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August 15, 2003

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

David M. Kaiser
Federal Consistency Coordinator
Office of Ocean and Coastal Resource Management
National Oceanic and Atmospheric Administration
1305 East-West Highway, 11th Floor
Silver Spring, MD 20910
Sent via email to CZMAFC.ProposedRule@noaa.gov

RE: June 11, 2003 Federal Register Notice, Volume 68, Number 112, page 34851,
Proposed Rule - Changes to the Federal Consistency Regulations 15 CFR Part 930,
Office of Ocean and Coastal Resource Management (OCRM)
National Ocean Service (NOS), National Oceanic and Atmospheric Administration
(NOAA), Department of Commerce (Commerce)

Dear Secretary Evans and Mr. Kaiser:

On behalf of Bill Lockyer, Attorney General for the State of California, I am providing comments on the proposed rule published in the Federal Register on June 11, 2003 in which NOAA proposed changes to the Federal Consistency regulations. The Attorney General submits that there is no need to amend the existing regulations and that the proposed changes are inconsistent with both the letter and spirit of the federal Coastal Zone Management Act (CZMA). The proposed rule should not be adopted.

As enacted in 1972 and as amended in 1990, the CZMA contemplates a partnership between the federal government and coastal states such as California. The main purpose of the

CZMA is to encourage and assist the coastal states in preparing and implementing coastal zone management programs to preserve, protect, develop and whenever possible restore the resources of the coastal zone of the United States. (16 U.S.C. § 1451 et seq.) The CZMA is designed to enhance, rather than narrow, a state's role in the management of its coastal resources. (*Acme Fill Corp. v. San Francisco Bay Conserv. & Dev. Com.* (1986) 187 Cal.App.3d 1056.) Congress afforded the states a meaningful and substantive role regarding federal activities and federally approved activities affecting their coastal zones through the federal consistency process. Once the state's coastal management program is approved, the CZMA gives coastal states the right to review federal activities and federally licensed and permitted activities for consistency with the states' approved coastal management programs. (16 U.S.C. § 1456 (c).) Compliance with the consistency review procedure is mandatory. (*California Coastal Commission v. United States* (S.D. Cal. 1998) 5 F.Supp.2d 1090.) Congress intended the consistency provisions to play a crucial role in motivating the states to cooperate with the federal government under the CZMA. (*Southern Pacific Corp. v. California Coastal Commission* (N.D. Cal. 1981) 520 F.Supp. 800, 803.) This enhancement of the power of the coastal states was to be limited only by matters of overriding national interest. (*Ibid.*)

In giving the states the substantive as well as procedural right to review federal activities and federally approved activities, Congress expressly provided that the states could review activities which will affect the states' coastal zone whether directly or indirectly, individually or cumulatively, and primarily or secondarily. The breadth of the states' review includes all reasonably foreseeable effects which may be caused by the activity but which are later in time or farther removed in distance. (U.S. Congressional and Administrative News, 101st Congress, 1990 Volume 6, pp. 2675-2676.) This exercise in cooperative federalism has worked extremely well over the years, as NOAA points out in the June 11, 2003 notice. (Notice, p. 34853 [of the 10,600 EP's and over 6,000 DPP's, states have concurred with all but 14 which the oil companies were able to appeal to the Secretary of Commerce and which resulted in 7 decisions to override and 7 decisions not to override].) The current regulations, revised just three years ago, have proven workable and entirely satisfactory. Given the success of this cooperative effort, there is simply no need for the proposed changes.

Summary of Key Objections to the Proposed Changes

There are four key objections to the proposed changes to the regulations: the definition of federal agency activity, how a previously approved federally licensed or permitted activity is determined to have substantially different effects, how failure to substantially comply with an approved Outer Continental Shelf (OCS) plan is handled and the lack of deference to the state regarding coastal zone effects. The change in the definition of federal agency activity would limit state review to "proposals for action," thus attempting to eviscerate the recent Ninth Circuit

decision upholding the state's right to review federal activities on the OCS. The power to determine whether a previously reviewed activity has substantially different effects than anticipated would shift from a joint effort among the state, federal agency and applicant to solely the federal agency with some weight, but no deference, given to the state's position. Similarly, with regard to OCS plans, the power would shift from the Director of OCRM to the Minerals Management Service (MMS) to determine whether an approved OCS plan has not been substantially complied with; only if MMS determines that substantial compliance has not been achieved and an amended plan is necessary would federal consistency occur. Federal agencies would be considered the "experts" on coastal effects on the state's own coastal zone whereas the state would no longer be given the deference accorded to it under current regulations. The proposed changes will not result in improved decision-making, will result in more disagreements between the state and federal agencies and will inevitably result in increased litigation.

Specific Comments

The Attorney General provides the following specific comments for your consideration.

Rule Change 4: § 930.31(a). The proposed changes would narrow the definition of federal activities from "any functions performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities" to "any functions performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities, which includes a range of activities where the Federal agency makes a proposal for an action which initiates an activity or series of activities and if coastal effects are reasonably foreseeable." The addition of the phrase "makes a proposal for action" is troublesome since it could reduce the type of federal activity which may be subject to review for consistency. In the preamble, NOAA explains that the change is intended to eliminate review of pre-decision activities such as planning documents. However, the explanation goes on to mischaracterize the recent Ninth Circuit Court of Appeals decision, *State of California v. Norton*, 311 F.3d 1162 (9th Cir. 2002), in which the Court embraced a broad definition of federal activities subject to federal consistency review. The change appears to be a thinly veiled attempt to eliminate review of certain activities, such as lease suspensions, in direct contravention of the Ninth Circuit's decision. NOAA characterizes such federal activities as interim or preliminary and thus not rising to the level of a federal activity for purposes of consistency review. (Fed. Reg. Notice, p. 34854.) The Ninth Circuit expressly rejected the argument that lease suspensions do not grant new rights or authority and are merely ministerial. The Court held that the lease suspensions are discretionary and their approval involves the exercise of judgment and implicates policy choices. Because the decision to extend leases through the suspension process is discretionary, it does grant new rights to the lessees when, absent the suspensions, all rights would have terminated. (*State of California v. Norton*, *supra*, at p. 1173, fn. 6.)

The proposed change is also contrary to Congress's express statement in the 1990 amendments in which Congress unequivocally stated its intent to adopt a broad interpretation of federal activity subject to consistency review. Any federal activity is subject to consistency review if it will affect any natural resources, land uses or water uses in the coastal zone and no federal agency activities are categorically excluded from this requirement. As Congress stated:

> "The question of whether a specific federal agency activity may affect any natural resource, land use or water use in the coastal zone is determined by the federal agency. The conferees intend this determination to include effects in the coastal zone which the federal agency may reasonably anticipate as a result of its action, including cumulative and secondary effects. Therefore, the term "affecting" is to be construed broadly, including direct effects which are caused by the activity and occur at the same time and place, and indirect effects which may be caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable." (U.S. Code Congressional and Administrative News, 101st Congress, 1990 Volume 6, pp. 2675-2676.)

Congress intended the law to have a broad reach in order to provide the states with the maximum participation in the future of their coasts. NOAA should not undermine Congressional intent by adopting a crabbed interpretation of federal agency activity.

Rule Change 9: § 930.51(e). The proposed change would limit the state's review of federally licensed or permitted activities where there are substantially different effects than previously contemplated and a new or amended submittal is warranted. Where an activity was previously approved, the federal agency (not the state) would determine whether the effects are substantially different and warrant state review. Although the state's opinion would be given considerable weight, it would not be given any deference. NOAA proposes this change because it considers the federal agency, rather than the state, to be the expert on whether a permitted activity is having different anticipated effects. However, this change substantially erodes the state's authority and its ability to review federally licenses and permitted activities which are not proceeding as originally represented or which are having unexpected effects. It will likely encourage disagreement and lead to litigation. It is also contrary to Congress's expressed intent that the federal consistency process be a joint and equal partnership between the state and Federal agencies. NOAA states in the preamble that the "expert permitting Federal agency" will make the determination about whether the effects are substantially different on the state's coastal zone. The state, rather than the Federal agency, should be considered the expert on the effects on the state's coastal zone and whether the effects are substantially different than previously reviewed.

Rule Change 17: § 930.85(c). The proposed change would shift the power from the

Director of OCRM to MMS to determine whether an OCS plan has not been substantially complied with and whether an amended plan must be reviewed by the state for consistency. NOAA states in the preamble that this is needed to clarify that MMS must make the determination whether a plan has been substantially complied with or not. Thus, MMS will determine whether a new or amended OCS plan will be required, without input from the affected state. In the 2000 rule changes to these regulations, NOAA stated in the preamble that one "federal agency had commented that the CZMA does not authorize NOAA to require OCS plan amendments. NOAA disagrees. This is an existing regulatory requirement and is mandated by the CZMA, CZMA § 307(c)(3)(B)." (Fed. Register Vol. 65, No. 237, p. 77148.) NOAA now proposes to abdicate its responsibilities to MMS.

Also in the 2000 rule changes, NOAA added section 930.65 which authorizes the state to monitor federally licensed and permitted activities to determine whether they are not being conducted as originally proposed and will cause substantially different effects. NOAA reasoned that this would provide the state with a "more meaningful opportunity" to address such instances; indeed, NOAA explained:

> "Previously, states could only request that the Federal agency take remedial action. If a Federal agency does not take remedial action, the State agency can request that the Director find that the effects of the activity have substantially changed and require the applicant to submit an amended or new consistency certification . . . or comply with the originally approved certification. This change mirrors the existing remedial action section of subpart E (*see* section 930.86 [sic - should be 930.85]) and, like section 930.86 [sic], is not expected to be used frequently. However, the procedure exists to ensure that federal license or permit activities continue to be conducted consistent with a management program." (Fed. Register Vol. 65, No. 237, pp. 77147- 77148, emphasis added.)

NOAA's rationale for adding the remedial section 930.65 now supports retaining section 930.85, the remedial section upon which section 930.65 was modeled. Section 930.85 was not intended to be used frequently, if at all, because it was intended to ensure compliance with OCS plans. Changing this remedial provision is a huge step backward; it would greatly reduce the state's ability to insure that OCS plans are carried out as proposed and approved. NOAA should retain the provisions of 930.86 which provide the state "with a more meaningful opportunity" to address instances where the state claims an OCS plan is not being substantially complied with and additional consistency review is mandated. Again, this change is inconsistent with both the letter and the spirit of the CZMA. Rather than fostering cooperation and giving the state a truly meaningful way to insure OCS plans continued compliance with the state's management program, this change would reduce the state's role and abdicate the Director's responsibility in

favor of MMS.

Rule Change 21: § 930.128. The proposed change would require the Secretary of Commerce to give greater weight to Federal agencies in administrative appeals where they provide comments within their area of expertise. NOAA's proposal ignores the expertise of the state in coastal planning and permitting issues. This change, along with the other changes noted above, reduce the deference accorded to the state under the current regulations and elevate the input of federal agencies. Congress intended the states to play an equal role in determining the fate of their coastal zones except in the most unusual circumstance: when either, after a judicial decision finding a federal activity to be inconsistent with a state's management program, the President determines that inconsistent activity is in the paramount interests of the United States or, with regard to OCS plans, the Secretary of Commerce determines that the plan's activity is necessary in the interest of national security. (16 U.S.C. § 1456 (c)(1)(B) and (c)(3)(B)(iii).) NOAA should not thwart Congress's intent by adopting narrow interpretations of laws intended to have a broad reach.

There are other process-related problems with the proposed rule changes. The Attorney General understands that the state agencies charged with implementing the CZMA in California will be commenting separately on the proposed rule change and urges NOAA to work with the appropriate state agencies to insure that this cooperative process works for all concerned parties in order to further the laudable goals of the CZMA.

In conclusion, the Attorney General urges NOAA to decline to adopt the proposed changes to the Federal Consistency regulations. The existing regulations have worked well over time to further the goals of the CZMA. There is simply no need for changes at this time. Thank you for considering these comments. If you have any questions, please do not hesitate to call.

Sincerely,

JAMEE JORDAN PATTERSON
Supervising Deputy Attorney General

For BILL LOCKYER
Attorney General

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