

**SANTA BARBARA COUNTY
BOARD AGENDA LETTER**



Clerk of the Board of Supervisors
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Agenda Number:
Prepared on: 8/07/03
Department Name: Planning and Development
Department No.: 053
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Placement: Departmental
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Continued Item: Yes
If Yes, date from: 8/12/03

TO: Board of Supervisors

FROM: Valentin Alexeeff, Director
Planning and Development Department

STAFF CONTACTS: Doug Anthony, Energy Specialist, Energy Division, 568-2046
Bill Dillon, Deputy County Counsel, 568-2950

SUBJECT: Notice of Proposed Rulemaking to Amend Regulations Implementing the Coastal Zone Management Act regarding Offshore Oil/Gas Leasing and Development

Recommendation(s):

That the Board of Supervisors: Authorize the Chair to execute the letter included herein as Attachment A, commenting on a Notice of Proposed Rulemaking published by the National Oceanic and Atmospheric Administration in the Federal Register (Vol. 68, No. 112, Wednesday, June 11, 2003, pp. 34851-34874).

Alignment with Board Strategic Plan:

The recommendation primarily aligns with Goal No. 2. A Safe and Healthy Community in Which to Live, Work, and Visit.

Executive Summary and Discussion:

Introduction:

The U.S. Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), is proposing to amend regulations that guide the Federal Consistency Process of the Coastal Zone Management Act (CZMA).¹ This process, widely known as a cornerstone of the CZMA, provides a limited waiver of Federal supremacy and authority in order to extend a larger role to coastal states (and their political

¹ This process is described in more detail below in the Background section.

subdivisions) in balancing potential adverse affects of Federal activities with the protection of each state's coastal resources. The proposed rule stems from one of several recommendations by the National Energy Policy Development Group, formed by Vice President Cheney in 2001 to address the nation's energy needs. The recommendation seeks "... *limited and specific procedural changes or guidance to the existing Federal consistency regulations are needed to improve efficiencies in the Federal consistency procedures and Secretarial appeals process, particularly for energy development on the Outer Continental Shelf.*"²

Comments are due no later than August 25, 2003.

Purpose, Scope, & Summary of Comments

The attached comment letter recommended by staff and County Counsel has two primary goals:

1. To support the purpose and intent of Congress when it crafted – and subsequently amended – the Federal Consistency Review process as a cornerstone of the CZMA; and
2. To avoid contentious, costly and time-consuming litigation.

Congress enacted the CZMA to realize a national coastal management program that comprehensively manages and balances competing uses of any coastal use or resources and manages and balances the impacts of any proposed coastal use, such as oil/gas leasing and development, to coastal resources or other coastal uses.³ Congress explicitly re-emphasized its support of the Federal Consistency Review process when amending the CZMA in 1990, including its intent to encourage early consultation and cooperation between the Federal government and the coastal states for all proposed Federal activities. In its 2000 update of CZMA regulations, NOAA acknowledged that implementation of the Federal Consistency Review process under existing regulations, for the most part, has been based upon reasonableness, objectivity, collaboration and cooperation.⁴

Unfortunately, the proposed rules hold the potential to impede the State's role and the local role in the CZMA process, to undermine future opportunities for collaboration and cooperation, and to shift the responsibility for problem solving from the CZMA process to the judicial system. Moreover, the proposed rule changes, in part, contradict the intent of Congress and the recent reaffirmation by the Ninth Circuit Court of Appeal in *California v. Norton*, regarding the State's authority to exercise its role in the Federal Consistency Review process. (California, Santa Barbara County, and others successfully challenged the U.S. Department of the Interior on the applicability of the CZMA process to the granting of OCS lease suspensions.)

² National Energy Policy Development Group, *Reliable, Affordable, and Environmentally Sound Energy for America's Future*, (Washington, D.C.: U.S. Government Printing Office, 2001-p. 5-8).

³ NOAA, "Coastal Zone Management Act Federal Consistency Regulations," *Federal Register*, December 8, 2000 (Vol. 65, No. 237), page 77124.

⁴ *Ibid*, page 77124.

The staff-recommended comment letter, if approved, would augment comments being submitted by the California Coastal Commission staff and the California Resources Agency. These entities directly administer the California Coastal Management Program and the Federal Consistency review for the State of California. The California Attorney General's Office may also submit comments. Accordingly, staff's recommended letter, in part, seeks to provide NOAA with the perspective of a local government with a long historical involvement with offshore oil/gas leasing and development and the Federal Consistency Review process.

Among other things, the attached comment letter attempts to inform and influence the rulemaking in the following ways:

1. The letter reiterates what is already well documented in the Federal Register notices for this rulemaking – the Federal Consistency Review process has worked very well. The letter further notes that delays in development of existing oil and gas leases offshore California have largely been brought about by market forces, rather than procedural deficiencies in CZMA regulations. Lengthy delays that are associated with the CZMA process are attributable to the U.S. Department of the Interior's reluctance to comply with procedural requirements (e.g., *California v. Norton*).⁵
2. The letter seeks to correct the rulemaking record with regard to the ruling issued by the U.S. Court of Appeals for the Ninth Circuit. Both the rulemaking and the courts agree that leases not previously subject to Federal Consistency review at the time of the lease sale are subject to the review if the lease term is extended via a suspension. However, NOAA steps beyond the court ruling, concluding "*that in all foreseeable instances, lease suspensions would not be subject to Federal Consistency review ...*"⁶ In contrast, the court reserved such judgment, stating: "*We reserve determination of California's right to review a lease suspension affecting a lease that was itself subject to consistency review [at the time of lease sale] for decision on the particular facts of such case if it should ever come before us.*"⁷ The Court's position is in concert with the CZMA process, discussed below.
3. The letter corrects the public record of this rulemaking regarding the purpose and legal requirements of the five-year leasing programs drafted and approved by the U.S. Department of the Interior. NOAA represents such programs as merely the deliberations and internal tasks of a Federal agency and, as such, they fall outside the scope of the Federal Consistency Review process. Staff quotes directly from the most recent five-year leasing program to state the true nature of five-year leasing programs and their affects on the geographic distribution and intensity of oil/gas leasing activities nationwide. The quotation also describes the extension legal requirements of five-year leasing programs, including one of achieving a proper balance among the potential for environmental damage, discovery of oil and gas, and adverse impact on the coastal zone.

⁵ Interior's reluctance to follow proper CZMA and NEPA procedures will have resulted in approximately a 5-year delay in some OCS development.

⁶ Page 34854 of the Federal Register notice of this rulemaking (Vol. 68, No. 112, June 11, 2003).

⁷ United State Court of Appeals for the Ninth District, *California v. Norton*, (No. 01-16637 D.C. No. CV-99-04964-CW), p. 27.

4. The letter also corrects the public record of this rulemaking by making it clear that it is the coastal state's, and not Federal agencies charged with administering oil and gas development, that are experts in interpreting the respective Coastal Management Program of each state. It expresses opposition to any effort via this proposed rulemaking to transfer the authority of a coastal state in implementing its coastal management program to a Federal agency, such as the Minerals Management Service.

5. The letter seeks to protect the involvement of local jurisdictions in the Federal Consistency Review process by opposing unnecessarily restrictive deadlines that, at a minimum, substantially reduce such involvement.

6. The letter requests a delay in the rulemaking until such time that the stated basis for such rulemaking has been fully disclosed. The rulemaking is based on a recommendation of the Report of the National Energy Policy Development Group. However, such basis remains unclear until such time that all relevant documents that led to the publishing of that report have been made public.

Background – Coastal Zone Management Act of 1972 & the Federal Consistency Process:

The CZMA provides much of the legal framework for protecting and enhancing the nation's coastal resources through sound management in cooperation with coastal states and territories. Among the declarations of national policy found in the act, the CZMA seeks

“... to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values as well as the needs for compatible economic development, which programs should at least provide for--

(C) the management of coastal development to improve, safeguard, and restore the quality of coastal waters, and to protect natural resources and existing uses of those waters,

(D) priority consideration being given to coastal-dependent uses and orderly processes for siting major facilities related to national defense, energy, fisheries development, recreation, ports and transportation, and the location, to the maximum extent practicable, of new commercial and industrial developments in or adjacent to areas where such development already exists, ...

(G) the coordination and simplification of procedures in order to ensure expedited governmental decisionmaking for the management of coastal resources,

(H) continued consultation and coordination with, and the giving of adequate consideration to the views of, affected Federal agencies,

(I) the giving of timely and effective notification of, and opportunities for public and local government participation in, coastal management decisionmaking,”

The CZMA also establishes a voluntary partnership between the Federal government and coastal states for management of coastal resources to implement this policy. States that choose to participate must develop and implement a coastal management program (CMP), which is certified by the Secretary of Commerce as

consistent with federal guidelines. The Secretary of Commerce certified the *California Coastal Management Program* in 1978. The California Coastal Act of 1976 is a key component of the State's CMP.

Once a state's CMP is certified, the CZMA Federal Consistency provisions apply to certain Federal agency activities and certain private activities done under the authority of a federal license or permit. The Federal Consistency process is a cornerstone of the CZMA that preserves the authority of coastal states to manage their coastal resources and provides a mechanism for resolving conflict between federal activities and state coastal management plans.

Federal Consistency is a limited waiver of federal supremacy and authority. Federal agency activities that have coastal effects [e.g., leasing of oil and gas tracts on the Outer Continental Shelf] must be consistent to the maximum extent practicable with the federally approved enforceable policies of the State's CMP. In addition, non-Federal applicants for federal approvals and funding [e.g., oil and gas exploration and production on the Outer Continental Shelf] must be fully consistent with the enforceable policies of State CMPs. (Notice of Proposed Rulemaking, page 34853.)

The Federal Consistency process does not apply to everything a Federal agency does in or near a state's coastal zone, nor to every non-federal application for Federal agency approval. Rather, Federal Consistency review is triggered when such actions or activities have reasonably foreseeable coastal effects – referred to as the “*effects test*.”

Background – CZMA Amendments of 1990 & the Federal Consistency “effects test”:

The Coastal Zone Act Reauthorization Amendments of 1990 made important clarifications to the Federal Consistency process that California and other coastal states sought. Congress clarified the applicability of the Federal Consistency to include any federal activity, or private activity that requires federal license or permit, if it will affect any natural resources, land uses, or water uses in the coastal zone. This broader interpretation encompasses both direct effects that are caused by the subject activity and occur at the same time and place, and indirect effects that may be caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.⁸

According to the Congressional Record for these amendments, the amendments reflect Congress' unambiguous intent that all Federal agency activities, or private activities requiring Federal agency license or permit, that meet the “effects test” are subject to the Federal Consistency process. The record also reflects that the “uniform threshold standard” of the “effects test” requires a factual determination, based on the effects of such activities on the coastal zone, to be applied on a case-by-case basis.⁹

Among other things, Federal Consistency reviews apply to the issuance of leases, approval of Exploration Plans, and approval of Development and Production Plans for oil and gas development on the Outer Continental Shelf (OCS). Under certain case-specific conditions, Federal Consistency also applies to the Federal government's suspension of oil and gas leases, which is an extension in the terms of offshore oil and

⁸ National Oceanic and Atmospheric Administration, “Coastal Zone Management Act Federal Consistency Regulations: Final Rule,” *Federal Register*, December 8, 2000, pp. 77123-77175.

⁹ *Ibid.*

gas leases where no progress has been made towards production of commercial quantities of hydrocarbons. It may also apply to five-year leasing programs that determine the geographic distribution and intensity of OCS leasing nationwide, after considering and balancing the nation's foreseeable energy needs against protection of the nation's coastal resources and other coastal uses.

Background – NOAA's Final Rule of 2000 for Implementing CZMA Amendments:

The National Oceanic and Atmospheric Administration (NOAA), which administers the CZMA under direction of the Secretary of Commerce, finalized extensive amendments to its regulations that implement the CZMA. In large part, these amendments incorporated the revisions of the 1990 Coastal Zone Act Reauthorization Act (described briefly above) and the 1996 Coastal Zone Protection Act.¹⁰ This rulemaking process represented five years of work and numerous consultations with other federal agencies, coastal states, and other interested parties.

Current Notice of Rulemaking:

The current notice of rulemaking directs most attention to the role of the CZMA, and its Federal Consistency process, in decisions about energy development on the Outer Continental Shelf (OCS). It is reproduced herein as Attachment B.

Mandates and Service Levels: The proposed rule affects the procedural implementation of the Coastal Zone Management Act and, in particular, the review of Federal activities, permits and licenses for consistency with the California Coastal Management Program. The rule focuses primarily on the Federal actions involving offshore oil and gas leasing and development. Consistency review is conducted primarily by the California Coastal Commission; however, Santa Barbara County often participates as an interested party because the Federal government historically has concentrated most of its oil and gas leasing and development offshore California in the Santa Barbara Channel and Santa Maria Basin, offshore Santa Barbara County.

Fiscal and Facilities Impacts: Expenses incurred in analyzing and preparing comments on this rulemaking by NOAA are budgeted in Fund 0001, Program 5080, Project PKS2 as shown on page D-298 of the County's FY 03-04 budget book, under expenditure item *Long Range Planning*. These expenses are offset by revenue from the Coastal Impact Assistance Program of 2001 administered by the National Oceanic and Atmospheric Administration, as shown on page D-298 of the County's FY 03-04 budget book, under the revenue source listed as *Grants*.

The CZMA Federal Consistency Review process affords the County a channel for protecting its coastal resources, including many of the County's coastal parks that provide recreational opportunities to its citizenry and tourists.

¹⁰ The notice of final rule was published in the *Federal Register* on December 8, 2000 and is available at <http://frwebgate.access.gpo.gov/>

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Special Instructions: Clerk of the Board will secure the Chair's signature, and Energy Division staff will ensure the executed comment letter reaches NOAA by the due date.

Concurrence: County Counsel

Attachments: A. Draft Comment Letter

B. Proposed Rulemaking

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Attachment A

Proposed Comment Letter

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 phrase “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.¹¹ NOAA should not and cannot prejudge 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

¹¹ 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.

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.¹² 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.**"¹³*

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.

Accordingly, Santa Barbara County believes much earlier consultation on issues, which the Federal Consistency Review process are intended to address and resolve through better

¹² 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.

¹³ 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.

alternatives, can and should occur during the 5-Year Leasing Program.¹⁴ 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.

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

¹⁴ 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.

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 sited 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

Mr. David Kaiser
August 19, 2003
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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]

Attachment B

NOAA's Notice of Proposed Rulemaking

Go To: http://coastalmanagement.noaa.gov/czm/federal_consistency.html

