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

David M. Kaiser
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National Oceanic and Atmospheric Administration
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Sent via email to CZMAFC.ProposedRule@noaa.gov

Dear Secretary Evans and Mr. Kaiser:

The following represents the concerns and comments of the Delaware Coastal Management Program (DCMP) regarding the proposed rule published in the Federal Register on June 11, 2003 in which NOAA proposed changes to the existing Federal Consistency regulations. The proposed changes seek to address recommendations from the National Energy Policy Development Group's 2001 Energy Report, specifically relating to siting of energy facilities in the coastal zone and outer continental shelf (OCS).

Each year, the DCMP reviews hundreds of direct federal actions, federal assistance, and federal licenses and permits for consistency with the enforceable policies of our program. While OCS plans and related energy facility siting has not historically been an important component of our program due to lack of economically recoverable energy resources off the coast of Delaware, the proposed changes reach further than simple clarifications to the OCS process and may have significant impacts to Delaware's review of direct federal actions, federal assistance and federal licenses and permits. Specifically, changes to the definition of "federal activities," and changes to language regarding required information for a consistency determination may reduce Delaware's ability to review certain federal activities with coastal zone effects and to receive sufficient information on which to base consistency review. In addition, a number of the proposed changes may have the unanticipated result of discouraging early coordination between the State and Federal agencies and limiting opportunity for public input. Delaware has significant concerns that the proposed changes, if adopted as written, may lead to diminished State control of actions impacting coastal zone resources.

The proposed rulemaking has commenced without actively engaging the coastal zone management community and as a result, many questions remain about the implications of the proposed changes on State and Federal programs and therefore, the DCMP urges NOAA to not adopt the proposed rules at this time. Specific comments, concerns and remedies are as follows:

Rule Change 4 – Section 930.31(a) – Federal agency activity

The DCMP opposes this change and recommends that the current language stand. The proposed change seeks to clarify the definition of a federal action that would have reasonably foreseeable coastal effects; however the chosen language is confounding and may reduce the ability of a coastal management program to review federal activities. Further, it may reduce a coastal management program's ability to become involved early in the process and to ensure that coastal policies are adequately addressed prior to initiation of review.

Rule Change 5. Section 930.31(d) Federal agency activity – general permits

The DCMP objects to this change and requests that more information be provided regarding the significance for both the federal agency and/or CZM program. The proposed text states that "federal agencies shall, to the maximum extent practicable, incorporate state conditions into the general permit. If the State's conditions are not incorporated into the general permit or a State agency objects to the general permit, the Federal agency shall notify potential users of the general permit that the general permit is not available in that State unless the potential users in those States provide the State agency with a consistency certification under subpart D of this part and the State agency concurs." The proposed change indicates that a general permit could be valid without *fully* incorporating conditions recommended by the State. Although general permits greatly benefit both the involved State and federal agencies, the proposed language could result in a reduction of the States ability to guide management and use of its coastal resources. Further, it may result in States objecting to general permit programs and increasing workloads for all involved agencies. We suggest that in order to be valid, a general permit must *fully* comply with the conditions set forth by the State coastal management program.

Rule Change 6 – Section 930.35(d) – General negative determinations

"Repetitive activities" are not defined. Without strict definition, the proposed changes can be broadly interpreted and undermine a State's ability to fully assess cumulative impacts and provide opportunities for public input. Further, a Federal agency issuing a general negative determination should be required to reassess the determination at least every three years, or at an interval formally agreed upon by both parties.

Rule Change 7 – Section 930.41(a) – State agency response

Initial review by a coastal zone management (CZM) program should not be considered a simple "checklist". As set forth by section 930.39, the consistency determination shall include "a detailed description of the activity, its associated facilities and their coastal effects, and comprehensive data and information sufficient to support the Federal agency's consistency statement." Further section 930.39 states that the "amount of detail in the evaluation of the enforceable policies, activity description and supporting information shall be commensurate with the expected coastal effects of the activity. It follows then, that for a state CZM program to determine whether an application is complete, some level of substantive review must take place in order to determine whether the information provided addresses all relevant policies.

The proposed 14 day time period should be extended to at least 21 days in order to ensure that the State has adequate time to review consistency determinations, particularly large and/or complex proposals. This extension also will allow a CZM program to fully address missing information up front and may minimize the need to object to a determination at a later date based upon insufficient information.

Rule Change 8 – Section 930.51(a) – Federal license or permit

The current text clearly specifies types of authorizations, including permits, approvals, certifications and leases. This specific information is helpful to federal agencies and applicants to understand what a federal "authorization" could entail. Changing the text to define a federal license or permit as "any required authorization which any Federal agency is empowered to issue to an applicant that an applicant is required by law to obtain in order to conduct activities affecting any land or water use or natural resource of the coastal zone" does not necessarily clarify the intent of this section and could limit State input into certain federal permits and licenses. The current language is adequate and should not be changed in the Final Rule.

Rule Change 9 – Section 930.51(e) – Substantially different coastal effects

Determining whether a renewal or major amendment will have substantially different coastal effects requires the expertise and coordination of both the Federal and State agencies. The proposed language places a greater emphasis on the role of the Federal agency in determining substantially different coastal effects and could minimize effective coordination with the State. The current language that requires "deference" to the opinion of the State agency should be retained to clarify that while the decision is ultimately that of the Federal agency, the State role in the decision making process shall be significant.

Rule Change 10 –Section 930.58 Necessary data and information

The DCMP strongly objects to this proposed change as it will significantly undermine the States' ability to receive adequate information regarding the proposed projects effects and compliance with coastal zone policies early in the review process. Eliminating language that requires information submitted by an applicant to contain "comprehensive data and information sufficient to support the applicant's consistency certification" and instead requiring the applicant to provide "any other information relied upon by the applicant to make its certification" does not reduce ambiguity, as is NOAA's stated purpose of this change, but does increase the likelihood of consistency determinations containing inadequate information for State review, resulting in lengthy review delays and/or objections due to inadequate information. This section should be amended to read:

(ii) to the extent not included in paragraphs (a)(1) or (a)(1)(i) of this section, a detailed description of the proposed activity, its associated facilities, the coastal effects, and other ***information sufficient to support the applicant's consistency certification****. Maps, diagrams, and technical data shall be submitted when a written description along will not adequately describe the proposal.*

Rule Change 11 – Section 930.58(a)(2) – Necessary data and information (State permits)

As a networked program, Delaware's Coastal Management Program requires that applicants receive all required state and local permits that are part of the enforceable policies of the Program. Failure to receive one of these permits would force the State to object to the applicant's determination. NOAA should ensure that the Final Rule reflect that a State continues to have the ability to object to a consistency determination if the necessary permits are not obtained.

Rule Change 12 – Section 930.60 – Commencement of state agency review

The comments above regarding substantive review versus "checklist" review and information sufficient to support the applicant's consistency determination should be reflected in this section.

Rule Change 15 – Section 930.77(a) – Commencement of state agency review and public notice

Previous comments regarding substantive review and information also pertain to changes proposed in this section.

The DCMP strongly objects to the language in subsection (3) that limits the State's ability to request information after a three month time period. NOAA does not provide a detailed assessment of the likely effect of this change, nor case history describing why it is necessary. The three month time period reduces not only the State's ability to receive additional necessary information or clarifications, but also reduces the effectiveness of the public process. This change should not be included in the Final Rule.

Rule Change 20 – Section 930.127 – Briefs and supporting materials

The proposed timeline of 30 days after receipt of the Appellant's brief for a State to submit their brief and supporting documentation to the Secretary as set forth in subsection (a) should be extended to at least 60 days. Meeting the 30 day deadline would be extremely difficult for the State of Delaware (and presumably many other States) due to the process required for legal assistance and due to the workload of the State Attorney General's office. Extending the time period to 60 days would not result in undue delay of the appeal process and would ensure that the State has adequate time to prepare necessary materials.

The proposed language in subsection (e) for extensions of briefing schedules is overly restrictive. The DCMP would support amending the proposed language to provide that briefing schedules can be extended for "good cause or mutual agreement of the parties or, as needed, to accommodate requests for additional briefs, or information from the Secretary under subsection (c)(3)."

Rule Change 21 – Section 930.128 – Public notice, comment period and public hearing

The proposed regulation as set forth in subsection (c)(1) adds new language providing that the "Secretary shall accord greater weight to those Federal agencies whose comments are within

their areas of expertise." This language should be deleted, as it may result in restricting the Secretary from fully considering all comments and weighing the expertise of all commenter, whether a Federal agency, State agency or other subject matter expert. If this language is to stand, the revised regulations should also set forth that wherever comments or input of the State or public are sought, that their views be given "greater weight for matters that are within their area of expertise."

Rule Change 22 – Section 930.129 – Dismissal, remand, stay…

The DCMP firmly opposes the proposed rule change in subsection (d) that would limit the time period for reconsideration on remand to State to 20 days. Because this would occur only when "*significant* new information" becomes available and that this information is likely to be technical and complex in nature, the specified 20 day review period is unrealistic and unreasonable. It is in the interest of both the appellant and the State that sufficient time is provided to consider any new information and the current standard of three (3) months should be retained.

The DCMP contends that NOAA has not fully demonstrated the need for changes to the federal consistency regulations at this time, nor has the impact of these changes to both State and Federal agencies been fully analyzed and addressed. Further, the reach of proposed rule changes exceeds the intent of clearly defining information needs and deadlines for energy related activities. Therefore, DCMP urges NOAA to not adopt the proposed changes at this time and to actively coordinate with involved agencies in order to adopt rules more acceptable to all parties.

Sincerely

Sarah W. Cooksey, Administrator
Delaware Coastal Management Program

Cc: John A. Hughes, Secretary
Andrea Kreiner, Governor's Policy Advisor