



**UNITED STATES DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
 NATIONAL OCEAN SERVICE  
 OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT  
 Silver Spring, Maryland 20910

Ms. Virginia KopKash  
 Assistant Commissioner  
 Land Use Management  
 State of New Jersey  
 Department of Environmental Protection  
 P.O. Box 420, 401 East State Street  
 Mail Code 401-07B  
 Trenton, NJ 08625-0430

JUN 18 2014

Re: Request to Review Federal Funding by the National Science Foundation to Rutgers University for Conducting 3-D Seismic Surveys in Federal Waters Offshore New Jersey

Dear Ms. KopKash:

Thank you for your request to review the federal grant application by Rutgers, The State University of New Jersey, to the National Science Foundation (NSF) to conduct 3-D seismic surveys in federal waters offshore of New Jersey. You requested the National Oceanic and Atmospheric Administration's (NOAA's) Office of Ocean and Coastal Resource Management (OCRM) to approve New Jersey's review of Rutgers' application as an unlisted activity under the Coastal Zone Management Act (CZMA) § 307(d), and NOAA regulations at 15 C.F.R. Part 930, Subpart F. In the alternative, the state has requested that OCRM concur that the activity is subject to the requirements under 15 C.F.R. Part 930, Subpart C and that the NSF is required to submit a consistency determination to New Jersey.

OCRM denies the State of New Jersey's request to review Rutgers' application as an unlisted activity. OCRM agrees that the proposed activity is federal funding assistance to a state or local government entity subject to the requirements of Subpart F of the CZMA Federal Consistency regulations. As such, the requirements of Subpart C do not apply. However, OCRM finds that New Jersey's request for approval to review the activity was not made in a timely manner as required under 15 C.F.R. § 930.98 and must be denied.

#### CZMA UNLISTED ACTIVITY REVIEW REQUESTS

States with federally-approved coastal management programs are required to list specific types of federal assistance programs subject to consistency review. 15 C.F.R. § 930.98. If an activity is unlisted or outside of the geographic scope of state CZMA federal consistency review approved by OCRM, a state must request OCRM approval to review the activity. The request must be timely submitted, notify the applicant, relevant federal agency, and OCRM that it intends to review the activity and demonstrate that the activity would have reasonably foreseeable effects on the coastal uses or resources of the state; otherwise a state waives its right to review the unlisted activity. *Id.* The waiver does not apply where the state office charged with implementing



an approved coastal management program does not receive notice of the application.

## PROJECT DESCRIPTION

The NSF is providing research funding to Rutgers and the University of Texas at Austin to conduct a high-energy, 3-D seismic survey in the Atlantic Ocean 25-85 km from the coast of New Jersey in June—July, 2014. As part of this project, Rutgers requested that NSF make available the NSF-owned Research Vessel (R/V *Langseth*), which is operated by the Lamont-Doherty Earth Observatory through a pre-existing cooperative agreement between NSF and Lamont-Doherty. The seismic survey would use a towed array of 4 or 8 airguns with a total discharge volume of ~700 in<sup>3</sup> or 1400 in<sup>3</sup>. In addition to the operations of the airgun array, a multi-beam echo-sounder, a sub-bottom profiler and an acoustic Doppler current profiler would be operated from the R/V *Langseth* throughout the survey. The survey would take place outside of state waters within the U.S. Exclusive Economic Zone in water depths of ~30-75 m.

The purpose of the survey is to collect and analyze data on the arrangement of sediments deposited during times of changing sea level from roughly 60 million years ago to present. The data would be used to assess past sea-level rise.

The survey cruise was originally scheduled to depart on June 3, 2014. The departure has been delayed pending issuance by the National Marine Fisheries Service (NMFS) of an Incidental Harassment Authorization pursuant to the Marine Mammal Protection Act (MMPA) § 101(a)(5)(D), and now the consideration by OCRM of the request by New Jersey for approval to review the proposed activity for which Rutgers has applied for NSF financial assistance.

## DISCUSSION

### 1. Applicable Subpart

OCRM has determined that the proposed activity is subject to requirements for the review of federal assistance to state or local government agencies under Subpart F of the CZMA Federal Consistency regulations.

The survey cruise is a combination of several forms of federal assistance. These forms of assistance are inseparable for the purposes of the project. The project could not go forward without each form of assistance. Looking across the various forms of NSF assistance to support the cruise, it is clear that this is a single project to conduct research with Rutgers as the lead Principal Investigator for the project.

NSF is providing the R/V *Langseth*, which is the only vessel of its kind available for conducting this type of survey. Under a pre-existing cooperative agreement with NSF, Lamont-Doherty Earth Laboratory (a private institution affiliated with Columbia University), will operate the vessel including the survey equipment. The cooperative agreement between NSF and Lamont-Doherty is from 2012 and is not part of the Rutgers project; NSF's in-kind support of the R/V *Langseth* for the project is incidental to the project. Lamont-Doherty is the applicant for the MMPA Incidental Harassment Authorization from NMFS.

Rutgers and the University of Texas are receiving federal financial assistance from NSF for the on-board research, which is the purpose of the cruise. Rutgers and the University of Texas are recipients of funding assistance under separate awards from the NSF (\$798,819 and \$194,431 for Rutgers and Texas, respectively). However, in reviewing the projects proposed by both institutions, the awards are for the same research project as described and funded by NSF. Although Rutgers and the University of Texas are both listed as Principal Investigators for the survey cruise, the research to be conducted builds upon more than two decades of research by Dr. Gregory Mountain of Rutgers in understanding the evolution of siliciclastic systems and quantifying eustatic changes preserved in the clinoformal architecture offshore New Jersey. Given the foundational research by Rutgers for which this project is an extension, the differences in the amounts of the grant awards to Rutgers and the University of Texas, and the area of focus offshore of New Jersey, Rutgers is the lead Principal Investigator for this project.

Being a state university of New Jersey, OCRM finds that Rutgers falls within the definition of “applicant agency” in 15 C.F.R. § 930.92 and that the review provisions of Subpart F for the Consistency for Federal Assistance to State and Local Governments apply.

New Jersey has requested that in the alternative to finding that the activity is subject to the review requirements of Subpart F, that OCRM concur that the activity is subject to the provisions of Subpart C for the review of activities conducted by federal agencies, and that NSF be required to submit a consistency determination for the project. Apart from finding that the project falls within the review provisions of Subpart F and as such is exclusive of Subpart C review, OCRM finds that the project is not being conducted by NSF. Through a competitive process, the research project was developed and proposed by Rutgers and is being conducted by Rutgers. The NSF approved assistance for the project but did not develop the proposal and will not be conducting the research.

## 2. The Timeliness of the New Jersey’s Request to Review Rutgers Application

OCRM finds that New Jersey’s unlisted activity request is untimely pursuant to 15 C.F.R. § 930.98.

The CZMA Federal Consistency regulations pertaining to unlisted activity review requests for federal assistance activities state that a state must “immediately” notify OCRM, the applicant agency and federal funding agency of its intent to review an unlisted activity upon notice of the application for federal assistance. 15 C.F.R. § 930.98. While “immediate” is not defined, the term requires a state to exercise due diligence and issue its unlisted notice shortly after receiving notice of the proposed activity. Notice does not need to be actual notice – it may be constructive such as through a Federal Register notice or the publication of an analysis performed pursuant to the National Environmental Policy Act. The regulation also states that OCRM is to be guided by the provisions of 15 C.F.R. § 930.54 for the review of unlisted federal licenses or permits in applying the unlisted activity requirements for federal assistance. At 15 C.F.R. § 930.54(c), it is specified that an unlisted activity review request must be submitted within 30 days of notice of a federal license or permit application. Prior to the revisions of the Federal Consistency regulations

in 2000, 15 C.F.R. § 930.54 had also stated that a state must submit an unlisted activity review request “immediately.” The preamble to the 2000 rules state that the revision to 15 C.F.R. § 930.54 in regard to the timeframe for submitting an unlisted activity review request was a clarification rather than a change to the rule.

OCRM was first contacted by New Jersey regarding its interest in reviewing the survey cruise on April 11, 2014. The email communication included two attachments: the March 17, 2014, *Federal Register* request for comments on the pending application of Lamont-Doherty for an MMPA Incidental Harassment Authorization (IHA) related to the survey cruise; and the Draft Environmental Assessment (Draft EA) for the Survey prepared for Lamont-Doherty and NSF. In the email communication, New Jersey assumed that the NSF was responsible for submitting either a consistency determination or negative determination for the assistance to Lamont-Doherty under Subpart C of the Federal Consistency regulations, and that Lamont-Doherty could be required to submit a consistency certification for the IHA authorization under the Subpart D provisions pertaining to unlisted federal licenses or permits. There was no mention of the role of Rutgers or NSF assistance to Rutgers in the communication. That is understandable in that the *Federal Register* notice makes no mention of Rutgers, and the Draft EA only mentions Rutgers once as the Principal Investigator with no mention of NSF assistance to Rutgers. The record of communications between OCRM and New Jersey in the days that followed the initial communication from the state shows confusion over the role of Rutgers in the project given that most of the publicly available documents focused on the role of Lamont-Doherty.

On April 16, 2014, Dr. Gregory Mountain, the Principal Investigator for Rutgers on the Project contacted the New Jersey Department of Environmental Protection with an email to Martin Rosen describing his role in the “project funded by NSF” and offering to provide more information on the project.

On April 22, 2014, a conference call was convened by OCRM with staff for the New Jersey Department of Environmental Protection and NSF participating. The conversation included a discussion of the respective roles of Lamont-Doherty and Rutgers and the University of Texas, with Rutgers being described as the lead for the project and Lamont-Doherty and University of Texas having supporting roles, and that Lamont-Doherty was not a recipient for NSF funds as part of the project.

On May 20, 2014, OCRM received by email the New Jersey Department of Environmental Protection’s request for approval to review the NSF assistance to Rutgers as an unlisted activity under Subpart F.

On May 29, 2014, NSF responded to New Jersey’s unlisted activity review request asserting that the state’s request is untimely. OCRM agrees.

Since at least the March 17, 2014, *Federal Register* request for comments by NMFS in regard to the MMPA IHA, the proposed seismic survey has received much attention by environmental groups and organizations representing fishermen in the local press in New Jersey and the attention of at least one member of Congress. The March 17 *Federal Register* notice was constructive notice to New Jersey of the proposed seismic survey. The state took no action to

begin to determine what CZMA consistency review authority applied to the activity until April 11, 2014. The state had actual knowledge that the project was under Subpart F of NOAA's regulations by the April 16, 2014, email from Dr. Gregory Mountain that Rutgers was a NSF funding recipient for the project. Even by the most permissive interpretation of the term "immediately" under 15 C.F.R. § 930.98 of 30 days, New Jersey's May 20, 2014, submission of its unlisted activity review request was untimely.

3. Whether the Proposed Activity Has Reasonably Foreseeable Effects on Any Land or Water Use or Natural Resource of the New Jersey Coastal Zone

In order to grant a state request to review an unlisted activity, OCRM must find that the state has shown that there are reasonably foreseeable effects to uses or resources of the coastal zone of the state. That finding is based on the analysis of coastal effects provided by the state and comments received on the request.

The State of New Jersey has alleged reasonably foreseeable effects to fisheries, marine mammals, sea turtles and users of shipwrecks and historical and archaeological resources.

Because New Jersey's unlisted activity request has been found to be untimely and must be denied, OCRM has not determined the sufficiency of the state's analysis of reasonably foreseeable effects from the activity.

CONCLUSION

Based upon a review of the information presented by New Jersey and NSF, OCRM denies the state's request to review the proposed marine geophysical survey in the federal waters offshore of New Jersey.

Please contact David Kaiser, Senior Policy Analyst, OCRM, at 603-862-2719, or Kerry Kehoe, Federal Consistency Specialist, OCRM, at 301-563-1151, if you have any questions.

Sincerely,



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Acting Director

cc:

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