

Operations Division  
Navigation and Operations Branch

Mr. David Kaiser  
Federal Consistency Coordinator  
Coastal Programs Division  
Office of Ocean and Coastal Resource Management, NOAA  
1305 East-West Highway 11<sup>th</sup> Floor  
Silver Spring, Maryland 20910

Dear Mr. Kaiser:

The U.S. Army Corps of Engineers, Operations Division has completed review of proposed clarification regulations implementing 1990 and 1996 amendments to the 1972 Coastal Zone Management Act (CZMA). The proposed rules are intended to amend the December 2000 final rules and provide greater transparency and predictability to the federal consistency process. The proposed rules are at Federal Register Volume 68, Number 112, of June 11, 2003, pages 34851-34874. Our comments will address the impact of the proposed regulations to the Corps navigation program.

Meeting the objectives of Federally approved coastal zone plans, while accomplishing the congressionally authorized navigation mission, is an important goal of the Corps. Section 307(c) of the CZMA was established in 1972, among other things, to require Federal activities to be in compliance to the "maximum extent practicable" with states federally approved coastal zone management plans. Since promulgation of the CZMA in 1972, and subsequent amendments, section 307(c) has evolved into a program that, in many states, is used to "regulate" federal activities through the consistency review process. "Regulation" of federal activities by the states under the CZMA is neither expressly stated nor implicitly inferred in congressional language to the CZMA.

After a careful review of the proposed rules we believe that NOAA has made some progress in clarifying the ambiguities of the December 2000 CZMA final rule. However, because of the great degree of latitude given states in interpreting what are reasonable and practicable information needs, Corps project managers are having difficulty meeting navigation project maintenance schedules established by the Congress through the budget process, while complying with coastal zone management programs. By their very nature, state coastal zone plans are general and often vague, with few, if any, exact requirements or standards from which the Corps might use as a basis for determining full compliance in advance of seeking a consistency determination. As such,

the Corps Section 307(c) compliance process has been frustrated by state requirements, conditions, and controls that are often difficult to accomplish, procedurally cumbersome, and can be outside the purview of the Corps to accomplish. Unlike future development activities where the consistency determination process can guide the development project, congressionally authorized navigation projects already exist. Thus, the fundamental question for Corps operations and maintenance activities becomes one of how, rather than whether, the project can be accomplished. Often, Federal agencies have little discretion to modify projects re-authorized by the Congress through the annual budget process.

We appreciate the Office of Ocean and Coastal Resource Management's (OCRM) extensive coordination of the proposed rules and willingness to make clarifications. However, we believe that the OCRM could have benefited more from the nearly 30 years of federal agency implementation of the CZMA through comprehensive interagency coordination. We appreciate OCRM efforts to clarify a number of technical issues in the regulations and attempt to strike a balance among the competing interests. Although we have a number of technical difficulties with the regulations, our major concerns fall into two areas as follows:

a. Conditional concurrences. The proposed rules do not address the states use of conditional concurrences. Throughout the history of the CZMA, the Office of Coastal Resource Management (OCRM) has held that conditional concurrences are not allowed. Conditional concurrences give state agencies the luxury of shifting the burden of determining compliance from the state agency to federal action agencies and applicants. Federal agencies and applicants have little recourse other than to accept conditions, or risk having their projects determined inconsistent with coastal zone programs. Historically, OCRM regulations have held that conditional concurrences cannot be used in lieu of explaining why a proposed activity is not consistent with a coastal zone program. The explanation has given applicants the opportunity to enter into negotiations to bring the project into full consistency. That process strikes a balance between what an applicant can do versus what the state wants. Conditional concurrences necessarily preclude that process. Why should a state be inclined to negotiate when it simply has to specify conditions, reasonable or otherwise, that become prerequisite to state approval? For example, when the Corps proposes to place dredged material in an ocean disposal site rather than beneficially using that material to construct wetlands, the state agency need only condition the concurrence to require the wetlands construction option regardless of cost or engineering feasibility. Failure of the Corps to accomplish the project in the manner prescribed by the state means the proposed project is inconsistent with the coastal zone program. We would like for the OCRM to clarify in the proposed rule that conditional concurrences are simply not contemplated under the CZMA.

b. Fully consistent versus consistent to the maximum extent practicable. We again bring this matter to your attention. The proposed rule does not address use of the terms "consistent to the maximum extent practicable" and "fully" consistent. We interpret the latter term to be absolute. The plain definition of "fully" means "completely." We have not found anywhere in the CZMA or subsequent amendments of

1990 and 1996 where the Congress explicitly mandates that Federal agencies comply with every state coastal zone requirement regardless of cost or national implication. The Corps, with the endorsement of the NOAA Office of General Counsel in 1989, has held that the Federal agency retains discretion over budgetary execution through the direction of Office of Management and Budget (OMB) and the Congress. The Corps has had a good working relationship with the coastal states, always reaching accord with coastal zone programs based on limitations in Corps expenditures. The proposed rule does not address those state requirements resulting in federal expenditures outside the budget process. The OCRM has previously suggested that our inability to be “fully consistent” is a simple matter of budgetary planning. The Congress rarely directs that federal agencies accomplish specific projects in specific manners. Placing line items requesting specific appropriations to meet specific state coastal zone consistency requirements at individual projects is unrealistic and would overwhelm the budget process. Requesting general appropriations in advance of knowing what individual states may require is not appropriate budget protocol. We ask that the OCRM revise the proposed rule to clarify that budget authority may limit a federal agencies ability to be fully consistent.

We would like to remind the OCRM that coastal program development has been in the works for nearly 30 years representing a hodgepodge of lessons learned from one program to the next. No two programs are similar and some are dozens of pages while others are comprehensive representing thousands of pages. Many of those programs contain requirements that cannot be legally accomplished by the Corps. For example, the OCRM approved a provision in the State of Texas coastal zone program, over objections by the Corps, that require “Dredged material from dredging projects in commercially navigable waterways.... [be].... used beneficially in accordance with this policy.” According to OCRM, that policy is legally enforceable and is essentially a mandate. When interpreted, using the OCRM language for “full” consistency and the OCRM interpretation regarding federal funding for compliance, the Corps would be compelled to use all dredged material from navigation projects beneficially, regardless of budget implications or national precedence. Other states need do little more than publish similar language in their coastal zone programs to set off a stampede for the limited federal dollars available through the Corps Operations and Maintenance dredging program. We believe that if the Congress intended for federal agencies to adhere to every state requirement, regardless of cost or national implication they would have waived Federal Supremacy in it’s entirety and given federal agencies unlimited budget authority. The Congress did not do that. The Congress merely instructed the federal agencies to comply to the “maximum extent practicable.” The legislative history of the CZMA and amendments support that conclusion. We urge the OCRM to remove language allowing conditional concurrences and continue to oppose language that mandates “full” consistency with all state coastal zone requirements.

#### Specific Comments:

a. Subsection 930.31(a). Federal agency activity. This section is all-inclusive and could mean “any” federal agency action or activity. We do not believe the Congress intended for routine maintenance or other non-consequential activities to be subject to

state consistency review. The language as proposed could give states authority to determine colors of paint for Government buildings or where Government employees might park on government property, for example. Inclusive in those examples of activities that do require consistency determinations should be examples of activities that do not meet the definition of an activity subject to CZMA review. We believe that illustrative examples can be just as useful for activities not subject to review as those that do such as routine recurring maintenance activities like grass mowing, painting, building and facility upkeep when those activities are already included in an existing consistency determination. The language as written is intrusive and too inclusive. The Federal Government will have no discretion but to seek consistency determinations or make negative determinations regardless of the category of activity. At subsection 930.51 of the proposed rule OCRM defined certain categories of federal license and permit activities that do not meet the test for requiring consistency determinations. Similar language should be included in this proposed subsection as well.

b. Subsection 930.41(a). State agency response. We understand the intent of the OCRM with this subsection. However, as written, it is likely to cause more confusion than clarity. We recommend that the last full sentence be broken into two separate but modifying sentences to read as follows: “Thus, if a Federal agency has submitted a consistency determination and information required by 930.39(a), then the State agency shall not assert that the 60-day review period has not begun because the information contained in the items required by 930.39(a) are substantively deficient. Additionally, the failure to submit information that is in addition to that required by 930.39(a) shall not be a basis for asserting that the 60-day review period has not begun.”

In summary, we believe that the rules OCRM proposes address some of the loopholes used by the states to prolong the consistency review process and impede federal agency decision making while executing congressionally authorized navigation projects. However, much work remains if the proposed rules are to make meaningful changes. We do not believe the proposed rules go far enough in clarifying state obligations to provide timely decisions that do not contain restrictive and costly conditions outside the purview of the federal agency’s implementation authority. If you need additional information regarding these comments, please contact Mr. Joe Wilson, at (202) 761-4649.

Sincerely,

Michael B. White  
Chief, Operations Division  
Directorate of Civil Works