



August 25, 2003

The Honorable Donald Evans
Secretary
United States Department of Commerce
14th Street and Constitution Avenue, NW
Washington, DC 20230

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
Silver Spring, MD 20910

RE: Proposed Rulemaking Amending the Coastal Zone Management Consistency Regulations (15 C.F.R., published in the Federal Register, Volume 68, No. 112 on June 11, 2003).

Dear Secretary Evans and Mr. Kaiser:

Attached are comments drafted by the Coast Alliance on behalf of 24 local, regional and national organizations concerned about the protection of our valuable and sensitive coastal resources. The Coastal Zone Management Act and its consistency regulations are critical for the protection of America's coastal ecosystems, and we therefore have grave concerns about this proposal to weaken the regulations. We appreciate your careful and thorough consideration of these comments.

Sincerely,

Dawn Hamilton
Executive Director
Coast Alliance

600 Pennsylvania Ave., SE • Washington, DC 20003 • 202.546.9554
email: coast@coastalliance.org

**Alaska Wilderness League * American Littoral Society * American Rivers * Clean
Ocean Action * Coast Alliance * Columbia River Crab Fishermen's Association *
Cook Inlet Keeper * Environmental Defense * Environmental Defense Center *
Gulf Restoration Network * Hudson Riverkeeper * Marine Conservation Biology
Institute * National Audubon Society * Natural Resources Defense Council * North
Carolina Coastal Federation * Northwest Environmental Advocates * Oceana * The
Ocean Conservancy * Oregon Shores Conservation Coalition * Save the Sound *
Scenic Hudson * Sierra Club * South Carolina Coastal Conservation League *
South Carolina Environmental Law Project**

August 25, 2003

The Honorable Donald Evans
Secretary
United States Department of Commerce
14th Street and Constitution Avenue, NW
Washington, DC 20230

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
Silver Spring, MD 20910

Dear Secretary Evans and Mr. Kaiser:

Coast Alliance is pleased to submit these comments in response to the Proposed Rulemaking amending the Coastal Zone Management Consistency Regulations (15 C.F.R. Part 930, published in the Federal Register, Volume 68, No. 112 on June 11, 2003), on behalf of the 24 signed organizations, all of which strongly object to the proposed revisions. Less than three years ago, after five years of careful and deliberate consultation among all stakeholders, new consistency regulations were crafted that strike a finely tailored balance among the competing uses of the nation's coastal resources. The current regulations have proven extremely effective in maximizing coordination between states, federal agencies, and federal applicants. There is no evidence that federal applicants or federal agencies have encountered any problems navigating the consistency review process since the 2000 revisions. In fact, the limited controversies surrounding the CZMA consistency provisions have related to the nature of the specific projects, and not the regulations themselves.

Rather than “clarify[ing] some sections and provid[ing] greater transparency and predictability” to the consistency regulations,¹ as claimed in the Proposed Rule, the proposed revisions simply ease the way for accelerated oil and gas development and other damaging projects detrimental to the coastal zone, and greatly undermine the role of the states in the coastal zone management process.

NOAA proposed the changes based on the CZMA-related recommendations in the “Report of the National Energy Policy Development Group” (Energy Report). The proposed rule cites the Energy Report’s claim that there is a lack of clearly defined requirements and information needs from federal and state entities, and uncertain deadlines for completing the procedures of the CZMA. Yet no information is provided to support these claims. We strongly object to what is clearly a one-sided response to requests from the energy industry.

REGULATIONS SIGNIFICANTLY REDUCE STATES’ AUTHORITY TO DETERMINE CONSISTENCY, AND UNDERMINE THE PUBLIC’S RIGHT TO PARTICIPATE

In the CZMA, Congress struck a delicate balance between state and federal authority over management of coastal zones. The CZMA and its consistency regulations have a proven record of success in helping create coastal management policy that is both protective of our coastal resources and addresses our nation’s energy demands. The proposed regulations would tip the scales in favor of federal projects and activities, and would severely undermine the ability of the states to ensure that federal activities are consistent with their coastal management programs, and to object to offshore drilling, dredging or other projects that could damage the coastal environment.

The proposed changes would significantly shorten the timeframe for consistency reviews, despite the fact there is no evidence that consistency review processes have resulted in delays in delivering energy resources.² In addition, the proposed changes would impose limits on the types of information a state may require in order to determine the consistency of a proposed project with its CMP,³ and eliminate states’ right to determine the adequacy of the data and information submitted by a federal agency or applicant.⁴

The new timelines proposed in the amendments would not give states sufficient time to evaluate the adequacy of documentation submitted by a federal agency or applicant for consistency review. In addition, it is impractical and imprudent to attempt to precisely identify the types of information a state will need in order to evaluate the consistency of a

¹ 68 Fed. Reg. 34851 (2003).

² See e.g. Rule Change 7, 930.41(a), State Agency Response; Rule Change 12, 930.60, Commencement of State Agency Review; Rule Change 15, 930.779(a), Commencement of State agency review and public notice.

³ See e.g. Rule Change 10, 930.58(a)(1), Necessary Data and Information; Rule Change 11, 930.58(a)(2), Necessary Data and Information (State permits); Rule Change 14, 930.76 (a), Necessary Data and Information for OCS Plans.

⁴ See e.g. Rule Change 7, 930.41(a), State Agency Response; Rule Change 12, 930.60, Commencement of State Agency Review; Rule Change 15, 930.77(a), Commencement of State Agency Review.

specific project. The types of data and information needed, as well as the level of specificity, will vary based on the nature of a project and the potential effect it will have on the coastal zone. Restricting the types of information available to the states across the board will significantly impair the effectiveness of the consistency review process. Further, by depriving the states the ability to ensure they have adequate information, the public's right to participate is compromised as well.

THE REGULATIONS WOULD ELIMINATE CONSISTENCY REVIEWS FOR CERTAIN ACTIVITIES

The Proposed Rule is in stark contrast to the intent of the CZMA, particularly the 1990 amendments, which were enacted to broaden the scope of activities subject to the consistency review process. The regulations put in place in 2000 were developed specifically to be consistent with Congress' intent in the 1990 amendments, and further established the broad reach of the consistency provisions. The Proposed Rule recommends several changes that would effectively exclude an array of activities from consistency review, including decisions related to offshore oil and gas development. Such exemptions are in clear violation of the CZMA. Unlike other environmental procedural statutes, such as the National Environmental Policy Act, the CZMA prohibits categorical exemptions in all cases. This prohibition was confirmed in *California v. Norton*, in which the court stated: "Whether a particular federal action affects the coastal zone is a factual determination' to be made on a 'case-by-case' basis."⁵

Narrowing the definition of "federal activity": Rule Change 4, section 930.31(a), Federal Agency Activity, would redefine the type of federal activity that triggers a state consistency review. We disagree that the proposed change would not alter the current application of the definition of federal activity. In fact, by modifying the definition of federal activity, the revision would disqualify entire categories of federal activities from state consistency reviews.

In the Explanation of Proposed Changes, the administration specifies that OCS lease suspensions would not require consistency review under the proposed change, that they are merely "ministerial in nature," and that consistency review would only be triggered when production proposals for individual leases are made. While this is offered merely as a convenient example, it completely contradicts the appeals court decision in *California v. Norton*.⁶ That decision required the Minerals Management Service to submit suspensions of undeveloped leases off the coast of California for consistency review. The proposed change to section 930.31(a) brashly attempts to preempt the application of that decision in similar situations in the future.

In reauthorizing CZMA in 1990, Congress affirmed the need for consistency reviews for offshore activities such as oil and gas lease sales. Subsequent lease suspensions, coming years after the original lease sales, must be subject to the same review, as circumstances

⁵ 311 F.3d. 1162, 1174, citing 65 Fed. Reg. 77125 (

⁶ 311 F.3d.1162 (Ninth Cir. 2002).

can and likely do change dramatically. While the decision in *California v. Norton* noted a distinction between the suspensions in that case from other possible situations where there had been a consistency review for the prior lease sales (there were none for the leases at issue in *California v. Norton*), that distinction was not the basis for the final opinion, and should not be relied upon for such a drastic change in the rules, or as an end-run around the opinion itself. In fact, the court explicitly “reserve[d] determination of California’s right to review a lease suspension affecting a lease that was itself subject to consistency review for decision on the particular facts of such a case if it should ever come before us.”⁷

The Explanation of Proposed Changes states that OCS five-year lease plans would be exempted from consistency review under the Proposed Rule as well. This too violates the intent of the 1990 CZMA amendments. In crafting the 2000 consistency rules, NOAA gave this issue significant consideration. The Final Rule stated specifically that five-year OCS plans must be subject to the CZMA federal consistency effects test. NOAA specifically pointed out Congress’ intent in 1990 to provide states the opportunity to review leasing activities, and Congress’ understanding that five-year OCS plans lay the foundation for those activities, including the amount and location of potential future development. We agree with NOAA’s position in crafting the 2000 rule when it found that allowing states to review five-years plans would help identify and reduce potential conflicts early in the process. NOAA also recognized at the time that under NEPA, five-year OCS plans are considered major federal actions with expected environmental effects.⁸

General Negative Determination: We strongly oppose the creation of a regulatory provision for “general negative determinations” in section 930.35(d). The CZMA requires a consistency review whenever effects on any land or water use or natural resource of the coastal zone are reasonably foreseeable. The 2000 rules specifically recognized the potential impact of cumulative effects of activities in the coastal zone, and as such, they remained subject to consistency review. Categorically excluding certain activities from consistency review based merely on the assumption they universally have no effect on the coastal zone would fail to protect against cumulative and secondary effects of activities over time. Federal activities and permits must be reviewed on a case-by-case basis.

Exempting “substantially different coastal effects”: Rule change 9, section 930.51(e), completely eliminates the authority of the state to share in the determination of whether the effects on the coastal zone from a renewal or major amendment are substantially different from the original consistency determination. Under the Proposed Rule, in cases where a project has been previously approved, the federal agency would be given exclusive authority to determine whether the change in activities will have an effect on the coastal zone. Having the sole responsibility for developing their own coastal management plans, states are the experts on those plans and on their coastal resources, and to that effect are in the best position to determine whether new activities will have

⁷ *Id.*, 1174.

⁸ 65 Fed. Reg. 77131-77132 (2000).

effects on a state's coastal resources. In addition, the proposed rule again offers no evidence that the state's current authority to significantly share in this decision-making process has unduly impeded any energy projects.

Precluding state reviews of changes in OCS plans: We have serious concerns about rule changes 16 and 17, sections 930.82 and 930.85(c). By giving the Minerals Management Service (MMS) exclusive authority to determine whether changes to an OCS plan are significant enough to warrant consistency review, rule change 16 could effectively preclude states from reviewing amended OCS plans for consistency with their CMPs. Similarly, rule change 17 precludes states from determining whether failures to comply with OCS plans are consistent with CMPs. In both of these cases, it is the states, not the Department of Interior, that are the experts as to whether activities comply with their coastal zone management regulations, and they should retain their authority to make those determinations.

Once again, we strongly urge NOAA not to adopt this unnecessary and significantly detrimental rule. The Proposed Rule stands in complete contradiction to the intent of the CZMA. It would undermine the effectiveness of the statute, which thus far has fostered successful partnerships between state and federal agencies, and created a productive balance among the competing uses of coastal resources. NOAA should withdraw the Proposed Rule and focus its efforts on putting the carefully crafted 2000 regulations to work.

Sincerely,

Cindy Shogan, Executive Director
Alaska Wilderness League

Cook Inlet Keeper

Tim Dillingham, Executive Director
American Littoral Society

Richard Charter, Marine Conservation
Advocate
Environmental Defense

S. Elizabeth Birnbaum, Director of
Government Affairs
American Rivers

Linda Krop, Executive Director
Environmental Defense Center

Cindy Zipf, Executive Director
Clean Ocean Action

Cynthia Sarthou, Executive Director
Gulf Restoration Network

Dawn Hamilton, Executive Director
Coast Alliance

Justin Bloom, Staff Attorney
Hudson Riverkeeper

Dale Beasley, President
Columbia River Crab Fishermen's
Association

William J. Chandler, Vice President
Marine Conservation Biology Institute

Bob Shavelson, Executive Director

Meeta Vyas, Vice President
Living Oceans Program

National Audubon Society

Sarah Chasis, Senior Attorney and
Director
Water and Coastal Program
Natural Resources Defense Council

Todd Miller, Executive Director
North Carolina Coastal Federation

Nina Bell, J.D., Executive Director
Northwest Environmental Advocates

Jay Nelson, Vice President for North
American Oceans
Oceana

Catherine Hazlewood, Clean Oceans
Program Manager
The Ocean Conservancy

P. Sydney Herbert, Secretary
Oregon Shores Conservation Coalition

Nina Sankovitch, Executive Director
Save the Sound

Warren P. Reiss, Esq., General Counsel
Scenic Hudson, Inc.

Carl Pope, Executive Director
Sierra Club

Melissa Ladd, National Issues
South Carolina Coastal Conservation
League

Jimmy Chandler, President
South Carolina Environmental Law
Project