American Petroleum Institute

1220 L Street, Northwest
Washington, DC 20005-4070
Tel: 202-682-8116
Fax: 202-682-8426
E-mail: anthonyb@api.org

Betty Anthony
Upstream General Manager

August 25, 2003

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: The National Oceanic and Atmospheric Administration's proposed rulemaking on "Coastal Zone Management Act Federal Consistency Regulations" (*Federal Register*, Vol. 68, No. 112, Wednesday June 11, 2003)

Dear Mr. Kaiser:

The American Petroleum Institute (API) appreciates this opportunity to comment on the National Oceanic and Atmospheric Administration's (NOAA) proposed regulations, "Coastal Zone Management Act Federal Consistency Regulations" (*Federal Register*, Vol. 68, No. 112, Wednesday June 11, 2003). API represents over 400 companies engaged in all sectors of the U.S. natural gas and oil industry, including exploration, production, offshore drilling and service companies, distribution (pipeline and marine) as well as refining and marketing. Our members have a direct and substantial interest in this rulemaking. In addition to the comments offered herein, we request that our previous comments on the Advanced Notice of Proposed Rulemaking be incorporated by reference.

API is committed to strengthening our nation's energy security, protecting ocean and coastal resources, and enhancing maritime commerce. API has always supported the Congressional intent of the Coastal Zone Management Act (CZMA) of 1972, which created a national program to manage and balance competing uses of, and impacts to, coastal resources and to provide the opportunity for states to comment on the direct impact to their coasts. Balanced and multiple uses of our coastal areas is more important than ever as we seek to develop our domestic energy supplies (especially clean-burning natural gas) and diversify other sources of energy (such as receiving facilities for liquefied natural gas), while continuing to protect the environment.

Natural gas and oil drive our economy – creating jobs, generating revenue for both federal and state governments and serving as the foundation for economic growth. U.S. offshore wells supplied more than 25 percent of the country's natural gas production and more than 30 percent of domestic oil production (Source: U.S. Department of the Interior, Minerals Management Service, 2002). And, offshore production is likely to continue to play a substantial role in providing the oil and gas needed to meet future

demand. It is estimated that 60 percent of the oil and 59 percent of the gas yet to be discovered in the United States are located on the Outer Continental Shelf (OCS).

We understand you will be receiving comments from other natural gas and oil trade associations including: the Domestic Petroleum Council, Independent Petroleum Association of America, and the National Ocean Industries Association. They will address many of the same issues covered in our comments and we urge you to carefully consider their comments as well.

NOAA Has Recognized The Need For Change

Through this rulemaking, NOAA has recognized that improvements can be made to the consistency review process that it implements and we applaud this action. In this rule, NOAA responds to comments on the advanced notice of proposed rulemaking as well as proposes several important rule changes that are intended to provide greater transparency and predictability to the federal consistency regulations. These regulations have significant impact on the operations of the natural gas and oil industry and our ability to provide energy for the nation's homes and businesses.

API recognizes that NOAA has taken note of our previous comments and has attempted to: make this very complicated federal consistency process more predictable for individual permittees and provide clearer guidance for states. NOAA has recognized that:

- Clarification is needed at the federal level on the information required to start the 6-month consistency review process for OCS plans and to ensure that requests for additional information will not delay the start of, nor extend, this review period.

- Establishing clear information requirements for consistency review and setting specific deadlines for acting upon appeals can reduce the time taken in reviewing projects without sacrificing states' ability to review federal plans.

- A State's assessment of the sufficiency of the information for purposes of an application being complete is not a "substantive" review but a "checklist" review to ensure that certain information is included. API endorses the inclusion of such clarification in the regulatory language and not just in the preamble. It is important for NOAA to give this requirement the full effect of law, to eliminate any potential for delay of the start of the 6-month period due to claims that information other than that specified in the checklist in the regulations is missing.

- Efficiencies can be made by allowing the use of a single consistency review for air and water permits. NOAA's endorsement of this process can be further enhanced by codifying the preamble language on this point in the regulatory language as well.

- Pre-leasing activity is typically preliminary or interim agency action and is not considered to have reasonably foreseeable coastal effects.

- Application of the "effects test" for purposes of federal agency consistency determinations is to be conducted by the lead permitting agency.

Additional Regulatory Changes Are Needed

However, API believes that additional changes are needed if the rule is to achieve its goal of providing "greater transparency and predictability to the Federal Consistency regulations."

The additional changes needed include:

- Guarantee that closure of the record in appeals decisions is governed by specific deadlines that cannot be extended indefinitely for receipt of additional National Environmental Policy Act (NEPA) and Biological Opinion documents. We continue to recommend that 120 - 180 days from notice of filing the appeal should be the deadline for closure of the record, and there should be no exceptions to this deadline.

- Recognize there is no need to "reopen" the deadline for closure of the record to develop or wait for additional NEPA and/or Biological Opinion documents as this information has already been developed prior to any oil and gas lease sale or in connection with the OCS plan. The data generated for review by the Minerals Management Service (MMS) prior to lease sales is comprehensive. Additional data is likely to be redundant and seems hardly consistent with Congressional intent regarding CZMA which sought "the coordination and simplification of procedures in order to ensure expedited governmental decisionmaking for the management of coastal resources." Thus, we strongly urge that the NEPA and Biological Opinion "reopeners" not be adopted.

- Require in the regulations that states delineate data and information requirements in their state CZM programs or in a Memorandum of Agreement with MMS prior to the beginning of the consistency review process. Even though NOAA has provided guidance at the federal level of what must be submitted in order for the consistency review period to begin, states can still issue continual requests for new information. Although we appreciate that such requests will not delay the start of the time period for the consistency review, continuing requests for additional information reduce the predictability of the consistency process. States have sufficient experience with the consistency review process and should be able to specify what they need upfront and not continue to impose new information burdens. We also urge that NOAA specify in the regulations (not just the preamble) that a state's completeness review is a "checklist" and not a substantive review in order to avoid further delay.

- Address how National Energy Policy Directives and Presidential Executive Orders on permit streamlining and actions affecting energy projects will be incorporated into the CZMA review process.

While our attached comments provide additional detail on key changes that are needed, further explanation of our concerns is warranted in this letter:

The proposed rule does not ensure that consistency appeals are made in a timely fashion. Closure of the appeals record in 120 - 180 days is appropriate.

NOAA has recognized that the decisionmaking record for Secretarial appeals should not remain open indefinitely. However, as proposed, the rule does not go quite far enough to ensure that decisions are made promptly. In 1996, Congress recognized the need to expedite the consistency appeals process and amended the CZMA to add a section which provided that the Secretary should issue a final decision in the appeal 90 days after issuance of a notice that the decision record was closed. While the intent of this 1996 amendment was to accelerate the appeals process, the amendment has not accomplished this goal, primarily because issuance of the appeal decision is tied to the close of the record which can remain open indefinitely. NOAA has proposed language to close the record but proposes an unnecessarily long period of 270 days**.** 120 - 180 days for closure of the record is a workable time period for such a deadline and is sufficient to make this decision. Further, the open-ended exemptions for NEPA and Endangered Species Act (ESA) Biological Opinions could extend the closure of the record indefinitely and defeat the purpose of the deadline.

The NEPA and ESA Biological Opinion "reopener" diminishes the certainty that a specific deadline for appeals decisions is intended to provide. API strongly urges that this proposed "reopener" not be adopted in the final rule.

This new language implies that the extensive environmental evaluations already required under statute (such as those undertaken by experts in the lead federal permitting agencies: Department of Interior, Federal Energy Regulatory Commission, Coast Guard) are insufficient. This proposal seems to indicate that additional analysis must be subsequently developed by NOAA in order for the Secretary of Commerce to rule on a consistency appeal. It ignores the very thorough environmental reviews already developed by MMS prior to the lease sale and in connection with OCS plans. (See Attachment 1, "OCS Regulatory Approval & Environmental Review Processes"). The record developed for the Secretary in an appeals decision contains not only the MMS reviews, the permit application and supporting materials, but also the permitting agency's own evaluations of those materials. Additional analysis of NEPA and ESA material is redundant and will prolong the decisionmaking process.

States can still issue continual requests for additional information. States should be required to identify information needs early on and not during the consistency review process.

Information needs of a state should be identified before the consistency review process begins. States have had over 15 years experience with the consistency process and should be able to identify early the types of information they need. Identifying information needs up front would not limit a state's authority or prevent them from obtaining the necessary information because the information submitted by the applicant would be developed with early guidance from the state. We appreciate that NOAA's

proposal provides that states' additional requests for information will not delay the start of, or extend the time-period for consistency review and believe that this will go a long way towards expediting the consistency review process. However, this will only work if NOAA fully enforces the position that state's review of the completeness of the information submitted is a "checklist" review to see if the documents listed in the proposal are in fact included in the submission to the agency. Further, the proposal leaves unlimited discretion for states to request additional information through amendment of their state CZM programs during the 6-month review period, and to object to a proposed energy project based on the lack of information. This creates uncertainty for lessees and applicants and we urge NOAA to require, not just encourage, that states now specify in their CZM programs what information will be required, and not change these information requirements without full review by NOAA and public comment.

Moreover, MMS has a comprehensive process in place (Attachment 1) that ensures that much of the needed information is already available to states at the time they begin their review. Any additional needs could readily be defined before the start of the review process.

The proposed rule does not address National Energy Policy Directives and Presidential Executive Orders on streamlining permitting and actions affecting energy projects. A permanent mechanism for consultation and coordination among agencies should be established.

Any revisions to the federal consistency process should incorporate a permanent mechanism for close consultation and coordination between NOAA and MMS, such as a formal Memorandum of Agreement (MOA). The MOA should outline the respective responsibilities of the two agencies, establish criteria for application of the "effects test", institute procedures for ensuring decisions consistent with national energy policy (especially the development of domestic energy resources) and explain how each agency would meet the objectives of the National Energy Policy and Executive Orders 13211 (Actions to Expedite Energy-Related Projects, May 18, 2001), on streamlining energy project permitting, and 13212 (Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution or Use, May 18, 2001), stressing the importance of assessing impacts of government decisions on energy supplies.

Summary

API applauds NOAA's efforts to improve the CZMA review process and urge that you carefully consider the additional changes we believe are needed. These changes would streamline the review process without sacrificing states' rights to consider the effects of projects that impact their coastal areas. And as you can see from the attachment, lease sales and development projects are subject to numerous CZMA consistency reviews. Improvements in the CZMA process are essential to enhancing our energy supplies and strengthening national security.

Unfortunately, the CZMA process has been used to block development of clean-burning natural gas, (in projects such as Manteo and Destin Dome) which could have provided

much needed domestic energy supplies. Destin Dome, for example, was expected to be able to provide enough natural gas to fuel all the homes in Florida for at least 10 years. The complicated and prolonged CZMA review process can add significant uncertainty, unpredictability and additional costs to energy projects thus causing companies to forgo projects.

API and its members believe that improvements can be made in the CZMA process to ensure that the impacts on our coastal resources are considered in a timely manner, while still meeting our important national energy and economic goal to develop domestic energy supplies and diversify our energy sources. And, this can be done while we continue to protect and preserve the environment.

We stand ready to work closely with NOAA to improve the review process and will be pleased to answer any questions you may have and/or provide additional information. Please do not hesitate to contact me at (682-8116), Lisa Flavin (682-8453) or Bob Moran (682-8424).

Sincerely,

Betty Anthony

Attachment 1
OCS Regulatory Approval & *Environmental Review* Processes

1. Develop 5-Year Program

Pre Lease

Solicit Comments → (50-day Comment Period) → Draft Proposed Program Published → (60-day Comment Period) → Proposed Program / *Draft EIS Published* → (90-day Comment Period) → Proposed Final Program / *Final EIS* → (60-day Period with Congress) → 5-Year Program Announced

2 ½ -3 yrs. Est. time could be longer

2. Planning for Specific Sale

Call for Information Published → (30-day Comment Period) → Sale Area Identification → *Draft EIS Distributed* → (45-60 day Comment Period) → *Final EIS Published* / CZM review begins → (↔ 30-day Comment Period / ↔ 3-month Period*) → Proposed Notice of Sale → (60-day Period) → Lease Sale → Leases Issued

12-14 mos. Est. time could be longer

Post Lease Sale

3. Exploration Plan (EP) Approval

EP/EIA Submitted → *Environmental Assessment* → (30-day Period) → CZM Review Starts → (3-month Period*) → Exploration Plan Approved → Well Permit Approved → Exploration Drilling Starts

3-6 mos. Est. time could be longer

4a. Development and Coordination Document (DOCD) Approval

DOCD/EIA submitted → *Environmental Assessment* → (30-day Period) → CZM Review Starts → (3-month Period*) → DOCD approved → Facility Permits Approved → Development Drilling Starts

4-8 mos. Est. time could be longer

4b. Development and Production Plan (DPP) Approval **

DPP submitted → CZM Review Starts → (3-month Period*) → *Draft EIS Published* → (90-day Comment Period) → *Final EIS Published* → DPP Approved → Production Well Application

12-18 mos. Est. time could be longer

* An additional 3-month period can be requested by the affected state. ** DPP used outside of Gulf of Mexico current planning areas. Overall time range = 5 to 6 ½ yrs. from beginning of the 5-year Program to DPP approval (this estimate could be longer due to actions of state and/or federal agencies).

EIA = Environmental Impact Analysis Blue = Key information documents Red = State opportunity for CZMA review

COMMENTS OF
AMERICAN PETROLEUM INSTITUTE, DOMESTIC PETROLEUM COUNCIL, INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, NATIONAL OCEAN INDUSTRIES ASSOCIATION, AND THE UNITED STATES OIL AND GAS ASSOCIATION
TO THE DEPARTMENT OF COMMERCE NOTICE OF
PROPOSED RULEMAKING ON COASTAL ZONE MANAGEMENT ACT FEDERAL CONSISTENCY REGULATIONS

68 Federal Register 34851 (June 11, 2003)

I. Introduction and Executive Summary.

The American Petroleum Institute ("API"), et al. offers the following comments in response to the Department of Commerce's June 11, 2003 notice of proposed rulemaking on federal consistency review under the Coastal Zone Management Act ("CZMA"). API appreciates the agency's effort to improve the consistency review process and to better clarify the information exchange that serves as an integral part of that process.

API is committed to strengthening our nation's energy security, protecting ocean and coastal resources, and enhancing maritime commerce. API has always supported the Congressional intent of the Coastal Zone Management Act (CZMA) of 1972, which created a national program to manage and balance competing uses of, and impacts to, coastal resources and to provide the opportunity for states to comment on such impacts. Balanced and multiple use of our coastal areas is more important than ever as we seek to develop our domestic energy supplies (especially clean-burning natural gas) and diversify other sources of energy (such as receiving facilities for liquefied natural gas), while continuing to protect the environment.

Oil and natural gas are major drivers of our economy – creating jobs, generating revenue for both federal and state governments and serving as the foundation for economic growth. U.S. offshore wells supplied more than 25 percent of the country's natural gas production and more than 30 percent of total domestic oil production (Source: U.S. Department of the Interior,

Minerals Management Service, 2002). And, offshore production is likely to continue to play a substantial role in providing the oil and gas needed to meet future demand. It is estimated that 60 percent of the oil and 59 percent of the gas yet to be discovered in the United States are located on the OCS.

Through this rulemaking, NOAA has recognized that improvements can be made to the consistency review process that it implements and we applaud this action. In its June 11th notice, NOAA responds to the comments submitted to the advanced notice of proposed rulemaking, and proposes several important rule changes that are intended to clarify and provide greater transparency and predictability to the federal consistency regulations. These regulations will have significant impact on the operations of the oil and natural gas industry and its ability to provide supplies to the nation's homes and businesses. API recognizes that NOAA has taken note of our previous comments and has attempted to make this very complicated federal consistency process more predictable for individual permittees and to provide clearer guidance for states.

NOAA has recognized the following concerns:

- Efficiencies can be made by allowing the use of a single consistency review for air and water permits. NOAA's endorsement of this process can be further enhanced by codifying the preamble language on this point in the regulatory language as well.
- Clarifying information needed to start the 6-month consistency review process for OCS plans and that requests for additional information will not extend this review time period.
- Setting specific deadlines for acting upon appeals that can reduce the time taken in reviewing projects without sacrificing states' ability to review federal plans.

- Clarifying in the preamble that the state's assessment of the sufficiency of the information for purposes of an application being complete is not a "substantive" review but a "checklist" review to ensure that certain information is included. API endorses the inclusion of such clarification in the actual regulatory language.
- Recognizing that MMS pre-leasing activity is typically in the nature of preliminary or interim agency action not considered to have reasonably foreseeable coastal effects and that the application of the "effects test" for purposes of federal agency consistency determinations is to be conducted by that particular federal agency.

Despite these important steps, API believes that several additional changes are needed to the proposed rule if the rulemaking is to achieve its goal of providing "greater transparency and predictability to the Federal Consistency regulations." Those changes include agency action to:

- Guarantee that closure of the record in appeal decisions is governed by a definitive deadline that cannot be extended indefinitely by the Secretary for receipt of NEPA and ESA documents. API recommends that a period of 120 – 180 days for the closure of the record is sufficient. As our comments discuss, the data generated for review by MMS in connection with lease sales and OCS Plans are comprehensive and additional environmental reviews are not necessary.
- Require states to specify information needs at the beginning of the consistency process through their state CZM programs or in Memorandums of Understanding with MMS, where appropriate.
- Clearly address how National Energy Policy Directives and Presidential Executive Orders on permit streamlining and actions affecting energy projects will be incorporated into the CZMA review process.

Part I of API's comments addresses NOAA's responses to the questions presented in its Advanced Notice of Proposed Rulemaking ("ANPR") published at 67 Fed. Reg. 44407 (July 2, 2002), and to the proposed procedural changes set forth in the June 11th notice. Part II of the comments considers the effect of NOAA's efforts in view of the goals set forth in the President's National Energy Policy and related Executive Orders. Finally, Part III reflects on NOAA's assessment of the overall status of consistency issues affecting OCS operations and urges due recognition of the obstacles that have limited OCS activity to portions of offshore Alaska and the Gulf of Mexico.

II. ANPR Questions and Proposed Procedural Changes.

A. State Information Needs.

The first ANPR question solicited comments on whether NOAA needed to further describe the scope and nature of the information necessary for states to complete consistency reviews, and whether improvements could be made in the methods of informing federal agencies and industry of such information requirements. API furnished comments explaining that, for reviews involving OCS plans, information guidelines developed under Minerals Management Service ("MMS") regulations and related guidance are entirely sufficient, and that no additional information should normally be needed for a state to conduct a consistency review for an OCS plan.

API appreciates and acknowledges NOAA's efforts in the proposal to clarify the information needed to start the six-month consistency review period for OCS plans. API notes, however, that this effort does not ultimately affect a state's ability, under current CZMA regulations, to make continuing requests for new data and information that increase the uncertainty of the consistency process. As the proposal states, these changes "would not affect a

State's ability to specifically describe 'necessary data and information' in the State's federally approved management program…, or to request additional information during the six-month review period…, or to object for lack of information." 68 Fed. Reg. 34857 (left column).

API believes that this open-ended authority in NOAA's regulations is not needed, given that MMS has promulgated extremely thorough environmental review regulations and agency guidance for OCS Plans, and information generated by this process should be honored by the states. MMS developed its requirements in consultation with the Gulf coastal states. API suggests that information now being provided to MMS should be sufficient for the state's purposes and disagrees with the statement in the preamble that concludes the opposite (68 Fed. Reg. 34861) (left column). In addition, states should be able to identify in their CZM programs the information that will be required if different from MMS requirements, so that applicants have this information at the beginning of the process. States have enough experience with implementation of their CZM programs over the last 15 years, and the types of projects they evaluate for consistency and do not need to evaluate, on a project-by-project basis, what information is needed.

NOAA's June 11th preamble correctly recognizes that one important contributing factor to information uncertainty related to consistency review is that certain states have failed to list specific information needs despite being encouraged to do so by NOAA's consistency regulations, or have not kept their management programs up to date by submitting timely changes for NOAA approval. But, even though NOAA says that the agency has begun to address these issues with the states, API urges NOAA to require the states to identify information needs in their CZM programs, not just encourage them to do so. NOAA should also ensure state compliance by recognizing that a failure to timely seek NOAA's ongoing approval of a specific

and current list of information needs will prevent a state from requesting supplemental information beyond what is currently described in the state's approved CZM plan, or in the permitting federal agency's regulations and guidance. Moreover, API asks NOAA to ensure that this process is open to public review.

API again urges NOAA to adopt regulations to provide a mechanism for applicants to invoke NOAA's intervention and effective oversight during consistency review if a state attempts to request information beyond what is specified in NOAA and MMS requirements or state CZM plans. To further promote other federal agencies' use of information guidelines such as those now used by MMS, API also suggests that NOAA regulations should be changed to specifically recognize that in cases where the federal permitting agency has promulgated specific consistency review guidance, in consultation with the states, a state will carry the distinct burden of demonstrating a particular need for any supplemental information in conducting its review.

Regarding other issues related to data and information needs, API endorses NOAA's clarification that the state's assessment of the sufficiency of the information for purposes of an application being "complete" is *not* a substantive review, but rather is what NOAA correctly characterizes as 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." 68 Fed. Reg. 34856 (left column). (NOAA's remarks are repeated both with regard to consistency certifications provided by federal agencies, as well as by private permit applicants.) API submits that the "checklist" nature of the process be confirmed in specific regulatory language, so that the states will be *required* to prepare such a checklist – that is, a checklist submitted to NOAA for approval with input by the appropriate federal agencies and affected industry – for inclusion in their coastal zone management programs. In preparing such checklists

for NOAA approval with respect to OCS plan reviews, states should work with the MMS to validate the known set of requirements specified in MMS regional guidance, in addition to NOAA's own regulations.

In addition, API endorses NOAA's attempted clarification of the definition of a "federal license or permit" requiring consistency review, as well as the deletion of the confusing phrase "comprehensive data and information sufficient to support the applicant's consistency certification" presently appearing in 15 C.F.R. § 930.58(a)(1)[1]. API also supports NOAA's general recognition that it would be impractical to require any NEPA documents in draft or final form to be included as information necessary to start the six month review period with regard to OCS plans, considering the OCSLA's explicit requirements for MMS to make decisions regarding a EP, as well as a DPP, within shortened time periods. However, the proposal appears inconsistent to then indicate that a state could nevertheless seek to amend its CZM program to require its receipt of any draft EIS prepared in connection with a DPP, in order for its consistency review period to begin.

Finally,[2] API believes that NOAA's proposed rule changes on a number of these issues would be, overall, a positive development. API also recommends, however, that NOAA revise the proposal to ensure that a state's information needs are specified in advance. Additionally, NOAA's oversight of state programs should be exercised to streamline permitting for energy

---

[1] API notes the deletion of the portion of the current § 930.58(a)(1) that limits the data to be supplied to that which is "sufficient to support the applicant's consistency certification" and the substitution of language that the applicant must provide "any other information relied upon." API requests clarification that the protections now afforded in § 930.58(c) to an applicant's confidential and proprietary information still remain in place if this substituted language is adopted. API would also suggest that NOAA consider restating the protection found in subpart (c) of § 930.58 by rephrasing the substituted language in subpart (a) to read "any other non-confidential and non-proprietary language relied upon."

projects and avoid *ad hoc* and unspecified supplemental information requests and thereby reinforce the certainty of the consistency certification process.

B. Appeal Timeframes.

1. Closure of Record and NEPA/ESA Documents.

The ANPR next solicited comments on whether a definitive date should be established for issuance of a Secretarial decision in override appeals; and, moreover, which, if any, federal environmental reviews should or could be included in an appeal's administrative record in a manner to accomplish expedited review. In its notice of proposed rulemaking, NOAA has offered a deadline for closure of the decision record of 270 days (which API believes could and should be reduced further, to 120, or at most 180 days) after notice of the appeal appears in the Federal Register, but then would allow this deadline *to be extended* (i) through mutual agreement of the parties to the appeal, or (ii) "as needed" to allow receipt of a final NEPA document or ESA Biological Opinion otherwise required for the issuance of the proposed federal permits at issue.

The CZMA's Congressional Declaration of policy provides that there should be "the coordination and simplification of procedures in order to ensure expedited governmental decision making for the management of coastal resources." 16 U.S.C. Section 303(2)(G). To carry out this Congressional policy, API believes that NOAA should propose a *definitive* deadline for closure of the decision record. API is concerned that the proposal's vaguely worded exemption for NEPA and ESA Biological Opinions diminishes the very certainty that a definitive deadline is intended to provide. Moreover, as discussed below, MMS has already performed a very thorough NEPA environmental review for every lease sale it conducts; performs additional environmental reviews for every EP or DPP filed for approval, and has completed a programmatic environmental review for the Eastern Gulf to guide future exploratory

efforts. Thus, for OCS plans, no additional NEPA or ESA reviews are needed at the time of an appeal to the Secretary of Commerce.

As part of the evaluation of whether the state's objection is consistent with the objectives of the Act or is necessary in the interest of national security, the Secretary of Commerce will have access to the full record as developed by the federal permitting agency, including MMS. MMS's review evaluates very closely the effects of oil and gas exploration and development on the coastal environments and incorporates information from studies on environmental concerns to make decisions on leasing areas and to develop environmental assessments or environmental impact statements required under NEPA or the OCSLA. For your agency's general information, API attaches to its comments a chart that illustrates the very thorough NEPA process that MMS uses for OCS exploration and development (prelease and post lease). *See* Attachment 1. This expert review leaves no stone unturned and, in light of this review, any additional request for NEPA or ESA analysis would be redundant. Moreover, the CZMA does not require any separate endangered species analysis, and to allow the Secretary to extend the close of the record of decision to request Biological Opinions performed under the ESA would be in effect changing the requirements of the statute.

Additionally, the record available to the Secretary includes not only the permit application and supporting materials, but also the agency's own evaluations of those materials. Moreover, the Secretary benefits from the federal permitting agency's expertise provided in its comments to the Secretary regarding the specific criteria for appeal, including project need, alternatives, and coastal impacts, which will provide the Secretary with the evidence necessary for the appeal decision.

Given this abundance of information in the decision record, API believes that the Secretary should not then be enabled to extend the close of the record indefinitely for preparation of yet additional documents "pursuant" to NEPA and ESA. Notwithstanding the statement in the response to comments that new NEPA or ESA documents are not suggested (*see* Response to Comment 13, 68 Fed. Reg. 34863)(left column), the proposed regulatory language allowing such extensions could be construed to allow the Secretary to request new, or additional NEPA impact analyses or Biological Opinions under the ESA. The language also could suggest that Federal agency evaluations such as those of the Department of the Interior under OCSLA[3] or of the Federal Energy Regulatory Commission in deciding an application under the Natural Gas Act, are not sufficient and must be subsequently developed by NOAA. No current CZMA statutory language suggests that Congress contemplated that the Commerce Department undertake a redundant, sequential evaluation of all substantive CZMA issues that were examined by the 'lead agency,' and API requests NOAA to reconsider the potential ramifications of this language.

2. Briefing Schedules.

Next, turning to the issue of briefing schedules allowed within the much-needed deadline for record closure, API believes that it would be both practical and helpful to allow the parties to submit additional response briefs within 20 days after the filing of the state's opening brief. This would allow the parties the opportunity not only for important rebuttal arguments, but also for the parties' responses to any public, or federal agency comments that had been received into the decision record.

---

[3] Indeed, as API discusses later in these comments, the same NEPA documents and other environmental review documents made available to states under the OCSLA for their consistency reviews are also *readily available* for inclusion in the record of decision in a consistency appeal.

Finally, while API sees potential utility in the provisions in proposed section 930.127(c)(2) for the Secretary to have the option of requesting an initial round of briefs to address only procedural or jurisdictional issues, followed by briefs on the merits as appropriate, the proposed rule needs to be changed to clarify that exercise of this option by the Secretary would constitute an exception to the otherwise uniform provision in proposed section 930.127(a) that requires the appellant's opening brief to be filed within 30 days of the appeal notice, and the state's brief to be filed 30 days thereafter. [4]

C. Coordinated Federal Documents.

Under the third item for requested comments, the ANPR solicited ideas on how NOAA can establish a more effective way to coordinate the completion of federal environmental review documents; the information needs of the states; and, MMS's and NOAA's interests and duties under various statutory timeframes established by the CZMA and OCSLA.

API's comments to the ANPR again emphasized that any state request for additional information should not extend the start date of the states' consistency review. API believes that NOAA's proposed changes to the information requirements discussed in Part II.A. of these comments, if implemented, will improve the general process, especially if NOAA will agree to implement the checklist requirement for states to utilize in stating its information needs.

---

[4] Proposed rule § 930.127(b)(2) states that "[a]t the same time that materials are submitted to the Secretary, the appellant and the State agency shall serve at least one copy of their briefs, supporting materials and all requests and communications *to the Secretary and on each other.*" (Emphasis added.) API believes that the highlighted language could be misread as requiring an additional obligation of service on the Secretary beyond the procedures already outlined in § 930.127(a) and (b)(2). Thus API requests that NOAA consider changing the language of proposed § 930.127(b)(2) to read as follows: "At the same time that materials are submitted to the Secretary, the appellant and State agency shall serve *on each other* at least one copy of their briefs, supporting materials, and all requests and communications submitted to the Secretary." (Emphasis added.)

In addition, API continues to believe that for OCS plan consistency review, states can readily use information provided in NEPA documents that MMS prepares for the sale of the OCS lease(s) which are the subject of the OCS plan. Similarly, the site-specific Environmental Assessment which is prepared as part of the filing of any OCS plan should readily satisfy any states' remaining information needs. API also noted that, for review of OCS plans, the MMS already has in place very thorough environmental review regulations, and has implemented a Notice to Lessees for the Gulf states effective August 29, 2002 under which specific state input on CZMA information requirements has been gathered. And, as acknowledged by NOAA, MMS also prepared a programmatic EA focusing on impacts from exploratory drilling and other activity in the Eastern Planning Area of the Gulf.

In the June 11th notice's discussion of this ANPR element, API notes that NOAA apparently inadvertently inserts part of its response to API's comments in such a way that it is unclear to the reader that it is NOAA's language, and not industry's comments, being encountered. Specifically, 68 Fed. Reg. 34863 (bottom right column), reproduces the text of industry's comments, the final pertinent sentence of which was ". . . [i]ndustry recommends that [MMS's] approach be adopted in the Federal Consistency requirements." The remaining language of that preamble paragraph regarding "effective coordination" and "regulatory mandate" was not part of API's comments, but rather is apparently part of NOAA's response to industry's suggestions. With this clarification in mind, API emphasizes the importance of the adoption by NOAA of the information exchange approach taken by MMS, by having federal permitting agencies work together with coastal states early on to clarify information needs. API does note that NOAA's responses to API's comments reflect a general endorsement of the MMS information guidelines. Finally, API recommends that NOAA consider regulatory changes to

make clear that such state coordination with the federal permitting agency is not a mere advisory provision but a required feature for state management programs.

D. General Negative Determination.

NOAA's ANPR also inquired whether a general negative determination, similar to general consistency determinations already provided by 15 C.F.R. § 930.36(c), should be allowed for repetitive federal agency activities which would have no individual or cumulative coastal effects. API's comments supported this procedure, and API endorses and appreciates NOAA's proposed rulemaking establishing that option for federal agencies.

E. Geographic Considerations.

This fifth ANPR element addressed the need for any necessary guidance or regulatory revisions to further clarify the process of identification of offshore projects having "reasonably foreseeable coastal effects." In its comments, API pointed out the important distinction made in the legislative history of the 1990 amendments between Congress's focus on the reversal of the *California v. Watt* decision and the expansion of state review of federal agency activity to include lease sales, and the corresponding recognition by Congress that there would be no change in the status quo for state review of private permitting activity. The proposed rulemaking, however, overlooks this important distinction.[5]

---

[5] API continues to take issue with NOAA's reading of the Congressional history of the 1990 amendments and Congress's various "endorsements" of NOAA's consistency policies at that time. Congress did not globally endorse NOAA's consistency regulations as otherwise contended by NOAA in such statements as "[w]hen Congress amended the CZMA in 1990, it specifically endorsed NOAA's consistency regulations and interpretation of the CZMA." 68 Fed. Reg. 34852 (right column). While API acknowledges that there is language in the 1990 Conference Report which in two places suggests that certain NOAA policies then in place were acceptable to Congress, NOAA overstates the effect of these comments in attempting to buttress certain of its more expansive consistency arguments.

The two passages in the Conference Report in which Congress referenced NOAA regulations need to be put in context. First, the Conference Report, 6 U.S.C.C.A.N. at 2677, in discussing the technical and conforming changes to CZMA Sections 307(c)(3)(A) and (B), and (d), notes that

While NOAA's June 11th notice contains certain helpful preamble statements regarding a recognition that activities located far offshore from coastal boundaries could indeed have no foreseeable coastal effects, NOAA regulations or specific guidance need to state that explicitly, and should endorse a procedure in which the MMS working with NOAA can remove certain projects from state consistency reviews. Towards this end, in its comments to the ANPR, API urged NOAA to monitor the state's interpretations of the "effects test", as well as the implementation of the "listing and geographic location" regulations found at 15 C.F.R. § 930.53, to ensure the state's right of consistency review in a reasonable manner. API especially noted the need for careful scrutiny of state attempts to conduct consistency review for OCS projects located at increasing distances from any state's coastal zone.

---

these provisions govern in part the "consistency of private activities for which federal licenses or permits are required," and then observes that "[t]hese requirements are outlined in the NOAA regulations (15 C.F.R. § 930.50-930.66) and the conferees endorse this status quo." But NOAA ignores the very next paragraph of that Report, which explains the "status quo" in the explicit statement that none of these technical changes "change existing law to allow a state to expand the scope of its consistency review authority." Elsewhere, at 6 U.S.C.A.A.N. p. 2674, the Conference Report references the definition of "enforceable policy" as being "in accordance with NOAA's existing regulations . . .[and] intended to endorse existing NOAA and state practice." Therefore, Congress's "endorsements" targeted only (i) NOAA's definition of enforceable policy and (ii) NOAA's existing requirements in 1990 regarding state review of federal permits.

Finally, API points out that NOAA incorrectly cites the 1990 Conference Report in another attempt to find additional support for its position. In its June 11th notice NOAA argues that:

> The definition of "consistent to the maximum extent practicable" was not significantly changed in 2000. NOAA's definition is long-standing (since 1979) and clearly reflects the language and intent of the CZMA. *NOAA's language was specifically endorsed by Congress in the conference report to the 1990 CZMA reauthorization* and has been upheld by Courts since then.

68 Fed. Reg. 34868 (right column) (emphasis added). But in the preamble's discussion immediately following this statement, NOAA inappropriately uses as its authority a quotation -- "The Committee supports this long-standing [NOAA] interpretation" -- which does *not* appear in the Conference Report for the 1990 amendments, but rather in another, *House* Report, Cong. Rec. H 8073, 8076. API notes that the Conference Report, and not this House Report, serves as the definitive statement of Congressional will.

Elsewhere, the proposed rulemaking preamble contains what API sees as potentially confusing language on this particular subject. First, in discussing the "effects test" at 68 Fed. Reg. 34853 (left and middle columns), NOAA observes that "[f]or OCS EP's and DPP's located far offshore, [a state's right to consistency review] would be a factual matter to be determined by the State, applicant and MMS on a case-by-case basis . . . " However, in the next paragraph, NOAA's discussion envisions the possibility that a state could seek to amend its CMP to specifically describe

> a geographic location outside the State's coastal zone where such [OCS] plans would be subject to State review . . . NOAA would approve only if the State could make a factual showing that effects on its coastal uses or resources are reasonably foreseeable as the result of a particular EP or DPP.

Considering NOAA's repeated observations that state reviews of OCS projects at far distances from a state's coastline would entail "case-by-case" consideration by not only the state, but also the applicant and MMS, API believes it would be inappropriate for NOAA to *ever* allow a state to amend its program to automatically include such a general geographic area of review.[6] The right of such review, if *ever* justified by actual "effects", should be confined instead to a case-by-case consideration under the procedures provided in 15 C.F.R. § 930.54 (i.e., review of unlisted activities).[7]

---

[6] For example, elsewhere in the preamble's discussion, 68 Fed. Reg. p. 34864 (right column), NOAA similarly comments that it "has determined that [these types of] conflicts are isolated examples, would most likely only occur in the Gulf of Mexico, and can be dealt with on a case-by-case basis should an issue arise."

[7] In these case-by-case determinations, a state must, first and foremost, bear the burden of demonstrating a "coastal effect" from the distant activity. And, API repeats the fundamental argument that application of NOAA's amorphous "effects test" in such a setting, i.e., involving state review of private permits or OCS plans, finds no support in CZMA's legislative history. However, even under the "effects test" standard, a state's bare argument that there is a statistical "chance" of a distant event giving rise to a coastal effect will not establish a *reasonably foreseeable effect*. (Any more than, for example, a weather forecast predicting a slight chance of precipitation will establish a *reasonably foreseeable* occurrence of precipitation.) Indeed, to

Finally, API's earlier comments to the ANPR also questioned NOAA's revisions of the definition of a "coastal use or resource" within 15 C.F.R. § 930.11. NOAA has taken no specific action to remedy this overbroad definition and in the proposal does not acknowledge that adding terms such as "scenic and aesthetic enjoyment" broadens this definition, and thereby inappropriately expands the reach of the effects test, 68 Fed. Reg. 34865 (far right column, NOAA Response to Comment 25). API re-urges its objection and submits that the ongoing interaction between MMS and the states regarding consistency review of OCS plans should be promoted in order to avoid any inappropriate use of this broad definition in the course of state review.

F. NOAA's Responses to Other ANPR Comments.

1. Conditional Concurrence.

API's response to the ANPR also urged NOAA to rescind the conditional concurrence procedures allowed by the earlier December 8, 2000 rulemaking, 15 C.F.R. § 930.4, or at the very least have the conditions under which such procedures could be imposed substantially narrowed and further clarified. CZMA 16 U.S.C. §§ 307(c)(3)(A) and (B) explicitly provide only that the state either concur or object, and do not authorize the state to impose new requirements on the activity under review as a condition of concurrence. In its June 11th notice, NOAA takes no action on this problem, and further, still offers no adequate explanation of the statutory basis for this procedure.

---

better ensure reasoned decision-making in these cases, API urges NOAA and MMS to implement an MOA process as advocated in Part III of these comments whereby objective criteria can be employed to determine what are "reasonably foreseeable effects."

2. Recognition That Decision on Effects of Federal Agency Activity Falls Within the Purview of the Agency Conducting the Activity.

In its earlier ANPR comments, API pointed out that NOAA's previous remarks treating such MMS activities as five-year leasing plans as potentially "federal agency actions subject to consistency review" were not only inconsistent with CZMA legislative history, but also an incorrect application of the definition of "federal agency activity." In its proposed rulemaking preamble, API notes that NOAA has receded from this position and acknowledges that MMS pre-leasing activity is typically more in the nature of preliminary or interim agency action not considered to have reasonably foreseeable coastal effects. API also notes NOAA's recognition in its June 11th notice that application of the "effects test" for purposes of federal agency consistency determinations is to be conducted by that particular federal agency (*e.g.*, "NOAA defers to Interior regarding the determination of effects for any specific Interior activity", 68 Fed. Reg. 34868 (top left column)). API supports NOAA's articulation of consistency review policy on this issue. API also supports NOAA's deference to an MMS determination that lease suspensions should be considered "interim activities" having no coastal effects.[8]

3. Interstate Consistency Regulations.

API questions the legal authority for NOAA to establish interstate consistency review requirements. The proposal response to comments that states that the procedure finds support in the "effects tests" is not consistent with the legislative history as we view it,[9] and does not

---

[8] On a related note, however, API continues to reject the reasoning of the 9th Circuit's decision in *California Coastal Commission v. Norton* and observes that NOAA is not required to adopt a decision of the 9th Circuit and extend such decision nationwide as suggested in its rulemaking preamble. Whether to apply this decision nationwide is a judicial determination within the purview of other circuit courts and the Supreme Court, which have not adopted the 9th Circuit ruling.

[9] The Conference Report for the 1990 amendments contains unambiguous language to the effect that the technical changes made with regard to consistency review for federal licenses and permits did not change "existing law to allow a state to expand the scope of its consistency review

address the fundamental constitutional infirmities concerning a state's ability to review activities taking place wholly within the boundaries of another state.

4. Change in Secretarial Appeal Criteria.

API had earlier articulated its concern with regard to the new Secretary appeal criteria, 15 C.F.R. § 930.121, which would require an activity to "significantly or substantially" further the national interest before the Secretary could override based on the statutory "national interest" criteria. In the June 11th notice, NOAA comments that the term "development" was used as a "general descriptor for OCS oil and gas activities", and further, that:

> [a]t this time, NOAA cannot foresee a case where OCS oil and gas activities do not further the national interest in a significant or substantial manner, inclusive of the exploration, development and production phases.

68 Fed. Reg. 34868 (left column). While NOAA's comment is a positive statement, its position is still modified by the critical words "[a]t this time", and remains in marked conflict with the precedential finding in the *Manteo* Secretarial override decisions that an OCS exploration plan targeting a potential natural gas reserve of 5 trillion cubic feet – which would constitute the largest find of domestic hydrocarbons since Prudhoe Bay – would make only a "minimal" contribution to the national interest. Because this inconsistency cannot be reconciled, the particular *Manteo* findings should be formally rescinded by the Secretary of Commerce in order to conform to NOAA's current articulation of CZMA national policy.[10]

---

authority", and, in the sentence immediately following, *specifically applies* that observation to a then pending dispute involving an attempt by North Carolina to perform an "interstate consistency review" of a Virginia-based project. 6 U.S.C.C.A.N. at p. 2677.

[10] API's caution is also underscored by the *Manteo* decisions' rejection of Interior's comments in those appeals in support of the exploration activity. Although Interior officials were quoted as describing the *Manteo* EP as the *most comprehensive exploration plan* prepared in the history of the U.S. offshore program, the Secretary refused to override based on the state's "lack of information" contentions. This experience seems to belie NOAA's insistence found elsewhere in its June 11th notice that the Secretary has given, and will continue to give, particular deference to

5. Consolidated Consistency Certification and Review for Multiple Federal Approvals for Activities Described in an OCS EP or DPP.

API appreciates NOAA's general endorsement of API's suggestion that CZMA consistency review of OCS activities described in detail in OCS plans should include federal approvals for individual permits under the Clean Water Act and Clean Air Act, and therefore states should not and need not conduct a separate consistency review for those additional federal permits. While NOAA's preamble comments will provide helpful guidance to the states, API suggests that the MMS, states, and industry would be better served by NOAA building that particular requirement into its consistency regulations, and by the agency preparing special regulatory guidance to prevent any further confusion in this regard.[11]

6. Additional Scrutiny of the Implementation of Federal Consistency Requirements by State Programs.

API proposed in its comments to the ANPR that NOAA should undertake a more active review of state programs than the current three-year rotation undertaken pursuant to 15 C.F.R. § 930.3, and specifically suggested that such review should be conducted on a semi-annual basis. NOAA has responded in its June 11th notice by suggesting that a semi-annual or annual review would strain existing federal or state resources, carrying what NOAA says is "little foreseeable benefit." NOAA then asserts that it conducts review of state programs in the course of

---

comments from agencies with expertise over the activities which are the subject of the override appeals.

[11] API points out what inadvertently could be misleading language in the preamble's discussion of the effects of a state's objection to a OCS plan certification. At one point, NOAA remarks that "[i]f the State objects to the consistency certification, then *MMS is prohibited* from approving the license or permits described in the EP or DPP." 68 Fed. Reg. 34853 (left column) (emphasis added). Of course, in the case of an expanded "single consistency certification" including individual air and water permits, the EPA, and not the MMS, could be the subject of the statute's restrictions on approval of the license or permit. Indeed, API notes that the CZMA's language at 16 U.S.C. § 1456(c)(3)(B) recognizes such a cross-agency effect for OCS plan certifications, by generally stating that without state concurrence or Secretarial override for the particular permit at issue "[n]o Federal official or agency shall grant … [that] license or permit for [that] activity described in detail in such plan …" *See also,* 15 C.F.R. § 930.81(b).

Secretarial appeals. However, in circular fashion, NOAA elsewhere asserts that it does *not* review the validity of the state's underlying objection in a consistency appeal, but rather in a state program review[12] – but now claims limited resources to conduct such state reviews.

API questions NOAA's position on these issues. First, NOAA itself has acknowledged that there is a readily foreseeable benefit of additional scrutiny of state programs, by elsewhere pledging to increase its effort to address state program deficiencies regarding outdated or unaddressed information requirements. Moreover, the experience to date taken from consistency appeals has not shown an active Secretarial oversight of the state's use of the consistency process, but rather a traditional deference by the Secretary to state interpretation of its CMP, and the converse focus by the Secretary on the federal appeal findings. Indeed, NOAA in its June 11th notice repeats its position that the Secretary's review in an appeal is "not a review of the basis for the State's objection", 68 Fed. Reg. 34863 (middle column), thus underscoring API's observation that the basis for a state's use of its CMP program to lodge an objection is essentially left unreviewed.[13]

API also disagrees that the Secretarial appellate process absolves NOAA of all responsibility to review the validity of the state's objection. In all areas of its implementation of CZMA, NOAA has an obligation to carry out the Congressional purposes of the CZMA, including the effectuation of the appeals process. The Congressional findings and purposes of CZMA require balanced decision-making based on the competing demands of coastal zone protection and economic development, and include a declaration of national policy that priority

---

12 See text at n. 12, below.

13 API is certainly aware that in an appeal the Secretary may address threshold procedural issues relevant to the proper formulation of the state's objection. But experience has shown that states have successfully masked what could be improper grounds for objections by tacking on allegations of other conflicts with enforceable policies, and thus evading Secretarial review.

consideration be given to energy uses. NOAA cannot carry out the Congressional purpose of balanced decision-making by unquestioned acceptance of a state's objections and a refusal to evaluate whether there is truly a rational basis for such objections in the state's NOAA-approved coastal management program.

Earlier justifications for the "de novo" approach indicate that NOAA favored such an approach because NOAA would evaluate the manner in which states carried out their consistency responsibilities as part of the Section 312 performance evaluations, and there were more appropriate forums (not identified) to resolve whether the state was actually correct.[14] NOAA's "de novo" approach that does not include a review of the underlying state's objection should be reevaluated in light of NOAA's statements regarding resource constraints NOAA says it faces in conducting Section 312 program reviews. 68 Fed. Reg. 34868 (middle column). An important oversight function of the statutory scheme is not being effectuated, if the state's manner of carrying out their consistency responsibilities is not undergoing thorough review under Section 312, and then again is not being reviewed as part of the consistency appeal process.

7. Consistency Review of General Permits, 15 C.F.R. § 930.31(d).

Finally, API has concerns about NOAA's proposed amendments to section 930.31(d) to clarify that if a state objects to a federal agency's consistency determination for a general permit, all potential users of that general permit would thereafter have to furnish individual consistency certifications for state review. This procedure counters the fundamental purpose of the general permit process. Indeed, NOAA's position conflicts with its own recognition of the nature of the federal approval involved in an MMS lease sale, whereby MMS can with justification proceed to

[14] See, e.g., Decision and Findings in the Consistency Appeal of Chevron U.S.A. Inc., (October 29, 1990).

conduct the lease held even in the face of state consistency objections. NOAA has consistently recognized that individual lessees, in taking their leases from the MMS after such a sale is conducted, would not have to furnish individual consistency certifications.[15]

III. Additional Changes to NOAA's Proposal Would Further National Energy Policy Directives and Presidential Executive Orders.

API supports the June 11th notice's acknowledgment of NOAA's responsibility under the President's National Energy Policy (NEP) to promote coordination between NOAA and MMS in OCS energy development. API believes, however, that the agency should more fully implement the requirement that the Departments of Interior and Commerce work together to solve interagency conflicts and develop mechanisms to address differences in the OCSLA and the CZMA. API reiterates that any revisions to the federal consistency process should incorporate a permanent mechanism for close consultation and coordination between NOAA and MMS such as a formal Memorandum of Agreement (MOA). The MOA could outline the respective responsibilities of the two agencies, institute procedures for ensuring decisions consistent with national energy policy and explain how each agency would meet the objectives of the NEP and Executive Order 13211, on streamlining energy project permitting, (Actions to Expedite Energy-Related Projects, May 18, 2001), and Executive Order 13212 stressing the importance of

---

[15] API requests NOAA to rescind the requirement for individual certifications in those states that object to an agency's general permit consistency determination. But, and only in the alternative, API would otherwise recommend that the last sentence of this provision, if not rescinded, be changed to read as follows: "If the State's conditions are not incorporated into the general permit or a State agency objects to the general permit, then the federal agency shall notify potential issuers of the general permit that the general permit is not available in that State **unless the individual potential user who wants to use the general permit in those States provides the State agency with a consistency certification under subpart D of this part and the State agency concurs.**" API is proposing the highlighted change in order to ensure that an individual user will have the opportunity to function under a general permit even if "all potential users" do not also pursue that opportunity.

assessing impacts of government decisions on energy supplies (Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use, May 18, 2001).

IV. NOAA's Remarks Regarding the Widespread "Success" of Consistency Review of OCS Activities Deserve Clarification.

Finally, API questions NOAA's characterizations in its June 11th notice of the widespread success of the CZMA consistency process in the review of OCS activity. For example, NOAA asserts "that [offshore statistics] demonstrate that offshore oil and gas exploration and development not only continues to occur, but flourishes," 68 Fed. Reg. 34860 (bottom middle column); and that "States have reviewed and approved thousands of offshore oil and gas facilities and related onshore support facilities." 68 Fed. Reg. 34852 (left column). Elsewhere, NOAA also highlights the fact that because only one lease sale has been objected to since 1990, and that state objection was administratively rejected by NOAA, that "all lease sales offered by MMS since the 1990 amendments have proceeded under the CZMA Federal Consistency provision." 68 Fed. Reg. 34853 (lower right column).

These statements do not make clear that the scope of offshore activity since 1990 – and for the matter since the mid-1980s – has been severely curtailed. Indeed, the "offshore statistics" promoted by NOAA have been overwhelmingly generated by activities mainly occurring offshore Texas, Louisiana, Mississippi, and Alabama – four states with combined coastlines barely exceeding *seven per cent* of the length of the entire coastal shoreline of the continental United States.[16]

It cannot be accurately represented that the CZMA consistency review process for OCS activity serves the *national* interest unless and until that process is realistically employed and

---

[16] See The World Almanac and Book of Facts (Famighetti, 1996); http://www.infoplease.com/ipa/A0001801.html (excluding Hawaii).

tested against offshore activities proposed to be conducted off of the East and West coasts – where, indeed, quite heated consistency battles have occurred in the past. Certainly, there are no "flourishing" OCS operations along coastal North Carolina, Florida, California, or New England.