



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL OCEAN SERVICE
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT
Silver Spring, Maryland 20910

MAY 12 1999

Kathleen Leyden
Director, Maine Coastal Program
State Planning Office
184 State Street
38 State House Station
Augusta, Maine 04333

Dear Ms. Leyden:

The Office of Ocean and Coastal Resource Management (OCRM) has completed its review of the changes to the Maine Coastal Program, received in this office on January 27, 1998. The review of the original submittal, which included revisions to the State's Marine Resources Law regarding the protection of the American Lobster and revisions to the Natural Resources Protection Act (NRPA) regarding public information requirements for dredging activities, was delayed for several reasons. The State agreed to extend the review period to allow comments by the U.S. Army Corps of Engineers (Corps) to be submitted regarding the revisions to the State NRPA requirements on public information about dredging, and to complete discussions with OCRM and within the State regarding the implications of the incorporation of the lobster protection policies and application of the dredging policy. The State subsequently withdrew the Marine Resources Law portion of the submittal, and agreed to move forward on the incorporation of revision to the NRPA regarding dredging.

OCRM concurs with the State's determination that the changes to the NRPA, 38 M.R.S.A. §480-D, sub-§9, related to public information requirements for dredging activities constitute a routine program change. OCRM agrees that all statutory changes are enforceable policies of the Maine Coastal Program, and that in accordance with NOAA regulations at 15 C.F.R. § 923.84 (b)(4)(i)(C), Federal consistency will apply after you publish notice of this approval, subject to the following clarification.

NRPA §§ 480-D(9)(B) and (9)(C) are reasonable requirements and are certainly applicable to any non-Federal applicant under the Coastal Zone Management Act (CZMA) § 307(c)(3). However, these subsections may not be applicable to Federal agencies under CZMA § 307(c)(1). Thus, OCRM's approval is qualified by the following discussion.



The revisions to the NRPA § 480-D(9) require, in part, that applicants for dredging permits from the Commissioner of Marine Resources:

- A. Clearly mark or designate the dredging area, the spoils disposal route and the transportation route;
- B. Publish in a newspaper of general circulation in the area adjacent to the route the approved transportation route of the dredge spoils; and
- C. Publish in a newspaper of general circulation in the area adjacent to the route a procedure that the applicant will use to respond to inquiries regarding the loss of fishing gear during the dredging operation.

The State's routine program change analysis states that these revisions will be applied to Federal agencies through Federal consistency in the following manner. Subsequent to the State's consistency concurrence with a Federal agency's proposal to dredge, the Federal agency must clearly designate the transportation route for barges hauling dredged materials, and publish that route in a local newspaper, along with information explaining the procedure by which the Federal agency will respond to inquiries about fishing gear lost during dredging operations.

Subsection (A) is not at issue. A Federal agency, such as the Corps, must provide the information required by NRPA § 480-D(9)(A) in its consistency determination to the State, but not in subsequent public notices. The Federal consistency requirement allows the State to review the Federal activity *prior* to final Federal approval of the activity. 16 U.S.C. § 1456(c)(1)(C); 15 C.F.R. § 930.34(b). The CZMA does not provide for "subsequent" or continuing oversight of the Federal activity, unless the Federal agency later substantially modifies the activity or where there are later phases. A state cannot condition its concurrence to require a later action by the Federal agency, unless the Federal agency agrees to such conditions. Thus, in the case of NRPA § 480-D(9)(B) and (C) the state cannot require that a Federal agency publish notices after the State's concurrence.

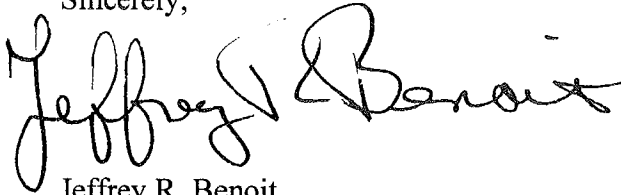
The CZMA requires that the Maine Coastal Program provide for public notification of the Federal agency's consistency determination. 16 U.S.C. § 1455(d)(14). Under CZMA § 306(d)(14), the State cannot require the Federal agency to provide or pay for such a notice. Also, a Federal agency may not have the authority to pay for certain notices. Thus, the State's consistency review cannot be based on whether a Federal agency has provided or paid for a notice.

Finally, NRPA § 480-D(9)(C), as applied to Corps dredging activities, would require the non-Federal sponsor of a Federal navigation project to respond to inquiries regarding the loss of fishing gear. The Corps' navigation program requires the non-Federal sponsor to "hold and save the government" from liability for damages caused by dredging activities. Letter from James P. Crawford, Corps, to Joelle Gore, OCRM (March 13, 1998). Presumably, if there is not a non-Federal sponsor, then the Corps' consistency determination would address inquiries regarding the loss of fishing gear during the Corps' dredging operation.

If there are still issues with the Corps over its dredging activities and the implementation of NRPA § 480-D(9), then I encourage the Corps and the State to try and resolve any impasse. OCRM is available to assist the Corps and the State in any such negotiations.

Please do not hesitate to call Joelle Gore at (301) 713-3117, Extension 177, or David Kaiser, Federal Consistency Coordinator, at (301) 713-3098, Extension 144, of my staff should you have questions regarding this approval.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey R. Benoit". The signature is written in a cursive, flowing style.

Jeffrey R. Benoit
Director

cc: Mr. James P. Crawford, Corps of Engineers