STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

Office of Project Management and Permitting
Alaska Coastal Management Program

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August 25, 2003

David Kaiser
Coastal Programs Division
Office of Ocean and Coastal Resources Management, NOAA
1305 East-West Highway, 11th Floor
Silver Spring, Maryland 20910

Dear Mr. Kaiser:

Thank you for the opportunity to respond to the June 11, 2003 *Federal Register* notice about proposed changes to the Coastal Zone Management Act consistency regulations. The State of Alaska appreciates the effort by the National Oceanic and Atmospheric Administration, Office of Ocean and Coastal Resource Management (OCRM) to provide clarity and specific language in certain sections of the consistency regulations.

The intent of the proposed rule is to respond to concerns raised in a report of the National Energy Policy Development Group about state consistency reviews of energy projects. It is important to note that the State of Alaska maintains an excellent working relationship with the oil industry operating in the state, and there are few instances where consistency reviews have delayed the approval of projects. Many of the proposed changes, intended to address the review of energy projects, would affect all consistency reviews involving a federal activity or a federally permitted activity. Though the individual proposed regulation changes may not have profound consequences on specific consistency reviews in Alaska, the overall substance of the changes appear to be much broader than the concerns raised about the consistency reviews of energy projects, with implications to the undermining of states' rights and a state's ability to review and comment on projects that affect coastal resources and uses.

The State of Alaska provided comments in October 2002 on the advanced notice of proposed rulemaking on these consistency regulations. In those comments, hereby adopted by reference for your consideration[1], we stated that there was no compelling argument or reason for offering amendments to the federal consistency regulations at this time. In fact, the June 11, 2003 *Federal Register* notice states that all commenters, except two federal agencies and the oil industry, urged OCRM to take no action or host additional stakeholder meetings before proceeding with rulemaking.

[1] See State of Alaska comments, dated October 2, 2002.

The State of Alaska encourages OCRM take no action on these proposed consistency regulations, and host additional stakeholder meetings before proceeding further. To facilitate further discussion on the important issues and implications of the proposed consistency regulations, we have attached specific concerns on the proposed rule.

Again, I appreciate the opportunity to comment on the proposed changes to the federal consistency regulations. If you have any questions about these comments, please contact me by calling (907) 465-8797 or by email at Randy_Bates@dnr.state.ak.us.

Sincerely,

/s/

Randy Bates
Coastal Program Manager

Carbon Copy:
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State of Alaska
Response to Proposed Changes to the Federal Consistency Regulations
August 25, 2003

This attachment represents detailed comments by the State of Alaska on the proposed changes to the Coastal Zone Management Act (CZMA) regulations found in 15 CFR 930. In our comments, we are referencing the proposed rule found in the Federal Register dated on June 11, 2003, pages 34870-34874.

15 C.F.R. 930.35(d) GENERAL NEGATIVE DETERMINATIONS
This proposed rule change would allow a federal agency to establish a "general negative determination" for repetitive activities that do not have reasonably foreseeable coastal effects. It is not clear why this provision is needed, especially in the context of energy projects, nor is it clear what kinds of federal activities would be covered by a general negative determination. Without a compelling argument justifying the need for this new category of negative determinations, this proposal should not go forward.

15 C.F.R. 930.41(a) STATE AGENCY RESPONSE
Replacing the word "immediately" with a 14-day period is a positive change. This time period is more realistic considering the workloads of state consistency review staff.

The change at 15 C.F.R. 930.41(a) that reads "The state agency's determination of whether the information required by § 930.39(a) is complete is not a substantive review of the adequacy of the information provided" is a substantive departure from the current approach. In Alaska, it is not uncommon to receive a consistency determination from a federal agency without a detailed description of the activity, associated facilities or coastal effects. In some cases, federal agencies have even submitted consistency determinations before project details had been developed. In such situations, it is impossible to know what coastal effects could result from the project.

Determining whether the federal agency's consistency determination has a detailed description of the activity, its associated facilities, their coastal effects, and comprehensive data and information sufficient to support the federal agency's consistency statement requires an analysis of the substance of the information presented, *not* just the fact that a document was submitted. Without some kind of determination of adequacy, an agency could meet the checklist approach by submitting a document with a relevant title but without the necessary substance in the body of the document. If the proposed rule becomes final, the State would be forced to run through a cursory checklist of document titles without an evaluation of the actual material provided, and may be required to begin a consistency review with inadequate information merely because the documents provided included the checklist titles. Given the short consistency review timeframes, this would be very problematic.

15 C.F.R. 930.51(a) and (e) FEDERAL LICENSE OR PERMIT
The language proposed for deletion in the first sentence of 15 CFR 930.51(a) should be retained for the sake of clarity: ". . . authorization, certification, approval, lease, or other form of permission . . ." Removing this language will leave open the question of whether leases issued by a federal agency, other than oil and gas lease sales, are subject to consistency. If the proposed change is maintained, the word "authorization" should be defined within the rule.

This proposed rule at 15 C.F.R. 930.51(e) would change the method for determining if a renewal or major amendment to a project should be reviewed for consistency. In the preamble to the 2001 regulation changes, NOAA clearly stated that ". . . a State agency's view should be accorded

deference to ensure that the State agency has the opportunity to review coastal effects substantially different than previously reviewed." The existing consensus-based approach ensures that the state has a seat at the decision-making table. The proposed change, however, would negate the intent of the 2001 regulation, and give the federal agency all the decision-making power as long as they "consulted" with the state. Consultation could be no more than a cursory phone call. The term "substantially different" can be interpreted differently by a state or federal agency. Giving the decision-making power solely to the federal agency would remove the ability of the state to have meaningful input into the decision.

15 C.F.R. 930.58(a)(1) NECESSARY DATA AND INFORMATION
The preamble to the proposed rule states that the proposed changes provide a greater level of specificity regarding what is needed to begin the state's six-month review period. Most of the proposed new language will help make the requirements more clear, but proposed deleted language ("comprehensive data and information sufficient to support the applicant's consistency certification") removes important requirements for the evaluation of a projects effects. This deleted language provides needed flexibility to respond to unique circumstances that arise in an individual project reviews.

The proposed new language requiring submittal of "any other information relied upon by the applicant to make its certification" should be changed back to the current language "any information sufficient to support the applicant's certification." The current language requires that the applicant "support" their certification, whereas the proposed language suggests the applicant need only include material relied upon for the certification – a lower standard of analysis.

15 C.F.R. 930.60 COMMENCEMENT OF STATE AGECNY REVIEW
The proposed changes to this section raise the same concerns as previously identified under 15 C.F.R. 930.41(a). Please consider those comments in the context of an activity requiring a federal license or permit.

In addition, the proposed change at 15 C.F.R. 930.60(a)(3) should be amended to clarify that the section refers only to the federal consistency time clock. The State of Alaska consistency review regulations include provisions to modify the state timelines without affecting the federal six-month time period.

15 C.F.R. 930.76(a) and (b) SUBMISSION OF AN OCS PLAN
The Outer Continental Shelf Lands Act (OCSLA), the Coastal Zone Management Act (CZMA), and the National Environmental Policy Act (NEPA) provide opportunities for a state to review proposed OCS activities. These three acts and implementing regulations contain different requirements and timelines. Before proceeding with any changes to Subpart F of the federal consistency regulations, a complete analysis of the interaction among these three acts should be undertaken. In addition, a meeting of state and federal representatives should be convened to discuss the ramifications of the proposed changes to the federal consistency regulations and how these regulations interrelate with the other two acts and implementing regulations. The remainder of the discussion under this section emphasizes the interrelation between the three acts for reviews of exploration plans and development and production plans.

This regulation should include a provision that requires the applicant to send the state a copy of the OCS Plan when the OCS Plan is submitted to the DOI. Receipt of a copy of the initial plan by the state will encourage early cooperation among the state, the DOI and the applicant. Early cooperation will help the state respond to concerns and ensure that the consistency review proceeds in a timely manner.

Exploration Plans
There is an inherent disconnect between the OCSLA, NEPA and the CZMA. Usually, Alaska is requested to provide comments on an exploration plan under OCSLA with a timeframe of 14 business days or less. This is an unrealistic expectation because important documents such as the environmental assessment, engineering documents, and the report of the Certified Verification Agent (independent third party review document) may not be available at the start of the review. Under these timeframes, it may not be possible to make meaningful comments under the OCSLA for non-routine projects in Arctic waters. Under these circumstances, the CZMA review an important tool for Alaska.

Recent legislation in Alaska requires the state consistency review to be completed in 90 days. This restriction makes it important for the state to receive complete information, including the environmental assessment and other reports before the state's review begins.[1] In the preamble to the proposed rule change, NOAA states that it would be incompatible with the statutory requirements of OCSLA to require final NEPA documents. It is not clear why requirement of draft NEPA documents prior to initiating a review would be incompatible with OCSLA. We cannot foresee a situation where a consistency determination should be reviewed prior to the preparation of a draft environmental impact statement (EIS).

Development and Production Plans
As with exploration plans, there is a challenge to coordinate reviews for development and production plans (DPP) under the OCSLA, NEPA and CZMA. Again, it is important that complete detailed information be submitted before the state's consistency review begins because our state review must be completed in 90 days.

Rather than require states to change their programs, the State suggests that the federal consistency regulations should require a draft EIS be submitted with the exploration plan when an EIS is prepared for a project. Information in a draft EIS is needed to determine consistency, and requiring this document to begin the state's consistency review process should not extend the review process. It usually takes longer than six months in Alaska to complete a final EIS after a draft EIS is issued.

15 C.F.R. 930.77(a) COMMENCEMENT OF STATE AGENCY REVIEW …
As stated in our comments on 15 C.F.R. 930.76, we believe the proposed requirements for submission of an OCS Plan should be expanded. Unlike other federally permitted projects that undergo state review, OCS Plans do not always include federal permits and associated information that would be otherwise available. The proposed changes to this section raise the same concerns as previously identified under 15 C.F.R. 930.41(a) and 930.60. Please consider those comments in the context of the submission of an OCS plan.

The proposed new language in Section 930.77(a)(2) should be removed. A state agency should not be required to amend its program to identify additional information that is needed to determine consistency. This is an added burden for states, and due to the case-by-case nature of consistency reviews, different information may be needed for various reviews depending on the project proposal and location. For example, for a project using standard technologies, information

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[1] For routine exploration projects, it may not be so critical to receive the environmental assess and the CVA report before the review begins. For a project such as the 2000 McCovey Project, however, the complex nature of the proposal and possible detrimental coastal effects made it important to have these documents before the review began.

in the OCS plan may be sufficient. For projects using new technology or located in hazardous areas, a state may need to consider engineering reports, environmental assessments, and reports of the certified verification agent (CVA) to determine consistency. In one Alaska OCS project, the CVA report revealed information about an extreme geophysical hazard that was not otherwise available. Listing these documents for all OCS reviews would provide an unnecessary burden on industry, because for most reviews, this level of information would not be needed.

The proposed three-month limitation for requesting information should be abandoned. Critical information needed for consistency and the final alternative may not be known until late in the NEPA process, well after the three-month limitation. When a development project requires an EIS, the state is required to submit its comments to the MMS under OCSLA within 60 days. In Alaska, an EIS for a project in Arctic waters may take several years to complete. Again, the complex interaction among the three acts requires a more thorough investigation and a dialogue between the states and federal agencies before the consistency regulations are changed. As an alternative to the strict three-month limitation for requesting information, we suggest that the state and the federal agency have the opportunity to mutually agree to extend the timeframe. Currently, there is no option for extension of this timeframe, nor for working together on needed information. Forcing this timeframe on states may result in state's issuing objections based on a lack of information.

15 CFR 930.82 AMENDED OCS PLANS

This proposed rule would make two changes. First, it removes a requirement that the applicant send a copy of the amended OCS plan to the state. This provision should remain because it encourages early cooperation among the state, the DOI and the applicant. Early cooperation can lead to agreements that would reduce review time once the consistency review begins.

The second change is an addition that the DOI will furnish the state with a copy of an amended OCS plan when it is satisfied that OCSLA and CZMA requirements have been met. While the DOI is best suited to determine if the requirements of OCSLA are met, DOI personnel may not have the expertise to decide if requirements of the CZMA regulations are met. There should be consultation process with the state built into this process.

15 CFR 930.85(c) FAILURE TO COMPLY SUBSTANTIALLY WITH AN APPROVED OCS PLAN

The proposed changes to this section would diminish the states' and NOAA's role in the event of noncompliance with an OCS plan. The preamble to the proposed rule change suggests that since the collaborative process described in this section has never been used, the decision should be made by the MMS of when a person has failed to comply with an OCS plan. Although the provisions in this section may never have been used, the fact that they exist may have served to encourage applicants to comply with OCS plans. Removal of the consultative process may have the opposite effect. Provisions to allow a written objection from the state and a finding by the NOAA director should be retained.

This ends the comments of the State of Alaska on the proposed changes to the federal consistency regulations.