STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
LANSING

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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

Dear Mr. Kaiser:

SUBJECT: Coastal Zone Management Act Federal Consistency Regulations (15 CFR Part 930) Proposed Rule, 68 Federal Register 34851-34874, June 11, 2003

Michigan's Coastal Management Program (MCMP) staff has reviewed the proposed rule changes. The following comments are being submitted on behalf of the MCMP. We believe that several of the proposed changes have the potential to affect our ability to effectively administer the federal consistency provisions of the Coastal Zone Management Act (CZMA), as amended. This letter describes our concerns by section with the proposed rule changes.

- **Rule Change 4 – Section 930.31(a), Federal Agency Activity**
  We feel the proposed changes may limit which federal activities we are able to review under the CZMA. The current regulation requires federal agencies to coordinate with states on a "wide range of activities," while the proposed change requires coordination when there is a "proposal for action." The current rule is less ambiguous, therefore an alteration is unnecessary.

- **Rule Change 6 – Section 930.35 (d), General Negative Determination (GND)**
  We believe there has been clear Congressional intent to eliminate "categorical exemptions" through amendments to CZMA section 307. The addition of a GND category will likely result in categorical exemptions. As such, we are strongly opposed to this proposed addition based on several serious concerns:

  - The definition of a "repetitive activity" is undefined and will likely be interpreted in a wide variety of ways. How similar must activities be to be "repetitive"? Since many activities carried out by federal agencies are "repetitive" in nature, we feel this new category could be used by federal

agencies to cover activities that are currently reviewed on a case-by-case basis. As an example, the federal disposal of lighthouses is an ongoing "repetitive" activity of concern in Michigan that may be considered a "repetitive" activity under this new category. A blanket determination of consistency for the disposal of 16 offshore lights was proposed in 1998 by the United States Coast Guard. Michigan did not concur with the determination as lighthouse disposals on state land merit a critical site-by-site review of proposed uses, environmental concerns, etc.

- The proposed change requires the activity is defined by "the expected number of occurrences over a specified period of time." These are inadequate parameters to determine cumulative effects. Absent are when and where the activities will occur. Under the proposed rule change, dredging projects could be considered by the United States Army Corps of Engineers as a repetitive activity. In reviewing this activity, we would need to consider timing (related to fish spawning) and location (related to protected areas such as designated underwater preserves). In addition, even small "repetitive activities" may have significant cumulative effects over the long-term.
- There is no requirement that the issuing federal agency review its decision in the future. This should not be optional. The very reason the CZMA works well to compel coordination between states and federal agencies is that it is *not* optional. At a minimum, we feel we must have the authority to compel the agencies to reassess if cumulative or unforeseen effects occur. We also feel there must be a mandated reassessment at three years.

- **Rule Change 7 – Section 930.41 (a), State Agency Response**
  We feel that this change will limit our ability to effectively review the federal agency's consistency determination due to the reduced time frames. Due to heavy caseloads, it may not be possible for us to review a federal agency's consistency determination and supporting materials within the proposed 14 day timeline. We make every effort to review files as rapidly as possible, but in cases when we cannot meet the 14 day timeframe, the unexpected effect of this change places us in a position where we must either approve without review or object to the project routinely. This certainly does not further the goal of interagency coordination. The inability to stop the review clock due to deficient supplied materials will likely lead to an increased level of objections. We will not give concurrence to proposed federal activities which do not have sufficient materials submitted. The original review timeline and the ability to stop the review clock pending complete information must be retained.

- **Rule Change 9 – Section 930.51 (e), Substantially Different Coastal Effects**
  The current language indicates "the determination of substantially different coastal effects. . . is made on a case-by -case basis by the state agency," while the proposed change shifts the determination to the federal agency. This is a significant shift in authority that we feel is unwarranted. The current language indicates "The opinion of the State agency shall be accorded deference." The proposed change would mandate "considerable weight to the opinion of the State agency." This is a lower standard that is poorly defined. These alterations will weaken the state's input at this stage and may lead to increased litigation and undermine expedited processes. The current standard should be retained.

- **Rule Change 10 – Section 930.58 (a)(1), Necessary Date and Information**
  We feel it is important the current language "comprehensive data and information sufficient to support the applicant's consistency certification" be retained rather than the proposed "any information relied upon by the applicant to make its certification." Information that is relied on but not relevant to state statutes is not sufficient to support the consistency determination. This fails to require necessary information and allows the incorporation of potentially irrelevant materials that will slow the review process. The "sufficient to support" and the authority of the state to make that determination language should be retained.

- **Rule Change 12 – Section 930.60, Commencement of State Agency Review**
  As with the proposed Rule Change 7 (above), this proposed change would not allow the state to stop the review clock pending incomplete submissions. When the submitted materials are deficient, this puts us in a position where we must either continue to review the deficient application or deny because we haven't received complete materials before we have to make a decision. The inability to stop the review clock due to deficient supplied materials may lead to an increased level of objections. We will not determine those proposed licenses and permits consistent which do not have sufficient materials submitted. The ability to stop the review clock pending complete information should be retained.

- **Rule Change 18 – Section 930.121(c), Alternatives on Appeal**
  We strongly object to this proposed language. This places the entire burden of determining alternatives on the state. The proposed language indicates "an alternative shall not be considered unless the state submits a statement . . . that the alternative would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program." This gives the state no recourse if we feel there is no alternative that would satisfy both the wishes

of the applicants and the enforceable policies of the state. Placing the burden entirely on the state could also stifle creative problem solving on the part of federal agencies. There are times when we deny consistency because in certain areas under certain conditions construction is not allowed under our statues, therefore *no* alternative "would permit the activity to be conducted in a manner consistent with the enforceable policies of the enforcement program." The current language in this section should remain unchanged.

- **Rule Change 20 – Section 930.127, Briefs and Supporting Materials**
  The proposed 30-day timeframe for the states to submit a reply brief is insufficient time. More appropriate would be 45 to 60 days. The proposed language also indicates "the secretary determines the content of the appeal decision record." This would allow the secretary to remove from the record materials submitted in accordance with the appeals process. This is not appropriate and materials submitted in accordance with the appeals process must remain in the appeal decision record.

- **Rule Change 21 – Section 930.128, Public Notice, Comment Period…**
  The proposed language "The secretary shall accord greater weight to those federal agencies whose comments are within their areas of expertise" should be removed, as it is unnecessary. No such weight is allowed to public comment or state agency comment in their areas of expertise. The secretary can and should be able to sort through all comments and review them accordingly without a pre-determined "weight" being assigned.

- **Rule Change 23 – Section 930.130, Closure of the Decision Record…**
  The proposed language indicates, "In reviewing an appeal, the secretary shall find that a proposed federal license or permit activity, or federal assistance activity, is consistent with the objectives or purposes of the Act . . . then the information in the decision record supports this conclusion." This is a change from the current language that included all submissions in the decision record. Rule Change 20 as proposed would allow the secretary to determine the content of the decision record. This could lead to a decision record which does not contain all relevant materials that will now serve as the basis for the appeal. Rule Change 23, taken with Rule Change 20 discussed above, may allow important relevant information to be absent in the appeal process. These proposed changes should be rejected. The proposed language also omits the section "The appellant bears the burden of proof submitting evidence in support of its appeal and the burden of persuasion." The current standard should be retained.

Thank you for the opportunity to comment on the proposed regulations. If you have questions regarding our comments, please contact me.

Sincerely,

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Environmental Science and Services Division,
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cc: Mr. John King, OCRM, NOAA
Ms. Elizabeth Mountz, OCRM, NOAA
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