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

Re: Proposed CZMA rule (68 Fed. Reg. 34851-74 (June 11, 2003))

Dear Mr. Kaiser:

On behalf of the Skokomish Indian Tribe ("Tribe"), we are submitting comments on the above proposed rule. The Tribe's proposed changes reflect the decision of *Skokomish Indian Tribe v. Fitzsimmons*, 97 Wn. App. 84, 982 P.2d 1179 (1999), in which the Washington Court of Appeals invalidated the Department of Ecology's "waiver" of its right to object to the city of Tacoma's consistency determination, while simultaneously objecting to the adverse coastal effects of Tacoma's proposed hydroelectric license for the Cushman Dam project. The court held that a state CMZA agency illegally "renders meaningless" the federal and state CZMA regulatory schemes, when it "choose[s] not to follow procedures prescribed by law to ensure" that federally licensed projects comply with state CZMA laws. *Id.* at 95. The Washington Supreme Court unanimously denied Ecology's petition for review. 143 Wn.2d 1018 (2000).

NOAA's proposed rule must incorporate this principle, which (1) is fully consistent with the federal Coastal Zone Management Act, and (2) carries out NOAA's desired effect in its rule change of providing greater "transparency and predictability" to the federal consistency regulations. First, NOAA should amend its rules to clarify that state agencies must either clearly concur (through express statement or by complete silence) or object to consistency certifications. Second, the rules must clarify that state CMZA agencies cannot expressly waive their CZMA rights if they have previously raised objections regarding coastal impacts that the proposed license does not address. Third, the rules must expressly acknowledge NOAA's and the federal licensing agency's respective duties to actively inquire into the legality of a state CZMA

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concurrence or objection that circumvents or contradicts the CZMA's goals and procedures, before the six month window closes. Fourth, the rules must provide an appeal and/or mediation mechanism for the licensing agency, NOAA, and the participating public to challenge illegal state maneuvers. None of these rule changes are prohibited by the CZMA, and in fact they are consistent with what NOAA acknowledges is the CZMA's "limited waiver of Federal supremacy and authority." 68 Fed. Reg. 34,852.

We suggest that NOAA articulate these concepts in, at minimum, the following sections: 15 C.F.R. § 930.62, § 930.63, § 930.64, § 930.65, and Subpart H.

Thank you for your consideration.

Sincerely yours,

MORISSET, SCHLOSSER, JOZWIAK & McGAW

Mason D. Morisset
Attorney for Skokomish Indian Tribe

Cc: Tribal Officials
Joe Christy, Esq.