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David B. Struhs
Secretary

August 25, 2003

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, 11th Floor
Silver Spring, Maryland 20910

RE: National Oceanic and Atmospheric Administration - Office of Ocean and Coastal Resource Management - Coastal Zone Management Act Federal Consistency Regulation - Proposed Rule - 68 Federal Register 34851 - 34874, June 11, 2003
SAI: FL200306112524

Dear Mr. Kaiser:

The Department of Environmental Protection, lead agency for Florida's Coastal Management Program (FCMP), has coordinated a review of the proposed rule published by the National Oceanic and Atmospheric Administration, Office of Ocean and Coastal Resource Management (NOAA) in the June 11, 2003, Federal Register, 68 F.R. 34851 - 34874. As proposed, the rule would impair both the consistency process and the state/federal partnership envisioned by the CZMA. Therefore, Florida encourages NOAA to withdraw the proposed rule and work with the states to address the legitimate concerns raised in its July 2, 2002, Advanced Notice of Proposed Rulemaking (ANPR), 67 F.R. 44407-44410, regarding procedures for considering appeals of state consistency objections. A copy of Florida's comments regarding the ANPR is enclosed.

The proposed changes undermine the authority provided to the states by Congress in the Coastal Zone Management Act (CZMA) and do not improve the consistency review process. The express intent of the CZMA is to "encourage *the states to exercise their full authority*" over the coastal zone. 16 U.S.C. § 1451(i) (emphasis added). Likewise, the CZMA's legislative history shows that Congress intended "to *enhance* state authority" by "*expanding* state participation in the control of land and water use decisions in the coastal zone. P.L. 92-583 at 4776, 4780 (emphasis added). However, the proposed changes severely weaken a state's ability to ensure that federal agency activities are consistent to the maximum extent practicable with approved State management programs and that federally permitted activities are consistent with these programs.

The proposed changes also ignore the conclusions and analyses presented in the ANPR. NOAA's own statistics affirm that the existing regulations are working well. As reported in the 2002 ANPR, the states have concurred with "nearly all" of the 16,600 oil and gas exploration and development plans

approved by MMS. In the history of the CZMA, only 15 state consistency objections were appealed by the oil and gas industry, representing .0009 % of the 16,600 plans approved by MMS. 67 F.R. 44409. One appeal for every 1,106 plans reviewed is compelling evidence that the CZMA is working effectively.

Moreover, to the extent that any problem exists related to the time necessary for consistency appeals, that problem does not stem from the states and should not be corrected at the states' expense. Briefing schedules and deadlines are set by NOAA and are beyond the control of the states. Florida shared industry's frustration with the time taken to conduct the appeal from Florida's objection to a Chevron development and production plan. Florida joined Chevron in urging NOAA to close the record and not further delay the appeal (cf. letters to the NOAA General Counsel dated May 4 and May 17, 2000.) While the previous Administration in Washington did not honor this request, the current Administration should not penalize the states for untimely decisions beyond their control.

This current Administration in Washington strongly supports states' rights. However, the proposed rule changes contradict the fundamental states' rights precepts embedded in the CZMA. If the appeals process truly needs to be modified to ensure a more efficient and predictable timeframe, NOAA should propose limited rule changes to accomplish this without infringing on each state's ability to serve as an equal partner in managing coastal resources. Coastal states value the relationship and shared responsibility authorized by the CZMA. Nowhere is this more evident than in the testimony presented to the U.S. Commission on Ocean Policy by states and a number of federal agencies during meetings held from September 2001 through November 2002. Coastal states recounted the effectiveness of the federal/state partnership established by the CZMA, and federal agencies encouraged the continuation of this partnership. The testimony stressed the importance of states as equal partners in coastal management and recognized that current CZMA regulations work well and, should not be weakened.

The Office of Ocean and Coastal Resources Management's own web site highlights the Coastal Zone Management Program as a proven, unique federal-state partnership. Florida welcomes an opportunity to work with NOAA, other federal agencies and states, and the regulated community to make appropriate improvements to the consistency process that will continue to strengthen this partnership and improve the appeals process. Section by section comments regarding the proposed rule are enclosed. If you require additional information, please contact Lynn Griffin or Jasmin Raffington at (850) 245-2163.

Sincerely,

Lisa Polak Edgar
Deputy Secretary

LEP/jrmm

Enclosure

cc: Lynn Griffin, FCMP
Ken Haddad, FWCC

State of Florida – Section by Section Comments
NOAA - Office of Ocean and Coastal Resource Management
CZMA Federal Consistency Regulation - Proposed Rule
68 Federal Register 34851 - 34874, June 11, 2003

Rule Change 4: § 930.31 (a) Federal Agency Activity.
The definition of Federal Agency Activity is revised to include examples that were made to clarify the meaning of the term. The examples, however, provide an extremely narrow interpretation of the term's meaning. If examples are provided, they should reflect the broad range of federal agency activities with reasonably foreseeable coastal effects. As noted in the CZMA's legislative history, the Congressional conference committee considered and rejected a proposal to list examples of federal agency activities subject to state review by noting:

> "…a statutory "listing" of activities should be avoided to prevent any implication that unlisted activities are not covered." P.L. 101-508 at 2676

Therefore, Florida recommends the deletion of the examples included in the revised definition of Federal Agency Activity.

Florida also disagrees with the comments in the preamble that suggest that there are no possible circumstances in which a suspension of operations or production would have coastal effects, and therefore, require consistency review. Since all circumstances cannot be known at this time, the need for consistency review should not be dismissed without consideration. The CZMA requires a case-by-case review of federal activities to determine their effects.

Of greater concern than the proposed rule text are the comments in the preamble explaining how the revised rule might be interpreted. Rather than clarifying the meaning of the proposed revisions, the explanation raises questions about the consequences of the changes. For instance, the explanation seems to imply that consistency reviews would not be conducted in conjunction with a NEPA review or other study and evaluation documents. Since the examples discussed in the preamble are mainly focused on OCS activities (except for the example in which the U.S. Navy proposes construction of a pier), the proposed rule does not sufficiently explain at what point in the planning and evaluation process for a federal project the project becomes a "proposal for action."

While the state agrees that "the proposed activity" is the action that is being considered or reviewed by the states for consistency with their CMPs, most federal project proposals develop over a long period of time during which the concept, feasibility and alternatives are evaluated. Consistency should be engaged at key funding, design and alternative decision points in this process so that a consistent project emerges at the end. In most cases, the planning and NEPA documents initiate the state's review and, in fact, are the

only manner in which a state is notified about an activity being proposed. The rule should clarify that consistency should be triggered by key decision points, regardless of how the project is packaged.

Rule Change 5: **§ 930.31(d) Federal agency activity – General Permits.**
The proposed wording of this section is unclear. It suggests that the promulgation of general permits with conditions requiring preconstruction notification (PCN) to verify appropriate use of the GP would not be eligible for review under Subpart C.

The promulgation of a GP is a direct federal agency activity. The promulgation of a GP is facilitated by incorporating conditions that address state requirements and consistency with the CMP, thereby increasing the likelihood of state concurrence with the GP. The resulting permit provides better customer service by simplifying and streamlining federal and state regulatory procedures. Some GP conditions, however, necessitate case-by-case reviews to verify that the project meets the requirements for coverage. The inclusion of conditions or a PCN in a GP should not result in the incorrect categorization of the GP as an indirect federal activity reviewed under Subpart D.

Rule Change 6: **§930.35(d) General Negative Determination.**
Florida agrees that the determination of effects is made by the federal agency; however, Florida does not agree that the CZMA supports unilateral effects determinations or unilateral decisions that result in the categorical exclusion of certain classes of federal activities from the consistency review process. CZMA's legislative history is clear. Decisions to exclude federal activities from state consistency review must be made on a case-by-case basis. Proposed federal actions must be evaluated to ensure that the proposed activity will not result in reasonably foreseeable coastal effects when viewed either individually or cumulatively with other activities.

The existing regulatory text at 930.35 provides federal agencies with the means to address "repetitive" federal activities. Federal agencies can also consult with affected states to streamline the review of "repetitive activities." Therefore, Rule Change 6 is not needed. In addition to being unnecessary, several portions of the proposed change are unclear. First, without a definition of "repetitive activity" it is unclear how a federal agency will determine which of its many actions are "repetitive." With few exceptions, most federal actions can be characterized as repetitive. Second, the proposed language could also be viewed in a manner that suggests that a General Negative Determination can be used if the federal agency determines that an individual occurrence of the "repetitive activity" will not result in reasonable foreseeable coastal effects. If this occurs, the cumulative effects of proposed federal actions will not be evaluated. State review or approval of negative determinations is not required; therefore, federal agencies can choose to ignore the state's views regarding the effect of federal activities on its coastal zone. Finally, the rule change does not require the reevaluation of General Negative Determinations. The failure to require periodic reevaluations will result in the misconception that the federal agency's obligation to ensure that its activities are consistent with affected state CMPs ends when the federal agency provides the state with a General Negative Determination.

Rule Change 7: **§ 930.41 State agency response.**
Florida is concerned that this rule change does not recognize that the substantive content of the necessary data and information identified by state CMPs is the data and information needed for consistency review. The submission of correctly titled information that is either incorrect or lacks the substantive content needed for review should not result in the premature start of the consistency review timeclock.

Rule Change 8: **§ 930.51(a) Federal license or permit.**
Florida does not understand the decision to delete "certification, approval, lease, or other form of permission" and the definition of "lease" from the existing definition of Federal License or Permit. The proposed deletions do not clarify the definition; therefore, existing language should be retained. Alternatively, the definition of "lease" could be transferred to 930.11.

Rule Change 9: **§ 930.51(e) Substantially different coastal effects.**
Florida disagrees that the use of "deference" in the current rule awards the state final decision making authority. The proposed change diminishes the fundamental concept of state-federal partnership envisioned by the CZMA and the state's pivotal role in determining consistency with its coastal program. Therefore, the current wording should be retained.

Rule Change 10: **§ 930.58(a)(1) Necessary data and information.**
Language included in the current rule '…and comprehensive data and information sufficient to support the applicant's consistency certification' should be retained. We disagree that this language is ambiguous and creates uncertainty. The language, which is derived from the statute, enhances certainty by explicitly describing the applicant's responsibility to provide sufficient data and information prior to the start of the review.

Also, the 'information relied upon by the applicant to make its certification' is not an equal substitute for 'data and information sufficient to support the applicant's consistency certification.' In some cases, these could be entirely different sets of information. The change is inconsistent with the CZMA and it inappropriately shifts responsibility for ensuring the availability of adequate information from the applicant to the state. No changes to this section of the regulation are necessary.

Rule Change 11: **§ 930.58(a)(2) Necessary data and information (State permits).**
If a proposed federal activity has already received state or local government permits, applicants should be required to provide the state with those permits along with the data and information developed during the review and approval of the state or local government permit. Therefore, additional language is required to clarify that the states can request permitting information for projects that may already be permitted.

Rule Change 15: **§ 930.77(a) commencement of State agency review and public notice.**
Florida is concerned with the following language proposed at 930.77(a)(3): *"The state agency shall make its request for additional information no later than three months after commencement of the State agency's review period. The State agency shall not request additional information after the three-month notification period described in s. 930.78(a)."*

No one is served by restricting the exchange of information between the state and operators during reviews. States must be able to confer with operators at any time during the review process and, if necessary, request supplemental information to ensure a clear understanding of the proposed activity or its impacts. The ability to freely communicate provides the parties with the opportunity to resolve any questions and concerns prior to the state's consistency decision. The proposed language could lead to unnecessary findings of inconsistency that could have been avoided with a simple exchange of information.

When combined with the changes to ss. 930.60, 930.76(a) and (b), the changes would require the start of consistency reviews before the adequacy of the information is known and may result in an increased number of inconsistency decisions based on a failure to provide adequate information. If the states are required to simply use a "check list" and accept substantively, then federal agencies and applicants should be required to provide states with the requested adequate substantive information in a timely manner. As currently written, the proposed rule is effectively limiting the available six month review period to three months. Federal agencies and applicants should not be allowed to use the timeclock to frustrate the states' attempt to review of federal activities under Subparts D and E.

Rule Change 17: **930.85(c) Failure to comply substantially with an approved OCS plan.**
The proposed changes to ss. 930.85(c) and (d) should be revised to retain the purpose and intent of the current language. The state determines whether an OCS activity is consistent with its coastal management program. If an operator fails to comply with an approved OCS plan and the failure to comply results in an inconsistency with the state's coastal management program, the state should have a substantial role in any federal decision regarding the corrective measures needed to address the noncompliance and the inconsistency. If in the state's view the noncompliance results in the need for a new consistency review, and the federal agency disagrees, the state should be provided with a mechanism to request an independent administrative review of its claim that the noncompliant activity is inconsistent with its coastal management program and a new consistency review is warranted. NOAA is uniquely qualified to hear such an appeal. NOAA's decision to withdraw its administrative review services cannot be justified by a reference to the fact that the services have never been used. The state's ability to seek and obtain administrative relief serves as a deterrent to actions that result in

inconsistencies with the state's coastal management program. Administrative review is a desirable alternative to litigation.

Rule Change 20: **930.127 Briefs and Supporting materials.**
While Florida encourages the setting of reasonable timeframes for decisions on appeals to the Secretary of Commerce, we are concerned that the wording of certain sections of the rule may be problematic. Section 930.127(c)(1) notes that,

> "The Secretary determines the content of the appeal decision record. Briefs and supporting materials submitted by the State agency and appellant, public comments and the comments of interested Federal agencies **usually** comprise the decision record of an appeal (emphasis added)."

The wording suggests that NOAA believes that the Secretary can, if he/she chooses, exclude briefs and supporting materials submitted by the state and the appellant, public comments and/or the comments of interested federal agencies from the appeal record. The section should be revised to assure states and applicants that, at a minimum, the record will include all information provided by the parties, the public and affected federal agencies. The record provides the basis for litigation that may result from the Secretary's consistency appeal decision. Therefore, the Secretary should not be given unlimited discretionary authority to restrict the inclusion of relevant material from the record.

The language proposed at s. 930.127 (e) is too limiting. It provides,

> "The Secretary may extend the time for submission of briefs and supporting materials only in the event of exigent or unforeseen circumstances."

Exigent or unforeseen circumstances are difficult to demonstrate. NOAA is strongly encouraged to change the proposed standard for decisions to extend the time for the submission of briefs and supporting materials to "good cause or by agreement of the parties." The recommended change is supported by the language proposed at 930.130(a)(2)(ii), that allows the Secretary to stay the closing of the decision record by agreement of the state and the appellant.

Rule Change 21: **930.128 Public Notice, comment period, and public hearing.**
Florida is concerned with the language proposed at 930.128(c)(2) that allows the Secretary reopen the comment period for federal agencies but does not include an option that would allow an extension of the public comment period. In addition, the language proposed at 930.128(b) suggests that the public could be required to comment prior to the availability of NEPA documents and other important information that clarify the nature of the proposed action and the potential for impacts on the state's coastal zone.

Rule Change 23: **930.130 Closure of the decision record and issuance of decision.**
Florida is concerned that the proposed language at 930.130(a)(2)(ii) limits the Secretary's ability to consider important information that may not be included in NEPA documents or Biological Opinions The proposed changes authorize the Secretary to stay the closing

of the decision record beyond the 270-day period "as needed to receive, on an expedited basis, the final (A) environmental analyses required under the National Environmental Policy Act (42 U.S.C. 4321 et seq.) for the Federal agency's proposed issuance of a license or permit or grant of assistance; or (B) Biological Opinions issued pursuant to the Endangered Species Act (16 U.S.C. 1531et seq.)…"

The Secretary's ability to make a fully informed decision could be compromised by limiting the Secretary's options in this way. Florida's experience provides a good example of the kind of information that could be denied the Secretary under the proposed rules. During the Union Exploration Partners, LTD and the Mobil Exploration and Producing U.S., Inc. consistency appeals to objections by the State of Florida for Pulley Ridge Blocks 629/630 and 799, respectively, the Secretary held open the appeal record to allow the Presidential and two State/Federal OCS Task Forces to conclude their deliberations on specific aspects of OCS activities and issue findings. The Secretary should be allow extend closure of the record to include any and all relevant information.