August 25, 2003

Mr. David Kaiser, Federal Consistency Coordinator
Coastal Programs Division
Office of Ocean and Coastal Resource Management
NOAA
1305 East-West Highway, 11th Floor
Silver Spring, MD 20910
CZMAFC.ProposedRule@noaa.gov

Re: Coastal Zone Management Act Federal Consistency Regulations – Proposed Rule [Docket No. 030604145-3145-01]

Dear Mr. Kaiser:

Clean Ocean Action is submitting the following comments regarding proposed changes to the Coastal Zone Management Act's (CZMA) Federal Consistency provision (Federal Register, Vol. 68, No. 112, Wednesday, June 11, 2003, pp. 34851-34874, inclusive.) Clean Ocean Action (COA) is a coalition of more than 150 business, fishing, conservation, citizen, and water recreation organizations in the mid-Atlantic, and is headquartered in Highlands, New Jersey. Clean Ocean Action has a long track record of involvement with the CZMA, and the consistency provision, within the state of New Jersey and in the national arena.

Clean Ocean Action ***strongly*** objects to and demands withdrawal of the changes to the consistency provision proposed by the National Oceanic and Atmospheric Administration (NOAA). They are unwarranted, unwanted, and unacceptable. Indeed these proposed changes are at the command of the oil and gas industry who have long sought to undermine states' ability to govern their own coastal destinies.

Please note that in addition to these substantive comments, we incorporate and support by reference comments on the proposed regulatory changes that are being submitted by the Coast Alliance, et al, and by the Environmental Defense Center, et al.

Clean Ocean Action strongly opposes the proposed changes to the consistency provision because they are a direct assault on fundamental rights of states, local governments, and citizens to assert governance over activities that may affect our coast which would result in greatly diminished protections for the coasts and oceans, and the living resources they support. The changes would make it far easier for risky activities to take place in the oceans, such as offshore oil and gas exploration and drilling activities. Oil and gas drilling and exploration can greatly harm air and water quality; fisheries, shellfisheries, and other wildlife; coastal and ocean water quality; and coastal land and nearshore resources. Unwise energy development, as well as

other risky coastal and ocean actions, poses the potential for massive environmental and economic degradation. The economies of coastal states and shore and marine related businesses dependent on clean and healthy oceans and coasts would be placed directly at risk by the proposed changes to the consistency provision.

In sum, Clean Ocean Action objects the proposed changes to the consistency provision for the following reasons:

- ***The changes are unnecessary and unwarranted***. The consistency provision enjoys an enviable track record of success. Furthermore, the CZMA program was thoroughly re-evaluated by NOAA during a recent five-year period of review and comment. This review resulted in revisions to the provision in 2001. These changes are not based on need.

- ***The responsibility entrusted to states to be stewards of coastal resources is undermined by the proposed changes.*** Federal agencies are given expanded authority at the expense of state resource management, including through participation by local governments and citizens.

- ***The proposed changes would undercut a state's ability to make prudent, fact-based determinations about potential threats to its coast and ocean resources from proposed activities.*** The proposed changes remove requirements that fundamental information about potential impacts from offshore energy activities be provided to states that help states make informed, prudent decisions about potential impacts on coastal and ocean resources. The changes would blindfold states and then require them to make rapid, and dangerously uninformed, determinations as to the safety of proposed oil and gas operations and other proposed activities.

- ***The proposed changes are the product of political pressure brought to bear upon NOAA by Vice President Cheney's Energy Task Force, some federal agencies, and the oil and gas industry.*** In the opening paragraph of the Federal Register notice, NOAA states that, "NOAA is proposing this rule to address the CZMA-related recommendations of the [Vice President Cheney] Energy Policy Development Group's Energy Report . . ." (68 Fed. Reg. 34851) It is reprehensible that Vice President Cheney's Energy Task Force, other Administration officials, and the oil and gas industry are pressuring NOAA to roll-back ocean protections that have been a part of the Coastal Zone Management Act for more than 30 years. The proposed changes would fundamentally alter the careful balance between state and federal interests, and environmental protection and energy development, that has been in place since the CZMA was signed into law by President Nixon, and reauthorized under President Reagan and the first Bush Administration. The proposed changes would be a green light for energy development interests who would have a clear shot at fragile coastal areas and pristine ocean waters that have been protected by law and practice for decades through the consistency provision and the CZMA.

Below are COA's detailed comments.

1. <u>The proposed changes are unnecessary and unwarranted</u>.

NOAA notes that it is the consistency provision – along with federal funding – that draws states into participating in the CZMA. To date, 34 of the 35 eligible states and territories have federally approved state coastal management plans through the CZMA (68 Fed. Reg. 34852). States join the

CZMA Program because, in large part, it provides an opportunity for coastal states to be partners with the federal government in making crucial coastal and ocean management decisions. In return for crafting comprehensive management programs that meet federal standards, states are given the authority to review federal actions, or federally licensed or permitted actions, that may have an effect on coastal and ocean resources for which states have taken pains to develop management plans. Thus, states are players in helping to determine the future of their marine resources.

By every measurement, the consistency provision is an excellent management tool -- and a harmonious one. The provision enjoys an enviable level of concurrence between the states and federal government. NOAA notes that, "While States have negotiated changes to thousands of Federal actions over the years, States have concurred with approximately 93% of all Federal actions reviewed." (68 Fed. Reg. 34852)

It is strange that in the Federal Register notice in which NOAA proposes sweeping changes to the consistency provision, the Agency simultaneously provides compelling factual evidence that no changes – sweeping or otherwise – are actually needed. A near universal concurrence is enjoyed by the provision. Moreover, NOAA cites example after example of the checks and balances between state and federal interests that have been hammered out in the CZMA and consistency provision over the years (68 Fed. Reg. 34853-34854).

In fact, the checks and balances are working well. NOAA notes that in the more than 30-year history of the CZMA, "there have been only 14 instances where the oil and gas industry appealed a State's Federal Consistency objection to the Secretary of Commerce and the Secretary issued a decision . . . . Of the 14 decisions . . . . there were 7 decisions to override the State's objection and 7 decisions not to override the State." (68 Fed. Reg. 34853) Further, even after Congress acted to strengthen and clarify the consistency provision in the 1990 amendments to the CZMA, every lease sales offered by Minerals Management Service (MMS) since 1990 "have proceeded under the CZMA Federal Consistency provision." (68 Fed. Reg. 34853). Since the 1990 amendments, there have been six State objections to OCS plans and "in three of those cases, the Secretary did not override the State's objection. In two of the cases the Secretary did override the State allowing MMS approval of the permits . . . and in one case the State objection was withdrawn." (68 Fed. Reg. 34853-34854) The presidential exemption, which was added to the statute in 1990, has never been used and as a final avenue for resolving any differences that arise between states and the federal government, mediation is offered (68 Fed. Reg. 34854).

Moreover, NOAA undertook a thorough analysis of the consistency provision and spent five years seeking input from a variety of stakeholders, including states, environmental groups, fishermen, citizens – as well as oil and gas industry representatives. The result of the five year deliberation were changes to the consistency provision in January 2001. There is no need to revisit this provision so soon after a multi-year examination has been recently completed and any needed modification was made at that time.

The track record for the consistency provision speaks for itself. As the saying goes, "if it ain't broke – don't fix it."

2. The responsibility entrusted to states to be stewards of coastal resources is undermined by the proposed changes.

The proposed changes to the consistency provision would place ocean and coastal resources – which already face a myriad of threats – at risk from unwise and indefensible oil and gas exploration and development activities, as well as other proposals. The entire proposal seeks to weaken the protections that are currently in place for marine resources by hobbling the role that states can play in assessing threats to coastal resources and acting accordingly. In this way, states' rights are severely curtailed by the NOAA proposal, and will severely undercut the ability of local governments and citizens to be heard. The following is an overview of the changes that NOAA proposes to make that would limit State's' rights.

Proposed Rule:

- **930.31(a) (68 Fed. Reg. 34854) Clarify "effects test."**

Practically, this would create exemptions that would preclude State review of certain activities, including Outer Continental Shelf (OCS) 5-Year Plans and oil lease suspensions. The idea is that activities leading up to an action would be exempt from state review. This would violate the CZMA ban on categorical exemptions. It would also violate the intent of the 1990 amendments to expand the right of state consistency review to include activities that may result in indirect, secondary, cumulative and reasonably foreseeable effects. Also this would violate the State of California v. Norton decision requiring case-by-case review for projects, including suspensions.

Indeed, NOAA suggests that, "Not all 'planning' or 'rulemaking' activities are subject to Federal Consistency . . . " This is a huge swathe of "pre-action" activities that NOAA would exempt from state consistency review, including a rulemaking activity itself. As an example, NOAA uses a Navy proposal to construct a pier, and argues that the Navy's compliance – or lack thereof – with crucial environmental statutes, such as the National Environmental Policy Act and the Endangered Species Act, would not be "Federal agency activities subject to Federal Consistency." The only activity which the state could review would be the proposal to build the pier. Whether or not that proposal comported with environmental law, and to what extent it did and in what manner, would not be subject to state review. This would remove from the state a huge source of information regarding the very environmental impacts with which the state is most deeply concerned.

There is no reason that states should not be able to review activities that lead up to a proposed action. The activities are part of the record, and have helped inform and describe the action. In fact, in a move that is as disturbing as NOAA's proposal, other federal agencies are attempting to require state and other entities to comment on activities leading up to actions in order to be allowed to comment on the final action itself. For example, the U.S. Army Corps of Engineers sponsored a study by the National Research Council: Special Report 262, *A Process for Setting, Managing, and Monitoring Environmental Windows for Dredging Projects (*Pre-Publication Copy October 2001.) This study recommends that essential dredging decisions should be made by a stakeholder group that includes state agency representation, and that the stakeholder group should meet to hammer out any issues in advance of issuing proposals for dredging and/or disposal. In the words of the study, "Agencies involved in these processes should integrate the work of the [Stakeholder Group] into their assessment of proposed projects. ***There should be no surprises . . .*** (emphasis added)" (NRC 2001.) In essence, the NRC study suggests that states must

participate in all the deliberations, meetings, and discussions leading up to dredging proposals in order to be able to participate in the actual "action" that is eventually taken. This approach is as wrong-headed as the proposed NOAA approach, which is the opposite one of barring state participation and review of pre-action activities. States should be neither compelled nor barred from activities that inform proposed actions. States cannot be shoved to the table under one federal scenario, and pushed away from it under the other. Such an approach would inevitably lead to haphazard coastal and ocean management, and a resulting diminishment of resource health.

Proposed Rule:

- **930.31(d) 68 Fed. Reg. 34855 <u>General Permits</u>.**

This proposal would actually bar states from treating general permits as a Federal license or permit activity. Currently, states may review general permits to determine if they are consistent with the state plans "to the maximum extent practicable" *or* states can review general permits to determine if they are fully consistent with state plans. Obviously, the latter is a more environmentally protective standard, and it is this standard that NOAA would specifically disallow states from using to review general permits. Further, if a state concurred with a consistency determination for a general permit, then the state would waive its rights to subsequently review individual uses of the general permit. This would require the state to issue a *carte blanche* approval, from which there is no escape or alternatively, to object to other federal agency actions merely to keep alive the state's ability to review subsequent actions. Ironically, as is the case throughout the proposed changes, this would lead to more, not less, strife.

In terms of the ocean and coast, if a state lost its ability to review subsequent individual uses of a general permit, all sorts of actions that are harmful to the environment could move forward through the auspices of a general permit. What is discussed in a general permit could mutate radically in an individual permit. States cannot be foreclosed from reviewing individual permits: critical coastal and ocean resources are at stake.

Proposed Rule:

- **<u>930.35(d) 68 Fed. Reg. 34855 General Negative Determination.</u>**

This would provide federal agencies with the discretion to determine if repetitive activities that, on an individual, case-by-case basis or cumulatively, cause coastal effects. Consistency reviews should be required each time. The NOAA proposal would give too much discretion to federal agencies by categorically excluding activities from review. This proposal, like others in this package, would present the state with recourse either through conflict resolution or litigation.

Proposed Rule:

- **930.51(e) 68 Fed. Reg. 34856 <u>Limiting of State's Rights</u>.**

NOAA refers to this proposed change as a "clarification" when it is, in fact, a re-write of the current standard. In determining whether the effects of a renewal or major amendment are substantially different than those previously reviewed by a state, the standard is proposed to be changed from "the opinion of the State agency's views shall be accorded deference" to one of mere consultation with the state. The state is once again demoted as a partner in coastal management, which runs directly counter to the intent of the CZMA, and the promise that it makes states when they voluntarily choose to join it.

3. The proposed changes would undercut a state's ability to make prudent, fact based determinations about potential threats to its coast and ocean resources from proposed activities.

These proposed changes, when taken in sum, whittle away at the most important tools that states have to ensure that proposed actions are not harmful to precious coastal and ocean resources. States would be denied critically important – indeed, fundamental – information necessary to prudent decision-making. NOAA would approach this through two categories of attacks: shortened timeframes and substituting 'checklists' of information for substantive reviews of information.

Proposed Rules:

- 930.41(a) 68 Fed. Reg. 34855-34856
- 930.60 68 Fed. Reg. 34857
- 930.77(a) 68 Fed. Reg. 34858

This package of changes would require states to only determine if a checklist of documents have been provided as part of the permit application process, rather than determine if the documents provide the necessary information. The substantive adequacy of the information is not to be reviewed by the states, only the receipt of documents bearing, evidently, the correct labels and titles. This is analogous to a surgeon limiting his actions to merely checking the heart to see if it is still pumping, rather than checking to see if the valves are functioning properly, if any of the arteries are clogged, what the blood pressure might be, etc. A superficial checklist review of received documents is no substitute for the receipt of meaningful information.

Adequate information is the foundation on which all consistency determinations rest. Having a permit applicant assert that adequate information is being provided is no guarantee that it is in fact adequate. Indeed the applicants' incentive is to provide the minimal information as cheaply as possible—it is setting up a system based on conflict of interest. For a state to conduct a careful, prudent and indeed balanced consistency review, it must have complete information. It can only make that determination by reviewing what it has received in depth, not merely on the surface.

NOAA seeks to further limit state review and decision-making capacity by beginning the 60-day review clock when the information provided by the federal agency in the "checklist" is received by the state. The state must notify the federal agency within 14 days of receipt of the "checklist" that additional information is required; e.g., that the "checklist" failed to provide adequate data. Starting the clock ticking when the materials are received by the state – rather than reviewed to determine if the materials are adequate -- encourages the already scandalous practice of permit notices being filed before weekends and federal holidays to help run down the clock. Precious review days can be lost to weekends and holidays, and when only 14 days are allowed for a state to plow through information to determine its adequacy, every lost day can wind up costing the ocean and coasts a great deal.

The current process is a collaborative one. States have limited resources to respond within 14 days to the receipt of information, and current regulations allow the needed flexibility. Within that initial 14 day period, it is possible that states will not have all the needed information, such as NEPA and ESA documents, which would result in crucially important information being excluded from state review.

In addition, once the checklist of information is received by the state from an applicant, the six-month review period begins ticking away. NOAA states that, ". . . . the State's determination of whether the information provided by the applicant . . . . is complete, is not a substantive review. Instead it is a 'checklist' review to see if the application, description of the activity, the coastal effects, the evaluation of the State's enforceable policies, and specific information described in the State's federally approved program are included in the submission to the State agency.. . . This review does not determine or evaluate the *substantive adequacy* of the information." In other words, if NOAA were an agency leasing dump trucks to contractors, it would remove the requirements that the driving record of the driver is clean.

Further, states would not be allowed to stop, stay or otherwise alter the time-clock except by written agreement of the applicant. For OCS plans, the state may request additional information only within the first three months of the six-month review period. This is an unconscionable limit on review and state participation, in a sense the clock itself becomes a ticking time-bomb for states and their coastal programs. Due to this truncated timeframe, opportunity for public hearings, public comment, and local government review are severely restricted if not sacrificed entirely.

Proposed Rules:

- 930.58(a)(1) 68 Fed. Reg. 34856
- 930.58(a)(2) 68 Fed. Reg. 34857
- 930.76(a)+(b) 68 Fed. Reg. 34858

These proposed rules address the uses of "checklists" of information as substitutes for actual careful reviews of the substantive information. For example, the requirement that applicants *secure all applicable state permits* as necessary data and information is not included as part of the checklist, only that states' permit ***applications be submitted***. Another example, for OCS plans, NOAA would not add language requiring that NEPA documents be included in the "checklist."

Proposed Rules:

- 930.125 68 Fed. Reg. 34859
- 930.127 68 Fed. Reg. 34859
- 930.129 68 Fed. Reg. 34859
- 930.130 68 Fed. Reg. 34859

NOAA announces in these proposed changes that it will strictly adhere to its new, shorter time periods for developing the decision record. Moreover, the public and other parties will only get one opportunity to provide their arguments to the Secretary of Commerce. Changes would be made to the dismissal, remand, stay, and procedural override provisions. And 270 days would be provided as a definitive date by which the Secretary would close the decision record in appeals filed from State objections.

All told, these proposed changes to current authorities that states have through the consistency provision would grossly hamper a state in making an informed, careful, and data-driven decision about the propriety of a proposed activity that may have coastal or ocean effects. NOAA is proposing that states do their job with less information, less time, and less authority. This is a recipe for disaster for the coasts and oceans.

4. The proposed changes are the product of political pressure brought to bear upon NOAA by Vice President Cheney's Energy Task Force, some federal agencies, and the oil and gas industry.

As noted above, NOAA directly attributes this proposed rulemaking to Vice President Cheney's Energy Report. This is stated in the opening lines of the Federal Register notice. Moreover, at 68 Fed. Reg. 34859, NOAA states that it "issued an ANPR on July 2, 2002, primarily to address issues raised by the [Vice President Cheney] Energy Report . . ." It further notes that the comments that it received in response to this 2002 Advanced Notice of Proposed Rulemaking were uniformly against re-opening the consistency provision, with the exception of "two Federal agencies and the oil and gas industry representatives . . . " (68 Fed. Reg. 34860) All commenters, with the exception of the two Federal agencies and oil and gas industry representatives, "urged NOAA to take no action because the recent [2001] rulemaking was comprehensive and further rulemaking is unwarranted as no problems have emerged with the existing regulations." (68 Fed. Reg. 34860).

It is clear that pressure from the oil and gas industry, along with Vice President Cheney's Energy Report, are to blame for these unwarranted and needless proposed changes to consistency. These interests are willing to play fast and loose with America's irreplaceable coastal and ocean resources.

In conclusion:

Clean Ocean Action and the citizens and organizations it represents calls on NOAA to resist these blatant attempts to dismantle ocean and coastal protections that have been in place through Republican and Democratic Administrations alike, for more than 30 years. Withdraw the proposed changes and leave the current CZMA unaltered.

Sincerely,

Cynthia A. Zipf
Executive Director

Beth A. Millemann
National Policy Coordinator

cc: New Jersey Delegation
open letter