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August 7, 2003

The Honorable Don Evans
Secretary
United States Department of Commerce
Fourteenth and Constitution Avenues, N.W.
Washington, D.C. 20230

Re: June 11, 2003, Federal Register Notice, 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 Secretary Evans:

The California Coastal Commission (CCC) and the San Francisco Bay Conservation and Development Commission (BCDC) offer these specific comments regarding the proposed changes to the federal consistency regulations. In a previous letter, we requested that the Department of Commerce withdraw the proposed regulatory changes. We continue to maintain that position. As we stated in our general letter, the proposed rule is unnecessary, will adversely affect the federal-state partnership established in the Coastal Zone Management Act (CZMA), encourage litigation, and is inconsistent with the CZMA. The following discussion responds to the specific changes identified in the proposed rule and identifies our primary concerns.

I. <u>Amendments, modifications, and changed circumstances</u>. For all federally permitted activities, the regulations would weaken the state agency's authority to assert jurisdiction over amendments, modifications, and changed circumstances. Additionally, the regulations would alter the current federal/state balance by shifting to federal agencies most of the authority to determine whether to submit a new or amended consistency certification.

The existing regulations provide:

> *§930.51 Federal license or permit.*
>
> *(e) The determination of substantially different coastal effects under paragraphs (b)(3), and (c) of this* ***section is made on a case-by-case basis by the State agency, Federal agency and applicant****. The opinion of the State agency shall be accorded deference and the terms ''major amendment,'' ''renewals'' and ''substantially different'' shall be construed broadly to ensure that the State agency has the opportunity to review activities and coastal effects not previously reviewed. (emphasis added)*

NOAA proposes to give the federal agency the primary authority to determine if a project has substantially different coastal zone effects. NOAA's proposal is as follows:

§930.51 Federal license or permit.

(e) The determination of substantially different coastal effects under paragraphs (b)(3), and (c) of this section is made on a case-by-case basis by the federal agency after consulting with the State agency, ~~Federal agency~~ and applicant. ~~The opinion of~~ The federal agency shall give considerable weight to the opinion of the State agency ~~shall be accorded deference~~ and the terms ''major amendment,'' "renewals'' and ''substantially different'' shall be construed broadly to ensure that the State agency has the opportunity to review activities and coastal effects not previously reviewed.

The question raised in these situations is not whether the project has substantially changed, but whether the changes have **substantially different coastal zone** effects. The state coastal zone management agency, and not the federal agency, is clearly the "expert" in determining whether an activity has coastal zone effects. The state agency has far more experience in administering the coastal program than federal agencies. This proposed change will significantly reduce the state's role in this determination. This clear erosion of state authority would likely lead to unnecessary litigation. The current equal partnership among the state, the federal permitting agency, and the applicant is the intent of the Congress and this change would undermine this Congressional intent (see CZMA §§302(i) and 303). In addition, the existing balance is in large part the reason for the success of the federal consistency process.

II. Changes to an OCS plan. One of the most significant regulatory changes is the proposed modification to the Outer Continental Shelf (OCS) section of the federal consistency rules. The proposal would change **who determines** whether a modification to the plan is significant and **who submits** an amended OCS plan to the state. Under the existing regulations, the permit applicant submits the amended plan. In the preamble to the proposed rule, NOAA describes the changes as follows:

Under NOAA's regulations and the OCSLA program, it is MMS that determines whether a change to an OCS plan is ''significant'' and thus, whether the change requires CZMA Federal Consistency review. This determination should be the same for failure to substantially comply with an approved OCS plan. This change would be consistent with CZMA section 307(c)(3)(B), and in fact the language is taken directly from the statute. The previous language was developed in the 1979 regulations as a means of determining when a person has substantially failed to comply. However, the existing section has not been used and NOAA believes that such determinations should be made by MMS. Also, to be consistent with § 930.76(c), this change would clarify that it is Interior, not the person, that submits the consistency certification and information to the State for OCS plans." [Emphasis added]

Under the proposed regulations, the Minerals Management Service (MMS) would determine whether a change is significant and would submit the amended plan to the state. The proposed revisions confuse the determination that the MMS makes under section 25(i) of the OCSLA (43 USC § 1351(i)) as to whether or not a proposed modification of a DPP or other OCS plan is or is not "significant" for purposes of the OSCLA (see 30 CFR § 250.204(q)(2)) with the entirely different standard under sections 930.51(b)(3) and (c) of the CZMA

regulations of whether or not a proposed OCS plan modification will have effects" substantially different than those originally reviewed by the State agency." Thus, whether or not a proposed modification of a DPP is or is not "significant" for purposes of the OCSLA has little or nothing to do with the completely separate and distinct determination of whether or not the modification satisfies the standard of 15 CFR §§ 930.51(b)(3) and (c). Moreover, at least under the current regulations (see comments above on proposed change to section 930.51(e)), it is manifestly incorrect to state that "the MMS determines whether a change to an OCS plan…requires federal consistency review."

For the reasons stated above, NOAA's premise that the MMS determines whether a proposed change to an OCS plan requires further federal consistency review is not well founded. For similar reasons, NOAA's conclusion that MMS should have the exclusive authority *under the CZMA* to make the determination of whether or not there has been a failure to comply with an approved OCS plan is equally unsupportable.

Moreover, OCRM gives no justification or explanation for its proposal to delete the definition of "failure substantially to comply with an approved OCS plan" in 15 CFR § 930.85(d). This unexplained deletion will remove as an available ground for requiring the submittal of a revised OCS plan a situation in which an activity described in a previously approved OCS plan is "having an effect on any coastal use or resource substantially different than originally described…[in the OCS plan]." Such a drastic weakening of regulatory standards is ill advised in any event, but, in particular, when OCRM has not given a justification for it.

These proposed changes will give the MMS additional authority in determining what to submit for federal consistency review. Primarily because of the existing equal partnership established in the CZMA, we work cooperatively with MMS and the OCS permit applicants. We believe that the proposed regulatory change, giving MMS sole discretion to determine these questions, will undo the balance that has enabled us to resolve the substantive issues.

In another change, NOAA proposes to remove the Director of OCRM from the process if the MMS fails to take remedial action at the request of the state. This procedure provides that if the state and MMS disagree over whether changed circumstances or project modifications are significant, the state can request OCRM to issue an independent determination. In proposing to delete this procedure NOAA states "…the existing section has not been used" (p. 34858). Only three years ago, NOAA found this procedure to be so meaningful that it decided to expand the application of this approach from just OCS activities to <u>all</u> federal permits (i.e., added it into § 930.65). NOAA stated at that time that the purpose of this expansion was:

> *… to provide States with a more meaningful opportunity to address instances where the State agency claims that an activity once found consistent or not affecting any coastal use or resource, is not being conducted as originally proposed and which will cause effects on a coastal use or resource substantially different than originally proposed. Previously, States could only request that the Federal agency take remedial action. If a Federal agency does not take remedial action the State agency can request that the Director find that the effects of the activity have substantially changed and require the applicant to submit an amended or new consistency certification and supporting information, or comply with the originally approved certification. This change mirrors the existing remedial action section of subpart E (see section 930.86) and, like section*

> *930.86, is not expected to be used frequently. However, the procedure exists to ensure that federal license or permit activities continue to be conducted consistent with a management program. [2000 Regulations, preamble, p. 77148]*

We also disagree with NOAA that this language is consistent with language taken from the statute (i.e., CZMA section 307(c)(3)(B)). We see no such statutory support for the change. The existing regulation provides incentives for the parties to resolve their differences. In California, we have effectively resolved disagreements with MMS and the oil companies over questions whether a change was significant. The following examples are situations where MMS and the CCC resolved these types of disagreements:

1) Exxon's proposal to move crude oil to San Francisco Bay through pipelines and then use tankers to transport the un-processed oil out of San Francisco Bay and through the Santa Barbara Channel to refineries in Los Angeles, when the approved DPP limited the project to the exclusive use of pipelines;

2) Various oil companies' proposed changes to oil spill contingency plans (that had originally been included within the DPP); and

3) Nuevo Energy Company's proposed drilling of 30 production wells from a federal platform (Irene) to resources under State waters, extending the life of the platform by 10 years.

The very existence of this authority assisted in the resolution of these disagreements. NOAA is seriously altering the federal/state balance envisioned in the CZMA by <u>deleting</u> the dispute-resolution mechanism currently available in § 930.85(c). The fact that OCRM has not used this procedure ignores the fact that its very existence provides an incentive to resolve these disputes. The argument cuts both ways: if OCRM has not used it, how can OCRM argue that the policy is in need of 'fixing.' Tinkering with this section will serve to intensify disputes, interfere with conflict resolution, and lead to more litigation.

III. <u>Federal Agency Activities</u>. The proposed rule would modify the definition of federal agency activities and would result in a significant narrowing of the type of federal agency activities subject to consistency requirements of the CZMA. The proposed rule does not describe or justify the need for this proposed change. The preamble to the existing federal consistency regulations (FR December 8, 2000, p. 77125) articulates Congress' intent by unambiguously stating the following:

> *The Congressional Record sheds further light on the intent and the scope of Congress' rejection of Secretary of the Interior. Congress not only rejected Secretary of the Interior, but eliminated the ""shadow effect'' of the Court's decision (i.e., its potentially erosive effect on the application of the federal consistency requirements to other Federal agency activities) * * * and also to dispel any doubt as to the applicability of this requirement to all federal agency activities that meet the standard [i.e., the effects test] for review.'' Congressional Record at H 8076.*
>
> *Thus, the application of the consistency requirement is not dependent on the type of activity or what form the activity takes (e.g., rulemaking, regulation, physical alteration, plan). Consistency applies whenever a federal activity*

> *initiates a series of events where coastal effects are reasonably foreseeable. See H.R. Rep. No. 1012, 96th Cong., 2d Sess. 4382. The CZMA, the Conference Report, and NOAA regulations are specifically written to cover a wide range of federal functions. The only test for whether a Federal agency function is a Federal agency activity subject to the consistency requirement is an ``effects test.'' Whether a particular federal action affects the coastal zone is a factual determination.*

In carrying out this intent, the existing regulations provide for a broad definition of "federal agency activities":

> ***§930.31 Federal agency activity.***
>
> *(a) The term ''Federal agency activity'' means any functions performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities. This encompasses a wide range of Federal agency activities which initiate an event or series of events where coastal effects are reasonably foreseeable, e.g., rulemaking, planning, physical alteration, exclusion of uses.*

The proposed regulations would unnecessarily narrow this definition as follows:

> *(a) The term ''Federal agency activity'' means any functions performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities, which includes a range of activities where the federal agency makes a proposal for action. ~~This encompasses a wide range of Federal agency activities~~ which initiates an ~~event~~ activity or series of activities and if ~~events where~~ coastal effects are reasonably foreseeable, e.g., ~~rulemaking, planning, physical alteration, exclusion of uses~~ a Federal agency's proposal to physically alter coastal resources, a plan that is used to direct future agency actions, a proposed rulemaking that alters uses of the coastal zone.*

In proposing these changes, NOAA has not explained why it needs to narrow the previously well-articulated definition. In fact, the regulations already limit the definition of "federal agency activity" by the need to establish effects on coastal uses or resources, and thus the change is unnecessary. Additionally, the change will create confusion and disputes over whether a federal agency activity results in an action. The proposed new definition would also invite federal agencies to narrowly characterize their activities as something that would not physically alter coastal resources. NOAA is well aware of the potential for such disagreements. In fact, it was specifically to reduce the uncertainty and potential disagreements that had previously arisen over the difference between "effects" and "direct effects" that led Congress to modify the effects test to delete the term "direct" in the 1990 Amendments. In 1990, NOAA described these changes with the following explanation:

> *The question of whether a specific federal agency activity may affect any natural resource, land use, or water use in the coastal zone is determined by the federal agency. … the term ``affecting'' is to be construed broadly, including direct effects which are caused by the activity and occur at the same time and place,*

> *and indirect effects which may be caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.*
>
> *Id. at 970-71. These changes reflect an unambiguous Congressional intent that all Federal agency activities meeting the ``effects'' test are subject to the CZMA consistency requirement; that there are no exceptions or exclusions from the requirement as a matter of law; and that 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. Id.; 136 Cong. Rec. H 8076 (Sep. 26, 1990).*

The proposed modifications would contravene this clear Congressional intent. NOAA has not documented any reason for the change and it would lead to confusion and increased disputes. In conclusion, we oppose this rule change because it serves to legislate by rule making and it is inconsistent with the CZMA.

IV. <u>Lease Suspensions</u>. The proposed regulations would undermine a recent court decision on lease suspensions, *California ex rel. Cal. Coastal Comm'n v. Norton, 150 F. Supp.2d 1046 (N.D. Cal. 2001), aff'd, 311 F.3d 1162 (9th Cir. 2002),* by attempting to virtually eliminate lease suspensions as a reviewable activity by a state. The preamble bases its conclusions on issues that are not part of the court's ruling. The preamble states:

> *Consistent with the Ninth Circuit's decision in California ex rel. Cal. Coastal Comm'n v. Norton, 150 F. Supp.2d 1046 (N.D. Cal. 2001), aff'd, 311 F.3d 1162 (9th Cir. 2002), granting or directing suspensions of OCS operations or production by MMS would be interim or preliminary activities and would not be Federal agency activities when a lease suspension would either not have coastal effects or, if the lease suspension set forth milestones that would have coastal effects, the State had previously reviewed the lease sale for Federal Consistency. (The Ninth Circuit emphasized that the leases at issue in California v. Norton had never been reviewed by California.) See NOAA's response to COMMENT 33 for further discussion on lease suspensions and California v. Norton and NOAA's conclusion <u>that in all foreseeable instances, lease suspensions would not be subject to Federal Consistency review since (1) in general, they do not authorize activities with coastal effects, and (2) if they did contain activities with coastal effects, the activities and coastal effects would be covered in a State's review of a lease sale, an EP or a DPP</u>. If a State believes that a particular lease suspension should be subject to Federal Consistency, the State could notify MMS. MMS could determine that the lease suspension is an interim activity that does not propose a new action with coastal effects and/or provide the State with a negative determination pursuant to 15 CFR § 930.35."*

If the court had believed that suspensions do not authorize activities with coastal effects, it would not have required the suspensions to be subject to federal consistency review. Furthermore, DOI failed to convince the court that the existence of subsequent state review of an EP or a DPP obviated the need for the review of a suspension. The preamble overreaches and attempts to settle questions the court simply did not address. These leaps of logic are not reasonable interpretations of the court's decision, and it appears that in requesting this

change, DOI and NOAA are simply attempting to "end run" a court decision with which they do not agree.

V. <u>OCS information requests – three-month limit</u>. For OCS activities, which by their very nature are complex and controversial, the proposed rule would limit requests for information by the state to the first three months of the six-month review period, and thus prohibit a state from asking for any information after three months. This change implies that unless a state requests information within the first three months of the review period, it may be prohibited thereafter from objecting based on lack of information. Given the emphasis in the previous regulatory changes on maximizing public participation in the federal consistency process, this proposal represents a policy reversal and would have the effect of stifling public input into the process. It would also clearly diminish state authorities by removing the ability of the state to object based on lack of information (or at a minimum, invite litigation over the question of whether the state retains this authority). It may require states to hold an additional hearing within three months, solely for identifying information needs. Alternatively, it may simply compel a state to act within three months, just to preserve its options, thus halving the effective review period from six months to three.

The idea that no new information need could or should arise after three months is not realistic, from a practical perspective gained from reviewing highly complex projects. State or federal resource agencies could list a new endangered species, the air or water quality agencies (which under our statute and under the CZMA we are required to rely on) could modify their standards, or changed circumstances could raise a new issue that simply had not been able to be anticipated at the beginning of the process. In addition, interested members of the public may alert the state to impacts or information about which it was not initially aware. We strongly oppose this change as unworkable, impractical, and unrealistic, and one that will lead to increased litigation, rather than a streamlined process.

VI. <u>Information requirements are only a checklist</u>. The proposed modifications to the regulation purport to clarify the provision in the existing regulations that provides that the time period for a state to review a consistency submittal does not start until the state receives the necessary analysis and information. However, the proposed change eliminates any meaning of this provision and will allow the time period to begin upon receipt of the submittal in almost all situations, effectively eliminating the states ability to evaluate the content of a consistency submittal before acting on it. Section 930.41 of the existing regulations provide the following:

> *The 60-day review period begins when the State agency receives the consistency determination and supporting information required by Sec. 930.39(a). If the information required by Sec. 930.39(a) is not included with the determination, the State agency shall immediately notify the Federal agency that the 60-day review period has not begun, what information required by Sec. 930.39(a) is missing, and that the 60-day review period will begin when the missing information is received by the State agency. If a Federal agency has submitted a consistency determination and information required by Sec. 930.39(a), then the State agency shall not assert that the 60-day review period has not begun for failure to submit information that is in addition to that required by Sec. 930.39(a).*

Section 930.39(a) provides:

> *(a) The consistency determination shall include a brief statement indicating whether the proposed activity will be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of the management program. The statement must be based upon an evaluation of the relevant enforceable policies of the management program. A description of this evaluation shall be included in the consistency determination, or provided to the State agency simultaneously with the consistency determination if the evaluation is contained in another document.*

In the preamble to the proposed regulations, NOAA attempts to 'clarify' that state agency review of information submitted:

> *…is not a substantive review. Instead, it is a ''checklist'' review to see if the description of the activity, the coastal effects, and the evaluation of the State's enforceable policies are included in the submission to the State agency. If the items required by § 930.39(a) are included, then the 60-day review starts. This review does not determine or evaluate the substantive adequacy of the information. The adequacy of the information is a component of the State's substantive review which occurs during the 60-day review period.*

This change will eliminate any meaningful ability of the states to review submittals to determine if they are complete. The purpose of this 'clarification' appears to be for removing discretion from states to seek the information requirements they need to analyze federal agency activities. This clarification would render the information requirements virtually meaningless and contravene their intent. For example, in many cases, a consistency submittal will include an analysis of some of the relevant policies, but fail to consider other relevant provisions of the state's coastal program. The changes will require the state to initiate the time period for consistency review despite the fact that the submittal is missing analysis of important coastal program policies. To date, we have never received any objections or concerns raised by federal agencies when we have asked for additional information necessary to support the agency's conclusion. Like many of the proposed changes, this change is a solution in search of a problem. The proposal is unnecessary, erodes the state authorities, and renders the information requirements meaningless.

VII. <u>Appeals to the Secretary of Commerce</u>. For appeals to the Secretary of Commerce, the rule would result in the following:

1. Set an arbitrary 270-day time limit for Secretary of Commerce decisions on appeals, and would limit the state to only one brief on an appeal, and with a very limited time for the state to prepare such brief.

2. Set an unrealistic 20-day period for a state response to a Secretary remand.

3. Would give greater deference to federal agency comments over state agencies and the public.

1. <u>270-day time limit, limited number of briefs</u>. The rule would establish a 270-day period for Secretarial review and would limit the number of briefs by both the state and the appellant. The appellant's brief would be due in 30 days, and the state would have 30 days after that to respond. The rule also:

> *"… makes clear the State's burden of submitting evidence when asserting an alternative to the proposed action is reasonable, available and consistent with the State management program. This has been the Secretary's long-standing practice in accordance with the Secretary's decision in Korea Drilling Inc. (1989). This change would codify existing practice and consistency appeal precedent."*

When looked at in light of the very small number of appeals compared to the vast number of federal consistency cases by the states, NOAA makes its own case that the need for an arbitrary limit to the Secretarial review process is unnecessary. In the ANPR, NOAA states that out of the thousands of energy projects that the states have authorized through the federal consistency process, there have only been a small handful (15) of appeals of state agency objections to the Secretary of Commerce. The regulations should maintain the Secretary's discretion as to the length of time needed for issuing a judicious decision. Any effort to force that period into a shorter time period may encourage additional litigation (thereby lengthening the process), if an appellant or a state believes its interests were not adequately considered.

In addition, 30 days is not an adequate time period for the state to respond to the new issues raised at the appeals level. As NOAA points out, the Secretary is not imposing his or her judgment on the consistency of an activity with a states' program, but rather is reviewing new questions of balancing competing national interests and looking at national security needs. By their very nature, these issues do not involve questions of consistency with the state's coastal program. Rather, these are new issues that the state does not (nor is required to) consider in its consistency review. The consideration of these issues will require additional data gathering and, possibly, public input, and thus 30 days is insufficient time for the states to consider these issues.

2. <u>Remands</u>. If the Secretary remands the case back to the state, because new information relevant to the state's objection arises, NOAA proposes to reduce the period for state comments from three months to 20 days. It would be virtually impossible for states to comply with this change and it is likely that information on the alternative would not be complete. As a new alternative, there would not be a complete design or adequate environmental evaluation. Rather, the states will be considering a conceptual plan. In addition, the change would eliminate public participation in the process, which is one of the cornerstones of federal consistency. In California's case, the CCC and the BCDC meet only once every 30 days. Under this proposal, insufficient time would be available for us to conduct a public hearing and determine consistency with our program.

3. <u>Public and federal agency comments</u>. The rules provide for public and federal agency comments (as is currently available) with two changes that give greater deference to federal agency comments. The new rules allow the Secretary to reopen the period for federal agency comments (within the overall decision period) without having a similar provision for state agency or public comments. A second proposed 'clarification' of what NOAA considers to be "making explicit the Secretary's practice" of according "greater weight to those Federal agencies whose comments are within the areas of their expertise."

Taken in the context of the other changes discussed in this letter elevating the status and authority of federal agencies at the expense of state agencies and the public, these changes are troublesome, or at best, unnecessary. The implication that the federal agencies are somehow "special" appears to be an effort to tip the federal/state balance. The Congress

intentionally created a level playing field between state and federal interests, which fosters negotiation and agreement by virtue of the fact that both interests are equal in status in the CZMA. We see no need for these proposed changes.

VIII. Conclusion. In conclusion, we do not think the existing regulations need to be changed. As we have repeatedly commented, NOAA has provided virtually no explanation or justification to warrant modifying the effective and successful state/federal balance inherent in the very successful CZMA federal consistency process.

Thank you for the opportunity to comment on the proposed rulemaking, and please feel free to contact the Executive Directors of our agencies, Peter Douglas (415-904-5201) and Will Travis (415-352-3653), if you have any questions concerning this matter.

Sincerely,

MIKE REILLY
Chair
California Coastal Commission

BARBARA KAUFMAN
Chair
San Francisco Bay Conservation and Development Commission

cc: The Honorable Gray Davis, Governor
Coastal Commissioners
Bay Commissioners
Congressional Delegation
The Honorable Barbara Boxer
The Honorable Diane Feinstein
Coastal States Organization