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October 7, 2002

David M. Kaiser
Federal Consistency Coordinator
Office of Ocean and Coastal Resource Management (N/ORM3)
1305 East-West Highway, 11th Floor
Silver Spring, Maryland 20910

Re: July 2, 2002, Federal Register Notice, Advance Notice of Proposed Rulemaking ("ANPR"), Procedural Changes to the Federal Consistency Process, 15 CFR Part 930

Dear Mr. Kaiser:

The Maine State Planning Office ("MSPO"), lead agency for the networked Maine Coastal Program, offers the following comments on behalf of the State of Maine ("State") in response to the above referenced federal register notice.

General comments

MSPO's basic comment is that NOAA should not proceed with this rulemaking. There is no manifest need for the potential rule changes noted in the above referenced ANPR. Rule changes of the kind suggested in the ANPR could further delimit and undermine states' ability to identify, manage, and protect their coastal resources. The State does not support changes to the consistency rules that would limit its ability to review offshore energy development or other matters subject to the consistency review under the Coastal Zone Management Act ("CZMA").

Statistics regarding the number and disposition of federal consistency matters reviewed by coastal that states cited in the ANPR¹ support the view that federal consistency review has been a useful and efficient tool and that the proposed rulemaking is unnecessary. MSPO is aware of no other facts that support the procedural changes discussed in the ANPR. In Maine, the consistency review process has provided a jurisdictional basis for coordinated identification of federal agency activities affecting the State's coastal resources, and state laws and rules applicable, as enforceable policies, to those activities. This jurisdictional basis has in turn provided a process and forum for discussion and negotiation regarding these potential effects and means to avoid, minimize or mitigate for them. Without the legal tool provided by the CZMA, states' ability to manage and protect their coastal resources would be seriously compromised.

NOAA's December 2000 rule revising the federal consistency regulations capped and reflected the results of a comprehensive, multi-year, multi-party revision process. There is too little experience with the revised regulations to support an initiative to make fundamental changes in them now, so soon after this recent revision. Moreover, such

ANPR at #4408

an initiative may suggest a fundamental shift in policy based on the flawed premise, unsupported by over 20 years of experience under the CZMA, that states' ability to apply federally reviewed and approved state laws to OCS and other projects and to exercise an independent, decision-making role under the CZMA is somehow problematic and not in the national interest. Such a policy is at odds with the long-standing state-federal partnership under the CZMA and the rights of states acknowledged in that partnership. We urge NOAA to reject this flawed and unsubstantiated premise, refrain from adopting such a policy, and stop this rulemaking at this stage.

Comments on questions posed in the ANPR

This section provides comments in response to the questions posed in the ANPR² that are identified here by the general subject matter of each question or set of related questions.

Information needed for CZMA review

In MSPO's view, it is neither necessary nor appropriate that NOAA amend the current regulations "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."³ Although Maine's experience with OCS development is limited, in our view the existing rules are sufficiently clear on what information must be submitted for OCS development and other activities subject to consistency review.

The efficacy of any national guidance on this topic is questionable. Each state's coastal program is different. Thus, the information needed will vary state-by-state based on differences in states' enforceable policies. This variability reflects a fundamental aspect of the CZMA: states have a measure of authority to review certain federal actions based on applicable state requirements. Likewise, from the perspective of an individual coastal program, the precise information required may vary depending on the details of the proposal, i.e., the type or amount of information may be different for projects of the same type based on facts regarding the specific proposal under consideration.

The apparent suggestion in the ANPR that state information requests "late in CZMA review period" may necessitate consideration of changes in the consistency rules does not bear scrutiny. Absent an agreement to the contrary, the time for consistency review is set in the consistency regulations. Information requests, which may stem from public comments received as a result of the public comment period required under the regulations, cannot by themselves alter the schedule for review. The best way, perhaps, for federal agencies and applicants to avoid the potential for unforeseen state information requests is to coordinate early with state review agencies and potentially interested parties to discuss the proposal and identify any issues and concerns and related information needs. Maine encourages early consultation and coordination, as do the consistency regulations themselves. NOAA may wish to consider guidance to help federal agencies and applicants appreciate and take advantage of the benefits of such coordination and advance identification of issues.

2. Timing of the Secretary's decision on appeal

Maine, whose coastal program was approved in 1978, has no direct experience with the process for appeal to the Secretary of Commerce of federal consistency decisions. However, MSPO's understanding of the rule suggests that a set limit on the time for preparation of the record on appeal as contemplated in ANPR may be inherently arbitrary and may adversely affect the potential for either a full and balanced exploration of pertinent issues on

² ANPR at 44410.

³ *Id.*

appeal, or settlement, e.g., through submittal of a revised application. Maine would be concerned about any time limit that may compromise its ability to defend its decisions, and manage and protect its coastal resources.

3. Coordination of NEPA and CZMA reviews

MSPO has encouraged federal agencies where practicable (e.g., the United States Army Corps of Engineers, for maintenance dredging activities) to provide the pertinent NEPA document as factual basis for a consistency determination. Although MSPO does not see a need to amend the rules at this time to foster or mandate this type of coordination, we recognize that NOAA guidance on how best to coordinate NEPA and CZMA reviews may be useful.

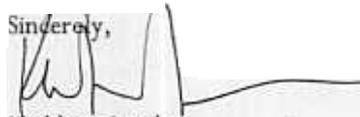
4. General negative determinations

The recently revised consistency regulations outline several tools for dealing with actions that in theory might be covered by a "general negative determination" if such a tool were available. We see no need, and potential for confusion, if these relatively new regulations were amended to add another new tool and additional terminology.

5. Offshore activities; geographical considerations

We believe that the existing regulations adequately address issues regarding state CZMA jurisdiction "when activities undertaken far offshore from State waters have reasonably foreseeable coastal effects"⁴ and likewise see no need to revise the related "listing" and "geographic location" provisions in the existing regulations. We also question whether further NOAA guidance on these necessarily fact-dependent issues would be helpful. Various types of offshore activities outside the State's coastal waters (i.e., 3 nautical miles) may affect its fisheries and other coastal resources. As noted above, we suggest that early coordination and consultation, recommended under the existing regulations, may be the best way to increase the "clarity and predictability of State CZMA Federal Consistency review for activities located far offshore"⁵ to the extent such an increase is needed.

Thank you for your consideration of these comments. Please notify me of any future agency actions related to this ANPR.

Sincerely,

Kathleen Leyden
Director, Maine Coastal Program

⁴ *Id.*

⁵ *Id.*