

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, 11<sup>th</sup> Floor  
Silver Spring, MD 20910

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

***Re: Notice of Proposed Rulemaking on Coastal Zone Management Act  
(68 Federal Register 34851/June 11, 2003)***

Dear Mr. Kaiser:

The Western Stated Petroleum Association (WSPA) is a non-profit trade association representing a full spectrum of companies which explore for, produce, refine, transport, and market petroleum products in the western United States. We appreciate this opportunity to provide our comments regarding the proposed rulemaking on the Coastal Zone Management Act (CZMA).

As you know, the CZMA requires State coastal management plans (CMPs) to consider the national interest in and give priority to a variety of coastal dependent uses and processes, including energy. As stated in previous comments submitted by WSPA on October 3, 2002, we generally concur with the Energy Report's identification of a potential lack of effectiveness with regard to CZMA and the Outer Continental Shelf Lands Act (OCSLA) interaction as it relates to a lack of clearly defined requirements, information needs from Federal and State agencies, in addition to uncertain procedural deadlines.

WSPA supports the intention and direction of the comments being submitted by the America Petroleum Institute, et al. We join in this collective effort in recommending changes in the CZMA consistency review process focusing on: 1) clarifying a state's role and responsibility in reviewing activities; 2) ensuring a certain, predictable and

transparent review process from the beginning; 3) guaranteeing a definitive appeals decision deadline; and, 4) not adopting decision deadline changes related to NEPA and/or Biological Opinion documents.

Specifically, we wish to reinforce the following points categorically:

### **State Information Needs**

- Information guidelines developed under Minerals Management Service (MMS) regulations and related guidance are entirely sufficient, and that no additional information should normally be needed for a state to conduct a consistency review for an OCS plan.
- States should be able to identify in their coastal zone management (CZM) programs the information that will be required if different from MMS requirements, so that applicants have this information at the beginning of the process.
- States should be required to identify information needs in their CZM programs, not just encouraged to do so.
- State compliance should be ensured by recognizing that a failure to timely seek NOAA's ongoing approval of a specific and current list of information needs will prevent a state from requesting supplemental information beyond what is currently described in the state's approved CZM plan, or in the permitting federal agency's regulations and guidance. Moreover, NOAA should ensure that this process is open to public review.
- NOAA should adopt regulations to provide a mechanism for applicants to invoke NOAA's intervention and effective oversight during consistency review if a state attempts to request information beyond what is specified in NOAA and MMS requirements.
- NOAA regulations should be changed to specifically recognize that in cases where the federal permitting agency has promulgated specific consistency review guidance, in consultation with the states, a state will carry the distinct burden of demonstrating a particular need for any supplemental information in conducting its review. This will further promote other federal agencies' use of information guidelines such as those now used by MMS.
- WSPA endorses NOAA's clarification that the state's assessment of the sufficiency of the information for purposes of an application being "complete" is *not* a substantive review, but rather is what NOAA correctly characterizes as a "checklist" review "to see if the description of the activity, the coastal effects, and the evaluation that the State's enforceable policies are included in the submission to the State agency."

- WSPA concurs that the “checklist” nature of the process be confirmed in specific regulatory language, so that the states will be *required* to prepare such a checklist – that is, a checklist submitted to NOAA for approval with input by the appropriate federal agencies and affected industry – for inclusion in their coastal zone management programs. In preparing such checklists for NOAA approval with respect to OCS plan reviews, states should work with the MMS to validate the known set of requirements specified in MMS regional guidance, in addition to NOAA’s own regulations.
- WSPA endorses NOAA’s attempted clarification of the definition of a “federal license or permit” requiring consistency review, as well as the deletion of the confusing phrase “comprehensive data and information sufficient to support the applicant’s consistency certification” presently appearing in 15 C.F.R. § 930.58(a)(1).<sup>1</sup> We also support NOAA’s general recognition that it would be impractical to require any NEPA documents in draft or final form to be included as information necessary to start the six month review period with regard to OCS plans, considering the OCSLA’s explicit requirements for MMS to make decisions regarding a EP, as well as a DPP, within shortened time periods. However, the proposal appears inconsistent to then indicate that a state could nevertheless seek to amend its CZM program to require, its receipt of any draft EIS prepared in connection with a DPP, in order for its consistency review period to begin.
- Finally, while NOAA’s proposed rule changes on a number of these issues would be, overall, a positive development the better solution would be to ensure that a state’s information needs are specified in advance. Additionally, NOAA’s oversight of state programs must remain vigilant to prevent coastal states from requesting supplemental information in an *ad hoc* and unspecified manner, and thereby perpetuating the uncertainty surrounding the consistency certification process.

### Appeal Timeframes

- In its notice of proposed rulemaking, NOAA has offered a deadline for closure of the decision record of 270 days (which WSPA believes could and should be reduced further, to 120, or at most 180 days) after notice of the appeal appears in the Federal Register, but then would allow this deadline *to be extended* (i) through mutual

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<sup>1</sup> WSPA also notes the deletion of the portion of the current § 930.58(a)(1) that limits the data to be supplied to that which is “sufficient to support the applicant’s consistency certification” and the substitution of language that the applicant must provide “any other information relied upon.” We request clarification that the protections now afforded in § 930.58(c) to an applicant’s confidential and proprietary information still remain in place if this substituted language is adopted. We suggest that NOAA consider restating the protection found in subpart (c) of § 930.58 by rephrasing the substituted language in subpart (a) to read, “any other non-confidential and non-proprietary language relied upon.”

agreement of the parties to the appeal, or (ii) “as needed” to allow receipt of a final NEPA document or ESA Biological Opinion otherwise required for the issuance of the proposed federal permits at issue.

- WSPA believes that NOAA should propose a *definitive* deadline for closure of the decision record. We share the view that NOAA’s vaguely worded exemption for NEPA and ESA Biological Opinions diminishes the very certainty that a definitive deadline is intended to provide. To reinforce this position, we join with API and others in citing that the MMS has already performed a very thorough NEPA environmental review for every lease sale it conducts and performs additional environmental reviews for every EP or DPP filed for approval. Thus, for OCS plans, no additional NEPA or ESA reviews are needed at the time of an override appeal. In addition, WSPA also agrees that, due to the CZMA not requiring any separate endangered species analysis, allowing the Secretary to extend the close of the record of decision to request Biological Opinions performed under the ESA would be in effect changing the requirements of the statute.
- Moreover, WSPA concurs that no current CZMA statutory language suggests that Congress contemplated that the Commerce Department undertake a redundant, sequential evaluation of all substantive CZMA issues that were examined by the ‘lead agency.’ We request NOAA to reconsider the potential ramifications of this language.

### **Briefing Schedules**

- WSPA shares the belief that it would be both practical and helpful to allow the parties to submit additional response briefs within 20 days after the filing of the state’s opening brief.
- WSPA also supports the Secretary having the option of requesting an initial round of briefs to address only procedural or jurisdictional issues, followed by briefs on the merits as appropriate. However, the proposed rule needs to be changed to clarify that exercise of this option by the Secretary would constitute an exception to the otherwise uniform provision in proposed Section 930.127(a) that requires the appellant’s opening brief to be filed within 30 days of the appeal notice, and the state’s brief to be filed 30 days thereafter.<sup>2</sup>

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<sup>2</sup> Proposed rule § 930.127(b)(2) states that “[a]t the same time that materials are submitted to the Secretary, the appellant and the State agency shall serve at least one copy of their briefs, supporting materials and all requests and communications *to the Secretary and on each other.*” (Emphasis added.) WSPA believes that the highlighted language could be misread as requiring an additional obligation of service on the Secretary beyond the procedures already outlined in § 930.127(a) and (b)(2). Thus we requests that NOAA consider changing the language of proposed § 930.127(b)(2) to read as follows: “At the same time that materials are submitted to the Secretary, the appellant and State agency

### **Coordinated Federal Documents**

- WSPA believes that NOAA's proposed changes to the information requirements if implemented, will improve the general process, especially if NOAA will agree to implement the checklist requirement for states to utilize in stating its information needs.
- In addition, WSPA believes that for OCS plan consistency review, states can readily use information provided in NEPA documents that MMS prepares for the sale of the OCS lease(s) which are the subject of the OCS plan. Similarly, the site-specific Environmental Assessment, which is prepared as part of the filing of any OCS plan should readily satisfy any states' remaining information needs. It should also be noted that, for review of OCS plans, the MMS already has in place very thorough environmental review regulations.
- WSPA joins in reinforcing the importance of the adoption by NOAA of the information exchange approach taken by MMS, by having federal permitting agencies work together with coastal states early on to clarify information needs.
- Finally, we recommend NOAA consider regulatory changes to make clear such state coordination with the federal permitting agency is not a mere advisory provision but a required feature for state management programs.

### **General Negative Determination**

- WSPA supports NOAA's proposed rulemaking establishing the option for federal agencies to allow for a general negative determination, similar to general consistency determinations already provided by 15 C.F.R. 930.36(c), for repetitive federal agency activities which would have no individual or cumulative coastal effects.

### **Geographic Considerations**

- NOAA regulations or specific guidance need to state explicitly, that activities located far offshore from coastal boundaries could indeed have no foreseeable coastal effects and should endorse a procedure in which the MMS working with NOAA can remove certain projects from state consistency reviews. WSPA urges NOAA to monitor the state's interpretations of the "effects test", as well as the implementation of the "listing and geographic location" regulations found at 15 C.F.R. 930.53, to ensure the state's right of consistency review in a reasonable manner. We underscore the need

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shall serve *on each other* at least one copy of their briefs, supporting materials and all requests and communications to the Secretary." (Emphasis added.)

for careful scrutiny of state attempts to conduct consistency review for OCS projects located at increasing distances from any state's coastal zone.

- WSPA shares the belief that it would be inappropriate for NOAA to *ever* allow a state to amend its program to automatically include such a general geographic area of review as is discussed in 68 Fed. Reg. 34853. We concur that the right of such review, if *ever* justified by actual "effects", should be confined instead to a case-by-case consideration under the procedures provided in 15 C.F.R. 930.54.
- WSPA questions NOAA's revisions of the definition of a "coastal use or resource" within 15 C.F.R. 930.11. Furthermore, we object to the addition of terms such as "scenic and aesthetic enjoyment" as they broaden this definition and thereby, inappropriately broaden the reach of the "effects test". WSPA also agrees that the ongoing interaction between MMS and the states regarding consistency review of OCS plans should be promoted in order to curtail any potential abuse of this broad definition in the course of state review.

### **Other Comments**

- **Conditional Concurrence**

WSPA urges NOAA to rescind the conditional concurrence procedures allowed by the earlier December 8, 2000 rulemaking, 15 C.F.R. § 930.4, or at the very least have the conditions under which such procedures could be imposed substantially narrowed and further clarified.

- **Recognition That Decision on Effects of Federal Agency Activity Falls Within the Purview of the Agency Conducting the Activity**

WSPA supports both NOAA's articulation of consistency review policy on this issue and NOAA's deference to an MMS determination that lease suspensions should be considered "interim activities" having no coastal effects.

- **Interstate Consistency Regulations**

WSPA joins in questioning the legal authority for NOAA to establish interstate consistency review requirements. In addition, the proposal response to comments that states that the procedure finds support in the "effects tests" is not consistent with the legislative history as we view it, and does not address fundamental constitutional infirmities concerning a state's ability to review activities taking place wholly within the boundaries of another state.

- **Change in Secretarial Override Criteria**

WSPA concurs that, due to the inability to reconcile inconsistencies between the words “[a]t this time” (68 Fed. Reg. 34868-left column) and precedential findings in the *Manteo* Secretarial override decisions, the particular *Manteo* findings should be formally rescinded by the Secretary of Commerce in order to conform to NOAA’s current articulation of CZMA national policy.

- **Consolidated Consistency Certification and Review for Multiple Federal Approvals for Activities Described in an OCS EP or DPP**

WSPA appreciates NOAA’s general endorsement of API’s suggestion that CZMA consistency review of OCS activities described in detail in OCS plans should include federal approvals for individual permits under the Clean Water Act and Clean Air Act, and therefore states should not and need not conduct a separate consistency review for those additional federal permits.

We join API and others in suggesting that the MMS, states, and industry would be better served by NOAA building that particular requirement into its consistency regulations, and by the agency preparing special regulatory guidance to prevent any further confusion in this regard.

- **Additional Scrutiny of the Implementation of Federal Consistency Requirements by State Programs**

WSPA joins API and others in questioning NOAA’s response to industry concerns that a more active review of state programs should be undertaken. We also disagree that the Secretarial appellate process absolves NOAA of all responsibility to review the validity of the State’s objection.

- **Consistency Review of General Permits-**

WSPA also is concerned about NOAA’s proposed amendments to Section 930.31 (d) to clarify that if a state objects to a federal agency’s consistency determination for a general permit, all potential users of that general permit would thereafter have to furnish individual consistency certifications for state review.

## **Final Comments**

WSPA supports the June 11<sup>th</sup> notice’s acknowledgment of NOAA’s responsibility under the President’s National Energy Policy (NEP) to promote coordination between NOAA and MMS in OCS energy development. We share API’s belief, however, that the agency should more fully implement the requirement that the Departments of Interior and Commerce work together to solve interagency conflicts and develop mechanisms to

address differences in the OCSLA and the CZMA. Any revisions to the federal consistency process should incorporate a permanent mechanism for close consultation and coordination between NOAA and MMS such as a formal Memorandum of Agreement (MOA).

NOAA's remarks regarding the widespread "success" of consistency review of OCS activities deserve clarification. It seems inaccurate to contend that "the [offshore statistics] demonstrate that offshore oil and gas exploration and development not only continues to occur, but flourishes," (68 Fed. Reg. 34860 (bottom middle column)); and that "States have reviewed and approved thousands of offshore oil and gas facilities and related onshore support facilities." 68 Fed. Reg. 34856 (left column) *without qualifying that the supporting data comes from only Texas, Louisiana, Mississippi, and Alabama* – four states with combined coastlines barely exceeding *seven per cent* of the length of the entire coastal shoreline of the continental United States - Certainly, there are no "flourishing" OCS operations along coastal North Carolina, Florida, California, or New England. To accurately represent that the CZMA consistency review process for OCS activity serves the *national* interest, it should be realistically employed and tested against offshore activities proposed to be conducted off of the East and West coasts – where, indeed, quite heated consistency battles have occurred in the past.

WSPA clearly understands and appreciates the important role that states play in assessing the impact of federal projects off their coasts and strongly support enhanced federal-state consultation. However, it is also important that the CZMA process not provide undue opportunities for delay of critically important energy projects. The comments herewith submitted on behalf of our members provide recommendations and feedback to more clearly define requirements and information needs from Federal and State agencies, in addition to increasing certainty with regard to procedural deadlines. The opportunity to refine the partnership between Federal and State agencies available through this consistency process is both welcome and appreciated.

Respectfully,

**Western States Petroleum Association**

Bob Poole,  
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