

State/Federal Considerations Outline

- I. Overview of State/Federal Requirements
 - A. What do we mean by “Federalism” issues
 - 1. Division of Power between State and Federal governments
 - 2. Implicates the U.S. Constitution
 - B. Federalism Authorities relevant to Fisheries
 - 1. MSA
 - 2. CZMA
 - 3. EO 13132
- II. Federalism in the MSA
 - A. Basic jurisdiction is that MSA applies in Federal waters, states have authority over state waters (inside 3-9 miles)
 - B. Exceptions
 - 1. States may regulate state-registered boats beyond state waters if no FMP, or the state regulations are consistent with any FMP
 - 2. FMPs may delegate management to states with consistent rules
 - 3. MSA may preempt state management in state waters under certain circumstances
 - a. The fishing occurs predominantly in the EEZ
 - b. State action will substantially adversely affect FMP
 - c. Conduct hearings upon the State’s request
 - 4. Special provisions for certain fisheries
- III. CZMA links to MSA actions
 - A. Purpose
 - 1. Preserve, protect, develop, enhance, and restore the Nation’s coastal zone
 - 2. Encourage states to be responsible for their coastal zones, and to develop “plans”
 - B. Triggers and Requirements 1: Federal Agency Activities
 - 1. Activities That affect
 - 2. A state’s coastal zone
 - a. Includes land use
 - b. Water use
 - c. Natural resources
 - 3. Requirement: Consistency Determination
 - a. Must be consistent to the maximum extent practicable
 - b. With enforceable policies of approved State Coastal Zone Management Plans
 - 4. Process
 - a. Agency determines whether action affects a state’s coastal zone
 - b. If yes, determine whether the agency action is consistent to the extent practicable
 - c. Notify the state of determinations under 1 and 2 above. Send letter.
 - i. Content of Notification
 - a) Detailed description of proposed activity
 - b) Expected coastal zone effects
 - c) Evaluation in light of enforceable state policies

- d. Timing
 - i. At least 90 days before taking action
 - ii. If no response after 60 days, infer concurrence
 - iii. If serious disagreement, seek mediation by the Secretary
 - 5. "General consistency" determinations
 - a. Agencies may prepare an umbrella determination to cover:
 - b. Repeated, or ongoing activities with cumulative effects
 - 6. Emergency actions: Deviation from consistency
 - a. If justified because of emergency or unforeseen circumstances
 - b. Substantial obstacle prevents complete adherence
 - c. Deviates the minimum necessary
 - d. Consistent to the maximum extent practicable
- C. Triggers and Requirements 2: Applicants for Federal Permits
- 1. Provide certification of consistency with the state's approved CZMP
 - 2. Agency may presume concurrent 6 months after initiation of review.

IV. EO 13132 Links to MSA actions

- A. Purpose
 - 1. Guarantee Constitutional division of powers
 - 2. Ensure agencies adhere to Federalism principles
 - 3. Emphasize role of state and local governments
- B. Trigger
 - 1. Federal agency action
 - 2. with "Federalism Implications"
 - a. "Substantial direct effects"
 - b. On
 - i. The States
 - ii. OR the relationship between the national government and the States,
 - iii. OR the distribution of power among the various levels of government
- C. Requirements:
 - 1. Adhere to Principles set forth in EO
 - 2. Consult with States
 - 3. Restrictions on use of Preemption
 - a. Preempt only if
 - i. Statute expressly provides
 - ii. OR where state's rules conflict
 - b. Process
 - i. Prior to promulgation
 - ii. Early consultation
 - iii. Provides "Federalism summary Impact Statement," to OMB (and in preamble)
 - a) Describes extent of consultation
 - b) Summary of concerns
 - c) Agency's need to act
 - d) Statement of extent to which state and local concerns have

Overview of the Fishery Management Process

been met

- iv. Makes correspondence available to OMB
- c. Keep scope of preemption to the minimum necessary
- d. Where the conflict can be foreseen, consult and attempt to avoid the conflict

- e. Provide States notice and opportunity to participate
- 4. Restrictions on regulations Imposing “Substantial Costs” on States not required by law, UNLESS
 - a. Funds are provided OR
 - b. Process
 - i. Prior to promulgation
 - ii. Agency consults
 - iii. Provides “Federalism summary Impact Statement,” to OMB (and in preamble)
 - a) Describes extent of consultation
 - b) Summary of concerns
 - c) Agency’s need to act
 - d) Statement of extent to which state and local concerns have been met
 - iv. Makes correspondence available to OMB
- 5. Certification
 - a. Must accompany draft rule to OIRA
 - b. Show adherence to principles and consultation requirements in timely manner