

## **BUZZARDS BAY PROJECT** **FEDERAL CONSISTENCY REPORT**

### **Introduction**

Section 320 of the Clean Water Act (CWA) directs the Buzzards Bay Project (BBP) and all other National estuary projects to review federal financial assistance programs and federal development projects for consistency with the recommendations contained in its Comprehensive, Conservation and Management Plan (CCMP). A well-conceived consistency review process can be used to facilitate implementation of the CCMP. Moreover, the BBP is required to develop an approach for coordinated implementation of its recommendations by not only federal agencies but state and local agencies also.

This report recommends the optimal way in which the goals, policies and objectives of the CCMP can be substantively implemented without being compromised by other contradictory activities, both federal and non-federal. It also addresses the procedural activities and institutional changes that will be necessary to carry out the prescribed strategy.

### **Executive Order 12372**

The CWA instructs that the review of federal assistance programs and development projects must be completed in accordance with Executive Order 12372 (EO). This EO was implemented by all federal agencies in 1983 pursuant to a government-wide regulation. It was intended to replace and improve the review process under Office of Management and Budget Circular A-95. The EO establishes a routine procedure for state and local government review and comment on federal assistance programs and development projects.

In Massachusetts, the Executive Office of Communities and Development (EOCD) coordinates the EO state clearinghouse function. EOCD receives notification from any federal agencies listed in the Catalog of Federal Domestic Assistance when federal assistance or a development project is proposed. EOCD in turn publishes notice of such actions in the Massachusetts Intergovernmental Review Monitor (MIRM). Any comments received by EOCD from state and local officials are referred to the respective federal agency. Then, that agency must either: (1) accept the recommendation, (2) negotiate acceptable solutions, or (3) explain in writing why the recommendation could not be accepted. There is, however, no obligation by any federal agency to alter a proposed action.

The Buzzards Bay Management Conference is required to identify the federal financial assistance programs and development projects, applications and proposals, it wishes to review for consistency with the CCMP. This has been completed in light of the priorities and recommended actions described in the CCMP. (The list is included as Appendix A to this report). The BBP will review the MIRM for any activities planned for the Buzzards Bay Watershed or the waters of Buzzards Bay that will affect implementation of the CCMP in any way, for as long as the Project remains in existence. At this time it appears that funding will continue through 1993.

### **Coastal Zone Management Consistency Review**

Section 307 of the Coastal Zone Management Act (CZMA) of 1972, as amended also recognizes the significance of federal actions. Section 307 and implementing regulations (15 CFR 930) require that direct federal activities/development projects; activities requiring a federal license or permit; and

activities receiving federal financial assistance be consistent with a state's approved Coastal Zone Management Plan.

CZMA requires that all federal activities and development projects that affect the coastal zone be consistent, to the "maximum extent practicable," with federally-approved state coastal zone management programs. The maximum extent practicable is defined as fully consistent with the state coastal zone management plan unless prohibited by laws or regulations that govern a federal agency's activities. Moreover, CZMA requires that no federal licenses or permits that affect the coastal zone shall be granted by a federal agency, nor shall any federal assistance be provided, unless the proposed activity is consistent with the state Coastal Zone Management Program (CZMP). This, in effect, provides a possible state veto over activities requiring a federal license or permit, or receiving federal assistance.

The Massachusetts Coastal Zone Management Office (MCZM), through its own regulations (301 CMR 20.0), as well as CZMA regulations, reviews federal activities/development projects, licenses, permits and offers of federal financial assistance that "significantly affect" the coastal zone. (The list of agencies and activities requiring a determination by MCZM is included as Appendix B). The Massachusetts coastal zone is defined as including: "land and waters within the area bounded by the seaward limit of the state's territorial sea, i.e., 3 miles....and landward to 100 feet inland of specified major roads, rail lines, or other visible rights-of-ways..." (MCZM Program, p. 14). Activities occurring outside the CZM boundary that have spillover effects on the coastal zone are also subject to federal consistency review. In fact, the "Coastal Zone Act Reauthorization Amendments of 1990" strengthen this provision by clarifying that all federal agency activities, whether in or outside of the coastal zone, are subject to the consistency requirements of Section 307 of the CZMA if they affect natural resources, land uses, or water uses in the coastal zone.

#### **Coordination with the Massachusetts Environmental Policy Act**

MCZM initiates most federal project reviews through the procedures established by the Massachusetts Environmental Policy Act (MEPA). However, MCZM has authority to always negotiate separately with federal agencies if it chooses to do so. Through MEPA review, MCZM comments and seeks changes in both federal and non-federal projects when it concludes that an activity will have a significant effect on the coastal zone. As units within the Executive Office of Environmental Affairs Secretariat, MEPA and MCZM work closely and have established common thresholds (eg., disposal of 10,000 or more yards of material), above which projects will be reviewed. Because most projects require both federal and state permits, this has simplified the process. In addition, by using MEPA thresholds even when MEPA may not have jurisdiction, MCZM attempts alleviate possible confusion and misunderstanding. (MCZM federal consistency review informational requirements and a summary of the review process are included as Appendix C).

In sum, MCZM has a well established and effective consistency review process that has been institutionalized within the state's governmental framework for over 12 years. It is well suited for overseeing proposed actions or projects which may impact the resources within the Buzzards Bay drainage basin. MCZM presents the added dimension of reviewing not only federal actions, but any action that will significantly affect the coastal zone. This is particularly relevant to Buzzards Bay where the CCMP has identified local land use activities to be its area of greatest concern.

## **MCZM Federal Consistency v. EO12372**

The Buzzards Bay CCMP will be better served through an MCZM federal consistency review of proposed actions than by a review coordinated through EOCD using the EO. While the EO provides a method that is basically procedural, the MCZM process is substantive, with the ultimate threat of a veto facing most federal actions that are not consistent with MCZM policies. Further, the MCZM process has become fully institutionalized and has the added clout of being conducted at the cabinet level of state government. It is also well understood by all affected federal agencies.

EO 12372 involves a clearinghouse function operating through a third party that has no familiarity with the CCMP or coastal water quality issues in general. It is an indirect process and those who have participated have found it to be frustrating and ineffective. MCZM however, is well acquainted with the CCMP as the state agency managing the Buzzards Bay Project. MCZM is a strong and eager supporter of the BBP's goals and objectives. Finally, coordination between MCZM and the BBP during a consistency review would be ensured through the logistical strength of sharing the same office space.

It should be mentioned that MCZM does rely on EO12372 and the MIRM for relevant proposed federal financial assistance programs and development projects. However, these listings result in a very small percentage of MCZM project reviews.

### **Incorporation of CCMP into Coastal Program**

The National Oceanographic and Atmospheric Administration (NOAA) and the Environmental Protection Agency (EPA) completed an agreement in September, 1988 ..... "to avoid duplication of effort, unnecessary expenditures of federal funds and the development of conflicting regulatory mechanisms, involving the Coastal Zone Management Program and the National Estuary Program." A coordination paper was developed that addresses NOAA and EPA responsibilities and several provisions directly involve issues concerning federal consistency. The most pertinent provision states that "To the extent permitted by law, States will be required to submit CCMPs developed under the NEP for incorporation into approved State CZM programs after approval by the Governor(s) and the EPA Administrator. CZMA Section 312 biennial evaluations will be used to ensure compliance.

The Buzzards Bay Management Committee in consideration of the NOAA - EPA Agreement and the strengths of the MCZM federal consistency review has determined that it is in the best interest of the Buzzards Bay Project and its CCMP to delegate the primary function of federal consistency review to the Office of Coastal Zone Management by incorporating the CCMP into the Massachusetts CZMP. As mentioned previously, the Buzzards Bay Project will supplement the MCZM review with its own review of federal actions reported in the state's MIRM and coordinated by EOCD. However, after the Project completes its work and is no longer funded, this activity will be undertaken solely by MCZM through the federal consistency process.

Delegation of federal consistency review will require a program amendment to the CZMP and could result in the designation of the CCMP as a special area management plan. To accomplish this, MCZM will review the CCMP for its consistency with the 27 Policies contained in the CZMP. (A preliminary assessment indicates that no major problems exist in this area.) Next, the CCMP will serve as an environmental impact statement/report that will be reviewed through the National Environmental Policy Act and the Massachusetts Environmental Policy Act. This process will serve to explain Massachusetts' intent to incorporate the management plan into its program. Incorporation will also require a detailed review by the federal Office of Ocean and Coastal Resource Management (OCRM) as the approving agency for state coastal zone programs.

The most significant actions resulting from incorporation of the CCMP into the CZMP will be the inclusion of the Buzzards Bay drainage basin within the coastal zone definition. This would clearly expand MCZM's oversight to review federal action throughout the basin. The recent reauthorization of CZMA has strengthened the state's authority to review land-side effects and it will hopefully provide the flexibility for officially expanding the coastal zone. Expansion of the coastal zone would also enhance MCZM's review of non-federal activities through MEPA. While not having the teeth inherent in federal consistency review, the evaluation of major non-federal projects, many of which involve critical land-use decisions in the upper reaches of the basin, would be most valuable to MCZM and the BBP.

Although expansion of the coastal zone will pose a major political challenge, it is well within the realm of possibility. Most importantly, it will provide a powerful management tool for successful implementation of the CCMP.

### **Enforceable Policies**

A basic principle of federal consistency review is that state agencies have sufficient existing statutory powers to carry out the enforceable provisions of the CZMP. In discussing incorporation of the CCMP, it has been argued by OCRM that this would be a non-substantive action because of the lack of enforceable policies within the plan. The CCMP primarily concentrates on additional recommended state actions, especially in the regulation of non-point sources of pollution, necessary to fully implement existing programs. The BBP believes that although some additional regulatory measures may be needed, the basic statutory authority is already in place and only requires program expansion; utilizing state water quality standards to control non-point sources of pollution. This is an area that realistically will require fine-tuning and additional policy development. However, through the commitment of the Massachusetts Department of Environmental Protection's Division of Water Pollution Control (DWPC), the use of water quality standards to control non-point sources should be implemented within 2-3 years (see Appendix D).

Specifically, DWPC has committed to the adoption of a regulatory standard for nitrogen inputs to sensitive embayments in its 1993 revision to State Water Quality Standards (314 CMR 4.0). Although the standards already contain a general statement concerning the over-enrichment of marine waters from nitrogen, realistically, no definable criteria are included that would allow for effective enforcement. Once this standard is in place it will be fully enforceable and dramatically strengthen the BBP's Action Plan for Managing Nitrogen Sensitive Embayments.

Another example is DWPC's commitment to include provisions for stormwater permitting in its State Water Quality Standards. While it can be argued that DWPC has the authority now to enforce stormwater violations of its coliform standard, no policy for permitting stormwater currently exists. Once this policy is in place in 1993, however, regulatory activity will proceed and in the process, help implement the BBP's Action Plans for Protecting and Enhancing Shellfish Resources and Managing Stormwater Runoff.

The BBP has included similar program expansions in CCMP Action Plans for Managing Wetlands and Marine Habitat, Managing Boat Waste, and Managing Sewage Treatment Facilities. In addition, Managing On-site Systems will also contain enforceable provisions pending amendment of the state's environmental code regulating the subsurface discharge of sanitary waste (Title 5). The BBP believes that the recommendations and policies stated in these Action Plans are consistent with MCZM Regulatory Policies 1, 3 and 10 and as such, will be enforceable under federal consistency review.

**Policy 1 -Protect ecologically significant resource areas (salt marshes, shellfish beds, dunes, beaches, barrier beaches, and salt ponds) for their contributions to marine productivity and value as natural habitats and storm buffers.**

**Policy 3 -Support attainment of the national water quality goals for all waters of the coastal zone through coordination with existing water quality planning and management agencies. Ensure that all activities endorsed by CZM and its policies are consistent with federal and state effluent limitations and water quality standards.**

**Policy 10 -All development must conform to existing applicable state and federal requirements governing sub-surface waste discharges, source of air and water pollution and protection of inland wetlands.**

<b>ACTION PLAN</b>	<b>APPLICABLE CZMP POLICIES</b>
Managing Nitrogen Sensitive Embayments	Policy 3
Protecting and Enhancing Shellfish Resources	Policies 1 and 3
Managing Stormwater Runoff	Policies 1, 3, and 10
Managing Boat Waste	Policy 3
Managing On-Site Systems	Policy 10
Protecting Wetlands and Marine Habitat	Policies 1, 3, and 10
Managing Sewage Treatment Facilities	Policy 3

**Implementation Plan**

After the Administrator of EPA signs the final CCMP for Buzzards Bay, the process of incorporating that document within the state's coastal program will begin. Although the Buzzards Bay Project believes that several CCMP Action Plans are enforceable under existing CZMP policies, MCZM prefers the creation of a new policy. Thus, a separate CZMP regulatory policy - Policy 13A will be drafted that applies only to the Buzzards Bay drainage basin and serves to require federal consistency with the enforceable provisions of the CCMP. In addition, an individual non-regulatory policy - Policy 28 will also be drafted and apply to non-enforceable CCMP actions.

Policy 13A will be subdivided into discrete units aligned according to the relevant goals, objectives and recommended actions contained in CCMP Action Plans. Supporting detail that substantiates the enforceable provisions of this new policy will be provided. While Policy 28 will not be enforceable, it will contain many of the critical land-use controls that form the "heart" of the CCMP and must be implemented at the local level.

The Coastal Zone Act Reauthorization Amendments of 1990 require states with approved coastal zone management programs to develop coastal nonpoint pollution control programs also. The Buzzards Bay Project and Coastal Zone Management Office believe that by incorporating the CCMP into the CZMP as described above, they will be meeting the intent of the legislation. In addition, the Buzzards Bay experience may provide a regional prototype for NOAA and EPA to follow in their endeavors to implement the legislation nationally and advance the agreement between the two agencies to complement their coastal responsibilities.

**The Federal Consistency Review Process: A Summary**

The BBP will delegate the review of federal activities for consistency with its CCMP to the Coastal Zone Management Office which will serve as the point of contact for the Buzzards Bay Management Conference. This review will then become part of MCZM's long-standing federal consistency review process. Proposed actions will be obtained through the established process and reviewed in light of newly created Buzzards Bay policies. After the completion of program commitments agreed to by DWPC, the enforceable policies will be strengthened further. This process is scheduled to begin subsequent to the incorporation of the CCMP into the CZMP and upon approval by the Secretary of Commerce.( See the accompanying schedule of events).

Due to the powerful and comprehensive nature of the MCZM review, the Management Conference does not anticipate the need for a conflict resolution strategy. A strategy for resolving any differences between MCZM and the Management Conference is also not required due to the close working relationship that has been implemented. Finally, the timeline for consistency review as established by MCZM is included in Appendix C, Section B Review Process Summary.

# SCHEDULE OF EVENTS

	_____ 91 _____ 92 _____ M    A    M    J    J    A    S    O    N    D    J    F    M
CCMP submitted to OMEP for review/ EPA Administrator signs CCMP	_____ ●
CCMP reviewed and certified as consistent with MA CZMP	_____ ●
New Buzzards Bay Policies developed for CZMP	_____ ●
MEPA/NEPA review of amended CZMP/Governor signs amended CZMP	_____ ●
Office of Ocean and Coastal Resource Management Reviews amended CZMP/Secretary of Commerce signs CZMP	_____ ●

