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Sierra Club • Save the Sound, Inc. • Earth Island Institute •
Northwest Environmental Advocates • New Jersey Environmental Lobby •
Sitka Conservation Society • Coast Alliance • RiverSides Stewardship Alliance •
Environmental League of Massachusetts • Clean Ocean Action •
Councilwoman Phyllis Wittner • Kodiak Audubon • Ugashik Traditional Village •
Mamaroneck Coastal Zone Management Commission • Alaska Public
Waters Coalition • Reef Relief • Tualatin Riverkeepers • Environmental Defense •**

National Resources Defense Council

David Kaiser
Federal Consistency Coordinator
Coastal Programs Division
Office of Ocean and Coastal Resource Management
NOAA
1305 East-West Highway, 11th Floor
Silver Spring, MD 20910

3 October 2002

ATTN: Federal Consistency Energy Review Comments

Dear Mr. Kaiser,

These comments are submitted on behalf of the undersigned organizations in response to NOAA's Advance Notice of Proposed Rulemaking (ANPR) for Procedural Changes to the Consistency Process.¹ We urge NOAA to not undertake rulemaking on the Coastal Zone Management Act's (CZMA) consistency provisions at this time.

We disagree with the statement in the ANPR that "NOAA is not considering significant changes to the Federal Consistency regulations."² The changes specified by the ANPR would limit the types, scope, and location of activities triggering review, and would limit the right of states and the public to provide meaningful input on a consistency decision. These changes severely constrain the ability of states to protect coastal resources and would endanger the state and federal partnership envisioned by the CZMA. The consistency rules were revised less than two years ago, and the final rule reflects five years of intense consultation between NOAA, federal agencies, states and stakeholders. There is no record of any problems encountered in the consistency

67 Fed. Reg. 44,407, 44,408 (2002).

² *Id.* at 44. 409.

process since the 2000 rulemaking; certainly none that warrants reopening and revising the final rule. Therefore, there is no evidence that the changes identified by the ANPR are warranted. Our detailed comments are provided for your review and consideration; should you have any questions about our comments please contact Catherine Hazlewood at The Ocean Conservancy at 202.429.5609.

General Comments

The federal consistency requirement of the CZMA³ requires federal actions (both direct and indirect) affecting the coastal zone to be consistent to the maximum extent practicable with federally approved enforceable state coastal management policies. Non-federal applicants for federal approvals and funding must be fully consistent with the enforceable policies of state coastal management policies. The federal consistency provisions are a cornerstone of the voluntary CZMA program, and a primary (perhaps *the* primary) incentive for states to participate.

These provisions have served for three decades to provide a needed process for states, federal agencies and applicants to work through potential problems in managing competing uses of the coastal zone. While states have taken an appropriately active role in reviewing federal activities, states have concurred with approximately 93% of all federal actions reviewed.⁴ Moreover, the ANPR acknowledges that states have concurred with nearly all the 10,600 Exploration Plans and 6,000 Development and Production Plans approved by Minerals Management Service since 1978.⁵ In the history of CZMA, industry has appealed only 15 state federal consistency objections to the Secretary of Commerce, and the Secretary has overridden state objections and allowed the OCS activities to proceed in about half the appeals. As noted in the ANPRM, “the record shows that energy development continues to occur, while reasonable State review ensures that the CZMA objectives have been met.”⁶ This record hardly supports regulatory changes to the CZMA consistency regulations that would weaken state and public reviews.

Over the last three decades, Congress has conducted numerous hearings on the CZMA and emphatically broadened, not limited, the scope of consistency reviews.⁷

³ 16 U.S.C. § 1456.

⁴ See 67 Fed. Reg. 44,407, 44,408 (2000).

⁵ *Id.*, at 44,409.

⁶ *Id.*

⁷ For example, in 1990 Congress amended CZMA in part to clarify the scope of the broad reach of consistency provisions, thereby effectively overruling the Court’s holding in *Secretary of the Interior v. California* that actions on the outer continental shelf were not activities “directly” affecting the coastal zone so as to require a consistency determination. See 464 U.S. 312, 104 S.Ct. 656 (1984). Section 1456(c)1)(A) was amended to delete the word “directly” modifying “affects” so that the statute required a consistency review any time a federal agency activity within or outside the coastal zone had an effect on

Congress has also expressly recognized and sanctioned the independent processes and requirements of the CZMA and the Outer Continental Shelf Lands Act.⁸ In NOAA's comprehensive review of the consistency provisions in 2000, the agency made its regulations consistent with Congress' intent, in recognizing the broad scope of the consistency requirement.⁹ A cornerstone of the new regulations is the need for early consultation and coordination.¹⁰

Neither the ANPR, nor the experience of our organizations, nor that of the states themselves, indicate a problem that requires a rule change or additional guidance. The ANPR refers to the Energy Report's claim that there is a lack of clearly defined requirements and information needs from federal and state entities, and uncertain deadlines for completing the procedures of the CZMA and OCSLA.¹¹ We strongly disagree with the Energy Report's allegations. Furthermore, no information is presented in the ANPR to support the need for changes to regulations or guidance, or to explain what specific problems NOAA intends to address.

Any proposed changes to the consistency provisions are premature and unnecessary. The Energy Report, cited as motivation for changes in the ANPR, was issued only five months after the final rule promulgating the revisions to the consistency regulations. The ANPR was published only 18 months after the final rule. There has been *no* evidence provided of specific problems by permittees or federal agencies since the rule revisions. Rule changes should not proceed without an adequate factual record demonstrating the basis and need.

any land or water use or natural resources of the coastal zone. 16 U.S.C. §1456(c)(1)(A). Furthermore, Congress indicated in the legislative history that the term "affects" is to be construed broadly, including effects caused by the activity which are later in time or farther removed in distance but are still reasonably foreseeable. H.R. Rep. No. 101-964, 1990 U.S.S.C.A.N. at 2675.

⁸16 U.S.C. §1456(c)(3)(B). *See also* 43 U.S.C. §1351(d) State concurrence in land or water zone use in coastal zone of State; 43 U.S.C. 1351(h) Approval, disapproval or modification of plan; reapplication; periodic review.

⁹ For example, NOAA changed definitions in 930.11 to recognize the broad scope of consistency, including the definition of "any coastal use or resources" 930.11(b); "effect on any coastal use or resources" 930.11(g), and even the replacement of the term "directly affecting the coastal zone" to "affecting any coastal use or resources" throughout Subpart C of Section 930.

¹⁰ *See, e.g.*, §§ 930.1 Overall objectives; 930.33(d) Identifying Federal agency activities affecting any coastal use or resource; 930.34 (d) State guidance and assistance to Federal agencies; 930.36 (a) Consistency determinations for proposed activities; 930.36 (e) National or regional consistency determinations; 930.56 State agency guidance and assistance to applicants; 930.75 State agency assistance to persons; 930.81 Multiple permit review; 930.153 Coordination between States in developing coastal management policies.

¹¹ 67 Fed Reg. 44,407, 44,408, citing the Report of the National Energy Policy Group, at 5-7, ISBN D-16-050814-2 (May 2001); available at <<http://www.whitehouse.gov/energy>>.

Finally, we are particularly concerned that in addition to OCS activities, the scope of the ANPR identified changes would apply to an incredibly wide array of projects and activities, including land acquisition, coastal restoration and watershed projects, permitting and licensing and more. The ANPR references provisions in the regulations that are outside of Subpart E, Consistency for OCS Exploration Development and Production Activities, e.g. sections 930.58 (Necessary Data and Information) and 930.53 (Listed Federal license or permit activities). Moreover, the ANPR appears to suggest that changes may also be needed in Subpart C governing federal agency activities, as well as to federal licenses and permits governed by Subpart D. Far-reaching and unintended consequences should be carefully weighed before the agency elects to formally consider any regulatory “fixes.”

Rather than undertaking any rule or guidance development at this time, we urge NOAA to facilitate greater understanding and education of the broad reach and scope of existing consistency requirements. The record of consistency reviews over time demonstrates that problems experienced by permittees were typically the result of a failure by the permittee, state, or federal agencies to fully adhere to CZMA’s consistency requirements. This type of problem usually arises from simple inexperience. This problem is better addressed by providing more resources to NOAA’s Office of Ocean and Coastal Resource Management and the NOAA Office of General Counsel to assist agencies and applicants with their consistency responsibilities.

Specific Responses to the Questions in the ANPR

The ANPR specifically requests comments on the following points:

Whether NOAA needs to further describe 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.

The current consistency regulations provide for an appropriate level of direction with regard to the information required at different stages of the consistency process, while allowing for some necessary flexibility. States coordinate with federal agencies and applicants on information needs, particularly in regard to OCS activities. The potential adverse consequences of narrowly defining data and information needs might far outweigh whatever perceived inconveniences there may be with the existing requirements. The specificity necessary to meet data and information requirements will vary widely with the nature and potential impact of an activity, purpose and scope of the enforceable policies of individual states, and new information on impacts. Trying to identify or specify blanket data and information requirements through the rulemaking is impractical and unwise.

For example, in the contexts of various CZMA reauthorizations and the 2000 Consistency rule process, industry representatives have proposed limiting the necessary data and information requirements to those required under the OCSLA. The broad requirements under the OCSLA do not provide all of the information that a state might need, nor the reviews that CZMA consistency affords to states. The CZMA consistency information requirements at 15 C.F.R. 930.76 and 15 C.F.R. 930.58 go well beyond the OCSLA regulations at 30 C.F.R. Subpart B.

Limiting reviews to information required under the OCSLA would deprive states of the ability to obtain the information necessary to determine whether federal and federally permitted activities are consistent with the enforceable policies of state CMPs. Moreover, the information submitted for Exploration and Development and Production Plans required under the OCSLA regulations could change at any time, without adequate state recourse.

Whether a definitive date by which the Secretary must issue a decision in a consistency appeal under CZMA sections 307(c)(3)(A), (B) and 307(d) can be established taking into consideration the standards of the Administrative Procedures Act and which, if any, Federal environmental reviews should be included in the administrative record to meet those standards.

Although the ANPR and Energy Report allege delays in the Secretarial appeals process, neither presents any record or basis for the allegation, nor does either attribute a particular cause for the alleged delays. To the contrary, between 1983 and 2001, there were 38 appeals decided by the Secretary.¹² The mean average length of time for concluding appeals was 25 months. For appeals involving OCS activities, the mean average for the length of appeals was 15 months with a range from 7-50 months.

This is a reasonable time frame for the development of the record, and the submission of briefs, replies and supporting information by the parties. The length of time necessary to develop the record is largely determined by the particular parties in a given consistency determination, as the Secretary ordinarily grants motions to reply and submit additional or rebuttal information. Sufficient time is necessary for the Secretary to conduct a *de novo* review, and the standard of review applied by the Secretary differs substantially from that required by a state objection. Whereas a state decision is based upon a review of consistency with state enforceable policies, the decision of the Secretary is based on fact specific assessments of several factors: whether there are national interests involved which are furthered in a significant or substantial manner by the proposed activity; whether the national interest outweighs the adverse impacts of an

¹² U.S. DEPARTMENT OF COMMERCE, NOAA, *Federal Consistency Requirements*, Appendix D, Nov. 2001.

activity; and whether there are available alternatives to allow the activity to go forward in a manner which is consistent with the state's enforceable policies.¹³ The Secretary may also need to determine threshold issues such as standing and the propriety of a state's objection.

There is a statutorily mandated time frame to reach a decision once an appeal record is completed – 90 days with a 45-day extension allowed.¹⁴ Shortening the time frame for developing the record after an appeal is filed would deny the Secretary from having the best available information to make a decision. It would also place the states at a disadvantage in responding to new information supplied by the appellant. As noted in the "Discussion of the Final Changes in the December 2000 Final Rule," "[i]ncreasingly, appeals to the Secretary result in the development of extensive administrative records containing information never reviewed by the State agency."¹⁵ We therefore urge NOAA to not change the existing rules to impose a uniform time limit on record development.

Whether there is 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.

We believe that evidence of the need for additional coordination has not been demonstrated, and that coordinating completion of federal environmental review documents is beyond the reach of consistency regulations. The coordination would need to extend to agencies' responsibilities under other federal statutes, each of which impose their own substantive and procedural requirements.

Rather than try to address this issue through amendments to CZMA consistency rules, you should take full advantage of the National Environmental Policy Act to improve coordination with multi-statute environmental reviews,¹⁶ as the consistency regulations encourage.¹⁷ Where multi-statute compliance has proven incongruous, this is usually because agencies have chosen for that particular review to make them so, and not because of any obstacle in the consistency regulations. We wish to particularly acknowledge the comments submitted by Coastal States Organization and the state of California in providing examples of processes that have demonstrated enhanced state and federal coordination.

¹³See 15 CFR § 930.121.

¹⁴16 U.S.C. § 1465.

¹⁵ 65 Fed. Reg. 77,124, 77,151 (2000).

¹⁶ See, e.g. 40 C.F.R. § 1500.5 (Regulations to reduce delay in complying with NEPA).

¹⁷ See 15 C.F.R. §930.37.

Whether a regulatory provision for a "general negative determination," similar to the existing regulation for "general consistency determinations," 15 C.F.R. 930.36(c), for 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 strongly oppose the creation of a regulatory provision for "general negative determinations."

Consistency review is required wherever effects on any land or water use or natural resource of the coastal zone are reasonably foreseeable. NOAA specifically included recognition of indirect (cumulative and secondary) and incremental effects in the 2000 rules. Any attempt to categorically exclude activities from review inevitably would fail to protect against cumulative and secondary effects of activities over time. 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.¹⁸ General negative determinations would also deprive the public's right to participate in consistency reviews at the state and local level. Finally, the only recourse for a state agency when presented with a negative determination is to request mediation or file litigation.

*Whether guidance or regulatory action is needed to assist Federal agencies and State
State
have
CMPs in determining when activities undertaken far offshore from State waters
reasonably foreseeable coastal effects and whether the "listing" and
"geographic location" descriptions in 15 C.F.R. 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.*

The CZMA statute and regulations are clear as to the intended breadth and scope of the "effects test" triggering necessary consistency review,¹⁹ how notice of subject activities is to be provided through listing,²⁰ and how unlisted activities having coastal effects are to be considered. Under consistency regulations, the NOAA Office of Ocean and Coastal Resource Management determines the applicability of the consistency provisions to activities far offshore outside the boundaries of review that

See 136 Cong. Rec. H8076 (Sept 26, 1990).

See 15 C.F.R. 930.11 (g) and 930.33

²⁰ *See* 15 C.F.R. 930.34, 930.53, 930.154.

have been recognized for a state.²¹ Consequently regulatory revisions are not needed, nor does additional guidance appear to be necessary.

Furthermore, we strongly oppose any attempt to limit the geographic scope or application of consistency review requirements. Congress clearly spoke to the need for consistency review for offshore activities such as oil and gas lease sales in reauthorizing CZMA in 1990, recognizing these activities had obvious effects on the use or resources of the coastal zone. The comments submitted by states provide numerous examples of proposed activities far offshore the coast that had great potential to affect the particular state(s).²²

Whether multiple federal approvals needed for an OCS EP or DPP should be or can 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.

The consistency regulations already allow for the consolidation of multiple federal approvals.²³ If the ANPR is contemplating whether such consolidations should be mandated, the answer is no. Additional consolidations are unnecessary and inconsistent with the CZMA. As noted throughout these comments, the requirements of the CZMA are independent of other federal requirements.

Thank you for this opportunity to comment.

Sincerely,

Catherine Hazlewood
Acting Director,
Clean Oceans Program
The Ocean Conservancy

Tim Eichenberg

Senior Advisor
Oceana

Bob Shavelson
Executive Director
Cook Inlet Keeper

²¹ See 15 C.F.R. 930.54(c).

²² See, e.g., Comments of the California Coastal Commission, p. 8.

²³ 15 C.F.R. 930.81.

Eugenia Marks
Director for Policy & Publications
Audubon Society of RI

David Raney, Chair
National Marine Wildlife and Habitat
Committee
Sierra Club
Leah Lopez
Staff Attorney
Save the Sound, Inc.

Gershon Cohen, Ph.D.

Page Else
Research Director
Sitka Conservation Society

Dawn Hamilton
Executive Director
Coast Alliance

Beth Milleman
Stacy Studebaker
President
Kodiak Audubon

Madelaine Berg
Member Coastal Zone Management
Commission
Town of Mamaroneck-Village of Larchmont
(New York)

David Matsuno
Roads Planner
Ugashik Traditional Village

Paul G. Johnson
Special Projects Coordinator
Reef Relief

Sue Marshall
Executive Director

Project Director Campaign to Safeguard
America's Waters
Earth Island Institute

Nina Bell, J.D.
Executive Director
Northwest Environmental Advocates

Marie A. Curtis
Executive Director
New Jersey Environmental Lobby

Councilwoman Phyllis Wittner
Town of Mamaroneck, NY
Kevin Mercer
Executive Director
RiverSides Stewardship Alliance

Pam DiBona
Vice President for Policy
Environmental League of
Massachusetts

Tualatin Riverkeepers

Richard Charter
Marine Conservation Advocate
Environmental Defense

Sarah Chasis
Senior Attorney & Program
Director

National Resources Defense Council, NY

Cynthia Zipf
Executive Director
Clean Ocean Action
Highlands, New Jersey

Keith Bayha
Steering Committee Chair
Alaska Public Waters Coalition
Eagle River, Alaska

cc: Becca Bernard
Staff Attorney, Trustees for Alaska