



DEPARTMENT OF THE NAVY
THE ASSISTANT SECRETARY OF THE NAVY
(INSTALLATIONS AND ENVIRONMENT)
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WASHINGTON, D.C. 20350-1000

02 October 2002

Mr. David W. Kaiser
Federal Consistency Coordinator
Office of Ocean and Coastal Resource Management (NORM3)
National Oceanic and Atmospheric Administration
1305 East-West Highway, 11th Floor
Silver Spring, MD 20910

ADVANCED NOTICE OF PROPOSED RULEMAKING ON PROCEDURAL
CHANGES TO THE FEDERAL CONSISTENCY PROCESS (2 JULY 2002)

Mr. Kaiser:

Thank you for the opportunity to review and comment on the above-referenced notice by the National Oceanic and Atmospheric Administration's Office of Ocean and Coastal Resource Management.

The enclosed comments are provided for your consideration. The comments reflect not only the views of the Department of the Navy, but the Defense Department as we are their Executive Agent for matters that have potential to affect military maritime activities.

If you have any questions regarding these comments, please contact Mr. Thomas Egeland on my staff at (703) 588-6671, or Ms. Marthea Rountree in the office of the Chief of Naval Operations Environmental Readiness Division (N45) at 703-604-1233.

Sincerely,

H. T. Johnson

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DEPARTMENT OF THE NAVY COMMENTS ON
ADVANCED NOTICE OF PROPOSED RULEMAKING
ON PROCEDURAL CHANGES TO THE FEDERAL CONSISTENCY
PROCESS (2 JULY 2002)

ISSUE 1: Whether the National Oceanic and Atmospheric Administration NOAA) needs to further describe the scope and nature of information necessary for a State Coastal Management Program (CMP) and the Secretary to complete their Coastal Zone Management Act (CZMA) reviews and the best way of informing Federal agencies and the industry of the information requirements.

A. Scope and Nature of Information

Coastal consistency determinations should be made by a Federal agency as early as feasible in the planning stage of a proposal. As a result, any issues identified by a State in its response to the consistency determination can be addressed in the final National Environmental Policy Act (NEPA) document and the Federal agency can then make its decision. More and more frequently, States are demanding design-level information (design drawings) on a proposal, but delaying the issuance of the consistency concurrence until the NEPA process is completed. While the basis for delay has been expressed as a need for additional information, the required "additional information" has mainly taken the form of a State demand for the Federal agency's final NEPA document. If that final document contains no further analysis of coastal effects, the information in it is irrelevant to the State's concurrence or objection to the consistency determination. Furthermore, by withholding a State response to the consistency determination until a final NEPA document is published, the State denies the Federal agency any benefit the agency might get from the State's comments on the consistency determination. We recommend that States not be allowed to delay their responses to consistency determinations under the ruse of the need for additional information. States should be held to the timelines established in 15 C.F.R. Part 930. To accomplish this, NOAA should clarify the purpose of consistency analysis, and the importance of a timely State response, so that Federal agencies can address that response in any final NEPA documentation.

B. Delays of Federal Agency Activities Resulting from Untimely State Information Requests

Under the current rules, a reviewing State agency may effectively extend the required 60-day consistency determination review period (thereby delaying Federal agency activities) merely by requesting additional information from the submitting Federal agency. The State agency is under no obligation to make its information request(s) in a timely manner. As a result, the rules as written, leave the Federal agency with considerable uncertainty in project or operational planning. We recommend that NOAA revise its rules or provide guidance as itemized below:

1. Provide a detailed description of the type and amount of documentation/information needed to "sufficiently" support a Federal agency's consistency determination (See Comment 1.A above).
2. Establish a definite time period for State notification of a Federal agency's supporting information deficiency (e.g., 14 calendar days).
3. Require that State reviewing agencies provide written notification to submitting Federal agencies of receipt of that agency's consistency determination, the acceptance of any supporting information, and the review period start date.
4. Clarify that in the event a Federal agency believes it has provided sufficient information to support a consistency determination, it may proceed with an action over a State agency's assertion that additional supporting information is needed, just as a Federal agency may proceed over a State's objection to its consistency determination (See 15 C.F.R. Part 930.43(d))

C. Information Security

Many State CMPs operate under a "network" organization requiring the involvement of many regulatory agencies and also must meet State public notice/participation requirements in reviewing actions. The Coastal Zone Management Act requires an opportunity for public participation before a State provides concurrence or objection to a proposed certification by a

Federal license or permit applicant that the proposed activity complies with the enforceable policies of the State's approved program and that the activity will be conducted in a manner consistent with the program (16 U.S.C. § 1456(c)(3)(A)). However, public participation is not required for State action on Federal consistency determinations (See 16 U.S.C. § 1456(c)(1) and (2)). There are times when, from the perspective of the Federal agency submitting information to a State agency, maintaining information security, especially handling of sensitive infrastructure and operational information (e.g., anti-terrorist/force protection related projects), is a critical concern. Consequently, NOAA should revise its rules or provide guidance that clarifies that Federal agencies, not State reviewing agencies, should make final determinations concerning the release of sensitive infrastructure or operational information that is submitted in support of a consistency determination under 16 U.S.C. § 1456(c)(1) or (2). We recommend a regulatory amendment to 15 C.F.R. Part 930.39(a) to read as follows:

In the case of a Federal agency consistency determination under 16 U.S.C. § 1456(c)(1) or (2), a Federal agency may identify to the State agency any sensitive infrastructure, operational, or other information that should not be made public. In making its informational security determination, the Federal agency shall balance the benefits of release to reviewing State agencies and the general public against the potential risks to national security, sensitive infrastructure, and other legitimate Federal interests. If the Federal agency determines that relevant information is not releasable to the public, then the Federal agency shall, in its consistency determination, provide the State agency with written notification of its determination. Federal agencies and State agencies should mutually agree on how best to coordinate the requirements of Federal agency informational security and compliance with the Act.

ISSUE 2: Whether a regulatory provision for a "general negative determination," similar to the existing regulation for "general consistency determinations," (15 C.F.R. Part 930.36(c)), from repetitive Federal agency activities that a Federal agency determines will not have reasonably foreseeable coastal effects

individually or cumulatively, would improve the efficiency of the Federal consistency process.

We endorse any effort to identify and exclude environmentally non-adverse Federal agency activities from Federal consistency review. A two-tiered approach is suggested. First, we recommend that the Federal consistency regulations be amended to grant "Negative Determination" status to any Federal agency activity meeting the definition of a categorical exclusion under its own agency's NEPA regulations. Second, we recommend that NOAA implement the proposed "General Negative Determination" process, but reserve it only for those Federal agency activities that are not covered by a NEPA Categorical Exclusion but still may be determined by the Federal agency to be repetitive and not reasonably likely to have either individual or cumulative coastal effects.

This approach would not only avoid wasteful duplicative Federal agency public notice rulemaking requirements, it would also be consistent with the treatment of actions identified as categorically excluded from NEPA on the basis of effects (i.e., categorical exclusions are a category of actions that do not have a significant effect on the human environment individually or cumulatively). Moreover, this approach would dovetail with existing regulatory options available to Federal and State agencies to work together to negotiate activity-specific *de minimis*, environmentally beneficial, and/or general consistency determinations for those activities reasonably likely to have coastal effects but should otherwise be exempted from further Federal consistency review (See, 15 C.F.R. Part 930.33(3)-(5)).

ISSUE 3: Whether guidance or regulatory action is needed to assist Federal agencies and State CMP's in determining when activities undertaken far offshore from State waters have reasonably foreseeable coastal effects and whether the "listing" and "geographic location" descriptions in 15 C.F.R. Part 930.53 should be modified to provide additional clarity and predictability to the applicability of State CZMA Federal consistency review for activities located far offshore.

Any NOAA regulations or implementation guidance addressing Outer Continental Shelf-related concerns under Subpart D (Federal License or Permit) requirements would likely have a direct impact on Department of Defense Federal consistency requirements

under Subpart C. Of particular concern is that any expanded NOAA guidance would have the potential to affect military operations, such as routine ship movements, exercises, etc. These activities mainly occur, and will continue to occur far offshore, with no measurable effects within the territorial seas. As a result, we strongly object to the development of guidance or regulations that would extend State review to any Federal maritime activities that occur well beyond a State's lawful jurisdiction.