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

Dear Mr. Kaiser:

The following comments are submitted by the **Environmental Defense Center** ("EDC") on behalf of **Friends of the Sea Otter, Environment California (formerly CALPIRG), California CoastKeeper, Sierra Club Los Padres Chapter, Defenders of Wildlife, Get Oil Out!, League for Coastal Protection, California Coastal Protection Network, Santa Barbara ChannelKeeper, Citizens Planning Association of Santa Barbara County, and Santa Monica BayKeeper**. The EDC is a public interest environmental law firm that represents community-based organizations in issues affecting the environment and quality of life along California's Central Coast. EDC frequently represents clients in Federal Consistency matters before the California Coastal Commission and was co-counsel for the Environmental Intervenors in State of California v. Norton. EDC and our clients strenuously object to the Proposed Rule regarding the Coastal Zone Management Act ("CZMA") Federal Consistency Regulations because they are unnecessary and will negatively affect the ability of coastal States to review Federal activities and permits that may degrade or otherwise impact the States' coastal zones.

The Proposed Rule was issued in response to the "Energy Report" that was submitted to President Bush by Vice-President Cheney's National Energy Policy Development Group on May 16, 2001. The intent of the authors of the Energy Report was to encourage new domestic oil and gas development, "*particularly for energy development on the Outer Continental* Shelf,"[1] despite the severe impacts to the environment, coastal communities and economies that rely on clean air and water.

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[1] / National Energy Policy Development Group, Reliable, Affordable, and Environmentally Sound Energy for America's Future (Washington, D.C.: U.S. Government Printing Office, 2001, p. 8.)

Instead, the nation should be pursuing conservation, efficiency, and energy sources that are clean, renewable, and sustainable.

Citing concerns about timing and delays, the Bush Administration seeks to undo or weaken existing environmental protection policies. The proposed revisions to the CZMA regulations are one part of this overall effort to gut environmental protections and reduce public and State involvement in Federal oil development issues. In fact, however, the current Federal-State comity provided in the CZMA has not resulted in any unnecessary delays for the Federal administration or oil industry; to the contrary, the State consistency review process has afforded much-needed coastal and public review and led to improved projects and actions. The only major delays have occurred when Federal agencies denied States their right of review and the matter was diverted to litigation. (For example, see State of California v. Norton, 311 F.3d 1162 (9th Cir. 2000).) Many of the provisions set forth in the Proposed Rule would likewise circumvent State review and result in further litigation.

I. There is No Demonstrated Need to Revise the CZMA Regulations.

A. The 2000 Revisions Were Comprehensive and Adequate.

Following the CZMA Reauthorization Amendments of 1990 (hereinafter "1990 Amendments"), NOAA completed a thorough review and update of the CZMA regulations in December, 2000. (65 Fed.Reg. 77124 et seq.) The regulations went into effect January 8, 2001, a little over two years ago. There have been no statutory changes since January, 2001, that require or warrant further revisions. Nor have there been any problems implementing the 2000 revisions that warrant further changes at this time.

B. There are no Demonstrated Problems with the Current Federal Consistency Review Process.

There have been no documented problems associated with the 2000 CZMA regulations. The current proposal admits as much, acknowledging that most Federal actions have resulted in State concurrence: "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); "Most projects are approved by the coastal States and there is little litigation….offshore oil and gas exploration and development not only continues to occur, but flourishes….Coastal States continue to ensure that both the CZMA's energy development and resources protection objectives are met….It is important to note the statistics referred to above and acknowledge that States concur with most projects reviewed, including oil and gas projects" (68 Fed.Reg. 34860); "NOAA agrees that the States do not object to the great majority of projects reviewed and that of the few objections there are very few appeals to the Secretary" (68 Fed. Reg. 34862-3).

While there has been little overall obstruction of the Federal approval and permitting process, the current CZMA regulatory framework has afforded States the role intended by the CZMA as originally enacted in 1972 and as amended in 1990. As such, the States have been able to consult to the Federal agencies and negotiate with both the Federal agencies and private applicants to ensure that activities affecting the State's coastal zones are consistent with the Federally-approved State coastal management programs. The new proposal would weaken the States' position in this coordinated process and potentially undermine the States' and public's abilities to fully participate in a meaningful manner.

II. The Proposed Rule Conflicts with the Requirements of the Coastal Zone Management Act.

The Proposed Rule is inconsistent with the mandate of the CZMA to encourage and assist coastal States in the exercise of their authority over the lands and waters in the coastal zone, and to encourage the full participation and cooperation of the public, State, and Federal governments. 16 U.S.C. §§1451(i), 1452(2) – (4). State participation is provided through assistance in developing coastal management programs, and in implementing these programs in critical part through the Federal consistency review process. The Federal consistency review process is based on the tenet that, once a coastal State's management program has been certified by the Federal government as meeting specific national standards and requirements, any Federally conducted or approved activity that may affect the State's coastal zone must be reviewed by the State for consistency with such program.

The proposed revisions also conflict with the clear legislative intent of the 1990 CZMA Amendments, which were passed in order to clarify and expand the breadth of State review authority over Federal agency actions and authorizations that result in coastal zone effects. The 1990 Amendments provide that:

> "Because of their proximity to and reliance upon the ocean and its resources, **the coastal states have substantial and significant interests in the protection, management, and development of the resource of the exclusive economic zone that can only be served by the active participation of coastal states in all Federal programs affecting such resources** and, wherever appropriate, by the development of state ocean resources plans as part of their federally approved coastal zone management programs."

16 U.S.C. §1451(m), emphasis added. The 1990 Amendments also expanded the scope of State consistency review by eliminating the requirement that States show a "direct" effect on a State's coastal zone. 16 U.S.C. §1456(c)(1)(A). Accordingly, Congress gave States the right to review activities that would pose any indirect, secondary, cumulative or reasonably foreseeable coastal zone effects. The Proposed Rule violates these

intentions by limiting the activities subject to State review and by imposing burdensome procedural and scheduling requirements on consistency review.

The U.S. Supreme Court has held that regulations will be declared invalid if they are inconsistent with, or frustrate, Congressional intent. In U.S. v. Larionoff, 431 U.S. 864, 873 (1977), the Supreme Court ruled that, "regulations, in order to be valid, must be consistent with the statute under which they are promulgated."[2] In U.S. v. Cartwright, 411 U.S. 546, 557 (1973), the Court declared a regulation invalid when it held that that even if a contested regulation "is not, on its face, technically inconsistent" with the statute it can be held as invalid if "it is manifestly inconsistent with the most elementary provisions." The Supreme Court held similarly in Federal Election Commission v. Democratic Senatorial, 454 U.S. 27, 32 (1981), where it stated, "The courts are the final authorities on issues of statutory construction. They must reject administrative constructions of the statute, whether reached by adjudication **or by rule-making**, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." (Emphasis added.) Finally, in the case of N.L.R.B. v. Brown, 380 U.S. 278, 291 (1965), the Supreme Court held that "reviewing courts are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."

Courts have looked to legislative history to determine Congressional intent in such inquiries. Federal Election Commission, 454 U.S. 27, 32; Chevron USA, v. Natural Resources Defense Council, 467 U.S. 837, 842-843 (1984).[3]

In this case, the legislative history of the 1990 CZMA Amendments shows a strong intent to <u>expand</u> the scope of State consistency review, whereas the proposed regulatory changes act to <u>limit</u> State consistency review. The 1990 Amendments,

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[2] / The court held a federal regulation governing bonuses for armed service re-enlistment to be invalid because the regulation was "contrary to the manifest purposes of Congress in enacting the VRB [variable re-enlistment bonus] program" (Id.).

[3] / The 9th Circuit has held similarly in a number of cases. In Vierra v. Rubin, 915 F.2d 1372, 1376 (9th Cir., 1990) the Court of Appeals held that a court may invalidate an agency regulation if "legislative history reveals a clear expression of congressional intent that runs contrary to the regulation." In State of Cal. V. Block, 663 F.2d 855, 860 (9th Cir., 1981) the 9th Circuit held that the court's "primary task when testing the statutory authority of a challenged regulation must always be to determine the intent of Congress." And in Community Hosp. of Chandler, Inc., v. Sullivan, 963 F.2d 1206, 1210 (9th Cir., 1992) the court held that "an agency's regulations must be consistent with the overall intent behind a statute." The D.C. Circuit also requires that reviewing courts must read the words of a statute "in their context and with a view to their place in the overall statutory scheme," looking to the legislative history and intent for guidance. State of Ohio v. U.S. Dept. of the Interior, 880 F.2d 432, 441 (C.A.D.C. 1989).

consistent with the original intent of the CZMA, were intended to further involve the States in coastal management decisions. This is shown in the report by the Committee on Merchant Marine and Fisheries, which stated, "Congress envisioned a voluntary and cooperative federal-state program to protect coastal resources, uses and values from [population and development] pressures. The states were selected as the key to effective coastal management and protection, while the federal role was to encourage states to exercise their full authority over coastal areas by developing management programs." (Committee on Merchant Marine and Fisheries, June 11, 1990, H.R. Rep. No. 101-535, accompanying H.R. 4450.)

Congress also clarified the intention to provide a very broad scope of State consistency review. By deleting the requirement for a "direct" effect on the coastal zone, Congress extended State review 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." Id.

This language was incorporated into the CZMA regulations in 2000. See Final Rule, 65 Fed.Reg. 77125, 77129-77130, preamble to §930.31(a) (65 Fed.Reg. 77131-77133), and §930.33.

As shown below, many of the proposed changes to the CZMA regulations would limit the States' ability to review such cumulative and future effects by exempting actions that are considered "preliminary" or "interim." However, the CZMA was intended to allow early review (similar to NEPA) of actions and their reasonably foreseeable effects, and to protect against any categorical exemptions.

The Proposed Rule also directly conflicts with the requirement in the 1990 CZMA Amendments allowing States to review preliminary oil and gas leasing activities. Congress enacted the 1990 Amendments to specifically overturn the Supreme Court ruling in Secretary of the Interior v. California, 464 U.S. 312 (1984), which narrowly interpreted the consistency review provisions and precluded States from reviewing Outer Continental Shelf ("OCS") lease sales. In response to that ruling, Congress amended the CZMA to include review of actions that would only "indirectly" affect a State's coastal zone; to expand the geographical scope of State review to include projects outside the State's coastal zone (including the OCS); and to specifically provide State consistency review of OCS leasing activities. Indeed, in describing the amendments the House Report stated, "this section amends the 'federal consistency' provisions of the CZMA. The Committee's principal objective in amending this section is to overturn the decision of the Supreme Court in Secretary of the Interior v. California, 464 U.S. 312 (1984) and

to make clear that OCS oil and gas lease sales are subject to the requirements of section 307(c)(1)." (136 Cong. Rec. H8076, Sept. 26, 1990.)[4]

The Proposed Rule violates the intent of Congress by exempting oil leasing actions such as the preparation of 5-Year Lease Programs and the extension of leases by granted or directed suspensions. Sec. 930.31(a), 68 Fed.Reg. 34854-55. This proposed change violates the CZMA by exempting initial lease plans that may lead to indirect, reasonably foreseeable effects, just as the ultimate lease sale does. As stated in the 2000 CZMA Federal Consistency Regulations Final Rule, "a planning document or regulation prepared by a Federal agency would be subject to the federal consistency requirement if coastal effects from those activities are reasonably foreseeable." 65 Fed.Reg. 77130. The CZMA itself provides that Federal agencies carrying out an activity that may affect a State's coastal zone "shall provide a consistency determination to the relevant State agency…at the earliest practicable time…" 16 U.S.C. §1456(c)(1)(C).

In the case of leasing activities, whether the action is approval of a 5-Year Lease Program, a lease sale, or a lease extension, the Federal agency has sufficiently detailed information and analysis (oftentimes, an EIS) that can be provided to the State to ensure early coordination and review for consistency with the State's coastal management program. NOAA acknowledged this fact in the 2000 Final Rule, when it stated that

> "In addition, the clear language of the 1990 amendments to the CZMA, and Congressional intent as described in the Conference Report for the 1990 amendments, **5-year OCS plans are subject to the CZMA federal consistency effects test, 5-year OCS plans are not exempted from the consistency requirements a matter of law or policy**, and there are efficient ways to address consistency and 5-year OCS plans if Interior

[4] / Statements from Congress confirm this intention. Congressman Panetta from California stressed the need to overturn the Supreme Court ruling. He reminded Congress that the original intent of the CZMA was to forge a "strong Federal-State partnership . . . to ensure the orderly and balanced development of our coastal resources." (136 Cong. Rec. H8081, Sept. 26, 1990.) Other legislators confirmed that the intent of Congress was to "clarify" that the CZMA provides states an oversight role when the federal government considers activities, including oil and gas lease sales that may impact a state's coastal zone. Congressman Bosco stated, "Congress intends States to have some oversight responsibility when the Federal Government considers oil and gas leases on the Outer Continental Shelf whether the activity is inside or outside of a State's coastal zone. This is a vital tool for States committed to protecting their coastal resources." (136 Cong. Rec. H8081, Sept. 26, 1990.) Congressman Hertel stated, "HR 4450 clarifies, as a general rule of law, that any Federal agency activity in the coastal zone is subject to consistency review, as long as that activity can conceivably have an affect on the coastal zone. This includes OCS lease sales and any other Federal activity that may have an affect on the coastal zone." (*Id*.)

> determines that coastal effects are reasonably foreseeable….Further, consideration of management program concerns to the maximum extent practicable at the 5-year OCS plan stage lays a foundation for leasing activities that will also be consistency to the maximum extent practicable….Applying the consistency requirement to the 5-year OCS program is sound policy for several reasons. First, the CZMA consistent to the maximum extent practicable standard is not onerous (especially at an early stage of OCS development). Second, the 5-year OCS plan offers a good opportunity, early in the OCS process, to attempt to resolve State concerns. Addressing consistency at the 5-year OCS plan stage allows States to identify coastal concerns, such as the location of future lease sales, and reduces potential conflict. Third, Interior NEPA documents have determined that the 5-year plan is a major federal action with expected environmental effects which present an excellent point to determine consistency with management programs." 65 Fed.Reg. 77131-77132, emphasis added.

III. The Proposed Rule Violates the Holding of the Ninth Circuit Court of Appeals Decision in *State of California v. Norton*.

Additionally, lease suspensions are subject to State consistency review, as held by the recent U.S. Ninth Circuit Court of Appeals ruling in State of California v. Norton, 311 F.3d 1162, 1173 (9th Cir., 2002). In that case, the Court affirmed a decision to subject Federal suspensions of 36 oil and gas leases to State consistency review. Despite this ruling, the Proposed Rule provides, "[g]ranting or directing suspensions of OCS operations or production by MMS would be interim or preliminary activities and would not be Federal agency activities when a lease suspension would either not have coastal effects or, if the lease suspension set forth milestones that would have coastal effects, the State had previously reviewed the lease sale for Federal Consistency." 68 Fed.Reg. 34854. The Rule goes even further and states that "It is NOAA's view that the *California v. Norton* decision is limited to the 36 leases in that case and that in all foreseeable instances, lease suspensions would not be subject to Federal consistency review since (1) as a general matter, they do not authorize activities with coastal effects, and (2) if they did contain activities with coastal effects, the activities and coastal effects should be covered in a State's review of a lease sale, and EP or a DPP." 68 Fed.Reg. 34867.

This statement is in direct violation of the recent ruling in State of California v. Norton, 311 F.3d 1162, 1172-1173 (9th Cir. 2002). In that case, the Ninth Circuit U.S. Court of Appeals held that the 1990 CZMA Amendments extend the States' right of review to lease suspensions. The Court pointed out that Congress specifically provided that lease sales shall be subject to State consistency review and that "although a lease suspension is not identical to a lease sale, the very broad and long term effects of these suspensions more closely resemble the effects of a sale." (Id. at 1174.) Indeed, the Court stated that the United States, appellants in the case, did not dispute that "activities that

will ultimately take place under the extended leases will affect the natural resources of the coastal zone." (Id. at 1171.)

The Court recognized that even during the lease suspension period there are numerous activities which cause effects before operations even begin. (Id. at 1172 n.5.) For example, the Court pointed out that lease suspensions require the lessees to achieve a list of milestones during suspension. (Id.) One such milestone in the Norton case included completing a 3D seismic survey using underwater explosives that may permanently injure marine mammals and affect fishing in the area to the point where compensation to fishers would be required. (Id.) Another such milestone required drilling of wells during the suspension period. (Id.) The Court emphasized that "the suspensions *require* the lessees to perform these milestones and therefore the suspensions do immediately affect the coastal zone within the suspension period." (Id.; emphasis in original.)

The Court went on to state that lease suspensions "represent a significant decision to extend the life of oil exploration and production off of California's coast, with all of the far reaching effects and perils that go along with offshore oil production." (Id. at 1173.) The court rejected the argument that lease suspensions do not grant new rights or authority and are merely ministerial. (Id. at n.6.) The Court determined that since the decision to extend the leases, through suspension, was discretionary, it would grant new rights to the lessees to produce oil and derive revenues, when in absence of the suspensions, all rights would have terminated. (Id.) As such, citing the 1990 CZMA Amendments, the Court held that "[t]he exploration plan and development and production plan stages are *not* the only opportunities for review afforded to States under the statutory scheme." 311 F.3d 1162, 1173, emphasis in original.

Finally, the Court did not limit its decision to the 36 lease suspensions in question, as NOAA states. Rather, the Court held that "[w]e reserve 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." Id. at 1175.

Therefore, the Proposed Rule must be withdrawn because it is inappropriate for NOAA to attempt to exempt lease suspensions from review, even in cases where the lease has been subject to prior consistency review. To try to exempt such activities will only lead to further litigation in the future.

IV. The Proposed Rule Violates the CZMA Requirements for Meaningful State Participation.

The proposed revisions would significantly modify the manner in which State consistency review is implemented, to the point that coastal States will not be able to fully conduct their obligations to protect their coastal jurisdictions. The proposed rule would limit the ability of coastal States to ensure the adequacy of information presented

by Federal agencies, put new time constraints on State review, make it more difficult for States to review changes in projects affecting the coastal zone, and impinge upon the ability of coastal States to respond to appeals. In addition, the proposed rule would redefine "Federal agency actions" to exempt certain activities from State review, in violation of the CZMA.

A. The Revisions Would Interfere with the States' Ability to Conduct Timely and Thorough Review.

1. The Proposed Rule Imposes Strict Time Limits on State Agency Response, Regardless of the Adequacy of the Information Submitted.

Sections 930.41(a), 930.60(b), and 930.77(a) impose strict timelines for agency review, regardless of whether the State has the necessary information. According to the proposed revisions, a coastal State may only comment on whether an item of information is missing, not whether it is adequate for the State to conduct consistency review. For example, §930.41(a), which pertains to the State's response to a Federal agency's consistency determination, states that

> The State agency's determination of whether the information required by section 930.39(a) is complete **is not a substantive review of the adequacy of the information provided**. Thus, if a Federal agency has submitted a consistency determination and information required by section 930.39(a), then the State agency shall not assert that the 60-day review period has not begun because the information contained in the items required by section 930.39(a) are **substantively deficient**, or for failure to submit information that is in addition to that required by section 930.39(a).

(See also §§ 930.60(b) and 930.77(a).)

Thus, even if the State receives inadequate information, it must review the submittal and make a determination within 60 days of the Federal agency's submittal. In contrast, existing §930.41(a) allows the State the opportunity to secure adequate information before having to respond with a consistency decision. This section does not restrict the State's ability to request substantive information. Furthermore, under the current regulations, the 60-day review period does not begin until the State receives the requested additional information, making the State review process complete and meaningful.

Pursuant to the Proposed Rule, however, a State agency will be required to respond to a consistency determination or certification, within a very short time frame (only 60 days for Federal agency actions), without necessarily having all the information necessary to conduct a complete substantive analysis. And yet, if the State declines to take action due to the lack of adequate information, concurrence will be presumed.

To make matters worse, the Proposed Rule makes clear that certain information, such as Clean Air Act and Clean Water Act permits, NEPA documents, Biological Opinions, and Army Corps permits, are not required as part of the Federal agency's submittal of an OCS plan, despite the fact that these items will provide critical information regarding project impacts and compliance with relevant environmental laws and regulations.

2. The Proposed Rule Prevents States from Requesting Adequate Information from Applicants.

The Proposed Rule further limits information submitted to States by applicants requiring Federal licenses or permits. Currently, §930.58(a)(1) allows a State agency to require **all necessary data and information**, which "may include State or local government permits or permit applications which are required for the proposed activity." The Proposed Rule would prohibit States from requiring State or local permits, and restrict submittals to permit applications. With this change, States will not have the benefit of analysis by other environmental agencies, including local agencies that review projects for consistency with local coastal plans, **even if this information is necessary to complete the State consistency review process**.

B. The Revisions Would Exempt Projects from State Consistency Review in Violation of the CZMA.

The CZMA does not allow for any exclusions or exemptions. As stated in the Norton decision, "'CZMA bars…categorically exempting suspensions from consistency review.' Coastal Zone Management Act Federal Consistency Regulations, 65 Fed.Reg. 77144 (Dec. 8, 2000). 'Whether a particular federal action affects the coastal zone is a factual determination' to be made on a 'case-by-case' basis. 65 Fed.Reg. 77125." State of California v. Norton, 311 F.3d 1162, 1174. The Proposed Rule violates this requirement by exempting "interim or preliminary" activities, including oil leasing plans and extensions, and activities that are pursuant to a General Permit or Negative Determinations. In addition, the Proposed Rule allows Federal agencies to exempt changes in activities without State review.

1. The Proposed Rule Would Exempt "Interim or Preliminary" Activities.

Section 930.31(a) of the Proposed Rule would be "clarified" to exclude certain "interim" or "preliminary" Federal agency actions from State review. Clearly, this proposal is unlawful because it would avoid the case-by-case review mandated by the CZMA and would prevent the opportunity for the State to review the indirect, cumulative, and reasonably foreseeable effects at an early stage in the Federal agency decision-making process. (See CZMA Regulations, 15 CFR 930.33(a)(1).)

In addition, the Proposed Rule violates the specific intent of the 1990 Amendments and 2000 regulatory changes to allow States the broadest review authority

possible when addressing offshore oil and gas development activities. The Proposed Rule exempts such oil and gas activities as OCS 5-Year programs and lease suspensions. This interpretation belies the fact that all Federal agency actions must be considered on a case-by-case basis, and that activities such as 5-Year programs and lease suspensions may indeed lead to coastal zone effects that should be reviewed by the States.

In the Proposed Rule, NOAA states that lease suspensions "would not be subject to Federal Consistency review since (1) in general, they do not authorize activities with coastal effects, and (2) if they did contain activities with coastal effects, the activities and coastal effects would be covered in a State's review of a lease sale, an EP or a DPP." 68 Fed. Reg. 34854. However, these arguments were specifically rejected by the Court of Appeals in the Norton case.[5] First, the Norton decision found that lease suspensions may in fact require specific activities that could cause direct effects on coastal resources. 311 F.3d 1162, 1171. Second, the Court held that Congress made clear when amending the CZMA in 1990 that Federal agency leasing actions are to reviewed separate from exploration or development and production plans. 311 F.3d 1162, 1173. Accordingly, the Court held that lease suspensions were separate Federal agency actions that could result in coastal zone effects and are therefore subject to State consistency review. 311 F.3d 1162, 1171-1175. Pursuant to the Norton ruling, NOAA may not consider lease suspensions as "interim activities" subject to a negative determination. A suspension is different than a lease in that it may authorize or require specific activities, and it is different than an EP or DPP because it involves a broader authorization for the lessee and avoids expiration of the lease. "These lease suspensions represent a significant decision to extend the life of oil exploration and production off of California's coast, with all of the far reaching effects and perils that go along with offshore oil production." 311 F.3d 1162, 1173.

Finally, the Court noted that, even if a lease or lease suspension had already been subject to State review, "We reserve 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." Id. at 1175. Thus, the Court rejected the proposal that future lease suspensions would be categorically excluded from State consistency review.

2. The Proposed Rule Would Exempt Activities Subject to a General Permit or General Negative Determination.

The Proposed Rule, §930.31(d), would allow General Permits to be used to avoid subsequent review of more specific activities, such as exploration or development plans. This proposal violates the requirement of the CZMA that any activity requiring Federal approval be considered on a case-by-case basis, to determine whether coastal zone effects will result. The current regulation allows the specific application of a General Permit to be considered a license or permit if circumstances warrant, in order to allow full State

[5] / The federal defendants chose not to petition for review of the Court of Appeal decision.

review. This flexibility should be retained to ensure proper State participation and compliance with the CZMA.

In addition, the Proposed Rule, §930.35(d), would allow Federal Agencies to rely on General Negative Determinations to avoid State review for a class of "repetitive activities." Again, this proposal violates the "case-by-case" review mandated by the CZMA.

3. The Proposed Rule Allows Federal Agencies to Preclude State Review of Changes in Activities.

Section 930.51(c) provides that amendments to Federal licenses or permit activities are subject to State review if the amendment will cause an effect on any coastal use or resource in a way that is substantially different than those already reviewed by the State agency. Currently, §930.51(e) provides that the determination of substantially different coastal effects is made on a case-by-case basis by the State agency, Federal agency and applicant, but that the "opinion of the State agency shall be accorded deference and the terms 'major amendment,' 'renewals' and 'substantially different' shall be construed broadly to ensure that the State agency has the opportunity to review activities and coastal effects not previously reviewed." Under the Proposed Rule, the deference would shift to the Federal agency, thereby potentially blocking State review and leading to further litigation. Since it is the State that is most familiar with its coastal management program and the resources within the State's coastal zone, it makes sense that it should be up to the State to determine whether there will be substantially different coastal effects.

Similarly, the Proposed Rule, §930.82, allows the Federal agency to decide whether to submit an amended OCS plan to the State. In addition, §930.85(c) would shift the determination of whether a person is failing to comply substantially with an approved OCS plan from the State to the Minerals Management Service. Each of these changes is an attempt to rob the States of their right to review Federally-authorized activities, in violation of the CZMA.

C. The Proposed Rule Would Diminish the State's Ability to Participate Effectively in the Appeals Process.

Despite the relatively low frequency and number of appeals, NOAA proposes major changes to shorten timeframes and expedite the appeals process. The Proposed Rule would hinder thoughtful decision-making by shortening the time periods for development of the decision record (§930.125); providing less time for States to submit briefs and supporting materials (§930.127); limiting coastal States to one brief on appeal; limiting a State's reconsideration on remand to 20 days (§930.129); and requiring closure of the appeal decision record and issuance of a decision within 270 days (§930.130). These timeframes would infringe upon the State's ability to provide evidence, fairly present its arguments, and respond to new information on remand.

In addition, the Proposed Rule precludes States from requesting additional information (e.g., NEPA or ESA documents) to assist in the review. Finally, to put the States at even more of a disadvantage, the Secretary is directed to give additional weight to the Federal agencies' comments but not the coastal States who oversee their own coastal management programs (§930.128). All of these changes combined will effectively dismantle the States' role in the CZMA appeal process.

Conclusion

The Proposed Rule is an unwise attempt to reverse the intent of Congress in 1990 to expand State review of Federal activities, to undermine the effect of the 2000 CZMA regulations, and to overturn, by administrative action, the Court of Appeals affirmation of States' rights in the State of California v. Norton case. The Federal government seeks to overturn these congressional and judiciary actions, despite the inherent violations of the separation of powers. Administrative regulations are no place to change law or reverse judicial opinion. For these reasons, and to avoid further litigation, NOAA should withdraw the Proposed Rule and work on fostering better cooperation and coordination with coastal States as required by the CZMA.

Sincerely,

Linda Krop
Executive Director/Chief Counsel

cc: U.S. Senator Boxer
U.S. Senator Feinstein
U.S. Representative Capps
Governor Gray Davis
California Coastal Commission
California Attorney General
County of Santa Barbara
County of San Luis Obispo