

Coastal Management Office
PO Box 418
Trenton, NJ 08625-0418

July 18, 2003

Mr. David Kaiser
Federal Consistency Coordinator
Coastal Programs Division
Office of Ocean and Coastal Resource Management
NOAA
1305 East-West Highway
11th Floor
Silver Spring, MD 20910

RE: Proposed rulemaking
Coastal Zone Management Act Federal Consistency Regulations, 15 CFR Part
930
Federal Register, Volume 68, Number 112, June 11, 2003
Docket 030604145-3145-01

Dear Mr. Kaiser:

The following comments are offered in response to the proposed rulemaking amending the Coastal Zone Management Act Federal Consistency Regulations, 15 CFR Part 930, published in the Federal Register, Volume 68, Number 112 on June 11, 2003.

Rule change 6: 930.35(d) General Negative Determination. This rule change adds a provision for a general negative determination. A Federal agency may use a general negative determination when it undertakes repetitive activities that, either on an individual, case-by-case or cumulative basis, do not have coastal effects. New Jersey's Coastal Management Program does not object to the concept, provided that the Federal agency be required to reassess whether the general negative determination remains applicable every five years. This will ensure that the activities continue to meet the provisions of 930.35 and continue to have no coastal effects. This suggested change is consistent with NOAA's stated purpose of the rulemaking, that is "...provide greater transparency and predictability to the Federal Consistency regulations."

Rule change 7: 930.41(a) State agency response. This rule change proposes to clarify when the State's consistency review period begins for Federal agency activities and the information necessary for a State to find that a Federal Agency consistency submission is complete. This determination would be based on a "checklist" review to ensure that the required elements of a consistency submission, that is description of activity, coastal

effects, and an evaluation of the State's enforceable policies are present. According to the proposal summary, this review would not be a determination of adequacy of this information. Further, the determination of the presence of the required elements for a complete submission must be made within 14 days of receipt of the original request.

New Jersey's Coastal Management Program objects to these proposed amendments. The 14-day review period does not provide the State with sufficient time to review the Federal agency's submission. Further, the review should not be limited to a checklist review but should consider the adequacy of the information provided. The state review period should not begin until the information submitted has been found sufficient for a substantial review to begin. Without adequate information, the public participation component of the Federal Consistency process would be compromised. The time period for a "completeness" determination should be extended to 21 days to provide the State with enough time to receive and review the information submitted. The rule should also address the implications of a Federal agency's failure to submit the information and specify a time period in which the Federal agency must respond to the State's request.

Rule change 9: 930.51(e) Substantially different coastal effects. This section addresses determinations of substantially different coastal effects for renewals or major amendments to federal licenses, permit or other approvals. Under these amendments the expert federal permitting agency would make the determination of whether there are substantially different coastal effects. This proposed amendment is objectionable because it weakens the Federal consistency component of the Coastal Zone Management Act which as stated in the supplementary information portion of the proposed rule summary "is the cornerstone of the CZMA program and a primary incentive for State's to participate." States rather than federal agencies are best positioned to determine if a renewal or major amendments effect the coastal resources of the State.

Rule change 10: 930.58(a)(1) Necessary data and information. According to the rule change summary, this change is proposed to specify the information requirements for Federal license or permit activities needed to start the 6-month consistency review period. The necessary data and information includes a copy of the Federal application; all supporting material provided to the Federal agency; information that is required and specifically described in the State's management program; and, a description of the activity, its associated facilities and the coastal effects. The requirement that the information be sufficient to support the applicants consistency certification is proposed for deletion. This concept should be retained.

Therefore, the "other information relied upon by the applicant to make its certification" required at (a)1ii should be modified to make it clear that the information must be sufficient to support the applicant's consistency certification. This clarification is necessary because the information the applicant believes is sufficient may not be the same as that the State deems sufficient. Hence, paragraph (a)1ii should be amended to read as follows:

- (ii) To the extent not included in paragraphs (a)(1) or (a)(1)(i) of this section, a detailed description of the proposed activity, its associated facilities, the coastal effects, and any other information sufficient to support the applicant's consistency

certification. Maps, diagrams, and technical data shall be submitted when a written description alone will not adequately describe the proposal;

Rule change 12: 930.60 Commencement of State agency review. According to the proposed rule summary, the changes to this section clarify when the State’s consistency review period begins for Federal licenses and permits. A “complete” submission is one that includes a description of the activity, the coastal effects, an evaluation of the State’s enforceable policies, and specific information described in the State’s Federally approved program. If these items are present, regardless of their adequacy, the 6-month review period would commence. According to the proposed rule language at (a), the State agency review would begin at the time the State agency receives a copy of the consistency certification and the necessary data and information required pursuant to 930.58, except as provided by 930.54(e) and (a)1 of this section. According to paragraph (a)1ii, in cases where the applicant has provided the consistency certification, but not all necessary data and information, the 6-month review period would begin on the date the consistency certification was received. Thus the information required for a “complete” submission is not that specified at 930.58, but a subset thereof. Further, proposed (a)2 specifies the State’s responsibility of notifying the applicant of the receipt of the necessary data and information. According to the new language, the date the information deemed missing was received by the State is the date the State’s review would begin. Thus, the proposed language at (a)2 contradicts that of (a)1ii. New Jersey’s Coastal Management Program supports the language of (a)2 that provides that the State review period begins upon receipt of all information and suggests that (a)1 be revised as follows:

(a) State agency review of an applicant’s consistency certification begins at the time the State agency receives a copy of the consistency certification, and the necessary data and information required pursuant to 930.58.

(1) If an applicant fails to submit a consistency certification in accordance with 930.57, or fails to submit necessary data and information required pursuant to 930.58, the State agency shall, within 30 days of receipt of the incomplete information, notify the applicant and the Federal agency of the missing certification or information, and that the State agency’s review has not yet begun, and that its review will commence upon receipt of the missing certification or information.

Revised language of paragraph (a) is based on the premise that 930.58 (Necessary data and information) is revised to require that the necessary data and information be sufficient (see comment on rule change 10).

Rule change 15: 930.77(a) Commencement of State agency review and public notice. This change clarifies when the State’s consistency review period begins for OCS plans. As previously set forth in our comments on rule changes 7 and 12, the State review period should not commence until all information listed in the “completeness” section is present and sufficient to make a consistency determination.

Rule change 18: 930.121(c) Alternatives on Appeal. This change addresses when alternatives can be raised, consequences of a State agency not providing alternatives and the level of specificity that the State agency needs to provide to satisfy the element on appeal. New Jersey's Coastal Management Program supports the proposed rule changes to this section. In particular, we strongly support the language clarifying that an alternative shall not be considered unless the State submits a statement to the Secretary that the alternative would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program. In contrast to proposed rule change 9 which takes the determination of an activity's effects on a State's coastal resources away from a State, this provision recognizes that the State is the entity best positioned to review an alternative for consistency with the State's enforceable policies.

If you have any questions on the above, please contact me at (609) 292-2662.

Sincerely,

Ruth E. Ehinger
Coastal Program Manager

- c. Elisabeth Morgan, OCRM
Mark Mauriello, LURP
Kim Springer, CMO