FEDERAL CONSISTENCY & the NEW HAMPSHIRE COASTAL PROGRAM

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An Applicant's Guide

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FEDERAL CONSISTENCY

AND

THE NEW HAMPSHIRE COASTAL PROGRAM

AN APPLICANT'S GUIDE

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FEDERAL CONSISTENCY AND THE NEW HAMPSHIRE COASTAL PROGRAM

INTRODUCTION

The coast and its resources have always been important to New Hampshire residents. This is evidenced by the extensive role played by the State in the management of coastal resources through state ownership and/or regulations. Activities within the coast, which are managed under state regulations or by permits, include dredging, fishing, boat moorings, and energy facility siting. In addition, much of the land used for public recreation and access is owned by the state parks system. Through these dual functions, ownership and regulation, state agencies exert considerable influence on coastal activities.

Over the years, the State has improved its management of activities in or near tidal waters. Under the jurisdiction of several state regulatory agencies such as the Water Supply and Pollution Control Commission, Water Resources Board, Fish and Game, Public Utilities Commission, and Department of Public Works and Highways, various development proposals are evaluated for their impact on resources, both natural and man-made. In conjunction with local ordinances, these state regulations form a network which helps ensure the wise use of coastal resources. The New Hampshire Coastal Program (NHCP), approved in June 1982, is based on this concept and relies exclusively on existing state laws, regulations, and agency programs.

Federal agencies also play a significant role in New Hampshire's coast. To facilitate coordination between the state and federal governments, the federal Coastal Zone Management Act of 1972 established a process to ensure that federal involvement with a state's coastal area would be, to some degree, consistent with the mandatory provisions of the state's approved coastal program. This process is commonly known as federal consistency.

Federal regulations describe in detail the requirements for the federal consistency process, which is designed to strike a balance between the need to promote activities and a concern for the protection of coastal resources.

The intent of this publication is two-fold:

- It discusses the federal consistency process from the applicant's perspective; and
- It describes the responsibility of the Office of State Planning which is the state agency charged with coordinating the consistency review.

PART I. FEDERAL CONSISTENCY: WHAT IS IT? HOW DOES IT WORK?

The federal Coastal Zone Management Act of 1972, as amended, (CZMA) encourages coastal states to develop and administer a management program for their coastal areas. The Act provides financial assistance to, and federal cooperation with, states that choose to participate in the voluntary program.

In addition, Section 307 of the CZMA requires that federal activities, which have an affect on the coastal area of a state, be conducted in a manner consistent with the requirements of an approved coastal program. Applicants for any of the four types of federal activities discussed below must certify that the proposal is consistent with the state program. The activity may not proceed until the state concurs with the certification or waives it rights, or the Secretary of Commerce determines that the project is consistent with the objectives or purposes of the CZMA or is necessary in the interest of national security, as detailed in Part IV. It should be noted, however, that state approval of an activity does not guarantee federal approval. The federal agency retains the right to apply stricter standards than those of the state.

Activities Which Require Consistency Review

Four categories of federal activities, identified in Section 307 of the CZMA and explained in this Guide, must be carried out in a manner consistent with the approved coastal program. In the case of federally conducted or supported activities, consistency is required to the maximum extent practicable.

1. DIRECT FEDERAL ACTIVITIES AND DEVELOPMENT PROJECTS

   Examples - Corps of Engineers dredging and other coastal projects
   - location, acquisition, and design of new or enlarged defense or coast guard installations
   - construction of post offices and other federal buildings

2. ACTIVITIES REQUIRING A FEDERAL LICENSE OR PERMIT

   Examples - licenses for non-federal hydroelectric projects
   - certificates for construction, operation of, or facilities for, transportation or storage of natural gas
   - any filling, dredging or other construction-related activities conducted by private, local, or state sectors that require a permit from the Corps of Engineers

3. OUTER CONTINENTAL SHELF (OCS) EXPLORATION, DEVELOPMENT, AND PRODUCTION ACTIVITIES

4. FEDERAL ASSISTANCE TO STATE AND LOCAL GOVERNMENTS

   Examples - outdoor recreation - acquisition, development, and planning grants (playing fields, community swimming pools)
   - construction grants for wastewater treatment plants
   - urban development action grants

Basis for New Hampshire Response

The enforceable laws and policies that constitute the New Hampshire Coastal Program form the basis for all consistency reviews of applicable federal activities that are in or directly affect the coastal area or affect the land and water uses in the coastal area. The reviews will be required for federal activities, development projects, licenses or permits, OCS plan approvals, and assistance within, but not limited to, the described boundaries of the approved state program. Seven communities - Seabrook, Hampton Falls, Hampton, North Hampton, Rye, Portsmouth, and New Castle - are included in the Ocean and Harbor Segment.

The laws and policies are discussed in detail in Chapters 3 and 4 of New Hampshire Coastal Program - Ocean and Harbor Segment, April 1982. The seventeen coastal policies cover:

1. Protection of natural coastal resource areas: beaches, sand dunes, rocky shores, tidal wetlands, and marine species habitats;
2. Fisheries management to protect habitats and manage fisheries resources;
3. Protection of water quality and water supply sources;
4. Oil spill prevention and cleanup;
5. Control of erosion due to storms and development adjacent to coastal waters;
6. Flood hazard control to prevent the loss of life and property;
7. Air pollution control;
8. Public access and recreation areas on the coast;
9. Protection of historic and cultural resources;
10. Maintenance and development of ports, harbors, navigable channels, and state lands for water dependent activities such as boating, fishing, and ocean commerce;
11. Management of dredge and fill activities to protect coastal resources and maintain channels;
12. Management of offshore and onshore sand and gravel excavation;
13. Orderly siting of energy facilities;
14. Urban waterfront revitalization;
15. Public investments in sewer treatment facilities, water supply systems, and highways to promote orderly growth and protect resources;
16. Coordination of state activities in the coast; and
17. Marine research and education.

All state agencies with jurisdiction in the coast are included in the program. However, the core of the coastal program is formed by six state regulatory and management programs:

RSA 483-A	Wetlands Board Regulations
RSA 148,149	Water Supply and Pollution Control Commission
RSA 211, 212, 214	Fish and Game Department
RSA 162-F, 162-H	Energy Facilities Siting Laws
RSA 12-A	Department of Resources and Economic Development, beaches, parks, historic sites, and fish pier management
RSA 271-A	Port Authority regulations and operations

Listed Activities

During program development the Office of State Planning, in consultation with federal agencies, identified federal activities that are likely to affect the coastal area thus requiring a federal consistency determination.

1. DIRECT FEDERAL ACTIVITIES AND DEVELOPMENT PROJECTS:

Department of Commerce/National Marine Fisheries Service

- Draft fishery management plans.

Department of Defense/Army Corps of Engineers

- Proposed projects, authorizations for dredging, channel works, breakwaters, other navigation works, erosion control structures, reservoirs, dams, beach nourishment, and other public works projects.

Department of Defense/Air Force, Army and Navy

- Location, acquisition, and design of new or enlarged defense installations. Actions conducted on federal lands with potential impact on non-federal coastal land and water including construction or expansion of buildings or acquisition of land.

Department of the Interior/Minerals Management Service

- OCS-lease sale activities -- selection of tracts, lease sale stipulations, and Proposed Notice of Sale.

Department of the Interior/Fish and Wildlife Services

- Acquisition and management including master plans of National Wildlife Refuges.

Department of the Interior/National Park Service

- Acquisition and management including master plans of national parks and seashores.

Department of Transportation/Coast Guard

- Location, design, and acquisition of new or enlarged installations.

Department of Transportation/Federal Aviation Administration

- Construction, maintenance, and demolition of federal aids to navigation.

General Services Administration

- Disposal of surplus federal land, property acquisition and building construction.

2. ACTIVITIES REQUIRING A FEDERAL LICENSE OR PERMIT:

Department of Defense/Army Corps of Engineers

- Section 10 permit; Rivers and Harbors Act of 1899.
- Section 9 and 10 permits; Rivers and Harbors Act of 1899.
- Section 404 permit; Clean Water Act and amendments.
- Section 103 permit; Marine Protection Research and Sanctuaries Act of 1972.

Department of Energy/Federal Energy Regulatory Commission

- License for non-federal hydroelectric projects; Section 4(e), Federal Power Act.
- Abandonment of gas pipeline; Section 7, Natural Gas Act.
- Certificates authorizing construction, or operation of, or facilities for, transportation or storage of natural gas; Section 7, Natural Gas Act.

Department of Energy/Economic Regulatory Administration

- Options and orders for permission for delivery of imported LNG.

Department of the Interior/Mineral Management Service

- Permit for pipeline rights-of-way for oil and gas transmission on Outer Continental Shelf.

Department of Transportation/Coast Guard

- License for the construction and operation of deepwater ports; Deepwater Port Act of 1974.

- Permit for construction or modification of bridge structures across navigable waters of the United States.

Department of Transportation/Federal Aviation Administration

- Permit and license for the construction, operation, or alteration of airports.

Environmental Protection Agency

- National Pollution Discharge Elimination System (NPDES) permit; Section 402 & 403, Federal Water Pollution Control Act.

- Ocean dumping permit (exercised jointly with Army Corps of Engineers)

Nuclear Regulatory Commission

- Permit and license required for the construction and operation of nuclear plant.

The Office of State Planning will monitor any activities not listed and may request permission from the Assistant Administrator for Ocean Services and Coastal Zone Management to require a consistency determination in some instances when such activities can reasonably be expected to affect the coastal area.

3. OCS EXPLORATION, DEVELOPMENT, AND PRODUCTION ACTIVITIES

- Plans for the exploration, development and production of Outer Continental Shelf (OCS) resources and all associated licenses and permits for activities described in the plan.

4. FEDERAL ASSISTANCE TO STATE AND LOCAL GOVERNMENTS

- All state and local government applications for federal assistance which cover the planning, design, construction, alteration, or expansion of physical development projects.

OFFICE OF STATE PLANNING RESPONSIBILITIES AND PROCEDURES

The Office of State Planning (OSP) is the agency responsible for issuing all federal consistency determinations in New Hampshire. OSP will ensure that state and regional agencies and local governments have the opportunity to participate in consistency reviews. In implementing the process, the OSP, among other things, will:

1. Consult with the applicant regarding the general requirements of the process together with the necessary information which must be submitted prior to the review of an application. Information required by existing federal regulations (environmental impact assessments/statements, permit and grant applications, etc.) will generally satisfy submission requirements to the OSP.

2. Upon submission, acknowledge receipt of application and notify applicant of anticipated review process schedule. Applicant will be notified if any additional information is required prior to commencement of the review.

3. Distribute application to appropriate state, regional, and local agencies for review. Applications will be reviewed against applicable coastal policies pursuant to New Hampshire's approved program, in addition to existing state, regional and local laws, requirements and policies.
   Note: In instances where state permit(s) are required for a particular activity, issuance of such permit(s) will constitute consistency.

4. If required, coordinate public notice and/or public hearing procedures established and used by federal agencies, or other state agencies.

5. In the event of disagreement and/or conflict with a proposed activity, work with both the applicant and reviewer(s) to resolve such problems in order that the activities proposed in the application can be carried out in a manner consistent with the state's approved coastal program.

Up to four potential applicants may be involved in one or more of the activity categories. Table A summarizes the applicants and those activities for which each must submit a consistency determination. Also indicated is the maximum review period, unless mediation, administrative appeal, or judicial action are invoked.

TABLE A

Activity	Federal Agency	State Agency	Local Governments	Private Sector	Maximum Review Period
Direct Federal Activities	X				45 days + 15 day extension
Federal Licenses, or Permits		X	X	X	6 months
OCS				X	3 months + 3 month extension
Federal Assistance		X	X		30 days (A-95)*

*New Hampshire has instituted a review process to replace the federal A-95. The successor mechanism is indicated wherever the A-95 designation is referenced in this document.

The following sections focus on each applicant and outlines the procedures that must be followed under each activity applicable to the particular applicant.

The final section summarizes the mechanisms available in the event of serious disagreements.

Federal Agencies and Federal Consistency

PART II. FEDERAL AGENCIES AND FEDERAL CONSISTENCY

Federal agencies must comply with the consistency provisions for DIRECT FEDERAL ACTIVITIES. These are projects that are undertaken by or in behalf of a federal agency, and are listed in the state program. They include:

- Planning;
- Construction, modification, or removal of public works facilities or other structures; and
- Utilization or disposal of land or water resources

Any such activity that directly affects the coastal area must be conducted or supported in a manner consistent, to the maximum extent practicable, with the approved state program. Compliance is not required if it would be contrary to existing law applicable to the federal agency's operations. However, whenever legally permissible, the federal agency must consider state management programs as supplemental requirements in addition to existing agency mandates.

All development projects in the coastal area are subject to the consistency provisions. Other activities, within or outside the coastal area and supported or conducted by federal agencies, but unlisted in the state program, must be reviewed by the federal agency to determine whether or not they directly affect the coastal zone and, therefore, require a consistency determination.

Steps The Federal Agency Should Take

1. Notify OSP of the proposed activity as soon as possible, but at least 90 days prior to final approval.

2. Federal agencies should consult with OSP, early in the planning process, to determine whether such activities will be consistent to the maximum extent practicable.

3. The agency may choose the form used for notification. Existing procedures such as A-95 and NEPA statements are encouraged. The notification should include a detailed description of the action.

4. Include one of the following statements:

   - The activity does not directly affect the coastal area and consistency is not required;
   - The proposed activity is consistent with the New Hampshire program; or
   - The proposed activity is consistent, to the maximum extent practicable. In this case, the legal authority which prevents full compliance should be cited.

5. Public notice is required for all development projects. Whenever possible this should be coordinated with notice issued by the state.

6. Public hearings should also be coordinated whenever feasible.

Timing and OSP Response

State response is required 45 days after receipt of notification. A state request for one 15 day extension must be granted. Additional extensions may be approved. If there is no state response or request for extension within the 45 day period, the federal agency may presume state concurrence with the consistency statement. Concurrence may not be assumed in cases where OSP does not receive notice of the federal activity.

The federal agency cannot proceed with the activity before the original 90 day notification period has elapsed.

In any instance where OSP determines that an activity will be inconsistent with the state program, its response should list specific reasons for the disagreement and alternatives which, if met, would achieve consistency.

Appeal Process - See Part VI.

State Agencies
and
Federal Consistency

PART III. STATE AGENCIES AND FEDERAL CONSISTENCY

State agencies are required to demonstrate consistency for two categories of federal activities:

A. Federal licenses and permits

Examples - permits for expansion of state pier facilities

- permits required for coastal highway construction

B. Federal assistance

Examples - acquisitions using Land and Water Conservation Funds

- federal assistance for highway projects

A. FEDERAL LICENSES OR PERMITS

The state agency should take the following steps:

1. Determine, through consultation with OSP, what material should accompany the application. Such information might include:

   - A detailed description of the proposed activity, sufficient to permit an assessment of the coastal area effects;
   - Maps, diagrams, and other technical data, if written description will not suffice;
   - A brief assessment of the coastal area effects; and/or
   - A brief set of findings, derived from the assessment, indicating that the proposal is consistent with the management program.

2. Send completed application to the federal agency, along with the required data, and a certification of consistency with the statement:

   The proposed activity complies with the New Hampshire approved coastal management program and will be conducted in a manner consistent with such program.

A copy of this certification, together with a copy of the completed application, is submitted to OSP at the same time. This marks the start of the consistency review period.

Public Notice

Public notice will be given for any license or permit reviewed for consistency. For activities that are subject to a state permit, OSP will use the applicable agency's notification process.

Timing and OSP Response

OSP will notify the applicant agency, at the earliest possible time, of any objections to the proposal and provide information on:

a) How the proposed activity is inconsistent with specific elements of the management program, and

b) Alternative measures which, if adopted, could result in the activity being consistent with the program.

Within three months, OSP will notify the applicant of the status of the review and the basis for any further delay in a decision. If OSP fails to respond within six months, the applicant may presume concurrence. If one or more state permits or licenses are required for the project, issuance of these permits will constitute state concurrence with the consistency certification.

B. FEDERAL ASSISTANCE

The category of federal assistance includes any assistance to an applicant through grant or contractual arrangements, loans, subsidies, guarantees, insurance, or other forms of financial aid. The applicant is any unit of state or local government which submits an application for federal assistance.

Notification Process

An application for federal assistance that requires A-95 review will use the established procedures. A request for federal assistance for which A-95 is not required will follow the consistency review procedures outlined under Federal Licenses and Permits (page 10).

Timing and OSP Response

The previous A-95 review requirements for notification, public information, and review period will apply for the consistency review until such time as a new process is in place.

The applicant may presume OSP concurrence with the proposal at the end of the review period if no objections have been issued. Any OSP objection to the proposal must:

- Describe how the proposal is inconsistent with specific elements of the management program; and

- List any alternative measures that could be adopted to ensure that the proposal is consistent with the management program.

An objection may be based on the applicant's failure, after written request, to provide sufficient information for concurrence or objection.

Appeal Process - See Part VI

Local Governments and Federal Consistency

PART IV. LOCAL GOVERNMENTS AND FEDERAL CONSISTENCY

Local governments will be required to demonstrate consistency for two types of federal activities:

A. Federal licenses and permits

Examples - permits for construction of local dams or hydroelectric projects or coastal highway construction

- permits required for dredging, filling, or other construction activities under Corps of Engineers jurisdiction

B. Federal Assistance

Examples - acquisitions using Land and Water Conservation Funds

- federal assistance for local highway projects

A. FEDERAL LICENSES OR PERMITS

The local government should take the following steps:

1. Determine, through consultation with OSP, what material should accompany the application. Such information might include;

   - A detailed description of the proposed activity, adequate to permit an assessment of the coastal area effects;
   - Maps, diagrams, and other technical data, if written description will not suffice;
   - A brief assessment of the coastal area effects; and/or
   - A brief set of findings, derived from the assessment, indicating that the proposal is consistent with the management program.

2. Send completed application to the federal agency, along with the required data, and a certification of consistency with the statement:

   - The proposed activity complies with the New Hampshire approved coastal management program and will be conducted in a manner consistent with such program.

A copy of this certification, together with a copy of the completed application, is submitted to OSP at the same time. This marks the start of the consistency review period.

Public Notice

Public notice will be given for any license or permit being reviewed for consistency. For activities that are subject to a state permit, OSP will use the applicable agency's notification process.

Timing and OSP Response

OSP will notify the applicant at the earliest possible time of any objections to the proposal and provide information as to:

a) How the proposed activity is inconsistent with specific elements of the management program; and

b) Alternative measures which, if adopted, could result in the activity being consistent with the program.

Within three months, OSP will notify the applicant of the status of the review and the basis for any further delay in a decision. If OSP fails to respond within six months, the applicant may presume concurrence. If one or more state permits or licenses are required for the project, issuance of these permits will constitute state concurrence with the consistency certification.

B. FEDERAL ASSISTANCE

The category of federal assistance includes any assistance to an applicant through grant or contractual arrangements, loans, subsidies, guarantees, insurance, or other forms of financial aid. The applicant is any unit of local government which submits an application for federal assistance.

Notification Process

An application for federal assistance that requires A-95 review will use the existing, or revised, procedures. A request for federal assistance for which A-95 is not required will follow the consistency review procedures outlined under Federal Licenses and Permits (page 12.)

Timing and OSP Response

The previous A-95 review requirements for notification, public information, and review period will apply for the consistency review until such time as a new process is in place.

The applicant may presume OSP concurrence with the proposal at the end of the review period if no objections have been issued.

Any OSP objection to the proposal must:

- Describe how the proposal is inconsistent with specific elements of the management program.

- List any alternative measures that could be adopted to ensure that the proposal is consistent with the management program.

An objection may be based on the applicant's failure, after written request, to provide sufficient information for concurrence or objection.

Appeal Process - See Part VI.

The Private Sector and Federal Consistency

PART V. THE PRIVATE SECTOR AND FEDERAL CONSISTENCY

Activities subject to federal consistency review when conducted by private persons and/or corporations are in two categories:

A. Federal licenses and permits; for example, privately funded hydroelectric projects, or dredging or filling activities.

B. Outer Continental Shelf (OCS) Exploration, Development, and Production Activities.

A. FEDERAL LICENSES AND PERMITS

The applicant should take the following steps:

1. Determine, through consultation with OSP, what material should accompany the application. Such information might include;

   - A detailed description of the proposed activity, adequate to permit an assessment of the coastal area effects;

   - Maps, diagrams, and other technical data, if written description will not suffice;

   - A brief assessment of the coastal area effects; and/or

   - A brief set of findings, derived from the assessment, indicating that the proposal is consistent with the management program.

2. Send completed application to the federal agency, along with the required data, and a certification of consistency with the statement:

   · The proposed activity complies with the New Hampshire approved coastal management program and will be conducted in a manner consistent with such program.

A copy of this certification, together with a copy of the completed application, is submitted to OSP at the same time. This marks the start of the consistency review period.

Public Notice

Public notice will be given for any license or permit being reviewed for consistency. For activities that are subject to a state permit, OSP will use the applicable agency's notification process.

Timing and OSP Response

OSP will notify the applicant agency, at the earliest possible time of any objections to the proposal and provide information as to:

a) How the proposed activity is inconsistent with specific elements of the management program, and

b) Alternative measures which, if adopted, could result in the activity being consistent with the program.

Within three months, OSP will notify the applicant of the status of the review and the basis for any further delay in a decision. If OSP fails to respond within six months, the applicant may presume concurrence.

If one or more state permits or licenses are required for the project, issuance of these permits will constitute state concurrence with the consistency certification.

B. OCS EXPLORATION, DEVELOPMENT, AND PRODUCTION ACTIVITIES

The objective of the consistency review for OCS activities is to ensure that any exploration, development, or production activities, which affect land and water uses in the coastal zone and are described in any required plans, are conducted in a manner consistent with the New Hampshire Coastal Program.

Steps the Applicant Should Take

1. Obtain the views and assistance of OSP during the early stages of plan preparation to ascertain the requirements that must be met and the data to be supplied.

2. When satisfied the proposed activity meets the consistency requirements, the applicant should submit to the Interior Department:

   - The completed application;

   - The accompanying data; and

   - The consistency certification stating:

     . The proposed activities described in detail in this plan comply with New Hampshire's approved coastal management program and will be conducted in a manner consistent with such program.

3. The applicant will provide OSP with:

   - A brief assessment relating the probable effects of the activities on land and water uses in the coastal area subject to the management program; and

   - A brief set of findings indicating that each proposed activity is consistent with the provisions of the Program.

The Interior Department will forward to OSP the consistency certification, a copy of the OCS plan, and any data or information required for the application. Confidential and proprietary information will be provided only if it is necessary to adequately assess the coastal effects of the proposal and after demonstration of adequate protection against public disclosure.

Timing and OSP Response

State agency review begins when all of the required material has been received by OSP. OSP will ensure timely public notice of the proposal.

As soon as possible, OSP will notify the applicant of concurrence with, or objection to, the proposal. If no decision has been issued within three months of commencement of review, OSP will notify the applicant of the status of the review and the basis for any further delay. State concurrence may be presumed, unless an objection has been issued:

a) At the end of the three month period unless the above notification has been received by the applicant.

b) In any event, within six months of commencement of review.

Appeal Process - See Part VI

Disagreements
and
Conflict Resolution

PART VI. DISAGREEMENTS AND CONFLICT RESOLUTION

Consultation between the applicant and OSP in the early stages of a proposal is strongly recommended so that all parties will understand the procedures and the constraints prior to investment of substantial time and/or monies.

Formal and informal conferences are suggested to resolve disagreements and to work out acceptable alternatives that will enable the work to be performed in a manner consistent with the state's coastal policies and regulations.

For direct federal activities, if a serious disagreement persists between the federal agency and the state, either party may:

- Request mediation by the U.S. Secretary of Commerce; or
- Seek judicial review, with or without having first exhausted the mediation process.

Even though the federal agency may proceed, if it determines that the activity is consistent to the maximum extent practicable, the agency is encouraged to suspend implementation of the activity beyond the 90 day period pending resolution of the disagreement.

For the remaining three categories of activities, the federal agency may not issue the license or approve the assistance in the event of unresolved objections to the application. As with direct federal activities, consultation is the preferred method for resolving disagreements. Secretarial mediation and judicial review are also possible. In addition, a formal objection from OSP will specify the applicant's right to appeal the objection to the Secretary of Commerce, who can overturn the objection based on findings that the activity:

A. Is consistent with the objectives or purposes of the CZMA in that it:

   1. Furthers one or more of the national objectives or purposes of the federal act;

   2. Will not cause adverse effects on the natural coastal resources substantial enough to outweigh the contribution to the national interest;

   3. Does not violate the requirements of the Clean Air or Clean Water Acts as each are amended; and

   4. There is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the management program; or

B. Is necessary in the interest of national security.