

**SANTA BARBARA COUNTY  
BOARD AGENDA LETTER**



Clerk of the Board of Supervisors  
105 E. Anapamu Street, Suite 407  
Santa Barbara, CA 93101  
(805) 568-2240

**Agenda Number:**  
**Prepared on:** 9/19/02  
**Department Name:** Planning and Development  
**Department No.:** 053  
**Agenda Date:** 10/1/02  
**Placement:** Departmental  
**Estimate Time:** 30 minutes  
**Continued Item:** NO  
**If Yes, date from:**

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**TO:** Board of Supervisors

**FROM:** Dianne Meester, Interim Director  
Planning and Development Department

**STAFF CONTACT:** Doug Anthony, Energy Specialist  
Energy Division, 568-2046

**SUBJECT:** Advanced Notice of Proposed Rulemaking for Regulation Implementing the Coastal Zone Management Act regarding Offshore Oil/Gas Leasing and Development

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**Recommendation(s):**

That the Board of Supervisors: Authorize the Chair to execute the letter included herein as Attachment A, commenting an Advanced Notice of Proposed Rulemaking that was published by the National Oceanic and Atmospheric Administration in the Federal Register (Vol. 67, No. 127, Tuesday, July 2, 2002, pp. 44407-44410).

**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 National Oceanic and Atmospheric Administration (NOAA) of the U.S. Department of Commerce recently published an Advanced Notice of Proposed Rulemaking, titled *Procedural Changes to the Federal Consistency Process* (reproduced herein as Attachment B). As described below, the Federal Consistency Process is a cornerstone of the Coastal Zone Management Act (CZMA) of 1972. NOAA's stated purpose in doing so is to evaluate whether "... 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." Comments are due no later than October 3, 2002.

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 federal and state partnership 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 [e.g., military operations] that have coastal effects 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. (Advanced Notice of Proposed Rulemaking, page 44408.)*

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.<sup>1</sup>

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.<sup>2</sup>

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). Last year, in *California et. al V. Norton* (2001) 150 F. Supp. 1046, the U.S. District Court for the Northern District of California ruled in favor of the State of California, California Coastal Commission, Counties of Santa Barbara and San Luis Obispo, Get Oil Out, and others, finding that the Federal consistency process also applies to federal approval of suspensions of production or operations, which essentially extends the terms of offshore oil and gas leases. The Department of the Interior's appeal of the ruling is currently under review by the federal appeals court.

*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.<sup>3</sup> This rulemaking process represented five years of work and numerous consultations with other federal agencies, coastal states, and other interested parties.

The recency of the forgoing five-year rulemaking effort is important here for the following reasons:

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<sup>1</sup> National Oceanic and Atmospheric Administration, “Coastal Zone Management Act Federal Consistency Regulations: Final Rule,” *Federal Register*, December 8, 2000, pp. 77123-77175.

<sup>2</sup> *Ibid.*

<sup>3</sup> The notice of final rule was published in the *Federal Register* on December 8, 2000 and is available at <http://frwebgate.access.gpo.gov/>

- There has not been sufficient time to assess how well the updated regulations are working in practice to entertain another update of the regulations so soon afterwards.
- It is not clear at all what more needs to be done to the existing regulations, given both the extensiveness of the recent regulatory updates, combined with the overall vagueness of the current advanced notice of rulemaking.

Current Advanced Notice of Rulemaking – Primary Focus & Impetus:

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). The impetus of the notice comes from one of several recommendations contained in an Energy Report, prepared by the National Energy Policy Development Group at the request of President Bush for purposes of evaluating the nation's energy policy. The recommendation that led to this advanced notice of rulemaking, along with its explanatory text, is repeated below for easy reference.<sup>4</sup>

*Congress has designated about 610 million acres off limits to leasing on the Outer Continental Shelf (OCS), which contains large amounts of recoverable oil and gas resources. These Congressional moratoria have been expanded by Presidential action through 2012, effectively confining the federal OCS leasing program to the central and western Gulf of Mexico, a small portion of the eastern Gulf, existing leases off California's shore, and areas off of Alaska.*

*Concerns over the potential impacts of oil spills have been a major factor behind imposition of the OCS moratoria. For areas that are available for possible development, it is projected that with advanced technology, we could recover 59 billion barrels of oil and 300 trillion cubic feet of natural gas. This type of exploration and production from the OCS has an impressive environmental record. For example, since 1985, OCS operators have produced over 6.3 billion barrels of oil, and have spilled only 0.001 percent of production. Naturally occurring oil seeps add about 150 times as much oil to the oceans. Additionally, about 62 percent of OCS energy production is natural gas, which poses little risk of pollution.*

*For those areas that are available for potential coastal zone and OCS exploration and production activity, businesses must comply with a variety of federal and state statutes, regulations, and executive orders. Aspects of these, under the Coastal Zone Management Act and the Outer Continental Shelf Lands Act and their regulations, attempt to provide for responsible development while considering important environmental resources. However, effectiveness is sometimes lost through a lack of clearly defined requirements and information needs from federal and state entities, as well as uncertain deadlines during the process. These delays and uncertainties can hinder proper energy exploration and production projects.*

*The Deep Water Royalty Relief Act of 1995, granting variable royalty reductions for new leases in deep water, contributed to a significant increase in deep-water leasing in the central and western Gulf over the last five years. The opportunities created in deep water help spur the development of new technologies and infrastructure for this frontier area. However, substantial economic risks remain to investment in deep water and continued incentives could help draw investment in other countries. Similar incentives could spur development in other technological frontiers, such as deep gas, or make possible continued production from both offshore and onshore fields near the end of their economic life.*

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<sup>4</sup> 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).

**Recommendation:**

★ *The NEPD Group recommends that the President direct the Secretaries of Commerce and Interior to re-examine the current federal legal and policy regime (statutes, regulations, and Executive Orders) to determine if changes are needed regarding energy-related activities regarding energy-related activities and the siting of energy facilities in the coastal zone and on the Outer Continental Shelf (OCS).*

In the notice, NOAA explicitly expresses its intent not to re-evaluate the 2000 final rule, but rather assumes a much narrower consideration to explore whether or not limited modifications are needed to address specific concerns, which are listed in the advanced notice of rulemaking and summarized below.

Current Advanced Notice of Rulemaking – Summary:

The advance notice requests comments on the following questions:<sup>5</sup>

- *“Should NOAA further define the scope and nature of information necessary for a State CMP and the Secretary to complete their CZMA reviews and the best way of informing Federal agencies and the industry of the information requirements?”*
- *Is there a more effective way to coordinate the completion of Federal environmental review documents, the information needs of the States, MMS and the Secretary within the various statutory time frames of the CZMA and OCSLA?*
- *Would a regulatory provision for a “general negative determination,” similar to the existing regulation for “general consistency determinations,” 15 CFR 930.36(c), for repetitive Federal agency activities that a Federal agency determines will not have reasonably foreseeable coastal effects individually or cumulatively, improve the efficiency of the Federal consistency process?*
- *Is guidance or regulatory action needed to assist Federal agencies and State CMPs in determining when activities undertaken far offshore from State waters have reasonably foreseeable coastal effects and should the “listing” and “geographic location” descriptions in 15 CFR 930.53 be modified to provide additional clarity and predictability to the applicability of State CZMA Federal Consistency review for activities located far offshore?*
- *Should or can multiple federal approvals needed for an OCS Exploration Plan (EP) or development and Production Plan (DPP) be consolidated into a single consistency review? For instance, in addition to the permits described in detail in EPs and DPPs, whether other associated approvals, air and water permits not “described in detail” in an EP or DPP, can or should be consolidated in a single State consistency review of the EP or DPP?*

The advanced notice of rulemaking also summarizes the track record of Federal Consistency Reviews, noting that: *“While States have negotiated changes to thousands of federal actions over the years, States have concurred with approximately 93% of all federal actions reviewed.”*

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<sup>5</sup> Reproduced here from page 44410 of the advanced notice of rulemaking (see Attachment B).

Regarding the track record for oil and gas activities on the OCS, the notice states that : “*The record shows that energy development continues to occur, while reasonable State review ensures that the CZMA objectives have been met.*” To point, the MMS has approved over 10,600 EPs and over 6,000 DPPs. States have concurred with nearly all of these permits. The oil and gas industry has appealed 15 cases to the Secretary of Commerce throughout the history of the CZMA (13 EPs and 2 DPPs). The Secretary overrode the State’s objection in 7 of these appeals and did not override 7 others. One decision remains pending.<sup>6</sup>

California’s record is somewhat similar. The California Coastal Commission has reviewed 120 EPs and 13 DPPs (which included installation and operation of fixed platforms). Of these cases, the Commission objected to 12 consistency certifications requested by the MMS, and only 10 of these were ultimately appealed to the Secretary of Commerce (see Attachment C). Of these ten, one pertain to the DPP for Exxon’s Santa Ynez Unit project, which was ultimately resolved prior to an official determination by the Secretary of Commerce.

*Preliminary Response by Coastal States:*

Preliminary communications among several coastal states, and inquiries from these states to NOAA, reveal a general sense of puzzlement about the substance and purpose of the advanced notice of rulemaking. Those who have shared draft comments express a commonly shared opinion that neither the experience of coastal states nor information provided in the advanced notice indicates a problem of a general nature that requires a change in current regulations. Inefficiencies appear to stem either from Federal agencies or applicants who are unfamiliar with the CZMA consistency requirements (or state CMP), or from their failure to fully adhere to those requirements. Better efficiencies might be achieved through early substantive consultations and devoting more federal resources to NOAA’s efforts to assist other federal agencies and applicants with understanding their responsibilities under the Federal Consistency process.

There are, however, some issues with the requirements in the OCSLA and the Consistency Review process. The Consistency Review process, for example, requires review within 30 days of submittal and, therefore, prior to completion of environmental analysis pursuant to the National Environmental Policy Act and, where applicable, the California Environmental Quality Act.

*Local Lessons in Improving Federal Consistency Efficiencies:*

Our own experience locally provides several examples of improved efficiencies via early consultation and problem-solving. Since 1990, for example, the MMS’s Tri-County forum, and specialized working groups that have formed through that forum to address specific issues, have or are working towards consensus on substantive or procedural issues for the following activities:

- Consideration of projects that adversely effect rocky habitats
- Consideration of new or renewed Exploration Plans or issuing new ones
- Consideration of High Energy Seismic Surveys
- Consideration of the disposition of offshore platforms upon their decommissioning

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<sup>6</sup> Page 44409 of the Advanced Notice.

None of these examples are likely candidates for federal rulemaking as a means of improving the Federal Consistency process because they are influenced considerably by regional factors that do not extrapolate well from one region to another. We suspect that most potential issues lend themselves better to early coordination for solutions rather than across-the-board rulemaking.

Meanwhile, local experience also shows that any regulatory process, including the Federal Consistency process, must and will continue to evolve in other ways, because rulemaking cannot possibly foresee all potential problems and adequately address them in advance. Such is the case with current litigation in *California v. Norton* to decide the applicability of Federal Consistency review to long-term extensions of inactive, non-producing leases. The hint of replacing the factual determination on a case-by-case process of the "effects test" with prescribed criteria via rules appears ill-advised.

#### Future Opportunities to Comment

NOAA chose to issue an Advanced Notice of Rulemaking for purposes of soliciting thoughts of several stakeholders. The agency will review all comments and make a decision whether or not to proceed with the rulemaking.

NOAA will publish a Notice of Proposed Rulemaking, pursuant to the Administrative Procedures Act, should it decide to proceed with this rulemaking. That notice will contain a proposed rule, along with an explanation of each component, and problems that the proposed rule is intended to resolve. It will also summarize comments that the agency received on the current Advanced Notice of Rulemaking. Members of the public will have opportunity to comment on the Notice of Proposed Rulemaking. There may or may not be additional opportunities to comment formally after that, depending on how the rulemaking evolves.

**Mandates and Service Levels:** It is too early to determine if the proposed rulemaking process would lead to any significant changes in state and local coastal zone management responsibilities or the ability to influence the future of offshore oil and gas development in a manner that is consistent with the California Coastal Management Program and County's Local Coastal Program. The activity of monitoring and, where warranted, providing local input on federal rulemaking related to offshore oil and gas development falls within the current level of service provided by County staff.

**Fiscal and Facilities Impacts:** No impacts to County facilities. 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-26 of the County's FY 02-03 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-26 of the County's FY 02-03 budget book, under the revenue source listed as *Grants*.

**Special Instructions:** Clerk of the Board will secure the Chair's signature on October 1, 2002, and Energy Division staff will ensure the executed comment letter reaches NOAA by the due date of October 3.

**Concurrence:** County Counsel

**Attachment A**

**Proposed Letter of Comment**



October 1, 2002

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. 020422093-2093)

Dear Mr. Kaiser:

On behalf of the Board of Supervisors, County of Santa Barbara, I am submitting the following comments in response to advanced notice of proposed rulemaking cited above. Santa Barbara County is situated adjacent to most of the OCS oil and gas leases and development in the Pacific OCS Region. The County's experience with offshore oil and gas, and related issues of coastal management, date 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.

We share the broad sense of confusion with many state coastal agencies about the purpose and need for the current advanced notice of rulemaking. As the track record reported in your notice shows, the Federal Consistency process is working quite well. This track record, the recent five-year rulemaking effort, the participation of coastal states in the process, and past experiences, illustrate a healthy, ever-evolving process, under the commendable stewardship of the National Oceanic and Atmospheric Administration's (NOAA) and, in our geographic context, the California Coastal Commission. The Energy Report, which serves as the impetus of the current notice, was published only five months after the extensive 1996-2000 rulemaking process concluded.

Nevertheless, we respect the opportunity taken herein by NOAA to evolve the process further by seeking input on potential procedural issues and potential solutions. We understand that, within

the context of an advanced notice of rulemaking, both responders and NOAA have ample opportunities to explore means of improving procedural efficiencies of the Federal Consistency process that would be considerably more efficient than formal rulemaking. In this context, we endorse the comments submitted by Mr. Peter Douglas, Executive Director, California Coastal Commission, and submit the following additional comments for your consideration.

The record of Consistency Review reviews illustrates that the system is working well. The minimal amount of appeals does not support across-the-board rulemaking. Accordingly, procedural amendments to hasten the Consistency Review process risk jeopardizing two principal cornerstones of that process:

- (1) the “uniform threshold standard” of the “effects test,” which requires a factual determination for each specific case, and
- (2) (2) a truly interactive public process, which requires sufficient flexibility to shape the scope and nature of information for each specific case.

Moreover, procedural issues stemming from unique characteristics of a single region likely do not lend themselves to across-the-board rules, but rather should evolve within a regional context through improved coordination among stakeholders. For example, procedural delays resulting from an agency’s or applicant’s unfamiliarity with the CZMA consistency requirements are likely better addressed through early consultations rather than formal rulemaking. The Pacific Regional office of the Minerals Management Service (MMS) has championed such an approach since 1990. Using its MMS/Tri-County forum and several multi-agency adhoc committees (often including interested members of the public), the office has sought, or is seeking, early consensus on procedures for early consultation to consider requests for new or renewed Exploration Plans, approval High Energy Seismic Surveys, or applications to decommission offshore platforms. It also facilitates early consultations routinely on project-specific issues. While not all these efforts fully resolve substantive differences of opinions, they help to resolve issues timely where stakeholders are willing to seek mutually beneficial results.

Lastly, an agency’s or applicant’s failure to adhere to the CZMA consistency requirements should result in procedural delays so that substantive, case-specific issues can be resolved, as intended by Congress when it adopted and subsequently amended the CZMA. Frankly, oil and gas development offshore California entails several complex issues that are not readily explained away by advancements in technology, as suggested in the recent Energy Report. While technology has undoubtedly improved offshore operations, local experience shows us that human error still remains a formidable concern. Additionally, offshore technology, such as oil spill cleanup capabilities, still has serious limitations.

We offer the following suggestions in response to your specific questions.

- **Should NOAA further define the scope and nature of information necessary for a State CMP and the Secretary to complete their CZMA reviews and the best way of informing Federal agencies and the industry of the information requirements?**

No, because it risks undesired circumvention of the substantive process that has largely proven to be successful and ever evolving. Attempts to prescribe rules that cannot possibly foresee all pertinent case-specific factors necessary to make a factual determination pursuant to a particular state's CMP risks circumvention of the process. Additionally, a truly interactive public process requires sufficient flexibility to shape the scope and nature of information for each specific case. Should NOAA prescribe the scope and nature of such information, it would seemingly risk circumvention of public participation, which is a cornerstone of the CZMA.

Instead, Federal agencies and the industry should clearly understand the explicit Congressional intent of the Federal Consistency process; that is, an "effects test" that requires a factual determination on case-specific factors. Second, Federal agencies and the industry should understand each state's CMP and seek clarification where necessary in advance. Early consultations with the applicable state will likely prove to be the most efficient option to identify the scope and nature of necessary information.

➤ **Would a definitive date by which the Secretary must issue a decision in a consistency appeal under CZMA §§ 307©(3)(a), (B), and 307(d) be able to consider standards of the Administrative Procedures Act and which, if any, Federal environmental reviews be included I the administrative record to meet those standards?**

We suggest not, since experience shows there are opportunities to resolve issues in a manner with which the coastal state and the appealing applicant can both live. Certainly, the Secretary may exercise discretion when a ruling can be made quickly if the facts and supporting information are sufficient and point to a clear decision. However, appeals processes are designed as they are to allow both parties, and other interested third parties, a fair and informed process.

➤ **Is there a more effective way to coordinate the completion of Federal environmental review documents, the information needs of the States, MMS and the Secretary within the various statutory time frames of the CZMA and OCSLA?**

This does not appear to be a problem thus far in California. As we understand it, major offshore oil and gas project undergo CZMA/NEPA reviews simultaneously and the staffs of the Minerals Management Service and California Coastal Commission have been very successful in working closely together in coordinating these simultaneous reviews. Additionally, the local regional office of the MMS has taken the initiative on several occasions to implement informal procedures to coordinate their OCSLA and NEPA processes with the CZMA processes, including opportunities for public input early in the processes. We understand from California Coastal Commission staff that this practice is consistent with Section 15 CFR § 930.37, and similar language may or may not be appropriate in Subparts D and E, depending on the context and intent of the language.

➤ **Would a regulatory provision for a "general negative determination," similar to the existing regulation for "general consistency determinations," 15 CFR 930.36(c), for repetitive Federal agency activities that a Federal agency determines will not have**

**reasonably foreseeable coastal effects individually or cumulatively, improve the efficiency of the Federal consistency process?**

We understand that the recent five-year rulemaking effort satisfactorily addresses this concern (§§ 930.36(c), 930.33(a)(3)(ii), and 930.35(a)). Further rulemaking on this point would be ill-advised without sufficient time to test the efficiencies of the recent rules.

➤ **Is guidance or regulatory action needed to assist Federal agencies and State CMPs in determining when activities undertaken far offshore from State waters have reasonably foreseeable coastal effects and should the “listing” and “geographic location” descriptions in 15 CFR 930.53 be modified to provide additional clarity and predictability to the applicability of State CZMA Federal Consistency review for activities located far offshore?**

No, unless such guidance is able to provide valid and reliable direction about those activities that would pass the “effects test” every time, regardless of project-specific and geographically specific factors. However, causal or intervening variables, such as currents and their contributing factors, differ from one geographic location to the next, and in some cases, they are not well understood and remain subject to ongoing scientific evaluation. Adequate guidance would require sufficient foresight of the range of potential case-specific facts to address and resolve future uncertainties or otherwise risk a “one-shoe-fits-all” prescription. The latter appears to conflict directly with the legislative direction of CZARA, which, as expressed in NOAA’s previous rulemaking, establishes *a generally applicable rule of law that any federal agency activity (regardless of its location) is subject to [the consistency requirement] if it will affect any natural resources, land uses, or water uses in the coastal zone. No federal agency activities are categorically exempt from this requirement And: ... that the “uniform threshold standard” requires a factual determination, based on the effects of such activities on the coastal zone, to be applied on a case-by-case basis.*” (Emphasis added.)

This response is not meant to understate the importance and value of early communications and coordination among federal agencies and between federal agencies and state CMPs. Proactive discussions initiated by federal agencies may help in many cases to promote early understanding of potential activities, identify issues, and seek resolution in advance, rather than a reactive approach under difficult schedules.

➤ **Should or can multiple federal approvals needed for an OCS EP or DPP be consolidated into a single consistency review? For instance, in addition to the permits described in detail in EPs and DPPs, whether other associated approvals, air and water permits not “described in detail” in an EP or DPP, can or should be consolidated in a single State consistency review of the EP or DPP?**

Maximizing multiple approvals sounds appealing conceptually; however, some major projects may not lend themselves to such practice. For good reason, the industry often will not invest resources into the level of detailed design required for some permits, such as air permits, until they have secured overall discretionary approvals first.

Mr. David Kaiser  
October 1, 2002  
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In conclusion, we thank NOAA for its strong stewardship in administering the CZMA process, and look forward to the published results of the current advanced notice of rulemaking.

Respectfully submitted,

GAIL MARSHALL, Chair  
Board of Supervisors

CC: Peter Douglas, Executive Director, California Coastal Commission  
Lisle Reed, Director, Minerals Management Service, Pacific OCS Region

**Attachment B**

**NOAA's Advanced Notice of Proposed Rulemaking**

[Federal Register: July 2, 2002 (Volume 67, Number 127)]  
[Proposed Rules]  
[Page 44407-44410]  
From the Federal Register Online via GPO Access [wais.access.gpo.gov]  
[DOCID:fr02jy02-20]

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DEPARTMENT OF COMMERCE

National Oceanic Atmospheric Administration

15 CFR Part 930

[Docket No. 020422093-2093]  
RIN 0648-AP98

Procedural Changes to the Federal Consistency Process

AGENCY: Office of Coastal Resource Management (OCRM), National Ocean Service (NOS), National Oceanic Atmospheric Administration (NOAA), Department of Commerce (Commerce).

ACTION: Advance notice of proposed rulemaking.

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SUMMARY: NOAA is evaluating whether 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 (OCS). This advance notice of proposed rulemaking requests public comment on the need for limited and specific changes or guidance on what such changes or guidance should be.

DATES: Comments on this advance notice of proposed rulemaking must be received by September 3, 2002.

ADDRESSES: Address all comments regarding this advance notice of proposed rulemaking to David Kaiser, Federal Consistency Coordinator, Coastal Programs Division, Office of Ocean and Coastal Resource Management, NOAA, 1305 East-West Highway, 11th Floor, Silver Spring, MD 20910. Attention: Federal Consistency Energy Review Comments.

FOR FURTHER INFORMATION CONTACT: David Kaiser, Federal Consistency Coordinator, Office of Ocean and Coastal Resource Management, NOAA, 301-713-3155 ext. 144.

SUPPLEMENTARY INFORMATION:

I. Background

For nearly 30 years the Coastal Zone Management Act (CZMA) has met the needs of coastal States and Territories (referred to as States), Federal agencies, industry and the public to balance the protection of

coastal resources with coastal development, including energy development. The CZMA requires States to adequately consider the national interest in the siting of energy facilities in the coastal zone through the development and implementation of their federally approved State Coastal Management Programs (CMPs). States have collaborated with industry on a variety of energy facilities, including oil and gas pipelines, nuclear power plants, hydroelectric facilities, and alternative energy development. States have reviewed and approved thousands of offshore oil and gas facilities and related onshore support facilities. On December 8, 2000, NOAA issued a comprehensive revision to the Federal Consistency regulations, which reflected substantial effort and participation by Federal agencies, States, industry, and the

[[Page 44408]]

public, over a five year period. Given this recent broad-based review, NOAA is not re-evaluating the 2000 final rule, rather it is considering whether limited modifications are needed to address the specific concerns discussed in this advance notice.

## II. History of the CZMA and NOAA's Federal Consistency Regulations.

The CZMA was enacted in 1972 to encourage States to be proactive in managing natural resources for their benefit and the benefit of the Nation. The CZMA recognizes a national interest in the resources of the coastal zone and in the balancing of competing uses of those resources. The CZMA is a voluntary program for States. If a State elects to participate it must develop and implement a CMP pursuant to federal guidelines. State CMPs are comprehensive management plans that describe the uses subject to the management program, the authorities and enforceable policies of the management program, the boundaries of the State's coastal zone, the organization of the management program, and other State coastal management concerns. The State CMPs are developed with the participation of Federal agencies, industry, other interested groups and the public. Once the Secretary of Commerce approves a State's CMP, then the CZMA Federal Consistency provision applies. Federal Consistency is a limited waiver of federal supremacy and authority. Federal agency activities that have coastal effects 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 must be fully consistent with the enforceable policies of State CMPs. The Federal Consistency provision is a cornerstone of the CZMA program and a primary incentive for States to participate. While States have negotiated changes to thousands of federal actions over the years, States have concurred with approximately 93% of all federal actions reviewed. Thirty-five States, Great Lake States and United States Trust Territories and Commonwealths (collectively referred to as ``coastal States'' or ``States'') are eligible to participate. Thirty-three of the eligible coastal States have federally approved CMPs. Indiana is developing a program and Illinois is not currently participating.

NOAA's Federal Consistency regulations, first promulgated in 1979, provide reliable procedures and predictability to the implementation of Federal Consistency. The regulations operated well for the Federal and State agencies and permit applicants and provided a reasonable interpretation of the CZMA's broad requirements. When Congress amended



the CZMA in 1990, it specifically endorsed NOAA's consistency regulations and interpretation of the CZMA. However, changes to the CZMA in 1990 and 1996 made clear that revisions to the regulations were needed.

In late 1996, OCRM began a process to revise the regulations by informally consulting and collaborating with Federal agencies, States, industry, Congress, and other interested parties. NOAA submitted two sets of draft rules to States, Federal agencies and others for comments and produced written responses to comments to each draft, before proposing a rule in April 2000. NOAA evaluated comments on the proposed rule and published a final rule on December 8, 2000, which became effective on January 8, 2001.

Most of the changes in the revised regulations were dictated by changes in the CZMA or by specific statements in the accompanying legislative history. For instance, the new regulations added language concerning the scope of the Federal Consistency "effects test." Prior to the 1990 amendments, Federal agency activities "directly affecting" the coastal zone were subject to Federal Consistency. The amendments broadened this language by dropping the word "directly" to include projects with "effects" on any land or water use or natural resource of the coastal zone. Other changes in the 2000 final rule improved and clarified procedural efficiencies and processes and made changes based on long-standing interpretive practice by NOAA.

### III. The Role of the CZMA in OCS Energy Development

In February 2001, the Administration established the National Energy Policy Development Group to bring together business, government, local communities and citizens to promote a dependable, affordable, and environmentally sound National Energy Policy. Vice-President Cheney submitted the Group's Report (Energy Report) to President Bush on May 16, 2001.

The Energy Report contains numerous recommendations for obtaining a long-term, comprehensive energy strategy to advance new, environmentally beneficial technologies to increase energy supplies and encourage less polluting, more efficient energy use. The CZMA and the Outer Continental Shelf Lands Act (OCSLA), a statute administered by the Minerals Management Service (MMS) within the Department of the Interior (DOI), are specifically mentioned. Energy Report at 5-7.

This advance notice is part of NOAA's evaluation of the Energy Report and NOAA's ongoing responsibility to address the national interest in effective coastal management. When States develop and amend their CMPs, and when making coastal management decisions, the CZMA requires State CMPs to adequately consider the national interest in the CZMA objectives and to give priority consideration to coastal dependant uses and processes for facilities related to national defense, energy, fisheries, recreation, ports and transportation.

The CZMA and the OCSLA interact both by explicit cross-reference in the statutes and through their regulatory implementation. Both statutes mandate State review of OCS oil and gas Exploration Plans (EPs) and Development and Production Plans (DPPs). Both statutes and their corresponding regulations provide a compatible and interrelated process for States to review EPs and DPPs. The Energy Report identifies potential lack of effectiveness in the CZMA-OCSLA interaction resulting from a lack of clearly defined requirements and information needs from Federal and State entities, as well as uncertain deadlines for completing the procedures of both statutes. Energy Report at 5-7.

The CZMA requires that when a lessee seeks MMS approval for its EP or DPP, the lessee must certify to the affected State(s) that activities covered in the plans are fully consistent with the enforceable policies of the State's CMP. If the State objects to the consistency certification, then MMS is prohibited from approving the activities described in detail in the EP or DPP. The lessee may appeal to the Secretary of Commerce to override the State objection and allow MMS to issue the approval. When deciding an appeal, the Secretary balances the national interest of the energy development against adverse effects on coastal resources and coastal uses. When MMS offers an OCS lease sale, it is considered a federal agency activity. If MMS determines that the lease sale will have reasonably foreseeable coastal effects, then MMS must provide a CZMA consistency determination to the affected State(s) stating whether the lease sale is ``consistent to the maximum extent practicable'' with the enforceable policies of the State's CMP. If the State objects, MMS may still proceed with the lease sale if MMS can show that it is

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fully consistent or consistent to the maximum extent practicable.

There are several safeguards within the CZMA and NOAA's regulations to ensure that Federal requirements are met and that the national interest in the CZMA objectives is furthered. These safeguards are discussed below using OCS oil and gas activities to illustrate.

The ``Effects Test.'' As discussed above, Federal Consistency review is triggered only when a federal action has reasonably foreseeable coastal effects, referred to as the ``effects test.'' Consistency does NOT apply to everything a Federal agency, or a non-federal applicant for federal approvals, does in or near a coastal State.

For OCS oil and gas lease sales, MMS determines which States will be affected and provides only those States with a Consistency Determination. For example, in the Gulf of Mexico, MMS has established the Eastern Planning, Central Planning and Western Planning Areas. MMS usually finds that lease sales in the Central and Western Planning Areas will not have reasonably foreseeable effects on Florida coastal uses or resources (within the Eastern Planning Area) and does not provide Florida with a Consistency Determination.

For OCS EPs and DPPs the CZMA mandates, as a general matter, State consistency review. However, as with Federal agency activities, a coastal State's ability to review the Plans stops where coastal effects are not reasonably foreseeable. For example, in the Gulf of Mexico, Florida reviews OCS Plans in the Eastern Planning Area, and only reviews an OCS Plan in the Central Planning Area if effects to Florida's coastal uses or resources are reasonably foreseeable. Usually, an OCS oil and gas activity in the Central Planning Area will be beyond the point where the activity will affect Florida. The State of Texas (in the Western Planning Area) does not usually review an OCS oil and gas activity proposed for the Eastern Planning Area because coastal effects in Texas are not reasonably foreseeable.

Under the CZMA and NOAA's regulations, if Florida wanted to review OCS plans in the Central Planning Area, or if Texas wanted to review OCS plans in the Eastern Planning Area, they could, if NOAA approved, amend their CMP to describe an area within the particular Planning Area as a geographic location where the plans are subject to State review. Or, the States could request approval from NOAA on a case by case

basis. In both cases, NOAA would approve only if the States could show that effects on their coastal uses or resources are reasonably foreseeable as a result of an activity in the described geographic location.

NOAA Approval of State CMPs. NOAA, with substantial input from Federal agencies, local governments, industry, non-governmental organizations and the public, must approve State CMPs and their enforceable policies, including later changes to a State's CMP. For example, NOAA has denied State requests to include policies in its federally approved CMP that would prohibit all oil and gas development or facilities off its coast. NOAA has found that such policies conflict with the CZMA requirement that States consider the national interest in energy development and balance resource protection with coastal uses.

Federal Agency Activities--`Consistent to the Maximum Extent Practicable and Fully Consistent.' For Federal agency activities under CZMA section 307(c) (1), such as the OCS Lease Sales, the Federal agency may proceed with the activity over a State's objection if the Federal agency is Consistent to the Maximum Extent Practicable with the enforceable policies of the State's CMP. This means that even if a State objects, MMS may proceed with an OCS lease sale if MMS provides to the State the reasons why the OCSLA requires MMS to proceed, despite inconsistency with the State. MMS could also proceed if it determined it was fully consistent. Under NOAA's regulations, the consistent to the maximum extent practicable standard also allows Federal agencies to deviate from State enforceable policies and CZMA procedures due to unforeseen circumstances and emergencies.

Appeal to the Secretary of Commerce. For non-federal applicants for federal approvals, such as OCS lessees, the applicant may appeal a State's objection to the Secretary of Commerce pursuant to CZMA sections 307(c) (3) and (d). The State's objection is overridden if the Secretary finds that the activity is consistent with the objectives or purposes of the CZMA or is necessary in the interest of national security. If the Secretary overrides the State's objection, then the Federal agency may issue its approval.

Since 1978, MMS has approved over 10,600 EPs and over 6,000 DPPs. States have concurred with nearly all of these plans. In the history of the CZMA, there have been only 15 instances where the oil and gas industry appealed a State's Federal Consistency objection to the Secretary of Commerce. Of those 15 cases (2 DPPs and 13 EPs), there were 7 decisions to override the State's objection, 7 decisions not to override the State, and 1 decision pending. The record shows that energy development continues to occur, while reasonable State review ensures that the CZMA objectives have been met.

Since 1990, when the CZMA Federal Consistency provision was amended, there have been several OCS oil and gas lease sales by MMS and only one State objection. However, in that one case OCRM determined that the State's objection was not based on enforceable policies. Thus, all lease sales offered by MMS since 1990 have proceeded under the CZMA. In addition, since 1990, there have been six State objections to Exploration Plans. In three of those cases, the Secretary did not override the State's objection. In two of the cases the Secretary did override the State, and one case is still pending before the Secretary.

Mediation. While mediation is not technically a safeguard as those described above, it has been used to resolve Federal Consistency disputes and allowed Federal actions to proceed. In the event of a serious disagreement between a Federal agency and a State, either party may request that the Secretary of Commerce mediate the dispute. NOAA's

regulations also provide for OCRM mediation to resolve disputes between States, Federal agencies, and others.

#### IV. Action Requested From the Public

Because of the thoroughness of NOAA's efforts during the recent revision of the Federal Consistency regulations, and the importance of the CZMA Federal Consistency provision to the State-Federal partnership, NOAA is not considering significant changes to the Federal Consistency regulations. However, the Energy Report and recent public interest in the energy industry has highlighted the need to evaluate whether NOAA should make procedural adjustments to improve efficiency in the administration of the Federal Consistency provision. Therefore, NOAA is considering limited regulatory changes or additional policy guidance that will further improve the operation of Federal Consistency.

NOAA is primarily addressing issues raised by the Energy Report which are related to the scope of information needed by the States and the Secretary in their respective reviews of OCS oil and gas activities on the OCS. NOAA is particularly concerned that the various timing requirements of the OCSLA, CZMA and their applicable regulations can result in procedural delays or delayed information requests. Under the existing regulations, the Federal Consistency review period starts when

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the State agency receives the applicant's consistency certification, the OCS plan, and the necessary data and information described in 15 CFR 930.58. The necessary data and information includes a detailed description of the activity, coastal effects, etc., and an evaluation relating the coastal effects to the enforceable policies of a State's CMP. This information is usually contained in the OCS plan and accompanying information. In addition, the necessary data and information can include information that is specifically identified in the State's CMP. NOAA's Federal Consistency regulations, 15 CFR 930.77(a)(2), specify the information available for the State's review of OCS oil and gas plans:

The State agency shall use 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 (see 30 CFR part 252) regulations and necessary data and information (see 15 CFR 930.58).

Despite this direction for information requirements, issues continue to arise as to the adequacy and types of information requested by and/or provided to the States. There are also instances where the State asks for additional information late in the CZMA review period. Frequently there is a time delay between the time a Federal agency or applicant for federal license or permit provides a coastal State with a consistency certification and the subsequent availability of routine environmental review documents such as National Environmental Policy Act (NEPA) compliance documents, reviews required under the Endangered Species Act (ESA) and related Clean Water Act (CWA) and/or Clean Air Act (CAA) reviews.

To address these and other procedural issues, NOAA seeks comments from the public concerning the following:

Whether NOAA needs to further describe the scope and nature of information necessary for a State CMP and the Secretary to complete their CZMA reviews and the best way of informing Federal agencies and the industry of the information requirements.

Whether a definitive date by which the Secretary must issue a decision in a consistency appeal under CZMA sections 307(c)(3)(A), (B) and 307(d) can be established taking into consideration the standards of the Administrative Procedures Act and which, if any, Federal environmental reviews should be included in the administrative record to meet those standards.

Whether there is a more effective way to coordinate the completion of Federal environmental review documents, the information needs of the States, MMS and the Secretary within the various statutory time frames of the CZMA and OCSLA.

Whether a regulatory provision for a ``general negative determination,`` similar to the existing regulation for ``general consistency determinations,`` 15 CFR 930.36(c), for repetitive Federal agency activities that a Federal agency determines will not have reasonably foreseeable coastal effects individually or cumulatively, would improve the efficiency of the Federal consistency process.

Whether guidance or regulatory action is needed to assist Federal agencies and State CMPs in determining when activities undertaken far offshore from State waters have reasonably foreseeable coastal effects and whether the ``listing`` and ``geographic location`` descriptions in 15 CFR 930.53 should be modified to provide additional clarity and predictability to the applicability of State CZMA Federal Consistency review for activities located far offshore.

Whether multiple federal approvals needed for an OCS EP or DPP should be or can be consolidated into a single consistency review. For instance, in addition to the permits described in detail in EPs and DPPs, whether other associated approvals, air and water permits not ``described in detail`` in an EP or DPP, can or should be consolidated in a single State consistency review of the EP or DPP.

Comments received by NOAA will help to determine its next steps, i.e., whether the Federal Consistency regulations should be amended to clarify data and information requirements in the State consistency review process or during the Secretarial appeal process or whether additional policy guidance on these and related issues is more appropriate. Any proposed changes to the Federal Consistency regulations would be published in the Federal Register following compliance with the Administrative Procedures Act and other relevant statutes and executive orders. Any proposed policy statement would be published in the Federal Register.

Dated: June 25, 2002.

Jamison Hawkins,  
Deputy, Assistant Administrator for Oceans and Coastal Zone Management.  
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## **Attachment C**

### **Federal Consistency Appeals of Energy Projects to the U.S. Secretary of Commerce – California Cases**

## Reproduced from Comments Drafted by California Coastal Commission Staff

1. **CCC #** CC-12-82  
**Applicant:** Union  
**Project:** Exploratory Oil Drilling, 2 Wells  
**Location:** Santa Barbara Channel, OCS-P 0203  
**Commerce Decision:** **Objection Overturned**
  
2. **CCC #:** CC-5-83  
**Applicant:** Exxon Oil  
**Project:** Exploratory Oil Drilling, 13 Wells  
**Location:** Santa Barbara Channel, OCS-P 0467 and 0231  
**Commerce Decision:** **Objection Sustained** 11/14/84

Notes: The Secretary of Commerce found that a reasonable alternative was available, as had been identified by the Commission: limiting drilling to the fishing "window" of January to April when thresher shark fishing is at a minimum.

3. **CCC #:** CC-7-83  
**Applicant:** Exxon Oil  
**Project:** Production Oil Drilling: 19 OCS leases, DPP, 3-4 platforms  
(Heather, Heritage, Harmony), 148 wells, & ass. onshore facilities,  
**Location:** Santa Ynez unit, Santa Barbara Channel, OCS-P 0180-0185,  
0187-0197, 0236 and 0239  
**Appeal Outcome:** **Objection to "Option A" Settled/appeal withdrawn upon**  
**resubmittal**
  
4. **CCC #:** CC-31-84  
**Applicant:** Gulf Oil  
**Project:** Exploratory Oil Drilling, 1 well  
**Location:** Santa Maria Basin, off Vandenberg Air Force Base, Santa  
Barbara County, OCS-P 0505  
**Commerce Decision:** **Objection Overturned** 12/23/85
  
5. **CCC #:** CC-16-85  
**Applicant:** Cities Service  
**Project:** Production Oil Drilling: Platform Julius  
**Location:** Santa Maria Basin, off North Vandenberg Air Force Base,  
Santa Barbara County, OCS-P 0409  
**Commerce Decision:** **Settled/appeal withdrawn**

Notes:– lack of information objection/appeal withdrawn upon resubmittal

6. **CCC #:** CC-36-86  
**Applicant:** Chevron  
**Project:** Production Oil Drilling: Platform Gail

**Location:** Eastern Santa Barbara Channel, offshore of Ventura Co., north of Anacapa Island, OCS-P 0205

**Appeal Outcome:** **Settled/appeal withdrawn (resolved through settlement agreement)**

7. **CCC #:** **CC-52-86**  
**Applicant:** **Korea Drilling Co.**  
**Project:** NPDES Permit, Disposal Of Drilling Discharges  
**Location:** Santa Barbara Channel  
**Commerce Decision:** **Objection Overturned** 1/19/89

8. **CCC #:** **CC-47-87**  
**Applicant:** **Texaco**  
**Project:** Exploratory Oil Drilling, 8 wells  
**Location:** 3.1 mi. S.W. of Point Conception/Vandenberg Air Force Base, Santa Barbara Channel, OCS-P 0505  
**Commerce Decision:** **Objection Overturned** 5/10/89

9. **CCC #:** **CC-2-88**  
**Applicant:** **Chevron**  
**Project:** Exploratory Oil Drilling, 1 well  
**Location:** Santa Barbara Channel, OCS-P 0525  
**Commerce Decision:** **Objection Sustained** 10/29/90

*Notes: the issue was air quality mitigation – the Secretary of Commerce found that a reasonable alternative was available, as had been identified by the Commission, which was to provide air quality mitigation in the form of “offsets” (i.e., onshore emission reductions equivalent to project-related air emissions).*

10. **CCC #:** **CC-1-88**  
**Applicant:** **Conoco**  
**Project:** Exploratory Oil Drilling, 6 wells  
**Location:** Santa Barbara Channel, OCS-P 0522  
**Appeal Outcome:** **Appeal Withdrawn after Chevron decision (CC-2-88)**

*Notes: air quality issues were identical in CC-1-88 and CC-2-88. Therefore once CC-2-88 was decided, Conoco had no little reason to pursue its appeal, as the Secretary’s decision on the air quality issue would be likely to be the same.*