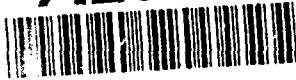


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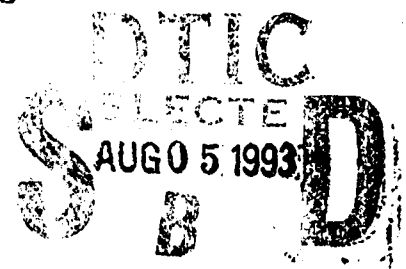


FEDERAL CONSISTENCY GUIDANCE:
FEDERAL CONSISTENCY WITH STATE
NONPOINT SOURCE MANAGEMENT PROGRAMS

AUGUST 1989

U.S. ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF WATER
OFFICE OF WATER REGULATIONS AND STANDARDS
WASHINGTON, D.C.



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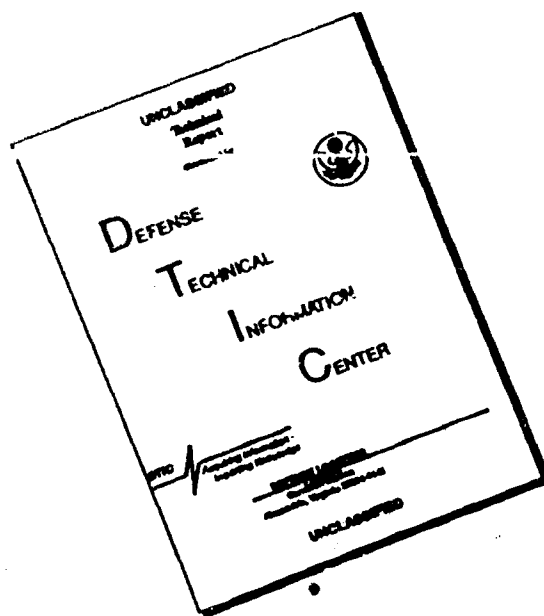
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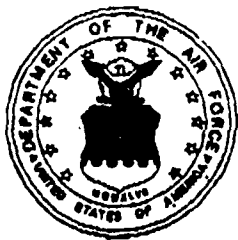
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EXECUTIVE SUMMARY

FEDERAL CONSISTENCY GUIDANCE:

FEDERAL CONSISTENCY WITH STATE NONPOINT SOURCE MANAGEMENT PROGRAMS

The Federal consistency provisions in Section 319 of the Clean Water Act (§§ 319(b)(2)(F) and 319(k)) enable each State to review Federal activities for consistency with the State nonpoint sources (NPS) management program. If the State determines that an application or project is not consistent with the provisions of its NPS management program and makes its concerns known to the responsible Federal agency, the Federal agency must make efforts to accommodate the State's concerns in accordance with Executive Order (EO) 12372.

Section 319 directs each State, as part of its NPS management program, to develop a list of the Federal assistance programs and development projects, if any, which it will review for consistency with the management program. This guidance urges States to include a description of the criteria and guidelines governing the reviews and to base the review criteria on the requirements, goals, policies, and other provisions of the management program. States are encouraged to focus Federal consistency reviews on programs or development projects which impact impaired or threatened waters as identified in State NPS assessment reports or through subsequent studies or analyses.

The State lead NPS agency will be responsible for conducting Federal consistency reviews. States are not expected to develop any new process for Federal consistency reviews but rather to conduct these reviews in accordance with the intergovernmental review process established by Executive Order 12372. The lead NPS agency should provide its list of Federal programs and projects, if any, to the State's EO 12372 "single point of contact" (SPOC) for Federal assistance. The SPOC will then route appropriate Federal project information to the lead NPS agency for review.

Other processes, including the NEPA environmental review process and the A-106 pollution abatement process, may also be used to promote and ensure Federal consistency with State NPS management programs.

EPA will work with the States and Federal agencies to support implementation of the section 319 Federal consistency requirements. Toward this end, EPA may conduct educational and liaison activities, provide technical assistance to States and Federal

agencies, and if requested, may facilitate State-Federal negotiations and assist with mediation and conflict resolution for selected high priority issues affecting impaired or threatened waters.

The success of the Federal consistency review process will depend largely on the ability of States and Federal agencies to implement the requirements in an open, cooperative manner. Through early notification, effective communication and constructive negotiations, States and Federal agencies can make the consistency review process an effective tool for achieving commonly shared clean water goals.

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FEDERAL CONSISTENCY GUIDANCE:

FEDERAL CONSISTENCY WITH STATE NONPOINT SOURCE MANAGEMENT PROGRAMS

I. BACKGROUND

A. Purpose

The purpose of this guidance is:

- 1) to assist States and Federal agencies in developing an effective nonpoint source (NPS) Federal consistency review process pursuant to the requirements of section 319 of the 1987 Clean Water Act (CWA);
- 2) to highlight other existing review mechanisms which may be used to promote and ensure Federal consistency with the State's NPS pollution control efforts; and
- 3) to explain the U.S. Environmental Protection Agency's (EPA's) role in supporting and facilitating the NPS Federal consistency efforts of States and Federal agencies.

B. Introduction

Many of the assistance programs, development projects, and land and facilities management activities administered by Federal agencies have the potential to cause NPS pollution impacts to the nation's waters. However, many of these same activities, when properly administered, have a great potential for supporting and advancing State NPS water pollution control efforts.

The Federal consistency provisions of section 319 of the CWA represent an opportunity for State and Federal agencies to more closely coordinate their activities and cooperate to achieve clean water goals. These provisions enable States to review Federal activities for consistency with the State's approved NPS management program developed pursuant to section 319 of the CWA. If the State determines that a Federal application or project is not consistent with the provisions of its NPS management program, and communicates its concerns to the appropriate Federal agency in accordance with Executive Order 12372 (EO 12372) the Federal agency must make efforts to accommodate the State's concerns.

Section 319 directs States to conduct their Federal consistency reviews pursuant to the intergovernmental review process established by EO 12372. Chapter II provides guidelines for using the State EO 12372 intergovernmental review process for conducting section 319 Federal consistency reviews.

States are also encouraged to use other existing review mechanisms to supplement the section 319 Federal consistency reviews or to review programs and projects which may have NPS effects but which are not subject to section 319 Federal consistency review provisions. Chapter III discusses some of these other mechanisms, including the National Environmental Policy Act's (NEPA) environmental review process, the A-106 pollution abatement process, and the Federal consistency review processes under the Coastal Zone Management Act's and the National Estuary Program.

Chapter IV outlines EPA's roles and responsibilities in supporting the efforts of States and Federal agencies to promote and ensure Federal consistency with the States' NPS control programs. Chapter V recommends liaison activities which may be conducted to promote intergovernmental coordination and cooperation in NPS Federal consistency efforts. Chapter VI outlines reporting guidelines designed to facilitate the Federal consistency review process through effective communications and information transfer.

It is EPA's intent in this guidance to provide flexible procedures which foster intergovernmental cooperation and coordination, utilize existing review mechanisms, and reduce duplicative efforts, while ensuring that the objectives of the section 319 Federal consistency provisions are met. The guidance emphasizes that the section 319 Federal consistency reviews generally occur within the State intergovernmental review process established pursuant to EO 12372, and are generally subject to its substantive and procedural requirements (specific exceptions are discussed in more detail in Chapter II).

While the Federal consistency provisions of section 319 focus on Federal activities, EPA also encourages States to give equal attention to State, and local agency activities as well as activities of the private sector in implementing management programs.

EPA will work with States and Federal agencies to support implementation of the section 319 Federal consistency requirements. To the extent possible EPA may conduct educational and liaison activities, and provide technical assistance to States and Federal agencies. If requested, EPA may facilitate State-Federal negotiations and assist with mediation and conflict resolution for selected high priority issues affecting impaired or threatened waters. EPA will also work with Federal agencies to support their pollution abatement and environmental protection efforts and to redirect programs and policies with environmentally adverse consequences.

The success of the Federal consistency review process will depend largely on the ability of States and Federal agencies to implement the review process in an open, cooperative manner. Through early notification, effective communication, and negotiations, States and

Federal agencies can make the consistency review process an effective tool for achieving commonly shared clean water goals.

C. Statutory Authority

Authority for the States' NPS Federal consistency review is found in two provisions in section 319 of the CWA. The text of these provisions is found in Appendix A.

1. Section 319(b)(2)(F)

Section 319(b)(2)(F) requires that each State NPS management program identify Federal financial assistance programs and development projects for which the State will review individual assistance applications or development projects, under EO 12372 procedures, for "their effect on water quality" and consistency with the State's NPS management program.

2. Section 319(k)

Section 319(k) requires that the Administrator of EPA transmit to the Office of Management and Budget (OMB) and to appropriate Federal departments and agencies a list of those programs and projects identified by the States under section 319(b)(2)(F). Not later than sixty days after receiving such notification, each Federal agency must modify its regulations, if necessary, to permit State review of its individual assistance applications and projects. If in the review of such applications and projects a State identifies inconsistencies with its NPS management program, the Federal agency must make efforts to accommodate the State's concerns. Pursuant to EO 12372, if the Federal agency cannot accommodate the State's concerns, it must explain the basis for its decision "in a timely manner."

II. SECTION 319 CONSISTENCY REVIEW PROCESS

A. Executive Order 12372

Section 319 directs States to conduct their Federal consistency reviews "pursuant to the procedures set forth in Executive Order 12372." EO 12372 (see Appendix B for complete text) replaced the A-95 Clearinghouse process and enabled States to establish their own "State process" for review of and comment on proposed Federal financial assistance and direct Federal development projects. Most State processes established pursuant to EO 12372 designate a "single point of contact" (SPOC) to perform clearinghouse functions, including the receipt, coordination and transmittal of project notifications and of review comments (Appendix C contains a list of SPOCs from the 1988 Catalog of Federal Domestic Assistance).

The SPOC is responsible for consolidating State comments and preparing the "State process recommendation," which constitutes the State's official review comments. Under EO 12372, Federal agencies "must make efforts to accommodate State and local elected officials' concerns" expressed as a State process recommendation through the SPOC. Where concerns cannot be accommodated, the Federal agency must explain in a timely manner its reasons for non-accommodation. If the State does not transmit its comments officially as a State process recommendation through the SPOC, the Federal agencies will still consider the comments, but the obligation to "accommodate or explain" no longer applies.

It is not our intent in this guidance to encourage States to develop a whole new review process for the section 319 Federal consistency reviews. Rather, we encourage States to use the existing EO 12372 process to accomplish the section 319 Federal consistency reviews. In general, section 319 Federal consistency reviews occur within the State intergovernmental review process established pursuant to EO 12372 and are generally subject to its substantive and procedural requirements, except for the specific provision of section 319(b)(2)(F) regarding which programs and projects may be reviewed.

B. Preparation of Section 319(b)(2)(F) List

Section 319(b)(2)(F) directs each State to identify in its NPS management program those Federal assistance programs and development projects, if any, it would like to review for consistency with its State NPS management program. The list of programs and projects should be prepared by the lead NPS agency in consultation with all other agencies, including appropriate local agencies, having NPS management responsibilities and with the State process SPOC. The State may also wish to consult the affected Federal agencies as early as practicable in order to facilitate resolution of issues that may arise during the review process.

Programs eligible for inclusion on the State's list include all programs and projects "which may have an effect on ... the State's nonpoint source pollution management program" and which are either: 1) currently subject to EO 12372, or 2) listed in the current Catalog of Federal Domestic Assistance. The lead NPS agency should consult the appropriate Federal agencies, the State SPOC, and the Catalog to determine which programs and projects are eligible for inclusion on the State's list.

A number of Federal programs are exempt from the requirements of EO 12372 for a variety of reasons, including those programs which provide direct financial assistance to individuals. However, States have the authority, pursuant to section 319(b)(2)(F), to review any program in the most recent Catalog of Federal Domestic Assistance regardless of whether it is exempt from EO 12372. Thus, States may review programs that

are exempt from EO 12372 for consistency with their NPS management program. If States use EO 12372 procedures to review such programs, the "accommodate or explain" provisions apply.

For Federal assistance programs that are implemented through uniform assistance to a large number of individuals and entities to support or encourage similar types of activities, the State may find that review of the individual assistance applications on a programmatic basis is more comprehensive and efficient than a review of each application for assistance. Review of individual applications is time consuming and resource intensive for both the States and the Federal agencies. We encourage States to focus on reviewing programs for consistency with NPS management programs rather than reviewing individual contracts or applications.

Although States have broad authority to conduct consistency reviews, their resources are limited. States are encouraged to focus section 319 Federal consistency reviews on impaired or threatened waters as identified in State NPS assessment reports or through subsequent studies or analyses. Focusing in such a fashion will help achieve the greatest water quality benefit for the resources expended.

If the lead NPS agency identifies programs or projects which it would like to review for consistency with the management program but which are not eligible for listing and review under the criteria above (i.e., currently subject to EO 12372 or listed in the current Catalog of Federal Domestic Assistance), the lead NPS agency should notify the responsible Federal agency and the appropriate EPA Regional Office. Federal agencies should make efforts to allow State section 319 consistency review of such programs and projects wherever possible; and where the Federal agency determines that section 319 consistency review is not possible, the Federal agency should inform the State of any alternative mechanism for State input.

As discussed above, if the State chooses to review any Federal programs and projects, the State must provide its list to EPA in its section 319 management program. In turn, EPA will assemble the State lists and transmit them to OMB and to appropriate Federal departments and agencies.

The lead NPS agency should also provide the list to the SPOC for EO 12372, so that the SPOC will route all assistance applications and development projects under the listed programs to the lead NPS agency for review and comment. We encourage the lead NPS agency to transmit copies of the list to all local, district, regional or other appropriate Federal agency offices to alert these agencies to provide applications and

project notifications for consistency reviews. (The Catalog of Federal Domestic Assistance includes a listing of all Federal agencies' offices.) The SPOC may also be responsible for providing this information to the appropriate Federal agencies.

C. Review Process

State NPS management programs should also include a description of the State's anticipated Federal consistency review process and a discussion of the criteria and guidelines governing the reviews. The following section discusses consistency review criteria.

When the lead NPS agency receives applications or project information from the SPOC, it should ensure that this information is routed to all appropriate cooperating State agencies and other entities having NPS management program responsibilities and interests. These cooperating agencies and entities should submit any comments to the lead NPS agency for incorporation in consensus NPS Federal consistency review comments to be transmitted to the SPOC. If consensus among the various NPS commenters cannot be reached, the lead NPS agency should still prepare a NPS Federal consistency recommendation to the SPOC but should accompany it with copies of the differing opinions.

The lead NPS agency may wish to delegate lead responsibility for providing consistency comments for particular Federal agencies to a cooperating agency where this would be more appropriate or practical. In such instances, however, the NPS lead agency should retain oversight responsibility and should remain the primary contact with the SPOC.

Because the FO 12372 obligation of "accommodate or explain" only applies to the State process recommendation submitted to the Federal agency through the State SPOC, it is imperative that the lead NPS agency work with the SPOC to ensure that its concerns are adequately reflected in the State process recommendation. The lead NPS agency may also wish to provide copies of any prepared comments directly to the Federal agency in addition to providing them to the State process. States are also encouraged to send copies of their comments to EPA Regional Offices.

For States which have not established a State process or designated a SPOC, the lead NPS agency should assume the clearinghouse functions of the SPOC. In other words, the lead NPS agency will be responsible for obtaining and disseminating project information and for coordinating and transmitting Federal consistency comments. In States without an established

State process and SPOC, however, the requirements of EO 12372 will not be strictly applicable. Comments transmitted to the Federal agencies outside of an established State process and SPOC do not trigger the "accommodate or explain" requirements of EO 12372.

NPS Federal consistency reviews must be conducted within the timeframes and deadlines already established by the State process and the Federal agencies' implementing regulations for EO 12372. Generally, these allow for comment periods of 30-60 days. The lead NPS agency should establish any internal deadlines necessary to ensure that comments may be transmitted to the State process within the established timeframes.

D. Consistency Review Criteria

The State's approved NPS management program is the review standard for Federal consistency determinations. The State will review Federal assistance applications and development projects to determine their consistency with the requirements, goals, policies and other provisions of the management program. Thus, the ability of a State to evaluate Federal consistency will depend greatly on the clarity and specificity of the management program.

Reviews should be conducted with respect to: 1) criteria developed by the State lead NPS agency based on the contents and goals of the State's NPS management program, and 2) general guidelines provided below. States should outline their Federal consistency review criteria and guidelines as clearly as possible in their management program or subsequent updates. These criteria and guidelines should be provided to the State SPOC, all State agencies with NPS responsibilities or interests, all relevant Federal agencies, and others, as appropriate.

The following considerations should serve as general guidelines for conducting Federal consistency reviews:

1. The extent to which the application or project is consistent with the requirements, goals, policies, and other provisions of the State NPS management program.
2. The extent to which the application or project will comply with applicable pollution control standards embodied in the management program, including:
 - a. Requirements for implementation of best management practices (BMPs) and other pollution control measures;
 - b. Water quality standards, including beneficial uses.

the numeric and narrative criteria established to support these uses, and the State's antidegradation policy; and

- c. Any statutory, regulatory or administrative requirements, such as permits, monitoring, or prohibition of activities under certain conditions.
- 3. The extent to which the application or project runs counter to, or needs to be coordinated with other projects or activities affecting the area's water resources.
- 4. The extent to which the application or project may support, enhance or contribute to the fulfillment of the State's NPS management program.

Reviews should consider not only direct effects of the activity, but also indirect effects and cumulative impacts. They also should consider both: 1) consistency with the mandatory provisions of the management program, and 2) consistency with non-mandatory provisions such as goal statements, policies, and recommendations. However, States should place priority on evaluating Federal programs and projects for consistency with mandatory provisions of the State's NPS management program.

E. Mitigation Measures

In its review comments, the lead NPS agency may wish to recommend mitigation measures to avoid or minimize damage to the environment. Mitigation measures may include:

- 1) not taking an action or a part of an action;
- 2) limiting the degree or magnitude of the action;
- 3) rectifying an impact by repairing, rehabilitating or restoring the affected environment;
- 4) conducting preservation or maintenance operations over the life of the action; and
- 5) replacing or providing substitute resources or environments.

The lead NPS agency may wish to request that the Federal agency include such mitigation measures as conditions of grants, contracts or permits.

F. Resolution of Consistency Conflicts

NPS Federal consistency conflicts should be handled through the existing conflict resolution mechanisms of the State process. The lead NPS agency should consult and work with the SPOC to ensure that the State's conflict resolution mechanisms are adequate and

appropriate for resolving Federal NPS consistency issues. The lead NPS agency may wish to outline the conflict resolution mechanisms in memoranda of understanding (MOU) or other formal agreements developed with the Federal agencies.

The lead NPS agency should inform the appropriate EPA Regional Office and the responsible Federal agency and/or the applicant of potentially significant conflicts as early as practicable in order to facilitate an early resolution. If the State's conflict resolution process and the transmittal of comments by the SPOC do not lead to accommodation of the lead NPS agency's concerns, the State should notify the appropriate EPA Regional Office.

G. Follow-up

Once agreement concerning accommodation of a State's concerns has been reached and an activity begins, follow-up inspections and monitoring may be necessary to ensure initial and continued consistency. Such follow-up could include: 1) on-the-ground inspection to ensure that BMPs and other control or mitigation measures are implemented, and 2) water quality monitoring to determine whether or not expected water quality is obtained.

In most cases, EPA urges Federal agencies to assume responsibility for conducting follow-up activities and ensuring that sufficient resources exist for inspections, monitoring and continued consistency. As necessary, the lead NPS agency should consult with the appropriate Federal agency to negotiate and formalize in an MOU the mutually agreed-upon responsibilities and procedures to ensure continued consistency.

H. Public Participation

The lead NPS agency may wish to provide for public participation in the consistency review process, particularly in significant or controversial reviews and in conflict resolution processes.

III. OTHER REVIEW PROCESSES AND PROGRAMS

While the primary Federal consistency review mechanism will be EO 12372 reviews, other review processes and programs may also prove useful for ensuring Federal consistency with State NPS management programs. Particularly important are the NEPA environmental review process (mainly applicable to Federal development projects) and the A-106 pollution abatement process (mainly applicable to Federal facilities and lands). Other

programs discussed in this chapter include the Federal consistency requirements of the Coastal Zone Management program and the National Estuary Program. States should also utilize other existing review mechanisms of the various Federal agencies wherever appropriate e.g., review proposed draft rules, plans, etc.

A. NEPA Process

The National Environmental Policy Act of 1969 (NEPA), as amended, directs Federal agencies to determine the potential environmental impacts of their proposed activities and to consider those impacts in their formal decision-making process. The NEPA process is intended to make environmental information available before decisions are made.

Federal agencies must prepare an Environmental Assessment (EA) and/or an Environmental Impact Statement (EIS) for all major actions significantly affecting the environment. About 10,000 EAs are prepared each year to evaluate potential environmental impacts and to determine the need for preparation of EISs. In contrast, only several hundred EISs are prepared each year, for projects viewed as having the potential for significant environmental impact.

Federal agencies are required to integrate the NEPA process with other planning at the earliest possible time. Cooperative consultation among agencies before preparation of an EIS can help: 1) ensure that planning and decisions reflect environmental values; 2) reduce the need for submission of adverse comments on the completed draft EIS; and 3) reduce the need for major changes in projects at later and more costly stages.

NEPA only requires Federal agencies "to consider" comments received during the public participation process, EO 12372 requires Federal agencies "to make efforts to accommodate or explain" State concerns. Accordingly, the requirements incumbent on Federal agencies under the two processes are not identical. Therefore, whenever possible, the EO 12372 process should be used as a vehicle for a State's review of NEPA documents to effect the "accommodate or explain" provisions of EO 12372.

When a State lead NPS agency uses the EO 12372 process for review of NEPA documents it should specify in its section 319(b)(2)(F) list those Federal programs whose EAs/EISs (whether programmatic or project-specific) it would like to review. The lead NPS agency should also submit this list to the SPOC to ensure that appropriate EISs are routed to the lead NPS agency for review and comment.

The lead NPS agency may also notify each listed Federal agency of its desire to receive requests for scoping comments and to review EISs submitted under that agency's programs. The lead NPS agency may also identify those types of projects for which it would like to receive EAs and other environmental documentation such as Findings of No Significant Impact (FONSI).

In preparing its review of the draft EIS, the lead NPS agency should evaluate the adequacy of the draft EIS and should identify any potential impacts that have not been identified in the document. The lead NPS agency should clearly identify any alternatives it finds inconsistent with its NPS management program, indicate its preferred alternative, and suggest any mitigation measures necessary to reduce or compensate for adverse impacts. In determining consistency with the management program, the lead NPS agency should use the same guidelines and criteria developed for its EO 12372 reviews (see p. 7).

The State lead NPS agency should ensure opportunity for comment by other State and local entities involved in the NPS management program and may delegate lead review responsibility to a cooperating agency if desired. Reviews of EAs or EISs by State lead NPS agencies or other agencies must be conducted within the timeframes and deadlines established for such documents.

B. A-106 PROCESS

The A-106 process requires Federal agencies to identify facilities, including lands and other property, which are not in compliance with Federal, State and local pollution abatement standards, and to provide a five-year pollution abatement control plan which includes annual cost estimates for bringing facilities into compliance (see Appendix E for text of OMB Circular A-106).

Through this process, Federal agencies plan projects to ensure continuing compliance, to meet new regulatory requirements, or to correct problems or violations identified by EPA or the States. The A-106 plans are updated by Federal agencies twice annually and budget priorities are given to projects at facilities which are currently, or soon will be, out of compliance. EPA is charged with reviewing these plans for OMB to ensure their adequacy and, if necessary, to recommend changes.

EPA may work with States to help identify applications of the A-106 process to identify and correct NPS problems. For example, some of EPA's Regional Offices

provide copies of Federal agencies' annual A-106 submissions to their States for review and comment. States which are not routinely receiving A-106 reports for review may request them from the EPA Regional Federal Facilities Coordinator.

States should report existing or potential NPS problems related to Federal facilities and lands in their section 319 annual report, in management program updates, or in other written communication to the EPA Regional Office and to the Regional Office of the Federal agency responsible for the project. Reviews conducted through the EO 12372 and NEPA processes may also reveal upcoming projects to the State which would be well-suited to the development of a five-year pollution control plan under A-106.

C. Coastal Zone Management Act

In coastal States, State Coastal Zone Management Act (CZMA) agencies have established State procedures to review proposed Federal actions for their consistency with approved State Coastal Zone management programs. CZMA Federal consistency review also operates through the State EO 12372 process and may serve as a model for NPS Federal consistency review in coastal States. The lead NPS agency and the CZMA agency may wish to coordinate and cooperate on consistency reviews of projects and applications affecting both the NPS and the CZMA management programs.

D. Section 320 - National Estuary Programs

Also relevant to coastal States is the new National Estuary Program established in section 320 of the CWA, as amended. This section provides for review of Federal financial assistance programs and Federal development projects, using EO 12372 to ascertain Federal consistency with estuarine management plans developed under section 320 of the CWA.

Although both section 319 and section 320 consistency reviews incorporate EO 12372 provisions, there are differences in the two review procedures. Despite these differences, since many of the Federal programs and projects to be reviewed for consistency under section 319 may also be reviewed for consistency under section 320, coastal States should consider coordinating these consistency review processes to the extent feasible.

IV. EPA ROLE

To the extent EPA is able to do so, EPA will support the efforts of the States and Federal agencies to fulfill the section 319 Federal consistency requirements. EPA's responsibilities fall into four main categories: 1) national/regional consistency promotion; 2) environmental review and oversight processes; 3) liaison, education and technical assistance; and 4) conflict resolution.

A. National/Regional Consistency Promotion

EPA Regional Offices may assist the State lead NPS agency in identifying major Federal programs and policies at the Regional level that are potentially inconsistent with State NPS management programs or that could be used to support these management programs. For selected high priority issues, affecting impaired or threatened waters, EPA Regional Offices may work with their other Federal agency regional counterparts and State lead NPS agencies to resolve issues and, where feasible and mutually beneficial, to redirect programs.

In particular, EPA Regions may analyze issues common to several States and arrange discussions with Federal agencies to solve these problems. Where appropriate, EPA Regions may refer national issues to EPA Headquarters for resolution through national program policies, regulations, guidance, and practices. Where possible, EPA will seek early action or resolution of identified issues, conflicts, and opportunities.

EPA Headquarters will work with other Federal agency headquarters to foster consideration of NPS concerns in the development and implementation of Federal agency legislation, regulations, policies and programs. In particular, EPA Headquarters will attempt to negotiate resolution of issues of broad scope identified by the Regions or by a significant number of States through their section 319(b)(2)(F) lists and their section 319 annual reports.

B. Environmental Review and Oversight Processes

1. NEPA

EPA Regional and Headquarters Offices will help promote Federal consistency with State NPS management programs by addressing potential NPS impacts of Federal actions through EPA's participation in the NEPA Environmental Review Process.

EPA Regional NPS coordinators may provide assistance to EPA Regional NEPA coordinators to address NPS-related concerns in EIS reviews. EPA Headquarters will attempt to ensure that NPS concerns are addressed in national-level EIS reviews such as reviews of legislation, regulations and policy.

2. A-106

EPA Regions may assist State lead NPS agencies in identifying NPS problems generated by Federal facilities and land. Where requested and where possible, EPA will assist Federal agencies in developing A-106 pollution abatement plans for these NPS problems. EPA Regions may also help ensure compliance with State NPS requirements through their review of A-106 plans.

EPA Headquarters may explore further opportunities for applying the A-106 process to NPS concerns and will inform EPA Regions and Federal agencies of any identified opportunities. EPA will also work with OMB and the Federal agencies to ensure that priority projects' budgets receive full consideration and available resources.

3. Coastal Zone Management and National Estuary Program

EPA Regional and Headquarters Offices will, for States with estuary programs, help promote the coordination of the National Estuary Program, NPS, and Coastal Zone Management Federal consistency reviews and will provide assistance where necessary.

C. Liaison, Education and Technical Assistance

EPA Regions may serve as liaisons, as needed, between States and EPA Headquarters and between States and Federal agencies. Also, where necessary, EPA Regions will develop and issue supplemental Federal consistency guidance to States and Federal agencies. EPA Regions may choose to arrange or assist with briefings, workshops and training sessions on implementing and fulfilling the Federal consistency requirements of section 319.

EPA Headquarters will conduct educational and liaison activities at the national level with Federal agency headquarters staff in accordance with the Nonpoint Sources Agenda for the Future (January 1989). Headquarters will continue to use the Federal/State/Local NPS Task Force to explain to Federal agencies their responsibilities and opportunities in the Federal consistency process.

EPA Regions and Headquarters may provide technical assistance on such matters as EMP implementation, mitigation measures, and design of water quality or on-ground monitoring systems where such technology is available. EPA Regions and Headquarters may also disseminate information on successful or innovative approaches to achieving consistency and will encourage use of interagency personnel assignments to effect intergovernmental coordination.

D. Conflict Resolution

When continued negotiations between the State lead NPS agency and a Federal agency do not result in issue resolution, the lead agency should notify the appropriate EPA Region. If requested, the EPA Region may work with the State lead NPS agency and Regional representatives of the appropriate Federal agency to attempt resolution of selected high priority issues or conflicts affecting impaired or threatened waters in a manner that is mutually acceptable to the State and the Federal agency. The EPA Region may convene a conflict resolution meeting to include the State lead agency, the local and/or Regional representatives of Federal agency, the EPA Region, and, where appropriate, other concerned parties.

Where the EPA Region is unable to negotiate a mutually acceptable accommodation between the State and the local and/or regional representatives of the Federal agency, the Regional office will inform EPA Headquarters in writing. EPA Headquarters may then notify the Headquarters office of the concerned Federal agency and may attempt to negotiate resolution of the issue. If informal negotiations between EPA staff and staff of the other Federal agency fail to resolve the conflict, the matter may be elevated within EPA for resolution as appropriate. For example, the Administrator may request OMB's assistance in resolving the conflict pursuant to the provisions of Executive Order 12088 (Appendix D).

V. LIAISON ACTIVITY

The intent of the section 319 Federal consistency provisions is to promote achievement of shared water quality goals by fostering cooperation and coordination between the States and the Federal agencies. This cooperative understanding will arise more from demonstration, education, and knowledge than from the threat of enforcement or penalty. Liaison and educational activities for the purposes of gaining understanding of the State's NPS management program will be crucial to the success of a State's NPS Federal consistency efforts and may be funded with section 319 implementation grants.

The State may wish to consider preparing and distributing a management program summary which highlights major goals, policies, programs, requirements, and targeted areas. The State may also wish to prepare a similar summary of the guidelines and specific criteria it will use in its Federal consistency reviews. Such summaries would serve as quick and accessible references for Federal agency personnel seeking to accommodate the State's concerns.

States may also wish to conduct workshops and training sessions with Federal agency personnel to ensure their understanding and cooperation with, both the management program as a whole and the Federal consistency requirements in particular. A State may wish to hire personnel specifically to work with Federal agencies to assist them in meeting the State's consistency concerns. For example, a State could detail an employee to a Federal agency to assist in preparation of development plans or proposals.

The lead NPS agency may also wish to design informational packets, workshops, and training sessions for State personnel who will be involved in the review process. These personnel might include staff of the lead agency, the State SPOC, or agencies involved in other environmental review processes. Another targeted audience might be environmental organizations or other sectors of the interested and affected public. States may also explore other, more innovative approaches to liaison and educational activities.

VI. REPORTING

This section presents reporting procedures designed to keep all parties informed, facilitate negotiations and accommodation, and enable EPA to assist States and Federal agencies in implementing the consistency provisions. EPA Regional Offices will work with States to establish mutually acceptable reporting procedures based on these guidelines.

A. State Reporting Responsibilities

Each State must submit, as part of its management program, a list of Federal programs and projects, if any, for which it will review individual applications and projects for consistency with the management program. States should also include a description of the State's anticipated Federal consistency review process and a discussion of the criteria and guidelines governing the reviews. States may update the list and other information each year in their annual reports to EPA. States may also update this information as necessary between annual reports by providing written notice to the EPA Regional Office.

When issues arising from the review of individual applications and projects cannot be resolved by the State and the relevant Federal agency(s), the State should submit to its EPA Regional Office a brief written report which includes: a) a summary of the project or application; b) the specific NPS concerns related to it; c) the efforts undertaken to date to resolve the issues; and d) the current status of the situation. EPA may use this information, as appropriate, to assist States and Federal agencies in resolving differences.

Under section 319(h)(11), States are required to report annually on progress in implementation of their NPS management program. This annual report should include a discussion of the State's Federal consistency activities for that year. This section should describe: a) liaison, educational, and technical transfer activities undertaken with respect to Federal consistency; b) consistency reviews performed; c) problems identified; d) problem resolutions; and e) unresolved problems and issues.

B. EPA Regional Office Reporting Responsibilities

Each EPA Regional Office will be responsible for transmitting the initial lists of Federal programs and projects provided in each State's management program to EPA Headquarters. Each EPA Regional Office may update these lists each year in its annual report submission to EPA Headquarters if updated information becomes available from the States.

When a State informs the EPA Regional Office of an unresolved conflict with a Federal agency and requests assistance, the Regional Office may decide to work with the State lead NPS agency and the appropriate Federal agency to attempt resolution of selected high priority issues or conflicts affecting impaired or threatened waters. If an EPA Regional Office decides to attempt such resolution, it should notify EPA Headquarters in writing. Accompanying this notification to Headquarters should be a brief explanation of the steps the Region plans to take to address the situation and a description of desired Headquarters' assistance, if any.

The EPA Regional Office will be responsible for keeping Headquarters informed of progress throughout the resolution process and should notify EPA Headquarters in writing if it determines that conflict resolution will not be possible at the Regional level.

EPA Regional Offices should include in their annual reports to EPA Headquarters a discussion of the Region's Federal consistency activities for that year. This section should include highlights of the States' activities as well as a

summary of the EPA Regional Office's efforts to promote and ensure Federal consistency.

C. EPA Headquarters Reporting Responsibilities

EPA Headquarters will be responsible for transmitting the States' lists of Federal programs and projects for which applications will be reviewed for Federal consistency to OMB and the appropriate Federal departments and agencies.

When an EPA Regional Office notifies EPA Headquarters of the need to elevate a Federal consistency conflict for resolution, EPA Headquarters may provide similar written notification to the headquarters office of the involved Federal agency. This notification will include a description of the project, the conflict, the resolution efforts to date, and a recommended course of action.

In its section 319 Final Report to Congress, EPA Headquarters will, pursuant to section 319(m)(2)(G): 1) identify the activities and programs of Federal agencies which are inconsistent with State NPS management programs and 2) recommend modifications so that such activities and programs are consistent with and assist the States in implementation of their NPS management programs.

Appendix A
Text of the Federal Consistency
Provisions of the Clean Water Act

Section 319

“(F) An identification of Federal financial assistance programs and Federal development projects for which the State will review individual assistance applications or development projects for their effect on water quality pursuant to the procedures set forth in Executive Order 12372 as in effect on September 17, 1983, to determine whether such assistance applications or development projects would be consistent with the program prepared under this subsection; for the purposes of this subparagraph, identification shall not be limited to the assistance programs or development projects subject to Executive Order 12372 but may include any programs listed in the most recent Catalog of Federal Domestic Assistance which may have an effect on the purposes and objectives of the State's nonpoint source pollution management program.

Section 319

"(k) CONSISTENCY OF OTHER PROGRAMS AND PROJECTS WITH MANAGEMENT PROGRAMS.—The Administrator shall transmit to the Office of Management and Budget and the appropriate Federal departments and agencies a list of those assistance programs and development projects identified by each State under subsection (b)(2)(F) for which individual assistance applications and projects will be reviewed pursuant to the procedures set forth in Executive Order 12372 as in effect on September 17, 1983. Beginning not later than sixty days after receiving notification by the Administrator, each Federal department and agency shall modify existing regulations to allow States to review individual development projects and assistance applications under the identified Federal assistance programs and shall accommodate, according to the requirements and definitions of Executive Order 12372, as in effect on September 17, 1983, the concerns of the State regarding the consistency of such applications or projects with the State nonpoint source pollution management program.

SEC. 3. (a) The State process referred to in Section 2 shall include those where States delegate, in specific instances, to local elected officials the review, coordination, and communication with Federal agencies.

(b) At the discretion of the State and local elected officials, the State process may exclude certain Federal programs from review and comment.

SEC. 4. The Office of Management and Budget (OMB) shall maintain a list of official State entities designated by the States to review and coordinate proposed Federal financial assistance and direct Federal development. The Office of Management and Budget shall disseminate such lists to the Federal agencies.

SEC. 5. (a) Agencies shall propose rules and regulations governing the formulation, evaluation, and review of proposed Federal financial assistance and direct Federal development pursuant to this Order, to be submitted to the Office of Management and Budget for approval.

(b) The rules and regulations which result from the process indicated in Section 5(a) above shall replace any current rules and regulations and become effective September 30, 1983.

[Sec. 5 amended by EO 12416 of Apr. 8, 1983, 48 FR 15587, 3 CFR, 1983 Comp., p. 186]

SEC. 6. The Director of the Office of Management and Budget is authorized to prescribe such rules and regulations, if any, as he deems appropriate for the effective implementation and administration of this Order and the Intergovernmental Cooperation Act of 1968. The Director is also authorized to exercise the authority vested in the President by Section 401(a) of that Act (42 U.S.C. 4231(a)), in a manner consistent with this Order.

SEC. 7. The Memorandum of November 8, 1968, is terminated (33 Fed. Reg. 16487, November 13, 1968). The Director of the Office of Management and Budget shall revoke OMB Circular A-95, which was issued pursuant to that Memorandum. However, Federal agencies shall continue to comply with the rules and regulations issued pursuant to that Memorandum, including those issued by the Office of Management and Budget, until new rules and regulations have been issued in accord with this Order.

SEC. 8. The Director of the Office of Management and Budget shall report to the President by September 30, 1984 on Federal agency compliance with this Order. The views of State and local elected officials on their experiences with these policies, along with any suggestions for improvement, will be included in the Director's report.

[Sec. 8 amended by EO 12416 of Apr. 8, 1983, 48 FR 15587, 3 CFR, 1983 Comp., p. 186]

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Appendix B

Text of Executive Order 12372

Executive Order 12372—Intergovernmental review of Federal programs

SOURCE: The provisions of Executive Order 12372 of July 14, 1982, appear at 47 FR 14442, 3 CFR, 1982 Comp., p. 197, unless otherwise noted.

By the authority vested in me as President by the Constitution and laws of the United States of America, including Section 401(a) of the Intergovernmental Cooperation Act of 1968 (42 U.S.C. 4231(a)), Section 204 of the Demonstration Cities and Metropolitan Development Act of 1966 (42 U.S.C. 3534) and Section 301 of Title 3 of the United States Code, and in order to foster an intergovernmental partnership and a strengthened federalism by relying on State and local processes for the State and local government coordination and review of proposed Federal financial assistance and direct Federal development, it is hereby ordered as follows:

Preamble amended by EO 12416 of Apr. 8, 1983, 48 FR 15587, 3 CFR, 1983 Comp., p. 1441.

SECTION 1. Federal agencies shall provide opportunities for consultation by elected officials of those State and local governments that would provide the non-Federal funds for, or that would be directly affected by, proposed Federal financial assistance or direct Federal development.

SEC. 2. To the extent the States, in consultation with local general purpose governments, and local special purpose governments they consider appropriate, develop their own processes or refine existing processes for State and local elected officials to review and coordinate proposed Federal financial assistance and direct Federal development, the Federal agencies shall, to the extent permitted by law:

(a) Utilize the State process to determine official views of State and local elected officials.

(b) Communicate with State and local elected officials as early in the program planning cycle as is reasonably feasible to explain specific plans and actions.

(c) Make efforts to accommodate State and local elected officials' concerns with proposed Federal financial assistance and direct Federal development that are communicated through the designated State process. For those cases where the concerns cannot be accommodated, Federal officials shall explain the bases for their decision in a timely manner.

(d) Allow the States to simplify and consolidate existing Federally required State plan submissions. Where State planning and budgeting systems are sufficient and where permitted by law, the substitution of State plans for Federally required State plans shall be encouraged by the agencies.

(e) Seek the coordination of views of affected State and local elected officials in one State with those of another State when proposed Federal financial assistance or direct Federal development has an impact on interstate metropolitan urban centers or other interstate areas. Existing interstate mechanisms that are redesignated as part of the State process may be used for this purpose.

(f) Support State and local governments by discouraging the reauthorization or creation of any planning organization which is Federally-funded, which has a Federally-prescribed membership, which is established for a limited purpose, and which is not adequately representative of, or accountable to, State or local elected officials.

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