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September 19, 2002

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Re: July 2, 2002, Federal Register Notice, Advance Notice of Proposed Rulemaking (ANPR), Procedural Changes to the Federal Consistency Process 15 CFR Part 930, Office of Ocean and Coastal Resource Management (OCRM), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (Commerce)

Dear Mr. Kaiser:

The California Coastal Commission (CCC) and the San Francisco Bay Conservation and Development Commission (BCDC) have the following comments on the questions and issues posed in the above federal register notice. We are surprised to see the advance notice of proposed rulemaking so soon after the recent updating of the federal consistency regulations published on December 8, 2000. As the preamble to the updated regulations notes, that review was the first major update in 20 years and included extensive consultation with federal and state agencies and other parties:

A proposed rule to revise portions of the federal consistency regulations was published on April 14, 2000 (65 Fed. Reg. 20269-20302). The purpose of this final rule is to codify the 1990 and 1996 statutory changes to CZMA Sec. 307, and to update the federal consistency regulations after 20 years of implementation by NOAA, States and Federal agencies. This final rule is also the result of a two year informal effort by NOAA to work with Federal agencies, State agencies, and other interested parties to identify issues and obtain comments on draft proposed revisions to the regulations. Thus, this final rule has already undergone substantial review and modification by Federal agencies, State agencies and other interested parties.

("Coastal Zone Management Act Federal Consistency Regulations: Final Rule (hereinafter, the "2000 Final Rule")," 65 Fed. Reg. 237, at p. 77125 (December 8, 2000).)

As the ANPR amply documents, the federal consistency process is remarkably successful, and is one that inherently considers the national interest in such matters as energy (and other minerals) development, national security, military needs, and port development. For example, in the ANPR OCRM points out the thousands of energy projects that have been authorized through this process, with only a small handful (15) of appeals of state agency objections to the Secretary of Commerce. The need for flexibility, certainty, and timely reviews by state agencies alluded to in the advance notice of proposed rulemaking have already been thoroughly incorporated into the federal consistency process, obviating the need for further

procedural changes. As explained below in greater detail, attempts to provide greater specificity or arbitrary time limits will be counterproductive, by decreasing rather than improving governmental efficiency.

The notice appears to focus on OCS and related activities, yet at the same time notes that:

Since 1978, MMS has approved over 10,600 EPs and over 6,000 DPPs. States have concurred with nearly all of these plans. In the history of the CZMA, there have been only 15 instances where the oil and gas industry appealed a State's Federal Consistency objection to the Secretary of Commerce. Of those 15 cases (2 DPPs and 13 EPs), there were 7 decisions to override the State's objection, 7 decisions not to override the State, and 1 decision pending. The record shows that energy development continues to occur, while reasonable State review ensures that the CZMA objectives have been met. ("Procedural Changes to the Federal Consistency Process: Advanced Notice of Proposed Rulemaking (hereinafter, the "ANPR")," 67 Fed. Reg. 127, p. 44407, at p. 44409 (July 2, 2002).)

California's regulatory experience has been similar; the CCC has reviewed a large number of OCS drilling proposals: 120 exploration plans (EPs) (formerly called Plans of Exploration (POEs), and 13 platforms (development and production plans, or DPPs). Of these cases, the CCC objected to only 12 consistency certifications for OCS energy projects, and ten appeals of these objections were filed with the Secretary of Commerce. The appellants in four of these ten appeals subsequently withdrew them. Moreover, in *each of the 12 instances of a CCC objection to an OCS energy project, including all ten cases that were appealed to the Secretary*, the activity was ultimately authorized under the CZMA to proceed, either by the CCC upon re-review (settlement upon resubmittal and withdrawal of the appeal) (4 instances) or by the Secretary of Commerce either overruling the CCC's objection (4 instances) or upholding the objection by determining that a particular mitigation measure was warranted (2 instances)(see attached Appendix 1). (The two cases that were not appealed were also authorized upon resubmittal.)

With respect to federal agency activities (which are not appealable to the Secretary of Commerce), such as a lease sale conducted by the MMS, as noted in the ANPR (p. 44409) under the existing CZMA regulations (15 CFR §930.43), federal agency activities can proceed notwithstanding a state's objection. The CZMA and implementing regulations provide that these activities must be consistent "to the maximum extent practicable" with the state's program, and in the event of a dispute between a federal and state agency, the parties are expected and encouraged to cooperate and negotiate. In the event this is unsuccessful, formal and informal mediation services are available from the Secretary of Commerce or its designee. If conflicts cannot be resolved, the state can seek redress through litigation. Moreover, pursuant to section 307(1)(B) of the CZMA, enacted by the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA), federal agencies can obtain a Presidential exemption (in the event a state prevails in any court challenge), if the President determines the activity to be in the "paramount interest" of the United States. In practice, the process has been remarkably effective. No Presidential exemption has yet been invoked, and there have been relatively few

objections by states to federal activities (most conflicts have been resolved through negotiation).

For example, California statistics show a greater than 95% approval rate for over 2,200 federal projects and federally permitted activities reviewed, and informal discussions with OCRM indicate over 90% approval rates occur nationwide. Approval rates for energy projects are even greater, as the above-quoted ANPR statement shows. Thus, the record confirms the infrequency of state agency objections. Along the same lines, a remarkably small number of cases (especially considering the nationwide scope of the CZMA program) have proceeded to litigation, dispelling fears voiced when the CZMA was enacted that it would result in regulatory gridlock. In fact, one of the great strengths of the CZMA is the extent to which it has successfully offered a process that avoids, rather than fosters, litigation.

Nevertheless, in the ANPR (at pp. 44408, 44410), OCRM offers the explanation that "...issues continue to arise as to the adequacy and types of information requested by and/or provided to the States" and "...potential lack of effectiveness in the CZMA-OCSLA interaction resulting from a lack of clearly defined requirements and information needs from Federal and State entities, as well as uncertain deadlines for completing the procedures of both statutes." These statements of purpose are vague and appear to be without basis in fact. We respectfully request that OCRM provide a more accurate rationale that describes real "problems" that would warrant going forward with any proposed rule change.

In summary, we simply do not see any real "problems" in need of fixing. Indeed, the proposed "solutions" to non-existent problems would in and of themselves create real problems. Accordingly, we see no basis to proceed with this proposal and strongly recommend it be dropped.

We will now address one by one the six specific points on which the ANPR solicited comments.

1. Information Requirements.

Issue. 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.

Response: One of the fundamental attributes of the CZMA is that it allows each state to develop its own coastal management program in light of the individual characteristics and priorities of the states. It is difficult to see how national standards could be effectively developed when each state has a different program and thus differing information needs. Thus, the development and imposition of detailed nationwide information requirements appears to be incompatible with the statutory framework of the CZMA.

Comparison of CZMA and OCSLA information requirements is also difficult. Most of the OCSLA information requirements ask for fairly specific and physical descriptions, as opposed

to an analysis of consistency with the enforceable policies of a state's CMP that is necessary for the CZMA review. Nevertheless the OCSLA regulations do include the following more generalized information requirements:

EPs - 250.203 ... (b) ... (17) An assessment of the direct and cumulative effects on the offshore and onshore environments expected to occur as a result of implementation of the Exploration Plan, expressed in terms of magnitude and duration, with special emphasis upon the identification and evaluation of unavoidable and irreversible impacts on the environment. Measures to minimize or mitigate impacts should be identified and discussed.

'18) Certificate(s) of coastal zone consistency as provided in 15 CFR part 930.

DPP - 250.204 (b) ... (11) An assessment of the effects on the environment expected to occur as a result of implementation of the plan, identifying specific and cumulative impacts that may occur both onshore and offshore, and the measures proposed to mitigate these impacts. Such impacts shall be quantified to the fullest extent possible including magnitude and duration and shall be accumulated for all activities for each of the major elements of the environment (e.g., water or biota).

(12) A discussion of alternatives to the activities proposed that were considered during the development of the plan including a comparison of the environmental effects.

(13) Certificate(s) of coastal zone consistency as provided in 15 CFR part 930.

The CZMA information requirements are not a "one-size-fits-all" list, but instead consist of a comparatively simple, case-by-case analysis based on site- and area-specific circumstances and individual state programs:

§930.76 Submission of an OCS plan, necessary data and information and consistency certification. Any person submitting any OCS plan to the Secretary of the Interior or designee shall:

(a) Identify all activities described in detail in the plan which require a federal license or permit and which will have reasonably foreseeable coastal effects;

(b) Submit necessary data and information pursuant to §930.58 [which specifies]:

§930.58 ... Necessary data and information [which] ... shall include the following: (1) A detailed description of the proposed activity, its associated facilities, the coastal effects, and comprehensive data and information sufficient to support the applicant's consistency certification. ... (3) An evaluation that includes a set of findings relating the coastal effects of the proposal and its associated facilities to the relevant

enforceable policies of the management program. Applicants shall demonstrate that the activity will be consistent with the enforceable policies of the management program.

Even more directly to the point, as the ANPR points out (p. 44410):

In addition, the necessary data and information can include information that is specifically identified in the State's CMP. NOAA's Federal Consistency regulations, 15 CFR 930.77(a)(2), specify the information available for the State's review of OCS oil and gas plans:

The State agency shall use the information submitted pursuant to the Department of the Interior's OCS operating regulations (see 30 CFR 250.203 and 250.204) and OCS information program (see 30 CFR part 252) regulations and necessary data and information (see 15 CFR 930.58).

As indicated in the above-quoted regulatory provisions, the CZMA and OCSLA requirements are already cross-referenced: OCSLA regulations cross-reference the CZMA requirements and the CZMA requirements refer back to OCS plans. In practice, these cross-references avoid unnecessary duplication of effort, and create requirements that are complementary and not internally inconsistent.

The ANPR mentions (at p. 44410) a potential concern that there are instances where the State asks for additional information "late in the CZMA review period." Such requests could occur for any number of reasons, including the fact that public participation is a cornerstone of the consistency review process (e.g., based on 15 CFR §930.2, which provides that: "*State management programs shall provide an opportunity for public participation in the State agency's review of a Federal agency's consistency determination or an applicant's or person's consistency certification*"). However, since any such requests for additional information would not extend the time for completion of agency review, they would not result in processing delays. Based on extensive federal consistency review experience (over 2,100 cases reviewed – see page 3), it is simply not practical to suggest that state agencies can be expected to be aware of all the questions that will arise during their review of projects at or before the time of a submittal.

The ANPR (at p. 44410) also expresses the concern that there may be time delays between the submittal of a consistency certification and the subsequent availability of an EIS or other environmental review documents (e.g., NEPA, ESA, CWA and/or CAA¹ reviews). Concerning NEPA reviews, based on our extensive reviews of OCS energy projects there have been few instances where the lack of availability of an EIS or other NEPA document led to an objection based on lack of information. An exception to this statement is Platform Julius (CC-16-85 and CC-46-86); the CCC initially objected based on lack of information but by the time of the second of these reviews the CCC had received the full NEPA document and other necessary information and was able to concur with the activity. Aside from this case, for major projects

¹National Environmental Policy Act, Endangered Species Act, Clean Water Act and Clean Air Act, respectively

either: (1) the CCC has reviewed the consistency submittal simultaneously with the NEPA process (in a manner similar to that described in 15 CFR §930.37, which encourages NEPA/CZMA document coordination for federal agency activities); or (2) the CCC has been able to request and receive the information it needed within the statutory review period. If information problems (such as lack of NEPA documents) do occur, they can be resolved using the procedures available under CFR §930.60, adopted when the federal consistency regulations were updated in 1990, which clarified when the consistency time clock may begin (see p. 9 of this letter for elaboration).

If OCRM does see fit to revise the information requirements aspect of the regulations, we would not oppose language analogous to that of §930.37 being placed in Subparts D and E of the regulations (i.e., for federally permitted (including OCS) activities). Concerning the other process mentioned (ESA, CWA and/or CAA) similar language could also be provided encouraging consolidated or simultaneous reviews. Nevertheless, for the reasons stated on page 7-8, we believe retaining flexibility rather than adoption of rigid rules serves the interests of both applicants for federal licenses or permits and state agencies.

As noted above, the CZMA information requirements do not lend themselves to a “one-size-fits-all” list. In response to a past OCRM request, the CCC did undertake an effort to supplement the CZMA requirements with a definitive list of OCS information requirements. The context for this was OCRM’s triennial evaluation of the CCMP for the period of 1984-1987), in which OCRM stated:

Finding: The CCC has extended its review of Federal consistency certification for OCS exploration, development and production operations for consistency with the CCMP beyond the maximum time period authorized under CZMA section 307 (c)(3)(B) and its implementing regulations by requesting additional information from applicants when they have provided all information required under 15 CFR §930.77.

Recommendation: Describe in the CCMP, pursuant to 15 CFR §930.75(b), any requirements for data and information necessary to assess the consistency of OCS operations not otherwise described in 15 CFR §930.77. ...

Litigation followed OCRM’s negative evaluation, and in *CCC v. Mack*, the U.D. District Court determined OCRM lacked the authority to withdraw program funding and require this and other program modifications through the annual review process. Nevertheless, in a settlement with OCRM, the CCC agreed to perform a number of tasks, including producing a document listing OCS information requirements for OCS plans. The CCC staff subsequently prepared a report entitled: “Proposed Regulations to Establish Information Requirements for Consistency Certification for Oil and Gas Exploration and Development on the OCS (February 2, 1990).” The CCC commenced the rulemaking process but did not complete it. Extensive MMS and oil industry concerns were voiced in writing and during public hearings, the other California State agencies opposed the adoption of any new regulations as duplicative of federal (i.e., MMS) regulations, and the amount of staff time estimated to produce, implement, and update these

regulations would be considerable. The effort was not productive because information needs change over time due to changed circumstances, and it soon became clear that such a list would be burdensome and wasteful for applicants. It also became clear that such a list would be out of date relatively soon after it was compiled, and a review of the 1990 list that was compiled provides further evidence that it is out of date based on current-day information needs in several issue areas. Ultimately, this effort was abandoned as inefficient and impractical. From that exercise the CCC staff concluded that the more comprehensive and relatively simple requirements of the CZMA benefit applicants by enabling them to focus on the relevant issues rather than satisfy an exhaustive and inflexible list of information requirements that would need to be satisfied. Furthermore, a list that is not adequate for all states may lead to more state objections based on lack of information, which would not improve the efficiency of the consistency review process.

2. Secretarial Appeals.

Issue. 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.

Response: As discussed in detail in the introduction to this letter (see pp. 2-3 above), CCC objections to energy projects have been rare, have resulted in only ten appeals to the Secretary of Commerce, and have not prohibited energy activities from proceeding. These cases underscore the point made in the ANPR that the record of federal consistency reviews and appeals does not lend credence to any assertion that the consistency review process frustrates the nation's energy development.

Concerning the *timing* of Secretarial appeals, which is specifically raised in the ANPR, we are concerned that establishing arbitrary limits would undermine opportunities for resolution of disputes between an applicant and a state, and again, California's experience with past and present Secretarial appeals bears this out. As noted above, in the cases of four appeals of California objections, the matter was later resolved through subsequent revised submittals to the CCC. For the most part these particular appeals were filed as a precautionary "placeholder," in the event informal resolution was not successful. Existing regulations (15 CFR §930.129(c) and (d)) specifically provide for such a "stay and remand." A current and closely related example of this situation is a currently pending appeal to the Secretary (by the City of San Diego for a non-energy activity). In this case, the CCC and the applicant have agreed to "stay" the appeal, pending successful resolution of the issue through a resubmittal. We do not believe either the public interest or the national interest is served by requiring the Secretary of Commerce to review cases that are likely to be resolved, and requiring the state agency and applicant to incur substantial costs briefing and arguing matters which can be successfully resolved *outside* the Secretarial appeals process. At the very least, no deadline for a Secretarial decision should be allowed to undermine the already well-established methods for

resolving disputes in sections 930.129(c) and (d) of the CZMA regulations. As we note above (pp. 5-6) regarding the information requirements, further regulation changes may diminish rather than increase flexibility and efficiency. Retaining flexibility available under current regulations serves the interests of both applicants and regulatory agencies.

There is already a statutorily mandated time frame to reach a decision once an appeal record is completed (i.e., 90 days with one 45-day extension allowed) (16 U.S.C. §1465). The only way to further shorten the time frame for appeals would be to have a limited time period for development of the record, once an appeal is filed. However, this would prevent the Secretary from arriving at a decision based on all available information. It would also prejudice the states, because the state is the respondent to the appeal, which usually contains new information supplied by the appellant, such as items relating to the standards the Secretary uses in deciding the appeal. An appeal to the Secretary is not only a de novo review, it is a decision based on a different standard from that of a state review. A state decision is based upon a review of consistency with state enforceable policies, while a Secretarial decision is based on factors such as 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 activity, and whether alternatives are available which would allow the activity to proceed in a manner that is consistent with the state's enforceable policies. For these reasons, Secretarial reviews are highly likely to involve new information, analyses and facts. As noted in the 2000 Final Rule (at p. 77151): *"Increasingly, appeals to the Secretary result in the development of extensive administrative records containing information never reviewed by the State agency."* Again, arbitrary time limits constraining the availability of the best material information in the appeal process will hinder rather than increase the integrity and efficiency of the appellate decision-making process.

3. Coordination.

Issue. 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.

Response: Coordination is already a cornerstone of the federal consistency review process, and in practice it is the norm. A good illustration of this is the encouragement in 15 CFR §930.37 for federal agencies to use NEPA documents as a vehicle for CZMA submittals. In California federal agencies routinely use NEPA documents in consistency submittals, enabling both the information, as well as the statutory review periods, to complement each other. With respect to MMS and OCS activities, CCC consistency reviews occur simultaneously with MMS and NEPA reviews to the degree practical under the relevant statutes. If information problems (such as lack of NEPA documents) do occur, they can be resolved using the procedures available under CFR §930.60, adopted when the federal consistency regulations were updated in 1990, which clarified when the consistency time clock may begin. Section §930.60 provides:

§930.60 Commencement of State agency review.

(a) Except as provided in §930.54(e) and paragraph (a)(1) of this section, State agency review of an applicant's consistency certification begins at the time the State agency receives a copy of the consistency certification, and the information and data required pursuant to §930.58.

(1) If an applicant fails to submit a consistency certification in accordance with §930.57, or fails to submit necessary data and information required pursuant to §930.58, the State agency shall, within 30 days of receipt of the incomplete information, notify the applicant and the Federal agency of the missing certification or information, and that: (i) The State agency's review has not yet begun, and that its review will commence once the necessary certification or information deficiencies have been corrected; or (ii) The State agency's review has begun, and that the certification or information deficiencies must be cured by the applicant during the State's review period.

(2) Under paragraph (a)(1) of this section, State agencies shall notify the applicant and the Federal agency, within 30 days of receipt of the completed certification and information, of the date when necessary certification or information deficiencies have been corrected, and that the State agency's consistency review commenced on the date that the complete certification and necessary data and information were received by the State agency.

The degree of regionwide coordination and planning, and pre-project reviews and coordination between MMS and the CCC staff, is extensive. The CCC staff, for example, meets and coordinates regularly with the MMS throughout the agencies' project review periods (e.g., pre-project meetings, NEPA scoping hearings, and numerous conference calls) to discuss any procedural issues and coastal issues of concern.

Another good example of the benefits of this type of coordination is illustrated by the MMS' leadership in convening an inter-agency task force effort in 1996 called the High Energy Seismic Survey (HESS) Team. The team consisted of a broad cross-section of state and federal regulators, oil and gas and commercial fishing interests, local government, marine research, geophysical operators, and environmental organizations. They met in a mediated setting, to fashion a coordinated regulatory approach and consensus decisionmaking for high energy seismic activities. The Team's result was a report entitled *High Energy Seismic Survey Review Process and Interim Operational Guidelines for Marine Surveys Offshore Southern California*. This report, dated February 19, 1999, included a flow chart for consolidated environmental review and state and federal agency permitting, as well as operational guidelines concerning review procedures and recommended mitigation, avoidance, and monitoring measures for agencies to consider in analyzing high energy seismic surveys. Both the process and results serve as a useful model for similar types of coordination and permit streamlining efforts, and we commend MMS for its vision in convening this team.

We would support any additional guidance encouraging these types of efforts; however it does not appear that any regulation changes are needed to provide such encouragement.

4. General Negative Determination.

Issue. Whether 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, would improve the efficiency of the Federal consistency process.

Response: We do not believe a regulation change is needed for this situation, as the flexibility already exists within the existing regulations for negative determinations that would enable submittals covering multiple activities. With the December 8, 2000, revisions to the regulations, available review procedures include:

(1) general consistency determinations for "*cases where the activities are repetitive and do not affect any coastal use or resource when performed separately*" (§ 930.36(c));

(2) "de minimis activities," which the regulations define as "*activities that are expected to have insignificant direct or indirect (cumulative and secondary) coastal effects and which the State agency concurs are de minimis*" (§930.33(a)(3)(ii)); and

(3) a negative determination for an activity: *(1) Identified by a State agency on its list, ... or through case-by-case monitoring; or (2) Which is the same as or is similar to activities for which consistency determinations have been prepared in the past; or (3) For which the Federal agency undertook a thorough consistency assessment and developed initial findings on the coastal effects of the activity.* (§ 930.35(a)).

Moreover, the regulations provide for further flexibility in that it is the federal agency that determines which of its activities affect a state's coastal zone (§ 930.33(a)), which category of submittal to use, and even whether any submittal at all is needed. For example, §930.33(a)(2) provides:

(2) If the Federal agency determines that a Federal agency activity has no effects on any coastal use or resource, and a negative determination under §930.35 is not required, then the Federal agency is not required to coordinate with State agencies under section 307 of the Act.

Based on the recent changes to the existing regulations in the 2000 Final Rule, which expanded the number of review categories, further modifications may serve more to confuse than to clarify the review process. In addition, we believe the flexibility is already present in the existing negative determination process to enable federal and state agencies to use that process for reviewing minor and repetitive Federal agency activities.

5. Geographic Considerations.

Issue. Whether guidance or regulatory action is needed to assist Federal agencies and State CMPs 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 CFR 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.

Response: The existing regulations adequately address this question. State agencies are already required to describe geographic areas within which federally permitted activities beyond state waters are subject to consistency review. OCRM's periodic performance evaluations of state coastal management programs pursuant to section 312 of the CZMA, the existing requirement for states to adopt geographic descriptions (15 CFR § 930.53(a)) and the requirement under the 2000 Final Rule for a state seeking to review an activity outside the coastal zone that is not within a geographically listed area, to obtain OCRM authorization for such a review (15 CFR § 930.53(a)(2)), are adequate to assure state reviews are limited to those activities reasonably likely to affect their coastal zones. Case-by-case analysis is necessary to determine the likelihood of effects, and Congress made it clear in the CZARA that the *location of effects* of activities (rather than the location of the activities themselves) determine whether CZMA authority is invoked. The preamble to the 2000 Final Rule (at p. 77124) provides:

This final rule codifies changes made to CZMA Sec. 307 in 1990. The Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) (Pub. L. No. 101-508) amended the CZMA to clarify that the federal consistency requirement applies when any federal activity, regardless of location, affects any land or water use or natural resource of the coastal zone.

Moreover, as the ANPR points out (at p. 44409), a coastal state's ability to review the activities stops where coastal effects are not reasonably foreseeable. Thus, a state attempt to review an activity located outside of its coastal zone (for example in the Gulf of Mexico – the example given in the ANPR) would be subject to scrutiny by NOAA. The 2000 Final Rule clarified that while states have the potential to review activities outside of their coastal zones, fairly substantial burdens of proof would need to be satisfied before such reviews could occur. For example, for such a review to occur a state would either need NOAA approval of that state's geographic description of areas outside of that state's coastal zone where reviews of activities authorized by listed permits would occur automatically, or the state would need NOAA approval of a request to review an activity not within a described geographic area. In both cases, notes the ANPR (p. 44409): "...NOAA would approve only if the States could show that effects on their coastal uses or resources are reasonably foreseeable as a result of an activity in the described geographic location."

Addressing interstate reviews, the preamble to the 2000 Final Rule (65 Fed. Reg. 237 at p. 77153) further noted:

A consistency list is a reasonable interpretation of the statute as a means of providing an orderly and predictable process. The proposed interstate consistency notification/consultation/listing procedure does not add a new program requirement. States are already required to have such lists and to define the geographic area outside the coastal zone where the lists will apply. Few States have described this geographic area. To meet the interstate requirement a State may choose to not change its list, but only to add an interstate geographic scope. The proposed procedure also does not mean that a State cannot review a type of federal activity; it means that the State must first consult with neighboring States and notify potential interstate applicants and federal agencies. This consultation procedure does not require that the State prove coastal effects or that neighboring States concur with the listing and geographic location description. Thus, NOAA does not believe that meeting this requirement is burdensome. NOAA believes that it is important that States must first go through the notification and listing procedure. Only then can a State review an interstate activity. This is necessary due to the often controversial nature of reviewing interstate activities. This will help ensure that interstate consistency reviews are carried out in a reliable, predictable and efficient manner, with notification to individuals in other States potentially subject to consistency review.

Further changes to the above-described “outside of coastal zone” or “far offshore” review mechanisms established by the 2000 Final Rule would at this point be premature given the brief period of time such mechanisms have been in effect. Furthermore, the adoption of inflexible or automatic limits to state authorities may frustrate and lengthen rather than expedite state review.

A few illustrative examples that the CCC has reviewed and/or commented on that could be considered “far offshore,” but still affecting the state’s coastal zone, are as follows:

- Navy nuclear submarine dumping in the early 1980s, which was planned to take place 200 miles offshore, which could affect coastal commercial fishing;
- 2| Navy low frequency military sonar to detect submarines located tens of miles offshore would ensonify and affect offshore areas thousands of square miles in area;
- 3| Proposals under consideration by the private sector in the 1970s and early 1980s (which would have been regulated by EPA) for burning toxic wastes up to 140 miles offshore, where prevailing winds could transport pollutants into the coastal zone, and where coastal zone concerns include transportation of the material through the coastal zone (with a potential for toxic spills within or affecting the coastal zone);
- 4| EPA designation of dredge disposal sites (and U.S. Army Corps of Engineers approval for disposal at the sites) as far as 50 miles offshore (e.g., the San Francisco Deepwater

Ocean Disposal Site), where spills occurring during the transportation of dredge spoils through the coastal zone could affect coastal water quality and commercial and recreational fishing; and

5. Department of Commerce (NOAA) approvals of deep seabed mining proposals including components many miles from the coastal zone (but including indirect effects such as onshore infrastructure modifications).

6. Consolidated Permits.

Issue. 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.

Response: Existing regulations already encourage, and many states already implement, to the extent practical, substantial interagency coordination and multiple-permit consolidated reviews. Please note that when the CCC considered requiring consolidating NPDES permits with OCS plans (pursuant to the OCS information list discussed on pages 6-7 above), MMS and the oil industry unilaterally opposed such a requirement and requested flexibility. The CCC supports additional guidance *encouraging* consolidation. We note that any such additional guidance should build on the existing regulations (§930.59 and §930.81), which provide:

§930.59 (a) Applicants shall, to the extent practicable, consolidate related federal license or permit activities affecting any coastal use or resource for State agency review. State agencies shall, to the extent practicable, provide applicants with a "one-stop" multiple permit review for consolidated permits to minimize duplication of effort and to avoid unnecessary delays.

§930.81 (a) A person submitting a consistency certification for federal license or permit activities described in detail in an OCS plan is strongly encouraged to work with other Federal agencies in an effort to include, for consolidated State agency review, consistency certifications and supporting data and information applicable to OCS-related federal license or permit activities affecting any coastal use or resource which are not required to be described in detail in OCS plans but which are subject to State agency consistency review (e.g., Corps of Engineer permits for the placement of structures on the OCS and for dredging and the transportation of dredged material, Environmental Protection Agency air and water quality permits for offshore operations and onshore support and processing facilities).

For additional information on this subject, see our response to Issue No. 3: Coordination, particularly the discussion about coordination and planning among agencies and other stakeholders, and the "HESS" Team effort, which included the development of a consolidated

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environmental review and state and federal agency permitting process. We would support any additional guidance encouraging these types of efforts, although we do not believe modifications to the regulations are necessary to implement them.

Conclusion. In conclusion, while we welcome guidance encouraging efficiencies in environmental document preparation and governmental reviews, we believe the existing regulations are adequate and appropriately flexible. Most, if not all, state coastal management agencies routinely rely on these procedures and conduct timely reviews and as much upfront advice and coordination as is practicable in the exercise of their federal consistency authorities. We do not think the existing regulations need to be changed. We do not see anything “broken and in need of fixing.” Accordingly, we see no substantive reason to proceed with any regulations changes at the time.

Thank you for the opportunity to comment on the advanced notice of proposed rulemaking, and please feel free to contact Mark Delaplaine, Federal Consistency Supervisor, at (415) 904-5289, or Alison Dettmer, Manager of the Energy and Ocean Resources Unit at (415) 904-5205, if you have any questions concerning this matter.

Sincerely,

PETER M. DOUGLAS
Executive Director
CCC

WILLIAM TRAVIS
Executive Director
BCDC

Attachment: Appendix 1. Secretarial Decisions on Appeals of Energy Projects - California

cc: Coastal Commissioners
Coastal States Organization

6. **CCC #:** CC-36-86
Applicant: Chevron
Project: Production Oil Drilling: Platform Gail
Location: Eastern Santa Barbara Channel, offshore of Ventura Co., north of Anacapa Island, OCS-P 0205
Appeal Outcome: **Settled/appeal withdrawn (resolved through settlement agreement)**

7. **CCC #:** CC-52-86
Applicant: Korea Drilling Co.
Project: NPDES Permit, Disposal Of Drilling Discharges
Location: Santa Barbara Channel
Commerce Decision: **Objection Overturned** 1/19/89

8. **CCC #:** CC-47-87
Applicant: Texaco
Project: Exploratory Oil Drilling, 8 wells
Location: 3.1 mi. S.W. of Point Conception/Vandenberg Air Force Base, Santa Barbara Channel, OCS-P 0505
Commerce Decision: **Objection Overturned** 5/10/89

9. **CCC #:** CC-2-88
Applicant: Chevron
Project: Exploratory Oil Drilling, 1 well
Location: Santa Barbara Channel, OCS-P 0525
Commerce Decision: **Objection Sustained** 10/29/90

Notes: the issue was air quality mitigation – the Secretary of Commerce found that a reasonable alternative was available, as had been identified by the Commission, which was to provide air quality mitigation in the form of “offsets” (i.e., onshore emission reductions equivalent to project-related air emissions).

10. **CCC #:** CC-1-88
Applicant: Conoco
Project: Exploratory Oil Drilling, 6 wells
Location: Santa Barbara Channel, OCS-P 0522
Appeal Outcome: **Appeal Withdrawn after Chevron decision (CC-2-88)**

Notes: air quality issues were identical in CC-1-88 and CC-2-88. Therefore once CC-2-88 was decided, Conoco had no little reason to pursue its appeal, as the Secretary’s decision on the air quality issue would be likely to be the same.