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COASTAL STATES ORGANIZATION

FOUNDED IN 1970 TO REPRESENT THE GOVERNORS OF THE THIRTY-FIVE COASTAL STATES, TERRITORIES, AND COMMONWEALTHS ON COASTAL, GREAT LAKES, AND OCEAN AFFAIRS.

HALL OF THE STATES, SUITE 322, 444 NORTH CAPITOL STREET, NW, WASHINGTON, D.C. 20001 (202) 508-3860 FAX (202) 508-3843

August 22, 2003

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

Re: **Coastal Zone Management Act Federal Consistency Regulations (15 CFR Part 930) Proposed Rule, 68 *Federal Register* 34851, June 11, 2003 [Docket No. 030604145-3145-01]**

Dear Secretary Evans:

Since 1970, the Coastal States Organization (CSO) has represented the interests of the Governors of the nation's 35 coastal States and Territories on matters relating to sound coastal and ocean resource management and development. CSO would like to acknowledge and strongly support NOAA and the Administration's reaffirmation of the basic States' rights foundation of the Coastal Zone Management Act (CZMA). While States are willing to work closely with the Federal agencies and applicants to improve coordination and to provide predictable and timely reviews, any regulatory changes must be narrowly tailored to avoid conflicting with States' rights. It is clear form the law and the current regulations that consistency is intended to encourage coordination early in the planning process. The CZMA consistency provisions provide a channel to process controversies, avoiding the need to resort to litigation or *ad hoc* regulatory intervention.

The Proposed Rule changes go beyond the technical and procedural changes referred to in the Advanced Notice of Proposed Rulemaking (ANPR) (67 *Fed. Reg., No. 127, 44407, June 2, 2002),* and the purported problems cited in the Vice President's Energy Report of lack of clearly defined "information needs" and "uncertain deadlines" relating to energy facilities activities and siting in the coastal zone and OCS. Many of the proposed changes affect not only energy related offshore activities but alter definitions, standards and procedures that apply to consistency review for other federal activities and permits. To the extent that changes are finally proposed, they must be *carefully targeted only* to address "limited and specific procedural changes or guidance" as called for in the ANPR and as needed to clarify offshore energy activity and siting information needs and deadlines.

CSO's fundamental concern with federal consistency Proposed Rule is that some so-called "clarifying" changes could lead to more, not less, conflict, litigation and delay. There is a danger, if not likelihood, that resorting to regulatory changes to "solve" perceived problems will result in new conflicts and disagreements. In other instances, the Rule would tilt the Federal-State balance that Congress intended in passing the Coastal Zone Management Act (CZMA) in favor of the Federal agencies. CSO has consistently maintained that there is no demonstrated need for these rule changes. Comprehensive consistency rule changes were approved just over two years ago. As noted in the Background to the Proposed Rule:

> *On December 8 2000, NOAA issues a **comprehensive revision** to the Federal Consistency regulations, which represented **substantial effort and participation** by Federal agencies, States, industry and the public **over a five year period.** (**Emphasis** added.)*

The Proposed Rule changes are a solution in search of a problem. The record is clear that the conflicts relating to offshore energy activity are by far the exception. As noted in the ANPR:

> *While states have negotiated changes to thousands of federal permits over the years, States have concurred with approximately 93 percent of all federal actions reviewed....Since 1978, MMS has approved over 10,600 EPs and over 6000 DPPs. States have concurred with nearly all these plans. (67 Fed. Reg. at 44408 and 44409)*

As described in more detail in the attached comments, some of the Proposed Rule changes could have the unintended effect of discouraging early cooperation among Federal agencies, applicants and the States; encouraging agencies to define activities more narrowly that are subject to consistency review, and; placing potential limits on States' rights to review Federal projects and activities that can reasonably be expected to affect State coastal resources. In a few instances, the Proposed Rule would also improperly shift from the Departments of Commerce or the States to the Department of Interior (DOI), the authority to make determinations regarding whether activities are being conducted in compliance with a state's coastal management program or are having substantially different affects on State coastal resources. These determinations are correctly left within the expertise of the States or Department of Commerce that has jurisdiction over administering the CZM program.

The CZMA consistency processes that are developed cooperatively with the States have improved efficiencies for oil and gas exploration, development and transport. For example, Alaska uses a memorandum of understanding with the Minerals Management Service to facilitate CZMA reviews of OCS activities. Texas has developed a general CZMA concurrence for its review of OCS oil and gas exploration plans. Maine and New Hampshire used the CZMA consistency review process to approve natural gas pipelines from Nova Scotia.

The few problems that have been experienced are more often then not a result of Federal agency conflicts, or agencies and applicants being unfamiliar with the CZMA consistency requirements and their failure to adhere to those requirements. More resources should be dedicated to developing memoranda of understanding with the States, and to supporting the NOAA Office of Ocean and Coastal Resource Management, the Office of General Counsel, Department of Interior and the Minerals Management Service to work with the States and to assist agencies and applicants to understand and fully comply with their consistency responsibilities.

CSO appreciates your consideration of these comments and incorporation of necessary changes into any Final Rule. CSO and the States stand ready to work with the Federal agencies to facilitate orderly review, and cooperation and coordination among States, Federal agencies and applicants.

Sincerely,

Tony MacDonald
Executive Director

cc: Vice Admiral Conrad Lautenbacher, Administrator, National Oceanic and Atmospheric Administration
David Kaiser, Esq., Federal Consistency Coordinator, Coastal Programs Division, OCRM, NOAA

Attachment

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AMERICAN SAMOA
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HALL OF THE STATES, SUITE 322, 444 NORTH CAPITOL STREET, NW, WASHINGTON, D.C. 20001 (202) 508-3860 FAX (202) 508-3843

August 22, 2003

Mr. David Kaiser
Federal Consistency Coordinator
Coastal Programs Division, Office of Ocean and Coastal Resource Management
National Oceanic and Atmospheric Administration
1305 East-West Highway, 11th Floor
Silver Spring, Maryland 20910

By email: CZMAFC.ProposedRule@noaa.gov / Original in Mail

Re: **Coastal Zone Management Act Federal Consistency Regulations (15 CFR Part 930) Proposed Rule, 68 *Federal Register* 34851, June 11, 2003 [Docket No. 030604145-3145-01]**

The following comments are being submitted on behalf of the Coastal States Organization (CSO) regarding the above captioned Proposed Rule changes to the Federal Consistency Regulations. These comments incorporate by reference the accompanying letter to The Honorable Donald Evans, Secretary of Commerce dated August 22, 2003.

Summary:

1. There is no demonstrated need for these rule changes particularly when comprehensive consistency rule changes were approved just over two years ago. (See August 22, 2003 letter to The Honorable Donald Evans)

2. While CSO does not see the need for any changes, to the extent that changes are made, they must be *targeted only* to address "limited and specific procedural changes or guidance" as called for in the Advanced Notice of Proposed Rulemaking and as needed to clarify offshore energy activity and siting information needs and deadlines. (See 67 *Fed. Reg., No. 127, 44407, June 2, 2002)*

3. There is a danger, if not likelihood, that resorting to regulatory changes to "solve" perceived problems or to "clarify" well established language from current regulations will result in creating unforeseen conflicts, confusion, and possibly increase litigation. *Ad hoc* regulatory changes should be avoided and more resources should be dedicated to developing memoranda of understanding with the States, working with States and assisting agencies and applicants with understanding their consistency responsibilities (See August 22, 2003 letter to The Honorable Donald Evans.)

4. The definition of "federal activities" should not be changed. This change would affect <u>all</u> Federal activities, not just energy or OCS activities, and invite Federal agencies to interpret more narrowly what activities are subject to state consistency and result in considerable confusion and conflict over the meaning and significance of the changes. (See *Rule Change* 4.)

5. The Proposed Rule Changes could:
   - discourage early cooperation among Federal agencies, applicants and the States (see e.g. *Rule Changes* 10, 14, and 17);

- encourage agencies to define activities more narrowly that are subject to consistency review (see e.g. *Rule Changes* 6, 7), and;
- limit States' rights to review Federal projects and activities that can reasonably be expected to affect state coastal resources (see e.g. *Rule Changes* 5, 6, 7, 10, 15.)

6. The proposed changes would improperly shift from the Departments of Commerce or the States to Department of Interior, the authority to make certain determinations regarding whether activities are being conducted in compliance with a State's coastal management program or are having substantially different affects on State coastal resources. These determinations are correctly left within the expertise of the States or Department of Commerce that has jurisdiction over administering the CZM program. (See e.g. *Rule Changes* 7, 16.)

7. The right of States to seek additional information relating to complex OCS proposals should not be arbitrarily cut off at 3 months, nor should a state's failure to request information in any way be used to limit a State's right to seek necessary information or to object to the proposed Federal activity for lack of information. (See e.g. *Rule Change* 15.)

8. While States do not object to establishing a reasonable time frame for the Department of Commerce to consider consistency appeals, the procedural provisions should assure that states: (i) have sufficient time to responds to briefs (at least 45 days); (ii) can seek DOC approval to extend the briefing schedule for "good cause or mutual agreement of the party", and; (iii) have adequate time to consider fully any remands (*e.g.* 3 months as provided in the current regulations.) (See *e.g. Rule Changes* 20, 21, 22.)

***Section by Section Comments**:*

Rule Change 4 – Section 930.31(a) Federal Agency Activity

CSO opposes the proposed changes as unnecessary and potentially imposing new limitations on federal activities subject to consistency review. These changes will affect all federal agency activities not just energy related activities. As noted in the explanatory language, "the proposed change would not alter the current application of the definition of federal activity…." The best way to accomplish this objective would be NOT to change the existing language. The proposed changes introduce new and ambiguous terms including "proposal for action"…"a plan that is used to direct future actions", and "a rulemaking that alters uses of the coastal zone" that would inject uncertainty, rather than clarity into the process. These changes also arguably establish a new threshold test to determine what constitutes a "proposal for action" in addition to the current controlling "effects test."

As noted in the preamble to the existing federal consistency regulations, it was the clear intent of Congress that:

> "*…the application of consistency requirement is not dependent on the type of activity or what form the activity takes (e.g. rulemaking, regulation, physical alteration, plan.) Consistency applies whenever a federal activity initiates a series of events where coastal effects are reasonable foreseeable. See H.R. Rep. No. 1012, 96th Congress, 2nd Session, 4382….**The only test for whether a Federal agency function is a Federal agency activity subject to consistency***

> ***review is an "effects test."*** *Whether a particular federal action affects the coastal zone is a factual determination. (Fed. Reg. December 8, 2000, p. 77125) (**Emphasis** added.)*

As the existing regulations provide, the CZMA is intended to encourage federal agencies to coordinate with states on a "wide range" of activities that have "reasonably foreseeable coastal effects." The "effects test" should be the only test to determining whether consistency applies. Several States have raised questions about whether the proposed changes would result in agencies going back to review the scope of federal activities they currently submit for consistency review. States have worked well in some cases with the Corps of Engineers and other agencies to provide phased review of plans that currently are submitted to consistency review. The proposed change in the definition of federal activity could have the unintended effect of discouraging agencies from coordinating with the States early to provide staged or phased review of plans for projects.

The assertion that this proposed change is not intended to change current application of the definition of federal activities is belied by the discussion and reasoning provided in the explanatory language. In its explanation, NOAA posits its interpretation and seeks unilaterally to limit the application of the Court decision in *California Coastal Commission v. Norton, 150 F. Supp.2nd 1046 (N.D. Cal 2001*. The Congressional and regulatory history are clear that whether a particular federal activity affects State coastal resources is a factual determination that should be made on a case-by-case basis. The proposed redefinition and explanatory language under the guise of clarifying the definition seem designed to predetermine the outcome.

CSO urges that the Final Rule retain the current definition of "federal activities." If any change is made, there should be an explicit statement that the intent is not to impose new limits on the "effects test" or to narrow federal agencies activities currently (and in the future) subject to consistency. The Final Rule should also explicitly reject the use of hypothetical examples in the explanatory language that assert unilateral legal interpretations to limit the application of State consistency or the reach of legal decisions.

Rule Change 5 – Section 930.31(d) Federal Agency Activity - General Permits

The primary change proposed in this section is to eliminate the Federal option to treat a proposed general permit as a federal license or permit (sec. 307(c) 3), rather than as a federal activity (sec. 307(c)(1). It is not clear whether a Federal agency has ever availed itself of this option or what advantages it might have. The Final Rule should further explain the significance of this change. In addition, the Final Rule should clearly affirm that when a State issues a consistency objection to the general permits, or other conditions are imposed on general permits that require case-by-case review then the applicant must obtain the State's concurrence before relying on the general permit.

Rule Change 6 – Section 930.35(d) General Negative Determinations

This provision would shift the emphasis away from a case-by-case consideration of consistency and reasonably foreseeable coastal effects to deciding what are "repetitive activities." The

proposed change creates an effective consistency exemption for an undefined category of "repetitive activities." The Proposed Rule does not provide adequate parameters to determine what are "repetitive activities," and how similar in nature the activity must be for agencies to avail themselves of this option. There is a concern that issuing a general negative determination may have the practical effect of minimizing full consideration of "cumulative impacts" that may be increasingly significant for ongoing activities. Several States also raised a concern that a general negative determination would effectively limit public notice and review of these repetitive activities.

There is strong opposition to the lack of adequate procedural safeguards in this proposed change. Any Final Rule providing for a general negative determination must be amended to provide the following procedural safeguards.

- A clear definition of what constitutes "repetitive activities" and a requirement that Federal agencies closely monitor activities to assure that there are no cumulative or unforeseen impacts.
- In describing in detail the activity it is not adequate to set out "expected number of occurrences over a specified period of time." Additional safeguards must be added to the Final Rule requiring agencies to provide sufficient details about when and where the activity would occur, and requiring that the States and public should be advised in advance of the actual occurrence and location of such activity to assure that it is being carried out as originally represented.
- Agencies should not have the option ('may") of periodically reviewing the general negative determination. The Final Rule must provide that Federal agencies are be required ("shall") to reassess at least every three (3) years or sooner if deemed necessary by the State or Federal agency.

Rule Change 7 – Section 930.41(a) State Agency Response

While CSO and the States recognize that there is a distinction between the determination whether information submitted pursuant to section 930.39(a) is complete and whether the consistency determination "substantively deficient," we reject the characterization that the State's review at this stage is merely a "checklist." If the supporting information includes an analysis of some State policies but ignores other relevant policies of a State coastal program or includes an analysis that is patently erroneous on its face, it should not be deemed administratively complete. Section 930.39 (a) explicitly provides that the consistency determination should "be based on an evaluation of the relevant enforceable policies."

The current language of the regulations is clearer and more concise than the proposed changes and should be retained. In issuing the Final Rule, it should be made clear that it is the responsibility of the agency making the consistency determination to provide supporting information demonstrating a thorough evaluation of all relevant policies before a determination is administratively complete. A complete and thorough analysis upon which a State can base its subsequent substantive review will expedite consideration.

In many cases, the new requirement that States notify the agency of missing information "within 14 days" will not pose a problem. We request that the Final Rule extend that period to "21 days" to assure that States have adequate time to review more complex proposals. It is in both

the agency and the State's interest that the consistency determination and supporting information be as complete as possible to assure expeditious and qualitative review. The Final Rule should also clarify that failure of a State to notify the agency of missing information within 21 days shall **not** bar the State from subsequently seeking necessary information and / or objecting to a consistency determination for lack of adequate information.

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

This proposed change is another example of a solution in search of a problem. No examples have been offered demonstrating problems arising out of the current language. The proposed change responds to a hypothetical problem. It would encourage conflict over coordination by vesting the determination of substantial effects in the Federal agency. The rationale provided for vesting this decision in the Federal agency is not convincing. Both the applicant and the State are likely to be in a better position and have the requisite expertise to assess the effect of the change on State coastal resources.

The current consensus-based process requiring that the determination "substantially different coastal effects" be made on a case-by-case by the "State agency, Federal agency and applicant" has worked well. This collaboration reflects the partnership that underlies the CZMA. Under the new language, the State would have to resort to after-the-fact mediation or litigation if they disagreed with the Federal agency. This could delay, rather than expedite the process.

In addition, the proposed rule would replace the current language providing that the opinion of the State agency "shall be accorded deference" with a new standard that gives the State opinion "considerable weight." The current language requiring "deference" is more commonly understood as a term of administrative review and should be retained over the new and undefined "considerable weight" standard.

Rule Change 10 – Section 930.58(a) (1) Necessary Data and Information

It is important that the current language in subsection (a)(1)(ii) requiring the applicant to submit information "*sufficient to support the applicant's consistency certification"* be retained. It is not necessarily sufficient, as provided in the proposed revisions, that the applicant "*relied on* the information" or that it was included in permit application material prepared to determine compliance with Federal permit requirements. What if the applicant "relied on" information that is unrelated to the applicable enforceable policies or is provided in error to support its consistency determination?

It is important to retain the link between information provided by the applicant and the standard that it be support an applicant's consistency determination. This reflects an important objective of the CZMA, which is to assure that agency and applicants substantively incorporate applicable State policies into their planning process. Therefore, the provision should be amended in the Final Rule as follows:

> *(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 any other information* ***addressing all relevant enforceable policies and sufficient to support the applicant's consistency certification****. Maps, diagrams, and technical data shall be submitted when a written description alone will not adequately describe the proposal.*

Note that this change or the inclusion of comparable language will also be important to addressing State concerns with Rule Changes 12, 14, 15 discussed below.

Rule Change 11 – Section 930.58(a)(2) Necessary Data and Information (State permits)

It is the States' understanding that the elimination of "permits" from the list of necessary data and information will **not** limit the State's right subsequently to object to the consistency determination if an applicant fails to secure necessary permits. The Final Rule should expressly affirm this understanding.

Rule Change 12 – Section 930.60 Commencement of State Agency Review

As noted in the comments to Rule Changes 7 and 10 above, the States reject the characterization that State review is merely a "checklist." The information should be adequate to address applicable State coastal policies, and to "support applicant's consistency determination." As discussed above, changes proposed to Rule Change 10 should be incorporated in the Final Rule.

The Final Rule should also be amended to clarify the relation between the timelines established in subsections (a)(1)(i) and (a)(2). The provisions in (a)(2) provides that the State agency's consistency review commences on the date that any missing information was received by the State agency. The language in (a)(1) should be amended to include a specific cross-reference to the timeline provided in (a)(2).

In addition, the applicant should bear the responsibility of promptly responding to a State request for missing information in order to assure that State's have adequate time to review all information. It is not sufficient for the applicant to provide the information "during the review period." Subsection should be amended at the appropriate place to provide as follows:

> "In the case where the applicant has provided a certification but not all necessary data and information required pursuant to section 930.58, ***the applicant shall provide the missing information requested to the State agency for review within 30 days of notification from the State.*** "

There is also a concern about the deletion of language requiring that missing information or other deficiencies be "corrected" or "cured" by the applicant is not clear. There is some concern that eliminating these requirements could result in turning the applicant's review from a substantive consideration of State policies into a ministerial action. Consistent with the change proposed in Rule 10, we propose that the Final Rule subsection (a)(2) be amended as follows:

> *"Within 30 days of receipt of the certification or necessary data and* ***information correcting the information deficiencies and sufficient to support the applicant's consistency determination*** *that was deemed missing pursuant to section (a)(1) of the section…".*

Rule Change 14 – Section 930.76(a) and (b) Submission of OCS Plans….

Because the proposed changes would rely on submission of necessary data and information "required pursuant to section 930.58," it is important that the changes recommended to Rule Change 10 and the clarification requested in Rule Change 11 or comparable language be included in the Final Rule. Without these changes, CSO would object to the removal of the language in the current subsection (a) for the reasons stated above.

Rule Change 15 - Section 930.77(a) Commencement of State Agency review and public notice

930.77(a)(1) -- As noted in the previous section, incorporation of changes to address objections to Rule Change 10 and 14 must be incorporated in the Final Rule. The attempt of the Proposed Rule to establish a bright line test between a "check list" review seeking to eliminate virtually any subjective element to the States' determination of what is an administratively complete consistency determination and the subsequent "substantive review" is artificial and legally inaccurate. These proposed changes seem to conflict with one of the primary goals of these regulations, which is to achieve a meeting of the minds on the important issues among the parties as early in the process as possible. It is not merely a question of matching the check list to the minimum procedural requirements.

930.77(a)(2) -- The Proposed Rule changes the *status quo* where, under section 930.58(a)(2), the State "**may"** amend its program to include information needs. The impact of the new requirement in subsection (a)(2) providing that if a State needs information in addition to the information required by section 930.76, it "**shall** amend its management program" is not clear. Why is this new requirement added to the regulations when the States already have the option to amend their programs under section 930.58(a)(2)? While it may be a good practice and one that should be encouraged where the information needs are clearly identifiable, a State agency should not be *required* to amend its program to request additional information that is needed to determine consistency. A State should not be required to amend its program to anticipate potentially unknowable information needs. An effort by the California Coastal Commission, MMS and industry in the early 1990's was abandoned by mutual agreement as potentially not productive because information needs change over time due to changed circumstances. A list could be overly burdensome and wasteful for applicants, if States tried to anticipate every possible concern. A list would be out of date relatively soon after it was compiled. The more comprehensive and relatively simple requirements of the CZMA benefit applicants by enabling them to focus on the relevant issues rather than satisfy an exhaustive and inflexible list of information requirements that would need to be satisfied. Furthermore, a list that is not adequate for all States may lead to more state objections based on lack of information, which would not improve the efficiency of the consistency review process.

It is very important that, if this new requirement is maintained or some variation thereof to encourage States to amend their programs, it ***not*** be open to interpretation as a bar or limit to the applicant providing or State requesting all necessary information supporting the consistency determination, when it has not been included in amended program. Any Final Rule addressing this issue must make it clear that this is not the intent. Consistency and effects on coastal resources should be determined on a case-by-case basis. Many of these plans are complex and the technology is evolving quickly. It is unreasonable to require States to anticipate all of their information needs in advance and to incorporate them into their CZM programs. States may not have the experience to anticipate information needs for state-of-the art OCS facilities, new offshore LNG facilities or other emerging uses of the OCS.

930.77(a)(3) – The States *strongly objects* to new language in subsection (3) that would restrict State's from requesting any information after three months. The proposed change would have no effect in expediting review but only have the effect of limiting the State and public's ability to seek necessary information. This new limitation on States' ability to seek and applicant's ability to provide necessary information may have the perverse effect of increasing State objections to proposed activities, because it would impose an arbitrary time limit on States and applicants from working collaboratively to address all information concerns during the review period.

While it may be reasonable to require States to describe the nature of the information and the necessity of having additional information, States should not be barred arbitrarily from seeking additional information after three months. Such additional information could be essential to resolving disputes. The assumption should not be that States are seeking to delay. States are more likely to be seeking information necessary to resolve any outstanding concerns. These requests would not extend the time for final decision. For example, 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 and the State could not have anticipated nor had the time to formally incorporate into its program.

Several States have also read this change as potentially barring the States from issuing a consistency objection for lack of information if they have not raised it within the three month period. That interpretation would clearly contradict both the intent and spirit of the CZMA. Any Final Rule addressing this issue should explicitly provide that a time limit or failure of a State to raise an information need during such period should **not** be interpreted as a bar to the State subsequently raising an objection.

Rule Change 17-- Section 930.85(c) Failure to comply...with OCS Plan

The Rule Change is proposed based on the fact that this section has not been used. If that is the case, how can it be asserted that it is a procedural or substantive impediment? The rationale for the change in the preamble relies on the mistaken assumption that failure to substantial comply with the OCS plan as it actually affects State coastal resources and consistency with the CZ program is the same as significant changes to an OCS plan. The former is properly within the purview of NOAA, while the latter is properly under the purview of MMS.

Several States observed that the current regulation providing for notice of alleged failure to both NOAA and MMS makes sense because NOAA administers the CZM program while MMS administers the OCS plan. The current provisions specify that there are 30 days for remedial action or the State may file a written objection to the Director of OCRM. Under the current provisions, the standard for the review to determine what constitutes a "*failure to comply with an approved OCS plan"* for the purposes of this review is set out in subsection (d) and specifically provides that:

> *"…if the State agency claims and the Director finds that one or more of the activities described in detail in the OCS plan* ***which affects any coastal use or resource*** *are being conducted or are having an effect on any coastal use or resource substantially different then originally described by the person in the plan or accompanying information and, as a result,* ***the activities are no longer being conducted in a manner consistent with the state's management program****." (****Emphasis*** *added.)*

The standard for review set out in subsection (d) is properly within the expertise of NOAA and the Director of OCVRM and should be retained. Many States view this appeal process as encouraging coordination and providing an incentive for compliance with OCS Plan. The provision simply provides that NOAA has a role in determining if there is a failure to substantially comply with an OCS Plan to the extent that the plan "affects any coastal use or resource….and, as a result, the activities are no longer being conducted in a manner consistent with the state's management program." While the DOI is best suited to determine if the requirements of OCSLA are met, it are not the agency with the expertise to determine whether CZMA regulations are met and whether there are actual effects on state resources resulting from failure to comply with a plan.

Rule Change 20 - Section 930.127 Briefs and Supporting material

As a general matter, it would be preferable for both States and the appellants to permit the Secretary to establish a briefing schedule in consultation with the parties as provided in the current regulation. This would enable a schedule to be established to meet the case-by-case needs of both parties. To the extent the Final Rule sets out a specific briefing schedule, it is in the best interest of both parties to have an adequate opportunity to submit information to assure a complete record. Allowing for a less rigid briefing schedule would not extend time set for completion of record and issuance of a final decision. CSO supports the following specific technical changes:

- *Subsection (a)* -- Provide at least 45 and preferably 60 days for State's to submit a reply brief.
- *Subsections (a),(b) & (c)* – Clarify the relation between the initial brief and reply and additional procedural or other briefs required by the Secretary. For example, would separate time periods be set out for those briefs? Would the need for these additional briefs extend the briefing schedule?
- *Subsection (c)(3)* -- There seems to be an error in subsection (c)(3) that refers to sections 930.127(a) and (c)1. The significance of these cross-references is not clear.
- *Subsection (e)* Provides for extensions of briefing schedules "only in the event of exigent or unforeseen schedule." This provision is overly restrictive. CSO supports amending the Final

Rule so that briefing schedules should also 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)."* This change reflects the usual administrative and judicial standard for extensions.

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

Subsection (c)(1) -- The proposed revision adds new language which provides that the "*Secretary shall accord greater weight to those Federal agencies whose comments are within their areas of expertise"* There is absolutely no need for this change. General administrative procedure and review standards should apply. Specific "weight" favoring the Federal agencies should not be allocated by regulation. This language may arguably impose a restriction on discretion of the Secretary to sort through **all** comments, weigh the relative expertise of commentors. If this language is added, than CSO requests that in this section and throughout the regulations wherever the comments or input of State or public are sought language be added that provides that their views be given *"greater weight for matters that are within their areas of expertise."*

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

Subsection (d) -- The proposal to limit the time for reconsideration on remand to State to 20 days is completely unworkable and unreasonable. This remand would come into play where "significant new information" not previously available is made available. That information could be complex and the State is likely to be seeing it for the first time. It is in the interest of the appellant that sufficient time be provided for State to reconsider based on the new information and a public hearing may need to be held. The current allowable 3 months should be retained.

Sincerely,

Tony MacDonald
Executive Director

Enclosure