



## CSO Process Update on Pending Regulatory Issues September 2023

This reference document provides updates on recent developments in ongoing regulatory issues. More information is available on the [Regulatory Resources page](#) (login required) in the Members Only section of the CSO website. Please contact John Ryan-Henry ([jryan-henry@coastalstates.org](mailto:jryan-henry@coastalstates.org)) for login information.

### Recent CSO Comments & Letters

(Since Mar. 20, 2023)

- [Comment to OPC on Sustainable Ocean Economy National Strategy](#) (Sep. 14, 2023)
- [Comment to FEMA on Community Disaster Resilience Zones RFI](#) (Jul. 25, 2023)
- [Comment to OPC on Ocean Justice Strategy RFI](#) (Jul. 24, 2023)
- [Letter to NOAA on BOEM Renewable Energy Modernization Rule](#) (Jun. 13, 2023)
- [Comment on BOEM Renewable Energy Modernization Rule](#) (May 1, 2023)
- [Comment on USGCRP National Nature Assessment RFI](#) (Mar. 31, 2023)
- [Comment on USACE WRDA2022 Implementation Guidance RFI](#) (Mar. 21, 2023)

## National Oceanic & Atmospheric Administration (NOAA)

### Federal Consistency Rulemaking

NOAA [continues to develop](#) a proposed rule revising its CZMA federal consistency regulations this year. The rulemaking was initiated in 2019 with an [Advance Notice of Proposed Rulemaking](#) (ANPR) focused on energy development. NOAA has coordinated with BOEM on the Renewable Energy Modernization Rule and is expected to propose federal consistency changes that align the two regulations. A summary of comments on the 2019 ANPR and the potential implications of their proposals is available on the [Federal Consistency Rulemaking](#) page of the members only website.

When the proposed rule is released, CSO will coordinate with members and national allies to find consensus on common-sense improvements, such as better alignment between NEPA and federal consistency review processes, and to deter changes that reduce state authority or influence through federal consistency, including restrictions on the scope of review or procedural hurdles.

## Atlantic Speed Rule

NOAA National Marine Fisheries Service (NMFS) has proposed [amendments to vessel speed regulations](#) along the Atlantic seaboard in response to an ongoing Unusual Mortality Event affecting North Atlantic Right Whales. The proposed rule would expand seasonal speed restrictions to vessels over 35ft. NMFS is preparing a consistency determination for the rulemaking, and [plans](#) to take final action by the end of 2023. NMFS also received and has solicited comments on a [petition](#) to establish speed restrictions in Rice’s whale habitat across a portion of the Gulf of Mexico.

CSO did not provide comments on the Sep. 2022 proposed rule. In Feb. 2023, CSO convened Atlantic state federal consistency personnel to discuss NMFS’s request for information for the CD and will continue to provide a platform for coordination among states and with the agency.

## Endangered Species Act Rulemaking

In Jun. 2023, the U.S. Fish and Wildlife Service and NOAA National Marine Fisheries Service issued a set of three proposed rules revising Endangered Species Act regulations. Rules for [listing and delisting](#) endangered and threatened species would end consideration economic and other impacts and allow designation of critical habitat not currently occupied by protected species. Requirements for [interagency consultation](#) would reverse previous limitations on the scope of Biological Opinions. The reinstated “[Blanket Rule](#)” would automatically apply the same ESA protections as endangered species to newly listed threatened species unless the agency develops a “special 4(d) rule” relaxing those protections.

Staff will continue to report to members on significant developments.

## U.S. Army Corps of Engineers (USACE)

### PR&G Rulemaking

USACE has [announced](#) it intends to issue a proposed rule this year for its long-deferred agency specific procedures implementing the 2013 [Principles, Requirements and Guidelines](#) (PR&G). A draft rule has been completed and is awaiting interagency review.

The PR&G sets a Federal Objective for water resource projects of maximizing sustainable economic development, avoiding and minimizing use and impacts to flood-prone areas, and protecting and restoring the

functions of natural systems. This rulemaking will provide an opportunity for USACE to modernize its treatment of national and regional economic benefits, improve coordination with states and communities, plan projects regionally and in coordination with related efforts, and better account for climate change, future conditions, and natural infrastructure.

CSO submitted [comments](#) on a June 2022 [Request for Information](#) framing PR&G priorities, and is coordinating with members and the national Natural Infrastructure Working Group, including joining a Sep 2023 E.O. 12866 meeting with USACE, Office of Management & Budget, and Council on Environmental Quality.

### **Federal Standard Guidance**

USACE has indicated that it intends to develop new guidance for benefit valuation and cost benefit analysis for dredge disposal options under the Federal Standard policy. Sec. 125(a)(2)(B) of WRDA 2020 directs USACE to integrate comprehensive economic and environmental benefits, efficiencies, and impacts of beneficial use of dredged material (BUDM) into dredging project planning. Additionally, USACE districts have begun to develop five-year Regional Dredged Material Management Plans identifying BUDM opportunities.

CSO is collaborating with national allies to facilitate USACE/state coordination on RDMMP development and promote improved implementation of Federal Standard policies.

### **Other Regulatory Items**

For each item below, staff will brief members as the agency releases new information and, for proposed rules, determine the need to submit national comments.

**Section 408:** USACE has [announced](#) it intends to issue a proposed rule to codify guidance currently available through [Engineer Circular 1165-2-220](#) for the [Section 408 program](#) regulating non-federal party alteration of Civil Works projects.

**P.L. 84-99:** USACE issued a [proposed rule](#) in Nov. 2022 replacing and revising its existing regulations for the [P.L. 84-99 Emergency Response & Recovery Program](#). The new rule would codify recent legislative changes to provide greater flexibility in restoring damaged coastal storm risk management projects. The agency [intends](#) to issue a final rule in fall 2023.

**NWP 12:** USACE [intends](#) to modify [Nationwide Permit](#) 12 in early fall 2023 for Clean Water Act § 404 and Rivers and Harbors Act § 10 permits for oil and gas pipelines. The agency has indicated that the rulemaking will include modifications to the permit.

**Reduced Cost Share:** USACE [intends](#) to issue a proposed rule in fall 2023 to broaden the eligibility of underserved communities for reduced Civil Works project non-Federal cost share provisions, expanding eligibility beyond flood risk reduction projects and including feasibility studies.

**NHPA:** USACE [intends](#) to issue a proposed rule in early fall 2023 to codify National Historic Preservation Act procedures for its regulatory program, following a [request for information](#) issued in June 2022.

## Bureau of Ocean Energy Management (BOEM)

### Renewable Energy Modernization Rule

BOEM [intends](#) to issue a final rule in spring 2024 revising offshore wind leasing and planning procedures, following a [proposed rule](#) issued in Jan. 2023. The proposed rule incorporates a recommendation submitted by CSO to better align the CZMA and NEPA review processes for review of commercial Construction & Operation Plans (COPs) by establishing the draft environmental impact statement as necessary data and information for federal consistency review.

CSO has submitted [comments](#) on the proposed rule and a [letter](#) to NOAA on implications for its federal consistency rulemaking, both developed through the Offshore Energy & Infrastructure (OEI) work group.

### NOI Checklist Guidance

BOEM issued [final guidance](#) in Aug. 2023 setting out data standards for and stakeholder engagement requirements iterative COP submissions based on the “Project Design Envelope” approach.

CSO submitted [comments](#) on BOEM’s Oct. 2022 [draft guidance](#) via the OEI work group. Staff will continue to report to members on significant developments.

### Vessel Incidental Discharge Act Rulemaking

EPA is still on track to [develop a Supplemental Notice](#) in fall 2023 reopening public comment on the Vessel Incidental Discharge (VIDA) [National Standards of Performance proposed rule](#) issued in Oct. 2020. The Supplemental Notice will provide clarification on the proposed rule, share new ballast water data from the U.S. Coast Guard, and discuss additional regulatory options EPA is considering for the final rule.

CSO submitted [comments](#) on the 2020 proposed rule, including EPA's [national consistency determination](#) for the rulemaking. CSO will coordinate as needed with EPA and members to provide coastal state feedback and ensure adequate alignment with enforceable policies.

### WOTUS Rulemaking

EPA and USACE issued a [second final rule](#) in Sep. 2023 amending its Jan. 2023 [final rule](#) defining “waters of the United States” for the purpose of identifying water bodies subject to the Clean Water Act. The amended rule is intended to conform the definition of “waters of the United States” to the U.S. Supreme Court’s May 2023 decision in [Sackett v. EPA](#) by removing reference to the “significant nexus” test and “interstate wetlands.” A factsheet and redline of the regulatory text are available at EPA’s rulemaking page. The conforming rule is in force in 23 states (18 coastal states) and all territories, but is stayed in 27 states (12 coastal states) and for some parties, where the pre-2015 regulatory regime is in force [pending litigation challenging the 2023 rule](#).

Staff will continue to report to members on significant developments.

### Water Quality Certification Rulemaking

In Sep. 2023, EPA issued a [prepublication edition](#) for a [final rule modifying Clean Water Act § 401 state water quality certification regulations](#), following the [proposed rule](#) issued in Jun. 2022. The final rule repeals certain 2020 regulatory changes, defines the scope of review as the water quality-related impacts from the entire activity subject to the federal permit, including construction and operation, and set a default six-month review time limit. An EPA [summary fact sheet](#) is available. Water quality certification requirements apply to waters of the United States, as revised under the WOTUS rule discussed above.

CSO submitted [comments](#) on the Jun. 2022 proposed rule. Staff will continue to track and inform members on new developments.

## Clean Water Act § 404 Assumption Rule

EPA issued a [proposed rule](#) to revise the [process for states and Tribes to administer Clean Water Act Section 404 dredge and fill permitting programs](#) in Aug. 2023. Elements of the proposed rule include clarification of retained waters, compensatory mitigation requirements (allowing banks and permittee mitigation but not in-lieu fees), and five-year permit limits.

Staff have briefed the Coastal Nonpoint Source Pollution Work Group will continue to report to members on significant developments.

## WQS for Tribal Reserved Rights Rulemaking

EPA issued a [proposed rule](#) in Dec. 2022 that would require states to develop updated water quality standards to protect tribal reserved rights at levels corresponding to the time those rights were established. EPA has [announced](#) that it intends to issue a final rule by the end of 2023, as well as an additional proposed rule in spring 2023 to establish WQSs for Indian reservations that do not have them.

Staff will continue to report to members on significant developments.

## Council on Environmental Quality (CEQ)

### NEPA Phase 2 Rule

The Council on Environmental Quality (CEQ) issued its long-expected National Environmental Policy Act (NEPA) Implementation Regulations [Phase 2 proposed rule](#) in Jul. 2023. Significant changes under the proposed rule include a codified definition for “environmental justice” that calls for more explicit consideration of impacts on burdened communities, requiring assessment of both the impacts of the proposed action on climate change as well as reasonably foreseeable effects of climate change on the proposed action, broadening consideration of context and intensity to include multiple geographic and time scales, and creating greater flexibility for agencies to promulgate and use categorical exclusions. The proposed rule also invites agencies to pursue “innovative approaches” to NEPA compliance when addressing “extreme environmental challenges” due to climate change. CEQ also [intends](#) to issue a final update to its [greenhouse gas guidance](#) in early 2024.

CSO [commented](#) on the “Phase 1” proposed rule. CSO will continue to engage with agencies and national partners to ensure that coastal states are able to effectively engage in NEPA review as participating /

cooperating agencies, and that NEPA rules and agency practices coordinate effectively with, and do not undermine, federal consistency review procedures.

## Federal Emergency Management Agency (FEMA)

### Federal Flood Risk Management Standard

In Mar. 2023, the National Climate Task Force issued a [State of the Science report](#) for applying the “Climate-Informed Science Approach” to flood risk assessment under the [Federal Flood Risk Management Standard](#). FEMA [intends](#) to issue a proposed rule in 2023 to implement the FFRMS for state and local floodplain management requirements. HUD [intends](#) to finalize its Mar. 2023 FFRMS [proposed rule](#) in early 2024.

CSO will work with members through the Coastal Hazards Planning and Adaptation Work Group and with FEMA, NOAA, and other key partners to provide information to states and convey state input to federal agencies as FFRMS compliance regulations are developed.

## Energy Department

### Coordinated Interagency Transmission Authorizations and Permits Program

The Energy Department [issued a proposed rule](#) in Aug. 2023 establishing a single administrative record and binding federal permit review timeline for voluntarily participating transmission projects. The new regulations apply to non-marine interstate transmission projects carrying greater than 230kV which require a NEPA Environmental Impact Statement. Proponents of offshore grid projects (not generation export cables) can also request to use the accelerated process.

Staff will share updates through the Offshore Energy & Infrastructure work group.

## Interagency

### Justice40

The [Justice40 Initiative](#), set out in E.O. 14008, “[Tackling the Climate Crisis at Home and Abroad](#),” requires federal agencies to direct 40% of the overall benefits of federal investments to disadvantaged communities in certain policy areas including climate, energy, and environment. The Office of Management and Budget (OMB)

has provided [guidance](#) for calculating benefits for covered programs, and tools such as the [Climate and Economic Justice Screening Tool](#) and the [Environmental Justice Scorecard](#) assist implementation.

In Apr. 2023, the White House issued E.O. 14096, “[Revitalizing Our Nation’s Commitment to Environmental Justice for All](#),” and launched several environmental justice-focused actions including an update to the [list of federal programs covered](#) under Justice40 requirements, a new Office of Environmental Justice in the Council on Environmental Quality, and the release of the first version of the Environmental Justice Scorecard.

Commerce Department has announced that Coastal Zone Management Grants are covered under Justice40 requirements. NOAA will provide reporting data to OMB on CZ grants to track progress toward the 40% goal. CSO expects that state coastal programs’ annual reporting requirements will not change to meet NOAA’s Justice40 reporting requirements, but that additional reporting requirements will apply to Bipartisan Infrastructure Law / Inflation Reduction Act funding.

CSO has submitted comments on a number of environmental justice-related agency requests for information and draft tools. Staff works directly with federal agencies and through grant projects, fellowships, and partnerships like the Digital Coast Partnership to support member equity goals and improve coastal community access to federal funding and resources.

## **Ocean Planning**

The interagency Ocean Policy Committee (OPC), a Congressionally mandated, Cabinet-level interagency committee charged with coordinating federal ocean policy, is in the early stages of developing two new national strategy documents for ocean management. The [National Strategy for a Sustainable Ocean Economy](#) is intended to set high-level goals and actions as an umbrella coordinating document across all ocean management issues, based on and supporting regional planning efforts, meeting United States obligations under the [High Level Panel for a Sustainable Ocean Economy](#). The [Ocean Justice Strategy](#) will describe the vision, goals, and high-level objectives for coordinating and guiding ocean justice activities across the federal government. Additionally, in March 2023, the OPC issued the [Ocean Climate Action Plan](#), which outlines whole-of-government actions to reduce carbon emissions, accelerate blue carbon efforts, and enhance coastal climate resilience.



CSO has submitted comments on OPC requests for information for the [National Strategy for a Sustainable Ocean Economy](#) and the [Ocean Justice Strategy](#), and will continue to engage through the Offshore Energy & Infrastructure work group as these planning efforts move forward.

### **Benefit Cost Analysis and Ecosystem Services Valuation**

In Apr. 2023, the White House issued E.O. 14094, “[Modernizing Regulatory Review](#),” implementing a range of equity, efficiency, and transparency policies for the federal rule making process. At that time, the Office of Management and Budget (OMB) concurrently issued proposed updates to its requirements for cost benefit analysis of federal rulemakings ([Circulars A-4](#)) and federal investment ([Circular A-94](#)), building on a Jan. 2023 [national strategy for natural capital accounting](#). In Aug. 2023, OMB and the Office of Science and Technology Policy issued further [draft guidance](#) for accounting for ecosystem services in benefit-cost analysis. (Circular A-94 does not apply to water resource projects, including USACE Civil Works projects, which are instead covered by the PR&G, addressed above.)

Federal benefit-cost analysis standards have significant influence over the outcomes of complex federal rulemakings and programs. Updates to these standards have the potential to increase federal investment in activities with long-term benefits like infrastructure development and climate adaptation, expand federal agency consideration of environmental and social impacts, and elevate the viability of nature-based designs.

Staff will continue to report to members on significant developments.

### **America the Beautiful (30x30) Initiative**

Few updates have come out in 2023 about the [America the Beautiful Initiative](#) to conserve 30% of U.S. lands and waters by 2030 (30x30). CSO submitted [comments](#) on an Apr. 2023 request for information on the development of a new [National Nature Assessment](#) (NNA), led by the U.S. Global Change Research Program. Staff continues to coordinate with ENGO partners to prioritize state policy and coastal resources in the national conversation, and will continue to report to members on significant developments.