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EXECUTIVE DEPARTMENT
MAINE STATE PLANNING OFFICE
38 STATE HOUSE STATION
AUGUSTA, ME 04333

JOHN ELIAS BALDACCI
GOVERNOR

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August 25, 2003

David M. Kaiser
Federal Consistency Coordinator
NOAA/Ocean and Coastal Resource Management
(N/ORM3)
1305 East-West Highway, 11th Floor
Silver Spring, Maryland 20910

by email CZMAFC.ProposedRule@noaa.gov/Original in mail

Re: June 11, 2003, Federal Register Notice, Proposed Rule, Coastal Zone Management Act, Federal Consistency Regulations, 15 CFR Part 930

Dear Mr. Kaiser:

The Maine State Planning Office ("SPO"), lead agency for the networked Maine Coastal Program, offers the following comments on behalf of the State of Maine ("State") on the above referenced proposed rule.

General comments

The State's general comments remain much the same as those stated in response to the Office of Ocean and Coastal Resource Management's ("OCRM") Advanced Notice of Proposed Rulemaking ("ANPR"). In summary, these comments are:

- A number of the proposed changes, considered individually and as a package, could be interpreted as further constricting and undermining states' ability to identify, manage, and protect their coastal resources;
- There has been too little experience with the consistency regulations, which OCRM comprehensively revised in 2000, to support an initiative to make changes in them now that in part upset the balance among federal, state, and private interests;
- This initiative continues to appear to rest in part on the flawed premise, unsupported by over 20 years of experience under the CZMA, that states' ability to apply federally reviewed and approved state laws to OCS and other projects and to exercise an independent, decision-making role under the CZMA is somehow problematic and not compatible with the national interest in energy policy or other matters; and
- There is no manifest need for many of the proposed rule changes, a number of which seem to have implications beyond review of OCS activities, which the ANPR suggested is the primary focus of this rulemaking.



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OCRM's responses to comments on the ANPR in part heighten rather than diminish these concerns. OCRM has clarified that, with the exception of the oil and gas industry and two federal agencies, every commenter "urged NOAA to take no action because the recent 2000 rulemaking was comprehensive and further rulemaking is unwarranted as no problems have emerged with the existing regulations."¹ These commenters included coastal states, which are responsible for implementing OCRM's consistency rules as applied to OCS development and other matters. Pointing primarily to a statement in the Administration's Energy Policy, neither OCRM's ANPR nor its response to comments presented information that substantiated or detailed problems that needed correction. Under these circumstances, OCRM's decision to proceed with this rulemaking is itself a concern.²

In a number of places, OCRM proposes to change language or terminology while suggesting that no substantive change is intended.³ We suggest that in general this approach may invite subsequent confusion and disputes over interpretation of language and intent.

Maine has had no experience with OCS development in recent years. It is our understanding that coastal states with such experience and the Coastal States Organization intend to submit detailed comments reflecting concerns about proposed changes to OCS-related provisions in consistency rules. We urge that OCRM give the state concerns they express careful consideration. The State recognizes that OCS development has the potential to adversely affect its coastal uses and resources. Consequently, the State objects to any changes in the consistency rules that would limit its ability to effectively and efficiently review offshore energy development or other OCS activities as appropriate.

In the following section, we'd like to highlight several specific concerns with the proposed changes.

Proposed change 6; general negative determination: The need for this change and the operative term "repetitive activities" are not clear. While we recognize the utility of the negative determination process, it does foreclose state consistency review. Consequently, if this provision is adopted, we suggest that a federal agency be required to review the basis for and renew its general negative determination at a reasonable interval (e.g., three years) to take into account changing conditions and new information.

Proposed change 7; state agency response: This proposed change is in part an example of how the proposed changes may erode coastal states' role in the consistency review process. In effect, this change appears to allow a federal agency to require a state to start the 60-day consistency review clock when the agency has submitted information that is "substantively deficient." OCRM justifies this proposal by suggesting that a state's review under 15 CFR section 930.39(a) is "not a substantive review" but a 'checklist' review."⁴ OCRM's explanation seems to suggest

¹ 68 FR 34851, 34860.

² It is interesting to note that in response to the specific example of concern raised by industry and discussed in the Proposed Rule notice OCRM clarified that "the State's use of consistency to ensure that the ice-platform met State enforceable policies is in fact how a State is authorized by Congress to use Federal Consistency." 68 FR 34851, 34860.

³ See, e.g., Proposed Rule Changes 4 and 8.

⁴ 68 FR 34851, 34856.

that if, for example, a federal agency sends in a one-paragraph narrative on the anticipated wetlands impacts of its proposal, as opposed to an alternatives analysis based on field data required under applicable state wetlands laws and rules duly adopted as enforceable policies, a state must treat the proposal as complete for processing. Such an approach may create a disincentive for federal agencies to consult effectively with coastal states and to provide information adequate and necessary for consistency review.

A “checklist” approach seems internally inconsistent with the 15 CFR section 930.39(a), which requires a federal agency to submit “comprehensive data and information sufficient to support the Federal agency’s consistency statement.” Since 15 CFR section 930.39(a) requires that a federal agency’s consistency statement be “based upon an evaluation of the relevant enforceable policies”, it follows that the federal agency must submit information that in fact shows relevant enforceable policies are met. In Maine, where the standards of state environmental licensing and permitting laws and rules serve as enforceable policies, the “comprehensive data and information” sufficient to demonstrate consistency is that required in relevant license and permit applications. It has been our experience that this information is most efficiently submitted and reviewed using or with reference to such applications. Consultation with the state before making its consistency filing is an efficient way for a federal agency to identify necessary information, which may of course vary in detail with the nature of the project proposed and project-specific concerns. We believe this approach has worked well for Maine and its federal partners, and see no need to undermine it.

In Maine, the proposed “checklist” approach would be significantly different from that applicable to a private party proposing a comparable project. In that case, the review clock does not start until all necessary information has been submitted. We suggest that the consistency rules ensure that federal agencies bear the same responsibility to submit information that the state deems necessary for review.

We do support replacement of the term “immediately” with a specific time for a state to inform a federal agency that its consistency determination contains insufficient information. We suggest that it may be more reasonable to allow states 30 days to make this decision, which as stated above, must involve some degree of substantive review to ensure that the requirement is meaningful and promotes early consultation and coordination.

Proposed Rule Change 8; definition of “federal license or permit”. It’s not clear why OCRM feels this change is needed. On its face, the main substantive change in this section appears to be elimination of a specific reference to a “lease” as a pertinent authorization. We are not clear why and how this change relates to the energy policy related concerns that OCRM has clarified underlie this rulemaking as a whole, or how this change may be seen as affecting state review of projects other than OCS activities.

Proposed Rule Change 9; substantially different coastal effects. This is another example of how the proposed rule changes may erode coastal states’ role in the consistency review process. We suggest that this provision’s current language, which accords “deference” to a coastal state’s views is more in keeping with its primary responsibility for management of its coastal resources, and is thus more appropriate than the proposal, which would transfer this decision to the federal

agency. OCRM has offered no compelling reason to justify shifting this authority away from the states.

Proposed Rule Change 10; necessary data and information. Our concerns regarding this section are comparable to those discussed regarding Proposed Rule Change 7. Again, this change seems to create a disincentive for an applicant to provide information that in fact shows its proposal meets applicable enforceable policies. OCRM's proposed deletion of the phrase "comprehensive data and information to support the applicant's consistency determination" is a concern which is exacerbated by proposed substitution of "any other information relied upon by the applicant to make its certification" for the excised language. This change appears to inappropriately limit an applicant's obligation to providing information that it has submitted for federal regulatory approval. As discussed above, we are aware of no compelling reason consistent with the nature and purpose of coastal states' role under the CZMA for anything other than pertinent enforceable policies to determine what information is necessary for consistency review.

Proposed Rule Change 11; state permits. In Maine, issuance of pertinent state licenses and permits constitutes state consistency concurrence or objection in the case of federally licensed or permitted activities. We are opposed to this change to the extent that it would undermine our ability to make efficient and effective use of this approach.

Proposed Rule Change 12; commencement of state agency review. By adding new language that OCRM explains as clarifying that the state's review of information submitted by an applicant for federal consistency review is a "checklist" as opposed to "substantive" review⁵, the proposed rule may hamper a coastal state's ability to review a proposal effectively and efficiently. First, the new language seems to limit an applicant's burden to trigger the consistency review clock to submission of "missing information" somehow divorced of any assessment of its adequacy. By contrast, the current language provides that the information submitted must in fact cure information deficiencies. Does this change mean, for example, that if the state says an assessment of effects on wildlife habitat is necessary, the applicant may satisfy this submission requirement so long as it submits virtually anything that's appropriately titled and packaged? To the extent that the answer is yes, it is difficult to understand how such a change will promote efficient and sound decision-making. Second, the clarification that the applicant's written agreement is needed to stop the review clock to ensure that the state has necessary information later on when, to use the proposed rule's distinction, the "substantive" review is underway compounds the problem. Overall, this change seems to have the potential to invite brinksmanship and force states to object to projects simply as means of ensuring that they have information necessary for review. NOAA's suggestion⁶ that states can address concerns resulting from the proposed change by amending their programs to specify information submission requirements seems to shift a new burden to the states and to invite disputes over whether necessarily broad-brush language on submission requirements covers information requirements in a specific instance.

Proposed Rule Change 15 seems to raise questions and concerns comparable to those of Proposed Rule Change 12.

⁵ *Id.* at 34857.

⁶ *Id.*

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In summary, we recognize and respect the role OCRM must play in addressing both state and national concerns in its efforts to ensure a balanced and equitable framework for decision-making pursuant to the CZMA's consistency provision. In this instance, we think that OCRM's proposed rule in places unduly tips the balance to the disadvantage of coastal states and the resources they manage. We urge OCRM to heed the concerns of coastal states and correct this imbalance.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kathleen Leyden', with a long horizontal flourish extending to the right.

Kathleen Leyden
Director, Maine Coastal Program