

compatible and interrelated process for States to review EP's and DPP's.

When MMS offers an OCS lease sale, it is considered a Federal agency activity. If MMS determines that the lease sale will have reasonably foreseeable coastal effects, then MMS provides a CZMA consistency determination to the affected State(s) stating whether the lease sale is "consistent to the maximum extent practicable" with the enforceable policies of the State's CMP. If the State objects, MMS may still proceed with the lease sale if MMS' administrative record and the OCSLA shows that it is fully consistent or consistent to the maximum extent practicable.

The CZMA requires that when a lessee seeks MMS approval for its EP or DPP, the lessee must certify to the affected State(s) that the activities authorized by the licenses or permits described in the plans are fully consistent with the enforceable policies of the State's CMP. If the State objects to the consistency certification, then MMS is prohibited from approving the license or permits described in detail in the EP or DPP. The lessee may appeal to the Secretary of Commerce to override the State objection and allow MMS to issue its approvals described in the plan. When deciding an appeal, the Secretary, among other elements, balances the national interest in energy development against adverse effects on coastal resources and coastal uses.

The CZMA and NOAA's regulations ensure that the national interest in the CZMA objectives are furthered. These safeguards are discussed below using OCS oil and gas activities to illustrate.

The "Effects Test." As discussed above, Federal Consistency review is triggered only when a Federal action has reasonably foreseeable coastal effects, referred to as the "effects test." Consistency does NOT apply to every action or authorization of a Federal agency, or of a non-Federal applicant for Federal authorizations.

For OCS oil and gas lease sales, MMS determines if coastal effects are reasonably foreseeable and provides affected States with a Consistency Determination. For example, MMS has established the Eastern Planning, Central Planning and Western Planning Areas for the Gulf of Mexico. MMS may determine that lease sales in the Eastern Planning Area will not have reasonably foreseeable effects on coastal uses or resources within the Central Planning Area. Therefore, MMS may choose not to provide States adjacent to the Central Planning Area with a Consistency Determination. MMS could also determine that a lease sale held far

offshore in the Eastern Planning Area would not have coastal effects on Florida or Alabama coastal uses or resources.

For OCS EP's and DPP's the CZMA mandates, as a general matter, State consistency review. However, as with Federal agency activities, a coastal State's ability to review the Plans stops where coastal effects are not reasonably foreseeable. For OCS EP's and DPP's located far offshore, this would be a factual matter to be determined by the State, applicant and MMS on a case-by-case basis.

Under NOAA's regulations, if a State wanted to ensure that OCS EP's and DPP's located in a particular offshore area would automatically be subject to State CZMA review, a State could, if NOAA approved, amend its CMP to specifically describe a geographic location outside the State's coastal zone where such plans would be subject to State review. See 15 CFR 930.53. Or, if a State wanted to review an EP or DPP where the applicant and/or MMS have asserted that coastal effects are not reasonably foreseeable, the State could request approval from NOAA to review such plans on a case-by-case basis. See 15 CFR 930.54 (unlisted activities). In both situations, NOAA would approve only if the State could make a factual showing that effects on its coastal uses or resources are reasonably foreseeable as a result of a particular EP or DPP.

*NOAA Approval of State CMPs.* NOAA, with substantial input from Federal agencies, local governments, industry, non-governmental organizations and the public, must approve State CMPs and their enforceable policies, including later changes to a State's CMP. NOAA's required approval ensures consideration of Federal agency activities and authorizations. For example, NOAA has denied State requests to include policies in its federally approved CMP that would prohibit all oil and gas development or support facilities off its coast because such policies conflict with the CZMA requirements to consider the national interest in energy development and to balance resource protection with coastal uses of national significance.

*"Consistent to the Maximum Extent Practicable and Fully Consistent."* For Federal agency activities under CZMA section 307(c)(1), such as the OCS Lease Sales, a Federal agency may proceed with the activity over a State's objection if the Federal agency is Consistent to the Maximum Extent Practicable with the enforceable policies of the State's CMP. This means that even if a State objects, MMS may proceed with an OCS lease

sale if MMS provides the State the reasons the OCSLA and MMS's administrative record for the lease sale requires MMS to proceed, despite inconsistency with the State's enforceable policies. MMS could also proceed if it determined that its activity was fully consistent. Under NOAA's regulations, the consistent to the maximum extent practicable standard also allows Federal agencies to deviate from State enforceable policies and CZMA procedures due to unforeseen circumstances and emergencies.

*Appeal to the Secretary of Commerce.* For non-Federal applicants for Federal authorizations, such as OCS lessees, the applicant may appeal a State's objection to the Secretary of Commerce pursuant to CZMA sections 307(c)(3) and (d). The State's objection is overridden if the Secretary finds that the activity is consistent with the objectives or purposes of the CZMA or is necessary in the interest of national security. If the Secretary overrides the State's objection, then the Federal agency may issue its authorization.

Since 1978, MMS has approved over 10,600 EP's and over 6,000 DPP's. States have concurred with nearly all of these plans. In the 30-year history of the CZMA, there have been only 14 instances where the oil and gas industry appealed a State's Federal Consistency objection to the Secretary of Commerce and the Secretary issued a decision (there were several appeals where the Secretary did not issue a decision because the appeals were withdrawn due to settlement negotiations between the State and applicant or a settlement agreement between the Federal government and the oil companies involved in the projects). Of the 14 decisions (1 DPP and 13 EP's), there were 7 decisions to override the State's objection and 7 decisions not to override the State.

Since the 1990 amendments to the CZMA, there have been several OCS oil and gas lease sales by MMS and only one State objection. In that one objection OCRM determined that the State's objection was not based on enforceable policies, MMS determined that it was consistent to the maximum extent practicable with the State's CMP, and the lease sale proceeded. Thus, all lease sales offered by MMS since the 1990 amendments have proceeded under the CZMA Federal Consistency provision. In addition, since 1990, there have been six State objections to OCS plans. In three of those cases, the Secretary did not override the State's objection. In two of the cases the Secretary did override the State allowing MMS approval of the permits