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STRONG ENFORCEABLE POLICIES: EXAMPLES AND TIPS



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I. Introduction and Background

Purpose. Enforceable policies (EPs) are the backbone of federal consistency review.¹ They provide the substantive standards on which state and territorial coastal management programs (CMPs) rely to influence federal actions in and affecting the coastal zone through the federal consistency process, pursuant to Section 307 of the Coastal Zone Management Act (CZMA) (16 U.S.C. § 1456). The process allows states and territories (hereafter referred to as “states”) to review not only proposed federal agency activities (e.g., navigation dredging by the Army Corps of Engineers), but also proposed activities by any non-federal entity requiring a federal license, permit, or permission (e.g., a Clean Water Act Section 404 permit). In general, if a state identifies one or more specific enforceable policies with which a federally authorized activity would be inconsistent, the permit or license may not be issued.²

The enforceable policies of coastal management programs vary significantly within and across coastal states and territories, both in content and in form. This is due both to differences between states’ laws and regulations and to choices made by states in developing and maintaining their National Oceanic and Atmospheric Administration (NOAA)-approved coastal management programs. In a legal context, some EPs are clear in their mandates and constructed well for federal consistency review purposes; others are not. Certain coastal resources, uses, and issues are addressed robustly in some states’ EPs, but less so in others. However, all CMPs are established and governed by living documents, which can be updated through the “program change” process (subject to NOAA’s approval), meaning states can decide to incorporate new or revised enforceable policies into their programs at any time.

This document highlights good examples of enforceable policies from across ten states whose coastal programs were reviewed by the Environmental Law Institute (ELI) in 2020 and 2021: California, Florida, Mississippi, New Jersey, New York, North Carolina, South Carolina, Texas, Virginia, and Washington. The examples, explanations, and discussions of policies’ strengths and weaknesses primarily focus on an illustrative subset of high value habitat types—tidal wetlands, submerged aquatic vegetation (e.g., eelgrass), and oysters—but also cover topics such as open ocean habitat and climate adaptation. However, these examples are intended to be useful beyond their specific subject matter, helping to shed light on the characteristics of strong EPs more generally.

By demonstrating robust resource protections, use restrictions, and other requirements and exemplifying language conducive to federal consistency review, these examples can be used by CMPs and other stakeholders who are interested in evaluating the strength of existing EPs and/or considering the possibility and desirability of future policy updates.

¹ It is beyond the scope of this paper to provide comprehensive background information on the Coastal Zone Management Act and the federal consistency authority. For a concise overview of federal consistency, see National Oceanic and Atmospheric Administration – Office of Coastal Management (NOAA OCM), CZMA FEDERAL CONSISTENCY OVERVIEW: SECTION 307 OF THE COASTAL ZONE MANAGEMENT ACT OF 1972 (Feb. 24, 2020), available at: <https://coast.noaa.gov/data/czm/consistency/media/federal-consistency-overview.pdf>.

² Under the CZMA and its regulations, applicants have the right to appeal a state’s objection to the Secretary of Commerce. Subpart H of the CZMA regulations authorizes the Secretary to override the state’s objection for two reasons: the activity is “consistent with the objectives of the CZMA;”¹³⁵ or the activity is otherwise “necessary in the interest of national security” (i.e., national security interest would be significantly impaired if the activity does not go forward as proposed). 15 C.F.R. § 930.121-22.

Evaluating “Enforceability” of Policies. The CZMA defines the term “enforceable policy” broadly to include state policies which are legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions, by which a state exerts control over private and public land and water uses and natural resources in the coastal zone (16 U.S.C. § 1453.) In the decades since the CZMA’s enactment, NOAA has further defined the criteria that a state law, regulation, plan, or other instrument must meet to be incorporated into the program as an enforceable policy for the purpose of federal consistency reviews, culminating in the promulgation in 2019 of a federal rule codifying eight essential characteristics of an enforceable policy (15 CFR 923.84(b).)

Under the rule, for NOAA to approve a state’s request to incorporate a new or revised enforceable policy into its coastal management program, the policy must:

- **Be legally binding under state law** – To be an enforceable policy for federal consistency purposes, the policy must be enforceable. Among other means of demonstrating the binding nature of a policy, the use of “shall” or “must,” rather than “should” or “may,” indicate the requirement of action or compliance.
- **Not be preempted by federal law** – If a state policy is preempted by federal law, the policy is not legally binding under state law, so it cannot be an enforceable policy.³
- **Contain standards of sufficient specificity to guide public and private uses** – The more clearly a policy states a prohibition, mandated action, or other requirement, the easier it is to comply with and enforce it. Furthermore, policies that apply broadly (to public and private actors) are easier to defend to NOAA than ones directed at a narrow audience or housed in legislative mandates to agencies or local governments.
- **Not refer to or otherwise purport to apply to federal agencies, federal lands, or federal waters** – Through the CZMA’s federal consistency provision, the federal government offered to follow coastal policies enforceable against other coastal users in the state (i.e. other public and private entities), but not state policies directed only at the federal government or lands or waters under federal jurisdiction.
- **Apply only to areas and/or entities under state jurisdiction** – The federal consistency process cannot be used to implement and enforce state policies aimed at areas (e.g., federal waters) and/or entities (e.g., federal agencies) that the state does not have authority to regulate.
- **Not adversely affect the “national interest” objectives of the CZMA** – NOAA will not approve the incorporation of policies into a state’s coastal program if the agency deems them to adversely affect the objectives described in 16 U.S.C. 1451 and 1452.⁴

³ According to NOAA guidance, “A policy is likely to be preempted if it regulates liquified natural gas facilities, hydropower, marine mammals, overflight, or railroad abandonment.” NOAA OFFICE OF COASTAL MANAGEMENT (OCM), ENFORCEABLE POLICIES TRANSCRIPT at 10 (accessed Nov. 29, 2022),

https://coast.noaa.gov/data/digitalcoast/elearning/captivate/enforceable_policies/docs/enforceable-policies-transcript-508c.pdf.

⁴ A recent instance of such a denial can be found in NOAA’s response to New Jersey’s request to incorporate the Shore Tourism and Ocean Protection from Offshore Oil and Gas Act (STOP Act) into the New Jersey coastal program as an enforceable policy. See NOAA OCM, CZMA Program Change Portal, Program Change Request Details: NJ 2018-1 (Sept. 19, 2018), <https://coast.noaa.gov/czmprogramchange/#/public/change-view/679>.

- **Not discriminate against a particular type of activity or entity** – Enforceable policies must apply to all relevant public and private entities that would have similar coastal effects.⁵
- **Not incorporate by reference other state or local requirements** – To become enforceable policies for federal consistency purposes, policies must be proposed to NOAA and evaluated and approved by NOAA. A reference to another policy within the language of an approved policy does not make that other policy also enforceable; such policy must be submitted to NOAA for independent incorporation into the state’s management program.⁶

Enforceable policies approved by NOAA in years past were not always strictly held to these standards, and exceptions still occur, though often with a qualification of NOAA’s approval. (For example, all program approvals now contain a standard qualification notifying the program that EPs may not incorporate other policies by reference, and that no “referenced policy may be applied for CZMA federal consistency review purposes unless that policy has been separately reviewed and approved as an enforceable policy by the Office for Coastal Management.”⁷) As a result, some NOAA-approved enforceable policies use “should” rather than “shall,” contain relatively vague standards, or even reference other laws or federal waters. Still, the enforceability criteria listed above, among other policy characteristics described later in this document, should be considered when evaluating the strength and reliability of an existing enforceable policy for federal consistency review, particularly if these policies may underpin a controversial decision by the state. These criteria should also be considered when identifying potential revisions to existing enforceable policies and suggesting language for new state policies that may be subsequently submitted to NOAA for incorporation as EPs.

⁵ NOAA’s denial of New Jersey’s STOP Act (see previous note) also references discrimination, noting, “NOAA will not approve proposed changes to enforceable policies that are arbitrarily discriminatory...and states cannot single out and discriminate against one industry without significant justification. When reviewing whether a proposed discriminatory policy is justified, [NOAA OCM] will also determine if the policy is limited in geographic scope, and whether the proposed change would adversely impact the national interest.” LETTER FROM JOELLE GORE, NOAA OCM, TO VIRGINIA KOPKASH, NEW JERSEY COASTAL PROGRAM MANAGER, RE: DENIAL OF REQUEST TO INCORPORATE THE STOP ACT (Sept. 19, 2018), available at: <https://coast.noaa.gov/czmprogramchange/#/public/change-view/679>.

⁶ See also NOAA OCM, CZMA FEDERAL CONSISTENCY OVERVIEW, *supra* note 1, at 6.

⁷ See, e.g., LETTER FROM JOELLE GORE, NOAA-OCM, TO KATHLEEN LEYDEN, MAINE DEPARTMENT OF MARINE RESOURCES, RE: PROGRAM CHANGE APPROVAL (Sept. 16, 2022), available at: <https://coast.noaa.gov/czmprogramchange/#/public/change-view/1273>.

The Importance of Updating Enforceable Policies

Since the enforceable policies that apply for federal consistency review purposes are limited to policies that have been specifically approved by NOAA, the version of the statute, regulation, or plan that was in effect at the time of NOAA's approval is the enforceable policy – not necessarily the version of the law that is *currently* in effect. When the law or other authority underlying an EP is amended later by a state legislature or agency, the changes should be submitted to NOAA for incorporation into the CMP. This allows strengthened policies to be properly reflected in federal consistency reviews and provides project proponents a more accurate representation of the enforceable policies with which the state expects compliance.

According to the federal regulations governing CZMA program changes, if and when previously approved enforceable policies “become obsolete or unenforceable” through subsequent changes in state statutes/regulations, “such policies will no longer be enforceable for purposes of CZMA Federal consistency review” (15 C.F.R. 923.84(c)). As an example, the regulation explains that “a state law change may repeal a previous policy or may change the policy in a manner that changes the scope and application of the policy,” resulting in a “new or substantially revised policy” (id). Guidance issued by NOAA's Office of Coastal Management goes further, stating: “If a state law supersedes or substantively revises an existing enforceable policy, neither the old policy nor the new or revised policy can be used for federal consistency until the changes are approved by NOAA.”⁸ A “substantive” revision is a lower bar than the “substantially revised” phrase used in the federal regulation, and it could open the door to more enforceable policies being deemed inapplicable for federal consistency purposes if not promptly updated via approved program change.

Types of Enforceable Policies Used by Coastal Programs. Among the 34 states and territories that participate in the National Coastal Zone Management Program under the CZMA, there is significant variation in the sources and structure of enforceable policies.

Form of Policies. **Some coastal programs submit complete sections of full-text statutes, regulations, and other documents** to NOAA for incorporation as enforceable policies, resulting in collections of enforceable policies that can be more than a thousand pages of text. Florida is one example of a state that has taken this approach. **Other programs submit what are referred to as “narrative policies,”** which are comparatively brief statements of policy that are either verbatim excerpts from or summaries of one or more statutes, regulations, or other binding legal instruments. A collection of narrative enforceable policies can be well under a hundred pages of text. Virginia, for instance, utilizes narrative enforceable policies.

Source of Policies. A common source of enforceable policies is state statutes. In some states—e.g., California—there is a single comprehensive coastal planning statute that was enacted by the state legislature in response to the federal CZMA. In other states, multiple statutes relevant to a wide range of issues and state agencies provide the foundation for a “networked” coastal program, like the one in Florida. Many programs also use state regulations for enforceable policies, which makes sense because regulations tend to be more detailed than their authorizing legislation, and NOAA

⁸ NOAA OCM, ENFORCEABLE POLICIES TRANSCRIPT, *supra* note 3, at 23.

expects enforceable policies to include specific standards to guide public and private uses. Indeed, as NOAA has become stricter about the need for enforceable policies to include a clear standard, some states are auditing their regulations with the goal of increasing specificity and clarity.

Some state coastal programs use other types of legally binding documents, such as plans and technical manuals, as the source of enforceable policies. In New Jersey, for example, sources of enforceable policies include the Meadowlands District Master Plan and the state Department of Environmental Protection's Technical Manual for Evaluating Wildlife Impacts of Wind Turbines Requiring Coastal Permits.⁹ The sources of the enforceable policies need not be state products or statewide in application: in some states (e.g., New York), NOAA-approved *local* ordinances and plans provide further detail on enforceable policies' implementation and/or create additional requirements that apply only within the part of the coastal area under that local government's jurisdiction.

Framing of Policies. It also can be useful to think of enforceable policies in terms of how they are framed. Enforceable policies typically fall into the following categories:

- **Resource-based**, concerning one or more types of biological or physical resources in the coastal zone (e.g., plants, fish and animals, minerals);
- **Use-based**, concerning one or more types of activities that occur in the coastal zone (e.g., development, public access/recreation, fishing, energy-related activities, historic preservation);
- **Area-based**, concerning specific regions or locations within the coastal zone; or
- Some combination of these.

States' adoption of enforceable policies in these categories can be traced to the provisions of the Coastal Zone Management Act. The CZMA's federal consistency provision allows state coastal programs to review federal actions that have reasonably foreseeable effects "on any land or water **use** or natural **resource**" of the coastal zone, and approved state CMPs must include, among other elements, "[a]n inventory and designation of **areas** of particular concern within the coastal zone" (16 U.S.C. §§ 1456(c), 1455(d) (emphases added)). While some states explicitly categorize their policies as resource-based, use-based, and/or area-based (e.g., New Jersey), in other states, the "type" of policy is implicit.

In many cases, it is difficult to categorically determine whether a policy is more resource-based, use-based, or area-based, and reasonable readers may disagree on the characterizations of some examples in the next section. Less important than an individual policy's characterization, however, is the use of policy framing considerations to facilitate a holistic evaluation of an enforceable policy collection, using these rough classifications as guideposts for identifying gaps in legacy policies' coverage of resources, areas, and uses that are important to the state in the present and near future.

⁹ See N.J. Department of Environmental Protection, Coastal Management Program: Enforceable Policies (last updated Mar. 24, 2022), https://www.nj.gov/dep/cmp/czm_enforcepolicies.html.

It is important to note that in some cases, an enforceable policy that is exemplary in certain ways also contains one or more minor “defects”—i.e., aspects which may or may not pass muster with NOAA today for unqualified approval pursuant to the eight criteria of enforceability codified by regulation in 2019. In these instances, a **red font color** and/or footnote are used to point out how the policy could be strengthened by today’s standards.

II. Example Policies for Protecting Key Habitats

Below are various examples of strong enforceable policies that have been adopted by the ten states within ELI’s 2020-2021 review. As noted previously, most of these examples are focused on specific nearshore and estuarine habitat types—tidal wetlands, submerged aquatic vegetation (eelgrass), and oysters—but they also provide a basis for discussion and analysis that apply to EPs in general.

Since the precise language and phrasing of policies are critical to their enforceability, emphases have been added here to help distinguish verbatim excerpts of enforceable policy language (italicized) from ELI’s accompanying descriptions and analyses.

A. Resource-Based Policies: Examples and Discussion

A resource-based policy is a straightforward way to protect coastal resources like habitat, species, and minerals from a broad range of potentially conflicting or damaging uses. Resource-based policies make it clear to federal consistency applicants, NOAA, and other stakeholders that it is state policy to protect living, cultural, and aesthetic resources whose value and services may be difficult to monetize or otherwise quantify when a federal agency or permit applicant is balancing environmental and economic interests of a proposed project. Another benefit of this approach is that resource-based policies typically will not risk running afoul of NOAA’s requirement that enforceable policies not discriminate against a particular use, activity, or industry.

Most CMPs include some type of protection for estuarine and nearshore habitats, but programs vary widely in terms of how—and how well—their enforceable policies address these habitats.

Broad vs. Specific Resource Policies. A **broadly worded resource-based policy** can prove useful in its flexibility, allowing a program sufficient latitude to interpret its language as may be necessary to address a wide range of circumstances. A downside, of course, is that the same latitude is available to project proponents and NOAA, who may argue for a different interpretation. Still, this approach is a reasonable choice, given the inability of programs to anticipate every possible scenario that may arise in a proposed federal action.

A **California** (California Coastal Commission (CCC) segment) policy, for example, states:

Marine resources shall be maintained, enhanced, and, where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine

environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes (Cal. Pub. Res. Code § 30230).

The above policy is strong in its phrasing, worded in mandatory terms (i.e., using “shall” in each sentence). Furthermore, by using imperative language, the policy’s obvious general applicability precludes any argument that it discriminates against a particular use group or entity. Several of the policy’s key terms (e.g., “maintained,” “healthy,” “adequate”) are not further defined, leaving them subject to interpretation by both CCC and project proponents; however, when reviewing challenges to the CCC’s expansive interpretation of other broad language found in the California Coastal Act (the statutory source of this policy and the other EPs of the CCC), California courts have tended to “construe it liberally to accomplish its purposes and objectives, giving the highest priority to environmental considerations.”¹⁰

Using Local Policies to Provide More Detail

In some states, **broad resource-based policies that apply statewide are complemented by local enforceable policies**, which can be used to provide more detail on how a CMP is implemented within a given municipality.

In **California’s San Francisco Bay** (BCDC segment), for instance, one of the generally applicable policies in the San Francisco Bay Plan is Subtidal Area Policy 2:

Subtidal areas that are scarce in the Bay or have an abundance and diversity of fish, other aquatic organisms and wildlife (e.g., eelgrass beds, sandy deep water or underwater pinnacles) should be conserved. Filling, changes in use; and dredging projects in these areas should therefore be allowed only if: (a) there is no feasible alternative; and (b) the project provides substantial public benefits.

Although it was approved by NOAA as an enforceable policy, this policy includes relatively weak language (“**should**” instead of “shall” or “must”); yet it serves as a basis for more specific locally applicable policies. One of these is found among the program’s Plan Map Policies (Map 4 and Map 5): “*Protect eelgrass beds and nearby endangered species habitats*” at Gateway Shoreline Park. This policy specifies that a certain type of subtidal habitat, eelgrass beds, be protected at the stated location. Moreover, it uses imperative language, thereby strengthening the “should” standard found in the generally applicable subtidal area policy.

¹⁰ E.g., *Elec. Pointe, LLC v. California Coastal Comm'n*, No. B211755, 2009 WL 3808354, at 2 (Cal. Ct. App. Nov. 16, 2009; unpublished and thus restricted for citation in California courts) (citing *McAllister v. California Coastal Com'n*, (2008) 169 Cal.App.4th 912, 928-929). In the legislature’s instructions in the statute for resolving conflicts between one or more of the enforceable policies, the legislature takes care to note that a specific provision does not necessarily trump a broad one: conflicts between EPs are to “be resolved in a manner which on balance is the most protective of significant coastal resources. In this context, the Legislature declares that *broader policies* which, for example, serve to concentrate development in close proximity to urban and employment centers *may be more protective, overall, than specific* wildlife habitat and other similar resource policies.” Ca. Pub. Res. § 30007.5.

On the other hand, **resource-based policies specifying protections for particular living resources and/or habitat types** can help ensure that federal consistency applicants interpret the policy as intended by the state: to protect specific, valuable living resources and habitats from impacts of coastal uses. These policies can address one or more species or habitat types. One benefit of crafting an enforceable policy addressing a single resource/habitat type is the ability to tailor the protective language to that resource's needs.

In **New Jersey**, for example, the Submerged Vegetation Habitat enforceable policy confers special protections on the following habitats, defined clearly and in detail:

*[W]ater areas supporting or documented as previously supporting rooted, submerged vascular plants such as widgeon grass (*Ruppia maritima*), sago pondweed (*Potamogeton pectinatus*), horned pondweed (*Zannichellia palustris*), and eelgrass (*Zostera marina*). In New Jersey, submerged vegetation is most prevalent in the shallow portions of the Navesink, Shrewsbury, Manasquan, and Metedeconk Rivers, and in Barnegat, Manahawkin, and Little Egg Harbor Bays. Other submerged vegetation species in lesser quantities include, but are not limited to, the following: water weed (*Elodea nuttalli*), *Eriocaulon parkeri*, *Liaopsis chinensis*, *Naja flexilis*, *Nuphar variegatum*, *Potamogeton crispus*, *Potamogeton epiphydrus*, *Potamogeton perfoliatus*, *Potamogeton pusillus*, *Scirpus subterminalis*, and *Vallisneria americana*. Detailed maps of the distribution of the above species for New Jersey, and a method for delineation, are available from the Department in the New Jersey Submerged Aquatic Vegetation Distribution Atlas (Final Report), February, 1980, conducted by Earth Satellite Corporation and also on 'Eelgrass Inventory' maps prepared by the Division of Fish and Wildlife, Bureau of Shellfisheries, 1983. (N.J. Admin. Code 7:7-9.6(a).)¹¹*

The policy establishes several specific categories of activities that are potentially permissible in SAV habitat and **sets out standards for each activity that are aimed at avoiding or minimizing impacts on the habitat**. For example, the construction of private boat docks, which can impact SAV by blocking light penetration if the footprint is too large, must adhere to the following siting and design standards found in the policy:

6. Construction of a single noncommercial dock or pier [is potentially permissible] provided that:

- i. There are no practicable or feasible alternatives to avoid impacts to submerged vegetation habitat at the site;*
- ii. The width of the structure will not exceed four feet, except for that portion of the structure adjacent to the mooring area, where the width and length may not exceed six and 20 feet, respectively;*
- iii. The pier shall have no more than two designated slips. No boats may be moored at a non-designated pier/dock area;*
- iv. No more than one pier shall be placed for every building lot and each building lot shall have a forty foot or greater frontage on the water. Where more than one lot has been assembled for the purpose of building, only one pier will be allowed;*

¹¹ If New Jersey relies on the referenced map and delineation method for defining SAV habitat for purposes of consistency review, the referenced materials should be submitted to NOAA for independent corporation as enforceable policies.

- v. *No dredging shall be performed in conjunction with the use of the dock or pier;*
- vi. *A minimum water depth of four feet at mean low water must be present in the area where the boats will be moored; and*
- vii. *There is no alternative mooring area at the site that would have less impact on the submerged aquatic vegetation...*

Another interesting feature of this policy is that it allows one type of relatively benign construction in SAV habitat when it is for the purpose of avoiding a more harmful activity, under very specific conditions:

7. The extension of existing piers or floating docks through submerged vegetation habitat to water at least four feet deep at mean low water, for the purpose of eliminating dredging or boating through submerged vegetation habitat, provided the width of the extended portion of the pier does not exceed four feet (except for the portion of the pier adjacent to the mooring area where the width shall not exceed six feet), there will be no increase in the number of boat moorings, and no dredging will be performed in conjunction with the use of the structure...

New Jersey's enforceable policies also include a specific Shellfish Habitat policy, which clearly defines shellfish habitat as “*an estuarine bay or river bottom which currently supports or has a history of production for hard clams (*Mercenaria mercenaria*), soft clams (*Mya arenaria*), eastern oysters (*Crassostrea virginica*), bay scallops (*Argopecten irradians*), or blue mussels (*Mytilus edulis*), or otherwise listed below in this section.*” The policy includes several specific criteria for how to determine whether an area receives special protection as a shellfish habitat; notably, it takes into account not only current shellfish density, but an area’s potential to support shellfish habitat, based on historic data¹²:

To qualify as a shellfish habitat special area, the area must meet at least one of the following criteria:

- 1. The area has a current shellfish density equal to or greater than 0.20 shellfish per square foot;*
- 2. The area has a history of natural shellfish production according to data available to the New Jersey Bureau of Shellfisheries, or is depicted as having high or moderate commercial value in the Distribution of Shellfish Resources in Relation to the New Jersey Intracoastal Waterway (U.S. Department of the Interior, 1963) and/or "Inventory of New Jersey's Estuarine Shellfish Resources" (Division of Fish, Game and Wildlife, Bureau of Shellfisheries, 1983-present)*
- 3. The area is designated by the State of New Jersey as a shellfish culture area as authorized by N.J.S.A. 50:1 et seq. Shellfish culture areas include estuarine areas presently leased by the State for shellfish aquaculture activities or hard clam relay, transplant and transfer as well as those areas suitable for future shellfish aquaculture development; or*
- 4. The area is designated as productive at N.J.A.C. 7:25-24, Leasing of Atlantic and Delaware Bay Bottom for Aquaculture.*

The policy prohibits “[d]evelopment which would result in the destruction, condemnation (downgrading of the shellfish growing water classification) or contamination of shellfish habitat is prohibited, unless the proposed development is a dock, pier, or boat mooring, expansion of an existing marina or construction of a new marina in limited infill situations, dredging, living shoreline, or a development required for national security...” and goes on to

¹² If New Jersey relies on the referenced data sources for defining shellfish habitat for purposes of federal consistency review, the referenced materials should be submitted to NOAA for independent incorporation as enforceable policies.

provide more detail about circumstances in, and conditions under, which the enumerated exceptions may be allowed (e.g. requiring docks and piers to be built using non-polluting materials; limiting bulkhead replacement to one time per location to minimize encroachment on shellfish habitat). The policy also includes mitigation requirements.

Another strength of New Jersey's Shellfish Habitat policy is that it provides a clear, unambiguous definition for the term "destruction," to include "*actions of filling to create fast land, overboard dumping, or disposal of solids or dredged materials which would smother shellfish populations, or create unsuitable conditions for shellfish colonization or the creation of bottom depressions with anoxic conditions*" (N.J. Admin. Code 7-7:9.2). Clear and detailed definitions add further specificity to enforceable policies' standards, potentially making it easier for the CMP to demonstrate the specific ways a proposed activity would violate the standard (and thus be inconsistent with the coastal program). In general, it is advisable for states to affirmatively submit the definitions section of EPs' underlying statutes and regulations to NOAA for incorporation into the program, and to avoid incorporating by reference definitions used in other areas of state law and/or by other agencies (unless the original source of the definition has been separately incorporated).

While New Jersey's habitat protection policies are made up of administrative code sections, **narrative policies can also be used to specify resource-based protections** for one or more species. For example, in **Virginia**, a narrative enforceable policy on marine fisheries has several elements that are explicitly relevant to oyster conservation, replenishment, and restoration. The narrative enforceable policy first states broadly that the policy of Virginia is "*to conserve and promote seafood and marine resources.*" Then, a set of six more-specific requirements apply to "*any activity in the Commonwealth's tidal waters.*" Several of the requirements are linked to oyster habitat, including:

C. Protect spawning stock, nursery areas and habitat.

D. Not encroach upon the natural oyster beds, rocks, and shoals of the Commonwealth, which shall not be leased, rented, or sold but shall be held in trust for the benefit of the people of the Commonwealth.

E. Engage in the planting or propagating of oysters only on assigned leases (i) that are not on waterfront that is already assigned or reserved for the riparian owners, (ii) on the beds of the bays, rivers, and creeks and shores of the sea lying outside the limits of navigation projects adopted and authorized by Congress and not required for the disposal of materials dredged incident to the maintenance of such projects, and (iii) on grounds other than the Commonwealth's natural oyster beds, rocks, or shoals held in trust for the benefit of the public.

F. Not encroach upon the lawful use and occupation of previously leased ground for the term of the lease unless exercising riparian rights or the right of fishing.¹³

Even though this is a narrative policy that summarizes more detailed requirements found across many statutory sections (see footnote 13), it remains specific enough to provide strong, clear protection to a valued resource.

¹³ This narrative policy cites as the underlying state authority: Va. Code Ann. §§ 28.2-101, -201, -203, -203.1, -225, -551, -600, -601, -603 -618, and -1103, -1203 and the Constitution of Virginia, Article XI, Section 3.

Expanding the Scope of Resource-Based Policies. Beyond specifying protections for valuable habitat types from activities occurring immediately within them, resource-based EPs can be crafted to expand the geographic reach of their protective coverage.

A common approach to broadening the geographic scope of habitat protection policies is to establish in enforceable policies **buffer areas** that help separate habitats from development activities. Some states include buffer provisions intermittently, within one or more specific policies; for example, one of **Mississippi's** marina siting provisions requires that marinas must be “*located at least one thousand (1,000) feet from shellfish harvesting areas*” (Ms. Admin. Code Title 22, Part 23, Rule 08 § 102). Similarly, a **New Jersey** dredging EP provides that dredging is permissible “*on a seasonally restricted basis only*” within 1,000 meters of oyster beds, in recognition of the fact that dredging impacts are especially harmful to oyster reproduction at certain times of year (N.J.A.C. 7:7-12.6(c).)

Other states have policies that establish habitat buffer areas—and prescribe standards for their management and use—categorically. In **North Carolina**, the enforceable policies categorically define a landward buffer around all non-ocean waters as “*estuarine shoreline.*” Estuarine shorelines are “*non-ocean shorelines extending from the normal high water level or normal water level along the estuarine waters, estuaries, sounds, bays, fresh and brackish waters, and public trust areas as set forth in an agreement adopted by the Wildlife Resources Commission and the Department of Environmental Quality [described in Rule .0206(a) of this Section] for a distance of **75 feet landward.***” A significantly wider buffer zone is enjoyed by some of the state’s highest-value waters: “*For those estuarine shorelines immediately contiguous to waters classified as Outstanding Resource Waters (ORW) by the Environmental Management Commission (EMC), the estuarine shoreline [area] shall extend to **575 feet landward from the normal high water level or normal water level***” (unless the Coastal Resources Commission establishes the boundary at a greater or lesser extent following required public hearings.)

The enforceable standard applicable in estuarine buffer areas provides:

All shoreline development shall be compatible with the dynamic nature of coastal shorelines as well as the values and the management objectives of the estuarine and ocean system. Other objectives are to conserve and manage the important natural features of the estuarine and ocean system so as to safeguard and perpetuate their biological, social, aesthetic, and economic values; to coordinate and establish a management system capable of conserving and utilizing these shorelines so as to maximize their benefits to the estuarine and ocean system and the people of North Carolina.

In effect, within this defined buffer zone, acceptable uses are ones consistent with the stated objectives and “*shall be limited to those types of development activities that will not be detrimental to the public trust rights and the biological and physical functions of the estuarine and ocean system. Every effort shall be made by the permit applicant to avoid or minimize adverse impacts of development to estuarine and coastal systems through the planning and design of the development project*” (N.C. Admin. Code 15A 7H .0209).¹⁴ More specifically, the policy provides that when a development lot is within or partially within the buffer area, impervious surfaces must be limited to 30% of the [buffer area] of a lot (unless the “*applicant can demonstrate,*

¹⁴ It is important to note that these policy excerpts and descriptions reflect current regulatory language, because that is what is used in practice by the North Carolina program for consistency reviews. However, according to publicly available information, the most recent incorporation of the Estuarine and Ocean System AEC policies into the CMP occurred in [2001](#), when the policies in Section 209 (coastal shoreline AEC) were updated.

through innovative design, that the protection provided by the design would be equal to or exceed the protection by the 30 percent limitation” (id)).

A different approach is seen in **Mississippi**, where enforceable policies explicitly expand the coverage of resource-based protections to **activities that are located outside, but still have potential to impact, the high value habitat**. The provision states:

Activities affecting coastal wetlands, but located outside of coastal wetlands must not affect the following characteristics to a greater extent than would otherwise be allowed under [certain other policies addressing activities in coastal wetlands]:

- 1. The natural supply of sediment and nutrients to the coastal wetlands.*
- 2. The natural temperature regimes that are part of the ecosystem of coastal wetlands.*
- 3. Salinity regimes.*
- 4. Sediment transport processes.*
- 5. Water flow and natural circulation.*
- 6. The long-term biological productivity of the coastal wetlands’ ecosystem.... (Ms. Admin. Code Title 22, Part 23, Rule 08 § 113).*

By detailing the specific characteristics of coastal wetland habitat that must be protected from effects of activities occurring elsewhere, the policy clearly signals to project proponents and other stakeholders the circumstances to which this “expanded coverage” policy is intended to apply, resulting in increased transparency and predictability.

B. Use-Based Policies: Examples and Discussion

Use-based policies are framed around the different types of activities that occur in the coastal zone (e.g., development, public access/recreation, fishing, energy-related activities, historic preservation). Use-based policies may establish standards for where and how different uses may be conducted; prohibit or limit certain uses; or establish hierarchies preferring certain uses over others.

Avoiding Discrimination

In the past, broad prohibitions of certain uses have been approved as EPs. However, under the current “enforceability” criteria (see pp. 1-2), broad prohibitions on activity types are likely to be seen as discriminating against a certain user group—and thus running afoul of NOAA’s requirement that EPs not “single out and discriminate against one industry without significant justification.”¹⁵ To avoid this issue, use-based policies must be crafted carefully. For example, one way to demonstrate to NOAA that a prohibition of a certain use would not be unduly discriminatory might be limiting the geographic scope of the prohibition, tailoring its application to those locations (specific or categorical) that are most susceptible to its harmful impacts.¹⁶ (However, this “limited prohibition” approach is not guaranteed to result in an approved EP, as NOAA is also likely to consider whether the proposed discrimination adversely affects one of the national interest objectives of the CZMA; for example, a prohibition on oil and gas development in the state’s marine waters may be deemed to adversely affect the national interest in energy self-sufficiency.) Another way to overcome the discrimination problem is to craft a policy that prohibits a certain activity type unless an enumerated set of standards and/or conditions are satisfied.

One of the most comprehensive ways to protect important marine resources from conflicting uses is through **ocean management policies**, which can help states coordinate the multiple uses in their coastal waters and help avoid conflicts between economic and ecological uses. While some ocean planning efforts take place at the regional level (e.g., the Mid-Atlantic Regional Ocean Council, known as MARCO), states can also develop ocean management planning frameworks at the state level – and incorporate their substantive provisions into the CMP as enforceable policies.

In **Washington**, for example, the program includes enforceable policies based on the state’s Ocean Resources Management Act (ORMA), which was enacted to “guide activities in the Pacific Ocean,” and its companion regulations, which are known as the Ocean Management Guidelines.¹⁷ The ORMA sets out high-level standards to determine the permissibility of “[u]ses and activities that require federal, state, or local government permits or other approvals and that will adversely impact renewable resources, marine life, fishing, aquaculture, recreation, navigation, air or water quality, or other existing ocean or coastal uses.” (Rev. Code Wa. 43.143.030). Under the ORMA policy, such uses may be permitted only if certain criteria are met or exceeded, including (but not limited to):

- (a) *There is a demonstrated significant local, state, or national need for the proposed use or activity;*
- (b) *There is no reasonable alternative to meet the public need for the proposed use or activity;*
- (c) *There will be no likely long-term significant adverse impacts to coastal or marine resources or uses;*
- (d) *All reasonable steps are taken to avoid and minimize adverse environmental impacts, with special protection provided for the marine life and resources of the Columbia river, Willapa Bay and Grays Harbor estuaries, and Olympic national park;*

¹⁵ LETTER FROM JOELLE GORE TO VIRGINIA KOPKASH, *supra* note 5.

¹⁶ See *id.*

¹⁷ WA. STATE DEPT. OF ECOLOGY, MANAGING WASHINGTON’S COAST: WASHINGTON’S COASTAL ZONE MANAGEMENT PROGRAM at 100 (Feb. 2001) (describing the ORMA), *available at*: <https://fortress.wa.gov/ecy/publications/documents/0006029.pdf>.

(e) All reasonable steps are taken to avoid and minimize adverse social and economic impacts, including impacts on aquaculture, recreation, tourism, navigation, air quality, and recreational, commercial, and tribal fishing.... (Rev. Code Wa. 43.143.030).

In addition to the above criteria, the ORMA also includes a provision **establishing a preference** for ocean uses that do not adversely affect environmental resources:

*If there are conflicts between uses, those uses that will not adversely impact renewable resources have preference over those that will adversely impact renewable resources.*¹⁸

Enforceable policies from the state’s Ocean Management Guidelines, which are found in state regulations, establish standards for general ocean uses and for seven different types of specific ocean uses (Wa. Admin. Code 173-26-360). According to the Washington State Department of Ecology, which administers the state’s coastal management program, “They provide more specific examples of the resources and uses that must be considered for identifying impacts of a project, as well as standards for avoiding and minimizing those impacts.”¹⁹ However, **referencing the regulatory provisions as “guidelines” and using the word “should”** (rather than “shall” or “must”) means these use standards are relatively weak from an “enforceability” standpoint, when taken on their own; thus, they may be most useful during federal consistency reviews as supplemental evidence on how the strongly worded, albeit vaguer standards in the ORMA EPs are intended to apply. Additionally, the ORMA and the Ocean Management Guidelines are only two parts of a larger, interconnected network of ocean management policies in Washington that also includes the state’s Shoreline Management Act and several enforceable provisions from Washington’s Marine Spatial Plan.²⁰

Applying Use Rules in Relation to Resource and Area-Based Policies. Even in states where use-based, resource-based, and location-based rules are explicitly identified as such, there may be ambiguities in when and how use rules should apply in the context of additional interrelated, overlapping, or perhaps even conflicting policies. By prescribing or providing guidance on how use rules interact with policies framed around resources and/or areas, a state can help avoid interpretation challenges and help ensure the body of policies work synergistically and not at cross-purposes.

New Jersey’s subset of use-based policies are expressly classified as “Use Rules,” which are described as “rules and conditions applicable to particular kinds of development” (N.J. Admin. Code § 7:7-15.1). The coastal zone management regulations clarify that in general, the EPs in New Jersey’s use rules do not preempt the program’s “location rules” (unless explicitly noted); the conditions in the use rules “must be satisfied in addition to the location rules...and the resource rules” that are also part of the state’s enforceable policies (*id.*). The use rules address 14 broad categories of coastal uses, including industry, ports, commercial facilities, mining, energy, transportation, housing, recreational, and coastal engineering, among others. In general, each use rule establishes standards under which the use is “*conditionally acceptable*”; some of the use rules also include limited prohibitions and/or additional guidance—in the form of “encouragement” or “discouragement”—on one or more of the specific development types that fall into each use category. Some of the use rules go beyond encouragement to establish explicit preference hierarchies; for example, the Industry policy

¹⁸ *Id.* at p. 100.

¹⁹ Wa. State Dept. of Ecology, WASHINGTON COASTAL ZONE MANAGEMENT PROGRAM ENFORCEABLE POLICIES (Sept. 2020), available at: <https://apps.ecology.wa.gov/publications/documents/2006013.pdf>.

²⁰ See *id.*

provides that “[m]arine resource-dependent industry, such as commercial fishing, is encouraged and shall have priority over other waterfront uses, except for recreation” (N.J. Admin. Code § 7:7-15.1). Notably, the Coastal Engineering policy establishes a mandatory hierarchy of shoreline protection alternatives, with a preference for non-structural measures that allow for the growth of vegetation where feasible and practicable, followed by hybrid measures, meaning purely structural measures such as bulkheads and seawalls are permissible only as a last resort (N.J. Admin. Code § 7:7-15.11).

Crafting “Backstop” Policies

As noted previously, the use rules in New Jersey do not apply in a vacuum and must be interpreted and applied in conjunction with the location rules and resource rules relevant to a given activity. These include what is referred to as the **basic location rule**, which serves as a sort of backstop for preventing harmful impacts of a broad category of uses: “development” activities generally. The basic location rule states simply,

A location may be acceptable for development under N.J.A.C. 7:7-9 [special area rules], 12 [general water areas], 13 [impervious cover and vegetative cover for general land areas and certain special areas], and 14, but the Department may reject or conditionally approve the proposed development of the location as reasonably necessary to:

- 1. Promote the public health, safety, and welfare;*
- 2. Protect public and private property, wildlife and marine fisheries; and*
- 3. Preserve, protect and enhance the natural environment (N.J. Admin. Code 7:7-14.2).*

As explained in its own Rationale section (not enforceable, but instructive as to implementation), this rule is “intended to afford appropriate discretion to the Department to reject or conditionally approve projects that otherwise meet the applicable rules but may pose a threat to the public, natural resources, property, or the environment. This commonsense approach recognizes that unusual circumstances may result in a project meeting the letter of the rules but not their intent and provides necessary parameters for the Department’s review of such projects.” The broad authority to reject or condition development approval to “preserve, protect and enhance the natural environment” and/or “protect...wildlife and marine fisheries” might be invoked to protect important habitat in a situation where development would otherwise be permissible under New Jersey’s policies.

Limiting Adverse Impacts of Specific Uses. Use-based policies can provide protections for valuable habitats by **limiting and/or conditioning certain uses based on particular risks they pose to certain resources**. In **Washington**, for example, a shoreline modification policy establishing standards for piers and docks provides mandatory, albeit broad, protections for certain resources:

Pier and dock construction shall be restricted to the minimum size necessary to meet the needs of the proposed water-dependent use.

...Piers and docks, including those accessory to single-family residences, shall be designed and constructed to avoid or, if that is not possible, to minimize and mitigate the impacts to ecological

functions, critical areas resources such as eelgrass beds and fish habitats and processes such as currents and littoral drift (Wash. Admin. Code 173-26-231(3)(b)).

While the above policy focuses only on piers and docks, it is a good example of a strong policy because it is clear and firm. It mandates that pier and dock design and construction avoid certain habitats to the extent possible, and where impossible both minimizes and mitigates impacts to those habitats. It also explicitly covers piers and docks associated with single-family homes, which are exempt from some states' enforceable policy coverage but can lead to significant cumulative damage to habitats such as eelgrass.

In general, for use-based policies that require "minimization" of impacts, it can be helpful if the language of the policy clearly describes what "minimization" means. In **Texas**, for example, policies on dredging and filling include the following provisions:

(1) Adverse effects from dredging and dredged material disposal and placement can be minimized by controlling the location and dimensions of the activity. Some of the ways to accomplish this include:

(A) locating and confining discharges to minimize smothering of organisms;

(B) locating and designing projects to avoid adverse disruption of water inundation patterns, water circulation, erosion and accretion processes, and other hydrodynamic processes;

(C) using existing or natural channels and basins instead of dredging new channels or basins, and discharging materials in areas that have been previously disturbed or used for disposal or placement of dredged material;

(D) limiting the dimensions of channels, basins, and disposal and placement sites to the minimum reasonably required to serve the project purpose, including allowing for reasonable overdredging of channels and basins, and taking into account the need for capacity to accommodate future expansion without causing additional adverse effects;

(E) discharging materials at sites where the substrate is composed of material similar to that being discharged;

(F) locating and designing discharges to minimize the extent of any plume and otherwise control dispersion of material; and

(G) avoiding the impoundment or drainage of critical areas.

(2) Dredging and disposal and placement of material to be dredged shall comply with applicable standards for sediment toxicity. Adverse effects from constituents contained in materials discharged can be minimized by treatment of or limitations on the material itself.

(3) Adverse effects from dredging and dredged material disposal or placement can be minimized through control of the materials discharged. Some ways of accomplishing this include:

(A) use of containment levees and sediment basins designed, constructed, and maintained to resist breaches, erosion, slumping, or leaching;

(B) use of lined containment areas to reduce leaching where leaching of chemical constituents from the material is expected to be a problem;

(C) capping in-place contaminated material or, selectively discharging the most contaminated material first and then capping it with the remaining material;

(D) properly containing discharged material and maintaining discharge sites to prevent point and nonpoint pollution; and

(E) timing the discharge to minimize adverse effects from unusually high water flows, wind, wave, and tidal actions.

(4) Adverse effects from dredging and dredged material disposal or placement can be minimized by controlling the manner in which material is dispersed.

(5) Adverse effects from dredging and dredged material disposal or placement operations can be minimized by adapting technology to the needs of each site.

(6) Adverse effects on plant and animal populations from dredging and dredged material disposal or placement can be minimized by:

(A) avoiding changes in water current and circulation patterns that would interfere with the movement of animals;

(B) selecting sites or managing discharges to prevent or avoid creating habitat conducive to the development of undesirable predators or species that have a competitive edge ecologically over indigenous plants or animals;

(C) avoiding sites having unique habitat or other value, including habitat of endangered species;

(D) using planning and construction practices to institute habitat development and restoration to produce a new or modified environmental state of higher ecological value by displacement of some or all of the existing environmental characteristics;

(E) using techniques that have been demonstrated to be effective in circumstances similar to those under consideration whenever possible and, when proposed development and restoration techniques have not yet advanced to the pilot demonstration stage, initiating their use on a small scale to allow corrective action if unanticipated adverse effects occur;

(F) timing dredging and dredged material disposal or placement activities to avoid spawning or migration seasons and other biologically critical time periods; and

(G) avoiding the destruction of remnant natural sites within areas already affected by development....

(8) Adverse effects from new channels and basins can be minimized by locating them at sites: (A) that ensure adequate flushing and avoid stagnant pockets; or (B) that will create the fewest practicable adverse effects on CNRAs from additional infrastructure such as roads, bridges, causeways, piers,

docks, wharves, transmission line crossings, and ancillary channels reasonably likely to be constructed as a result of the project... (31 Tx. Admin. Code 501.25).

Requiring “Evaluation” or “Consideration”

Another approach is to require that certain habitats must be “evaluated” or “considered” when determining whether a proposed activity should be allowed. For example, in **South Carolina**, all categories of projects throughout the coastal zone are evaluated for (among other criteria) “*the extent to which the project will protect, maintain or improve water quality, particularly in coastal aquatic areas of special resource value, for example, spawning areas or productive oyster beds.*”²¹ Although it **does not use mandatory language** and thus could be stronger, an interesting feature of this policy is that it requires consideration of a proposed project’s positive effects on valuable habitats, rather than simply requiring consideration of negative impacts.

Considering Energy Policies as Models for Other Use-Based Policies. The CZMA requires all NOAA-approved state coastal programs to address energy facilities, and in many states, **the energy facility policies offer some of the most robust and detailed use-based enforceable policies.** In addition to protecting living resources and habitats from harmful impacts of energy facilities themselves, these policies offer a model that could be replicated (with appropriate modifications) to address other uses known to have adverse impacts on valuable habitats.

In **North Carolina**, for example, the enforceable policies include detailed siting criteria for energy “*facilities in or affecting the use of public trust waters and adjacent lands or coastal resources*” (15A N.C. Admin. Code 7M.0403). There is a general requirement that adverse impacts on marine and estuarine resources be avoided; additional siting criteria include (but are not limited to):

- *Damage to or interference with existing or traditional uses, such as fishing, navigation and access to public trust areas, and areas with high biological or recreational value ..., shall be avoided to the extent that such damage or interference is likely to have significant adverse impacts on the use of public trust waters and adjacent lands or coastal resources;*
- *Placement of structures in geologically unstable areas, such as unstable sediments and active faults, shall be avoided to the extent that damage to such structures resulting from geological phenomena is likely to have significant adverse impacts on the use of public trust waters, adjacent lands or coastal resources;*
- *Significant adverse impacts on federally listed threatened or endangered species shall be avoided;*
- *Major energy facilities are not appropriate uses in fragile or historic areas, and other areas containing environmental or natural resources of more than local significance, as defined in [state law], such as parks, recreation areas, wildlife refuges, and historic sites;*

²¹ S.C. DEPT. OF HEALTH AND ENV’L CONTROL, POLICIES AND PROCEDURES OF THE SOUTH CAROLINA COASTAL MANAGEMENT PROGRAM at page III-3, *available at*: https://scdhec.gov/sites/default/files/docs/HomeAndEnvironment/Docs/OCRM_Policies_Procedures.pdf.

- *In the siting of energy facilities and related structures, significant adverse impacts to the following areas [among others] shall be avoided:*

(A) areas of high biological significance, including offshore reefs, rock outcrops, hard bottom areas, sea turtle nesting beaches, coastal wetlands, primary or secondary nursery areas or spawning areas and essential fish habitat areas of particular concern as designated by the appropriate fisheries management agency, oyster sanctuaries, submerged aquatic vegetation as defined by the Marine Fisheries Commission, colonial bird nesting areas, and migratory bird routes;

(B) tracts of maritime forest in excess of 12 contiguous acres and areas identified as eligible for registration or dedication by the North Carolina Natural Heritage Program;

(C) crossings of streams, rivers, and lakes except for existing readily-accessible corridors;

(E) artificial reefs, shipwrecks, and submerged archaeological resources;

...(G) primary dunes and frontal dunes;

...(H) established recreation or wilderness areas, such as federal, state and local parks, forests, wildlife refuges and other areas used in a like manner;

...(J) cultural or historic sites of more than local significance; and

(K) segments of Wild and Scenic River System (15A N.C. Admin. Code 7M.0403).

The above standards use strong enforceable language. In many places, the standard is simply “shall be avoided,” without any of the common qualifiers (e.g., “where possible,” “to the greatest extent feasible”). Notably, North Carolina’s energy facility siting standards also include a temporal standard, which provides:

Construction of energy facilities shall occur only during periods of lowest biological vulnerability. Nesting and spawning periods shall be avoided (15A NCAC 7M.0403).

OCS Policies

States are not allowed to *directly regulate* energy-related activities in federal waters or on the Outer Continental Shelf (OCS), since these activities occur within federal jurisdiction and are regulated at the federal level. Nevertheless, states are entitled to participate in federal authorizations for OCS activities through the consistency review process, and a handful of states' EPs address how the state will review offshore energy activities that occur outside of, but which may affect, state coastal waters.

For example, **New York's** Policy #29 provides broadly:

"The development of offshore uses and resources, including renewable energy resources, shall accommodate New York's long-standing ocean and Great Lakes industries, such as commercial and recreational fishing and maritime commerce, and the ecological functions of habitats important to New York."

Expanding the Reach of Use-Based Policies. As with resource-based policies, states may find ways to craft use-based policies to effectively expand their temporal and/or geographic reach. For instance, **North Carolina's** EP collection includes multiple policies that use forward-looking language, which may in effect expand the geographic scope of protection. These include the Pollution of Waters policy (which applies to all areas of environmental concern (AEC), discussed more below):

*No development shall be allowed in any AEC which would have a substantial likelihood of causing pollution of the waters of the state in which shellfishing is an existing use to the extent that such waters would be officially closed to the taking of shellfish. This rule shall also apply to development adjacent to or within closed shellfish waters when a use attainability study of those waters documents the presence of a significant shellfish resource **in an area that could be expected to be opened for shellfishing given reasonable efforts to control the existing sources of pollution.*** (15A N.C. Admin. Code 7H.0602, emphasis added.)

With this policy language, North Carolina intends to protect not only existing shellfishing-quality waters, but also waters that could be used for shellfishing in the future, seemingly extending protections to these waters without any guarantee that the condition precedent (i.e., reasonable efforts to control existing sources of pollution) will even occur.

North Carolina's general antidegradation policy not only includes language that might help protect high value habitat areas from many different development types—including, potentially, activities occurring upland and seaward of the state's defined coastal zone—but also is written with an eye toward future improvements of existing development. The policy states in part:

It is hereby declared that no land or water use shall cause the degradation of water quality so as to impair traditional uses of the coastal waters....At every possible opportunity, existing development adjacent to [coastal area] waters shall be upgraded to reduce discharge of pollutants (15A N.C. Admin. Code 7M .0801).

This policy is notable for its attempt to incentivize upgrades to existing development, presumably where there is a nexus between existing development and a current application—e.g., for an

addition, extension, repair, or replacement of existing infrastructure. It also raises interesting questions about the potential reach of a requirement in the federal CZMA regulations that federal and state agencies “cooperate” in ongoing efforts to monitor federal license and permit activities that were previously approved, “in order to make certain that such activities continue to conform to both federal and state requirements” (15 C.F.R. §§ 930.65-.66).

Another approach to expanding coverage of an EP is to explicitly address indirect and/or cumulative impacts. For example, **New Jersey’s secondary impacts policy** states:

(a) Secondary impacts are the effects of additional development likely to be constructed as a result of the approval of a particular proposal. Secondary impacts can also include traffic increases, increased recreational demand and any other offsite impacts generated by onsite activities which affect the site and surrounding region.

(b) Coastal development that induces further development shall demonstrate, to the maximum extent practicable, that the secondary impacts of the development will satisfy this chapter. The Department may restrict coastal development from connecting to an approved infrastructure in order to prevent adverse impacts to special areas as defined at N.J.A.C. 7:7-9 and to protect and preserve coastal resources.

1. The level of detail and areas of emphasis of the secondary impact analysis are expected to vary depending upon the type of development. Minor projects may not even require such an analysis. Transportation and wastewater treatment systems are the principal types of development that require a secondary impact analysis, but major industrial, energy, commercial, residential, and other projects may also require a rigorous secondary impact analysis.

2. Secondary impact analysis must include an analysis of the likely geographic extent of induced development, its relationship to the State Development and Redevelopment Plan, an assessment of likely induced point and non-point air and water quality impacts, and evaluation of the induced development in terms of all applicable special area rules, N.J.A.C. 7:7-9; general water area rules, N.J.A.C. 7:7-12; requirements for impervious cover and vegetative cover for general land areas and certain special areas, N.J.A.C. 7:7-13; location rules, N.J.A.C. 7:7-14; and resource rules, N.J.A.C. 7:7-16 (N.J. Admin. Code 7:7-14.3).

C. Area-Based Policies: Examples and Discussion

A number of states use **area-based policies to protect important habitat types** and other high value coastal resources (e.g., cultural and historic resources). Area-based policies concern specific regions or locations within the coastal zone. The “areas” to which policies apply may be broad categories (e.g., all areas of the coastal zone with certain ecological or geological characteristics) or specific locations (e.g., a named barrier island or state park).

Enhanced Protections for Certain Areas within the Coastal Zone. Area-based policies can be used to designate habitats such as estuaries and/or tidal wetlands as areas of special concern within the coastal program, entitling them to enhanced protection from conflicting uses. For example, **North Carolina’s** program uses designations called “areas of environmental concern” (AEC) as a basis for the state’s robust protections of many important coastal resources. In North Carolina, all estuarine waters are managed as AECs. The enforceable policies state that the management objective

of the estuarine and ocean system is “to conserve and manage” these areas “so as to safeguard and perpetuate their biological, social, economic, and aesthetic values and to ensure that development occurring within these AECs is compatible with natural characteristics so as to minimize the likelihood of significant loss of private property and public resources” (15A N.C. Admin. Code 7H.0203).

For each type of AEC, the policies set out use standards; for estuarine and ocean waters, the policy provides:

Suitable land/water uses shall be those consistent with the management objectives in this Rule. Highest priority of use shall be allocated to the conservation of estuarine waters and their vital components. Second priority of estuarine waters use shall be given to those types of development activities that require water access and use which cannot function elsewhere such as simple access channels; structures to prevent erosion; navigation channels; boat docks, marinas, piers, wharfs, and mooring pilings (15A N.C. Admin. Code 7H.0206).

Activities in all the state’s AECs, including estuarine and ocean waters, are subject to use standards. The policy establishing use standards for estuarine and ocean AECs is one of North Carolina’s most important enforceable policies. It uses strong, clear language throughout:

- (A) The location, design, and need for development, as well as the construction activities involved shall be consistent with the management objective of the Estuarine and Ocean System AEC (Rule .0203 of this subchapter) and shall be sited and designed to avoid significant adverse impacts upon the productivity and biologic integrity of coastal wetlands, shellfish beds, submerged aquatic vegetation as defined by the Marine Fisheries Commission²², and spawning and nursery areas;*
- (B) Development shall comply with State and federal water and air quality rules, statutes and regulations;*
- (C) Development shall not cause irreversible damage to documented archaeological or historic resources as identified by the N.C. Department of Cultural resources;*
- (D) Development shall not increase siltation;*
- (E) Development shall not create stagnant water bodies;*
- (F) Development shall be timed to avoid significant adverse impacts on life cycles of estuarine and ocean resources; and*
- (G) Development shall not jeopardize the use of the waters for navigation or for other public trust rights in public trust areas including estuarine waters (15A N.C. Admin. Code 7H.0208).*

According to North Carolina program staff, the standard of avoiding “significant adverse impacts” on coastal resources is interpreted broadly and provides the foundation for most of the program’s negotiations with federal consistency applicants, attachment of conditions to consistency determinations, and, in rare circumstances, outright objections. Also notable is the policy’s explicit coverage of construction activities, which may help ensure protection against certain indirect/temporary impacts. (Note that this estuarine and ocean AEC policy also includes specific use standards for 13 activity types; some of these include explicit protections for oysters, SAV, and/or coastal wetlands.)

Texas is another state that uses special area designations in its policies to confer wide-ranging enhanced protections on important coastal resources. Certain habitats are defined as “critical areas” in the Texas regulations that make up the state’s enforceable policies. These critical areas receive

²² The North Carolina program should submit the Marine Fisheries Commission definitions of SAV habitat for independent incorporation as enforceable policies, rather than incorporating them by reference here.

specific protections from development activities affecting the coastal zone. Texas regulations define “critical area” as “*a coastal wetland, an oyster reef, a hard substrate reef, submerged aquatic vegetation, or a tidal sand or mud flat.*”²³

The enhanced protections include a general prohibition:

Development in critical areas shall not be authorized if significant degradation of critical areas will occur (31 Tx. Admin. Code 501.23.)

Importantly, this enforceable policy defines “significant degradation” in some detail. An activity results in significant degradation if the state finds that the development activity will:

...cause or contribute to significant adverse effects on: (i) ...plankton, benthos, fish, shellfish, wildlife, and consumption of fish and wildlife; (ii) the life stages of aquatic life and other wildlife dependent on aquatic ecosystems, including the transfer, concentration, or spread of pollutants or their byproducts beyond the site, or their introduction into an ecosystem, through biological, physical, or chemical processes; [or] (iii) ecosystem diversity, productivity, and stability, including loss of fish and wildlife habitat or loss of the capacity of a coastal wetland to assimilate nutrients, purify water, or reduce wave energy (31 Tx. Admin. Code 501.23.)

In **Mississippi**, a set of enforceable policies protecting “sensitive coastal wetlands”²⁴ apply to coastal wetlands containing submerged aquatic vegetation, emergent marsh vegetation, shellfish beds, fishing reefs, and hard banks containing reef building organisms.²⁵ (On its face, the definition does not include minimum shellfish density requirements and would, in theory, cover areas containing any number of oysters.) The Mississippi enforceable policies include outright prohibitions on certain activities in sensitive coastal wetlands, e.g.:

- *Breakwaters, groins and jetties must not be constructed in areas of sensitive coastal wetlands*” (Subsection 103, Bulkheads, Seawalls, Breakwaters, Groins and Jetties);
- *“Areas containing sensitive coastal wetlands must not be used for dredged material disposal”* (Subsection 107, Dredged Material Disposal);
- *“Sensitive coastal wetlands and other productive shallow water areas must be avoided when siting extraction facilities.”* (Subsection 110, Oil and Gas Exploration and Production);
- *For channels and access canals, “Alignments must avoid sensitive coastal wetlands, nursery and spawning areas, and archeological and historical sites”* (Subsection 106, Channels and Access Canals);
- *“Extraction of marine mineral resources (sand, gravel, shell, phosphates, etc.) within sensitive coastal wetlands is prohibited except for obtaining cultch material or material for beach replenishment”* (Subsection 111, Other Mineral Extraction); and

²³ Critical areas are a subset of Texas’ Coastal Natural Resource Areas (CNRAs). CNRAs are the natural resources that the Texas CMP is generally designed to protect--*viz.* coastal barrier, coastal historic area, coastal preserve, coastal shore area, coastal wetlands, critical dune area, critical erosion area, Gulf beach, hard substrate reef, oyster reef, special hazard area, submerged land, submerged aquatic vegetation, tidal sand or mud flat, water of the open Gulf of Mexico, and water under tidal influence. 31 Tx. Admin. Code 501.3(a)(8) (“Coastal natural resource area (CNRA)--Any area defined in Texas Natural Resources Code, §33.203(1) that is located within the coastal zone.”)

²⁴ Mississippi defines “sensitive coastal wetlands” in Part 23, Rule 03 of its coastal rules, which it does not hold out as containing enforceable policies. To help ensure the term enjoys the intended definition during federal consistency review, Mississippi could submit the regulation containing the definition as an enforceable policy for NOAA’s approval.

²⁵ In contrast to New Jersey, on its face, this definition does not include minimum shellfish density requirements and would, in theory, cover areas containing any number of oysters.

- *“Thermal discharges must not be located in critical habitat or sensitive coastal wetlands area (Subsection 116, Intake and Discharges).”*

As area-based provisions woven into various use-based subsections, the above policies are an illustration of how enforceable policies can effectively combine use-based and area-based approaches to result in clear, well-tailored protective standards that applicants (and NOAA) are likely to appreciate.

Protecting Open Ocean Habitats. In addition to nearshore and estuarine habitats, which are entitled to some degree of increased protection in most coastal states, some states afford enhanced protection to habitats found farther from shore.

In **Washington**, for instance, certain habitat types are protected as “critical saltwater habitat” areas. The policy states, in part:

Critical saltwater habitats include all kelp beds, eelgrass beds, spawning and holding areas for forage fish, such as herring, smelt and sandlance; subsistence, commercial and recreational shellfish beds; mudflats, intertidal habitats with vascular plants, and areas with which priority species have a primary association. Critical saltwater habitats require a higher level of protection due to the important ecological functions they provide.

...Docks, piers, bulkheads, bridges, fill, floats, jetties, utility crossings, and other human-made structures shall not intrude into or over critical saltwater habitats except when all of the conditions below are met:

- *The public's need for such an action or structure is clearly demonstrated and the proposal is consistent with protection of the public trust, as embodied in [state law];*
- *Avoidance of impacts to critical saltwater habitats by an alternative alignment or location is not feasible or would result in unreasonable and disproportionate cost to accomplish the same general purpose;*
- *The project including any required mitigation, will result in no net loss of ecological functions associated with critical saltwater habitat (Wa. Admin. Code 173-26-221(2)).*

The above policy excerpt’s primary shortcoming is the fact that the full policy identifies content for those government staff developing shoreline master programs rather than broadly prohibiting or requiring certain actions, but the fact that its content is mandated (“shall” and “must” rather than “should”) makes the policy strong enough to be useful for federal consistency reviews.

Using Enforceable Policies to Protect Offshore Habitats from Seabed Mining

Enforceable policies can be used to protect offshore habitats from specific uses, including seabed mining. In **North Carolina**, for example, an enforceable policy governing all ocean waters provides that an entity conducting mining of submerged lands shall avoid:

Natural reefs, coral outcrops, artificial reefs, seaweed communities, and significant benthic communities identified by the Division of Marine Fisheries or the WRC... [and] shall not be conducted on or within 500 meters of significant biological communities identified by the Division of Marine Fisheries or the WRC, such as high relief hard bottom areas... Mining activities also “shall be timed to minimize impacts on the life cycles of estuarine or ocean resources; and ... shall not affect potable groundwater supplies, wildlife, freshwater, estuarine, or marine fisheries (15A N.C. Admin. Code 7H.0208).

Washington has among its enforceable policies provisions from the state’s marine spatial plan, which include a policy likely relevant to seabed mining and offshore habitats:

An applicant for proposed new ocean uses involving offshore development, as defined in the Shoreline Management Act (RCW 90.58.030(3)(a)), must demonstrate that the project will have no adverse effects on an [Important, Sensitive and Unique Area (ISUs)] located at the project site or to off-site ISUs potentially affected by the project (Washington Marine Spatial Plan at 4.3.3(3)(a) (2018)).

Seabed mining, or at least some of its affiliated structures and activities, likely qualify as “development,”²⁶ and thus must demonstrate that such a proposed project would not adversely affect “Important, Sensitive, and Unique Areas” (ISUs). ISUs include aquatic vegetation and habitats such as kelp, eelgrass and shellfish beds, and while coastal estuaries are not designated as ISUs, many ISUs occur in them.

III. Example Policies for Promoting Restoration and Climate Adaptation

In addition to protecting existing habitat, enforceable policies can be vehicles for affirmatively promoting habitat restoration. Two key strategies for doing so include living shorelines policies and beneficial use of fill policies.

Advancing Restoration Goals with Living Shoreline Policies. Living shorelines offer a wide range of benefits to human uses and ecosystems alike but can be particularly important for conservation of SAV and shellfish in their vicinity. Thus, **policies that mandate implementation**

²⁶ “Development” is defined in Rev. Code Wash. 90.58.030(3)(a) as: “a use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level.”

of living shorelines for shoreline stabilization instead of hard armoring, at least where possible, can significantly promote restoration of SAV and shellfish habitat.

An example of this approach is **New Jersey's** coastal engineering policy. Coastal engineering is defined broadly as “a variety of non-structural, hybrid, and structural shore protection and storm damage reduction measures to manage water areas and protect the shoreline from the effects of erosion, storms, and sediment and sand movement,” including, among other measures, “living shorelines, and the construction of retaining structures such as bulkheads, gabions, revetments, and seawalls” (N.J. Admin. Code 7.7-15.11). The **rule establishes a hierarchy of the measures available** for shoreline protection, starting with non-structural measures “that allow for the growth of vegetation,” which must be used “unless it is demonstrated that use of non-structural measures is not feasible or practicable.”²⁷ Helpfully, the rule enumerates factors that may be considered to determine feasibility, including but not limited to “presence of shellfish habitat, submerged vegetation and wetlands at the site.”²⁸

Under this and similar policies, the availability of living shorelines as a first-line shoreline protection measure can provide opportunities to implement projects that protect, restore, or enhance shellfish and SAV habitat – and/or displace proposed hard armoring projects that could disturb it.

States can also establish in their enforceable policies standards for implementing living shorelines responsibly. In **New Jersey**, a separate use-based EP governs implementation of living shoreline projects, defining them as “a shoreline management practice that addresses the loss of vegetated shorelines and habitat in the littoral zone by providing for the protection, restoration or enhancement of these habitats. This is accomplished through the strategic placement of vegetation, sand or other structural and organic materials” (N.J. Admin. Code 7:7-12.23).

Under this policy, in all general water areas in the state:

(b) The establishment of a living shoreline to protect, restore, or enhance a habitat area is conditionally acceptable provided:

1. It is demonstrated that the project:

- i. Is part of a plan for the restoration, creation or enhancement of the habitat and water quality functions and values of wetlands, wetland buffers, and open water areas;*
- ii. Is consistent with the requirements of the Wetlands Act of 1970, the Waterfront Development Law, Coastal Area Facility Review Act, and this chapter;*
- iii. Will improve or maintain the values and functions of the ecosystem; and*
- iv. Will have a reasonable likelihood of success, or, if performed by a college or university, will advance the level of knowledge regarding living shorelines in the State; and*

²⁷ If non-structural measures are not feasible or practicable, “then hybrid shore protection and/or storm damage reduction measures that allow for the growth of vegetation, such as stone, rip-rap, sloped concrete articulated blocks or similar structures, or gabion revetments, shall be used.” Finally, if the use of hybrid measures is not feasible or practicable, then structural measures “such as bulkheads, revetments, sea walls, or other retaining structures” may be used. Note that the hierarchy does not apply to “water dependent uses within existing ports.”

²⁸ “Factors considered in determining whether use of a non-structural measure is feasible include the type of waterway on which the site is located, the distance to the navigation channel, the width of waterway, water depth at the toe of bank, the bank orientation, shoreline slope, fetch, erosion rate, the amount of sunlight the site receives, substrate composition, and presence of shellfish habitat, submerged vegetation and wetlands at the site. For guidance on measures that may be appropriate depending upon factors impacting a site, see Guidance for Appropriate Shoreline Protection and/or Storm Damage Reduction Measures for a Site available from the Division of Land Use Regulation’s website at <https://www.nj.gov/dep/landuse/guidance.html>. This guidance follows N.J.S.A 52:14B-3a and does not impose any new or added requirements nor can it be used for enforcement purposes.”

2. *The living shoreline complies with the following:*

- i. It disturbs the minimum amount of special areas [such as SAV and shellfish habitat], as defined at N.J.A.C. 7:7-9, necessary to successfully implement the project plan. The Department may approve a reduction in the size of a particular special area in order to allow an increase in a different special area if the Department determines that the activities causing the reduction are sufficiently environmentally beneficial to outweigh the negative environmental effects of the reduction; and*
- ii. It does not include placement of fill beyond the footprint of the shoreline as it appeared on the applicable Tidelands Map, except for a structural component of the project intended to reduce wave energy.*

(c) The beneficial use of dredged material is acceptable in the establishment of a living shoreline provided the material complies with [state standards also incorporated as EPs].

Beneficial Use of Dredged Material for Habitat Restoration. Many, if not most, regulated coastal development activities involve some amount of dredging and filling waters or wetlands. Beneficial use policies, which govern where (and how) dredged material is placed after its removal from the water bottom, are among the most useful for facilitating habitat restoration. Many states have enforceable policies that address where and how beneficial use projects occur. By enshrining state-specific beneficial use standards in enforceable policies, states might help streamline dredge and fill permits and other environmental permitting processes by effectively narrowing the range of viable alternatives that are on the table during negotiations with project proponents and federal regulators.

Some of the most interesting beneficial use provisions are found in the San Francisco Bay segment of **California** (i.e., the BCDC program), which incorporated into its program a full suite of “Fill for Habitat Amendment” policies in 2020.²⁹ These provisions were added “to allow more fill for habitat projects in the San Francisco Bay, and to address associated concerns about expediting habitat restoration and habitat adaptation to sea level rise.”³⁰

They include but are not limited to statements that:

- *“Allowable fill for habitat projects in the Bay should (a) minimize near term adverse impacts to and loss of existing Bay habitat and native species; (b) provide substantial net benefits for Bay habitats and native species; and (c) be scaled appropriately for the project and necessary sea level rise adaptation measures in accordance with the best available science. The timing, frequency, and volume of fill should be determined in accordance with these criteria.”³¹*
- *Filling of the Bay may be allowed for the purpose of “Restoring, enhancing, or creating ecosystems that provide habitat for native fish, other aquatic organisms, or wildlife; enhance coastal resilience; and provide services such as water filtration, carbon sequestration, protection of shorelines from flooding and erosion, and raising the surface elevation of subsided land. Fill for these purposes will be especially important to facilitate the adaptation of habitats to rising sea level.”³²*

²⁹ San Francisco Bay Conservation and Development Commission, Fill for Habitat Amendment Factsheet, <https://bcdc.ca.gov/BPAFHR/FillHabitatFaqs.html>.

³⁰ NOAA OCM, Program Change Request Details: BCDC-2020-1, <https://bcdc.ca.gov/BPAFHR/FillHabitatFaqs.html>.

³¹ SF Bay Plan Fish/Aquatic Policy 6.

³² SF Bay Plan Justifiable Fill Policy.

Various other enforceable policies from the San Francisco Bay Plan explicitly facilitate marsh migration, including:

- *“Sediment placement for habitat adaptation should be prioritized in (1) subsided diked baylands, tidal marshes, and tidal flats, as these areas are particularly vulnerable to loss and degradation due to sea level rise and lack of necessary sediment supply, and/or in (2) intertidal and shallow subtidal areas to support tidal marsh, tidal flat, and eelgrass bed adaptation...”³³*
- *“To the greatest extent feasible, habitat projects should be sustained by natural processes; increase habitat connectivity; restore hydrological connections; provide opportunities for endangered species recovery; and provide opportunities for landward migration of Bay habitats. As conditions change, management measures may be needed to maintain habitat and ecological function in some areas...”³⁴*
- *“Where feasible, former tidal marshes and tidal flats that have been diked from the Bay should be restored to tidal action in order to replace lost historic wetlands or should be managed to provide important Bay habitat functions, such as resting, foraging and breeding habitat for fish, other aquatic organisms, and wildlife. ... As conditions change, management measures may be needed to maintain habitat and ecological function in some areas.”³⁵*

The BCDC program has various habitat creation policies that anticipate sea level rise and recognize that habitats are dynamic and can be expected to migrate landward.

Notably, the informational requirements associated with the last policy excerpted above also discuss marsh migration. For habitat projects, “[d]esign and evaluation of the project should include an analysis of,” among other things: “how the project’s adaptive capacity can be enhanced so that it is resilient to sea level rise and climate change; ... the impact of the project on the Bay’s and local embayment’s sediment transport and budget; ... an appropriate buffer, where feasible, between shoreline development and habitats to protect wildlife and provide space for marsh migration as sea level rises...”³⁶

While the above policies would be stronger if they **stated what “shall” occur rather than what “should” occur**, it is notable that they are explicitly addressing sea level rise and climate adaptation, and they provide a model that may be useful to other states in that regard.

IV. Concluding Thoughts

There are many reasons why the enforceable policies of coastal management programs vary significantly across and within coastal states and territories. Some of the factors that determine the form and content of a jurisdiction’s EPs are beyond the control and influence of current program staff, including the overall program structure, legislative framework, and regulations promulgated by

³³ SF Bay Plan Fish/Other Aquatic Policy 7.

³⁴ SF Bay Plan Tidal Marshes and Tidal Flats Policy 5.

³⁵ Id.

³⁶ Id.

other agencies pursuant to their own statutory authorities. However, in most states there are opportunities for program staff to advance program changes—which may or may not involve additions or amendments to the underlying state statutes and regulations—that can strengthen their enforceable policies.

For states and other stakeholders interested in evaluating a collection of existing enforceable policies and identifying opportunities to strengthen them, a good place to begin is by taking an inventory based on the different approaches discussed above. For example, identifying all of a state’s existing resource-based policies can provide an opportunity to compare a list of covered resources, and the level of protection they enjoy under the policy language, with current conservation and restoration objectives. This exercise might help identify gaps that could be filled by new or amended EPs, as well as new, less-obvious opportunities to apply existing policies in novel ways. It is common, and understandable, for state coastal programs to make updates to their EPs only occasionally or when strictly necessary based on legislative input, NOAA feedback, or other external drivers, but a holistic evaluation undertaken when the program is not under external pressure can yield many benefits. Even for programs with severe resource constraints, federal assistance in the form of CZMA grants—which has been increased in the 2022 Inflation Reduction Act—may be available to enable larger-scale efforts by state coastal management agencies to update and modernize enforceable policies.

For states where such modernization efforts are overdue, the time is now. As new offshore industries emerge, shorelines erode, and sea levels rise, many states’ coastal zones will see increased conflict between existing and proposed uses of the coastal zone and its resources. The manner in which competing uses are reconciled will depend in large part on federal license and permit decisions by the U.S. Army Corps of Engineers, the Bureau of Ocean Energy Management, and other federal agencies, and the federal consistency authority arguably is the most powerful tool available to states to influence federal decisions that impact coastal areas. It is also one of the most adaptable and responsive regulatory tools available to states, who have the ability to update their enforceable policies relatively quickly to tackle emerging issues or increasing challenges—e.g., climate change and sea level rise—even while federal-level actions to incorporate these considerations into other key environmental laws’ implementation frameworks is comparatively slow.

A perhaps less obvious, but nevertheless important, benefit of the federal consistency authority is the relationship building that occurs as a result of routine coordination between federal agency staff and their state counterparts. Having strong, clear enforceable policies in place can support these relationships by facilitating easier negotiations and helping to forestall prolonged discussions and disagreements arising from differing interpretations of what it means to be consistent with the state program. In the context of coastal management and in the broader environmental arena, the value of solid, trustful relationships between the state and federal government is difficult to overstate.



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