

October 1, 2002

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

Attention: *Federal Consistency Energy Review Comments (Docket No. 020422093-2093)*

Dear Mr. Kaiser:

On behalf of the Board of Supervisors, County of Santa Barbara, I am submitting the following comments in response to the advanced notice of proposed rulemaking cited above. Santa Barbara County is situated adjacent to most of the OCS oil and gas leases and development in the Pacific OCS Region. The County's experience with offshore oil and gas, and related issues of coastal management, date back over a century. This County has been intimately involved with balancing the national interest of OCS oil and gas development against the adverse effects of such development on coastal resources and coastal uses since the advent of OCS offshore California in 1963.

We share the broad sense of confusion with many state coastal agencies about the purpose and need for the current advanced notice of rulemaking. As the track record reported in your notice shows, the Federal Consistency process is working quite well. This track record, the recent five-year rulemaking effort, the participation of coastal states in the process, and past experiences, illustrate a healthy, ever-evolving process, under the commendable stewardship of the National Oceanic and Atmospheric Administration's (NOAA) and, in our geographic context, the California Coastal Commission. The Energy Report, which serves as the impetus of the current notice, was published only five months after the extensive 1996-2000 rulemaking process concluded.

Nevertheless, we respect the opportunity taken herein by NOAA to evolve the process further by seeking input on potential procedural issues and potential solutions. We understand that, within

the context of an advanced notice of rulemaking, both responders and NOAA have ample opportunities to explore means of improving procedural efficiencies of the Federal Consistency process that would be considerably more efficient than formal rulemaking. In this context, we submit the following additional comments for your consideration.

The record of Consistency Review reviews illustrates that the system is working well. The minimal amount of appeals does not support across-the-board rulemaking. Accordingly, procedural amendments to hasten the Consistency Review process risk jeopardizing two principal cornerstones of that process:

- (1) the “uniform threshold standard” of the “effects test,” which requires a factual determination for each specific case, and
- (2) a truly interactive public process, which requires sufficient flexibility to shape the scope and nature of information for each specific case.

Moreover, procedural issues stemming from unique characteristics of a single region likely do not lend themselves to across-the-board rules, but rather should evolve within a regional context through improved coordination among stakeholders. For example, procedural delays resulting from an agency’s or applicant’s unfamiliarity with the CZMA consistency requirements are likely better addressed through early consultations rather than formal rulemaking. The Pacific Regional office of the Minerals Management Service (MMS) has championed such an approach since 1990. Using its MMS/Tri-County forum and several multi-agency adhoc committees (often including interested members of the public), the office has sought, or is seeking, early consensus on procedures for early consultation to consider requests for new or renewed Exploration Plans, approval High Energy Seismic Surveys, or applications to decommission offshore platforms. It also facilitates early consultations routinely on project-specific issues. While not all these efforts fully resolve substantive differences of opinions, they help to resolve issues timely where stakeholders are willing to seek mutually beneficial results.

Lastly, an agency’s or applicant’s failure to adhere to the CZMA consistency requirements should result in procedural delays so that substantive, case-specific issues can be resolved, as intended by Congress when it adopted and subsequently amended the CZMA. Frankly, oil and gas development offshore California entails several complex issues that are not readily explained away by advancements in technology, as suggested in the recent Energy Report. While technology has undoubtedly improved offshore operations, local experience shows us that human error still remains a formidable concern. Additionally, offshore technology, such as oil spill cleanup capabilities, still has serious limitations.

We offer the following suggestions in response to your specific questions.

- **Should NOAA further define the scope and nature of information necessary for a State CMP and the Secretary to complete their CZMA reviews and the best way of informing Federal agencies and the industry of the information requirements?**

No, because it risks undesired circumvention of the substantive process that has largely proven to be successful and ever evolving. Attempts to prescribe rules that cannot possibly foresee all pertinent case-specific factors necessary to make a factual determination pursuant to a particular state's CMP risks circumvention of the process. Additionally, a truly interactive public process requires sufficient flexibility to shape the scope and nature of information for each specific case. Should NOAA prescribe the scope and nature of such information, it would seemingly risk circumvention of public participation, which is a cornerstone of the CZMA.

Instead, Federal agencies and the industry should clearly understand the explicit Congressional intent of the Federal Consistency process; that is, an "effects test" that requires a factual determination on case-specific factors. Second, Federal agencies and the industry should understand each state's CMP and seek clarification where necessary in advance. Early consultations with the applicable state will likely prove to be the most efficient option to identify the scope and nature of necessary information.

➤ **Would a definitive date by which the Secretary must issue a decision in a consistency appeal under CZMA §§ 307©(3)(a), (B), and 307(d) be able to consider standards of the Administrative Procedures Act and which, if any, Federal environmental reviews be included in the administrative record to meet those standards?**

We suggest not, since experience shows there are opportunities to resolve issues in a manner with which the coastal state and the appealing applicant can both live. Certainly, the Secretary may exercise discretion when a ruling can be made quickly if the facts and supporting information are sufficient and point to a clear decision. However, appeals processes are designed as they are to allow both parties, and other interested third parties, a fair and informed process.

➤ **Is there a more effective way to coordinate the completion of Federal environmental review documents, the information needs of the States, MMS and the Secretary within the various statutory time frames of the CZMA and OCSLA?**

This does not appear to be a problem thus far in California. As we understand it, major offshore oil and gas project undergo CZMA/NEPA reviews simultaneously and the staffs of the Minerals Management Service and California Coastal Commission have been very successful in working closely together in coordinating these simultaneous reviews. Additionally, the local regional office of the MMS has taken the initiative on several occasions to implement informal procedures to coordinate their OCSLA and NEPA processes with the CZMA processes, including opportunities for public input early in the processes. We understand from California Coastal Commission staff that this practice is consistent with Section 15 CFR § 930.37, and similar language may or may not be appropriate in Subparts D and E, depending on the context and intent of the language.

➤ **Would a regulatory provision for a "general negative determination," similar to the existing regulation for "general consistency determinations," 15 CFR 930.36(c), for**

repetitive Federal agency activities that a Federal agency determines will not have reasonably foreseeable coastal effects individually or cumulatively, improve the efficiency of the Federal consistency process?

We understand that the recent five-year rulemaking effort satisfactorily addresses this concern (§§ 930.36(c), 930.33(a)(3)(ii), and 930.35(a)). Further rulemaking on this point would be ill-advised without sufficient time to test the efficiencies of the recent rules.

➤ **Is guidance or regulatory action needed to assist Federal agencies and State CMPs in determining when activities undertaken far offshore from State waters have reasonably foreseeable coastal effects and should the “listing” and “geographic location” descriptions in 15 CFR 930.53 be modified to provide additional clarity and predictability to the applicability of State CZMA Federal Consistency review for activities located far offshore?**

No, unless such guidance is able to provide valid and reliable direction about those activities that would pass the “effects test” every time, regardless of project-specific and geographically specific factors. However, causal or intervening variables, such as currents and their contributing factors, differ from one geographic location to the next, and in some cases, they are not well understood and remain subject to ongoing scientific evaluation. Adequate guidance would require sufficient foresight of the range of potential case-specific facts to address and resolve future uncertainties or otherwise risk a “one-shoe-fits-all” prescription. The latter appears to conflict directly with the legislative direction of CZARA, which, as expressed in NOAA’s previous rulemaking, establishes *a generally applicable rule of law that any federal agency activity (regardless of its location) is subject to [the consistency requirement] if it will affect any natural resources, land uses, or water uses in the coastal zone. No federal agency activities are categorically exempt from this requirement* And: ... *that the “uniform threshold standard” requires a factual determination, based on the effects of such activities on the coastal zone, to be applied on a case-by-case basis.*” (Emphasis added.)

This response is not meant to understate the importance and value of early communications and coordination among federal agencies and between federal agencies and state CMPs. Proactive discussions initiated by federal agencies may help in many cases to promote early understanding of potential activities, identify issues, and seek resolution in advance, rather than a reactive approach under difficult schedules.

➤ **Should or can multiple federal approvals needed for an OCS EP or DPP be consolidated into a single consistency review? For instance, in addition to the permits described in detail in EPs and DPPs, whether other associated approvals, air and water permits not “described in detail” in an EP or DPP, can or should be consolidated in a single State consistency review of the EP or DPP?**

Maximizing multiple approvals sounds appealing conceptually; however, some major projects may not lend themselves to such practice. For good reason, the industry often will not invest

2.

Mr. David Kaiser
October 1, 2002
Page 5

resources into the level of detailed design required for some permits, such as air permits, until they have secured overall discretionary approvals first.

In conclusion, we thank NOAA for its strong stewardship in administering the CZMA process, and look forward to the published results of the current advanced notice of rulemaking.

Respectfully submitted,

GAIL MARSHALL, Chair
Board of Supervisors

CC: Peter Douglas, Executive Director, California Coastal Commission
Lisle Reed, Director, Minerals Management Service, Pacific OCS Region