a Coastal Management Program by the U.S. Secretary of Commerce, the following activities, when undertaken within the coastal area, and outside of the coastal area and affecting any coastal land or water use or resource, are required to be consistent with the enforceable policies of the approved Coastal Management Program:

- (1) activities directly undertaken by federal agencies (See 15 CFR Part 930, Subpart C, requiring that these activities be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of a Coastal Management Program. The term "consistent to the maximum extent practicable" means fully consistent with the enforceable policies of the Coastal Management Program, unless full compliance is prohibited by existing law applicable to the Federal agency; see discussion below and 15 CFR 930.32);
- (2) activities requiring federal agency licenses, permits, or other forms of authorizations (See 15 CFR Part 930, Subpart D, requiring that these activities be conducted in a manner consistent with a Coastal Management Program); and
- (3) federal financial assistance activities, through grant or contractual arrangements, loans, subsidies, guarantees, insurance, or other form of financial aid (See 15 CFR Part 930, Subpart F, requiring that this assistance be granted only when they are consistent with a Coastal Management Program).

These requirements are known as the "consistency" provisions of the CZMA. The Congress intended the consistency provisions of the CZMA to cause substantive changes in federal agency decision-making, especially within the context of discretionary powers residing in those agencies.

Consistency is firmly rooted in federal, State, and local legislative, judicial, and administrative case law. It is an important mechanism affecting agency decision-making, and is an important and powerful tool for achieving multiple comprehensive coastal and inland waterway policies and objectives. Through the consistency provisions of the CZMA, the consistency authority delegated to and conferred upon the states by Congress constitutes one of the broadest and most far reaching grants of authority to affect federal decision-making that has ever been made, providing the means to affect the discretionary decision-making activities of federal agencies so that comprehensive and agreed-upon State coastal policies, or policy standards and objectives that also advance federal coastal objectives, are met and advanced. With regard to direct federal agency activities and appropriations, the consistency provisions of the CZMA limit even the ability of the Executive Branch of the federal government to exempt a federal agency from requirements that federal activities be undertaken in a manner consistent to the maximum extent practicable with an approved Coastal Management Program.

B. NEW YORK COASTAL MANAGEMENT PROGRAM

In response to the CZMA and after eight years of development, New York's Coastal Management Program was approved by the U.S. Secretary of Commerce on September 30, 1982. It is described in a document entitled "State of New York Coastal Management Program and Final Environmental Impact Statement" (NYCMP). That document was the culmination of years of local, state and federal government efforts, as well as those of groups representing civic, environmental, development and other interests. There are five primary means through which the NYCMP is implemented and advanced:

1. Comprehensive planning through the development of Local Waterfront Revitalization Programs (LWRPs), Regional Coastal Management Programs, and Special Management Area Plans as elements of the NYCMP;
2. Advocacy of activities that advance the State's coastal policies;
3. Technical assistance to State agencies, local government, and the private sector;
4. Funding of studies, plans and projects that advance coastal policies and LWRPs;
5. Through the review of activities to ensure they are consistent with the NYCMP and LWRPs.

Principal Function of the NYCMP

The principal function of the NYCMP is to provide a framework for public and private decision-making in the coastal area.

Coastal Policies

The CZMA requires that a Coastal Management Program include "enforceable policies" to guide decision-making. As defined in the CZMA, the term "enforceable policy" means State 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 water uses and natural resources in the coastal zone.

New York's NYCMP contains forty-four policies with which federal and state agencies must adhere, and which serve as a reference for local government actions in the coastal area, especially when developing an LWRP. (See summary of LWRPs in *Coastal Management Program Special Management Areas*, beginning on page 62) The NYCMP policies are grouped into ten categories that address: 1) Development; 2) Fish and Wildlife; 3) Flooding and Erosion; 4) Public Access; 5) Recreation; 6) Historic Resources; 7) Visual Quality; 8) Agricultural Lands; 9) Energy and Ice Management; and 10) Water and Air Resources.

The forty-four NYCMP policies were developed after an exhaustive analysis of the full range of federal and State regulatory and other decision-making standards contained in statutes, rules, regulations, and case law affecting the coastal area. They are explicit statements of policy, developed to provide clear and explicit statements of federal and state policy that are to be used in government agency decision-making in the coastal area and to guide private decision-making. These coastal policy statements and their attendant explanations and guidelines provide the objectives and standards for the NYCMP, the development of LWRPs, and the implementation of national CZMA objectives.

In 1981, the State Legislature enacted Article 42 of the State Executive Law to implement the CZMA at the State level, and as the legal basis for implementation of the State's NYCMP. Article 42 contains a statement of coastal policies, an option for coastal municipalities to prepare and adopt LWRPs as formal components of the NYCMP, and a requirement, similar to the one required of federal agencies, that State agency actions be consistent with the State's coastal policies, or an approved LWRP. In that Act the State Legislature recognized, as did Congress in enacting the CZMA, that the State's coastal area is subject to the increasing pressures of population growth and economic development, including the demands of industry, commerce, residential development, recreation, and energy production, and that these competing demands have resulted in the loss of living marine resources and wildlife, diminution of open space areas, shoreline erosion, permanent adverse changes to ecological systems, and a loss of economic opportunities. Like the CZMA, Article 42 of the State Executive Law seeks to insure

"...the proper balance between natural resources and the need to accommodate the needs of population growth and development", functions to coordinate policy and planning for the wise use, development, and protection of the State's coastal resources, and includes the legislative declaration of policy: "To assure consistency of state actions and, where appropriate, federal actions, with policies of the coastal area and inland waterways, and with accepted waterfront revitalization programs within the area defined by such programs."

For further information regarding the coastal policies, see Section II.4 of this manual, entitled *Coastal Management Program Policies*, beginning on page 69).

II.2 COASTAL MANAGEMENT PROGRAM SPECIAL MANAGEMENT AREAS

The NYCMP provides for special management areas and the means for managing activities affecting those areas. The means for managing these special management areas vary given many differing circumstances from place to place. They include the development of comprehensive programs that include land and water use plans for the coastal area of a municipality, regional programs and plans reflecting regional circumstances and needs, and the designation of specific areas having unique or otherwise important characteristics and values that warrant special management consideration.

Local Waterfront Revitalization Programs

As the CZMA encourages states to develop and implement coastal management programs, Article 42 of the State Executive Law encourages the development and implementation of Local Waterfront Revitalization Programs by cities, towns, and villages. A Local Waterfront Revitalization Program (LWRP) developed and

approved in accordance with Article 42 of the State Executive Law is a comprehensive local management program for the coastal or inland waterway* area of a municipality. After development and review by the public and by federal and State agencies, and after adoption of the necessary local implementing legislation by the participating municipality, an LWRP may be approved by the New York Secretary of State. The Office of Ocean and Coastal Resource Management in the U.S. Department of Commerce's National Oceanic and Atmospheric Administration may concur with that State approval of the municipality's LWRP as a refinement and means of further implementing the State NYCMP.

The adoption of an LWRP is often the culmination of many years of development, reflecting the circumstances and characteristics of local and regional resources and development patterns and local, regional, State and national needs and interests. It also involves the drafting and adoption of local laws to implement the LWRP. The result is a long-term enforceable and defensible comprehensive plan and program for the coastal area, incorporating enforceable and defensible decision-making standards that are based on a careful and thorough analysis of conditions and needs in the coastal area of a municipality, a region, and the State. Developed in partnership with the State and reflecting local, regional, and State circumstances and needs, LWRPs identify appropriate areas for new development and redevelopment where natural resource constraints are limited and such development is necessary or appropriate, and where existing infrastructure is adequate to support such development, while protecting important or sensitive undeveloped areas and resources from inappropriate development and uses. Through the NYCMP and LWRPs, the State and coastal municipalities are able to provide a highly effective means of addressing the direct effects of uncoordinated and unplanned development and urban or suburban "sprawl", and many cumulative and secondary effects of activities in the coastal area, by limiting direct, by limiting funding, and by limiting approval actions so as to protect important coastal natural resources and areas, and by directing, "targeting" and expediting approvals, funding, and other actions to areas that are appropriate for certain uses and development.

An LWRP is different from a traditional master plan or comprehensive plan for a municipality because it is developed and adopted by a municipality working jointly with the State, is approved by the State as the State's plan for the coastal area covered by the LWRP, and is approved by the federal government as a component of the State's NYCMP in order to advance local, State NYCMP, and national CZMA objectives.

The development of LWRPs as an important means of implementing and advancing the NYCMP and national CZMA objectives was subjected to the National Environmental Policy Act review process and an environmental impact statement as part of the development, review, and approval of the NYCMP. Prior to approval by the New York Secretary of State, LWRPs are also subjected to State Environmental Quality Review Act processes and applicable environmental impact statements, as well as a separate federal review and approval processes as part of the NYCMP implementation process. Federal, State, regional, county, municipal, and other agencies and special interest groups and the general public are included in that review, comment, and approval process, and, in effect, upon adoption of the LWRP and its implementing legislation, its approval by the New York Secretary of State, and concurrence with the Secretary's approval by the U.S. Department of Commerce's Office of Ocean and Coastal Resource Management, all three levels of government adopt the policies, goals and objectives of the LWRP as their plan and decision-making standards for the coastal area covered by the LWRP.

Federal consistency provisions apply only to the coastal area. While municipalities in inland waterway areas are encouraged to develop an LWRP, and State consistency provisions apply both in the coastal area and wherever else an LWRP has been approved by the New York Secretary of State, whether in or out of the coastal area, an LWRP outside of the coastal area does not constitute an element of the NYCMP, and federal coastal consistency provisions do not apply to an LWRP outside of the coastal area.

With regard to municipal commitment or consistency with an LWRP, a municipality's adoption of an LWRP and a municipal consistency law binding the municipality's decision-making to its LWRP embodies the municipality's commitment that, in exchange for federal and State consistency, or waivers of sovereignty, the municipality will hold itself to the policies and purposes of its own LWRP. Like the federal and State consistency provisions, a municipal consistency law requires the actions of the municipality to be consistent with the policies and purposes of the adopted and approved LWRP. In this regard a change of zone, the approval of subdivisions, or other activities requiring discretionary approvals and permits by municipal agencies, or a direct action by a municipality such as the construction of a public dock, are examples of municipal actions that are required to be consistent with an LWRP.

Where an LWRP has been approved by the Secretary of State and has been incorporated by amendment in New York's federally approved NYCMP, the direct, funding, and approval activities of federal and State agencies, departments, and public authorities are subject to federal and State consistency provisions that require agency activities to be consistent with the approved LWRP. If a direct State or federal activity or one requiring authorization from a State or federal agency is determined to be inconsistent with the policies and purposes of the approved LWRP, the State or federal action may not be undertaken. Conversely, activities that are consistent with an LWRP may be undertaken or authorized, and activities that would advance an LWRP should not be delayed, especially when such activities are specifically identified in an LWRP that has undergone the SEQRA process.

Clearly, the benefits of approved LWRPs include the advancement of federal, State and local economic development and resource protection efforts, the targeting of public and private investments in providing, maintaining, or improving infrastructure or other improvements in appropriate areas, and acquiring and protecting other important areas and resources for specific uses, including the protection of important natural resources, as well as expediting projects or activities that would advance the overall objectives of LWRPs, the NYCMP, and the CZMA.

Harbor Management Plans

An LWRP may also include a Harbor Management Plan (HMP). Recognizing the need for better management and control of uses, projects, and structures in or over navigable waters and underwater lands, and because those areas are important for navigation and other forms of access, commerce, fishing, recreation, and environmental and aesthetic protection, the State Legislature amended Article 42 of the State Executive Law to provide for the development an HMP as an element of an LWRP. In certain circumstances a municipality may also develop an HMP that is not included in an LWRP. Article 42 of the Executive Law also authorizes municipalities to enact local laws and ordinances necessary to implement an HMP. These plans allocate space for certain uses of waters and underwater lands in areas covered by an LWRP, and are essentially the "water side" equivalent of municipal land use plans. They usually include, at a minimum:

1. dredged and/or designated navigation channels and other areas that are to remain clear of physical obstructions to navigation and other forms of access in or over the water and underwater lands;
2. vessel anchoring and mooring areas; size or other dimensional standards for in-water structures;
3. swimming, fishing, or shellfishing areas;
4. capital improvement projects involving dredging, bulkhead, marina, public pier or other infrastructure needs, or resource restoration projects; and
5. areas or resources that are to be protected because of their sensitivity, natural or cultural or other character values, or other importance.

Regional Coastal Management Programs

The NYCMP has been amended to provide for regional coastal management programs. The program change states:

“In addition to special management areas that focus on discrete geographic areas, the New York Coastal Management Program may develop regional coastal management programs for the coastal zone of one or more of New York’s several major water bodies. These regional coastal management programs will refine the State coastal program to address the specific circumstances and conditions in the coastal region.”

The Long Island Sound Coastal Management Program (LISCMP) is the first regional coastal management program incorporated into the NYCMP. It covers the Long Island Sound coastal areas of Westchester County and portions of New York City, and the Long Island north shore areas of Nassau and Suffolk Counties, eastward to Fishers Island.

Through its incorporation into the NYCMP, the LISCMP refines the Statewide NYCMP, reflecting an analysis of the unique regional circumstances of the Long Island Sound coastal area and the application of State coastal policy to those circumstances. It includes thirteen Long Island Sound Coastal Policies, derived from and involving a consolidation of the 44 policies of the NYCMP, based on those circumstances, reflecting regional needs, the land and water use plans and policy objectives of approved LWRPS, other governmental, and general public, development, and other special interest consensus. Among its many findings and purposes, the LISCMP identifies areas where new and expanded water-dependent uses and facilities and other development should be expedited, and where new development in sensitive or other important areas should be limited. The thirteen Long Island Sound Coastal Policies were subsequently codified in 19 NYCRR Part 600, and, except in those circumstances involving areas covered by an approved LWRP, are the State coastal policies with which State agency actions and federal agency activities must be consistent. The LISCMP contains several general and specific plans and projects for areas warranting special management, such as areas identified as Maritime Centers, Regionally Important Natural Coastal Areas, and areas that can accommodate new development or redevelopment. It includes information regarding region-wide public access, water quality problems and needs, and dredging practices and needs.

Similar to the relationship between the NYCMP and LWRPs, when activities would be undertaken in or affect an area covered by an approved LWRP in the Long Island Sound region, the approved LWRP provides the primary basis for determining whether the activities would be consistent with NYCMP.

Significant Coastal Fish and Wildlife Habitats

Significant Coastal Fish and Wildlife Habitats have been designated in the Long Island, New York City, Hudson River, Great Lakes, and St. Lawrence River regions. Significant Coastal Fish and Wildlife Habitats are identified and designated, in accordance with the NYCMP and Article 42 of the State Executive Law and implementing regulations in 19 NYCRR Part 602, to implement and advance NYCMP Policy 7, which states:

"Significant coastal fish and wildlife habitats will be protected, preserved, and where practical, restored so as to maintain their viability as habitats."

Subsequent to their designation, State agency actions affecting those habitats are required to be undertaken in a manner consistent with NYCMP Policy 7 and applicable State coastal policies in 19 NYCRR Part 600. Federal consistency provisions relating to NYCMP Policy 7 apply to designated Significant Coastal Fish and Wildlife Habitats upon concurrence with those designations by the National Oceanic and Atmospheric Administration's Office of Ocean and Coastal Resources Management. The designation of these areas and the

implementation and the advancement of NYCMP Policy 7 through State and federal consistency provisions also advances other applicable NYCMP policies relating to the balancing of competing demands affecting coastal resources, and appropriate land and water uses in and affecting the coastal area.

It is important to note that unlike the federal Endangered Species Act or Essential Fish Habitat or other species specific programs, NYCMP Policy 7 and its implementation is not a species specific-approach geared to assessing the effects of activities on particular species and the protection of particular endangered or threatened species or species of particular concern, or any other particular species identified as having specific importance for any particular use. Rather, the purpose of NYCMP Policy 7 is to protect, preserve, and where practical restore the ecological viability of habitats that merit special protection, so that the habitats can support or be used by important species.

Significant Coastal Fish and Wildlife Habitats are identified, evaluated, mapped, and designated by the New York Secretary of State based on recommendations of the State Department of Environmental Conservation, in accordance with NYCMP enabling legislation in Article 42 of the Executive Law and implementing regulations in 19 NYCRR Part 602. Designated Significant Coastal Fish and Wildlife Habitats are those habitat areas which:

- (1) exhibit to a substantial degree one or more of the following characteristics:
 - (i) the habitat is essential to the survival of a large portion of a particular fish or wildlife population (e.g., feeding grounds, nursery areas);
 - (ii) the habitat supports a species which is either endangered, threatened or of special concern as those terms are defined at 6 NYCRR Part 182;
 - (iii) the habitat supports fish or wildlife populations having significant commercial, recreational or educational value;
 - (iv) the habitat is of a type which is not commonly found in the State or a coastal region of the State; and
- (2) are to varying degrees difficult or even impossible to replace in kind.

Depending on the geographic location, characteristics constituting, and other circumstances relating to any particular designated Significant Coastal Fish and Wildlife Habitat, NYCMP Policy 7, in addition to State and Federal consistency requirements, is supported and implemented in varying parts and to varying degrees by: Articles 8 (SEQRA), 11 (Fish and Wildlife Management Practices Cooperative Program), 15 (Stream Protection), 20 (Park Preserve System), 24 (Freshwater Wetlands), 25 (Tidal Wetlands), 45 (Nature and Historical Preserve Trust), 54 (Environmental Protection), and 56 (Implementation of Clean Water/Clean Air Bond Act) of the State Environmental Conservation Law; Chapter 791 of the Laws of 1992 (amending the Environmental Conservation, Public Lands, and Executive Laws relating to construction in and over underwater lands); and Article 46 of the State Executive Law (regarding the Long Island South Shore Estuary Reserve).

Narratives and accompanying rating forms and maps constitute a record of the basis for Significant Coastal Fish and Wildlife Habitat designations. These provide specific information regarding important elements of the habitats, fish and wildlife resources that depend on or are important elements of the habitats and their values, and the elements of the habitats that are to be protected, preserved, and where practical, restored so as to maintain their viability as habitats. This information is referred to as the habitat documentation for each designated habitat. General information is also provided in the habitat documentation to assist in evaluating the effects of proposed activities on parameters essential to a particular habitat's values.

A habitat impairment test included in the narrative impact assessment section of habitat documentation is to be used to determine whether a proposed activity is or would be consistent with NYCMP Policy 7. The habitat

impairment test must be met for an activity to be consistent with NYCMP Policy 7. That general habitat impairment test is as follows:

In order to protect and preserve a significant habitat, land and water uses or development shall not be undertaken if such actions would:

- destroy the habitat; or,
- significantly impair the viability of a habitat.

To assist in applying this test, the habitat documentation includes:

- definitions of the terms habitat destruction, significant impairment, and the tolerance range of organisms;
- the range of parameters to be considered in applying the habitat impairment test; and examples of generic activities and adverse effects, or impacts, that could destroy or significantly impair habitats or their values.

The impact assessment in the habitat documentation is carefully worded for specific purposes. For example, certain impact assessments state that certain shoreline structures "could" impair the viability of a habitat, or physical modifications of a habitat through filling or dredging "could" impair or destroy "valuable habitat". The word "could" is intentional, indicating that while certain activities could impair the viability of a habitat or destroy valuable habitat constituting part a component of a designated habitat, further analysis of an activity and the circumstances involving it is required to determine whether or not an activity would impair the viability of a habitat or destroy valuable habitat constituting a component of a designated habitat. Other impact assessments state that certain activities "would" impair the viability of a habitat or "would" destroy valuable habitat. In those instances, based on understandings of the characteristics, functions and values of the designated habitat, and the effects of certain activities on the habitat, activities that "would" impair the viability of a habitat or destroy valuable habitat constituting an important component of the habitat would not be consistent with Coastal Policy 7. Where activities are identified in the habitat documentation as ones that "would" impair the viability of a habitat or destroy valuable habitat constituting an important component of a designated Significant Coastal Fish and Wildlife Habitat, those activities are not to be conducted or undertaken, because they are not and would not be consistent with the policy to protect, preserve, and where practical restore the viability of the designated habitat as a habitat.

Scenic Areas of Statewide Significance

As Significant Coastal Fish and Wildlife Habitats are identified and designated to implement and advance NYCMP policies, Scenic Areas of Statewide Significance (SASSs) are identified and designated to implement and advance NYCMP Policy 24, the purpose of which is to:

“prevent impairment of scenic resources of Statewide significance”.

SASSs are areas that have been determined to be of Statewide aesthetic value to the coastal area based on consideration of the following factors:

1. the area exhibits, alone or in combination, the following characteristics:
 - a. unusual variety of major components;
 - b. unusual unity of major components;
 - c. striking contrasts between lines, forms, textures and colors; or

- d. an area generally free of discordant features which, due to siting, form, scale or materials, visually interrupt the overall scenic quality of the resource;
2. the area is unique in the region or the State's coastal area;
3. the area is visually and physically accessible to the general public; or
4. the area is widely recognized by the general public for its visual quality.

SASSs have been designated in the Hudson River coastal region. Other areas may be designated in other coastal regions in the future.

In accordance with Policy 24 of the NYCMP and Article 42 of the Executive Law and implementing regulations in 19 NYCRR Part 602, the Department of State identified and evaluated areas that were subsequently designated as SASSs. Those areas and their important qualities and values and elements of them that are to be protected from impairments, and maps delineating the areas, are described in a July 1993 publication of the Department of State entitled Scenic Areas of Statewide Significance (SASS document). That document also constitutes the findings in support of the determination that the areas meet the criteria of Statewide significance to the coastal area pursuant to 19 NYCRR Part 602.(c). It also provides narrative descriptions of qualities and values of the areas that are to be protected from impairments resulting from the irreversible modification or destruction of landscape features and of architectural elements which contribute significantly to the scenic quality of the coast, and impairments resulting from the addition of structures which reduce views or are discordant with the landscape because of their inappropriate scale, form, or construction materials.

NYCMP Policy 24 includes siting and design guidelines that are to be used to evaluate the effects of proposed development: the appropriate siting of new structures and other development; the use of scale, form and materials compatible with the landscape's existing scenic components; the incorporation of historic elements in new development; the maintenance of existing landforms and vegetation; and the removal and screening of discordant features. Those guidelines and the information in the SASS document are to be used in evaluating and determining how activities would affect SASSs and, based on that information, how activities would affect NYCMP Policy 24 and whether they would be consistent with or advance the coastal policy of the State to prevent impairments of scenic resources of Statewide significance. As with other applicable State coastal policies, agency and private activities that are subject to consistency with State coastal policies or an approved LWRP are not to be undertaken if they would impair a SASS.

Other Special Management Areas

In addition to the preceding special management areas, the program also provides for special management areas where intermunicipal issues require a concerted and cooperative effort of the affected local governments and the State. Also, certain issues affecting discrete areas within a coastal municipality may require focused and detailed management. Therefore, several other types of special management areas may be identified. These areas include:

- Centers of Maritime Activity
- Waterfront Redevelopment Areas
- Regionally Important Natural Areas and
- Small Watersheds

II.3 COASTAL MANAGEMENT PROGRAM POLICIES

The NYCMP policies that are to be used to guide decision-making affecting coastal areas are grouped in the following general categories:

Development Recreation	General Safeguards
Fish and Wildlife	Energy and Ice Management
Historic and Scenic Resources	Public Access
Flooding and Erosion Hazards	Water and Air Resources
Agricultural Lands	

In certain areas the NYCMP policies are refined and give specificity to guide decision-making in NYCMP special management areas covered by: Regional Coastal Management Programs; the Long Island Sound Regional Coastal Management Program; the City of New York Waterfront Revitalization Program and other approved Local Waterfront Revitalization Programs; Scenic Areas of Statewide Significance; Significant Coastal Fish and Wildlife Habitats; and Harbor Management Plans.

While the distinction can never be complete, for the most part each of the coastal policy statements either:

- promotes the beneficial use of coastal resources;
- prevents their impairment; or
- deals with major activities that substantially affect numerous resources.

In all cases State agencies are required to adhere to each policy statement as much as is legally and physically possible.

The policies designed to promote the **use** of coastal resources are summarized as:

- revitalize underutilized waterfronts (Policy 1)
- facilitate water dependent uses (Policy 2)
- expand the State's major ports (Policy 3)
- expand the State's commercial fishing industry (Policy 10)
- expand public access and water related recreation (Policies 9 and 19 through 22)
- develop coastal energy resources (Policies 27 and 29)
- redevelop the existing built environment (Policies 1, 4, 5, and 23)
- expedite permitting procedures (Policy 6)

Use of all coastal resources is, however, constrained by the realization that to assure a reasonable quality of life for the long term, the coastal resources essential to society must be carefully managed or used frugally. This necessitates strong protection measures for certain fragile or rapidly diminishing resources. The resources identified as needing **protection** are:

- significant coastal fish and wildlife habitats (Policies 7 and 8)
- the traditional character and purposes of small harbors (Policy 4)
- historic and cultural resources (Policy 23)
- exceptional scenic areas (Policy 24)
- agricultural land (Policy 26)
- dunes, beaches, barrier islands and other natural protective features (Policy 12)
- water and air resources (Policies 30 through 43)
- wetlands (Policy 44)

Supplementing the above are policies that address major activities. These policies clearly state that special care must be taken not to impair valued coastal resources when undertaking these activities,:

- siting energy facilities (Policy 17)
- dredging for navigation, mining, and excavation in coastal waters (Policy 15)
- managing solid and hazardous wastes (Policy 39)
- ice management practices (Policy 28)
- siting and building structures in erosion hazard areas (Policies 11, 13, 14, 16, and 17)
- adequate consideration of State and public interests for all major activities (Policy 18)

All of the policies are derived from laws and regulations administered by State agencies. The various laws provide the basis for and are essential to the enforcement and implementation of the coastal policies. Many of the policies are carried out by programs administered in total or in part by other State agencies. For example, the State Department of Environmental Conservation administers regulatory programs that provide for the protection of tidal and freshwater wetlands (Policy 44), restrict development and other activities in flood and erosion hazard areas (Policies 11 - 17), and protect air and water resources (Policies 30 - 35 and 40 - 43). Other agencies, such as the State Office of Parks, Recreation and Historic Preservation, Public Service Commission and the State Board on Electric Generation Siting and the Environment administer programs that provide coastal recreational facilities, regulate the siting of energy transmission facilities and regulate the location of electric power plants.

Other NYCMP policies are based upon the provisions of Article 42 of the Executive Law. These policies carry out the intention of the State Legislature that there be "a balance between economic development and preservation that will permit the beneficial use of coastal resources while preventing the loss of living marine resources and wildlife, diminution of open space areas or public access to the waterfront, shoreline erosion, impairment of scenic beauty, or permanent adverse changes to ecological systems" (Executive Law Section 912(1)).

The forty-four (44) policies of the NYCMP, which are to be used for Federal consistency purposes, are included in the appendices to this manual. Those policies in the appendices are excerpted from the NYCMP document.

For State agency actions affecting the policies of the coastal area outside of the Long Island Sound region of the coastal area, the policies applicable to those State agency actions are included in Section 912 of Article 42 of the State Executive Law, and in DOS regulations in 19 NYCRR Part 600. The 19 NYCRR Part 600 regulations also refer State agencies to the policies in the NYCMP document.

For both Federal and State consistency purposes, the coastal policies applying to the Long Island Sound region are in the Long Island Sound Regional Coastal Management Program document, and in DOS regulations in 19 NYCRR Part 600. The 19 NYCRR Part 600 regulations are also included in the appendices to this manual.

For Federal, State, and municipal consistency purposes in an area covered by an approved LWRP, the policies and purposes of an LWRP are included in Section III, and reflected in the Land and Water Use Plans in Section IV of an approved LWRP.

For Federal and State consistency purposes in special management areas, such as areas covered by approved Harbor Management Plans or watershed management plans that are not included in an approved LWRP but are amendments to the NYCMP, the policies of the NYCMP are guided by the special area management plan documents for those areas. Either the municipality having such plans or the DOS should be contacted regarding those plans.

HOW TO ASSESS SECTION (with examples)

II.4 HOW TO ASSESS ACTIVITIES FOR THEIR AFFECTS ON AND CONSISTENCY WITH COASTAL POLICIES

To properly determine whether an activity is or is not consistent with the NYCMP, it is necessary to understand the intent of Congress and the State Legislature in creating the NYCMP as well as the relationship between coastal policies and the overall objectives the policies are intended to achieve, and to follow an analytical process.

Congressional findings in the CZMA and State Legislative findings in Article 42 of the State Executive Law recognized the prevalence of a wide range of competing demands on the resources and use of the coastal area. To resolve this competition for the use of the coastal area, Congress established for coastal areas, and the State Legislature established for coastal or inland waterway areas, in legislative policy, overall objectives that are to be achieved for those areas. Congress declared:

“It is the national policy to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation’s coastal zone for this and succeeding generations.”

The State Legislature declared it to be the public policy of the State of New York:

“To achieve a balance between economic development and preservation that will permit the beneficial use of coastal and inland waterway resources while preventing the loss of living marine resources and wildlife, diminution of open space areas or public access to the waterfront, shoreline erosion, impairment of scenic beauty, or permanent adverse changes to ecological systems.”

Congress and the State Legislature set forth the means for resolving these conflicts and achieving the public policy they established. Congress found:

“The key to more effective protection and use of the land and water resources of the coastal zone is to encourage states to exercise their full authority over the lands and waters in the coastal zone by assisting states, in cooperation with the Federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone, including **unified policies, standards, methods, and processes** for dealing with land and water use decisions of more than local significance.”

The State Legislature found:

“...it is in the interest of the people of the state that **coordinated and comprehensive policy and planning** for preservation, enhancement, protection, development and use of the state’s coastal and inland waterway resources take place to insure the proper balance between natural resources and the need to accommodate the needs of population growth and development.” (Emphasis added)

The policies of the NYCMP and the requirement that Federal and State agencies act in a manner consistent with these coastal policies are key elements for carrying out the coastal and inland waterways programs the legislatures established. It is important to understand that the coastal policies are not a list of discrete statements with each an end in itself, but are a comprehensive set of decision-making standards designed to achieve overall objectives for the coastal area of the Nation and State. The policies of the NYCMP do not conflict with one another. In order to achieve the overall objectives for the use and protection of the State’s coast as a whole, the relative applicability of any one policy varies according to geographic conditions of the area where the policies are being applied.

Not understanding and considering all relevant effects of an activity and properly considering its effects on and consistency with applicable coastal policies undermines and defeats the basic purposes of the CZMA, the NYCMP, and an approved LWRP. It is therefore necessary to have an informed understanding of the effects of activities on both the physical coastal environment, its resources, and the wide range of uses of the coastal area, its developed

and natural resources, and their values. This involves of necessity an identification, evaluation, and assessment of effects based on the underlying understanding, throughout the exercise of identifying, evaluating, and assessing effects, that the NYCMP is primarily a land and water use program, designed to provide a means of addressing oftentimes competing uses of coastal lands, waters, and resources, and coastal policy objectives. This provides the important benefits of advancing all applicable coastal policy objectives through routine decision-making, rather than advancing single-purpose objectives that not only compete with but may also conflict with or undermine other policies or policy objectives, thereby undermining efforts to advance overall objectives in a rational and comprehensive manner.

Because the NYCMP is essentially a land and water use management program, the basic approach to assessing the effects of activities and their consistency with coastal policy involves determining whether the purpose of a proposed activity, or the intended use, is appropriate in the area where it would be undertaken. This is important because circumstances are different throughout the coastal area, involving and including, as examples:

- patterns, types, and scales of development and uses;
- the character, functions, values, and uses of natural resources;
- public and private land ownership and, based on that ownership, public and private rights and interests in and to resources and their uses;
- legitimate governmental objectives reflected in regulations and land and water use plans for special management areas.

The following examples reflect common types of activities routinely reviewed and considered throughout New York's coastal regions. They reflect the types of activities that have been reviewed for their consistency with the NYCMP or an LWRP, and resulting approaches to consistency decisions that have successfully withstood administrative appeals or judicial scrutiny.

Private Docks and Piers Accessory To Private Residential Uses

Relatively small activities can have significant effects on coastal policies designed to protect or enhance the public's use and enjoyment of the shore and its natural resources. Private docks accessory to private residential uses, a generally common and acceptable activity, are a prime example.

There has been a tremendous increase in the numbers of private docks and piers, accessory to the residential use of privately owned upland, in publicly owned waters and on publicly owned underwater lands throughout New York's coastal regions. Requests for federal, State, and certain municipal authorizations for these types of structures and uses associated with them exceed all other types of requests for authorizations in the coastal area. Thousands of these structures have been built and, given the thousands of privately owned upland lots abutting coastal waters, requests for thousands more are expected over the next decade and more. Managing these structures, the many uses associated with them, and their many effects involve many issues. Coastal resources managers in New York and its municipalities, other states, and at the federal level generally agree that:

"Few issues confronting coastal resource managers are as divisive or difficult to manage as regulating the construction of private recreational docks and piers associated with residential development" (NOAA Coastal Ocean Program, Decision Analysis Support Series Number 22, January 2003).

There are, however, many means of addressing and managing these types of structures, their uses, and their effects. The following examples demonstrate both how the effects of these structures and their uses can be assessed for their effects on and consistency with coastal policies, and how they can be managed to address a wide range of important issues.

When considering and assessing the effects of such structures it is important to understand that the shoreline and in-water components of such structures always:

- physically obstruct some types of lateral public access along publicly owned shorelines to varying degrees;
- physically obstruct public access to and along publicly owned underwater lands and/or waters seaward of the shoreline; and,
- depending on the location of the mean high water line and depths of water along the shoreline, physically obstruct to varying degrees public access in and over public waters for navigating, fishing, swimming, or other lawful purposes.

Such structures also affect to many different and varying degrees, depending on the circumstances where they are constructed and used, the following natural resources:

- growth, vitality, and productivity of vegetated wetlands or other important vegetation under, near, and within which the structures are constructed and used;
- sediments and their characteristics under, near, and within which the structures are constructed and used;
- species using and dependent upon the area affected by the structures and their uses.

These structures and many uses associated with them also affect, to varying degrees:

- the developed and natural aesthetic visual character, qualities and values of the shoreline.

To understand the effects of these structures and their uses on coastal policies, it is first necessary to understand and assess the effects of the structures on both natural and other coastal resources, and uses of those resources.

When assessing the effects of in-water structures, such as private docks or piers accessory to private residential uses of upland lots, especially in tidally influenced areas, one of the first issues that should be considered is whether the applicant requesting authorization for the structure owns the upland abutting the water and whether that applicant might be entitled to the structure on the upland abutting the water, and on the underwater lands and in the water adjacent to that abutting upland. This is important because only the owner of an upland area abutting the water has riparian rights, which generally include, in most but not all circumstances, a right to physically occupy public lands and waters and to interfere, to varying but limited degrees, with unfettered public access along and public use of the publicly owned shoreline and publicly owned waters and other resources. While an applicant for permission to construct the structure may own some portion of the upland, not all applicants who apply for authorizations for in-water structures own the upland adjacent to the water's edge, and are therefore not riparian owners, and in many instances do not have the right to construct and use such structures either on the upland adjacent to the water when that upland is owned by another, or in the water and on underwater lands adjacent to that upland. In such circumstances, and without lawful permission of the owner of the upland abutting the water, an applicant would have no right to occupy publicly owned underwater lands and waters and affect public resources and legitimate public rights of access to and uses of them.

When assessing and considering the effects of such structures it is also important to consider the uses associated with the structures, the individual and cumulative and secondary effects of those uses on both resources in the area, and lawful public uses of those resources. For example, the type and number of vessels using a dock often affect sensitive nearshore areas by causing increased scouring of shallow areas and the suspension of sediments in those areas.

The types of effects that should be considered include the effects of a structure and its uses on public access to and use of resources, existing and restorable natural resource and development characteristics and values, and possible conflicts between important resources and other uses of an area. For example, a small dock crossing a sandy beach and healthy and productive vegetated wetland in a relatively undeveloped public park area, where the general public

has relatively unfettered physical access to and use of the shoreline and nearshore areas, would have significantly greater effects on public values and uses of the shoreline than the same dock, crossing an unvegetated wetland and sandy beach area in an intensely developed and used commercial harbor area where the public has no physical access to and use of the shoreline.

Examples of how factors are considered for their effects on resources, development patterns and characteristics, and other uses, and how those effects would affect coastal policy, are included in the Department's decisions in Appendix N (see Miller and Stutchin decisions). It is important to note that both of those decisions and the underlying bases for them recognize the generally understood adverse and undesired direct and cumulative and secondary effects of certain shoreline structures such as docks and piers, and uses associated with them.

Water-Dependent vs. Non-Water-Dependent Uses

Many desirable activities can only function when located along the shoreline with characteristics that meet their needs. The areas these uses require are often sought by other uses that don't require a location in or adjacent to the water. To assure that these water-dependent uses or activities, such as marinas, boat yards, commercial shipping facilities involving the sea-land transfer of goods, shellfishing, swimming and recreational boating, have adequate land and water area, the NYCMP policy affords a priority to these uses in appropriate locations.

The purposes of this policy include limiting non-water-dependent structures and uses in, on, under, or over coastal waters and reserving those areas for important and appropriate water-dependent structures and uses. Water-dependent uses are defined in Section 911.7 of Article 42 of the State Executive Law as:

“...an activity which can only be conducted on, in, over or adjacent to a water body because such activity requires direct access to that water body, and which involves, as an integral part of such activity, the use of the water.”

A list of examples of water-dependent uses are included in the explanation of policy for policy #2 of the NYCMP.

Non-water-dependent uses proposed along the shore must be evaluated for their potential to replace, interfere with or preclude appropriate water-dependent uses. For example, an over-water dining deck should not displace or preclude the use of in-water areas for appropriate water-dependent uses (see Molly Malone and Claire Papas decisions in Appendix N).

In some cases a water-dependent use may not be consistent with the coastal policy relating to water-dependent uses. The policy promotes water-dependent uses in **appropriate** locations. For example, a facility involving the shipment and offloading of petroleum was determined to be inconsistent with coastal policy relating to water-dependent uses because it would have involved dredging and impairing a sensitive and important habitat, and the upland where the facility would have been located was uniquely suited for urban waterfront redevelopment.

Large Scale Development

Large scale developments, whether involving high density residential, industrial, commercial, or major utilities, are regularly proposed along the coast. By their nature they have a complex array of beneficial and adverse effects. They may or may not be consistent with coastal policies, depending on these effects and the location of the development. For example:

Dauids Island

Developers proposed several high rise residential towers, a large marina, sewage treatment facility, and heliport on an island in the City of Rochelle in Long Island Sound. Access to the island would have been provided by a bridge

that would affect a nearby park. The towers and the bridge would have had significant adverse effects on long-recognized and valued views from surrounding communities and on traffic and public access. The development also had the potential for economic benefits for the City. While large scale development on this island would not necessarily be inconsistent with coastal policy, this development was not consistent with coastal policy because it did not avoid or mitigate the significant adverse effects on the achievement of the coastal policies. The development did not receive necessary authorizations and was not undertaken (see Davids Island “Xanadu” decision in Appendix N).

Kingston Business Park

The City of Kingston proposed the redevelopment of abandoned, formerly industrial lands for a business park, in the area covered by the City’s State and Federally approved LWRP. Financial assistance for the development was required from the Federal Economic Development Administration. The business park advanced coastal policies promoting the redevelopment of formerly developed, underutilized areas, in an area suitable for the business park where the development adhered to performance standards that advanced and did not conflict with other coastal policies. The development was approved and funded and sustained challenges in State and Federal courts (see Kingston Business Park decision in Appendix M).

Bethlehem Energy Center

A major power generating facility near the Hudson River was readily consistent with coastal policies and approved because it replaced a former facility with a more modern one where the new facility would not conflict with other uses and important resources. It had been designed to significantly reduce the use of water for the facility and overall adverse effects on air quality, water quality, and fisheries.

Millennium Pipeline

The provision of natural gas and other energy production and transmission facilities is one of the important objectives of the NYCMP. As a result, it is recognized that some energy transmission facilities must of necessity traverse the Hudson River and other water bodies. However, these and other large scale linear transmission facilities, including telecommunications facilities, must be properly routed and designed to meet other equally important coastal policy objectives. In this instance, the proposed pipeline would have involved new trenching through and the destruction of important habitat of the Hudson River, and a route through a municipality’s domestic water supply well field and in close proximity to the City of New York’s major water supply transmission system. The pipeline was therefore not consistent with coastal policies relating to the proper siting of energy transmission facilities and the protection of important coastal resources. There were alternative routes for the pipeline that would be consistent with coastal policies (see Millennium Pipeline decision in Appendix R) .

ADVANCING COASTAL POLICIES THROUGH MODIFICATION AND MITIGATION

In evaluating activities for their consistency with coastal policies, it is not sufficient to merely determine whether there is no adverse affect on the achievement of a policy. Coastal policies should also be advanced where there is the opportunity to do so. The following are examples of how this has been achieved:

Westhampton Beach

The U.S. Army Corps of Engineers, having initially been authorized to construct groins along the Atlantic Ocean shoreline on Long Island’s south shore, had constructed several groins in the Westhampton Beach area in the late 1960’s. Almost two decades later the Corps was preparing to construct more groins in the area. That activity, involving a direct undertaking on the part of the Corps, was subject to consistency with the NYCMP.

Through the consistency review process it was determined that the construction of those groins would not be consistent with several coastal policies relating to: the protection of important natural protective features and physical coastal processes; limiting development in coastal hazard areas; the use of public funds for erosion protection structures; and public access to public lands and water resources. The project was substantially redesigned and modified to be consistent with the applicable coastal policies by modifying the plans for groins and beach nourishment to partially correct the interference of the existing groins with the alongshore transport of sand to downdrift areas. The redesigned project was also required to provide for improved public access to publicly owned resources along an approximately two mile stretch of ocean beach between private residences and the Atlantic Ocean. This was achieved both by dedicating for public access the beach seaward of newly constructed dunes, and by requiring new public parking and dune walkover accessways to the beach where no such public access previously existed.

It is important note that this project involved modifications to mitigate for the adverse effects of previously authorized and constructed structures, thereby advancing coastal policies relating to natural protective features and important coastal processes. At the same time the modifications also advanced coastal policies relating to the maintenance and improvement of public access to coastal resources. These policy objectives were advanced in addition to the primary objective of reducing hazards to life and property.

Bulkhead Replacement in the City of New York

An owner of bulkheaded upland adjacent to a canal in New York City applied for permits to reconstruct the bulkhead two feet (2') seaward of the existing bulkhead. The upland was almost fully developed with a major building foundation near the bulkhead, leaving little space and no readily available means of removing the old bulkhead and replacing it, in place, without jeopardizing the existing building. The upland owner's property line was coincident with the existing bulkhead, and because the City of New York owned the underwater land in the canal, the applicant had no rights to construct the bulkhead and fill the area in the canal seaward of the existing bulkhead. The construction of the bulkhead on the City's underwater lands and filling the waters in that area would not have been consistent with either NYCMP or City of New York Waterfront Revitalization Program policies relating to public access to and uses of publicly owned lands and waters.

When the applicant's proposal underwent the consistency review process, which included coordination with the Waterfront and Open Space Division of the City of New York's Planning Department, the City identified a demand and need for improved public access along the canal. The City also indicated that a City street end running perpendicular to the bulkheaded canal, adjacent to the applicant's side yard line, provided a means of access to the canal at the end of the street. However, the public did not have access along the canal from the street end.

To accommodate the needs of the applicant, to avoid the improper alienation of public lands for private uses, and to meet the need for public access along the canal, the upland owner was allowed to construct the new bulkhead seaward of the old bulkhead after he modified his proposal so that the public was provided with the right to use an unrestricted walkway from the street end along the length of the canal where the bulkhead was reconstructed.

AWARENESS OF LAND OWNERSHIP AND THE PUBLIC TRUST

The nature of ownership of property along the coast is complex. When considering an activity along the coast, it is necessary to understand who owns or has property interests in and to the upland and underwater lands. This is especially important in developed areas where the shoreline has changed and conveyances of public interests in or to underwater or formerly underwater lands may or may not have been made over time.

The following examples summarize circumstances where the ownership of lands along the water's edge have significant effects on public and private interests along the shoreline. Those effects and the circumstances regarding them affect the achievement of coastal policies.

Private Dock In Westhampton, Long Island Region

An individual applied for authorization from the U.S. Army Corps of Engineers to construct a pile-supported dock into Moriches Bay from the upland on a barrier spit. The underwater lands in Moriches Bay are publicly owned and the public has access to and uses the area and resources of the bay.

During the course of the review of the applicant's proposed dock it became apparent that the length of the dock would exceed the length of docks customarily constructed and authorized in Moriches Bay. In response the length of the proposed dock was shortened to meet local custom and practice standards. That shorter dock would have fewer and less overall adverse effects than a longer dock on the resources in Moriches Bay and public access to and use of the shoreline and nearshore areas and resources of the bay. That shorter dock would ordinarily meet DOS general concurrence criteria and therefore be consistent with the enforceable policies of the NYCMP. However, during the latter part of the review of the application and the consistency certification for it, the Trustees of the Town of Southampton raised questions regarding the ownership of a thirty-foot (30') wide strip of the upland abutting the mean high water line along Moriches Bay. Underwater lands in the bay are owned by the Trustees, and in certain areas and circumstances the Trustees also own formerly underwater filled lands, beaches, and other upland areas. This is similar to New York State's ownership of formerly underwater filled lands to the last known location of mean high water along the shore. In this instance the strip of upland abutting the water had formerly been underwater lands owned by the Trustees. The area became upland as a result of the breaching of the barrier spit and the creation of a flood delta and the overwashing of sediments into the bay from an major Atlantic Ocean storm several years earlier.

Based on the changes in the position of the shoreline as a result of the storm, it appeared from the information that had been submitted that the applicant's property lines did not comport with the current position of the mean high water line along the shoreline, and that the Town Trustees might own the upland abutting the bay. If the Trustees owned the upland abutting the water, the applicant would not have riparian rights, which generally include the right to construct and use a dock on and in publicly owned underwater lands and waters, thereby physically interfering, to varying degrees, with public access to and along and use of the shoreline and its resources. Without those basic rights the applicant would have no right to a private dock that would interfere with public rights and interests in and to the area and resources seaward of the mean high water line. If the Trustees owned the accreted strip of land abutting the bay, only the Trustees would have those rights. The Trustees had indicated they were opposed to dock on the upland they claimed.

In this instance, if the upland were owned by the Trustees, the proposed private dock and its private uses, on publicly owned upland and in the publicly owned bay, interfering with public access to and uses of the nearshore area of the bay, would not be consistent with coastal policies relating to public access to publicly owned lands and water resources. To properly assess the consistency of the proposed dock and its uses with relevant coastal policies and make the necessary determination, it was clearly necessary to determine ownership of the upland abutting the bay.

To determine where the applicant's upland property lines were in relation to mean high water line along the bay, the following information was required:

- a copy of the applicant's deed to the upland;
- a survey of the property described in the metes and bounds description of the property in the deed, showing the lot lines approaching and along the shoreline, and showing the relationship of those property lines to the location of the mean high water line of Moriches Bay.

That information was not provided, and as a result the DOS objected to the applicant's consistency certification on the grounds of insufficient information. However, had the applicant provided that information and shown it did in fact own the upland abutting the bay, the DOS would have issued its General Concurrence determination

immediately given the original proposal was modified to shorten the dock so it would both comport with local custom and practice standards, and not unreasonably interfere with public rights and interests in and to the nearshore areas of the bay.

For similar and related information regarding private docks see the discussion of Private Docks and Piers earlier in this Section.

Development in Rensselaer, Hudson River Region

Many upland areas along the shoreline of the Hudson River consist of formerly underwater filled lands that were and remain the property of the State, even where certain State interests in and to those lands were conveyed to others. In many areas the State conveyed interests in those lands for railroads and other important uses that advanced the commerce interests of the State. State interests in and to underwater and formerly underwater lands have also been conveyed for other activities. In many instances those conveyances were for specific purposes or included conditions that were required to be met. When the purposes of certain conveyances are discontinued, and if the conditions of a conveyance were not or are no longer being met, conveyances can become invalid or private interests in the lands can be discontinued. This can be important, especially in areas where there are needs for public access to or along the shoreline, where there are needs to restore or improve the quality of natural resources, and where there are needs to redevelop areas for other important uses.

A major development involving the construction of high rise residences was proposed on several acres along the shoreline of the Hudson River, in an area where the demand for access to and along the river was very high. During the review of the proposal it appeared that the development would have been in an area that was once underwater land which had been filled more than a century earlier, therefore requiring more in-depth review of that matter to determine the developer's rights to and interests in the area. After reviewing the developer's deeds for the land and records of conveyances of State lands and interests in them in the area, it was discovered that the proposed development would in fact have been on formerly underwater filled lands. It was also discovered that there had been conveyances of State interests in and to those lands decades earlier, that those conveyances included conditions limiting the conveyances, and that State interests remained in and to those lands. Those interests provided a means for the State to ensure that the development provided for public access to and along the Hudson River. The developer and several State agencies were apprised of that information, and the developer and State agencies began negotiating the design of the development so that it provided for public access to and along the shoreline. For other reasons the developer subsequently discontinued his efforts to develop the property, those negotiations were never completed, and the development was never approved.

Several years later there were more concerted efforts on the parts of agencies and the public to develop accessways along the river as part of a regional trail. Trail planners had difficulty finding an area along the Hudson River where the trail could be developed. The business owner currently occupying the land that had been the subject of earlier negotiations had no interests in allowing the general public to traverse the land as part of a trail system.

Following up on the earlier discovery of remaining State interests in the filled lands, it was discovered that the conveyances to the filled lands, where the trail was being considered, included "reversionary" clauses providing the State with the means to recover all of the State's interests in and to those lands. The trail is now being planned in that area.

THINK SYSTEMATIC EFFECTS, NOT JUST IMMEDIATELY DISCRETE NEEDS

When considering the effects of activities on the coastal area, its resources, and uses, consider broad and indirect effects in addition to the more apparent direct effects of an activity in a discrete area.

Seawalls and revetments set back from the water's edge and at the toe of a dune or bluff can prevent areas landward of them from being lost to erosion. However, when storm driven waves reach them and are deflected by the structures, the beach fronting and on either side of them is often scoured and eroded. That sand usually moves downdrift to other areas in the surf zone or farther offshore, and as a result the volumes of sand and height and width of the fronting beach are reduced, resulting in reductions in the level of protection afforded by a higher and wider beach. As the areas adjacent to the structure are scoured and eroded, the demand for sand from updrift supplies areas is increased. As a result of increased scour and erosion of land adjacent to the structures, adjacent property owners often look to construct similar structures to stem the increased rate of erosion of their land. This can lead to significant adverse effects not only to the beach fronting a bulkheaded area, but also in areas well downdrift of the bulkheaded area.

An example of this could involve the construction of many seawalls, along several hundred feet of the toe of a bluff fronted by a sandy beach, updrift of a barrier spit. Barrier spits are created by and are dependent upon a steady supply of sand from updrift sources. If bulkheads prevent the steady movement of sand from the face of a bluff, to the beach, and downdrift to the barrier spit, the barrier spit will be starved of sand. Starving the barrier spit of sand will eventually result in a narrower spit with reduced value as a natural protective feature for areas landward of it, with a greater likelihood of overwashes or breaches. While overwashes are desired in natural areas as a means of widening and strengthening barriers on their bay sides, the barrier is also dependent on the maintenance of sand supplies to its face fronting on larger water bodies.

These effects of a weakened barrier spit are significant, and are even more significant if a barrier spit is used for public beaches and parklands, support significant coastal fish and wildlife habitats, or are developed with residences and other structures that would be susceptible to greater risks from coastal flood, erosion, and storm hazards. Activities that result in these significant effects are not consistent with coastal policies relating to: the protection of natural protective features such as bluffs, barrier spits, and beaches for their values as protective features; interference with important natural coastal processes that natural protective features depend on in order to exist and function as natural protective features; the protection of significant habitats; and reducing risks to human life and property from coastal flooding and erosion hazards.

In these circumstances alternatives to bulkheads or seawalls are often available, and those alternatives often provide a higher level of protection to development than bulkheads or seawalls. Examples include limiting new development in or near natural protective features or other erosion and flood hazard areas, and moving existing development as far from the hazard or natural protective feature area as possible. In some circumstances the costs of moving development away from coastal hazards is less expensive than constructing and maintaining seawalls and bulkheads. These alternatives would be consistent with and would advance the applicable coastal policies.

THINK HABITAT, NOT INDIVIDUAL SPECIES

Policy #7 of the NYCMP is the explicit statement of the legislative intent of the State to protect, preserve, and where practical restore habitats that have been designated as Significant Coastal Fish and Wildlife Habitats. While important species use or rely on these designated habitats and the values of the habitats vary depending on the species using, relying upon, or constituting elements of the habitats, the policy is directed to the protection of the designated habitats and their functions and values, rather than individual species using the habitat. This is important because the ecosystem functions, characteristics, qualities, productivity, benefits and values of many coastal fish and wildlife habitats have declined, and once lost, many important habitats and their functions and values are irreplaceable. It makes no sense to protect individual species without protecting the habitat they depend on to survive.

The functions and values of habitats differ from place to place and approaches to managing activities having adverse effects in one habitat area may not be appropriate in another. For example, in one habitat area it would be appropriate to maintain dredge existing navigation channels and boat basins during the late summer and early

fall in order to avoid the overall adverse effects of dredging in that area during the habitat's peak periods of productivity and when sensitivity and biological oxygen demands are highest in that area, and then time when important species relying on and constituting important elements of it are least susceptible to disturbances. In another habitat having very different physical and biological characteristics and values, a more appropriate time to maintenance dredge would be during the early summer when the habitat is least productive, least sensitive to disturbances, and not used by important species. Other habitats may be so sensitive to disturbances or of such high habitat value that no dredging or similar physical disturbances would be appropriate, even if the dredging were to occur during seasons when those disturbances or physical changes would be least disruptive to the habitat and species using, constituting, or dependent on it.

More information regarding State-designated Significant Coastal Fish and Wildlife Habitats is in Section II.2 of this manual.

GENERALLY BE AWARE OF LAND USE PATTERNS AND THE SCALE OF DEVELOPMENT

The direct, indirect, and cumulative and secondary effects of activities are influenced by existing types, patterns, scales and densities of land and water uses and development. The construction and use of a new two hundred unit high rise residential complex in an area of a major metropolitan city with many similar structures in the area would obviously not have the same direct and indirect effects on the development character, traffic, land use patterns and natural resources as a similar complex in a rural area. The addition of a new marina in a large, dredged, deep draft harbor surrounded by other marinas and boat yards would not have the same effects as the same marina and the dredged basins and channels that would be required for it in a small, shallow, relatively undeveloped harbor brimming with high natural resource characteristics and surrounded by low density residential development.

Consider potential conflicts between uses and strive to avoid them, especially conflicts between water-dependent and non-water-dependent uses. For example, a Long Island municipality was considering a proposal to rezone an area from one zoned for commercial water-dependent uses such as boat yards, marinas, and marine sales, to one zoned for relatively high density residential uses for senior citizens. The area being considered for rezoning and areas around and near it had been used for a wide range of commercial water-dependent uses for many years. Recognizing the importance of commercial water-dependent uses and the need to protect them, the area and the areas surrounding it had been zoned specifically for commercial water-dependent uses approximately a decade earlier. There were no amenities in the area such as sidewalks, open spaces, or other facilities or services that would support residential uses in the area. During its consideration of the request to rezone the area the municipality recognized the types and scale of commercial water-dependent uses in the area, and the importance of maintaining them. The municipality also recognized and considered the likelihood of conflicts between the residential and commercial water-dependent uses given that many commercial water-dependent uses such as marinas and boat yards generate considerable noise and traffic and can often be unsightly. To protect the existing uses of the area and avoid conflicts between uses and types of development in the area, the request to rezone the area was not granted. When challenged in State court the municipality's decision was upheld in large part for the foregoing reasons.

These are examples of instances where conflicts between uses are generally obvious. So these types of conflicts can be avoided, the potential for them should be considered when assessing the effects of activities and their consistency with coastal policies, and land and water use plans that advance those policies.

DON'T CONTINUE THE PROBLEM - REVERSE IT

Through full consideration of circumstances the application of coastal policies in the early planning phases of activities can advance positive changes, and reverse the multiple adverse and undesired effects of problems. Undesired land and water uses can be changed to desired uses. The existing built environment can be modified to correct problems resulting from that built environment. For example:

State Highway Project

The State was planning to widen and provide roadway drainage improvements to a busy roadway area that often flooded. The roadway areas consisted of a bridge over a tidal river, a major three-way intersection, and three multiple lane roadways sloping downward toward the bridge and the river. Areas between the roadway and the river consisted of low-lying and densely vegetated highway right-of-ways and undeveloped parklands that were part of a greenbelt trail along the river. The river supported a designated Significant Coastal Fish and Wildlife Habitat that also supported important sport fisheries. Further, the river was designated a Scenic and Recreational River in accordance with State law; and the area where the project was planned was in part of the recreational river designation and near a designated scenic part of the river. The river's water quality was impaired as a result of direct urban and roadway runoff through conventional highway drainage culverts; and large volumes of that runoff entered the river from the area where the State was planning the roadway improvements.

The project was in an area covered by an approved LWRP. The LWRP identified the important habitat and recreational values of the river, and the need to improve its water quality by reducing direct discharges of runoff and the use of best management practices to retain and treat runoff before discharging to the river. The LWRP also identified the need to restore the viability of the designated habitat in the river, to protect and improve recreational access to the river, and to maintain the relatively high natural visual quality and character of the river and parklands adjacent to it.

After the State planned and designed the roadway improvements, they were submitted to the municipality for its review in accordance with State LWRP consistency review requirements. After reviewing the plan the municipality indicated the plan and its various elements did not reflect the need to reverse water quality impairments from roadway runoff and to protect and restore the viability of the designated habitat in the river. The municipality showed that the plan not only would do nothing to remedy existing problems, but it would exacerbate those problems through the roadway widening and increased runoff into the river. The municipality also indicated the plan would impair public access to the river, trail, and undeveloped park areas, as well as the important relatively undeveloped character of the river area, which was surrounded by suburbanized commercial and residential development.

Based on the problems identified by the municipality's LWRP and the opportunity to reverse existing adverse effects and advance multiple objectives, the plan was redesigned to incorporate a public access trail crossing the roadway through a low-lying adjacent highway right of way. That right of way to the river through the adjacent parkland was also used for the installation of an unobtrusive retention and treatment system for roadway runoff. This achieved significant benefits that advanced coastal policies relating to water quality, recreational access, habitats, and visual quality.

ELIMINATE AND PHASE OUT THE CAUSES OF PROBLEMS

To accommodate changing circumstances and needs and to advance objectives for change, activities that are undesired or the source of problems can be phased out over time. This is commonly accomplished through the municipal rezoning of areas for uses different uses and building types than those currently existing. For example, areas can be rezoned so that previously authorized structures and uses become legal but non-conforming structures and uses which over time are replaced by new structures and uses. In this approach existing structures which are demolished by fire or storm, are intentionally torn down for replacements or other substantial reconstruction, or are in major disrepair and requiring major maintenance or replacement by new construction can be required to meet new structural standards. In a similar manner existing non-conforming uses can be discontinued or replaced by new uses, most often done when the existing non-conforming use is discontinued for a year or more or the structure supporting the non-conforming use is destroyed or intentionally removed. In each of these instances, existing non-conforming structures and uses can be limited so they do not expand.

In some circumstances where causes of problems can be phased out to reverse trends that create problems or result in adverse effects. For example:

- In areas where development is prone to damage from flooding and wave damage, prohibiting the reconstruction of substantially damaged or reconstructed structures in designated natural protective feature and erosion hazard and flood zone areas, requiring that newly constructed structures be located away from natural protective feature and erosion hazard and flood areas. This avoids the problems caused by structures in areas where they interfere with the protective functions and values of protective features while also reducing or avoiding the risks of flood and storm-driven wave damage to the structures and human life;
- In areas where existing docks or bulkheads and their associated uses conflict with natural resource values, navigation and other forms of public access, and desired community character values, those structures and their associated uses can be phased out in certain areas to eliminate those conflicts, or replaced with new structures that reduce conflicts between important resources and uses.

In such manners the discontinuance of non-conforming structures and uses over time provides a means of addressing and eliminating or reducing the adverse cumulative and secondary effects of undesired or inappropriate activities, achieving legitimate governmental coastal policy and LWRP objectives in special management areas. This can be accomplished by ensuring activities are consistent with coastal policies and LWRPs through Federal, State, and LWRP consistency provisions.

CONSIDER THE ELEMENTS OF NYCMP GENERAL CONCURRENCE CRITERIA

The NYCMP includes criteria for identifying minor activities which have been determined to be consistent with the NYCMP. Those criteria are identified in Section I.4 of this manual.

These General Concurrence criteria are not only a checklist to identify activities with de minimis effects on the coastal policies and in most circumstances are consistent with them, they are a useful tool for identifying areas of potential conflict with coastal policies. A “yes” response to any of these criteria will help focus attention where there is the potential for conflict with coastal policy, therefore requiring further assessments or analysis of the circumstances to help in assessing effects on and consistency with coastal policy.

ADDITIONAL CONSIDERATIONS WHEN REVIEWING ACTIVITIES OR ACTIONS FOR THEIR CONSISTENCY WITH AN APPROVED LWRP

When considering the consistency of an activity with the policies and purposes of an approved LWRP, it is usually most efficient and helpful to first compare what is being considered against the land and water use plan and projects represented in Section IV of the LWRP.

The land and water use plan contained in an LWRP is implemented through municipal zoning and other land and water use legislation and regulation as well as by the obligations of State and Federal agencies, and of municipalities with an approved LWRP, to act consistent with the LWRP. The plans in an LWRP reflect the application of the coastal policies to a geographic area. The overall land use plan in an LWRP is usually visually represented in a zoning or land use map, or both, and a Harbor Management Plan Map or Chart in Section IV of an approved LWRP. Such land and water use plans often implement in large part many if not all of the policies and purposes of an LWRP.

If a proposal involves a use that does not comport with the zoning or land use map or a harbor management map or chart in Section IV of an approved LWRP, it is unlikely to be consistent with the policies and purposes of the LWRP. That activity would therefore not be consistent with the applicable enforceable policies of the NYCMP as it is reflected in the State and federally approved LWRP. An example of this is involved the construction of an access road to a State facility. The access road was constructed through an area that an LWRP specifically identified

as one that was to remain undisturbed as part of an overall plan to create buffers between the State facility and other uses. While the road itself had no adverse effect on any specific policy, it was inconsistent with the LWRP because the use was not allowed in the land use plan. Although the State agency had begun construction, the State agency removed the roadway and revegetated the area after being made aware of the obligation to be consistent with the LWRP.

Section IV of an LWRP also includes specific physical projects or other activities designed to advance the policies and purposes of an LWRP and the NYCMP. As with uses that fully comport with the land and water use plan in Section IV and policies and policy standards in Section III of an approved LWRP, specific projects identified in Section IV of an LWRP should be advanced. In addition, Section VI.B of an LWRP identifies specific agency actions that should be undertaken to advance the LWRP.

However, activities that comport with the general land and water use plan in Section IV or some similar part of an approved LWRP are not always fully consistent with an LWRP simply because those activities or uses generally comport with the land or water use plan. It is also necessary to compare what is being considered against any applicable policies and/or policy standards in Section III of an approved LWRP, especially since policies in Section III of an LWRP often include specific performance standards that must be met for permitted uses. For example, certain water-dependent industrial uses may be desired and permitted along a municipality's waterfront, but the height of any structures necessary for or otherwise supporting such uses may be limited by policies involving water-dependent uses on the shoreline (likely included in Policy 2 of an LWRP), or by policies protecting important views, general aesthetics, or historic resources. Since such performance standards are also implemented through municipal zoning or other laws or regulations and through State and/or federal consistency provisions, anyone considering such activities should carefully coordinate and discuss the consistency of proposed activities with the municipal official or agency responsible for overall administration of the LWRP to ensure that what is being contemplated is or would be fully consistent with all of the applicable policies and purposes of an LWRP.

In conclusion, it is important to remember that the performance standards, the proposed projects, and the land and water uses in an LWRP are equally as important as the policies in determining the consistency of an activity with an approved LWRP.

NEPA and SEQRA

In addition to having been developed to advance national coastal management objectives, the NYCMP and its implementation, including the development of LWRPs as elements of the NYCMP, were subjected to National Environmental Policy Review Act (NEPA) review and decision-making processes. The NYCMP indicates and NEPA and U.S. Department of Commerce NYCMP approval findings indicate that the NYCMP is to be advanced in large part through the development and implementation of LWRPs as refinements of the NYCMP, affording the means of tailoring national and State coastal policy objectives so that they also reflect local circumstances and needs, thereby advancing important national, State, and municipal objectives. LWRPs that are subsequently incorporated into the NYCMP upon their approval by the New York Secretary of State and concurrence with that approval by the federal Office of Ocean and Coastal Resources Management are not required to undergo further NEPA review. Instead, as is often required of other comprehensive land and water use planning processes, the policies and purposes and land and water use plans included in an LWRP are subjected to coordinated municipal and State agency SEQRA review and decision-making processes, including the adoption of formal SEQRA and LWRP adoption and approval findings. This is important to note because, in accordance with federal CZMA, NYCMP, and State coastal and LWRP provisions, the effect of adoption of an LWRP by a municipality, approval of an LWRP by the Secretary of State, and concurrence with that approval by the federal government is the same as having all three levels of government formally adopt the decision-making criteria included in the policies and purposes and land and water plans of an LWRP, once the LWRP and its elements have been subjected to environmental review processes. This is also especially important because those actions on the part of government provide the bases for subsequent reviews and decision-making. This becomes more apparent when considering the

foreseeable direct and indirect effects of a large-scale development proposal in an area covered by an approved LWRP along with the effects of that development on the policies and purposes of the NYCMP as reflected in an LWRP, and the consistency of that development with the NYCMP as expressed in the applicable policies and purposes of an LWRP.

Take for example a proposal to construct a large-scale residential development in an area represented in a land and water use plan and proposed zoning map in Section IV of an LWRP as an area zoned and to be used for commercial water-dependent uses such as yacht clubs, boat yards, and marinas. It should be apparent from a quick review of that proposal against the land and water use plan and zoning map in the LWRP that developing and using that area for residential uses would clearly conflict with and not be consistent with the policies and purposes of the LWRP as represented in the land and water use plan of LWRP and the municipality's zoning for the area. In that instance, an EIS to assess the full range of effects of the development is not necessary. That development would neither comport with nor be consistent with the NYCMP as it is reflected in the land and water use plan and zoning laws implementing the policies and purposes of the approved LWRP. The development would therefore not be consistent with the NYCMP.

Conversely, if the development plan for the area consists of a marina, boat yard or yacht club, and such a development plan meets any relevant performance standards that might be included in an LWRP, such as those limiting building heights or meeting some other site plan criteria, that development, providing for important water-dependent uses in an area where it has been predetermined that those uses are appropriate, that plan would likely be consistent with and would likely advance the LWRP, State coastal policies, and national coastal management objectives. Since the relevant information had been considered when the area was identified as one appropriate for those uses and had undergone the SEQRA process when those decisions were being made, it would not be necessary to develop a new EIS to assess the full range of effects of the development, whether it would meet relevant decision-making standards, and its appropriateness in the area. In certain circumstances it may be appropriate to conduct a supplemental SEQRA review of activities that are not well defined in an LWRP. An example of how the effects of relatively large scale activities on an area and its consistency with an approved LWRP can be assessed is included in Appendix M (Kingston Business Park Decision).

CUMULATIVE AND SECONDARY EFFECTS

Inherent in any well developed comprehensive planning and decision-making process is the consideration and analysis of the cumulative and secondary effects of ongoing or proposed activities.

Depending on their locations, a single dock, seawall, or bulkhead in and of itself might not have a significant adverse effect in a habitat or at the toe of a bluff. However, the uses associated with a dock, such as motorized boating, can have or lead to significant adverse effects in pristine natural or relatively undeveloped areas. In addition, the construction of one dock or seawall in an area where they initially did not exist, can be precedent-setting, opening the door to more and more structures and uses that result in incrementally greater adverse effects in the immediate and other nearby areas. It is necessary to consider the cumulative and secondary effects of activities to manage them effectively and to achieve policy-based objectives and plans that implement and advance those objectives.

It was the cumulative and secondary effects of the numerous and discrete activities taking place in and affecting the nation's coastal area that prompted Congress and the State Legislature to establish a program based on a comprehensive set of policies with provisions for comprehensive land and water use plans to implement those policies, and the requirement for activities to be consistent with the State's coastal policies. The issues addressed by the State's coastal policies reflect the direction to be taken by agencies to achieve many beneficial direct, indirect, cumulative, and secondary effects while eliminating, avoiding, and reducing their adverse effects.

Complying with the preceding consistency provisions and properly implementing all of the applicable coastal policies of the NYCMP, and policies and purposes of LWRPs, given the relevant circumstances, provides an

effective means of addressing the wide range of beneficial and adverse cumulative and secondary effects of activities in the coastal area. If the careful reviews outlined in the preceding parts of this manual are undertaken, most cumulative and secondary effects of activities in the coastal area will be addressed, providing the NYSCMP and LWRPs highly effective tools achieving the results that Congress and the State Legislature intended: to reduce the direct and indirect adverse and advance the beneficial cumulative and secondary effects of activities through the coastal management programs they established.

II.5 FREQUENTLY ASKED QUESTIONS

1. **The federal CZMA and Article 42 of the State Executive Law call for the "balancing" of national coastal management objectives and State coastal policies. Some of the 44 policies of the NYCMP document appear to compete or conflict with others. For example, some of the policies call for developing underutilized areas and facilitating water dependent uses, which can include intense commercial and industrial uses in and adjacent to coastal waters, while others call for the protection and restoration of significant coastal fish and wildlife habitats. How is the "balancing" of national coastal management objectives and State coastal policies achieved ?**

Given the many often competing responsibilities of government and competing agency objectives, the key to achieving the "balancing" of national coastal management objectives called for in the CZMA, State coastal policy in Article 42 of the State Executive Law, and the NYCMP is by advancing applicable coastal policies through the planning, designing, undertaking, approving, and funding of activities in a manner that avoids **conflicts** between **competing** coastal policies and objectives. (Bold added for emphasis)

The "balancing" called for in the CZMA and NYCMP was accomplished through the development of the NYCMP, its enforceable policies, and the means through which the NYCMP and its enforceable policies are to be implemented. The "balancing" of competing objectives and policies called for in the CZMA and Article 42 of the State Executive Law is achieved through: a) the legislative findings in Section 910 of Article 42; b) State coastal policies in Section 912 of Article 42 and reiterations of coastal policy in Department of State regulations in 19 NYCRR Part 600; c) the development, approval, and implementation of LWRPs as components of the NYCMP; d) through the enforceable policies of the NYCMP that are contained in the State's federally approved NYCMP document; and e) implementation of the NYCMP as described in the federally approved NYCMP and amendments to it.

Activities are required to be consistent with all applicable NYCMP policies so that all applicable policy objectives are met. Activities that are not consistent with all applicable NYCMP policies are not consistent with the NYCMP. No policy is intended to be advanced to the detriment of another. If an activity is not consistent with one or more NYCMP policies, it is not consistent with the NYCMP. This furthers the uniqueness of coastal consistency and the "balancing" of competing CZMA and NYCMP objectives by requiring activities to be consistent with all applicable NYCMP policies. While certain CZMA objectives and NYCMP policies compete with others, conflicts between competing objectives and policies are to be avoided through the requirement that activities be consistent with all applicable NYCMP policies.

Consider for example new dredging of and siting and operation of a large commercial marina or boat yard in a shallow, highly sensitive and valuable area consisting of tidal wetlands. The area had been designated as a Significant Coastal Fish and Wildlife Habitat in order to protect, preserve, and where practicable restore the viability of that habitat as a habitat. Dredging and siting the facility and its uses in that area would result in conflicts between competing NYCMP policies relating to economically important water-dependent commercial and recreational uses (economic development and important water-dependent use policies), and NYCMP policies relating to the protection, preservation, restoration, and use of wetlands and important habitats and their functions and values (habitat wetlands, other natural resource and use policies). Dredging the habitat and destroying its functions and values for the commercial water-dependent facility would neither be consistent with Policy 2 of the NYCMP relating to the siting of important water-dependent facilities and uses in appropriate areas where they would not conflict with other important uses or resources, nor would it be consistent with Policies 7 and 44 of the NYCMP relating to the protection of wetlands and important habitats and their uses. The economically important water-dependent facility should instead be sited outside of the habitat where it would not impair the habitat or conflict with other important uses. Doing so would be consistent with and advance the applicable and multiple NYCMP policies and CZMA objectives. This is how the NYCMP is

designed to be used, and how DOS, through consistency reviews in accordance with the CZMA, implementing regulations in 15 CFR Part 930, and the NYCMP, ensures activities are consistent with the NYCMP.

2. What are the Department of State's roles in federal and State agency decision-making?

Federal Role

Pursuant to the CZMA, State Executive Law, and the NYCMP, the Department of State is the State of New York's designated coastal management agency, and is responsible for the overall administration of the NYCMP. In that capacity and in addition to other NYCMP and inland water way program responsibilities, the Department is responsible for reviewing and determining whether federal agency activities and those involving federal agency authorizations or financial assistance are consistent with the enforceable policies of the NYCMP. This is a delegated decision-making authority in accordance with the CZMA and can only be exercised by the Department of State. This consistency decision-making authority and the results of the Department's exercise of it is a part of federal agency decision-making processes and standards requiring federal agency activities to be consistent with the NYCMP. These federal review and decision-making requirements and standards are in addition to other federal decision-making requirements, and affect the discretionary decision-making of Federal agencies. This is more fully described in Section I.4 of this manual.

State Role

With regard to its role as the State's coastal management agency and its overall administration of the NYCMP and Local Waterfront Revitalization Programs in coastal and inland waterway areas, the Department of State's role is different from its role as part of federal review and decision-making processes. For State agency actions in or affecting the coastal area and in areas covered by approved LWRPs anywhere in the State, and other than its decisions regarding the approval of LWRPs, Harbor Management Plans, the approval and delegation of authority to municipalities to enact legislation and regulate structures and uses in the water to implement Harbor Management Plans, and decisions to fund or undertake certain direct actions, the Department usually has no direct decision-making role limiting another State agency from undertaking its own actions

In addition to its responsibilities for the overall administration of the NYCMP and making consistency decisions regarding federal agency activities, the Department is also responsible for providing a wide range of technical assistance to other agencies at all levels of government, including other State agencies, and advising those agencies of the consistency of their actions with State coastal policy. While this role is advisory the Department's coastal policy advice or opinions are important, especially given the Department's role as the State's designated coastal management agency and its direct role in and the effects of its decisions on federal agency decision-making. In this regard the Department's coastal policy opinions and advice generally carries substantial weight, and agencies generally defer to the Department of State's expertise when a proposal involves both federal and State agency decision-making, both of which are subject to review for consistency with State coastal policy and approved LWRPs. This relationship was discussed by a State Department of Environmental Conservation (DEC) Administrative Law Judge in re Xanadu Properties Associates (DEC ALJ Interim Decision, September 10, 1990) p.5:

"The Applicant is correct that the DOS and DEC reviews are separate and that under state law, implemented by 6 NYCRR Part 617.9(e), the DEC must certify to the projects's consistency with the policies set forth in the Executive Law, Article 42. However, consistency with those policies is an area within the primary expertise of the DOS...This Department [DEC], while not necessarily bound by [DOS's] determination, ordinarily will defer to the DOS in matters of coastal policy consistency - especially in a case as this where due to federal jurisdiction the DOS is itself an involved agency which must explicitly evaluate the Project instead of merely advising sister state agencies." (ALJ's decision affirmed by DEC Commissioner Interim Decision, October 15, 1990)

In related matters regarding SEQRA it's important to note that the SEQRA does not apply to Federal agencies, and because the Department of State's consistency review and decision-making in accordance with the Federal CZMA is part of federal agency review and decision-making processes, that decision-making by the Department of State is not subject to SEQRA. This is also in part because in this capacity the Department does not issue or deny or fund activities; it determines whether activities are or would be consistent or inconsistent with coastal policy. While the result of that consistency decision by the Department determines whether a Federal agency may or may not authorize, fund, or otherwise proceed with an activity, it is ultimately the responsibility of a Federal agency to approve, deny, fund or otherwise undertake an activity in accordance with Federal authorities based on the Department's consistency decision.

- 3. I'm considering undertaking an activity in a municipality with an approved LWRP. It involves construction and some fill seaward of mean high water, and requires authorization from the U.S. Army Corps of Engineers, so I know I am required to complete and submit a Federal Consistency Assessment Form to the Corps and to the Department of State. When completing the Federal Consistency Assessment Form and assessing the consistency of my proposal with coastal policy, do I consult and consider and base my assessment on the 44 policies of the NYCMP, or the policies of the LWRP?**

The assessment should be based on the policies and purposes of the LWRP. This is explained in more detail in Sections II.2 and II.4 of this manual.

- 4. I'm considering undertaking an activity in the Long Island Sound region in an area without an approved LWRP. It would require authorization from the U.S. Army Corps of Engineers. Which coastal policies do I use when assessing the consistency of my proposed activity with the NYCMP?**

The assessment should be based on the policies contained in the Long Island Sound Regional Coastal Management Program.

- 5. I represent a State agency that is considering applying for federal financial assistance to undertake a major new construction project in the coastal area, about 800' inland from the water's edge along the Lake Ontario shoreline. No permit or similar types of authorization are required from a federal agency. The project site is in an area covered by an approved LWRP. Is my State agency required to complete a Federal Consistency Assessment Form (FCAF), and is the project required to be consistent with the 44 policies of the NYCMP, or the approved LWRP?**

If the proposed activity does not require authorization from a Federal agency, the FCAF is not to be completed.

For activities involving financial assistance from Federal agencies applicants are required to provide a brief evaluation of the relationship of the proposed activity and any reasonably foreseeable coastal effects to the policies of the NYCMP. In this instance the applicable policies of the NYCMP are the policies and purposes of the approved LWRP.

Since the construction project would be directly undertaken by a State agency, your agency should also complete a State agency Coastal Assessment Form, or CAF (not the same form as an FCAF), as soon as possible when considering the construction project, and provide a copy of it to DOS. Your agency should also make a consistency determination and include it in your agency's SEQRA findings. This and other State agency consistency obligations are described in Section I.5 of this manual.

- 6. I represent a State agency that is considering undertaking an Unlisted action in the coastal area. I understand my agency is required to consider the effects of my agency's action on coastal policies, and I understand that because authorization or funding for the project is required from a Federal agency my agency is required to complete a Coastal Assessment Form (CAF) and submit it to the Department of**

State. When should my agency complete the CAF, why is the completion of a CAF required, and is anything further required on the part of my agency in order to meet State agency coastal consistency obligations?

The CAF should be completed as soon as possible when contemplating the action. The completion of the CAF and its submission to the DOS is required to: help State agencies in their assessments of the consistency of their actions with coastal policy; help State agencies in making determinations of significance pursuant to SEQRA; provide notice to DOS that a State agency is considering an action that DOS must review for consistency with the NYCMP in accordance with Federal consistency requirements; and enable DOS to coordinate with and advise the other State agency of the consistency of its action with coastal policy, if necessary.

These requirements are different than Federal consistency obligations. Both are explained in more detail in Sections I.4 and 1.5 of this manual.

- 7. In an Environmental Impact Statement (EIS) pursuant to SEQRA (State Environmental Quality Review Act) or NEPA (National Environmental Policy Act), where in an EIS document is it most appropriate to provide the coastal policy assessment or analysis of effects on and consistency with coastal policy?**

The most appropriate place for that assessment and analysis is toward the end of the document after all other relevant issues have been assessed, including alternatives, because it is usually necessary to assess, understand, and consider relevant effects on resources and uses. That assessment, understanding, and consideration of effects is necessary in order to assess and understand effects on coastal policy and the consistency of activities with the applicable policies.

- 8. My client is considering a hydroelectric project in a river five miles from the nearest coastal area. Authorization for the project is required from the U.S. Army Corps of Engineers and the Federal Energy Regulatory Commission. The project will affect the quantity and quality of water, to some degree, downstream of the project site in the coastal area. Is my client's proposed activity subject to consistency with the NYCMP?**

Yes. The standard for determining whether the activity is subject to consistency with the NYCMP is the "effects test" contained in the CZMA. Whether in or out of the coastal area, that activity is subject to consistency with the NYCMP if it would have any reasonably foreseeable direct or indirect effects on any coastal resource or use. This effects test is explained in more detail in the Subpart B discussion of the Federal consistency regulations in Appendix B of this manual.

- 9. A proposed project is "categorically excluded" from the requirements of the National Environmental Policy Act. Are the project and any necessary federal agency authorizations for it, or any federal financial assistance for it, exempt from NYCMP consistency provisions?**

No. The consistency provisions of the CZMA and NYCMP are separate from NEPA requirements, and no Federal agency activities are categorically excluded from the consistency provision of those consistency provisions.

