



State/Federal Considerations

I. Overview of State/Federal Requirements

A. What are “Federalism” issues?

The U.S. Constitution protects state and local governments from intrusions by Federal government. This division of State and Federal powers is what we mean by “Federalism.” Several laws and EOs restrict the ability of the Federal government to restrict, preempt, or create inconsistencies with state law. Fishery managers need to be aware of Federalism-based constraints and procedures before engaging in Federal rulemaking.

This chapter will review the following:

- MSA jurisdictional and federalism provisions
- The Coastal Zone Management Act (CZMA)
- Executive Order 13132 (Federalism)

II. Federalism in the MSA

In general, the MSA applies in Federal waters (generally 3 to 200nm from shore), and state laws apply within state waters (generally 0-3 nm from shore). Note that in several Gulf Coast states, the state waters extend from 0-9 nm from shore.

The MSA establishes several exceptions to this basic jurisdictional approach.

1. States may regulate state-registered boats beyond state waters if no FMP exists, or if the state regulations are consistent with any FMP.
2. FMPs may delegate management authority to states with consistent rules.
3. The MSA may be used to preempt state management in state waters under certain circumstances, where:
 - a) The fishing occurs predominantly in the EEZ
 - b) State action will substantially adversely effect the FMP, and
 - c) The Secretary adheres to specified procedures and conducts hearings upon the State’s request
4. The MSA includes special jurisdictional provisions for certain fisheries (MSA section 306(a) - (c) and note).

III. CZMA links to MSA actions

A. Purpose

The CZMA is intended to preserve, protect, develop, enhance, restore the Nation's coastal zone, and to encourage states to be responsible for their coastal zones, and to develop "plans." More specifically, the CZMA is meant to encourage state development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values as well as the needs for compatible economic development (16 U.S.C. § 1452).

B. Trigger 1: Federal Agency Action

The consistency provisions of the CZMA are triggered whenever there is a Federal agency activity that affects a State's coastal zone. The concept of the coastal zone has broad meaning and encompasses, land use, water use, and natural resources.

C. Requirement for Federal Agency Actions: Consistency Determination

Once triggered, the CZMA requires that the Federal action be consistent to the maximum extent practicable with enforceable policies of approved State Coastal Zone Management Plans:

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 the approved State management programs.

The CZMA provides affected states an opportunity to comment on the consistency of proposed fishery management actions with approved State plans. The agency must send letters to the states sufficiently in advance of taking final action (at least 90 days unless agreed otherwise).

From a rulemaking perspective, the CZMA establishes two kinds of requirements that we must be aware of: (1) determinations, supported by the record, as to whether the action will affect the resources of the coastal zone, and as to whether the proposed action is consistent to the maximum extent practicable, and (2) procedural requirements relating to notification of states within a specified time period.

D. Process for Federal Agency Actions: Consistency Determinations under the CZMA.

Federal agencies are required to provide State agencies with consistency determinations for all Federal agency activities affecting any coastal use or resource. The primary issues to consider in complying with the consistency determination requirements are (1) whether the Federal agency activity, including development projects, affects any coastal use or resource and (2) if so, the activity must be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of approved State management programs. The CZMA sets up a 4-step procedure for obtaining state input on this question.

1. 4-Step Process

Step 1: Agency determines whether action affects a state's coastal zone.

The Federal agency (i.e. NMFS) determines which of its activities affect any coastal use or resource of States with approved management programs. Under the Magnuson-Stevens Fishery Conservation and Management Act process, the Regional Fishery Management Councils often make determinations about activities affecting coastal uses or resources. However, NMFS is ultimately responsible for this process. Once the effects determination has been made, the remaining questions are what process must be followed and what document must be prepared.

Step 2: If yes, the agency determines whether the action is consistent to the extent practicable with the State's enforceable policies.

Step 3: The agency then must notify the state of determinations under Steps 1 and 2. If the agency determines there are effects, this notification must be made at least 90 days before final action.

Step 4. Await State concurrence or objection (60 days)

2. Notification. The consistency determination must include a detailed description of the proposed activity, its expected coastal zone effects, and an evaluation of the proposed activity in light of the applicable enforceable State policies. It is important to be aware of the consistency requirements during the development of fishery management actions and to include supporting documentation as the record is developed.

3. Timing. The consistency determination should be provided to State agencies at the earliest practicable time, but no later than the point in which the Federal agency reaches a significant point of decision-making in its review process. The consistency determination shall be provided to State agencies at least 90 days before final approval of the Federal agency activity, unless both the Federal and State agencies agree to an alternative notification schedule. It is important to note here that the process can be very flexible as long as both the State and the agency agree to the schedule.

A State agency is required to inform the Federal agency of its concurrence with or objection to the Federal agency's consistency determination at the earliest practicable time. However, the Federal agency may presume State agency concurrence if the State agency's response is not received within 60 days from receipt of the Federal agency's consistency determination and supporting information (15 C.F.R. §§ 930.36 & 930.41).

4. Negative Determinations under the CZMA. - In the event that the Federal agency determines that there will be no coastal effects, the Federal agency shall provide the State agencies with a negative determination for specified Federal agency activities. The procedures relating to the preparation of a negative determination and the time-frame for issuing a negative determination are contained in 15 C.F.R. § 930.35

5. General consistency determinations. In cases where Federal agencies will be performing repeated activity other than a development project (for instance, ongoing maintenance, waste disposal) which cumulatively has an effect upon any coastal use or resource, the Federal agency may develop a general consistency determination, and avoid the need for separate consistency determinations for each incremental action controlled by the major activity.

A Federal agency may provide a State agency with a general consistency determination only in situations where:

- The incremental actions are repetitive and do not affect any coastal use or resource when performed separately;
- The State and Federal agencies mutually agree on a general consistency determination for *de minimis* activities (§ 930.33(a)(3));
- Or any other repetitive activity or category of activities.

If a Federal agency issues a general consistency determination, it must periodically consult with the State agency to discuss the manner in which the incremental actions are being undertaken (15 CFR 930.36(c)).

E. Emergency actions: Deviation from consistency

In the event that NMFS is required to publish an emergency rule, the regulations permit NMFS to deviate from full consistency with an approved management program when such deviation is justified because of the emergency or some other unforeseen circumstance, which presents the Federal agency with a substantial obstacle that prevents complete adherence to the approved program. However, any deviation shall be the minimum necessary to address the emergency or exigent circumstance and the Federal agency would be required to carry out its activities consistent to the maximum extent practicable with the enforceable policies of a management program, to the extent that the emergency or exigent circumstance allows (15 C.F.R. § 930.32(b)).

If an emergency deviation is being asserted, the record must contain the facts showing compliance with the specified criteria, i.e.:

- Justified because of emergency or unforeseen circumstances
- Substantial obstacle prevents complete adherence
- Deviates the minimum necessary
- Consistent to the maximum extent practicable

F. Requirements for Applicant for Federal permits:

- Applicants for Federal permits must “certify” consistency with the State’s approved CZMP
- State has extended timelines for review. 6 months from when State determines information is complete
- “listed” v “unlisted” activities
- SSLL example

IV. EO 13132 Links to MSA actions

A. Overview

Signed by President Clinton on August 4, 1999, the “Federalism” Executive Order, seeks to guarantee the division of governmental responsibilities between the State and Federal governments that was intended by Framers of the Constitution. The EO seeks to ensure that Federal agencies adhere to principles of federalism in formulating and implementing of policies. It also emphasizes the unique place State and local governments have in our government system by emphasizing inter-governmental consultations and enhanced sensitivity to their concerns. The EO promotes its federalism policies in four key ways:

- It identifies nine “fundamental federalism principles” to guide Federal agencies.
- It identifies four criteria for policy-making when federalism implications exist.
- It dictates special requirements if an agency propose to preempt state law.
- It requires agencies to develop and implement a process to consult with the states in the development of policies.

B. Trigger

The key words that trigger responsibilities under the EO are “Federalism Implications.” The phrase “Federal implications” means that the planned action or policy statement has “substantial direct effects on the States or the relationship between the national government and the States, or on the distribution of power and responsibilities among various levels of government.” The procedural and analytical requirements apply when an agency is developing an action with federalism implications that also either (1) imposes substantial direct costs on a State or local government that would not be required by State law; or (2) preempt state law.

C. Requirements.

The EO requires agencies to adhere to its policies and consult with states. It also prohibits agencies from preempting state provisions or imposing direct costs on states except in limited circumstances.

1. Preemption

The EO prohibits agencies from promulgating regulations that have federalism implications and that would preempt State laws unless: a statute expressly provides for preemption, or where the state’s rules conflict.

If preemption is warranted, the EO sets forth a process that must be followed. Prior to promulgation, the agency must consult with State and local officials, provide a document called a “federalism summary impact

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statement” to OMB (and in the preamble of the rule), and make available to OMB any written communications submitted by State and local officials.

2. “Substantial Costs”

The EO prohibits agencies from promulgating regulations that have federalism implications *and* “substantial costs,” unless one of two conditions is met: The funds to pay the direct costs incurred by State and local governments in complying must be provided by the Federal government; or Prior to promulgation, the agency must consult with State and local officials, provide a “federalism summary impact statement” to OMB, and make available to OMB any written communications submitted by State and local officials.

3. “Federalism summary Impact Statement”

So what is a Federalism Summary Impact Statements (FSIS)? It should be a document containing:

- A description of the extent of the agency's prior consultation with State and local officials,
- A summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and
- A statement of the extent to which the concerns of State and local officials have been met.

The FSIS should be included in a separately identified portion of the preamble to the regulation, and it should be submitted with any draft regulation to OMB for review under EO 12866 prior to promulgation of the final regulation.

4. Certification

To ensure preemption requirements are adhered to, EO 13132 requires any draft final regulation or proposed legislation with federalism implication that is submitted to OMB for review must be accompanied by a certification from the federalism official. This certification must demonstrate that both the evaluation of federalism principles and consultation processes have been met in a meaningful and timely manner.