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: Coastal Zone Management Act Federal Consistency Regulations: Proposed Rule (Federal Register, Vol. 68, No. 112, June 11, 2003, pages 34851 through 34874) DEQ-03-105F

Dear Mr. Kaiser:

The Commonwealth of Virginia has completed its review of the Proposed Rule described above. The Virginia Coastal Resources Management Program (VCP) consists of a network of programs administered by several agencies. The Department of Environmental Quality (DEQ), as the lead agency for the VCP, coordinates the review of federal consistency determinations with agencies administering the Enforceable and Advisory Programs of the VCP. The following state agencies and regional planning district commissions joined in the review of the Proposed Rule (agencies with asterisks (*) administer Enforceable Programs of the VCP):

Department of Environmental Quality*
Department of Conservation and Recreation*
Department of Health*
Virginia Institute of Marine Science
Chesapeake Bay Local Assistance Department*
Crater Planning District Commission
Northern Neck Planning District Commission
Richmond Regional Planning District Commission
Hampton Roads Planning District Commission

The following entities were also invited to comment: Department of Game and Inland Fisheries,* Department of Historic Resources, Marine Resources Commission,* RADCO Planning District Commission, Northern Virginia Regional Commission, Middle Peninsula Planning District Commission, and Accomack-Northampton Planning District Commission.

Nature of Proposed Action

The National Oceanic and Atmospheric Administration ("NOAA") proposes to revise the Federal Consistency Regulations (15 CFR Part 930) under the Coastal Zone Management Act to address recommendations of the National Energy Policy Development Group convened in 2001. These recommendations were described last year in NOAA's Advanced Notice of Proposed Rulemaking ("ANPR"), which appeared in the Federal Register on July 2, 2002. The Commonwealth responded to the ANPR on September 23, 2002 (DEQ-02-125F). As indicated above, the Proposed Rule appears in the Federal Register, Vol. 68, No. 112, June 11, 2003, pages 34851 through 34874 (hereinafter "Notice").

General Comments

Virginia supports procedural changes that improve the overall efficiency of the federal consistency review process. However, it appears that many of the proposed changes go beyond the technical and procedural changes referred to in the ANPR and could affect the substance of federal consistency review (see, in particular, the discussions of Rule Changes 12 and 15, below). Comments submitted to NOAA on the ANPR indicated that no changes in the Federal Consistency Regulations are needed to address OCS development. As DEQ's Water Division indicates (see attached comments), if the perceived deficiencies in the consistency review process pertain only to Outer Continental Shelf (OCS) energy development, then there is no reason to address provisions other than those appearing in Subparts E, (Consistency for OCS Activities, sections 930.70 through 930.85), G (Secretarial Mediation, sections 930.110 through 930.116), and H (Appeal to the Secretary, sections 930.120 through 930.131). It would seem to be more appropriate to address the issues in policy guidance, rather than by rule-making.

Also, the existing review process essentially guarantees some rights to state coastal agencies (hereinafter "state agencies") to review projects and activities affecting their coastal resources, using federally-approved state rules as their bases of evaluation (Notice, page 34852, center and right columns). Any changes to the regulations must be accomplished in a manner which does not conflict with such rights.

In addition, we are concerned that only state and local government permit applications, instead of the actual permit determinations, are required for the "necessary data and information" that sets the review time clock in motion; this may not provide the time necessary to determine whether the permit may be issued, and the project found consistent with the applicable Enforceable Program. (See detailed discussion of Rule Change 11, below.)

Comments on Rule Changes

In summary, Virginia has no comments or objections concerning Rule Changes 1, 2, 3, 5, 13, 16, 18, 19, or 20. Our comments on other Rule Changes follow.

*Rule Change 4, section 930.31(a), federal agency activity.* The proposed change would modify the wording of this provision to emphasize the idea that a federal agency function refers to a proposal for action that has a coastal effect, according to the Notice (page 34854, left and center columns). The change adds a number of words and phrases to give examples of an agency's responsibilities and activities in attempting to further define them as activities not included under permit issuance (Subpart D of the Regulations) or federal assistance (Subpart E).

Comment. This proposed change would add as much uncertainty as it purports to remove, and we do not consider it an improvement to the existing rules. For example, new terms such as "proposal for action" and "plan that is used to direct future actions" are likely to inject confusion into a process that is fairly well established. In addition, these adjustments to the language, with their emphasis on specific types of activities, appear to be adding a new test to the definition of activities with "reasonably foreseeable coastal effects."

*Rule Change 6, section 930.35(d), general negative determinations.* Rule Change 6 would move sub-section (d) to a new sub-section (e) and then add a new sub-section (d) which provides for a "general negative determination" (Notice, page 34855, center and right columns). This would be provided by the federal agency when it is performing a "repetitive activity" that the federal agency determines will not have reasonably foreseeable coastal effects. It would be added to the concept of negative determination already described in sections 930.34 and 930.35. No limit is imposed on its use or effectiveness, except that it would have to adhere to the requirements of section 930.35. It would have to describe the activity so covered, and the number of occurrences of the activity; but the extent to which the activity would have cumulative impacts, for example, is left unaddressed. According to the Notice, it would be up to the state agency to decide when the general negative determination no longer applies, and to request that the federal agency reassess it. No guarantee is given on the result of such a request.

In the event of conflict, the mediation provisions of Subpart G are mentioned (Notice, page 34855, right column).

Comment. Our concern with this proposed change is that it would appear to create a new class of activity exempted from consistency review by virtue of the repetitive nature of the activity. There would be no requirement to reassess the applicability of a general negative determination. Nor would there be a requirement to define or analyze the nature of the activity and possible cumulative impacts. Instead, the emphasis is on the "number of occurrences." The rationale gives, as examples, distant versus nearby activities, as indicated above, but does not provide guidance on what makes a distant, repetitive activity one that does not require review and what happens if its consequences affect coastal resources or uses. In addition, the proposed change would effectively foreclose public notice, and state agency review, of undetermined additional classes of activities. If this change is adopted, Virginia's Department of Conservation and Recreation indicates that it should require the discussion and justification of cumulative impacts in the general negative determination.

*Rule Change 7, section 930.41(a), state agency response.* The proposed rule would require that a state agency notify the federal agency submitting a consistency determination if the submission is lacking complete information in 14 days, in writing, instead of "immediately." It would state that if the written notification is not accomplished in the 14 days, the review period would begin at the time of receipt of the original submission. The proposed rule also states that the state agency's determination of completeness is "not a substantive review of the adequacy of the information provided" (Notice, pages 34855-34856).

Comment. The rationale for these changes (Notice, page 34856, left column) fails to explain why the completeness determination should be the result of a "checklist" instead of a substantive review. It states that the failure of the state agency to meet the 14-day period for notifying the federal agency of a deficiency is effectively a "waiver" of that claim; but it goes on to state that the state agency may object to the consistency determination for lack of information at the end of the 60-day review period. These two statements appear contradictory.

The proposed change puts an unreasonable deadline on the completeness review. As the Hampton Roads Planning District Commission points out, in Virginia local governments have a role in the consistency review process, through their administration of programs that are part of the Enforceable Policies. A time period of 14 days would not be sufficient to allow state distribution of a consistency determination to affected local agencies in time for them to notify the state, and the federal agency, of deficiencies in the submission. For both state and local governments to determine whether a consistency determination contains the necessary information has typically required at least 30 days.

Given the complexities of the information that may be required, especially for OCS activities, a 30-day completeness review would seem appropriate.

Also, the Final Rule must clearly indicate that it is the responsibility of the agency making the consistency determination to provide supporting information which demonstrates a thorough evaluation of all the relevant policies before such a determination can be deemed as administratively complete. The burden of proof should not be shifted to the states. In this regard, the current language of the regulations is clearer than the proposed changes and should be retained.

*Rule Change 8, section 930.51(a), federal license or permit.* The proposed rule change would streamline the definition by substituting "authorization" for "authorization, certification, approval, lease, or other form of permission," and limiting the authorization to activities affecting coastal zone natural resources. It would strike the definition of "lease" from this provision, so that federal agency leases of property for "non-federal activities" would not be included among matters for which consistency certification is required. The term "lease" would be re-defined, limiting its scope to oil and gas activities, and placed under Subpart C as a federal action.

Comment. These changes would remove federal leasing for other than oil and gas activities from coverage by the consistency rules. Limiting the definition of "authorization" to activities affecting coastal zone resources would narrow the existing definition which applies to activities affecting coastal uses. With the narrowing of the definition and the removal of lease coverage for non-oil and gas activities, this proposed change might significantly reduce the scope of federally licensed activities subject to consistency review.

*Rule Change 9, section 930.51(e), federal license or permit, determination of "substantially different coastal effects."* The determination of "substantially different coastal effects" under this provision is shared by the state agency, the federal agency, and the applicant, and the state agency is given deference in making the determination. This rule change would remove the responsibility from the state agency and give it to the federal agency, which would have to consult with the state agency and applicant, giving "considerable weight" to the state agency's opinion.

Comment. We believe that the new undefined standard "considerable weight" is too vague. The current language requiring "deference" is more commonly understood as a term of administrative review. Also, using a different terminology does not change the fact that Rule Change 9 would shift the responsibility of finding "substantially different effects" from a state agency-federal agency-applicant combination to the federal agency. No justification is provided for shifting this determination to the federal agency. The explanation in the Proposed Rule suggests that this Rule Change is one of clarification,

making sure that the state agency did not decide "substantially different" effects all by itself. This rule change would be costly as well as time-consuming for states and for NOAA, while producing no worthwhile result in the consistency review process and relative capabilities of the state and federal governments. The existing rule allows for informal or formal conflict resolution, leaving open the possibility of mediation or litigation without making either of these costly and time-consuming courses of action more likely, as the proposed rule would do.

*Rule Change 10, section 930.58(a)(1), necessary data and information.* This proposed Rule Change would replace the requirements in the existing rules for the applicant to submit "sufficient information to support its consistency certification" with "any other information relied upon by the applicant to make its certification."

Comment. The information "relied upon by the applicant" may not be sufficient, in quantity or nature, to "support the consistency certification" in the judgment of the state agency reviewing the certification. This proposed Rule Change would produce unnecessary conflict between applicants and state agencies by requiring state agency acceptance of information that may be inadequate.

*Rule Change 11, section 930.58(a)(2), necessary data and information.* Among the items of information that may be required by state agencies are "state or local government permits or permit applications which are required for the proposed activity" (section 930.58(a)(2)). The proposed Rule Change would strike the words "permits or," leaving the states without the ability to require an issued permit as part of the information with which the state evaluates the consistency of the proposed project.

Comment. The Final Rule should include language affirming the State's right subsequently to object to the applicant's certification if the applicant fails to secure necessary permits. As DEQ's Water Division points out, a state agency may not have time to determine whether a proposed project or activity is consistent with an enforceable program if the time clock for review of a consistency certification begins upon receipt of a permit application. Most of the Enforceable Programs in Virginia's Coastal Resources Management Program are permit programs: if a proposed project or activity requires a permit and is issued one, it is consistent with that Enforceable Program. The issued permit also provides more useful information to other reviewing agencies than would a permit application. However, the proposed Rule Change would remove the state's ability to require an issued permit as part of the information it uses to decide consistency.

As the Hampton Roads Planning District Commission indicates, state agencies must know whether the applicant's proposed activity qualifies for a permit in order to determine its consistency with the Enforceable Programs of the Coastal Management Program. Thus if an applicant fails to obtain a permit from one of the Enforceable

Programs of the state's coastal management program, this is evidence that the proposed activity is inconsistent with that Program.

In short, this Rule Change would undermine the entire review process, making the conclusion of a consistency review tentative (similar to a conditional concurrence) and dependent for its finality upon whether a permit gets issued afterward. This would create uncertainty for the applicant.

*Rule Change 12, section 930.60, commencement of state review.* The standard for declaring a certification to be sufficient and under review under the present rule is that the identified deficiency has been corrected. The Rule Change effectively changes the standard from sufficiency and correctness to the receipt of information which the applicant asserts will correct the deficiency (see the old and new versions of sub-sections (a)(1)(i), (a)(1)(ii), and (a)(2)). The review commences once the information is received, whether it corrects the deficiency or not.

Comment. This proposed change overlooks the fact that receipt of information by the state agency is not the same as correction of deficiencies by the applicant. In addition, analyzing whether deficiencies have been corrected takes longer than merely receiving information. Moreover, proposed sub-section (a)(3) prohibits the state from suspending the time clock without the written agreement of the applicant once the review period has begun – i.e., upon receipt of additional information that may or may not correct the deficiency in the initial submission.

*Rule Change 14, section 930.76(a) and (b), necessary data and information and consistency certification for outer continental shelf activities.* This Rule Change would drop an essential requirement of section 930.76(a), which is to "identify... activities described in detail in the [OCS] plan which require a federal license or permit and which will have reasonably foreseeable coastal effects." It would leave intact the requirements to submit the plan itself and the consistency certification to the Secretary of the Interior, who would then make a copy of the information for the state agency. But there would be no obligation on the applicant to consider or describe the impacts of any activities contemplated in an OCS plan upon coastal resources. Any such consideration, under the proposed change, would be accomplished by the state agency through its analysis of the OCS plan.

Comment. This procedural change would shift all of the responsibility for analyzing the impacts of proposed OCS actions from the applicant proposing them to the state agency, thereby violating a basic precept of the Coastal Zone Management Act and also the National Environmental Policy Act. The precept is that agencies or entities proposing actions which will have environmental impacts must demonstrate consideration and analysis of those impacts and an effort to mitigate them, to the

satisfaction of agencies with environmental oversight responsibilities, before proceeding with the actions.

*Rule Change 15, section 930.77(a), commencement of state agency review and public notice.* Insofar as sub-section 930.77(a)(1) is concerned, the Rule Change would not be significant. However, the proposed sub-section (a)(2) would make it necessary for the state to amend its program to get information in addition to that required by section 930.76. Section 930.76 requires the applicant to submit, among other things, "necessary data and information pursuant to section 930.58," discussed above as indicated.

Comment. We believe that requiring a program change to get additional information would be unduly burdensome to state agencies, especially in light of the other changes proposed in the Notice.

Also, Rule Change 15 would add a new and burdensome provision to Section 930.77(a) and fails to explain why such a provision is needed (see the Notice, page 34858, center and right columns). The proposed new sub-section (a)(3) would require the state coastal agency to provide minute detail, in writing, of the reasons why additional information is requested – shifting the burden of proof to the state agency from the applicant as with Rule Change 14 (above). It also would close off any additional inquiry by the state agency after three months into the review process. This is unreasonable; state agencies should not be barred from seeking information after three months. The information sought might be essential to resolving a dispute, rather than causing it.

*Rule Change 17, section 930.85, failure to comply substantially with an approved OCS plan.* Rule Change 17 would leave sub-section 930.85(a) intact. However, in sub-section (b), it would remove the requirement that the Director be informed of the state claim of substantial failure to comply. In sub-section (c), it would take the decision on substantial failure to comply away from the Director and give it to MMS. The Rule Change would allow MMS to decide its satisfaction concerning compliance, then inform the state agency of the result and provide it a copy of the amended plan, "necessary data and information, and consistency certification." This parallels the removal of jurisdiction from the state agency found in Rule Change 9 (above). The argument presented in the Notice for this change is that under the Federal Consistency Regulations as well as the OCSLA "program" (no citations given), it is MMS that determines whether a change to an OCS plan is significant and thus requires federal consistency review; therefore MMS should determine the substantial failure to comply with an approved OCS plan (page 34858, right column).

Comment. The argument presented, first, confuses "significant change to an OCS plan" with "substantial failure to comply." Secondly, it overlooks the fact that it is the state agency in particular, and NOAA as overseer of the Coastal Zone Management Act

implementation, that have the expertise to determine whether a proposed activity requires consistency review. MMS does not have the requisite expertise to interpret the CZMA, any more than NOAA has the requisite expertise to interpret the OCSLA all by itself. For this reason, section 930.85(a) begins with the statement that MMS and NOAA shall cooperate in monitoring OCS activities to ensure that they conform to state and federal laws. Rule Change 17 retains this charge to cooperate (in sub-section (a)), but defeats it by giving all decision authority to MMS in regard to finding and correcting a "substantial failure to comply."

*Rule Change 21, section 930.128, public notice, comment period, and public hearing.* The Rule Change would alter the notification concerning the Secretary's actions on appeals in a number of ways. It would eliminate the "timely" requirement in favor of a 30-day requirement to get the public notice out. It would make the federal agencies' comment period concurrent with that offered to the public. It would mandate "greater weight" to the comments of the federal agencies "whose comments are within the areas of their expertise." It would also allow a re-opening of the comment period for federal agencies, "on the Secretary's own initiative or on request, for good cause shown," but the change would abolish the Secretary's ability to extend the comment period. The change would require that a request for a public hearing be filed within 45 days of the publication of the initial notice of appeal in the Federal Register.

Comment. Reducing the time for processing of Secretarial appeals presupposes that the time requirements promulgated less than three years ago -- when the Federal Consistency Regulations underwent a significant revision following several years of analysis, comments, and responses -- are somehow excessive to the need. For us, this presupposition is at least open to argument: it is not a given.

*Rule Change 22, sub-sections 930.129(c) and (d), stay and remand the processing of an appeal.* Rule Change 22 would remove the Secretary's ability to remand the appeal for reasons other than those allowed under section 930.130 governing the stay of closing of the decision record.

Comment. This would have the effect of discouraging applicant-state agency resolution of issues through negotiation, since it would no longer allow settlement or negotiation as a basis for remanding an appeal. Issues would remain unresolved, until the Secretary decides them in favor of one side or the other. This change would promote conflict rather than resolution.

In regard to sub-section (d), Rule Change 22 would allow the Secretary to remand only for 20 days, provided that time is within the time frame in section 930.130 for "development of the Secretary's decision record." As Rule Change 23 proposes, the "development of the Secretary's decision record," from the time of the first publication of

the Notice of Appeal in the Federal Register, is an arbitrary 270 days. Effectively, the sub-section (d) change, in combination with Rule Change 23, would reduce the time frame that the Secretary can allow for a remand of an issue to the state from three months to 20 days or less, because it has to fit within the new 270-day rule.

Comment. These two changes appears to be unreasonable. The only rationale given for the changes in section 930.129 are that they would "accommodate the proposed 270-day period to develop the decision record in section 930.130." The existing appeal and remand provisions of section 930.129 are in keeping with established administrative and common law.

*Rule Change 23, section 930.130, closure of the decision record and issuance of decision.* Rule Change would require the Secretary to close the decision record within 270 days (approximately 9 months) after the initial publication of the notice of appeal, except in two cases where the Secretary may stay the closing past the 270 days:

- when the appellant and the state agency agree in writing to a specified period of time; or

- when the Secretary needs to see the final EIS or EA (pursuant to NEPA) or Biological Opinion (pursuant to the Endangered Species Act, or ESA) relative to the federal agency action in question (license, permit, or grant of assistance) in order to decide the appeal.

Comment. It is not clear why this rule is necessary since there is no discussion indicating that Secretarial appeals are in any way burdensome, numerous, or overly long insofar as any applicant, state agency, or federal agency is concerned.

## Conclusion and Recommendation

We believe that this effort to change the Federal Consistency Regulations is unnecessary and should be withdrawn. NOAA issued a comprehensive revision of the federal consistency regulations on December 8, 2000 which involved substantial effort and participation by state agencies, federal agencies, local governments, industry and the public. There is no demonstrated need for the proposed rule changes. As previously stated, if the perceived deficiencies in the existing review process pertain only to Outer Continental Shelf energy development, then the revisions should be restricted to OCS provisions addressed in Subpart E, G, and H of the Regulations.

Thank you for the opportunity to comment.

Sincerely,

Michael P. Murphy, Director
Division of Environmental Enhancement

Enclosures

cc: Derral Jones, DCR
Alan D. Weber, VDH
Thomas D. Modena, DEQ-Waste
Ellen Gilinsky, DEQ-Water
Kotur S. Narasimhan, DEQ-Air
Harold J. Winer, DEQ-TRO
John D. Bowden, DEQ-NVRO
Tony Watkinson, MRC
Thomas A. Barnard, Jr., VIMS
Catherine M. Harold, CBLAD
Victor Liu, Crater PDC
Jerry W. Davis, Northern Neck PDC
Paul E. Fisher, Richmond Regional PDC
John M. Carlock, Hampton Roads PDC