Connecticut's comments on

NOAA's Proposed Changes to the Federal Consistency Regulations, noticed June 11, 2003
(68 Federal Register 34851, June 11, 2003[Docket No. 030604145-3145-01])

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in consultation with the Office of the Attorney General

SUBPART C--CONSISTENCY FOR FEDERAL AGENCY ACTIONS

RULE CHANGE 7
Section 930.41(a) - State Agency Response

The proposed language would establish a 14-day period for a State to determine and notify an agency sponsoring a Federal activity whether or not their submission contains the information required by section 930.39(a). If such notification is not issued by the State within 14 days of its receipt of a Federal submission, the review clock is deemed started on that initial receipt date. This is an extremely tight time frame, especially if the submission is voluminous and/or there has been little or no coordination with the State prior to Federal submission. While the proposed language continues to state that the determination of whether or not the information required by 930.39(a) is complete is not a substantive review, in practicality it is often not possible to sever the two types of review, especially with projects that trigger a review under NEPA. In those cases, the required information may be scattered throughout a NEPA document and a relatively thorough review is necessary to determine whether or not the submittal meets the minimal standards set forth in 930.39(a). The proposed rule should be changed to increase the amount of time to review for completeness to at least 30 days and to explicitly require that the applicant identify where the coastal consistency information can be found in the materials submitted. Additionally, to reasonably enable States to expedite the initial review for completeness, the rules should also include more specific standards for submissions to require that they be presented in a manner that makes it easy to discern whether or not the minimum information necessary has been provided.

SUBPART D--CONSISTENCY FOR ACTIVITIES REQUIRING A FEDERAL LICENSE OR PERMIT

RULE CHANGE 11
Section 930.58 Necessary Data and Information (State Permits)

This proposed rule change would remove "State or local government permits" from the list of necessary data and information that a State can identify in their management program as required for a complete Federal consistency submission. This may push applicants for Federal permits towards either concurrent applications or a Federal consistency concurrence request prior to filing a State or local permit application when a project requires a State or local government permit. The federal consistency review time frame as proposed by these rule changes is completely unrealistic for processing state permits. In Connecticut, there is a 30 to 45 day statutorily mandated public notice requirement for permit applications and such applications require substantial, detailed evaluation and analysis in order to ensure that statutory standards for

approval are met. Neither historic nor current agency staffing levels in this State have allowed processing of these permits within the existing slender window, much less that now proposed for Federal coastal consistency review. Given the current fiscal situation appertaining in this and many other States and the fact that even in fiscally "fat" years environmental programs have been chronically under-funded, this situation is unlikely to change, putting reviewing States at a disadvantage that these proposed rule changes will only exacerbate.

Concurrent submissions with no change in the time frames of the respective administrative processes will lead to a State making a decision on the federal consistency application prior to making a decision on the related State permit, and will result in the perception, if not the reality, that the State permit has been pre-judged. This is not likely to be acceptable to the regulated community. Accordingly, we have identified three alternatives, any of which would resolve this issue:

1. Federal consistency review should commence only after the State permit process is complete;

2. Concurrent submissions would only be acceptable if the timeline for federal consistency review is significantly extended to be consistent with the time it actually takes to process State and local permits. (Given the statutorily-mandated administrative processes, departmental resources, extremely lean staffing, and exceedingly heavy workloads, anything less than 12-18 months would be unreasonable.); or

3. The rules could be changed to provide States the ability to issue phased federal consistency concurrences with the preliminary or conceptual concurrence issued based on a Federal agency's federal consistency submission and the final coastal consistency concurrence issued as part of the required State permit. Denial for substantive inconsistency at either phase would be possible.

A phased approach appears to be the most reasonable of these alternatives and is not unprecedented in the Federal coastal consistency process as it is allowed under Subpart C--Consistency for Federal Agency Actions section 930.36(d).

RULE CHANGE 12
Section 930.60--Commencement of State Agency Review

Section 930.60(a) - It is unclear why "or extend the six-month review period" in the first line on page 8 is proposed for deletion. It seems that "staying the consistency time clock" is not the same as extending the review period. The former means "stopping the time clock" which presumably re-starts at the agreed upon time or action while the latter is not keyed to the time clock and, thus, it provides additional flexibility and could be beneficial to either the Federal agency or the State agency or, in many instances, both. Provided any alteration of the time frame is agreed to in writing by State agencies and applicants, the regulations should continue to provide for this flexibility.

Section 930.60(3)(b) - The proposed language for this section begins with "The State agency's determination that a certification and necessary data and information…is not a substantive review of the adequacy of the information provided." In most cases, it is virtually impossible to

determine whether or not "necessary data and information" has been submitted without performing a substantive review of the data and information provided. Thus, severing the substantive review of a consistency concurrence request from an evaluation of the adequacy of the information provided in support of a Federal action is generally not feasible and this language should be deleted from the final rule change.

The proposed language for this section references "…documents required by section 930.58…" However, that section of the existing regulations does not specify documents that must be submitted, but rather identifies the information that must be provided. The proposed language should be corrected.

SUBPART E--CONSISTENCY FOR OUTER CONTINENTAL SHELF (OCS) EXPLORATION, DEVELOPMENT AND PRODUCTION ACTIVITIES

RULE CHANGE 17
Section 930.85--Failure to comply substantially with an approved OCS plan

Section 930.85(b) - Although no changes are currently proposed to this section, recent review prompted by the proposed rule making has revealed that this section could be clearer as to who should be responsible for recommended remedial action. We recommend this subsection be clarified through the addition of language at the end of the next to last sentence. Thus, this sentence would read, "Such claim shall include a description of the specific activity involved and the alleged lack of compliance with the OCS plan, and request for appropriate remedial action by the licensee or permittee."

Section 930.85(c)

To clarify this section, we recommend the following modifications: 1) insert "or to the State's request for appropriate remedial action" between "…and applicable regulations" and "the person shall comply with…" in the third line of subsection (c); and 2) insert "if such has been prepared" between "…amended OCS plan (excluding proprietary information)" and "necessary data and information…" in the last sentence of the proposed language of this section.

SUBPART G--SECRETARIAL MEDIATION

RULE CHANGE 18
Section 930.121(c)--Alternatives on appeal (page 13)

The second portion of this section is added language that, if adopted, will prohibit the Secretary from considering any alternative that the State had not determined to be consistent with the applicable enforceable policies. It is unreasonable to expect a State to conduct a comprehensive analysis of alternatives to ensure complete consistency especially in complex projects which are not within the expertise of a coastal management agency. Further, it is unfair to require the State to commit to a finding of consistency on an alternative that necessarily will not have been fully developed or analyzed. However, it is often possible to identify alternatives with fewer impacts that, upon further study, may prove to be acceptable. Additionally, the consideration of alternatives should include those identified by the Secretary or any party to the appeal and not be limited to those the State identifies.

If the language is adopted as proposed, it seems entirely likely that an applicant for Federal activity could do a cursory "bare-bones" evaluation and propose an alternative that is clearly unacceptable to the State so that the alternatives analysis burden would fall to the State. The responsibility to conduct a reasonable alternatives analysis rightly belongs to the applicant, who has the original burden of proof and persuasion respecting its chosen proposal. The weight of legal authority in a variety of permit review schemes has consistently put the responsibility for the consideration of alternatives on the applicant.

RULE CHANGE 20
Section 930.127--Briefs and Supporting Materials

Section 930.127(a) – The proposed rule change would inevitably create a significant hardship on state coastal management programs owing to the short turnaround time for the filing of briefs and supporting materials. The thirty (30) day time period is not responsive to the large size and complexity of many projects that require coastal consistency review, nor the ability of agency staffs to marshal their own resources and necessary legal support for the preparation of these filings. The original text, requiring the agency to weigh the input of both the applicant and the State regarding the submission of briefs and supporting materials after consultation with the Secretary, is flexible and fair. The present text of the rule regarding scheduling is, in fact, more consistent with the proposed language in subsection (c)(1) which recites that the Secretary "has broad authority to implement procedures governing the consistency appeal process to ensure efficiency and fairness to all parties." No change is needed.

Section 930.127(d) - This a new section setting forth the burden for both the appellant and the State during an appeal to the Secretary. If adopted, this section would place the burden of submitting evidence in support of alternatives identified by a State on that State. With respect to coastal resource and/or coastal use issues, this may be reasonable, however, the regulations should make clear that the State is not required to submit evidence regarding the financial or technological viability of a State-identified alternative as that is generally outside of our areas of responsibility and expertise. The State should continue to have a responsibility to identify potential alternatives, if they exist, but the applicant/appellant should bear the burden of demonstrating that such alternatives are infeasible. This section should also clarify that the appellant bears the burden of persuasion in opposition to an alternative identified by the State.

Section 930.127(e) - This section allows the Secretary to "extend the time for submission of briefs and supporting materials only in the event of exigent or unforeseen circumstances." This begs the question of whether the time line for submittals can be extended if all parties agree, even if circumstances are not exigent or unforeseen. Additional flexibility is warranted here, and the proposed standard of "exigent and unforeseen circumstances" is simply too inflexible to be consistent with the Secretary's recognized obligation to be fair to all parties and, also, one may add, to the consistency appeal process.

Section 930.128(a) – The public and federal agency comment period is too short; thirty (30) days is inadequate for the public and government agencies to act; that is, to obtain materials, review them, work up comments, and, in the case of government agencies, to get comments through internal review channels and into final form for transmittal to the Secretary. This latter observation will make inevitable the filing of requests under subdivision (2) to reopen the period

for federal comment before the closure of the decision record. No less than sixty (60) days should be provided under subsection (a)

RULE CHANGES 22
Section 930.129 - Dismissal, Remand, Stay and Procedural Override

Subsection (d) of the proposed language, if adopted, will require a State to reconsider a denial within 20 days of remand of same by the Secretary. In every respect, this is a ridiculously short time frame for reasonable reconsideration of a project if significant new information is submitted to the Secretary. In fact, a twenty-day remand period completely subverts the notion that the new information is "significant" at all, thereby signaling that the remand period as a serious agency *review process* is illusory. State agencies would be hard-pressed to receive, assign, review, recommend internally, and issue official decisions on remand within so short a time frame. The current regulatory language is not only adequate, it is both flexible and consistent with the Secretary's acknowledged obligation to be fair to all parties.

Section 930.130(2)(ii) - This subdivision, purporting to expedite other environmental analyses conducted pursuant to NEPA or the Endangered Species Act, in connection with any extension of the proposed 270-day period for the decision record in a coastal consistency appeal is unnecessary, may infringe upon other coordinate agency processes, and worse, gives the impression that review pursuant to these two environmental statutes can and should be hurried along as interfering with the consistency review process. The Secretary should simply delete the phrase "on an expedited basis."

RULE CHANGES 18 THROUGH 23

Finally, the time limits set forth in the proposed language regarding Secretarial appeals and mediation in general are extremely short and are unrealistic in light of the increasing complexity of individual activities and the rapid changes in technology that must be researched and understood by reviewing agencies prior to rendering a decision.

The timeframes that NOAA has proposed for the Secretarial appeal process cannot be squared with one fundamental set of empirical data, which is the amount of time it has taken NOAA itself to produce decisions on coastal consistency appeals. The most important consideration behind the length of time it has taken to resolve past consistency appeals, one should properly assume, has been NOAA's determination that the quality of the review process should not be compromised. The proposed regulations indicate that NOAA's commitment to a fair and thorough consistency appeal process has changed. Thus, it appears to us that the drastic acceleration of and limitations on the Secretarial appeal process are designed to effect a substantive change in consistency decisions in favor of appellants and to the detriment of the States, and even of NOAA itself.