August 19, 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, MD 20910

Attention: Federal Consistency Energy Review Comments (Docket No. 030604145-3145-01)

Dear Mr. Kaiser:

On behalf of the Board of Supervisors, County of Santa Barbara, I am submitting the following comments in response to the proposed rule cited above. Santa Barbara County is situated adjacent to most of the oil and gas leases and development in the Pacific Outer Continental Shelf (OCS) Region. The County's experience with offshore oil and gas and related issues of coastal management dates back over a century. This County has been intimately involved with balancing the national interest of OCS oil and gas development against the adverse effects of such development on coastal resources and coastal uses since the advent of OCS offshore California in 1963. Most recently, the County was one of the plaintiffs in *California v. Norton*.

We are quite concerned about the purpose and need for the current proposed rule. Our concern stems from four compelling factors:

1. **The Current Process Is Working Well.** The record of Consistency Review reviews illustrates that the system is working very well. The background sections of the proposed rulemaking and the earlier Advanced Notice of Rulemaking establish this fact well. Conflicts tend to be resolved more efficiently through the collaborative and cooperative channels provided to coastal states, rather than the last-resort of litigation if cooperative channels are narrowed or closed.

2. **Market Forces, Not CZMA Processes, Have Delayed Offshore Development.** It is well known to most analysts that the delays in the development of OCS leases since 1986, at least delays offshore California, are attributable to market forces. Contributing factors have included both price-based and quality-based competition between crude oils available from

the Pacific OCS and crude oils available from other sources (e.g., Alaska and, more recently, foreign sources). No nexus exists between these fundamental market causes and the proposed CZMA rulemaking.

3. **Undermining Congressional Intent of the "Effects Test."** Some components of the proposed rule, as well as some of the supportive explanations, are out of sync with both the intent of the CZMA and the recent *California v. Norton* decision. Congressional intent sought to encourage early and consistent consultation with coastal states, as well as determination of effects on coastal resources and uses based upon case-specific factors. Some explanations provided in support of the proposed rules avoid consultation and unreasonably prejudice what should be case-by-case determinations regarding the applicability of Federal Consistency review to certain Federal actions.

4. **Stated Basis for Rulemaking Not Fully Disclosed.** The notice of proposed rulemaking states its intention to implement the recommendations of the Report of the National Energy Policy Development ("NEPD") Group. That Report, however, only very generally mentions the Coastal Zone Management Act and vaguely suggests a re-examining of the "federal legal and policy regimes . . . to determine if changes are needed . . ." The list of documents compiled by the NEPD Group, however, includes some policy papers that have not been released to the public and that specifically address the CZMA Federal Consistency Process. Therefore, the notice of rulemaking is unable to make a factual case for the basis of the rulemaking. Since not all of the documents that led to the publishing of that Report have been made public, the County believes any action on the proposed rule must be delayed until all relevant evidence has been placed in the public docket for this rule and public review has been allowed.

Accordingly, we urge NOAA to either vacate the proposed rulemaking altogether, or delay the rulemaking until all relevant documents that pertain to the Energy Report have been disclosed to the public and included in the docket for this rulemaking effort. Should any rulemaking proceed, we urge NOAA to consider the specific concerns detailed below and to adjust the proposed rule accordingly.

Basis for Rule Amendments

Rule changes should not be based on unseen information. The preamble states that the proposed rule amendments will implement recommendations of the Energy Report prepared by the National Energy Policy Development Group that was established by Vice President Cheney. This Report, however, only very generally refers to the Coastal Zone Management Act and, further, vaguely recommends that the President direct Secretaries of Commerce and Interior "re-examine the current federal legal and policy regimes (statutes, regulations, and Executive Orders) to determine if changes are needed regarding energy related activities and the siting of energy facilities in the coastal zone and on the Outer Continental Shelf." (Energy Report, May 2001, p. 5-20.) Completely absent from the Report is any statement or recommendation that suggests specific changes to the CZMA process. Therefore, on the face of the proposed

rulemaking, NOAA had not identified any policy statement or other rationale that supports or justifies the proposed rule amendments.

Also troubling is that the process that led to the preparation of this Energy Report often was not a public process and, indeed, the United States Department of Energy still refuses to release many of the documents that were created for and considered by the Task Force. In particular, we have reviewed the Department of Energy Vaughn Index, dated April 25, 2002, which lists documents withheld from public review, and we note that at least 7 documents directly relate to the CZMA consistency process. These are Documents 440, 441, 895, 1275, 1931, 1936, and 1982. (See Exhibit A for Excerpts of Index.) The above-identified documents are not meant to be an exhaustive list and, indeed, many other documents on the Index could relate to CZMA issues; however, the titles are too general to determine their exact subject. If the recommendations of the Energy Report are to be the basis for the rule amendments, then all documents and records relevant to the Energy Report's preparation and recommendations must be made available to the public as part of the public docket for this rulemaking action and the comment period must be extended to afford members of the public an opportunity to review and comment on this information and evidence. The County is particularly interested in any documents that detail the need for the changes to the NOAA regulations that are now being proposed. For NOAA to proceed without disclosing such documents will be in violation of the Federal Administrative Procedure Act (5 U.S.C. section 551 et seq.).

Description of "Effects Test" and Lease Sales

The Notice of Proposed Rulemaking accurately points out that the 1990 amendments to the CZMA broadened the applicability of the consistency process by modifying the phase "directly effects" by dropping the word "directly." The stated legislative intent of this amendment was to allow states the opportunity to review OCS lease sales as part of the consistency process. Review of lease sales is consistent with the intent and purpose of the CZMA, which is to encourage early consultation and cooperation between the federal government and the coastal states for all proposed federal activities. The preamble then goes on to say that in certain instances, lease sales may not "effect" the coastal zone, thereby suggesting that there will be a case-by-case review of whether lease sales require a consistency analysis.

The County's position is that, given the impacts eventually caused by the development that follows lease sales, it will always be reasonably foreseeable that such lease sales will adversely affect the coastal zone in a manner that will require a consistency review. The development implications under lease sales are far too great to ever support a finding that they would have no adverse impact on the coastal zone.

Rule Change 6: General Permits (§ 930.31(d))

The County notes that a general permit may have adverse impacts on the coastal zone that are only revealed on a case-by-case review. Therefore, while a state may not find a basis to object to such a permit, such as an NPDES permit, the actual application to a particular situation involving

sensitive coastal resources may make a consistency review appropriate and necessary. The rule amendments should reflect this possibility.

Rule Change 4: Definition of "Federal Agency Activity"

- **Application of Federal Consistency Review to Lease Suspensions**

The proposed rule amendment is described simply as a clarification that "would not alter the current application of the definition of Federal agency activity . . . ." (68 Federal Register at 34854.) Then, even though no substantive change to the rule is proposed, the preamble goes on to discuss at length the scope and meaning of the recent Ninth Circuit Court of Appeal decision in *California. v. Norton* (2002) 311 F.3d 1162. In particular, NOAA makes the following comment regarding the recent ruling.

> *"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, an EP or a DPP."* (Page 34867.)

Santa Barbara County believes that the NOAA comment is far too broad in concluding that future lease suspensions will not be subject to a consistency review. In particular, the County notes that the Ninth Circuit reserved the issue of whether future lease suspensions would be subject to a consistency review. On this point, the Court stated:

> *"We have before us today only leases that were issued prior to the 1990 Coastal Zone Management Act amendments, which have never been subject to consistency review. Accordingly, we need only decide the lease suspension question with respect to such leases. 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."* (*California v. Norton* 311 F.3d at 1174-1175.)

The County believes NOAA's comments about potential future lease suspensions are extraneous to the proposed rule amendment and attempt to prejudge matters not currently pending before NOAA. Regarding lease suspensions, the County points out that the Minerals Management Service leases tracts in the OCS for oil and gas development for a primary lease terms of 5 or 10 years maximum with an understanding that formidable steps toward production commence during that primary term. Further, the Outer Continental Shelf Lands Act (OCSLA) requires lessees to exercise due diligence in developing their leases. Notwithstanding such statutory obligations being placed on lessees, the liberal use of lease suspensions can and have prolonged the life of non-producing leases for one or more decades. The 36 leases involved in *California v. Norton* exemplify such circumstances where development has been delayed between 17 and 33 years at the time the Department of the Interior granted the disputed lease suspensions.[1] NOAA

[1] With one exception, these delays are directly attributable to market forces, not the CZMA and its implementing regulations. This trend of delays also indicates that market forces will continue to dictate the timing in which OCS leases offshore California are developed, rather than primary lease terms or compliance with the CZMA.

should not and cannot prejudice the case-specific determination if renewal of leases two or more decades after initial issuance qualifies for review. In such cases, a changing coastal environmental, along with new information, or a better understanding of potential effects on coastal resources, may warrant consistency review of a lease suspension, even where a lease was originally subject to Federal Consistency Review at the time of the lease sale.

Further, County notes that the holding in *California v. Norton* was based on several factors that NOAA ignores in its discussion. While NOAA points out that the Court focused on the 36 undeveloped leases that had not previously been subject to consistency review; the Court also noted a change in circumstances that had occurred since the original leases had been issued. In particular, the Court stressed that "the lease suspensions represented 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." (*California v. Norton* at 1174.) Further, the Court stressed, as pointed out by Santa Barbara and San Luis Obispo counties in the litigation, that all but one of the lease sales predated the state coastal management plan and all predated key coastal protection policies adopted by the counties, such as the Santa Barbara County oil transportation policies. (*Id*.) Further, as pointed out by the environmental groups in the litigation, there had been a change in environmental circumstances such as the expanded range of the threatened sea otter and the creation of the Monterey Bay Marine Sanctuary. (*Id*.)

Accordingly, we urge NOAA to mirror the Court's lead, reserving without prejudice any determination of California's right to review a lease suspension to such time that the particular facts of such a case, if it should ever arise, become available.

- **Definition of "Federal agency activity"**

Without explanation, the proposed revision deletes "exclusion of uses" among listed examples. We request that you reinstate this example to reflect the full purpose and intent of the CZMA. Conflict between coastal uses can and do result from some federal agency activities.

- **True Nature of the Minerals Management Service's 5-Year Leasing Program**

The proposed rule and accompanying explanations understate the importance of 5-Year Oil & Gas Leasing Programs as illustrated in the following statement:

> *"Not all "planning" or "rulemaking" activities are subject to Federal Consistency since such planning or rulemaking may merely be part of the agency's deliberative process. Likewise, the plan or rulemaking may not propose an action with reasonably foreseeable coastal effects and would therefore not be subject to Federal Consistency. If, however, an agency's administrative deliberations result in an actual plan to take an action, then that plan could be subject to Federal Consistency if coastal effects are reasonably foreseeable. For example, in the OCS oil and gas program, MMS produces a 5-year Leasing Program "Plan." MMS has informed NOAA that the 5-Year Program Plan is a preliminary activity that does not set forth a proposal for action and thus, coastal effects cannot be determined at this stage. Accordingly, MMS' proposal for action would occur when MMS conducts a particular OCS oil and gas lease sale."* (Page 34854 – emphasis added.)

The 5-Year Leasing Program is a poor example and its use in this context unreasonably prejudices California's right to seek a determination of consistency. Five-Year Leasing Programs culminate in a formal decision pursuant to the OCSLA, as to the location, concentration and timing of OCS leasing nationwide that is believed necessary to meet the nation's energy needs.[2] By law, this decision is based upon several factors, explicitly including a determination of coastal effects. Each 5-Year Leasing Program is accompanied by an Environmental Impact Statement, which assesses impacts of different leasing alternatives that affect the distribution and concentration of proposed lease sales around the nation. Additionally, each program is subject to a formal public review and comment process that does not meet the narrow exceptions of "agency deliberations or internal tasks."

The County offers a corrected characterization of the 5-Year Leasing Program, as presented by the Minerals Management Service in its introduction to the most recent 5-Year Leasing Program.

> *"Section 18 of the Act* [OCSLA] *requires that the 5-year program be prepared in a manner consistent with four main principles: (1) consideration of economic, social, and environmental values and* ***the potential impact on marine, coastal and human environments****; (2)* ***a proper balance among potential for environmental damage, discovery of oil and gas, and adverse impact on the coastal zone****; (3) assurance of receiving fair market value; and (4) consideration of eight factors. These factors are (a) existing information on geographical, geological, and ecological characteristics of regions; (b)* ***equitable sharing of developmental benefits and environmental risks among regions****; (c) location of regions with respect to needs of energy markets; (d)* ***location of regions with respect to other uses of the sea and seabed****; (e) interest of potential oil and gas producers; (f)* ***laws, goals, and policies of affected States****; (g)* ***relative environmental sensitivity and marine productivity****; and (h) relevant environmental and predictive information. …"*
>
> *"The 5-year oil and gas program process and decisions fulfill both the letter and the spirit of section 18 of the OCS Land Act* ***by providing for environmentally responsible oil and gas leasing*** *in selected prospective areas of the OCS where it appears there is sufficient industry interest,* ***where neither the laws or policies of adjacent States and localities nor other uses of the sea and seabed are significant impediments to OCS program activity****, and where there is agreement among interested and affected parties that consideration of leasing is feasible within the 1997-2002 timeframe. … This program is unique in its development from the bottom up and* ***its grounding in the principle of working in partnership with affected parties to develop a reliable schedule of lease offerings so that the new program can serve as a framework of collaboration among parties****."* [3]

Subsequent lease sales provide opportunity to address the effects on coastal resources from developing only those leases involved in the lease sale. However, the lease sale is not the earliest time where consultation should commence and it occurs too late to consider alternative distributions and concentrations of leasing to best balance the nation's energy needs with protection of coastal resources. Those alternatives were finalized in the 5-Year Leasing Program.

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[2] As example, the Minerals Management Service conducted 10 lease sales offshore California (1966-1984), resulting in 369 leases. Fifty-four percent of those leases (200 in all) were concentrated in a small coastal area of the Santa Barbara Channel and Santa Maria Basin.

[3] U.S. Department of the Interior, Minerals Management Service, *Proposed Final Outer Continental Shelf Oil & Gas Leasing Program 1997 to 2002: Decision Document*, August 1996, pages 1-2.

Accordingly, Santa Barbara County believes much earlier consultation on issues, which the Federal Consistency Review process are intended to address and resolve through better alternatives, can and should occur during the 5-Year Leasing Program.[4] The 5-Year Leasing Program does initiate a series of actions with reasonably foreseeable coastal effects. If it did not, it would not comply with the requirements of the OCSLA.

Rule Change 7: State Agency responses (§ 930.41(a))

NOAA proposes to allow a state agency 14 days to determine if sufficient information has been submitted regarding federal activities in order to initiate the 60-day review period for the state's consistency determination. This initial period is to help resolve disputes that have occurred as to when the 60-day period commences.

The County supports an initial review period to determine if the submittal is complete. The proposed 14-day period is, however, far too short to allow for essential communications between state and local agencies concerning the proposed activity. For example, for projects proposed off of the County's coast, Coastal Commission consultation with County staff would be an essential component of determining if the submittal is complete. Fourteen days is far too short to allow for the review and consultation needed for this to occur. Therefore, the County recommends a period of 30 days for the initial review. Further, this process will be streamlined substantially if the federal agency provides the information to the local government adjacent to the proposed federal activity at the same time it is submitted to the state coastal agency. This would provide notice to the local jurisdiction and also help ensure timely consultation with the state agency. The County notes that such a review period is consistent with the initial review period allowed under California law for development project applications.

Therefore, the County requests that the period be lengthened to 30 days and that the federal agency submit the proposal to the adjacent local jurisdiction at the same time it is submitted to the state agency.

Rule Change 9: Substantially Different Coastal Effects (§ 930.51(e))

We disagree with this proposed amendment and request that deference be allotted to coastal states in order to achieve process efficiencies. Federal "expert permitting agencies" often resist the Federal Consistency review process, as illustrated in the historic evolution of *California v. Norton.* The result typically creates an environment of conflict and distrust as opposed to the intended environment of collaborative and efficient decisions and processing of reviews. In *California v. Norton*, the Federal agency's resistance to Federal Consistency review resulted in substantial delays, only to have two courts reaffirm the State agency's position that such review was applicable. Any amendments to current rules should seek to improve this situation through a Federal consistency procedure that provides adequate public notice, comment and thoughtful consideration. That is a much better prerogative than the litigious outcome of your proposals.

[4] It has not been an issue to the County thus far because no leasing has been proposed offshore California since the 1990 amendments to the CZMA.

Further, Federal agencies are not "expert" in determining the adverse environmental effects on the states' coastal zones. Rather, it is the states that are intimately familiar with their own state coastal resources, including study of sensitive habitats and environments, as well as the management programs in place to safeguard such environments. It is the states that have the staff, expertise, and experience in managing the coastal resources on a broad basis. In contrast, agencies such as the MMS are geared toward approving and managing oil and gas projects, and in this effort, depend upon expertise in other Federal agencies (e.g., National Marine Fisheries Service), state agencies, (e.g., California Coastal Commission), and local agencies (e.g., coastal counties of California with certified Local Coastal Programs).

The County further notes that NOAA has not cited any evidence in the record for its assertion that the Federal agencies are "expert permitting agencies" for purposes of the CZMA. Indeed, the County submits that it is the limited scope of such agencies that led Congress to enact the federal CZMA in order to encourage a federal-state partnership in the management of the nation's coastal resources.

Rule Change 12: Commencement of State Review of Federal Licenses or Permit Activities (§ 930.60)

In order for a state to require additional information for its review process, NOAA suggests a state must amend its state management program and have the amendment approved by NOAA. The County believes the proposal is far too structured and formal a requirement for the states to fulfill for the simple purpose of obtaining the information necessary to review proposed projects. In particular, the County notes that NOAA has not processed many amendments to state approved management programs, nor is NOAA committing to provide the resources necessary to process such amendments. Further, the information needs of the states to review proposed Federal licenses and permits is often driven by developing environmental studies about the character and nature of the coastal environment. Requiring the states to request and NOAA to approve formal amendments to the approved state management plan every time additional informational needs are identified will undercut the effectiveness of the review process by the states. It will actually lengthen the review process as states seek time extensions to obtain needed information to review activities for consistency with coastal management programs. Further, the requirement is unnecessary and, therefore, should not be imposed.

Rule Change 14: NEPA Documentation for OCS Plan (§ 930.76(a) & (b))

The County supports a requirement that the NEPA documentation be provided before the six month state review process begins. This can be accomplished for draft EIS documents. Where that is not possible (apparently MMS asserts this cannot be done for EA's), the NEPA document should be provided as soon as possible and in no event later than 30 days after submittal to the state.

The County disagrees with NOAA's proposal to require each state to list the NEPA EIS in their state management plan as an informational requirement in order for the state to be able to receive

the EIS as part of a complete informational submittal to the state. Where possible, rulemaking should standardize the informational requirements needed for state consistency review. Any EIS prepared for the project will obviously be useful and even essential information for the state's consistency determination. Therefore, the County requests that, for a project that requires an EIS, the draft EIS be submitted as part of the informational submittal to the state under this section.

Rule Change 15: Commencement of State Agency Review (§ 930.77(a))

This amendment appears out of sync with the case-specific determination of consistency for individual projects, which requires case-specific facts and information. Instead each coastal state is burdened with the considerable and difficult task of foreseeing all necessary case-specific information for all such cases involving OCS plans, and listing that information as a requirement in their respective coastal management programs. We find such amendment to be somewhat unrealistic and contrary to the intent of Federal Consistency, wherein case-specific determinations involve case-specific information that may not always be contained in a generic list of informational requirements applicable to all activities. The amendment also appears to place coastal states in an unfair disadvantage if they have not yet experienced offshore oil and gas leasing/development, by expecting them to anticipate such issues in advance of any such experience. The first oil development project offshore a coastal state will also be more difficult because it represents a steep learning curve for all involved.

Rule Change 22: Remand to the State based on significant new information (§ 930.130)

We object to the minimal, 20-day remand period to the State for reconsideration of consistency if new significant information warrants such remand. Such a short period not only unreasonably impedes the State to respond comprehensively, but it also effectively eliminates any opportunity public consideration, including affected local jurisdictions. We do not believe that the Federal government should impose such short turnaround periods that it could not reasonably meet itself.

In conclusion, we find that the proposed rules hold the potential to impede the State's role in the CZMA process, and to shift responsibility to resolve issues from the Federal agencies to the judicial system. We are not sure how such an approach achieves the stated goal of improving procedural efficiencies in the process. The County is willing to meet with NOAA and stakeholders at any time to discuss ways in which the process can be shortened and still meet the necessary review requirements.

Thank you for considering our comments. Please contact Mr. Steve Chase or Mr. Doug Anthony of our staff at (805) 568-2040 if you have any questions regarding our comments.

Respectfully submitted,

NAOMI SCHWARTZ, Chair
Board of Supervisors

CC: Senator Barbara Boxer
Senator Dianne Feinstein
Representative Lois Capps
Peter Douglas, Executive Director, California Coastal Commission
Peter Tweedt, Director, Minerals Management Service, Pacific OCS Region

Exhibit A

Excerpts from the Vaughn Index
April 25, 2002

http://www2.nrdc.org/air/energy/taskforce/pdf/doevaughn.pdf

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATURAL RESOURCES DEFENSE COUNCIL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civ. No. 1:01CV02545 (GK)**
	)	
UNITED STATES DEPARTMENT OF ENERGY,	)	
	)	
Defendant.	)	
	)	

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civ. No. 1:01CV00981 (PLF)**
	)	
UNITED STATES DEPARTMENT OF ENERGY, et al.,	)	
	)	
Defendants.	)	
	)	

DEPARTMENT OF ENERGY'S VAUGHN INDEX
APRIL 25, 2002

1. …

440. Undated document entitled "Coastal Zone Management Act Federal Consistency Regulations." B-5 Exemption - Material withheld contains the author's comments, recommendations, and suggestions relating to preparation of draft NEPDG report. 2 pages. #4605-4606 Withheld [PDF version – page 52]

441. Undated document entitled "Energy Policy and Coastal Management." B-5 Exemption - Information withheld consists of containing the author's comments, recommendations, and suggestions relating to preparation of draft NEPDG report. 1 page. #4607 Withheld … [PDF version – page 52]

1275. Undated document entitled “Coastal Zone Management Act.” B-5 Exemption - Information withheld consists of deliberative and pre-decisional material consisting of a draft issue paper containing proposed recommendations, views, discussion or factual background pertaining to the subject topic as it relates to the development of the NEP. 2 pages. #11498-11499 Withheld … [PDF version – page 254]

1931. Document entitled “Coastal Zone Management Act.” Exemption B-5 - Information withheld consists of pre-decisional and deliberative recommendations to revise draft report. 3 pages. #19698-19700 Withheld … [PDF version – page 431]

1936. Document entitled “Coastal Zone Management Act.” Exemption B-5 - Information withheld consists of pre-decisional and deliberative recommendations for draft report. 3 pages. #19708-19709 Withheld … [PDF version – page 431]

1982. Document entitled “Coastal Zone Management Act.” Exemption B-5 - Information withheld consists of pre-decisional and deliberative position paper containing proposed recommendations, views, discussion or factual background pertaining to the draft NEP. 2 pages. #19808-19809 Withheld … [PDF version – page 437]

895. E-mail to Joseph Kelliher from K Murphy, dated March 21, 2001. Subject: RE: CZMA. B-5 Exemption - Deliberative and pre-decisional Process. Redacted information concerns policy recommendations for the NEP. 1 page. #24243 Released in Part [PDF version – page 513]