

NORTH CAROLINA FEDERAL CONSISTENCY DETERMINATION SUBMISSION GUIDANCE (SUBPART “C” 15 CFR 930)

This brochure provides guidance to Federal agencies on how to submit a consistency determination to the State of North Carolina under the Coastal Zone Management Act (CZMA). The suggested format for submitting a consistency determination under Subpart “C” of 15 CFR 930 is presented on the second page.

The Coastal Zone Management Act requires that a Federal agency (when it proposes any activity inside or outside of the coastal zone that will have a reasonably foreseeable effect on any coastal uses or any natural resources located within the coastal zone) provide the State of North Carolina with a consistency determination. Through the consistency determination the Federal agency has the opportunity to demonstrate how the proposed activity complies, to the maximum extent practicable, with the enforceable policies of the State’s approved coastal management program. North Carolina’s coastal zone management program consists of, but is not limited to, the Coastal Area Management Act, the State’s Dredge and Fill Law, and the land use plan of the County and/or local municipality in which the proposed project is located.



The information and data that must be supplied in a consistency determination is specified in 15 CFR 930.39. The text of 15 CFR 930.39 is attached to this brochure for reference. Consistency determinations are submitted to the N.C. Division of Coastal Management (DCM), which administers North Carolina’s coastal management program. Please submit the consistency determinations to the Federal Consistency Coordinator, at DCM’s Morehead City office at the address under “*Contact Information*”.

Federal agencies are required to provide consistency determinations at least ninety (90) days before final approval of the proposed activity. State review of the proposed activity will commence upon the receipt of the consistency determination that complies with the filing requirements. The State has a maximum of sixty (60) days to either “*concur*” or “*object*” to the agency’s consistency determination. The Federal agency may not initiate its activity until the State has either concurred or the procedures of 15 CFR 930.43 and 15 CFR 930.44 have been followed. Unless the time limit has been mutually extended, should the State fail to act within the sixty-day review period, concurrence can then be presumed. Federal agency staff are encouraged to contact the Federal Consistency Coordinator at the address below for more information.

FURTHER INFORMATION

- N.C. Division of Coastal Management (DCM): www.nccoastalmanagement.net/rules/rules.htm
- Office of Coastal Resource Management: <http://coastalmanagement.noaa.gov/>
- Government Printing Office (15 CFR 930): <http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR>

CONTACT INFORMATION

Federal Consistency Coordinator
NC Division of Coastal Management
400 Commerce Avenue
Morehead City, NC 28557-3421
252-808-2808



N.C. Division of Coastal Management

SAMPLE SUBMISSION FORMAT

The N.C. Division of Coastal Management (DCM) recommends a two-part submission consisting of a cover letter and supporting documents that contain the information required by 15 CFR 930.39. To minimize paperwork logistics related to soliciting public comments, DCM requests that Federal agencies submit one paper copy plus fifteen (15) CDs that contain the consistency determination along with all supporting documentation as PDF files.

Cover Letter: The cover letter should state the purpose of the submission (a request for concurrence from DCM of the Federal agencies consistency determination) with a brief description of the proposed project, its location, a statement that the Federal agency has reviewed the State's coastal program (citing specific policies as appropriate), a statement that the proposed activity is consistent (to the maximum extent practicable) with the enforceable policies of the State's coastal management program, a statement referring to the supporting documentation for more detail, and concludes with a designated point-of-contact including contact information. In the event the Federal agency is using a consultant as a point-of-contact, the cover letter should also designate the consultant as an authorized representative.

Supporting Documentation: The supporting documentation includes the consistency determination itself plus all associated documents and should present the information required by 15 CFR 930.39 and should provide DCM with the data and analysis needed to document that the proposed project is consistent (to the maximum extent practicable) with the enforceable policies of the State's coastal management program. DCM recommends that the State's coastal program be reviewed and that the project's compliance with specific policies be evaluated. For example, 15A NCAC 07M .0800 relates to the protection of water quality. The Federal agency must explain, as applicable, how the proposed project has been sited and designed to avoid and/or minimize any adverse impacts to water quality. The Federal agency should also describe how any unavoidable adverse impacts would be ameliorated. To the maximum extent practical, adverse impacts to coastal resources and coastal uses must be avoided. Impacts that cannot be avoided must be minimized and mitigated.

Areas of Environmental Concern: Section 113A-113 of the Coastal Area Management Act (CAMA) defines "*Areas of Environmental Concern*" (AECs). The proposed project's relationship to an AEC is important for establishing DCM's standard of review. DCM will review a proposed project that is **outside** of an AEC under Subchapter 7M of Chapter 7 of Title 15A of North Carolina's Administrative Code. Should portions of the proposed project occur **within** an AEC, then Subchapter 7H of Chapter 7 of Title 15A of North Carolina's Administrative Code would also apply. The supporting documentation must evaluate whether any of the proposed development would occur within an AEC to establish the appropriate standards of review.

Other State Permits: The supporting documentation should discuss other State permits that may be required, including the status of the permit applications. DCM suggests that any required State permits be obtained, if possible, prior to initiating the consistency review process and that any issued permits be included as part of the supporting document. Addressing other State permits at the consistency stage minimizes the potential for "*late hits*" in the review process and aides the Federal agency in demonstrating implied conformance with the State's coastal management program.

Environmental Documents: Should the proposed project require an environmental document, the completed document may be used as part of the "*Supporting Documentation*" for the consistency determination. For purposes of NEPA review, the Federal agency submits the environmental documents to the North Carolina State Clearinghouse. The NEPA and consistency review processes are discrete independent procedures requiring separate courses of review and action.

N.C. Division of Coastal Management

Relevant Sections of Subpart “C” of 15 CFR 930 Taken From the January 2007 Version of the Code of Federal Regulations (CFR)

*(These citations have been reformatted, portions have been omitted;
therefore these citations are unofficial.*

*The current CFR version may be viewed by utilizing the link below.)
<http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR>*

§ 930.39 CONTENT OF A CONSISTENCY DETERMINATION.

- (a) The consistency determination shall include a brief statement indicating whether the proposed activity will be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of the management program. The statement must be based upon an evaluation of the relevant enforceable policies of the management program. A description of this evaluation shall be included in the consistency determination, or provided to the State agency simultaneously with the consistency determination if the evaluation is contained in another document. Where a Federal agency is aware, prior to its submission of its consistency determination, that its activity is not fully consistent with a management program’s enforceable policies, the Federal agency shall describe in its consistency determination the legal authority that prohibits full consistency as required by § 930.32(a)(2). Where the Federal agency is not aware of any inconsistency until after submission of its consistency determination, the Federal agency shall submit its description of the legal authority that prohibits full consistency to the State agency as soon as possible, or before the end of the 90-day period described in § 930.36(b)(1). The consistency determination shall also include a detailed description of the activity, its associated facilities, and their coastal effects, and comprehensive data and information sufficient to support the Federal agency’s consistency statement. The amount of detail in the evaluation of the enforceable policies, activity description and supporting information shall be commensurate with the expected coastal effects of the activity. The Federal agency may submit the necessary information in any manner it chooses so long as the requirements of this subpart are satisfied.
- (b) Federal agencies shall be guided by the following in making their consistency determinations. The activity its effects on any coastal use or resource, associated facilities (e.g., proposed siting and construction of access road, connecting pipeline, support buildings, and the effects of the associated facilities (e.g., erosion, wetlands, beach access impacts), must all be consistent to the maximum extent practicable with the enforceable policies of the management program.
- (c) In making their consistency determinations, Federal agencies shall ensure that their activities are consistent to the maximum extent practicable with the enforceable, policies of the management program. However, Federal agencies should give consideration to management program provisions which are in the nature of recommendations.
- (d) When Federal agency standards are more restrictive than standards or requirements contained in the management program, the Federal agency may continue to apply its stricter standards. In such cases the Federal agency shall inform the State agency in the consistency determination of the statutory, regulatory or other basis for the application of the stricter standards.
- (e) *State permit requirements.* Federal law, other than the CZMA, may require a Federal agency to obtain a State permit. Even when Federal agencies are not required to obtain State permits, Federal agencies shall still be consistent to the maximum extent practicable with the enforceable policies that are contained in such State permit programs that are part of a management program.

§ 930.41 STATE AGENCY RESPONSE.

- (a) A State agency shall inform the Federal agency of its concurrence with or objection to the Federal agency’s consistency determination at the earliest practicable time, after providing for public participation in the State agency’s review of the consistency determination. 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 required by § 930.39(a). The 60-day review period begins when the State agency receives the consistency determination and supporting information required by § 930.39(a). If the information required by § 930.39(a) is not included with the determination, the State agency shall notify the Federal agency in writing within 14 days of receiving the determination and supporting information that the 60-day review period has not begun, identify missing information required by § 930.39(a), and that the 60-day review period will begin when the missing information is received by the State agency. If the State agency has not notified the Federal agency that information required by § 930.39(a) is missing within the 14 day notification period, then the 60-day review period shall begin on the date the State agency received the consistency determination and accompanying information. The State agency’s determination of whether the information required by § 930.39(a) is complete is not

a substantive review of the adequacy of the information provided. Thus, if a Federal agency has submitted a consistency determination and information required by § 930.39(a), then the State agency shall not assert that the 60-day review period has not begun because the information contained in the items required by § 930.39(a) is substantively deficient. The failure to submit information not required by 930.39(a) shall not be a basis for asserting that the 60-day review period has not begun.

- (b) State agency concurrence shall not be presumed in cases where the State agency, within the 60-day period, requests an extension of time to review the matter. Federal agencies shall approve one request for an extension period of 15 days or less. In considering whether a longer or additional extension period is appropriate, the Federal agency should consider the magnitude and complexity of the information contained in the consistency determination.
- (c) Final Federal agency action shall not be taken sooner than 90 days from the receipt by the State agency of the consistency determination unless the State concurs or concurrence is presumed, pursuant to paragraphs (a) and (b), with the activity, or unless both the Federal agency and the State agency agree to an alternative period.

§ 930.43 STATE AGENCY OBJECTION.

- (a) In the event the State agency objects to the Federal agency's consistency determination, the State agency shall accompany its response to the Federal agency with its reasons for the objection and supporting information. The State agency response shall describe:
 - (1) How the proposed activity will be inconsistent with specific enforceable policies of the management program; and
 - (2) The specific enforceable policies (including citations).
 - (3) The State agency should also describe alternative measures (if they exist) which, if adopted by the Federal agency, would allow the activity to proceed in a manner consistent to the maximum extent practicable with the enforceable policies of the management program. Failure to describe alternatives does not affect the validity of the State agency's objection.
- (b) If the State agency's objection is based upon a finding that the Federal agency has failed to supply sufficient information, the State agency's response must describe the nature of the information requested and the necessity of having such information to determine the consistency of the Federal agency activity with the enforceable policies of the management program.
- (c) State agencies shall send to the Director a copy of objections to Federal agency consistency determinations.
- (d) In the event of an objection, Federal and State agencies should use the remaining portion of the 90-day notice period (*see* § 930.36(b)) to attempt to resolve their differences. If resolution has not been reached at the end of the 90-day period, Federal agencies should consider using the dispute resolution mechanisms of this part and postponing final federal action until the problems have been resolved. At the end of the 90-day period the Federal agency shall not proceed with the activity over a State agency's objection unless:
 - (1) the Federal agency has concluded that under the "consistent to the maximum extent practicable" standard described in section 930.32 consistency with the enforceable policies of the management program is prohibited by existing law applicable to the Federal agency and the Federal agency has clearly described, in writing, to the State agency the legal impediments to full consistency (See §§ 930.32(a) and 930.39(a)), or
 - (2) the Federal agency has concluded that its proposed action is fully consistent with the enforceable policies of the management program, though the State agency objects.
- (e) If a Federal agency decides to proceed with a Federal agency activity that is objected to by a State agency, or to follow an alternative suggested by the State agency, the Federal agency shall notify the State agency of its decision to proceed before the project commences.

§ 930.44 AVAILABILITY OF MEDIATION FOR DISPUTES CONCERNING PROPOSED ACTIVITIES.

In the event of a serious disagreement between a Federal agency and a State agency regarding the consistency of a proposed federal activity affecting any coastal use or resource, either party may request the Secretarial mediation or OCRM mediation services provided for in subpart G.