



North Carolina Department of Environment and Natural Resources
Division of Coastal Management

Michael F. Easley, Governor

Donna D. Moffitt, Director

William G. Ross Jr., Secretary

October 2, 2002

David Kaiser
Federal Consistency Coordinator
NOAA/OCRM
1305 East-West Highway
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Silver Spring, MD 20910

Reference: DCM02-46 ANPR Procedural Changes to the Federal Consistency Process

Dear Mr. Kaiser:

The North Carolina Division of Coastal Management (DCM) has reviewed the Advanced Notice of Proposed Rulemaking (ANPR) for Procedural Changes to the Federal Consistency Process published in the Federal Register on July 2, 2002. In seeking public comment, the ANPR poses six specific questions. We will address each of these questions, and will also provide relevant additional comments for your consideration before any further action is taken on this matter.

Questions

1. Regarding further describing 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:

The depth and amount of information needed to evaluate a consistency proposal is related to the number of resources that will be impacted and the breadth of the project. Information needs for Outer Continental Shelf (OCS) projects are significant because they are typically quite elaborate and could affect many resources. Current regulations effectively describe the information requirements and content of a federal consistency determination. Overall, North Carolina has a history of early coordination with federal agencies, with discussion of information needs prior to submittal of a consistency determination. Adding further specificity to the regulations could limit the ability of the states, in coordination with the federal agencies, to

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evaluate federal activity proposals and associated, appropriate information needs on a case by case basis. Making explicit specifications could cause confusion if the specifications include information that is not relevant to particular projects, or does not include information that is relevant to particular projects. This is also the case for information needs that are necessary (or not) for projects located in individual states – each state has its own unique resources and associated information needs which are worked out through coordination with the federal agencies.

2. Regarding whether a definitive date can be established by which the secretary must issue a decision in a consistency appeal, 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:

Since 1988, DCM has kept a complete database of all projects reviewed by the state pursuant to federal consistency provisions. To date, a total of 1,687 federal activity projects, 1,004 federal assistance projects, 469 federal license projects, and 12 OCS projects have been reviewed. Of the total 3,172 projects reviewed, only 62, or about 1.9 %, were found to be inconsistent with the NCCMP. Just one of these 62 projects was an OCS project. Few projects have been appealed. These statistics indicate that only a small number of projects are affected by current rules regarding findings of inconsistencies.

A review of our files indicates that most of the projects found inconsistent by the state were likely to have significant adverse impacts, including the Mobil Oil consistency review. Placing definitive dates on the issuance of decisions for consistency appeals is, from North Carolina's standpoint, not necessary. Limiting decision times more than allowed by current law could result in hasty decisions that may be based on an incomplete record of information.

3. Regarding whether there is a more effective way to coordinate the completion of Federal environmental review documents, the information needs of the States, Minerals Management Service (MMS) and the Secretary within the various statutory time frames of the CZMA and Outer Continental Shelf Lands Act (OCSLA):

Attempting to further streamline these review processes by modifying the consistency rules would seem inappropriate. Projects are often reviewed for consistency and concurrently for compliance with the National Environmental Policy Act (NEPA). However, consistency and NEPA reviews each have their own authority, and each type of review addresses different, albeit often overlapping, requirements and issues. Consistency reviews are conducted primarily intrastate with other state agencies, while NEPA documents are reviewed by other federal agencies in addition to state agencies. In addition, review times and procedures are different for the two types of reviews. In most cases, North Carolina has effectively been able to coordinate the timing of NEPA reviews with consistency reviews to meet the schedules and deadlines of the

federal agency sponsoring the project. As an example of this, we reference the Memorandum of Agreement that was developed between North Carolina and Mobil Oil.

4. Regarding whether a regulatory provision for a "general negative determination" similar to "general consistency determinations" would improve the efficiency of the federal consistency process:

A general consistency determination for certain types of activities that are not likely to have more than minimal effects on coastal resources is reasonable. In such cases, the fact that there are apt to be some effects is acknowledged and understood by both the state and the federal agency. Currently, the rules allow for a negative determination to be submitted when an activity is likely to have *no* effects on a state's coastal resources. It would seem unwise and actually unfeasible to purport an all-inclusive "no effect" for certain types of projects. Establishment of a general negative determination for consistency purposes would also make the implementation of state federal consistency programs more confusing than it already is.

5. Regarding guidance or regulatory action to assist Federal agencies in determining when activities undertaken far offshore from State waters have reasonably foreseeable coastal effects and whether the "listing" and "geographic locations" descriptions in 15 CFR 930.53 should be modified to provide additional clarity and predictability to the applicability of CZMA Federal Consistency review:

Based on our experiences and history of ocean related federal activities reviewed, North Carolina believes that the current regulations and the descriptions given in 15 CFR 930.53 are adequate, and that further clarification is not necessary.

6. Regarding the consolidation of multiple federal approvals for an OCS (Exploration Plan (EP) or Development and Production Plan (DPP) into a single consistency review:

It is our understanding that the rules as currently written allow for consolidation of federal approvals, although it is not required. We also understand that the requirements of the CZMA are independent of other federal requirements, and that mandatory consolidation would be inconsistent with the CZMA. We therefore do not feel such consolidation is necessary.

Additional Comments

The Supplementary Information contained in the APNR provides a comprehensive background and history of the CZMA and the Federal Consistency Regulations. The strength, propriety, and importance of the regulations to the coastal states and the federal agencies we work with are obvious in paragraphs I and II. Any changes made to the current regulations as a

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result of this ANPR could be counterproductive to the state's federal consistency review processes and DCM's ability to protect North Carolina's coastal resources.

Significant time and effort went into the recent changes to the consistency regulations published in December 2000. It would seem inappropriate to reopen these rules to change so soon based on concerns of the Energy Report, especially since OCS projects constitute a very small number of projects reviewed for federal consistency (0.4% in North Carolina since 1988). Currently the states and federal agencies are still adjusting to the new regulations and realizing the way they affect implementation of CZMA and their CMPs. To pursue additional rule changes could only add significant confusion and delay the effective implementation of 15 CFR 930.

North Carolina is quite concerned that the proposed rulemaking could have effects and implications for the review of projects other than OCS activities. While the proposed rule making would theoretically address issues related to offshore oil and gas proposals and the National Energy Policy Development Group's Energy Report, the proposed rules would be applicable to all federal consistency reviews. As stated previously, OCS activities comprise a small portion of the projects reviewed for consistency (and compliance with NEPA). It would seem ill advised to subject all projects to regulations intended for this small class of actions.

The State of North Carolina supports the position and comments of the Coastal States Organization (CSO). Their comments reflect the expertise and opinions of an organization that represents the interest of all of the coastal states having federally approved Coastal Management Programs. We strongly urge the Office of Ocean and Coastal Resource Management (OCRM) to give full consideration to our comments and those of the CSO before taking any further action on this matter.

The Division of Coastal Management appreciates the opportunity to comment on this ANPR. Please contact Ms. Caroline Bellis at (919) 733-2293, extension 249, if you have any questions. Thank you for your consideration of the North Carolina Coastal Management Program.

Sincerely,



Donna D. Moffitt

cc: Robin Smith, DENR
Marc Bernstein, Attorney General's Office
Kerry Kehoe, Coastal States Organization