August 22, 2003

David Kaiser
Federal Consistency Coordinator
NOAA Office of Ocean and Coastal Resource Management
1305 East-West Highway
Silver Spring, Maryland 20910

REFERENCE: Proposed Changes to Coastal Zone Management Act
Federal Consistency Regulations

Dear Mr. Kaiser:

The State of North Carolina has conducted a review of the proposed revisions to the Coastal Zone Management Act (CZMA) Federal Consistency regulations found in the Code of Federal Regulations (CFR) Title 15 Commerce and Foreign Trade – Chapter IX National Oceanic and Atmospheric Administration (NOAA) Part 930 Federal Consistency with Approved Coastal Management Program. Based on that review, we believe that the proposed revisions have the potential to significantly weaken the authority granted to states under CZMA-Federal Consistency Regulations. The following comments are submitted in response to the proposed rule changes:

Proposed Rule Change 1: § 930.1 Overall objectives.

The proposed revision would clarify the term "federal action" to include all types of activities subject to the federal consistency requirement under subparts C, D, E, F and I of Part 930. The State has no objections to this revision.

Proposed Rule Change 2: § 930.10 Failure substantially to comply with an OCS Plan.

The proposed revision would correct an inaccurate reference to § 930.86(d), and would reflect that § 930.85(d) has been replaced by § 930.85(c). The State has no objections to the revision of the index; however, comments on the proposed replacement language contained in § 930.85(c) will be addressed under Proposed Rule Change 17 below.

Proposed Rule Change 3: § 930.11(g) Definitions – Effect of any coastal use or resource (coastal effects).

The proposed revision replaces the term "federal action" with "Federal agency activity or federal license or permit activity." We believe that the language proposed here is unusually complicated to accomplish the task at hand and therefore oppose it. We suggest that because OCRM proposes

to move the definition of "federal action" to § 930.1(b), the use in § 930.11(g) of the previously defined term "federal action" would be sufficient. As drafted, the language is confusing because it appears to use two distinct phrases, i.e. "federal action" and "federal agency activity or federal license or permit activity") to refer to the same thing.

Proposed Rule Change 4: § 930.31(a) Federal agency activity.

The proposed revision ostensibly clarifies and expounds on the term "Federal agency activities" but OCRM states that it does not substantially change the meaning and intent of the rule. The State does not understand the reason for the rule change. OCRM indicates that its intent is to eliminate from review mere agency deliberations and planning documents that explore possible projects. If these types of actions truly have no effect on the coastal zone, they are excluded by the "effects" limitation. If such actions do affect the coastal zone (and the State does not here allege categorically that such actions do or do not affect the coastal zone) then the activities should be subject to review. Therefore, the definition of "federal agency activity" should be as broad as possible.

The Act itself leaves no room for OCRM to limit the scope of § 307(c)(1)(A) in this manner. The Act indicates that "[e]ach federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone" shall be subject to consistency. CZMA § 307(c)(1)(A). Clearly, the primary limitation on consistency is not the nature of the federal action, but the effects thereof. Had Congress intended to limit consistency to a subset of federal activities, it would have qualified the term "federal agency activity" with more than the open-ended word "each." The State opposes this change as unnecessary and contrary to the intent of Congress and the express language of the Act.

Proposed Rule Change 5: § 930.31(d) Federal agency activity – General Permits.

The current rules allow a federal agency to propose a general permit program under either CZMA § 307(c)(1) (federal agency activity), or CZMA § 307(c)(3)(a) (federal license or permit activity).

The proposed revision would remove the option of proposing a general permit under CZMA § 307(c)(3)(a) (federal license or permit activity). All proposals for general permit programs by a federal agency would fall under § 307(c)(1) (federal agency activity), and would be subject to the consistency requirements for federal agency activities found in Subpart C. A proposed general permit program could not be considered a federal license or permit activity, and would not be subject to the consistency requirements for federal license or permit activities found in Subpart D.

There are at least two significant differences between Subpart C (Consistency for Federal Agency Activities) and Subpart D (Consistency for Activities Requiring a Federal License or Permit). Federal agency activities are only required to be "consistent to the maximum extent practicable" with a state's Coastal Management Plan (CMP), and are subject to a sixty-day consistency review period. Activities requiring a federal license or permit are required to be fully consistent with a state's CMP and are subject to a six-month consistency review period.

The current regulations allow the federal agency to use either of these subparts for issuance of a general permit, therefore the proposed revision does not appear to significantly alter the general permit process. Since the consistency requirements for a federal agency activity are less demanding and have a shorter review period than those for an activity requiring a federal license or permit, it is unlikely that a federal agency would want a proposed general permit program to be reviewed under CZMA § 307(c)(3)(a) (Federal license or permit activity).

The State supports the proposal regarding the treatment of state agency objections to general federal permits and failures by the federal agency to incorporate into the general federal permit recommended state conditions, i.e. that such conditions convert the general federal permit from a federal action to a federal licensing or permitting action. We suggest that the phrase "[i]f the State's conditions are not incorporated into the general permit" should be clarified. If the language used by the federal agency to incorporate the state-proposed condition varies in any way from the state-proposed condition or if other conditions of the federal permit conflict with or override the state-proposed condition, this should cause the general federal permit to be a federal licensing or permitting action and not a federal agency action. With such clarification, we do not oppose the proposal.

Proposed Rule Change 6: § 930.35(d) General Negative Determination.

This revision would change § 930.35(d) to § 930.35(e) and would insert additional guidance and requirements for seeking a general negative determination for cases where a federal agency performs repetitive activities that the federal agency has determined will not have reasonably foreseeable coastal effects. This rule allows the federal agency to avoid having to issue separate negative determinations each time that particular repetitive activity occurs. The proposed rule would also allow a federal agency to periodically review the applicability of a general negative determination.

The State does not oppose the concept of a general negative determination, and we generally support the proposed rule text. We agree with the suggestions made by the Coastal States Organization. In particular, we support the concept of a mandatory periodic review of the general negative determination, but suggest that prior to undertaking each review the federal agency should be permitted to request an affirmative waiver of the review from each affected state. This should relieve the federal agency from unnecessary paperwork where there is no disagreement regarding the effects of the activity.

Proposed Rule Change 7: § 930.41(a) State agency response.

The State is particularly concerned with the proposed revisions to § 930.41 (State agency response). One of the revisions would allow states only 14 days from receipt to determine if the supporting information submitted as part of a federal agency's consistency determination fully satisfies the requirements of § 930.39(a) (Content of a consistency determination). After that time period expires, states would no longer be able to "stop the clock" on the sixty-day review period provided for a state to concur or disagree with a federal agency's consistency determination. Due to the complex nature of many federal projects and the potential for those projects to have significant effects on coastal resources and uses, a thorough review of the supporting information

submitted in accordance with § 930.39(a) may require more than 14 days to complete. Too short a fuse could force the state to make broader requests for information, whereas providing sufficient time to review the submitted information allows the parties to discuss the information and the state to narrow its focus. The proposed revisions would also prohibit states from requesting additional supporting information once the fourteen day period has expired and force states to render a consistency determination within the allotted sixty-day time period, when in some cases, additional data is needed to make an informed decision. The State does not support this revision, and proposes a minimum 30-day review period for determining if the submittal satisfies the requirements of §930.39(a).

Proposed Rule Change 8: § 930.51(a) Federal license or permit.

The revisions would clarify the meaning of "federal license or permit" to include "any required authorization that 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." The revisions do not appear to significantly alter the original intent of the rule. The State does not object to the proposed rule changes.

Proposed Rule Change 9: § 930.51(e) Substantially different coastal effects.

This section stipulates that major amendments to a federal license or permit be included in the definition of "federal license or permit" and therefore require a consistency determination. The definition of "major amendment" includes any activity that would "affect any coastal use or resource in a way that is substantially different than the description or understanding of effects at the time of the original activity."

The current rule provides that "the determination of substantially different coastal effects under paragraphs (b)(3) and (c) of this section is made on a case-by-case basis by the state agency, federal agency and applicant. The opinion of the state agency shall be accorded deference…." The proposed rule would only require the federal agency to "give considerable weight" to the opinion of the state agency.

OCRM explains that the intent of the original rule was not to give the state agency the final say on the determination of "substantially different coastal effects." The State submits that neither the letter nor the intent of the original rule has been violated and therefore sees no reason to amend the rule. In fact, the current rule promotes beneficial cooperation among states, the federal government and the applicant. The State strongly objects to this rule change.

Proposed Rule Change 10: § 930.58(a)(1) Necessary data and information.

The current rule requires an applicant for a federal license or permit to provide the state agency with "necessary data and information" along with the consistency certification. Included in the definition of necessary data and information under § 930.58(a)(1) is "comprehensive data and information sufficient to support the applicant's consistency certification." The proposed rule change would replace this language with "any other information relied upon by the applicant to make its certification."

The State is concerned that the information "relied upon by the applicant to make its consistency certification" may not provide sufficient data and information necessary for the state's evaluation of the certification. Simply because an applicant relied on information, documents, studies, and the like does not by itself guarantee the relevance of that information, etc. to the determination. Certain language in the current rule does far more to ensure the relevance of such information than the proposed rule and therefore that text should be retained. The State strongly objects to this rule change and supports the language suggested by the Coastal States Organization, which retains said text from the current rule, but also adopts much of the proposed rule.

Proposed Rule Change 11: § 930.58(a)(2) Necessary data and information (State permits).

The current rule requires an applicant's consistency certification to include necessary data and information and states: "Necessary data and information may include state or local permits or permit applications which are required for the proposed activity." The proposed revision would not include the actual state or local permit, just the permit application. The intent is to allow the consistency certification review process to move forward if the state or local permit required for the activity has been applied for, regardless of whether any required permit has actually been issued. Under the proposed revision, the state agency could concur with a consistency certification while a state or local permit required for the proposed activity was under review. This could significantly complicate the process if the consistency certification and the state or local permitting process could not be fully coordinated. It makes more sense to allow all permitting agencies and the state consistency program to speak with one voice to the extent possible. We believe that presenting the applicant with artificially fractured permitting and consistency decisions is a far worse "conundrum" than that which prompted this proposal. See 68 Fed. Reg. at 34,857/1. Therefore, the state should be allowed to require the applicant to submit all permits and permit applications.

In addition, the proposed rule could be interpreted to indicate that the "necessary data and information" *cannot* include permits even if the permit already has been issued. This interpretation would be unjustifiably restrictive and should not be implied. The State does not support this rule change.

Proposed Rule Change 12: § 930.60 Commencement of State agency review.

The current rule stipulates that the state agency's review period commences upon receipt of the applicant's consistency certification and the information and data required by § 930.58. The proposed revision would replace "information and data" with "necessary data and information" as defined in the proposed change to § 930.58(a)(1). Beyond that, the proposal is not clear. If it were intended that subsections (a)(1)(i) and (ii) be read as mutually exclusive options, then the process is as follows: If a state receives neither the certification nor the skeletal "checklist" of information, the review process does not begin, but if the state receives both of these items, then the review clock begins. Under this reading, the state can request further information, but this does not stop the clock. In this context, the term "information" in subsection (i) must be read as something different than "necessary information and data" in subsection (ii). After all, subsection (i) specifically says that the clock does not start if the state does not receive the "certification *or*

information ...." However, this interpretation is incongruous with subsection (ii) which appears to use the term "information" as a short form for "necessary information and data." Further, subsection (2) specifically contemplates that the clock will not start if the state has not received the "necessary data *and* information."

The only harmonious reading of this rule is that subsection (ii) is completely optional. That is, if the state has received the certification but not all of the necessary data and information, the state may elect to start the clock anyway and await the information. We believe that having this option removes certainty from the process and would be exercised extraordinarily infrequently if at all. The passage should be redrafted to indicate plainly that the clock does not start until the state receives all necessary data and information required pursuant to § 930.58. We support the language proposed by the State of New Jersey.

Moreover, and more importantly, the State strongly objects to the triggering of the review clock based upon a so-called "checklist" review. There is the potential for a large disparity between the information relied upon by the applicant, or even that the applicant deemed sufficient, to make its consistency certification and the comprehensive data and information necessary for state review of certification. The proposed rule change would, in situations in which the applicant failed to submit sufficient information, force the state to begin and possibly finalize its review without a complete record. That is an unproductive and extraordinary administrative posture that is inconsistent with existing regulations and therefore arbitrary. During an override proceeding, the Secretary must determine whether the project is "consistent" with the Act (or otherwise necessary for national security). In that context, the rules allow the Secretary "to stay the processing of an appeal on her own initiative ... to allow additional information to be developed relevant to the analysis required of the Secretary ...." 15 C.F.R. § 930.129(c). No reason has been advanced why a state should not be afforded the same administrative rights when making its consistency determination. Because Secretarial review is not an appeal in the traditional sense, and is an override on different grounds, both the state and the Secretary should be permitted the tools necessary to make their determinations based on complete records. The State strongly objects to this rule change.

Proposed Rule Change 13: § 930.63(d) State agency objection to a consistency certification.

The proposed rule change would reflect that § 930.121(d) had been changed to § 930.121(c). The State has no objections to the revision; however, comments on the proposed replacement language for § 930.121(c) will be addressed under Proposed Rule Change 18 below.

Proposed Rule Change 14: § 930.76 (a) and (b) Submission of an OCS plan to the Secretary of the Interior or designee.

The proposed rule would again reference the definition of necessary data and information contained in the proposed revision to § 930.58(a)(1) (Necessary data and information). As noted in our comments to Proposed Rule Changes 10 and 12, the information relied upon by the applicant to make its consistency certification may not provide the comprehensive data and information necessary for the state to review the certification. The State objects to this proposed rule change.

Proposed Rule Change 15: § 930.77 (a) Commencement of State agency review and public notice.

The proposed rule would again reference the definition of "necessary data and information" contained in the proposed revision to § 930.58(a)(1) and, would prohibit the state agency from suspending the six-month review period (unless agreed to by the applicant, in writing) while waiting to receive additional information or clarification as is allowed under the current rule when the state agency determines that "comprehensive data and information sufficient to support the consistency certification" has not been provided. As noted in our comments on Proposed Rule Changes 10, 12 and 14, the proposed rule would restrict the state agency's authority to require additional data and information. It also suffers from the same defect noted above of potentially unfairly increasing the likelihood that the state would be forced to render a decision on an inadequate record.

The proposed rule also would prohibit a state agency from requesting additional information after three months following the commencement of the review period. The proposed rule provides no justification for this restriction. We note that the rules place no limits on the time the applicant has to respond to any request. Therefore, an applicant could derail the cooperative information gathering process by simply delaying its response to a legitimate request until after the three-month deadline had passed, and thus thwarting any fair follow up requests. This significant restriction of the review process is not warranted and hardly balanced.

Finally, the proposal quixotically seems to prohibit a state from requesting further information in OCS cases unless the state first amends its Coastal Management Program (CMP). If this intended to create an absolute bar to requesting information that is not presently specifically described in the state's CMP, the rule is woefully out of touch with the complexities of OCS projects and the peculiarities presented by each application. It is utterly impossible for a state to describe specifically all the information that may be needed for any given consistency determination of this nature. Further, if any new areas of concern are developed in the context of an OCS consistency determination, the state reviewing the determination in which that concern first arose would be barred from seeking information regarding it because it could not have foreseen the new concern and could not have included it in its CMP. This retards instead of encourages genuine and good faith review of unique and new circumstances. The State strongly objects to this proposed rule change.

Proposed Rule Change 16: § 930.82 Amended OCS plans.

The current rule requires that if an OCS plan is objected to, or the Secretary of the Interior determines that the OCS plan is not consistent with the CZMA and is not necessary in the interest of national security, but the applicant still intends to conduct the activities described in the OCS plan, then the applicant must submit an amended plan to both the Secretary of the Interior and the state agency.

The proposed rule would require the applicant to submit the amended plan to the Secretary of the Interior only. Upon a determination by the Secretary that the amended plan meets the requirements of the Outer Continental Shelf Lease Act (OCSLA) and Subpart E (Consistency for

Outer Continental Shelf (OCS) Exploration, Development and Production Activities), the Secretary would furnish the state agency with a copy of the amended OCS plan. The amended OCS Plan and consistency certification would then be reviewed by the state agency (with a three-month review period) as provided for by § 930.83 (Review of amended OCS plans; public notice).

The proposed revision does not appear to substantially change the process for review of amended OCS plans and the State does not object.

Proposed Rule Change 17: § 930.85(c) Failure to comply substantially with an approved OCS plan.

The current rule states that when a state agency claims that a person or entity is failing to comply with an approved OCS plan and that failure involves activities affecting any coastal use or resource not consistent with the approved management program, the state agency must file a claim with the Minerals Management Service (MMS) describing the specific activity involved, the alleged lack of compliance and a request for remedial action. The rule further specifies that a copy of the claim shall be sent to the responsible person and to the Director of the Office of Ocean and Coastal Resource Management (OCRM). The Director determines if the person or entity has failed substantially to comply with an approved OCS plan.

The proposed revision would remove the Director of OCRM from the process. The responsibility for determining if the person or entity has failed substantially to comply with an approved OCS plan would be transferred to the Minerals Management Service. The stated rationale for this change is that MMS already determines if a change to an OCS plan is significant and/or requires CZMA Federal Consistency review, so MMS should also be responsible for determining if the person or entity has failed to comply substantially with the approved OCS plan.

The State suggests that the proposed rule does not properly recognize the purposes of the Act. Two concepts are involved here: Compliance with the OCS plan, and consistency with the state's CMP. The more important purpose of the OCS consistency process is to ensure that OCS activities are consistent with the CMP. OCRM and the states have greater experience and expertise in making such a determinations. Therefore, MMS, the state and OCRM should work together to determine if the licensee has failed to comply with the OCS plan, and if so whether the noncompliance warrants further action to achieve consistency with the state's CMP. The primary inquiry should be the latter, not the former. Therefore, the State does not support this rule change.

Proposed Rule Change 18: § 930.121(c) Consistent with the objectives or purposes of the Act.

The current rules allow the Secretary of Commerce (Secretary), when determining whether there is a reasonable alternative to a proposed activity that the state believes to be inconsistent with the enforceable policies of its Coastal Management Program, to consider among other things, reasonable and available alternatives described in the state’s objection letter and other information described during the appeal. Other information includes, but is not limited to, alternatives proposed by the appellant or a third party.

The proposed revisions would change the word "described" to "submitted," meaning that any alternatives the state, the appellant or a third party propose to the Secretary must include a statement by the state in a brief or other supporting material, that the proposed alternative is consistent with the enforceable policies of the CMP. Additional language would prohibit the Secretary from considering any proposed alternative unless accompanied by a state consistency statement.

The proposed rule change clarifies the existing rule with regard to how a proposed alternative to an activity deemed inconsistent with a CMP must be submitted to the Secretary for consideration. The premise for the change is that the Secretary of Commerce is responsible for determining if an alternative is consistent with the CZMA or is otherwise necessary in the interest of national interest, not whether the alternative is consistent with a state's CMP. Before considering whether an alternative is preferable to the proposed activity, the Secretary must know if the alternative is consistent with the state's CMP. The State does not object to this change.

Proposed Rule Change 19: § 930.125 Notice of appeal and application fee to the Secretary.

The current rule requires appellants to file a notice of appeal to the Secretary within 30 days of receipt of a state agency objection. The rule does not provide any requirements concerning the content of the notice of appeal.

The proposed change would require the appellant to provide a statement that briefly explains the appellant's argument for each ground for appeal of the state agency's objection. Any ground for appeal or other issue concerning the state agency's objection not identified in the notice of appeal shall not be considered by the Secretary.

This change is meant to ensure that all information used by the Secretary to reach a decision is submitted in a timely manner so that the Secretary can close the record of decision and/or render a decision within the 270-day period specified in the proposed changes to § 930.130 (see Proposed Rule Change 23). The State does not object to the proposed change.

Proposed Rule Change 20: § 930.127 Briefs and supporting materials.

The current rule requires the Secretary to establish a schedule for submittal of briefs and supporting materials by the appellant and the state agency, but no specific time limitations are stipulated. The proposed changes would require the appellant to submit a brief and supporting information within thirty days of filing the notice of appeal. The state agency would be required to file a brief and supporting information within thirty days of receipt of the appellant's brief.

The change is meant to ensure that all information used by the Secretary to reach a decision is submitted in a timely manner so that the Secretary can close the decision record and/or render a decision within the 270-day period specified in the proposed changes to § 930.130 which will be addressed under Proposed Rule Change 23. The State is concerned that in complex appeal cases, the thirty-day time period may not be sufficient for preparation and submittal of briefs and supporting information.

There are several other significant changes (additional language) to this rule that address the appeal process. For ease of review, they are addressed separately below.

1. The appellant and the state agency must submit four copies of their briefs and supporting materials to the General Counsel for Ocean Services (one in electronic format for posting on the web), and must serve (by certified mail or hand delivery) at least one copy of their respective briefs and supporting materials to the Secretary and to each other. Briefs and/or materials not submitted within the stipulated time period may be disregarded and not entered into the Secretary's decision record of the appeal.

2. The Secretary has broad authority to implement procedures governing the appeal process, and the Secretary determines the content of the decision record. The Secretary may require the appellant or the State agency to submit additional briefs, and may request additional information determined to be necessary by the Secretary, including documents prepared by federal agencies pursuant to the National Environmental Policy Act (NEPA) or the Endangered Species Act (ESA).

3. The appellant and the state agency are not allowed to submit additional briefs or materials not requested by the Secretary. Any unrequested briefs or materials submitted to the Secretary may be disregarded and not entered into the Secretary's decision record of the appeal.

4. The appellant bears the burden of submitting evidence in support of its appeal and the burden of persuasion. The State agency bears the burden of submitting evidence to support any alternative proposed by the state agency during the appeal.

5. The Secretary may extend the time period for submittal of briefs and supporting materials only in the event of exigent or unforeseen circumstances. The current rule allows the Secretary to extend the time period at his own initiative or the request of a "party" (appellant, state agency, federal agency, etc.) provided the request was made prior to the date prescribed in the briefing schedule.

These changes are intended to impose strict limitations on the time frames for submittal of briefs, documents and information related to the appeal. Failure to meet the deadlines can result in the brief or other information being excluded from the decision record. Furthermore, the right of a state agency to request an extension to the time period would be taken away.

The State generally supports these changes, but we have particular concerns. First, we suggest that allowing the appellant 30 days to file the notice of appeal, and an additional 30 days to file its brief, whereas the state is permitted only 30 days in which to respond is unfair to the state. We recommend that the state be given 60 days, which equals the total time afforded the appellant. Second, we ask that subsection (b)(1) of the final rule clarify whether supporting materials must be submitted in electronic format or whether just the briefs must be so submitted. Third, we suggest that the Secretary's authority to determine the scope of the record is not unbridled and is limited by settled principles of administrative and procedural law. Subsection (c)(1) should state that, at a minimum, the record shall be comprised of all properly filed and served briefs and supporting

materials and all timely submitted public and agency comments. Fourth, as the rule allows for the Secretary to order additional briefs, subsection (e) should clarify that the Secretary may establish the filing periods for such briefs beyond the limits specified in subsection (a).

Proposed Rule Change 21: § 930.128 Public notice, comment period, and public hearing.

The current rule allows the Secretary to extend the time for submitting comments on his own initiative or at the written request of a party or interested federal agency provided the extension request is received prior to the date prescribed in the briefing schedule. All interested or affected parties (federal agencies, state agencies, appellants, etc) would be allowed to submit comments before the closure of the decision record.

The proposed change would allow the Secretary, on his own initiative or upon written request, for good cause shown, to reopen the period for federal agency comments. Other parties (appellant, state agency, etc.) would not be allowed to submit comments during this period.

It is the State's position that all interested or affected parties, not just federal agencies, should be able to submit comments if the Secretary reopens the period for comments. The change appears to accommodate the time extension request of a federal agency while excluding other parties from submitting comments.

Furthermore, the proposal elevates the status of certain federal agencies "whose comments are within the areas of their expertise." There is no reason here not to recognize that certain considerations upon appeal may be within the state's area of expertise. The obvious example is the availability of alternatives that are consistent with the state's CMP. The state also is likely to have expertise regarding the proposed activity's separate and cumulative coastal impacts. It is far from certain that the federal agency will always have knowledge and insight superior to that of the state.

Except for these two aspects of this proposal, the State supports this change.

Proposed Rule Change 22: § 930.129 Dismissal, remand, stay, and procedural override.

The current rule allows the Secretary to stay the processing of an appeal at his own initiative or upon the request of an appellant or state agency: to allow additional information to be developed; to allow mediation or settlement negotiations; or to remand the appeal back to the state agency for reconsideration (with a maximum three-month time period) of its consistency position.

The proposed revision and the proposed revision to § 930.130 would require both the appellant and the state agency to mutually agree (in writing) to a stay in the processing of the appeal. This is a significant change in that the state agency would no longer be allowed to request a stay unless the appellant agrees to the request.

Another proposed change to § 930.129 is to reduce the time period for state agency review of an appeal that the Secretary has remanded back to the state for re-consideration from up to three months (as determined by the Secretary) to no more than 20 days. This remand only occurs by definition when significant, relevant new information is presented. It is unreasonable to require the

state to review and analyze such weighty new information in only 20 days (and possibly fewer). This review period should be *at least* 60 days, and the parties should be permitted to extend the period by agreement. The State does not support these changes.

Proposed Rule Change 23: § 930.130 Closure of decision record and issuance of decision.

The current rule requires the Secretary to publish a notice in the Federal Register no sooner than thirty days after closure of the decision record. There is no time period set for closure of the decision record.

The proposed change would require the public notice to be published immediately after closure of the decision record, and further specifies that the decision record be closed no later than 270 days after the initial notice of appeal was published in the Federal Register. The Secretary would be allowed to stay the closure of the decision record if mutually agreed to (in writing) by the appellant and the state agency or if needed to receive the final environmental analyses required under NEPA or biological opinions issued pursuant to ESA.

The State respects the need for certainty in the override process and believes that these proposals reasonably accommodate the needs of the parties. The State does not oppose these changes.

In summary, the State of North Carolina appreciates the opportunity to comment on the proposed changes to Title 15 CFR § 930 (Coastal Zone Management Act - Federal Consistency Regulations). The State recognizes that revisions may be necessary in order to provide a more efficient, predictable consistency process, and is supportive of these changes provided they do not undermine the ability of the State to adequately manage and protect its coastal resources. As noted in our comments, several of the proposed changes could severely restrict the authority of the State to request additional necessary information. Other changes could restrict the ability of the State to request (and be granted) time extensions during the consistency review and/or appeal process. The State requests that NOAA consider re-drafting, or eliminating, the proposed rule changes to address these concerns. If you have any questions, or wish to discuss these comments further, please contact me, or Guy Pearce at (919) 733-2293 ext 249 or email to guy.pearce@ncmail.net.

Sincerely,

Donna D. Moffitt

cc: Bill Ross - Secretary NC DENR
Robin Smith – Assistant Secretary NC DENR
Tony MacDonald – Coastal States Organization