



STATE OF NEW YORK
DEPARTMENT OF STATE
41 STATE STREET
ALBANY, NY 12231-0001

GEORGE E. PATAKI
GOVERNOR

RANDY A. DANIELS
SECRETARY OF STATE

September 30, 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

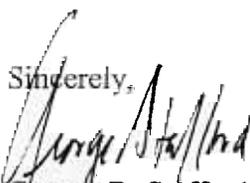
Re: Federal Consistency Energy Review Comments

Dear Mr. Kaiser:

The Department of State's comments regarding procedural changes to the consistency regulations implementing the Coastal Zone Management Act (CZMA) and the New York Coastal Management Program (CMP) are attached.

In summary, we do not see a demonstrated problem with the existing regulations in the magnitude of which would warrant an amendatory process. Less than two years have passed since the latest revisions to the regulations, and there has not been sufficient time and experience to indicate whether further changes are necessary. Further, opening the regulations would result in changes which may not be consistent with the intent of the Coastal Zone Management Act. Nevertheless, if a decision is made to proceed, we have suggested several minor changes which we believe to be appropriate.

If you have any questions regarding these comments, please contact Sam Messina, Deputy Director of the Division of Coastal Resources at (518) 473-2469, or Steven Resler, Supervisor of Consistency Review and Analysis at (518) 473-2470.

Sincerely,

George R. Stafford

Director
Division of Coastal Resources

GRS/scr
SCR:C:15CFR930ANPR2.wpd

New York State Department of State Comments Regarding Proposed Energy Amendments to 15 CFR 930

Background

Section III of OCRM's July 2, 2002 Federal Register notice states, with regard to the National Energy Policy Development Group Report (Energy Report):

“The Energy Report identifies **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. Energy Report at 5-7”. (**Bold** added for emphasis)

That section of the notice also indicates that MMS has approved over 10,600 EPs and over 6,000 DPPs, that states have concurred with nearly all of these plans, and:

“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”;

and that of those instances, involving 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”.

General Comments

The latest amendments to 15 CFR 930 have been in effect less than two years. They were developed over a period of several years, involving consultation and experiences with federal, state and local agencies and the public. There has not been sufficient time to assess nor documented experiences indicating whether changes to the regulations are necessary.

Given the choice of the word “potential” in the notice, with no indication of any real lack of effectiveness regarding the interaction of the CZMA and OCSLA in the remainder of it, we must ask the question:

“Is there in fact a need to amend the regulations, based on fact rather than a perception of a problem or the potential for one?”

There may be potential lack of effectiveness in administering and implementing the CZMA and OCSLA and their regulations, if the regulations and their intent for early consultation with states by applicants and federal agencies are not fully adhered to or properly used to guide the consistency of activities with a CMP. The CZMA regulations regarding the activities of federal agencies in 15 CFR 930.34, activities requiring authorizations from federal agencies in 15 CFR 930.56, and OCS exploration, development and production activities in 15 CFR 930.75 encourage, as a preliminary

matter, early consultation with state CMP agencies regarding the means to ensure the activities will be conducted in a manner consistent with CMPs, and to identify any applicable enforceable CMP policies, based on the information submitted to the state agency. This preliminary consultation provides the means of ensuring that subsequent necessary information and data required by 15 CFR 930.39, 15 CFR 930.58 and 930.63(c), and 15 CFR 930.76 and 930.77, and any additional necessary information and data required by a state CMP, is considered: 1) in evaluating the coastal effects and consistency of activities with a CMP; 2) as the basis for consistency determinations and certifications, and; 3) as part of the basis for a state's concurrence with or objection to consistency determinations and certifications.

The problem, and the "potential lack of effectiveness in CZMA-OCSLA interactions", is the result of a lack of this early consultation, on the part of federal agencies or applicants, and the failure of federal agencies to comply with and inform applicants of these requirements pursuant to 15 CFR 930.53(d).

Given the foregoing, the Department offers the following comments on specific topic areas:

Regarding further describing 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:

This does not appear to be an issue that needs to be addressed through changes to CZMA OCS regulations in 15 CFR Part 930.

The scope and nature of what is required by the 15 CFR 930 regulations appear sufficient. However, the references in 15 CFR Part 930.76(a) to "necessary data and information" pursuant to 930.58 can be confusing. With regard to OCS plans, section 930.76(b) requires the submission of necessary data and information pursuant to 930.58. Section 930.58 is found in 15 CFR Subpart D, which only applies to activities requiring federal licenses, permits, or similar forms of authorizations. For clarity, the necessary information and data requirements found in 15 CFR 930.58 should be included in 930.76 of Subpart E. Section 930.58 might alternatively be amended to provide an exception for necessary information and data for OCS plans. OCRM might also consider restating the purposes of the CZMA and informing federal agencies of the need to notify applicants of CZMA requirements and encouraging early consultation with state CMPs. This would ensure an identification of applicable CMP policy and information and data needs as early as possible, prior to the formal submission of plans and applications, so that the "necessary information and data" required by 15 CFR 930 and state CMPs are provided upon the filing of consistency certifications with MMS and the states, and the submission of consistency determinations to states by MMS and other federal agencies.

2. Regarding definitive dates by which the secretary must issue a decision in a consistency appeal

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:

There are no deadlines for Secretarial decisions. We question whether there have been instances where a Secretarial decision has taken too long a period of time. If so, it would be appropriate to know whether that was a result of actions taken or not taken by a state, or the Secretary, or by an applicant.

Unless inconsistent with the Administrative Procedure Act, no deadline should be imposed. Where a deadline is not met, some party will end up being penalized. Imposing a deadline could also encourage dilatory tactics to have the case dismissed without ever reaching the merits. If it is decided that a definitive date is necessary, it should not preclude consideration of federal environmental reviews, that include relevant information, in the administrative record.

3. Regarding 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:

A more effective way of coordinating completion of federal environmental review documents and information needs of state CMPs, MMS, and the Secretary could be accomplished through the inclusion of the following in federal NEPA, OCS, or other environmental reviews:

- a) assessments of effects on coastal uses and resources;
- b) based on a) above, an identification of applicable state and federal CMP policies and effects on them; and
- c) based on b) above, a summary assessment describing how the activity would comply with and be undertaken in a manner consistent with a State CMP.

There will always be some time frame conflicts among different federal statutes. NOAA has previously taken the only realistic approach, and the one specified in the CZMA: early cooperation, consultation and coordination between the states' consistency reviews and federal agency actions. While the NEPA and the CZMA 15 CFR 930 consistency processes are different, and NEPA and similar environmental documentation is not required to include CMP consistency assessments and analysis, the 15 CFR 930 regulations encourage that analysis in federal environmental review documents. That is appropriate, and can be an effective means of reducing redundant efforts and expediting review and decision-making time frames, based on all relevant information needs.

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 “negative determination” pursuant to the CZMA and 15 CFR 930 must be based on an activity not having any reasonably foreseeable direct or indirect effect on any coastal use or resources. We find it difficult if not impossible to determine how an unknown range of types and levels of activities might be predetermined not to have any direct or indirect effects on any coastal use or resource. In that respect, “general negative determinations”, based on unknowns, would not be appropriate, and could weaken or undermine the clear Congressionally mandated “effects test” in the CZMA and the 15 CFR 930 regulations.

We note that a CZMA “negative determination” should not be confused with a NEPA or similar “negative determination” or “Finding of No Significant Impact” (FONSI). A CZMA negative determination only applies when there are no reasonably foreseeable effects on any coastal use or resource. A negative determination is not based on whether an effect is adverse, beneficial, significant, insignificant, or related to the size or scope of effects. It would be extremely difficult and might not be possible to predetermine whether a range of activities, of many different sizes, affecting many different uses and resources to many and varied degrees, in many different areas and circumstances, would or would not have any direct or indirect effects on any use or resource in or of the coastal area.

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:

It has been New York’s experience that the “effects test” and applicability of consistency with a CMP when an activity directly or indirectly affects any coastal use or resource is not well understood by federal agencies and others. Guidance similar to that provided in OCRM’s Friday, December 8, 2000 Federal Register Notice, which provides excellent supplementary information explaining the CZMA consistency effects test, would be an appropriate means of helping federal agencies understand and apply this standard.

6. Regarding the consolidation of multiple federal approvals for an OCS EP or DPP into a single consistency review:

Given the regulations in 15 CFR 930.40, 930.59, and 930.76(a) and 930.81(a) encourage and provide for consolidation, there is no apparent need for this. Multiple federal approval and other activities can be, in many cases should be, and in New York many are consolidated in a single consistency review and decision if the federal agency activities are known. This is

often advantageous to both the states and federal agencies, and applicants, if conceptual plans are reviewed and receive early approval. If necessary or appropriate, in order to develop detailed performance standards, more detailed implementation projects can be subsequently reviewed and approved, ensuring that proposals can at least proceed through early stages and eventually, through later review and approval processes, and be designed and implemented to meet or be consistent with all relevant CMP standards. This process can be likened to traditional land use planning, zoning, and site plan review processes, whereby early conceptual approval for permitted uses is granted, and subsequent approvals are necessary to ensure site plan or other design or performance standards are met.

Finally, it is not clear that any of the purported problems are sufficiently defined and/or documented as to require regulatory amendment. Beyond that, any resolution would require opening the regulations to amendment, and involve all of the consequences attendant to such a process.