

**NOAA's Proposed Changes to the Federal Consistency Regulations - June 11, 2003**  
underline is proposed new language, ~~strikeout~~ is proposed deletions.

RULE CHANGE 1: § 930.1(b) Overall Objectives.

(b) To implement the federal consistency requirement in a manner which strikes a balance between the need to ensure consistency for federal actions affecting any coastal use or resource with the enforceable policies of approved management programs and the importance of federal activities (the term "federal action" includes all types of activities subject to the federal consistency requirement under subparts C, D, E, F and I of this part.);

RULE CHANGE 2: § 930.10 Failure substantially to Comply with an OCS Plan.

~~930.86(d)~~ 930.85(c).

RULE CHANGE 3: § 930.11(g) Definitions - Effect of any coastal use or resource (coastal effects).

(g) *Effect on any coastal use or resource (coastal effect)*. The term "effect on any coastal use or resource" means any reasonably foreseeable effect on any coastal use or resource resulting from a federal action. ~~(The term "federal action" includes~~ Federal agency activity or federal license or permit activity (including all types of activities subject to the federal consistency requirement under subparts C, D, E, F and I of this part.) Effects are not just environmental effects, but include effects on coastal uses. Effects include both direct effects which result from the activity and occur at the same time and place as the activity, and indirect (cumulative and secondary) effects which result from the activity and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects are effects resulting from the incremental impact of the federal action when added to other past, present, and reasonably foreseeable actions, regardless of what person(s) undertake(s) such actions.

RULE CHANGE 4: § 930.31(a) Federal agency activity.

(a) The term "Federal agency activity" means any functions

performed by or on behalf of a Federal agency in the exercise of its statutory ~~responsibilities. This encompasses a wide range of Federal agency activities~~ responsibilities, which includes a range of activities where the Federal agency makes a proposal for action which initiate initiates an event activity or series of events activities and if where coastal effects are reasonably foreseeable, e.g., a Federal agency's proposal to physically alter coastal resources, a plan that is used to direct future agency actions, a proposed rulemaking that alters uses of the coastal zone. ~~foreseeable, e.g., rulemaking, planning, physical alteration, exclusion of uses.~~ "Federal agency activity" does not include the issuance of a federal license or permit to an applicant or person (see subparts D and E of this part) or the granting of federal assistance to an applicant agency (see subpart F of this part).

RULE CHANGE 5: § 930.31(d) Federal agency activity - General Permits.

(d) A general permit ~~program~~ proposed by a Federal agency is subject to this subpart if the general permit ~~program~~ does not involve case-by-case or individual approval of a license or permit by the Federal agency. ~~agency, unless a Federal agency chooses to subject its general permit program to consistency review under subpart D of this part, by providing the State agency with a consistency certification.~~ When proposing a general permit, ~~program,~~ a Federal agency shall provide a consistency determination to the relevant management programs and request that the State agency(ies) provide the Federal agency with review, and if necessary, conditions that would permit the State agency to concur with the Federal agency's consistency determination. State concurrence shall remove the need for the State agency to review individual future case-by-case uses of the general permit for consistency with the enforceable policies of management programs. Federal agencies shall, to the maximum extent practicable, incorporate ~~the~~ State conditions into the general permit. If the ~~State~~ State's

conditions are not incorporated into the general permit or a State agency objects to the general permit, then the Federal agency shall notify potential users of the general permit that the general permit is not ~~authorized for~~ available in that State unless the ~~State agency concurs that the activity is consistent with the enforceable policies of its management program.~~ Accordingly, the applicants potential users in those States shall provide the State agency with a consistency certification under subpart D of this part and the State agency concurs.

RULE CHANGE 6: § 930.35(d) General Negative Determination.

930.35~~(d)~~ (e)

(d) General Negative Determinations. In cases where Federal agencies will be performing a repetitive activity, that the Federal agency determines will not have reasonably foreseeable coastal effects, whether performed separately or cumulatively, the Federal agency may provide a State agency(ies) with a General Negative Determination, thereby avoiding the necessity of issuing separate negative determinations for each occurrence of the activity. The General Negative Determination must adhere to all requirements for negative determinations under § 930.35. In addition, the General Negative Determination must describe in detail the activity covered by the General Negative Determination and the expected number of occurrences of the activity over a specified time period. If a Federal agency issues a General Negative Determination, it may periodically assess whether the General Negative Determination is still applicable.

RULE CHANGE 7: § 930.41(a) State agency response.

(a) A State agency shall inform the Federal agency of its concurrence with or objection to the Federal agency's consistency determination at the earliest practicable time, after providing for public participation in the State agency's review of the consistency determination. The Federal agency may presume State agency concurrence

if the State agency's response is not received within 60 days from receipt of the Federal agency's consistency determination and supporting information required by § 930.39(a). The 60-day review period begins when the State agency receives the consistency determination and supporting information required by § 930.39(a). If the information required by § 930.39(a) is not included with the determination, the State agency shall ~~immediately~~ notify the Federal agency in writing within 14 days of receiving the determination and supporting information that the 60-day review period has not begun, identify missing what information required by § 930.39(a), ~~is missing~~ and that the 60-day review period will begin when the missing information is received by the State agency. If the State agency has not notified the Federal agency that information required by § 930.39(a) is missing within the 14 day notification period, then the 60-day review period shall begin on the date the State agency received the consistency determination and accompanying information. The State agency's determination of whether the information required by § 930.39(a) is complete is not a substantive review of the adequacy of the information provided. Thus, If a Federal agency has submitted a consistency determination and information required by § 930.39(a), then the State agency shall not assert that the 60-day review period has not begun because the information contained in the items required by § 930.39(a) are substantively deficient, or for failure to submit information that is in addition to that required by § 930.39(a).

RULE CHANGE 8: § 930.51(a) Federal license or permit.

(a) The term "federal license or permit" means any required authorization ~~authorization, certification, approval, lease, or other form of permission~~ which any Federal agency is empowered to issue to an applicant that an applicant is required by law to obtain in order to conduct activities affecting any land or water use or natural resource

of the coastal zone. The term does not include OCS plans, and federal license or permit activities described in detail in OCS plans, which are subject to subpart E of this ~~part.~~ ~~The term "lease," means a lease issued by a Federal agency to a non-federal entity that authorizes or approves the use of federal property for a non-federal activity. The term lease does not include~~ part, or leases issued pursuant to lease sales conducted by a Federal agency (e.g., outer continental shelf (OCS) oil and gas lease sales conducted by the Minerals Management Service or oil and gas lease sales conducted by the Bureau of Land Management). Lease sales conducted by a Federal agency are Federal agency activities under subpart C of this part. ~~part if coastal effects are reasonably foreseeable.~~

RULE CHANGE 9: § 930.51(e) Substantially different coastal effects.

(e) The determination of substantially different coastal effects under paragraphs (b) (3), and (c) of this section is made on a case-by-case basis by the Federal agency after consulting with the State agency, ~~Federal agency~~ and applicant. The Federal agency shall give considerable weight to the opinion of ~~The opinion of~~ the State agency ~~shall be accorded deference~~ and the terms "major amendment," "renewals" and "substantially different" shall be construed broadly to ensure that the State agency has the opportunity to review activities and coastal effects not previously reviewed.

RULE CHANGE 10: § 930.58(a) (1) Necessary data and information.

(a) The applicant shall furnish the State agency with necessary data and information along with the consistency certification. Such information and data shall include the following:

(1) A copy of the application for the Federal license or permit and

(i) all material provided to the Federal agency in support of the application; and

(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 relied upon by the applicant to make its certification. ~~and comprehensive data and information sufficient to support the applicant's consistency certification. Maps, diagrams, and technical data and other relevant material shall be submitted when a written description alone will not adequately describe the proposal; (a copy of the federal application and all supporting material provided to the Federal agency should also be submitted to the State agency);~~

RULE CHANGE 11: § 930.58(a)(2) Necessary data and information (State permits).

(2) Information specifically identified in the management program as required necessary data and information for an applicant's consistency certification. The management program as originally approved or amended (pursuant to 15 CFR part 923, subpart H) may describe data and information necessary to assess the consistency of federal license or permit activities. Necessary data and information may include State or local government ~~permits or~~ permit applications which are required for the proposed activity. Required data and information may not include confidential and proprietary material; and

RULE CHANGE 12: § 930.60 Commencement of State agency review.

(a) Except as provided in § 930.54(e) and paragraph (a)(1) of this section, 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 ~~information and data~~ 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:

(i) The State agency's review has not yet begun, and that its review will commence upon receipt of the missing certification or information; or ~~once the necessary certification or information deficiencies have been corrected, or~~

(ii) In the case where the applicant has provided a certification, but not all necessary data and information required pursuant to § 930.58, the ~~The~~ State agency's review has begun, and that the missing certification or information deficiencies must be cured by the applicant must be received by the State agency during the State's review period.

(2) Within 30 days of receipt of the certification or necessary data and information that was deemed missing, pursuant to paragraph (a)(1) of this section, the State agency shall notify the applicant and Federal agency that the certification and necessary data and information required pursuant to § 930.58 is complete, the date the information deemed missing was received, and that the State agency's consistency review commenced on the date of receipt.

~~(2) Under paragraph (a)(1) of this section, State agencies shall notify the applicant and the Federal agency, within 30 days of receipt of the completed certification and information, of the date when necessary certification or information deficiencies have been corrected, and that the State agency's consistency review commenced on the date that the complete certification and necessary data and information were received by the State agency.~~

(3) Once the six-month review period has begun under paragraphs (a), (a)(1) or (2) of this section, State agencies shall not stop, stay, or otherwise alter the consistency timeclock without the applicant's written agreement. State agencies and applicants (and persons under subpart E of this part) may mutually agree to stay the consistency

timeclock. ~~or extend the six-month review period.~~ Such an agreement shall be in writing and a copy shall be provided to the Federal agency. A Federal agency shall not presume State agency concurrence with an activity where such ~~an~~ written agreement exists or where a State agency's review period, under paragraph (a)(1)(i) of this section, has not begun.

(b) The State agency's determination that a certification and necessary data and information under paragraph (a) of this section is complete is not a substantive review of the adequacy of the information provided. If an applicant has submitted the documents required by § 930.58, then a State agency's or Federal agency's assertion that the information contained in the submitted documents is substantively deficient, or a State agency's or Federal agency's ~~A State agency~~ request for clarification of the information provided, or information or data in addition to that required by § 930.58 shall not extend the date of commencement of State agency review.

RULE CHANGE 13: § 930.63(d).

930.121~~(d)~~ (c).

RULE CHANGE 14: § 930.76(a) and (b) Submission of an OCS plan, necessary data and information and consistency certification.

(a) Any person submitting any OCS plan to the Secretary of the Interior or designee ~~shall:~~

~~(a) Identify all activities described in detail in the plan which require a federal license or permit and which will have reasonably foreseeable coastal effects;~~

~~(b) Submit~~ shall submit to the Secretary of the Interior or designee (1) a copy of the OCS plan, (2) the consistency certification, (3) the necessary data and information required pursuant to § 930.58, and (4) the information submitted pursuant to the Department of the Interior's OCS operating regulations (see 30 CFR 250.203 and 250.204)



and OCS information program regulations (see 30 CFR part 252).

~~(c) (b) When satisfied that the proposed activities meet the federal consistency requirements of this subpart, provide the Secretary of the Interior or designee with a consistency certification and necessary data and information. The Secretary of the Interior or designee shall furnish the State agency with a copy of the OCS plan and necessary data and information and consistency certification.~~  
information submitted under paragraph (a), (excluding proprietary information).

RULE CHANGE 15: § 930.77(a) Commencement of State agency review and public notice.

(a)(1) Except as provided in § 930.60(a), State agency review of the person's consistency certification begins at the time the State agency receives the information required pursuant to § 930.76(a) and (b). ~~a copy of the OCS plan, consistency certification, and required necessary data and information~~ If a person has submitted the documents required by § 930.76(a) and (b), then a State agency's assertion that the information contained in the submitted documents is substantively deficient, or a State agency's request for clarification of the information provided, or information and data in addition to that required by § 930.76 shall not delay or otherwise change the date on which State agency review begins. ~~extend the date of commencement of State agency review.~~

(2) To assess consistency, the State agency shall use the information submitted pursuant to § 930.76. ~~the Department of the Interior's OCS operating regulations (see 30 CFR 250.203 and 250.204) and OCS information program (see 30 CFR part 252) regulations and necessary data and information (see 15 C.F.R. 930.58).~~ If a State agency needs information in addition to the information required pursuant to § 930.76, it shall amend its management program pursuant to

§ 930.58(a)(2).

(3) After the State agency's review begins, if the State agency requests additional information, it shall describe in writing to the person and to the Secretary of the Interior or its designee the reasons why the information provided under § 930.76 is not adequate to complete its review, and the nature of the information requested and the necessity of having such information to determine consistency with the enforceable policies of the management program. The State agency shall make its request for additional information no later than three months after commencement of the State agency's review period. The State agency shall not request additional information after the three-month notification period described in § 930.78(a) .

RULE CHANGE 16: § 930.82 Amended OCS plans.

If the State agency objects to the person's OCS plan consistency certification, and/or if, pursuant to subpart H of this part, the Secretary does not determine that each of the objected to federal license or permit activities described in detail in such plan is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security, and if the person still intends to conduct the activities described in the OCS plan, the person shall submit an amended plan to the Secretary of the Interior or designee ~~and to the State agency~~ along with a consistency certification and data and information necessary to support the amended consistency certification. The data and information shall specifically describe modifications made to the original OCS plan, and the manner in which such modifications will ensure that all of the proposed federal license or permit activities described in detail in the amended plan will be conducted in a manner consistent with the management program. When satisfied that the person has met the requirements of the OCSLA and this subpart, the Secretary of the Interior or designee shall furnish the State agency

with a copy of the amended OCS plan (excluding proprietary information),  
necessary data and information and consistency certification.

RULE CHANGE 17: § 930.85(c) Failure to comply substantially with an approved OCS plan.

(a) The Department of the Interior and State agencies shall cooperate in their efforts to monitor federally licensed or permitted activities described in detail OCS plans to make certain that such activities continue to conform to both federal and state requirements.

(b) If a State agency claims that a person is failing substantially to comply with an approved OCS plan subject to the requirements of this subpart, and such failure allegedly involves the conduct of activities affecting any coastal use or resource in a manner that is not consistent with the approved management program, the State agency shall transmit its claim to the Minerals Management Service region involved. Such claim shall include a description of the specific activity involved and the alleged lack of compliance with the OCS plan, and a request for appropriate remedial action. A copy of the claim shall be sent to the person. ~~and the Director~~

(c) If a person fails substantially to comply with an approved OCS plan, as determined by Minerals Management Service, pursuant to the Outer Continental Shelf Lands Act and applicable regulations, the person shall comply with the approved plan or shall submit an amendment to such plan or a new plan to Minerals Management Service. When satisfied that the person has met the requirements of the OCSLA and this subpart, the Secretary of the Interior or designee shall furnish the State agency with a copy of the amended OCS plan (excluding proprietary information), necessary data and information and consistency certification. ~~If, after 30 days following a request for remedial action, the State agency still maintains that the person is failing to comply substantially with the OCS plan, the governor or State agency may file a written objection with~~

~~the Director. If the Director finds that the person is failing to comply substantially with the OCS plan, the person shall submit an amended or new OCS plan along with a consistency certification and supporting information to the Secretary of the Interior or designee and to the State agency. Following such a finding by the Director, the person shall comply with the originally approved OCS plan, or with interim orders issued jointly by the Director and the Minerals Management Service, pending approval of the amended or new OCS plan. Sections 930.82 through 930.84 shall apply to further State agency review of the consistency certification for the amended or new plan.~~

~~(d) A person shall be found to have failed substantially to comply with an approved OCS plan if the State agency claims and the Director finds that one or more of the activities described in detail in the OCS plan which affects any coastal use or resource are being conducted or are having an effect on any coastal use or resource substantially different than originally described by the person in the plan or accompanying information and, as a result, the activities are no longer being conducted in a manner consistent with the state's management program. The Director may make a finding that a person has failed substantially to comply with an approved OCS plan only after providing a reasonable opportunity for the person and the Secretary of the Interior to review the State agency's objection and to submit comments for the Director's consideration.~~

RULE CHANGE 18: § 930.121(c) Alternatives on appeal.

(c) There is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program. ~~When determining whether a reasonable alternative is available, the~~ The Secretary may consider but is not limited to considering previous appeal decisions, alternatives described in state objection letters and alternatives and

other ~~new~~ information ~~described~~ submitted during the appeal. An alternative shall not be considered unless the State submits a statement, in a brief or other supporting material, 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.

RULE CHANGE 19: § 930.125 Notice of appeal and application fee to the Secretary.

~~(b)~~ (b) The appellant's notice of appeal shall include a statement briefly explaining the appellant's argument for each ground for appeal of the State agency's objection under § 923.121, as well as any procedural/threshold arguments regarding the State's objection. Grounds for appeal or issues concerning the State agency's objection not identified in the appellant's notice of appeal shall not be considered by the Secretary and will not be considered part of the Secretary's decision record.

[Reletter the rest of the paragraphs (c), (d), (e) and (f) respectively.]

RULE CHANGE 20: § 930.127 Briefs and Supporting Materials.

(a) ~~The Secretary shall establish a schedule of dates and time periods for submission of briefs and supporting materials by the appellant and the State agency.~~ Within 30 days of the filing of the Notice of Appeal, the appellant shall submit to the Secretary a brief accompanied by all such supporting documentation and material as the appellant deems necessary for the consideration of the Secretary. Within 30 days of the State's receipt of the Appellant's brief and supporting documentation and material, the State shall submit to the Secretary a brief and all such supporting documentation and material the State deems necessary for the consideration of the Secretary.

(b) (1) Both the appellant and State agency shall send four copies

of their ~~briefs,~~ briefs and supporting materials ~~and all requests and communications to the Secretary, each other, and to the Office of Assistant General Counsel for Ocean Services (GCOS), NOAA, 1305 East West Highway, Room 6111 SSMC4, Silver Spring, Maryland 20910, one of which must be in an electronic format compatible (to the extent practicable) with the website maintained by the Secretary to provide public information concerning appeals under the CZMA.~~

(2) At the same time that materials are submitted to the Secretary, the appellant and 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.

(3) Each submission to the Secretary shall be accompanied by a certification of mailing and/or service on the other party and on GCOS. Service may be done by mail or hand delivery. Materials or briefs submitted to the Secretary not in compliance with time periods specified in this subpart for filing with the Secretary or without certification of service on the other party may be disregarded and not entered into the Secretary's decision record of the appeal.

(c) (1) The Secretary has broad authority to implement procedures governing the consistency appeal process to ensure efficiency and fairness to all parties. The Secretary determines the content of the appeal decision record. Briefs and supporting materials submitted by the State agency and appellant, public comments and the comments of interested Federal agencies usually comprise the decision record of an appeal. The Secretary may determine, on the Secretary's own initiative, that additional information is necessary to the Secretary's decision, including documents prepared by Federal agencies pursuant to the National Environmental Policy Act (42 USC 4321 et. seq.) and the Endangered Species Act (16 USC 1531 et. seq.), and may request such information.

(2) To promote efficient use of time and resources, the Secretary may, upon the Secretary's own initiative, require the appellant and the State agency to submit briefs and supporting materials addressing and/or relevant only to procedural or jurisdictional issues presented in the Notice of Appeal or identified by the Secretary. Following a decision of the procedural or jurisdictional issues, the Secretary may require briefs on substantive issues raised by the appeal if necessary.

(3) The Secretary may require the appellant and the State agency to submit briefs in addition to those described in 930.127(a) and (c)(1) as necessary.

(4) Unless additional briefs are requested by the Secretary under paragraphs (1) or (2), the parties shall not submit any briefs or materials in addition to those described in paragraph (a), and any unrequested briefs or materials may be disregarded and not entered into the Secretary's decision record of the appeal.

(d) The appellant bears the burden of submitting evidence in support of its appeal and the burden of persuasion. The State agency bears the burden of submitting evidence in support of any alternatives proposed by the State agency or submitted to the Secretary by the State agency during the conduct of the appeal.

~~(c) (e) The Secretary may extend the time for submission of briefs and supporting materials only in the event of exigent or unforeseen circumstances. on his own initiative or at the request of a party so long as the request is received prior to the date prescribed in the briefing schedule. A copy of the request for an extension of time shall be sent to the Assistant General Counsel for Ocean Services.~~

~~(d) (f) Where a State agency objection is based in whole or in part on a lack of information, the Secretary shall limit the record on appeal to information previously submitted to the State agency and relevant comments thereon, except as provided for in sections 930.129(b)~~

and (c).

RULE CHANGE 21: § 930.128 Public notice, comment period, and public hearing.

(a) The Secretary shall provide ~~timely~~ public notice of the appeal within 30 days after the receipt of the Notice of Appeal and payment of application fees by publishing a Notice in the Federal Register ~~At a minimum, public notice shall be provided in the Federal Register and in a publication of general circulation in~~ the immediate area of the coastal zone likely to be affected by the proposed activity.

(b) The Secretary shall provide an opportunity for public comment on the appeal of no less than 30 days to run concurrently with the opportunity to comment provided to interested Federal agencies. ~~The public shall be afforded no less than 30 days to comment on the appeal.~~ Notice of the public comment period shall take the same form as Notice required in paragraph (a) of this section and may be provided in the same Notice as the Notice of the filing of the appeal.

(c) ~~(1) The Secretary shall afford interested Federal agencies, including the Federal agency whose proposed action is the subject of the appeal, with an opportunity to comment on the appeal.~~ Notice of the opportunity for interested Federal agencies to comment on the appeal shall take the same form as Notice required in paragraph (a) of this section and may be provided in the same Notice as the Notice of the filing of the appeal. The Secretary shall ~~afford notice to the Federal agencies of the time for filing their comments~~ accord greater weight to those Federal agencies whose comments are within the areas of their expertise.

(2) The Secretary may, on the Secretary's own initiative or upon written request, for good cause shown, reopen the period for Federal agency comments before the closure of the decision record.

~~(d) The Secretary may extend the time for submitting comments on his own initiative or at the written request of a party or interested~~



~~Federal agency so long as the request is received prior to the comment date identified in the public notice. A copy of the request for an extension of time shall be sent to the Assistant General Counsel for Ocean Services.~~

~~(e)~~ (d) The Secretary may hold a public hearing in response to a request or on the Secretary's ~~his~~ own initiative. A request for a public hearing must be filed with the Secretary within 45 days of the publication of the Notice in the Federal Register required in paragraph (a). If a hearing is held by the Secretary, it shall be noticed in the Federal Register and guided by the procedures described within § 930.113.

RULE CHANGE 22: § 930.129 Dismissal, remand, stay, and procedural override.

(c) The Secretary may stay the processing of an appeal or extend the period for the development of the Secretary's decision record, in accordance with § 930.130. ~~on her own initiative or upon request of an appellant or State agency for the following purposes:~~

~~(1) to allow additional information to be developed relevant to the analysis required of the Secretary in 930.121,~~

~~(2) to allow mediation or settlement negotiations to occur between the applicant and State agency, or~~

~~(3) to allow for remand pursuant to paragraph (d) of this section;~~

(d) The Secretary may ~~stay the processing of an appeal and~~ remand an appeal it to the State agency for reconsideration of the project's consistency with the enforceable policies of the State's management program if significant new information relevant to the State agency's objection, that was not provided to the State agency as part of its consistency review, is submitted to the Secretary by the State agency, the appellant, the public or a Federal agency. The Secretary shall determine a time period for the remand to the State not to exceed 20 days and the time period for remand must be completed within the period

described in § 930.130 for the development of the Secretary's decision record. ~~three months.~~ If the State agency responds that it still objects to the activity, then the Secretary shall continue to process the appeal. ~~appeal and shall include the significant new information in the decision record.~~ If the State agency concurs that the activity is consistent with the enforceable policies of the State's management program, then the Secretary shall declare the appeal moot ~~dismiss the appeal~~ and notify the Federal agency that the activity may be federally approved.

RULE CHANGE 23: § 930.130 Closure of the decision record and issuance of decision.

~~(a) No sooner than 30 days after the close of the public comment period, the Secretary shall publish a notice in the Federal Register stating that the decision record is closed and that no further information, briefs or comments will be considered in deciding the appeal.~~

(a)(1) With the exception of paragraph (2), the Secretary shall close the decision record and not consider additional information, briefs or comments for an appeal no later than 270 days after the date of the Secretary's Notice of Appeal published in the Federal Register under § 930.128(a). Upon closure of the decision record, the Secretary shall immediately publish in the Federal Register a notice indicating when the decision record has been closed.

(2) The Secretary may stay the closing of the decision record beyond the 270-day period described in paragraph (1):

(i) for a specified period mutually agreed to in writing by the appellant and the State agency; or

(ii) as needed to receive, on an expedited basis, the final (A) environmental analyses required under the National Environmental Policy Act (42 USC 4321 et seq) for the Federal agency's proposed issuance of a

license or permit or grant of assistance; or (B) Biological Opinions issued pursuant to the Endangered Species Act (16 USC 1531 et seq) for the Federal agency's proposed issuance of a license or permit or grant of assistance.

(b) No later than 90 days after publication of a Federal Register notice indicating when the decision record for an appeal has been closed, ~~the closure of the decision record~~ the Secretary shall issue a decision or publish a notice in the Federal Register explaining why a decision cannot be issued at that time. The Secretary shall issue a decision within 45 days of the publication of ~~such notice~~ a Federal Register notice explaining why a decision cannot be issued within the 90-day period.

(c) The decision of the Secretary shall constitute final agency action for the purposes of the Administrative Procedure Act.

(d) ~~The appellant bears the burden of submitting evidence in support of its appeal and the burden of persuasion.~~ In reviewing an appeal, the Secretary shall find that a proposed federal license or permit activity, or a federal assistance activity, is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security, when the information ~~submitted~~ in the decision record supports this conclusion.

(e) (1) If the Secretary finds that the proposed activity is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security, the Federal agency may approve the activity.

(2) If the Secretary does not make either of these findings, the Federal agency shall not approve the activity.