

**DEPARTMENT OF COMMERCE****NATIONAL OCEANIC AND  
ATMOSPHERIC ADMINISTRATION****15 CFR Part 930**

[Docket No. 990723202-0338-02]

RIN 0648-AM88

**Coastal Zone Management Act Federal  
Consistency Regulations**

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

**ACTION:** Final rule.

**SUMMARY:** The National Oceanic and Atmospheric Administration (NOAA) revises the regulations implementing the federal consistency provision of the Coastal Zone Management Act of 1972 (CZMA). The Coastal Zone Act Reauthorization Amendments of 1990, enacted November 5, 1990, as well as the Coastal Zone Protection Act of 1996, enacted June 3, 1996, amended and reauthorized the CZMA. Among the amendments were revisions to the federal consistency requirement contained in section 307 of the CZMA. Current federal consistency regulations were promulgated in 1979 and are in need of revision after 20 years of implementation. The purpose of this final rule is to make such revisions.

**DATES:** Effective January 8, 2001.

**FOR FURTHER INFORMATION CONTACT:** David W. Kaiser, Federal Consistency Coordinator, Office of Ocean and Coastal Resource Management (N/ORM3), 1305 East-West Highway, 11th Floor, Silver Spring, MD 20910. Telephone: 301-713-3155, extension 144.

**SUPPLEMENTARY INFORMATION:****I. Authority**

This final rule is issued under the authority of the CZMA, 16 USC 1451 *et seq.*

**II. Background**

The following terms are defined for the purpose of this preamble:

The term "management program" means the objectives, policies and other requirements of a State coastal management program that has been federally approved by NOAA, pursuant to CZMA § 306.

The term "State agency" means the designated federal consistency agency for a particular management program.

The term "consistency determination" means the determination provided by a Federal agency to a State agency for a Federal agency activity under CZMA § 307(c)(1) that the Federal agency determines will have reasonably foreseeable effects on any land or water use or natural resource of a State's coastal zone (such effects are also referred to as "coastal effects" or "effects on any coastal use or resource").

The term "negative determination" means the determination provided by a Federal agency to a State agency for a Federal agency activity under CZMA § 307(c)(1) that the Federal agency determines will not have reasonably foreseeable coastal effects.

The term "consistency certification" means the certification provided by an applicant for a federal approval under CZMA § (c)(3) or a State agency's or local government's certification under CZMA § 307(d).

The term "concurrence" means a State agency's approval of a consistency determination, negative determination, or consistency certification.

The term "objection" means a State agency's disagreement/disapproval of a consistency determination, negative determination, or consistency certification.

The term "enforceable policy" means a policy that is legally binding under State law and is part of that State's management program.

The term "maximum extent practicable" means that Federal agencies must conduct their activities under CZMA § 307(c)(1) in a manner that is fully consistent with the enforceable policies of a management program, unless prohibited from full consistency by the requirements of federal law applicable to the activity.

The CZMA was enacted to develop a national coastal management program that comprehensively manages and balances competing uses of and impacts to any coastal use or resource. The national coastal management program is implemented by individual State management programs in partnership with the Federal Government. The CZMA federal consistency requirement, CZMA § 307, requires that Federal agency activities be consistent to the maximum extent practicable with the enforceable policies of a management program. The federal consistency requirement also requires that non-federal activities requiring federal permits, licenses or that receive federal financial assistance, be fully consistent with a State's federally approved management program. The federal consistency requirement is an important

mechanism to address coastal effects, to ensure federal consideration of State management programs, and to avoid conflicts between States and Federal agencies by fostering early consultation and coordination.

Congress strongly re-emphasized the importance of consistency in the CZMA amendments of 1990 and specifically endorsed long-standing requirements of the CZMA consistency regulations. Thus, in making regulatory changes NOAA has been careful to adhere to statutory requirements and has given deference to the long-standing consistency provisions that comport with new statutory requirements. The implementation of consistency by the States and Federal agencies and guidance by NOAA, especially in the past few years, for the most part has been based on reasonableness, objectivity, collaboration and cooperation. The strength of revised regulations and State-Federal interaction needs to further these goals and be solidly grounded in the statute and long-standing usage. With that in mind, aside from the revisions required by the changes to the CZMA, it is not NOAA's intent to fundamentally change or "weaken" the consistency requirement. NOAA's intent is to clarify certain sections, provide additional guidance where needed, and provide States and Federal agencies with greater flexibility for Federal-State coordination and cooperation.

**III. Coastal Zone Act Reauthorization  
Amendments of 1990**

This final rule codifies changes made to CZMA § 307 in 1990. The Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) (Pub. L. No. 101-508) amended the CZMA to clarify that the federal consistency requirement applies when any federal activity, regardless of location, affects any land or water use or natural resource of the coastal zone. This new "effects" language was added by the CZARA to replace previous language that referred to activities "directly affecting the coastal zone," establishing:

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.

H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 968-975, 970 (hereinafter Conference Report). The focus of the Federal agency's evaluation should be on coastal effects, not on the nature of the activity. The Conference Report

provides further clarification on the scope of the effects test:

The question of whether a specific federal agency activity may affect any natural resource, land use, or water use in the coastal zone is determined by the federal agency. The conferees intend this determination to include effects in the coastal zone which the federal agency may reasonably anticipate as a result of its action, including cumulative and secondary effects. Therefore, the term "affecting" is to be construed broadly, including direct effects which are caused by the activity and occur at the same time and place, and indirect effects which may be caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.

*Id.* at 970–71. These changes reflect an unambiguous Congressional intent that all Federal agency activities meeting the "effects" test are subject to the CZMA consistency requirement; that there are no exceptions or exclusions from the requirement as a matter of law; 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. *Id.*; 136 Cong. Rec. H 8076 (Sep. 26, 1990).

Other changes made to the CZMA by the CZARA include the addition of § 307(c)(1)(B) which, under certain circumstances, authorizes the President to exempt a specific Federal agency activity if the President determines that the activity is in the paramount interest of the United States. This section does not require implementing regulations. The CZARA also makes clear the requirement that Federal agency activities and federal license or permit and federal assistance activities must be consistent with the enforceable policies of management programs. Finally, the CZARA made technical and conforming changes to the other existing federal consistency requirements of CZMA §§ 307(c)(3)(A) and (B), and 307(d) for the purpose of conforming these existing sections with changes made to § 307(c)(1).

#### IV. CZARA and *Secretary of the Interior v. California*, 464 U.S. 312 (1984)

In 1984, the Supreme Court held that outer continental shelf (OCS) oil and gas lease sales by the Department of the Interior's Minerals Management Service were not activities subject to the CZMA consistency requirement as the lease sales did not directly affect the coastal zone. *Secretary of the Interior v. California*, 464 U.S. 312 (1984). In amending the CZMA federal consistency section in 1990, Congress overturned the effect of the decision in *Secretary of the Interior* and made it clear that OCS oil and gas lease sales are

subject to the consistency requirement. Conference Report at 970. Congress also intended this change to clarify that other federal activities (in or outside the coastal zone) in addition to OCS oil and gas lease sales are subject to the federal consistency requirement. The remainder of the consistency discussion in the Conference Report makes this clear as does similar discussion in the Congressional Record, 136 Cong. Rec. H 8068 (Sep. 26, 1990) [hereinafter Congressional Record] (incorporated into the Conference Report, *see* Conference Report at 975).

Changes to the consistency section clarify that any federal activity is subject to the consistency requirement (regardless of location) if coastal effects are reasonably foreseeable, and that there are no categorical exemptions. Conference Report at 970. The discussion in the Conference Report on whether to list other federal activities that are subject to the consistency requirement, *e.g.*, activities under the Ocean Dumping Act, further clarifies that no federal activities are categorically exempt and that the determination of whether consistency applies is a case-by-case analysis based on reasonably foreseeable effects on any coastal use or resource. *See* Conference Report at 971.

The Congressional Record sheds further light on the intent and the scope of Congress' rejection of *Secretary of the Interior*. Congress not only rejected *Secretary of the Interior*, but eliminated the "shadow effect" of the Court's decision (*i.e.*, its potentially erosive effect on the application of the federal consistency requirements to other Federal agency activities) \* \* \* and also to dispel any doubt as to the applicability of this requirement to all federal agency activities that meet the standard [*i.e.*, the effects test] for review." Congressional Record at H 8076.

Thus, the application of the consistency requirement is not dependent on the type of activity or what form the activity takes (*e.g.*, rulemaking, regulation, physical alteration, plan). Consistency applies whenever a federal activity initiates a series of events where coastal effects are reasonably foreseeable. *See* H.R. Rep. No. 1012, 96th Cong., 2d Sess. 4382. The CZMA, the Conference Report, and NOAA regulations are specifically written to cover a wide range of federal functions. The only test for whether a Federal agency function is a Federal agency activity subject to the consistency requirement is an "effects test." Whether a particular federal

action affects the coastal zone is a factual determination.

#### V. Coastal Zone Protection Act of 1996

On June 3, 1996, the President signed into law the Coastal Zone Protection Act of 1996 (CZPA), Pub. L. No. 104–150. Section 8 of the CZPA addresses the Secretarial override process whereby the Secretary of Commerce may override a State's consistency objection to a federal permit, license or funded project. Specifically, CZPA section 8 requires the Secretary to publish a notice in the **Federal Register** indicating when the decision record in a consistency appeal has closed. No later than 90 days after the date of publication of this notice, the Secretary is required to issue a final decision or publish another notice in the **Federal Register** detailing why the decision cannot be issued within the 90-day period. In the latter case, the Secretary is required to issue a decision no later than 45 days after the date of the publication of the notice. This final rule makes conforming changes in the Secretarial override regulations contained in subpart H of part 930.

#### VI. Purpose of This Final Rulemaking

A proposed rule to revise portions of the federal consistency regulations was published on April 14, 2000 (65 Fed. Reg. 20269–20302). The purpose of this final rule is to codify the 1990 and 1996 statutory changes to CZMA § 307, and to update the federal consistency regulations after 20 years of implementation by NOAA, States and Federal agencies. This final rule is also the result of a two year informal effort by NOAA to work with Federal agencies, State agencies, and other interested parties to identify issues and obtain comments on draft proposed revisions to the regulations. Thus, this final rule has already undergone substantial review and modification by Federal agencies, State agencies and other interested parties.

#### VII. Section-by-Section Discussion of Final Changes and Response to Comments on the Proposed Rule

Throughout part 930 NOAA makes a number of minor revisions, as well as a number of revisions that will implement the CZARA and the CZPA. The minor revisions include changes that will update the regulations and make them easier to use. The following is a section-specific discussion of some of these changes, as well as changes that will implement the CZARA and the CZPA. In addition, there were numerous comments on the proposed rule and NOAA. These comments are summarized under the relevant sections

below along with NOAA's response. While many commenters suggested changes to the regulations, these same Federal agencies, State agencies and others provided comments that noted the importance of and the improvements to the regulations, and the need to finalize the regulations. NOAA greatly appreciates these comments and the assistance that the Federal agencies, State agencies and other interested parties have provided to NOAA over the past three years to develop these revised regulations. Because of the number of changes made to the regulations, 15 CFR part 930 is published in its entirety in this **Federal Register** notice.

#### *Subpart A—General Information*

Minor changes are made to clarify that the obligations imposed by the regulations are for State agencies as well as for Federal agencies and other parties, and to clarify that the purpose of the regulations is to address both the need to ensure consistency of federal actions affecting any coastal use or resource with the enforceable policies of management programs and the importance of federal programs. Changes are made to encourage State agencies and Federal agencies to coordinate as early as possible, and to allow State agencies and Federal agencies to mutually agree to consistency procedures different from those contained in the regulations, providing that public participation requirements are still met and that all relevant management program enforceable policies are considered. Minor editorial changes are not individually identified in the section-by-section analysis.

Section 930.1(c). One commenter claimed that the proposed rule complicates rather than simplifies the administrative process. NOAA does not agree. The rule clarifies existing NOAA policy that State agencies, Federal agencies and applicants may mutually agree to augment or replace the requirements of the consistency regulations with other intergovernmental coordination efforts, so long as public participation requirements are met and the State agency is adequately enforcing its management program. Such intergovernmental coordination efforts may be more efficient and effective for the particular State and specific activity. Most States already have procedures to simplify and coordinate their consistency and other permit reviews. In addition, NOAA's changes improve the clarity of some sections that are currently cause for confusion. This

increased clarity will provide a more predictable and better understood process.

Another commenter noted that public participation is an important element of the CZMA and should receive a high priority in the regulation. NOAA agrees and has made the last parenthetical in subsection (c) a clause within the sentence.

Section 930.1(e). One State commented that the section should retain reference to objectives of management programs, and not just to enforceable policies. NOAA disagrees. In 1990, Congress placed great emphasis on the need for State agency consistency decisions to be based on enforceable policies. *See* CZMA § 304(6a), Conference Report at 972. The CZMA was changed, in part, to expressly require consistency with enforceable policies. CZMA §§ 307(c)(1) and (c)(3)(A). Advisory policies are still addressed in section 930.39(c). The terms objectives, standards, policies and criteria are not retained, either for the reasons stated above, or because they are redundant with enforceable policies.

Sections 930.1(h) and (i) are removed. *See* below under sections 930.132–134, and subpart I.

Section 930.2 codifies the requirement for public participation for all types of consistency reviews which was added by CZARA, CZMA § 306(d)(14). Environmental groups commented that public participation should be required for "negative determinations." NOAA disagrees. CZMA § 306(d)(14) requires that State agencies provide for public participation in the State agencies' review of consistency determinations (Federal agency activities), and other similar decisions. NOAA believes that this provision refers to consistency determinations and certifications which are submitted for activities which the project proponent reasonably expects will have coastal effects and where State agency review is required. Where a State agency decision or review is not required, public participation is not required. State agencies are required to review consistency determinations and certifications. *See* response to comment regarding section 930.3. Public notice under CZMA § 306(d)(14) is not required for State agency review of negative determinations, since a State agency is not required to review, and in fact may never review, a Federal agency's negative determination, which is a finding of no coastal effects. The new time frames for State agency review of negative determinations are only provided if a State agency decides to review a negative determination and to

ensure that such a discretionary review occurs in a timely manner. If a Federal agency were to agree that coastal effects are reasonably foreseeable and that its negative determination was not correct, then the Federal agency would submit a consistency determination pursuant to subpart C, which would be subject to public comment.

Section 930.3 was formerly located at section 930.145. Two State commenters said that this section misconstrues the CZMA claiming that State agency implementation of federal consistency is not required, but is discretionary. NOAA does not agree. Another commenter recommended that the regulations allow citizens to petition NOAA if a citizen believes a management program is not being implemented. The comments regarding State agency obligation to perform consistency reviews incorrectly interprets CZMA program development, approval and continuing review requirements; the "presumption" language in CZMA § 307; and ignores the public participation requirement added by Congress in 1990. A coastal State voluntarily participates in the CZMA program. However, to obtain management program approval a State must develop a program pursuant to CZMA and NOAA regulatory guidelines. Further, to continue to have an approvable program, the coastal State must adhere to CZMA and NOAA regulatory implementation requirements and must implement its federally-approved management program. NOAA monitors such implementation through the CZMA § 312 evaluation process. Federal consistency is one of the requirements that a State must implement. If a State is not reviewing federal activities for consistency and allowing the public to comment on the State's reviews, then the State is not adequately implementing its federally-approved management program.

The CZMA contains numerous sections that are part of the requirement for States to implement federal consistency if the States want to maintain an approvable program. For example, CZMA § 306(d) requires States to implement federally-approved management programs, particularly §§ 306(d)(1) (management program adopted pursuant to NOAA regulations), § 306(d)(2)(D) (identification of the means by which the State will exert control over coastal uses), and § 306(d)(2)(F) (the organizational structure used to implement the management program).

Moreover CZMA § 312(a) requires the Secretary to evaluate State programs to ensure that a State has adequately

“implemented and enforced” its program. If the State is not adequately implementing and enforcing its program the Secretary may suspend the State’s grant for non-compliance, CZMA § 312(c)(1), and require the State to take necessary actions to remedy the non-compliance, CZMA § 312(c)(2)(A). If the State does not remedy the non-compliance, then the Secretary may withdraw program approval. CZMA § 312(d). A State cannot adequately implement its management program unless the State ensures, through federal consistency, that federal activities are consistent with the State’s enforceable policies. For instance, one State waived consistency on numerous projects due to a State statute that required the State to issue all State decisions within 90 days or the State’s permission is presumed. NOAA identified this as a management program implementation problem and required the State, to “seek administrative or regulatory mechanisms that ensures consistency is separate from issuance of a permit by default, or ensure consistency is conducted within the 90-day permit review period.” OCRM/NOAA, Evaluation Findings for the New Jersey Coastal Management Program for the Period from September 1991 through November 1994, at 30 (June 1995). As a result, the State clarified the application of the 90-day statute and took steps to complete its consistency reviews within the 90-day State-imposed period. NOAA followed up on this issue in the State’s next evaluation and required the State to provide an explanation of how it is enforcing its program in light of the 90-day State statute. OCRM/NOAA, Evaluation Findings for the New Jersey Coastal Management Program for the Period from December 1994 through November 1997, at 23 (April 1998).

In 1990 Congress added CZMA § 306(d)(14) which requires States to provide for public participation in a State’s review of federal consistency determinations and other consistency decisions by a State. Thus, if a State agency receives a consistency determination from a Federal agency, the State cannot simply waive consistency review. The State agency must provide for public comment on a State review to either concur with or object to the determination. In addition, the State must implement its program and cannot do so if it ignores federal activities under CZMA § 307, which will affect the State’s coastal uses or resources.

CZMA § 307 also specifies that State’s must implement its program through federal consistency. For instance, § 307(c)(3)(A) provides that States

“shall” establish procedures for public participation and “shall” notify Federal agencies and applicants of its concurrence or objection. The “presumption” of a State agency’s concurrence in the CZMA and NOAA’s regulations is not an indication of State agency discretion to be non-responsive. The “presumption” of concurrence is to ensure that consistency reviews occur in a timely fashion by providing a penalty to the State for not responding within the statutorily specified time frames. Patterns of non-compliance are remedied through the CZMA § 312 evaluation process, as described above.

NOAA’s regulations also contain numerous sections requiring States to implement their federally-approved programs, including federal consistency. For example, 15 CFR section 923.1(b) requires States to comply with CZMA §§ 306 and 307 for program approval; section 923.1(c)(6) requires States to have sufficient means to implement and ensure conformance with their management programs (which includes their federal consistency programs); section 923.1(c)(7) mirrors CZMA § 306(d)(14) requiring public participation in its consistency reviews; sections 923.40(a) and (b) and 923.46 require States to have the organizational structure to implement their programs; section 923.53 requires a State to include in its program “the procedures it will use to implement the Federal consistency requirements. \* \* \*”; section 923.133(c)(1)(i) requires that for continued management program approval that the State has “[i]mplemented and enforced the [federally approved program.]” and, under section 923(c)(2)(i)(C), the State “is effectively carrying out the provisions of Federal consistency.” Finally, the criteria for invoking interim sanctions for non-compliance, under sections 923.135(a)(3)(i)(A), (D), and (E), include “ineffective or inconsistent implementation of legally enforceable policies,” “ineffective implementation of Federal consistency authority,” and “inadequate opportunity for intergovernmental cooperation and public participation” including input through CZMA § 306(d)(14) (public input into consistency decisions).

Federal consistency is an integral part of ensuring consistent application of State enforceable policies to all entities, be they public, private, local government or federal, and ensuring adequate implementation of the State’s management program, and as such, the statute, the regulations and agency practice require States to meet the CZMA § 307 federal consistency requirements.

As for the comment regarding a process for citizen notification to OCRM of State non-compliance, the CZMA already contains such a process under the section 312 program evaluation process.

Section 930.4 clarifies the use by State agencies of conditional concurrences. Conditions of concurrence should not replace State objections and the identification of alternatives for activities that the State agency finds are inconsistent with its management program. Since conditional concurrences could seriously weaken the State authority granted by the CZMA consistency requirement, this rule only allows conditional concurrences pursuant to the following criteria: (1) Conditions must be based on specific enforceable policies, (2) the applicant must amend its federal application, and (3) the Federal agency approves the application as amended with the State conditions. If all of these requirements are not met, then the conditional concurrence is an objection.

Several Federal agencies, many State agencies and others provided comments either in support of or against this provision. The CZMA does not specifically address conditional concurrences. The CZMA provides predictability and finality by requiring the State agency to concur or object within a prescribed time period. The CZMA does not provide the State agency with the authority to enforce its concurrence (or conditions) beyond the State’s consistency decision deadline (e.g., six months for licenses or permits). Once a State agency has concurred, even with conditions, the State agency retains no further consistency authority over the project (unless the project has changed and not begun, see proposed supplemental coordination under sections 930.46, 66 and 101).

If a State agency objects, then the State agency retains its authority over the project; the Federal agency cannot issue the license or permit and a Federal agency may not be able to proceed with a Federal agency activity. Some States still prefer conditional concurrences, presumably as a more positive response to an applicant or Federal agency. However, a conditional concurrence may not provide an applicant or a Federal agency with a definitive response within the specified review periods. A conditional concurrence interjects less clarity into the consistency process. Also, when a State agency issues a conditional concurrence the Federal agency may issue the permit or, in the case of a Federal agency activity, proceed with the activity. Thus, issuing an objection and describing

alternatives provides applicants and Federal agencies with a definitive response and retains State agency authority.

A State cannot, through the CZMA, enforce its conditions after it has concurred. The State may request that the Federal agency take enforcement action or may seek a court order against the applicant. The CZMA does not require a Federal agency to adopt a State's conditions of concurrence and OCRM could not require this through regulation. A State condition may also be outside the purview of the Federal agency. The CZMA only requires that the Federal agency shall not grant its approval until the State agency has concurred, concurrence is conclusively presumed, or the Secretary overrides a State agency's objection. Also, if a State agency concurs with conditions and the Federal agency issues its approval consistent with the conditions, but the applicant later does not comply with the conditions, the Federal agency is not required to take an enforcement action. Enforcement action is a purely discretionary action by a Federal agency. *See State of New York v. DeLyser*, 759 F. Supp. 982 (W.D.N.Y. 1991).

However, the revised regulations do include the concept that the applicant may modify its federal permit application pursuant to State conditions and if the Federal agency approved the amended application, the Federal agency would be more likely to enforce the State's conditions (since the State conditions would be part of the federal permit). When reviewing activities under CZMA § 307(c)(3)(A), it is the responsibility of the applicant to submit a consistency certification to the State agency and therefore it is also the responsibility of the applicant to address the State's conditions in the application, rather than have the Federal agency granting the permit or license directly impose the conditions. If the applicant did not modify its federal permit application pursuant to the State conditions or the Federal agency did not approve the amended application (with the State conditions), then the concurrence would be deemed an objection. Providing for conditional concurrences in the regulations does not preclude States from issuing an objection. A discussion of whether the Federal agency can enforce the State's conditions should take place during the review period to help determine if a conditional concurrence is the best course of action. States have a choice of choosing either option on a case by case basis.

Under section 930.4, the existing time frames for State agency review of consistency certifications and consistency determinations still apply. If the State has proposed conditions and is awaiting a response from the applicant or Federal agency on proposed conditions and does not hear back within the specified review period, the State agency can still issue an objection. The State agency, applicant and Federal agency can also negotiate a new timeframe for responding to the State's proposed conditions and issuing the conditional concurrence.

Section 930.5 is added to clarify that the mediation and negotiation sections of the regulations do not preclude other State enforcement actions where the State has jurisdiction or believes it is necessary to take enforcement or judicial action. One commenter asked that mediation be mandatory. NOAA disagrees. The use of the remedial action and mediation provisions are not mandated by the statute, the existing regulations or long-standing practice. These provisions are provided in statute and regulation to provide mechanisms to resolve conflict, but are not the only possible remedies, hence the first sentence of this section referring to other possible actions. Certainly, States and Federal agencies are encouraged to attempt to resolve any differences outside of judicial review.

Section 930.6 moves the non-definitional parts of section 930.11(o) (formerly section 930.18) to a section describing the responsibilities of the State agency. Section 930.6(a) acknowledges that a State may have two separate management programs (for distinct regions) and two separate federal consistency agencies. Currently, California has two separate management agencies (the California Coastal Commission and the San Francisco Bay Conservation and Development Commission).

Section 930.6(b) simplifies consistency terminology. At present, different terms are used to describe State responses for Federal agency activities ("agreement or disagreement") and federal license or permit activities ("objection or concurrence"). Now, a State agency would either object to or concur with a consistency determination or a consistency certification. In response to one commenter, NOAA added public participation language to this subsection. While the public participation requirements are adequately covered in other sections, mention of the requirements here would be appropriate and helpful. Thus, in subsection (b), the phrase "and, where

applicable, the public." is added after "local government agencies." In subsection (c), the phrase "and that applicable public participation requirements are met." is added to the end of the first sentence after "State management program policies."

Section 930.6(c) is added to clarify the role of the single State agency for coordinating federal actions and the State agency's responsibility to apply all relevant enforceable policies when conducting consistency reviews.

Several State agencies and others supported section 930.6 in their comments, while also recommending changes that were not compatible with the Statute regarding the State agency. NOAA did not make any of the suggested changes for the following reasons. For the reasons Stated above in response to comments on section 930.3, and further elaboration below, the words "uniformly and comprehensively" are retained. States are required to implement their federally approved programs and to apply all relevant enforceable policies to a particular federal activity. The CZMA requires compliance with all relevant enforceable policies of a "management program" and not a subset thereof. *See e.g.*, CZMA §§ 307(c)(3)(A), 304(12). A major criterion for management program approval is a determination that State agencies responsible for implementing the management program do so in conformance with the policies of the management program. 15 CFR section 923.40(b). *See also* section 923.41(b)(2). Networked management programs must also demonstrate that management program authorities implement the full range of policies. Section 923.43(c). The federal consistency regulations mirror the requirement for the application of enforceable policies in a comprehensive manner. Uniformity is required to ensure that States are not applying policies differently, or in a discriminatory way, among various entities for the same type of project for similar purposes, *e.g.*, holding a Federal agency to a higher standard than a local government or private citizen. Obviously, if similar projects, *e.g.*, shoreline stabilization, are proposed for different purposes, then the States review and decision will vary between the two projects.

Other sections contain information regarding Federal agency responsibilities. This section only applies to State agencies. The CZMA requires that a State have a single State agency for grant administration and management program implementation (including federal consistency). CZMA §§ 306(d)(6) and 307(c)(1)(C). Further,

NOAA's program approval regulations require a single State agency charged with implementing federal consistency, section 923.53(a)(1), as does the existing federal consistency regulation, section 930.18. The need for a designated State consistency agency is to ensure: uniform application of a State's management program policies, efficient coordination of all management program requirements, comprehensive coastal management review, that all relevant enforceable policies are considered for a federal consistency review, that public participation requirements are met, and that there is a single point of contact for Federal agencies and the public to discuss consistency issues. The State agency coordinates consistency reviews, issues concurrences and objections, coordinates with Federal agencies, provides guidance on complying with the consistency requirement, handles appeals to the Secretary and mediation requests, etc. The State agency may rely on the expertise of other State agencies, but other State agencies may not be the designated State agency for consistency reviews, decisions, etc.

Regarding the use of State permits, as discussed above, the State agency must ensure that all applicable enforceable policies are applied to a consistency matter. If described in a State's management program, the issuance of relevant State permits can constitute the State agency's consistency concurrence for federal license or permit activities if the State agency ensures that the State permitting agencies (or the State agency) review individual projects in light of all applicable management program policies. The State agency must monitor such permits issued by another State agency. Monitoring does not mean that the State agency has some sort of overlord role or the ability to overrule another State agency's permit decision (although some State agencies may have this authority). Monitoring means that the State agency is aware of other State agencies' actions that affect the management program, the State agency ensures that other State agencies' decisions are consistent with the management program, and that decisions are being made within the consistency timeframes, etc.

If all management program enforceable policies are contained in State permit standards, then usually the issuance of the relevant State permit(s) will be sufficient for determining consistency. However, there may be cases where a State permit is not required, but the policies contained in a permit program are applicable to the project. In these cases, the State agency must ensure that the activity is

consistent with these policies. The State agency must also ensure that public participation requirements are met.

A State agency may develop alternative consistency procedures with Federal agencies. In doing so, the State agency must still be the consistency contact and ultimate decision maker, the State must enforce its CMP, and public participation requirements must be met by the State.

In response to a comment on section 930.6, regarding compliance with State environmental review laws, as discussed above, States are required to apply relevant enforceable policies of the management program. The preparation and use of State environmental review documents, and compliance with such State environmental review laws, is governed by applicable State law, and not the CZMA or NOAA's regulations. What is required, is that the State implement its federally approved management program, as discussed above. Likewise, how the State coordinates with NEPA documents is not proscribed by the CZMA. The CZMA and NEPA are two separate statutes with distinct requirements. Often consistency reviews are coordinated through NEPA documents as a matter of administrative convenience and also to provide environmental information to support a consistency determination. NOAA encourages such practice, as previously discussed in the preamble to the proposed rule under proposed section 930.37.

#### *Subpart B—General Definitions*

The definitions have been re-designated to reduce the total number of regulation sections. There is now just a section 930.10 for the index and a section 930.11(a) through (o) for the definitions contained in subpart B.

Section 930.11(d) clarifies that associated facilities are indispensable parts of the proposed federal action. A variant of the addition was previously a comment to the 1979 regulations. 44 Fed. Reg. 37145. This addition ensures that the State agency would have sufficient information to fulfill its coastal planning and management responsibilities, and the proponent of the federal action would not be faced with the situation where there has been receipt of State agency approval regarding one element of the project with later objection to an associated facility which was not earlier reviewed with the remainder of the proposal.

Sections 930.11(b) and (g) define "any coastal use or resource" and "effect on any coastal use or resource," respectively. These terms are not

intended to alter the statutory requirement which refers to any land or water use or natural resource of the coastal zone. These terms are merely a simpler description of the statutory requirement. The term "minerals" has been added to include both surface and subsurface mineral resources. Aesthetics and scenic qualities are not natural resources, but are enjoyment or use of natural resources. These concepts have been added to the definition of coastal use. Land has been added to natural resource. A sentence has also been added to include coastal uses and resources detailed in a management program. Resource creation or restoration projects has been added as a coastal use. This includes tidal and nontidal restoration and creation projects. Air and invertebrates have been added as natural resources. Since historic and cultural resources are important coastal resources under the CZMA (*see* §§ 302(e), 303(2) and 303(2)(F)), the protection of historic and cultural resources of the coastal zone is included in the examples of coastal uses.

Several States and environmental groups commented that these sections are the core of the 1990 amendments and fully supported these sections. Several commenters wanted additions or deletions to these sections and for NOAA to define "reasonably foreseeable" in subsection (g). NOAA did not make changes to these sections based on these comments. The definition for coastal uses and resources is derived primarily from CZMA § 304 (coastal uses of national significance are defined in CZMA § 304(2)). Not all coastal uses or resources can be added. The list is not exclusive, but is meant to highlight the more common uses and resources. The list includes coastal resources of national significance, which include beaches and barrier islands, as defined in CZMA § 304(2). The definition also uses the term "land" in its description of natural resources, which includes barrier islands, spits, beaches and bluffs. Therefore, NOAA disagrees that it is necessary to add these terms to the definition of coastal resource. Biological, hydrological, and geophysical systems are not resources, but processes that affect resources. The resources that are affected by these processes are included in the definition. It is also not clear why just these processes are proposed to be listed. Such a list would imply that other processes are not included. These three terms have not been added.

The definition of coastal effects is not over broad, but is consistent with the CZMA, legislative history and CEQ/

NEPA definitions of cumulative and secondary effects. The changes to the CZMA in 1990 specifically removed application of federal consistency to "direct" effects (and likewise "significant" or "substantial" effects). See also response to comments regarding section 930.31(a), and the preamble to this rule. Explanation of the change in 1990 is contained in the Conference Report. The "effects" language is taken from the Conference Report. The Conference Report is persuasive authority for interpreting the CZMA. The Conference Report states that coastal effects are to be construed broadly and include both direct effects which result from the activity and occur at the same time and place, and indirect (cumulative and secondary) effects which result from the activity and are later in time or farther removed in distance, but are still reasonably foreseeable. The Conference Report makes it clear that the test for triggering consistency is not whether the effect is significant or substantial, but whether it is reasonably foreseeable. NOAA could not put back in (or retain what is currently in) regulation that which Congress specifically removed in 1990.

Whether consistency applies is not dependent on the type of federal activity, but on reasonably foreseeable coastal effects. For example, a planning document or regulation prepared by a Federal agency would be subject to the federal consistency requirement if coastal effects from those activities are reasonably foreseeable.

Again, the application of consistency is not limited by the geographic location of a federal action; consistency applies if there are reasonably foreseeable coastal effects resulting from the activity. A federal action occurring outside the coastal zone may cause effects felt within the coastal zone (regardless of the location of the affected coastal use or resource). For example, a State's fishing or whale watching industry (which are coastal uses) could be affected by federal actions occurring outside the coastal zone. Thus, the effect on a resource or use while that resource or use is outside of the coastal zone could result in effects felt within the coastal zone. However, it is possible that a federal action could temporarily affect a coastal resource while that resource is outside of the coastal zone, e.g., temporary harassment of a marine mammal, such that resource impacts are not felt within the coastal zone. As stated above, the coastal effects test is a fact-specific inquiry. NOAA is not further defining "reasonably foreseeable." Congress envisioned that Federal-State coordination through

consistency would be interactive. Thus, the application of consistency, the varied State management programs, the analysis of effects, and the case-by-case nature of federal consistency precludes fast and hard definitions of effects and what is reasonably foreseeable.

The "substantial" language in sections 930.46 and 930.66 refer to supplemental coordination for proposed activities. The intent in these sections was to address situations where coastal effects have substantially changed, not to define the scope of effects to trigger initial State agency review.

The proposed definition includes cumulative and secondary effects as part of indirect effects via the following language: "indirect (cumulative and secondary) effects which result from the activity and are later in time or farther removed in distance, but are still reasonably foreseeable." The definition goes on to state that "Indirect effects resulting from incremental impact of the federal action when added to other past, present and reasonably foreseeable actions, regardless of what person(s) undertake such actions." This language is consistent with the Council on Environmental Quality's definition of cumulative effects. 40 CFR section 1508.7.

The so-called "chain of events" concept was already captured in the proposed rule under section 930.31, which is derived from legislative history discussing the scope of consistency.

Section 930.11(h) adds a definition of enforceable policy by reference to CZMA § 304(6a), and clarifies that an enforceable policy must be sufficiently comprehensive and specific to control coastal uses while not necessarily inflexibly committing the State to a particular path. See *American Petroleum Institute v. Knecht*, 456 F. Supp. 889, 919 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979); 15 CFR section 923.40(a); Conference Report at 972. One Federal agency, three States and the environmental groups had various comments on this definition. These comments included: the definition is too broad, enforceable policies should include federal law, the section should require compliance with State environmental review requirements, and that not all policies should have to be formally incorporated into federally approved management programs.

NOAA did not change the definition based on these comments. Changing the scope of the definition of enforceable policies would be inconsistent with the CZMA. Under CZMA § 307(c), Federal agencies are required to submit a consistency determination to the State

agency if it determines that there are reasonably foreseeable effects. The consistency determination should include an evaluation of the proposed activity in light of the applicable enforceable policies in the State's Coastal Management Program (CMP). The State has the authority to then review this consistency determination and decide whether it agrees with it, including the Federal agency's interpretation of the State's enforceable policies. If the State disagrees with the consistency determination, then it must describe how the activity is inconsistent with the enforceable CMP policies and alternatives (if they exist) that would allow the activity to be conducted in a manner consistent to the maximum extent practicable. If agreement cannot be reached between the State and Federal agencies, the Federal agency may still proceed with the activity, as long as it clearly describes to the State the specific legal authority which limits the Federal agency's discretion to comply with the State CMP's enforceable policies.

The regulations encourage early discussions between the State and the Federal agency over the meaning of the State's enforceable policies. For instance, section 930.34 encourages early consultation between Federal and State agencies to obtain the State views and assistance regarding the means for determining that the proposed activity will be conducted in a manner consistent to the maximum extent practicable with the State's CMP. In addition, the definition envisions that discussions between the State and Federal agencies may be necessary in order to determine the consistency of the activity with the State's enforceable policies.

CZMA § 307(e) requires that States with approved CMPs must submit changes to the CMP for approval by OCRM before they can be considered enforceable policies under the CMP. Therefore, States cannot use enforceable policies that are not part of the State's CMP for review of activities under federal consistency. States are encouraged to send in proposed changes to their CMPs as soon as possible for review by OCRM.

The CZMA does not provide for the inclusion of federal laws into State CMPs, but rather a listing of the State enforceable policies (e.g., laws, constitutional provisions, regulations and judicial decisions). Federal agencies or applicants for federal permits undertaking activities that have reasonably foreseeable coastal effects must consider the enforceable policies of the State's CMP (see CZMA

§§ 307(c)(1)(A) and (3)(A)). This does not preclude the need for these activities to comply with relevant federal laws, but the CZMA does not grant authority to States to consider federal laws as State CMP enforceable policies when reviewing Federal agency activities or federal license or permit activities.

In addition, in order for a State law to be used under federal consistency, it must be a part of the State's approved CMP. Under CZMA § 306(d)(2)(D), the State must include a list of enforceable policies in its coastal management program. Under CZMA § 306(e)(1), it is the State's responsibility to request that OCRM consider including new or revised enforceable policies for inclusion in the State CMP. Therefore, in order for a State to add an enforceable policy to its CMP for the purposes of federal consistency, such as the California Environmental Quality Act (CEQA), the State must make that request to OCRM. Also, whether a Federal agency must be fully consistent with CEQA would depend on whether Federal law precluded full consistency, pursuant to the section 930.32 consistent to the maximum extent practicable standard.

Management measures does not refer to the "(g)" guidance for Coastal Nonpoint Programs. It is a term borrowed from the Conference Report and *American Petroleum Institute v. Knecht* that describes reasonable State interpretations of its enforceable policies.

#### *Subpart C—Consistency for Federal Agency Activities*

Throughout the regulations the phrase "directly affecting the coastal zone" has been changed to read "affecting any coastal use or resource." This codifies changes made to the CZMA by CZARA and includes reasonably foreseeable effects on any land or water use or natural resource of the coastal zone.

In section 930.30 NOAA deleted "conducted or supported" to conform this section with changes made by CZARA. In addition the title of subpart C and throughout subpart C, the term "Federal activity" is changed to "Federal agency activity" to avoid confusion with federal activities under subparts D, E, and F. The phrase Federal agency activity is taken directly from the CZMA.

NOAA amended section 930.31(a) to further describe the scope of the federal consistency effects test by clarifying the term "functions." This language is derived from the CZMA's legislative history. Three Federal agencies commented that the definition is too

broad and should not include certain federal activities. NOAA disagrees. Federal agency activities are not defined by the type of activity, but rather, whether the activity will have reasonably foreseeable coastal effects. Despite this clear statutory and legislative intent, there have been questions over the years as to whether a particular Federal agency action is subject to the consistency requirement. These questions have primarily arisen for rulemaking and planning activities, and that is why these activities are included in the rule. Clearly, these are Federal agency functions. A rulemaking by NMFS that limits the catch of a species of fish is a rulemaking that affects a State's fishing industry, which is an effect on a coastal use. A rulemaking by the Corps to authorize activities in navigable waters and wetlands under its Nationwide Permit Program will allow activities that affect coastal resources. Likewise, if a Federal agency takes an action that interferes with a coastal use, an "exclusion of uses," e.g., prohibiting public access or fishing, that is a Federal agency activity that has a coastal effect. A Federal agency activity that initiates a series of events where coastal effects are reasonably foreseeable, is subject to consistency. Congress emphasized this as far back as 1980, H.R. Rep. No. 96-1012, 96th Cong., 2d Sess. 34 (May 16, 1980), and re-emphasized the concept in 1990 when it declared that consistency applies to Federal agency activities with cumulative and secondary direct and indirect effects. Conference Report at 970.

The question at hand is whether such actions will have reasonably foreseeable coastal effects. If so, then consistency applies. If not, then consistency does not apply. (Although the Federal agency may have to provide the State agency with a "negative determination" if: (1) The activity is listed in the management program, (2) the State agency notifies the Federal agency that the State believes that an unlisted activity will have coastal effects, (3) the Federal agency provided consistency determinations for similar activities in the past, or (4) the Federal agency conducted a thorough assessment and developed initial findings on coastal effects.) The question of coastal effects must be made on a case-by-case basis, except where States and Federal agencies have agreed that a class of activities will not have coastal effects (or will have de minimis effects as provided for in section 930.33(a)(3)), and are thus not subject to consistency. Thus, if a Federal agency does not

believe that a particular rulemaking or plan will have reasonably foreseeable coastal effects, then the Federal agency does not have to provide a consistency determination.

As to the comments regarding the CZMA and the Outer Continental Shelf Lands Act ("OCSLA"), the Comment makes NOAA's case. The comment talks about activities that do not affect the coastal zone. If that is the case, then the Federal agency does not need to provide a consistency determination and may have to provide a negative determination. As for the matter of 5-year OCS plans by Interior, the position of the United States was made clear by the U.S. Department of Justice by its Office of Legal Counsel (Justice) in a letter from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, Justice, to Mr. C.L. Haslam, General Counsel, Department of Commerce, and Mr. Leo M. Krulitz, Solicitor, Department of the Interior, dated April 20, 1979 [Justice Opinion]. In addition, the clear language of the 1990 amendments to the CZMA, and Congressional intent as described in the Conference Report for the 1990 amendments, 5-year OCS plans are subject to the CZMA federal consistency effects test, 5-year OCS plans are not exempted from the consistency requirement as a matter of law or policy, and there are efficient ways to address consistency and 5-year OCS plans if Interior determines that coastal effects are reasonably foreseeable. See letter from NOAA's Office of Ocean and Coastal Resource Management to Interior's Minerals Management Service, dated August 7, 1996. If Interior determines that coastal effects from the 5-year OCS plans are *not* reasonably foreseeable, then Interior should issue a negative determination.

Section 18 of the OCSLA requires that procedures be established for consideration of State coastal management programs. Interior asserts that this section and the 1978 amendments to the OCSLA deliberately reject the consistency requirement in favor of providing for consideration of State coastal management programs. NOAA believes that this interpretation of the OCSLA as applied to the CZMA is incorrect for four reasons: (1) The plain language of the conference report (and other legislative history) for the 1978 amendments to the OCSLA does not reject the consistency requirement, (2) the 1978 amendments to the OCSLA added clear language that the consistency requirement was not affected, (3) in 1979 Justice determined that pre-lease sale activities are subject to the consistency effects test, and (4)

even if the intent of the 1978 amendments to the OCSLA was to reject the consistency requirement, the 1990 amendments to the CZMA clarifies that all federal activities are subject to the consistency requirement if there are reasonably foreseeable coastal effects. Further, consideration of management program concerns to the maximum extent practicable at the 5-year OCS plan stage lays a foundation for leasing activities that will also be consistent to the maximum extent practicable.

When the CZMA and the OCSLA are read together, the OCSLA requirement for "consideration" of State coastal management programs is consistent with the CZMA requirement that Federal agencies conduct their activities consistent with State coastal management programs. If the intent of Congress was to repeal the CZMA federal consistency requirement for pre-lease sale activities then it would have specifically said so. As Justice stated:

[T]he intention of the legislation to repeal must be clear and manifest; that every attempt must be made to reconcile the statutes involved; and that a repeal by implication will be found only where there is a "positive repugnancy" between the statutes in question. *Morton v. Mancari*, 417 U.S. 535, 549-551 (1974); *Borden v. United States*, 308 U.S. 188, 198-199 (1939).

Justice Opinion at 10. In this case, requiring Interior to conduct an effects test, and to provide a State with a consistency determination or a negative determination, where appropriate, does not interfere with Interior's pre-lease responsibility under the OCSLA.

The 1978 OCSLA conference report contains two references to the CZMA. Under "Considerations," page 103, the report states:

The House amendment includes among the consideration for a leasing program the policies and plans under the [CZMA]. The Senate bill contains no comparable provision. The conference report follows the House amendment and contains no such specific provision as it is included within the consideration of "laws, goals, and policies of affected States."

This discussion in the conference report and the corresponding section of the OCSLA specifically require Interior to address State coastal management program requirements and says nothing about rejecting the CZMA federal consistency requirements. The second reference to the CZMA in the conference report is on page 105, and it States:

Both versions provide for regulations as to coastal zone management applicability. The House amendment provides for regulations involving "consideration" of a program "being developed or administered" pursuant to section 305 or 306, respectively, of the

[CZMA]. The Senate bill provides for "coordination" of the program with the management program being developed and also for "consistency" to the extent practicable with the management program. The conference report is the same as the House amendment. The Secretary is to establish procedures by regulation for consideration of State coastal zone management programs.

While the Senate version was more specific as to the federal consistency requirement, the House version does not reject the consistency requirement.

Section 608(a) of the 1978 OCSLA amendments expressly provides that: "[E]xcept as otherwise expressly provided in this Act, nothing in this Act shall be construed to modify, or repeal any provision in the CZMA" (emphasis added). This language was also included in the section-by-section analysis of section 19 in the House report. Justice Opinion at 12, citing, H. Rept. 5-590, at 153, n.52. No section of the OCSLA expressly repeals the CZMA and the sections on pre-lease sale activities do not expressly modify the CZMA. Thus, there is no basis to reject the CZMA consistency requirement based on the conference report language.

Justice also found, after the 1978 amendments, "that neither the [CZMA] Amendments of 1976 nor the [OCSLA] Amendments of 1978 affect the application of § 307(c)(1) to [OCSLA] pre-lease activities." Justice Opinion at 2. Justice also reviewed the legislative history and found that it did not exempt pre-lease sale activities from consistency. *Id.* at 12. Justice found that pre-lease sale activities are subject to consistency effects test just like any other federal function. *Id.* at 2.

Lastly, the 1990 amendments clarified that any federal activity is subject to the consistency requirement if coastal effects are reasonably foreseeable. The 1990 amendments to the CZMA also specifically rejected any categorical exemptions. The only test for the application of consistency is the effects test. Thus, even if, arguendo, pre-lease sale activities were exempted, pursuant to the OCSLA amendments of 1978, from consistency, they are now, pursuant to the 1990 CZMA amendments, clearly subject to the consistency requirement.

Applying the consistency requirement to the 5-year OCS program is sound policy for several reasons. First, the CZMA consistent to the maximum extent practicable standard is not onerous (especially at an early stage of OCS development). Second, the 5-year OCS plan offers a good opportunity, early in the OCS process, to attempt to resolve State concerns. Addressing

consistency at the 5-year OCS plan stage allows States to identify coastal concerns, such as the location of future lease sales, and reduces potential conflict. Third, Interior NEPA documents have determined that the 5-year plan is a major federal action with expected environmental effects which present an excellent point to determine consistency with management programs.

In 1984, the Supreme Court held that OCS oil and gas lease sales by MMS were not activities subject to the CZMA consistency requirement as the lease sales did not directly affect the coastal zone. *Secretary of the Interior v. California*, 464 U.S. 312 (1984). Despite NOAA regulations and Justice opinions indicating that the ruling was limited to oil and gas lease sales, other Federal agencies relied on *Secretary of the Interior* to argue that their activities were not subject to the federal consistency requirement. In amending the CZMA in 1990, Congress overturned the effect of the decision in *Secretary of the Interior* and made clear that OCS oil and gas lease sales are subject to the consistency requirement. Conference Report at 970-72. Congress also intended this change to apply to other federal activities (in and outside the coastal zone) in addition to OCS oil and gas lease sales. The remainder of the consistency discussion in the Conference Report makes this clear as does similar discussion in the Congressional Record, 136 Cong. Rec. H 8068 (Sep. 26, 1990) [hereinafter "Congressional Record"] (incorporated into the Conference Report, see Conference Report at 975). The Conference Report clearly states that changes to the consistency section clarify that any federal activity is subject to the consistency requirement (regardless of location) if coastal effects are reasonably likely, and that there are no categorical exemptions. Conference Report at 970. The discussion in the Conference Report on whether to list other federal activities that are subject to the consistency requirement, e.g., activities under the Ocean Dumping Act, further clarifies that no federal activities are categorically exempt and that the determination of whether consistency applies is a case-by-case analysis based on reasonably likely effects on any coastal use or resource. See Conference Report at 971.

The Congressional Record sheds further light on the intent and the scope of Congress' rejection of *Secretary of the Interior*. Congress noted that since the Court's decision, "other federal agencies have broadly interpreted the case in a manner that would exclude their

activities from [consistency],” and that “[t]he federal consistency provisions are at the heart of the Nation’s coastal zone management program and it has become increasingly clear that the combination of Supreme Court dicta and federal agency belligerence are a troublesome combination.” Congressional Record at H 8072–73. Congress not only rejected *Secretary of the Interior*, but eliminated the “‘shadow effect’ of the Court’s decision (i.e., its potentially erosive effect on the application of the federal consistency requirements to other federal agency activities) \* \* \* and also to dispel any doubt as to the applicability of this requirement to all federal agency activities that meet the standard [the effects test] for review.” *Id.* at H 8076.

Within the existing regulations and the proposed rule are means for Interior to provide consistency determinations, where applicable, in a reasonable and efficient manner. Briefly, the regulations would allow Interior to use the effects test to determine whether a consistency determination is required; or could note the lack of information at that 5-year OCS plan stage; and could provide a consistency determination to more than one State under the new section for determinations for activities that are national in scope or affect more than one State; and, finally, States and Interior could agree that the 5-year plan is too early in the OCSLA process, and that consistency determinations may be provided at later stages.

Section 930.31(b). One Federal agency commented that a “development project” should include a characteristic from each of the two groups of descriptors. The “and” in this section has always been interpreted as including at least one characteristic from each of the two groups. However, to make it clearer, the word “includes” has been inserted after “and”.

Section 930.31(c) is added to clarify that CZMA § 307(c)(1) is a residual category. Federal actions that do not fall into subparts D, E, or F are Federal agency activities. CZMA § 307(c)(1)(A); *see* 44 Fed. Reg. 37146. One Federal agency commented that NOAA should state that fisheries licensing programs are subject to subpart C. No change is required for this section. A fisheries licensing program would continue to be under subpart C. An individual license to an applicant to conduct an activity would be under subpart D. No change is needed to continue the status quo.

Section 930.31(d) addresses the hybrid nature of general permit programs developed by Federal agencies. This occurs when a Federal agency proposes to replace the need for

an applicant to obtain an individual permit with a general set of requirements which, if met by the applicant, would allow the applicant to proceed with the activity without a case-by-case approval by the Federal agency. Two examples are the Corps’ Nation-wide Permit (NWP) program under the Clean Water Act § 404 and the Environmental Protection Agency’s (EPA’s) general National Pollutant Discharge Elimination System (NPDES) permits for discharges from OCS oil and gas facilities. The development of the general permit program is best thought of as a Federal agency activity. Even though a general permit will authorize license or permit activities, the development of the federal requirements is an action by a Federal agency, not an applicant. Moreover, there is not a discreet federal or license permit activity to review and there is not an applicant. Neither the statute nor the regulations contemplated the hybrid nature of general permits. CZMA § 307(c)(1)(A) does provide that a Federal agency is subject to § 307(c)(1) unless it is subject to paragraph (2) or (3)(license or permit activities). However, this does not resolve the matter since § 307(c)(3) does not imply or anticipate a situation where a Federal agency is an applicant for its own approval, and for general permits the Federal agency is not actually undertaking the license or permit activity covered by the general permit. Federal agencies may of course choose to subject their general permit programs to CZMA § 307(c)(3)(A).

Several commenters had various suggested changes to section 930.21(d). NOAA made corresponding changes to the rule. NOAA agrees that subpart C applies to general permit programs and not case-by-case approvals to non-Federal applicants. This was the intent of the section and clarifying language has been added. “Should” is changed to “shall” as the intent was to remove the need for case-by-case reviews where the State agency concurs with the general permit program. Language was added to address the situation where a Federal agency subjects itself to subpart D. Some Federal agencies want to subject their general permit programs to the requirements of subpart D. This gives States greater leverage over the Federal action. If Federal agencies want to do that, NOAA wants to provide them that flexibility. NOAA has added clarifying language regarding the need for State agency concurrence for an individual general permit, where the State objected to the general permit program.

Even though general permit programs are for activities that would normally be

subject to subpart D, the consistent to the maximum extent practicable standard still applies since the general permit program is covered under subpart C. It may be possible, although unlikely, that a federal statute requires a Federal agency to conduct a program in such a manner that would not be fully consistent with a State’s enforceable policies. The regulations already contain numerous instructions to Federal agencies regarding notice to State agencies and the content of consistency determinations.

Section 930.31(e) is added in response to a comment from a State to clarify existing NOAA interpretation that a modification to a Federal agency activity that has coastal effects and has not been subject to State agency consistency review, is a Federal agency activity subject to the consistency requirement.

NOAA amended section 930.32 to clarify the consistent to the maximum extent practicable standard. NOAA divided section 930.32(a) into 3 subsections. Subsections (1) and (2) are the existing regulations and subsection (3) is new. Minor changes were made to section 930.32(a)(1) and the last sentence in (a)(1) is moved to the end of (a)(2). These changes are made for clarity and brevity; there are no substantive changes in subsections (a)(1) and (2). The term “discretion” as included in the existing regulations and retained in the revised regulations means that the more discretion a Federal agency has under its legal requirements, the more the Federal agency must be consistent with the management program’s enforceable policies. In subsection (a)(2), NOAA deleted the term “supplemental” since the CZMA requires that a management program’s enforceable policies are requirements, not supplemental requirements. Also, supplemental is somewhat redundant with the rest of the sentence.

Two Federal agencies commented that the consistent to the maximum extent practicable standard was too restrictive and one State agency commented that “legislative history” is not federal legal authority. The final, proposed and pre-existing regulations all correctly describe “consistent to the maximum extent practicable” for purposes of the CZMA. Congress clearly intended Federal agencies to be consistent with State management programs (*see e.g.*, H.R. Rep. No. 92–1049, 94th Cong., 2d Sess. 18–19), the regulations have reflected this for over 20 years, courts have upheld the definition (*see e.g.*, *California Coastal Commission v. Navy*, No. 97cv2219 (S.D. Cal. Jan. 28, 1998),

and Congress specifically endorsed the definition in the 1990 amendments in the Conference Report.

Section 930.32(a)(3) clarifies the effect of federal appropriations law on the consistent to the maximum extent practicable standard. A lack of funding does not excuse a Federal agency from having to conduct a federal activity in a manner that is consistent with management program enforceable policies. Management program enforceable policies are, in most cases, in place long before the planning of many federal projects and in advance of budgeting for annual appropriations. A Federal agency cannot avoid any State requirement that it finds burdensome simply by not funding the required action. Advance planning and early coordination can help alleviate these concerns. If Federal agencies know what the State's enforceable policies are then costs can be factored into an agency's planning. Also, just as Federal agencies cannot avoid other federal and State law requirements (e.g., under the Clean Water or Air Acts, NEPA) due to funding constraints, they cannot avoid management program enforceable policies. State enforceable policies are developed pursuant to the CZMA, approved by the Federal Government, and applicable to Federal agencies through the CZMA federal consistency requirement.

One Federal agency commented that section 930.32(a)(3) overturns long held views of Federal agencies and NOAA or preempts the Federal budgetary process. Another Federal agency, while acknowledging that a lack of funding does not automatically render an action not practicable, it may not always be possible to plan for State requirements in advance. Several States commented that NOAA should require Federal agencies to plan for State policies and that the word "only" should be inserted. One commenter wanted NOAA to rewrite the section, and the environmental groups commented that there were contradictory statements in the section. The only modification NOAA has made is to remove the word "discretionary" as it is somewhat redundant and limiting. In response to the comments, it is NOAA's understanding that the "long held views" of the Federal agencies, with the possible exception of one or two offices within one or two Federal agencies, are compatible and in agreement with this section. Moreover, the changes made by Congress to the CZMA in 1990 carry more weight than a Federal agency's "view." NOAA must base its regulations on the statute. In this case, the definition of "consistent to the

maximum extent practicable" is well-established and recognized by Federal agencies and was specifically endorsed in the 1990 CZMA changes. See Conference Report at 972. This section is also consistent with previous statements made by the Department of Commerce's General Counsel. The letter that the commenter refers to was a comment submitted to the Corps on the Corps' proposed regulations. See letter from Douglas A. Riggs, General Counsel, Department of Commerce, to the Corps (Aug. 20, 1986) (Riggs letter). The comments provided to the Corps in the Riggs letter recommend that the Corps use NOAA's regulations to define coordination between the Corps' program and the coastal States and discusses "consistent to the maximum extent practicable" consistent with NOAA's existing and proposed regulations. The reference to "appropriations" in the Riggs letter is ambiguous at best, but, if interpreted with the statute and NOAA's regulations at the time, merely mean that if something in appropriations law prohibits full consistency, then the Corps is consistent to the maximum extent practicable. Any ambiguities in the Riggs letter were replaced by the clear language of the CZMA as amended in 1990. Problems arise if Federal agencies use dollar amounts specified in appropriations law as part of the consistent to the maximum extent practicable equation. These problems are: (1) The CZMA Presidential exemption in CZMA § 307(c)(1)(B) is the only express exemption due to lack of appropriation amounts (even then, the appropriations needed for full consistency would have to be specifically requested by the President as part of the budgetary process, and Congressional appropriations would have to specifically exclude from funding the cost of being fully consistent); (2) appropriations laws often provide little guidance as to how funds are to be used; and (3) the CZMA mandates that State enforceable policies are substantive requirements. Sometimes appropriations are insufficient due to inadequate planning, failure to include the cost of CZMA compliance in a budget request, or insufficient funds from other sources. The solution is to ensure that Federal agencies plan and budget for full consistency early in the scoping process for an activity and to include specific costs for full consistency in their budgetary process.

NOAA believes the meaning of section 930.32(a)(3) is clear and has not added the word "only." NOAA has not

replaced "should" with "shall" when discussing the admonition for Federal agencies to plan and budget for the costs of being consistent with State policies as there is no basis in the statute for NOAA to impose such a directive. The statute requires the Federal agency to be consistent to the maximum extent practicable with enforceable policies. How a Federal agency does this and how it funds such consistency is determined by other Federal law or each agency's planning, budgetary and policy-making processes. The language of this section is clear regarding appropriations and consistency. There is no contradiction as the section merely acknowledges that appropriation laws are Federal law which may contain specific legal prohibitions to full consistency. Absent such specific prohibitions, the Presidential exemption is the only provision which may be used by a Federal agency to make a finding that a lack of funds prohibits full consistency.

Section 930.32(b) clarifies that in an emergency, or other similar unforeseen circumstance, the Federal agency must still adhere to the consistency requirements, to the extent that exigent circumstances allow. For example, a Federal agency, responding to an emergency, must still provide a consistency determination to the State agency, if time allows. If the time frame for responding to an emergency is too short for a consistency determination, the Federal agency should coordinate with the State agency to the extent possible. To avoid uncertainty in these instances, the Federal agency and State agency may mutually agree to emergency response planning prior to an actual emergency, or develop expedited procedures or a general review for reasonably foreseeable emergency situations and activities. The phrase "exigent circumstances" is used since many agencies respond to emergencies, but they may not be mandated by law to respond within a certain time frame. Thus, their rapid response may be determined by the emergency nature of the activity (*i.e.*, the exigent circumstances), not their discretionary authority. Several State agencies commented that this section needs to be clearer regarding Federal agency responsibilities to ensure that Federal agencies deviate only when there is a true emergency and that even when there is an emergency, the Federal agency still complies with the consistency requirements if the action continues after the emergency is past. NOAA agrees that this section needed revision to better reflect the

“emergency” nature of deviating from consistency. The consistency requirements should not be set aside unless absolutely necessary and if an emergency arises, then consistency should be adhered to once the emergency passes if there is still an activity occurring. NOAA has made corresponding changes to this section.

Section 930.32(c) addresses national security activities that are “classified.” The 1990 changes to the CZMA make it clear that all federal activities are subject to the consistency requirement. Thus, a classified activity that will affect coastal uses or resources is subject to the consistency requirement unless exempted by the President under CZMA § 307(c)(1)(B)). However, under the consistent to the maximum extent practicable standard, the Federal agency need only provide project information that it is legally permitted to release. Despite the fact that a Federal agency may not be able to disclose certain project information, the Federal agency must still conduct the classified activity consistent to the maximum extent practicable with the management program. Concerned management programs may want to consider developing general consistency agreements with relevant Federal agencies for classified activities. The definition of “classified” is adopted from the Freedom of Information Act. Information concerning the national defense or foreign policy is protected from disclosure provided it has been properly classified in accordance with the substantive and procedural requirements of an executive order. As of October 14, 1995, the executive order in effect is E.O. 12,958, 3 CFR 333, reprinted in 50 U.S.C. § 435 note (1994). Generally, it is preferable, however, not to identify the particular executive order in the regulations, because it may be supplanted by a new order and courts have held that agencies should always apply the executive order in effect at the time the classified determination is made—*i.e.*, an agency does not have to go back through all of its old information and reclassify it pursuant to the latest executive order. One commenter said the definition of classified activity was too broad and that the rule should encourage the use of qualified third parties to review classified materials. NOAA does not agree that the language of the subsection is over broad. The subsection adequately instructs Federal agencies to withhold only classified material. NOAA agrees that using a qualified third party to review classified material

is appropriate where both the Federal agency and State agency agree.

Section 930.33(a)(1) clarifies that effects on any coastal use or resource are not limited to environmental effects and that a review of relevant management program enforceable policies is necessary to determine whether the activity will affect any coastal use or resource. Two commenters recommended that NOAA add language that an activity has coastal effects if it initiates actions leading to effects (so-called “chain of events” language) and that NOAA add language regarding State-Federal consultation. NOAA has added the chain of events language from section 930.31(a) to this section as well. The sentence regarding consultation with State agencies is not added as the regulations contain sufficient direction for Federal agencies to consult with State agencies.

Section 930.33(a)(2) clarifies when federal consistency does not apply to a Federal agency activity. If there are no effects on any coastal use or resource and a negative determination is not required, then the Federal agency need not provide anything to the State. Several States and the environmental groups commented that Federal agencies should consult with State agencies even when there are no coastal effects or to provide a negative determination. NOAA added the phrase “Federal agency activity” to distinguish this section from the need to consult with State agencies for development projects. The other comments are not accepted, because the intent of this section is to clarify when Federal agencies must consult with State agencies. The CZMA does not require Federal agencies to coordinate with State agencies for activities that do not have coastal effects. To require coordination for such activities would be contrary to the CZMA, unreasonable and place an enormous burden on the Federal agencies with little or no benefit to management programs. NOAA also believes it would also be unwise to “encourage” such unnecessary coordination. The regulations do require that a Federal agency provide a State agency with a negative determination in certain circumstances, and this has been retained in the revised regulations.

Section 930.33(a)(3) provides a process whereby State agencies and Federal agencies can more efficiently address “*de minimis*” activities. *De minimis* activities cannot be unilaterally excluded from the Federal consistency requirement. Two Federal agencies commented that this section will be very useful, but suggested NOAA use a different word than “trifling.” Another

Federal agency commented that *de minimis* activities should be excluded, by rule, from the consistency requirement. State commenters supported the section with suggested wording changes. One environmental group commented that *de minimis* activities should only be excluded after opportunity for public comment. Other environmental groups opposed this section as contrary to Congressional intent that no activities be excluded that have coastal effects. These groups also asked that public comment be provided for if the section were retained.

NoAA has replaced the word “trifling” with “insignificant” and has also clarified that *de minimis* applies to activities with insignificant direct and indirect coastal effects. While the use of this section will be limited to activities with little or no coastal effect, NOAA agrees that States need to provide for public input before excluding such activities. NOAA believes that the CZMA provides States with the flexibility to exclude such activities with insignificant effects, by agreement with Federal agencies and with opportunity for public input. NOAA intends to foster efficient and effective administrative mechanisms. This section allows States to do that.

If Federal agencies cannot unilaterally exclude their activities from consistency, neither can NOAA on its own, by rule, exclude activities. The 1990 amendments to the CZMA clearly require that federal actions are subject to consistency if they affect coastal uses or resources. There is no distinction as to the magnitude of effects. Seemingly minor effects may have substantial coastal effects when cumulative and secondary effects are considered. Congress specifically recognized this in 1990. Conference Report at 970–72. There are several problems with listing or mandating a *de minimis* exception, as suggested by the comment. As the court noted in *Environmental Defense Fund v. EPA*, 82 F.3d 451 (D.C. Cir. 1996), *modified* by 92 F.3d 1209 (D.C. Cir. 1996), “[t]he ability to create a *de minimis* exemption is not an ability to depart from the statute, but rather a tool to be used in implementing the legislative design. \* \* \* Of course, \* \* \* a *de minimis* exemption cannot stand if it is contrary to the express terms of the statute.” The express terms of the CZMA are that consistency applies to “each” federal activity “affecting” “any” coastal use or resource. Neither the CZMA nor the Conference Report specifically authorize a *de minimis* exemption. Conference Report at 970–972. Rather, the Conference Report provides persuasive

authority regarding legislative design: "effects" are to be construed broadly and include reasonably foreseeable direct and indirect effects. Further, Congress amended the CZMA in 1990 to specifically guard against Federal agencies exempting their activities. Thus, any attempt to address *de minimis* activities must be done cautiously and only with the concurrence of the State agency. Finally, many States are concerned with the cumulative effect of seemingly *de minimis* activities. States are not only concerned with resource protection issues, but ensuring that their efforts to address *de minimis* activities through other planning and permitting activities are not compromised by exempting other *de minimis* activities.

The CZMA, however, allows States and Federal agencies to agree to address *de minimis* activities in a flexible manner. The proposed revisions do not provide detailed definitions of *de minimis* activities. Rather, OCRM proposes some general guidelines and then leaves it to the Federal agency and States, with opportunity for public comment, to agree as to what is *de minimis*.

Section 930.33(a)(4) allows State agencies and Federal agencies to mutually agree to exclude environmentally beneficial activities from further State agency review. Two commenters said that environmentally beneficial activities should not be excluded from review, that public comment is needed and that the section should be deleted. NOAA believes that States and Federal agencies should have the flexibility to agree to exclude activities from consistency review that will be beneficial to the environment. This is consistent with the CZMA's directives regarding administrative efficiency and effectiveness. See CZMA § 303(2)(G), (H) and (I). NOAA has clarified that environmentally beneficial refers to the protection and restoration of natural resources of the coastal zone. NOAA also recognizes the importance of such decisions to the public and has specifically required that any such exclusion requires public notice and comment pursuant to CZMA § 306(d)(14).

Section 930.33(c)(2) is removed. Outer continental shelf (OCS) oil and gas lease sales are Federal agency activities and are subject to the CZMA consistency requirement. See Sections III and IV of this proposed rule. Likewise, pre-lease sale activities are also subject to the consistency requirement if coastal effects are reasonably foreseeable. See 44 Fed. Reg. 37154 (comment to section 930.71); Letter from Leon Ulman,

Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Dept. of Justice, to C.L. Haslam, General Counsel, U.S. Dept. of Commerce and Leo M. Krulitz, Solicitor, U.S. Dept. of the Interior (Apr. 20, 1979).

Section 930.33(d) clarifies the CZMA federal consistency "effects test." Early Federal-State coordination is emphasized to reduce conflict, build public support, provide a smooth and expeditious federal consistency review, and to help Federal agencies avoid costly last minute changes to projects in order to comply with management program enforceable policies. The earlier the coordination, the less likely it is that conflict will arise. Early coordination also enables a Federal agency to address coastal management concerns while the agency still has the discretion to alter the activity and before substantial resources have been expended.

Section 930.34 is replaced by a new section 930.34, which contains some of the information from the original section 930.34. Other parts of the original section 930.34 are moved to section 930.36.

Section 930.34(a)(2) encourages Federal agencies and State agencies to use existing procedures to coordinate consistency reviews. However, for permit requirements in management programs that are not required of Federal agencies by federal law other than the CZMA, the Federal agency may submit the necessary information in any manner it chooses so long as the requirements of this subpart are satisfied. NOAA has encouraged the practice of management programs using State permitting procedures as an administrative convenience to process Federal agency consistency determinations under CZMA § 307(c)(1) and (2). This results in efficient State consistency reviews by taking advantage of existing review procedures otherwise applicable to permitting actions. This new section is based on a comment in the original 1979 regulations, 44 Fed. Reg. 37147.

There were various comments on section 930.34(a) regarding a description of the nature of coordination being recommended, mandating early coordination, cross-referencing the section to section 930.36(b) and section 930.39, the meaning of the removal of the word "directly," standardizing notification and response procedures, and adding "cumulative effects" to the section. NOAA has not made any changes based on these comments. The regulations should not specify the nature of the coordination recommended as States and Federal

agencies should have flexibility to determine how best to conduct such coordination. NOAA cannot require early coordination. If a State has problems conducting consistency within the specified time periods, then the State needs to make changes to State laws or processes. The State could also develop an MOU with particular Federal agencies. Cross references to other sections are redundant and not necessary. As stated earlier, all references to coastal effects refers back to the definition in section 930.11(g), which includes reasonably foreseeable direct and indirect (cumulative and secondary) effects on coastal uses or resources.

Section 930.34(b) is moved to section 930.36(b) and amended to clarify that the Federal agency must provide a consistency determination to the State while the Federal agency still has the ability to alter the activity to address management program policies.

Sections 930.34(b)(2) and (c) is deleted, with parts of these sections moved to new section 930.34(c). These sections are confusing and are not needed, because the listing provision for Federal agency activities is a recommendation and not a requirement and Federal agencies must provide a consistency determination to applicable States for activities with coastal effects regardless of whether the State has listed the activity. One commenter said that the State agency should provide for public comment before an activity is listed or de-listed. Public comment is already provided for when the State proposes to submit a listing or de-listing to NOAA as a program change, under 15 CFR part 923, subpart H.

Other comments were made on section 930.34(c) by two Federal agencies and several State agencies requesting clarification and changes to unlisted Federal agency activities. In response, NOAA added language to subsections (b) and (c) to clarify that listing of Federal agency activities is optional. Thus, time limits for State agency notification of unlisted Federal agency activities are not appropriate since a Federal agency is required by statute to provide a consistency determination when coastal effects are reasonably foreseeable. In some cases, the Federal agency may not be aware of its CZMA responsibilities and NOAA cannot, by rule, remove the consistency requirement when there may be coastal effects. If a Federal agency actually makes a determination of no effects, in many cases a negative determination will be required so that the State will receive notice with attendant time frames. If a negative determination is

not required, and the Federal agency made a CZMA determination of no effects, it may so notify the State agency as a matter of comity and improved coordination. Previous language is not retained as it was confusing. Consistency is an affirmative duty for Federal agencies and, as such, the State agency listing procedure is not mandatory.

Section 930.34(d) encourages Federal agencies to seek assistance from the State agency in its determination of effects and consistency. At a minimum, State agencies must be able to provide Federal agencies with the applicable enforceable policies. Because identifying a State's enforceable policies can be difficult, Federal agencies noted the importance of this provision. Also, providing the Federal agency with the applicable policies will help focus the Federal agency's efforts on the State agency's concerns. One State agency commented that identifying enforceable policies could be problematic, because a State agency may fail to identify all applicable policies or the Federal agency may overlook policies. One State agency commented that State agencies should have flexibility to decide how to offer assistance, and one commenter said that the public or local governments should be able to identify additional policies.

NOAA did not change the rule based on these comments. The statute and regulations clearly require Federal agencies to be consistent with all applicable enforceable policies, including those that may have been overlooked at one time. Moreover, the regulation already addresses early identification of enforceable policies by stating that such identification is: "based upon the information provided to the State agency at the time of the request."

The statute and regulations are clear that the Federal agency prepares the consistency determination. If a State does not want to assist the Federal agency in the preparation, then the State loses a good opportunity to ensure that all of its relevant policies are considered and accurately interpreted. Further, NOAA believes that it is the State agency's responsibility to be able to accurately and completely identify its enforceable policies. The implementation of federal consistency at the State level is solely the responsibility of the State agency. Neither the public nor local governments can identify, or interpret, applicable management program enforceable policies for federal consistency purposes. See sections 930.6 and 930.11(o) (for responsibilities

and definition of the State agency), and response to the comment regarding section 930.6.

Section 930.35 applies to negative determinations and clarifies existing requirements for negative determinations. Various comments were made regarding the State lists and when a negative determination should be provided. NOAA responded by adding a reference to the list in section 930.34(b). The word "relevant" is removed. NOAA has re-inserted the language from existing section 930.35(a)(3). NOAA had previously proposed to eliminate this subsection as not used and redundant. However, States provided persuasive information and examples that demonstrated that this section is used often, and used differently than the other requirements for negative determinations, and provides States with an effective notification of Federal agency activities. A consistency determination is not required if a State agency objects to a negative determination. The determination of coastal effects is made by the Federal agency and even if a State objects, the Federal agency may still rely on its no effects determination and proceed with the activity. In such cases, State and Federal agencies may enter into mediation to resolve the matter, or the State may litigate. NOAA cannot require a Federal agency to provide a consistency determination or a negative determination prior to the 90-day notification requirement. The regulations already contain sufficient encouragement for Federal agencies to consult with State agencies prior to the 90-day period and early in the planning phase of a Federal agency activity.

Section 930.35(b) clarifies the information requirements for a negative determination. A negative determination, by definition, is a finding of no effects. Thus, the information provided to the State agency for a negative determination may not be as substantial as that provided for a consistency determination. One Federal agency commented that it opposed the need to provide an evaluation of enforceable policies as part of its negative determination. A Federal agency's review of a State's enforceable policies is essential for determining coastal effects. This is emphasized in changes to section 930.33(a)(1) (Identifying Federal agency activities affecting any coastal use or resource).

Section 930.35(c) clarifies that if a State agency wishes to disagree with a Federal agency's negative determination, it must do so within 60 days or its concurrence is presumed.

Public notice under CZMA § 306(d)(14) is not required for State agency review of negative determinations since negative determinations are not consistency determinations as contemplated by the Act. This section also clarifies that, if a Federal agency were to agree that coastal effects are reasonably foreseeable and that its negative determination was not correct, then the State agency and Federal agency may agree to an alternative schedule to promote administrative efficiency. One Federal agency objected to applying the 90-day statutory notification period and the 60-day State agency response period to negative determinations. Another Federal agency asked that the section be clarified regarding State lists and the postponement of the activity by the Federal agency. Several States commented that Federal agencies should be required to postpone action until disagreements have been resolved. One commenter and the environmental groups commented that States should provide for public comment of the State agency's review of a negative determination. NOAA responded by adding language to subsection (c) to clarify that State agencies are not obligated to respond to a negative determination. As such, States are not required to provide for public participation for negative determinations under CZMA § 306(d)(14). A State could acquiesce in all negative determinations that it receives without providing any review or response. It is simply an acknowledgment of the Federal agency's determination that its activity will not have coastal effects, and that, therefore, the activity is not subject to the consistency requirement. If a State agency believes that the activity will have coastal effects and the Federal agency agrees, then the Federal agency would provide a consistency determination, which would require the State agency to provide for public participation in the State agency's review of the consistency determination. To clarify this, the final clause of the subsection from the proposed rule is deleted as it does not matter whether a new 90-day clock is started or whether an alternative schedule is agreed upon for a consistency determination, public participation would be required.

To be consistent with the change to § 930.43(d), "should postpone" is changed to "should consider postponing." A Federal agency cannot be required to postpone final action past the 90-day period. If a Federal agency

maintains that coastal effects are not reasonably foreseeable, and has met the procedural requirements of these regulations, then the Federal agency has fully met its consistency responsibilities. If a State disagrees with a negative determination, it can seek mediation where the Federal agency might agree to postpone action, or sue the Federal agency for making an arbitrary and capricious finding that coastal effects are not reasonably foreseeable. The regulations already require that a negative determination be submitted at least 90 days prior to agency action. NOAA does not intend to disturb this long-standing provision. This is based on the statutory requirement for consistency determinations since a Federal agency could determine, after input from a State, that the activity does in fact have coastal effects. The new review period, which is reasonably based on the review periods for consistency determinations, is provided to ensure that States respond in a timely fashion, if a State elects to respond. These review periods will actually provide a Federal agency with a more timely response to a negative determination, *i.e.*, within 60 days rather than 90 days. As States are not required to list Federal agency activities, neither can they be required to list activities for which negative determinations have been prepared in the past. A Federal agency could request that State do so, and it would be in the best interest of the State to provide such information, but it cannot be required.

Section 930.36 is moved to section 930.35(d). Section 930.36 incorporates existing sections 930.37 and 930.34(b) and elaborates on consistency determinations for proposed activities.

Section 930.36(c) clarifies the use of general consistency determinations. Federal agencies may provide State agencies with general consistency determinations for repetitive activities in the same manner that they provide single consistency determinations. A general consistency determination is still only allowed in a limited number of cases where the activities are repetitive and do not affect any coastal use or resource when performed separately. NOAA has added greater flexibility for State agencies and Federal agencies to mutually agree to use general determinations. The primary purpose of a general determination is for repetitive activities. Allowing a Federal agency to unilaterally provide a general determination for non-repetitive activities that have cumulative effects would be inconsistent with the 1990 CZMA changes. A general consistency determination may be used for de

minimis activities only when the Federal agency and State agency have mutually agreed to do so. The terms "periodic" and "substantially similar in nature" are proposed to be deleted as the concept of "repetitive" includes these terms. One Federal agency commented that the section was vague. Several States commented that coordination with States prior to submitting a general determination should be required. Periodic consultation on a general consistency determination will vary depending on the nature of the Federal agency activity. Thus, NOAA is leaving this phrase unchanged and allowing States and Federal agencies to develop consultation periods. As is the case for non-general consistency determinations, Federal agencies cannot be required to consult with States prior to the 90-day period. It is certainly in the interest of all concerned to consult prior to submitting a general consistency determination and the regulations contain ample encouragement for early coordination.

Section 930.36(d). One Federal agency commented that a State agency should not be able to re-review earlier phases of an activity with which the State concurred. The regulation is clear that a consistency determination will be provided for each phase. By definition, the State then reviews and objects or concurs with each determination. The State cannot revisit its earlier concurrence. If the activity is substantially changed then the later phased consistency determination should cover the changes from the previous phase or new section 930.46 may require a supplemental determination.

Section 930.36(e) describes a method to efficiently address consistency requirements for a federal activity that is national or regional in scope. For example, a federal activity, such as a rulemaking or planning activity, may apply to more than one coastal State where coastal effects are reasonably foreseeable. Providing each State with a separate consistency determination may be difficult, inefficient and not cost effective, even with early coordination. The proposed regulation provides States and Federal agencies with the means to effectively coordinate, ensure adequate consideration of management programs, and provide an efficient, cost effective and timely method for meeting the consistency requirement. Two Federal agencies expressed concerns on whether national rulemaking or plans should be subject to consistency. One Federal agency commented that it was unclear how the process differed for national

consistency determinations. One State commented that a State should be able to require additional information to start the consistency review period. One commenter said that a national consistency determination should require essentially the same information as that for a consistency determination submitted to one State.

NOAA disagrees that this subsection will not facilitate the development of consistency determinations that apply to multiple States. This section allows Federal agencies to send one consistency determination applicable to all States, using one discussion for coastal effects and enforceable policies that are in common among the States. There would be individual State sections in the consistency determination only for those State effects and policies that are not in common. The second sentence in subsection (e)(2) has been amended to clarify this. As discussed in response to comments on section 930.31, the CZMA makes no distinction between Federal agency activities that are local in scope and those activities, regulations, and plans, that are national or regional in scope. Whether these national activities are subject to consistency is based on whether coastal effects are reasonably foreseeable as a result of the activities. NOAA has not added language regarding additional information. Such a circumstance is already addressed in the regulations. Section 930.39 describes the content of a consistency determination. If the information required by section 930.39, in conjunction with section 930.36(e), is not provided, then the Federal agency has failed to submit a complete consistency determination and, thus, the 60-day State agency review period has not started and will not start until the information is provided. To require separate consistency determinations under this section would defeat the purpose of this section.

Section 930.37(c) is moved to section 930.36(d) and amended to clarify that phased consistency determinations refers to development projects and activities. Section 930.37 clarifies coordination of consistency with the use of NEPA documents to address consistency requirements. Federal agencies are not required to address consistency requirements in NEPA documents, but may use NEPA documents, at the Federal agency's discretion, as an efficient and effective mechanism to address the consistency requirements. The use of NEPA documents for consistency purposes does not, however, mean that a NEPA document necessarily satisfies all

consistency requirements. The Federal agency must still comply with the applicable sections in 15 CFR part 930, subpart C. Section 930.37 provides flexibility for States and Federal agencies to agree to different NEPA/consistency review procedures. Coordination between States and Federal agencies on federal consistency requirements should occur at an early stage, usually at the draft environmental impact statement (EIS) stage, and before the Federal agency reaches a significant point in its decision making and while the Federal agency still has discretion to modify the activity. A final EIS is a significant point in an agency's decision making and further modifications are much harder to do and require more resources. It is more efficient and in keeping with the intent of consistency for State agencies and Federal agencies to coordinate at the draft EIS stage. Arrangements should be made to do supplemental consistency reviews in case the project substantially changes in the final EIS or Record of Decision. Several commenters noted how useful this section will be regarding NEPA and CZMA coordination. One commenter, however, asserted that the section is flawed and is contrary to NEPA. NOAA disagrees.

NOAA has not added language to the rule regarding when to do consistency reviews in conjunction with NEPA, as many Federal agencies and States earlier commented that they want the flexibility to work out the timing of consistency and NEPA among themselves. Thus, the discussion above regarding draft EIS documents remains. This section is not flawed, and in fact, is consistent with and complements NEPA and CEQ's regulations. The CEQ regulations referred to in the comment discuss integrating NEPA, not the CZMA, into a Federal agencies decision making process. In addition, NEPA and the CZMA have different "effects tests." Thus, it may be that a NEPA document may not contain needed CZMA information or that a conclusion regarding effects for NEPA purposes will not satisfy the CZMA effects test. What this section does do is encourage government efficiency and reduce paperwork by specifically encouraging Federal agencies to use NEPA as a vehicle to address all CZMA consistency issues, as well as NEPA issues in the same environmental review document.

Section 930.38. One State asked if program changes, including additions to management programs through the incorporation of a State's Coastal Nonpoint Program, applies to this section. NOAA's response is that all

enforceable policies that become part of a management program through program changes, including the program change process for Coastal Nonpoint Programs, apply for federal consistency purposes once approved by NOAA.

Section 930.39(a) is amended to clarify that the Federal agency's evaluation of the management program's enforceable policies is included in the consistency determination, and that the Federal agency's consistent to the maximum extent practicable justification accompanies the consistency determination, if the Federal agency is aware that its activity will not be fully consistent with the management program's enforceable policies. Section 930.32(a)(2) already requires a written justification to the State agency describing the legal impediments to full consistency. The State agency needs to know this information as soon as the Federal agency is aware of an inconsistency. Thus, when a Federal agency knows that it is not fully consistent prior to issuing its consistency determination, it should provide its justification to the State agency as part of its consistency determination. There are times, however, when the Federal agency believes it is fully consistent and does not learn that it is not fully consistent until after submittal of the determination. In such cases the Federal agency needs to provide its justification to the State agency as soon as it learns of the activity's inconsistency, in any event before the end of the 90-day period. The last sentence in subsection (a) is derived from the last sentence of former section 930.34(a). One Federal agency commented that this section should allow for the Federal agency's evaluation of enforceable policies in documents accompanying the consistency determination. NOAA agrees. The evaluation of relevant enforceable policies requires that the State agency identify those policies upon request. The regulations already allow a Federal agency to provide its determination in any manner it chooses. Thus the evaluation could be in an accompanying NEPA document if the document was provided to the State agency along with the consistency determination. The section has been amended to more clearly address this.

Section 930.39(b) is amended to conform to CZARA. Federal agencies are responsible for evaluating the consistency of nonassociated facilities or any other indirect effects if the effects are reasonably foreseeable. The last clause is deleted since it is inconsistent with CZARA and the effects test and is covered under the proposed new

definition of effects. One Federal agency commented that this section incorrectly expands the consistency requirement to the effects of activities. Consistency is based on the effects of Federal agency activities. Thus, there is no expansion of consistency beyond the statutory requirement. If a Federal agency did not consider the effects from its activity, there would be no basis on which to make its consistency determination or negative determination. The last clause is deleted since it is inconsistent, perhaps redundant, with the coastal effects definition, particularly the clarifications made by CZARA. While the CZMA does not confer upon Federal agencies jurisdiction to regulate activities beyond that granted to the Federal agency by its authorities, under the CZMA "effects test" Federal agencies are responsible for evaluating the consistency of nonassociated facilities or any other indirect effects if coastal effects are reasonably foreseeable. This is now more appropriately covered under the new definition of effects contained in section 930.11(g).

The last sentence of section 930.39(c) is deleted, because it is redundant with the rest of section 930.39(c). One Federal agency commented that adequate consideration is vague. NOAA has deleted "adequate" as the word is vague and "consideration" provides sufficient guidance to Federal agencies regarding non-enforceable policies. By definition, a Federal agency does not have to be consistent with non-enforceable policies, but, hopefully, will at least consider such policies and satisfy the policies if possible. If a management program does not have an applicable enforceable policy, then the Federal agency need not evaluate any corresponding coastal effects. However, experience has shown that it is very rare that a management program does not have some applicable enforceable policy, albeit a broadly applicable policy.

Section 930.39(d) is amended to clarify that if a Federal agency applies its more restrictive standards, it must, under the consistent to the maximum extent practicable standard, notify the State agency that it is proceeding with the activity even though the more restrictive federal standard may not be consistent with the State standard.

Section 930.39(e) clarifies the relationship between State permit requirements and the federal consistency requirements. Federal agencies must obtain State permits (including management program permits) when required by Federal law (other than the CZMA). For example,

the Clean Water Act (CWA) requires Federal agencies to obtain State permits and certifications that regulate and control dredging and water pollution within the navigable waters of the State. See 33 USC §§ 1323, 1341, 1344(t); *Friends of the Earth v. Department of the Navy*, 841 F.2d 927 (9th Cir. 1988). However, in some instances, there may be an issue as to the scope of a State or local permit that a Federal agency is required to obtain by another federal law. To insure that such a requirement is "not enlarged beyond what the language [of the federal law] requires," *Department of Energy v. Ohio*, 503 U.S. 607 (1992), citing, *Eastern Transportation Co. v. United States*, 272 U.S. 675, 686 (1927), and to minimize conflicts in situations where the scope of the State permit requirement is an issue, Federal agencies or States should consult with the U.S. Department of Justice on the scope of the federal law. When a Federal agency is not required to obtain a State permit, the Federal agency must, pursuant to the CZMA, still be consistent to the maximum extent practicable with management program enforceable policies, including the standards that underlie a State's permit program.

Section 930.40 is amended to simplify the reference to section 930.39, by deleting subsections (b) and (c) and adding a reference to section 930.39 at the end of section 930.40.

Section 930.41(a) and (b) is amended to simplify terms used in these regulations, extend the time for State agency review of consistency determinations from 45 to 60 days, and clarify that State agency objections must be received by the last day of the 60-day review period (or last day of an extended period). Presently, a State response to a Federal agency's consistency determination is either an agreement or disagreement, and a State agency's response to an applicant's consistency certification for a federal license or permit activity is either a concurrence or an objection. The difference is largely semantic and confusing. Thus, all State responses to any consistency determination or certification are now either a concurrence or an objection. The intent of the change regarding the State agency's response is to clarify when the Federal agency may presume concurrence.

The time period for a State agency's response to a consistency determination would be increased from 45 days to 60 days to allow States to provide adequate public participation as required by CZMA § 306(d)(14) (added in 1990 by CZARA). Federal agencies must provide

consistency determinations to State agencies at least 90 days prior to federal action. CZMA § 307(c)(1)(C). Currently, NOAA regulations require States to respond within 45 days of receiving the determination. Section § 930.41(a). If a State needs more time, a Federal agency must allow one 15-day extension. Section 930.41(b). These regulatory requirements were promulgated prior to the addition of CZMA § 306(d)(14). OCRM's Final Guidance implementing CZMA § 306(d)(14) did not change these requirements. 59 Fed. Reg. 30339. It will be difficult for many States to meet the public participation requirement under State law and still respond within 45 days. The likely result of this new requirement is that for most reviews of consistency determinations, States will need at least one 15 day extension, resulting in at least a 60-day review. Thus, in order for States to develop meaningful public participation procedures, and to provide greater predictability for Federal agencies as to when a State agency's consistency review will be completed, NOAA has provided States with a 60-day review period (extension provision remain the same). This should alleviate the inconsistency between current regulations and the CZMA § 306(d)(14) requirement. The total time allowed before a Federal action may commence (90 days) does not change.

Two Federal agencies and one interest group commented that they disagree with extending the State agency's response time to 60 days. One Federal agency commented that responses should be received by the last day and not postmarked. Several States commented on the wording of the section related to "postmarked" as provided for in the proposed rule. NOAA agrees that using "postmarked" may create confusion and will not provide the notification deadline that is needed for consistency reviews and which are contemplated by the statute and which has been the long-standing interpretation of the existing regulations. By statute, there must be a date whereby concurrence can be presumed. NOAA also agrees that the use of fax machines and email make it much easier for the State agency to send its response, and the Federal agency to receive it by the deadline. This change is also reasonable given the longer State agency review period for Federal agency activities. Thus, NOAA has changed "postmarked" to "receipt" in sections 930.41(a), 930.62(a), 930.78(b) and 930.155(d).

NOAA does not believe that the reduction in time between a State agency's response and the end of the 90-

day period will substantially alter any necessary discussions between the State and the Federal agency. Experience shows that States and Federal agencies usually know before a State response if there is a problem. Usually a Federal agency will delay starting its activity past the 90 days to try and reach agreement with the State. If the Federal agency cannot do this, and it is consistent to the maximum extent practicable, then it can proceed at the end of the 90-day period.

The word "immediately" is retained since the Federal agency is under the impression that the 60-day review period has begun and needs to know as soon as possible if its determination and accompanying information is not complete. Even two weeks may be too long a time. There should not be a problem with networked management programs, as a completeness review is minimally substantive and should just be making sure the information required by section 930.39(a) is included. The information may not have everything the State wants, but that is not what is required by section 930.39(a) to start the review period.

Section 930.41(c) is amended to clarify that the 90-day period begins when the State agency receives the determination and that Federal agency action cannot commence prior to the end of the 90-day period unless the State agency concurs or the Federal agency and the State agree to a shorter period.

Section 930.41(d) is added to clarify that States cannot unilaterally place an expiration date on their concurrences. States must decide if they can concur with a consistency determination absent an agreement on time limits. One Federal agency commented that the language of the section is vague. States commented that the section may not be necessary and could be covered by section 930.4 (conditional concurrences). The word "modifications" has been inserted to clarify that a later action involving a previously reviewed activity could be a later phase or a modification. A cross-reference to supplemental consistency determinations under section 930.46 is also added.

There are several reasons why time limits are not acceptable. First, the CZMA requires a Federal agency to provide a consistency determination 90 days before final Federal agency approval. CZMA § 307(c)(2). The CZMA does not allow States to re-review the same activity. Second, State consistency decisions and objections must be based on the enforceable policies of a State's management program. A time limit on a

State's concurrence would be based on the possibility that the activity or the State's program would change and not on enforceable policies, as required by the CZMA. Further, State agencies and Federal agencies may agree to a time limit for a State's concurrence, including concurrences for de minimis activities and general determinations. The CZMA does, however, require Federal agencies to carry out each activity in a manner that is consistent to the maximum extent practicable with a State's enforceable policies. Thus, if a project substantially changes between the time that the State reviews the activity and when the activity begins, the Federal agency must provide a new or supplemental consistency determination since the State would not have had the opportunity to review the "new" activity. This is precisely the situation section 930.46 is designed to address. Section 930.46 only applies to previously reviewed activities that have not yet begun and the coastal effects are substantially different than as originally reviewed by the State agency.

Regarding the use of a conditional concurrence under section 930.4 to impose time limits, the CZMA only authorizes one bite of the consistency apple for any particular Federal agency activity. It is a basic consistency requirement that Federal agencies provide consistency determinations for proposed activities and the States review the activity based on the information available at that time. If an activity later substantially changes, the Federal agency may have to provide a supplemental or a phased consistency determination. A conditional concurrence, therefore, cannot be used to provide for subsequent review of the same activity. For the same reasons a "time" condition would also be inconsistent with the CZMA. That is why a State should object rather than issue a conditional concurrence. Thus, NOAA has not cross-referenced section 930.4. If a State agency does issue a conditional concurrence with a time limit, and the Federal agency does not agree, the conditional concurrence automatically becomes an objection. It may also be that the objection would be invalid unless the time limitation had a basis in an enforceable policy. Under the proposed section 930.41(d), a State agency and a Federal agency may agree on a time limitation. The proposed section 930.41(d) provides for instances where a project changes or the effects change.

Section 930.41(e) clarifies that a State agency may not assess the Federal agency with a fee for the State's review of the Federal agency's consistency

determination, unless such a fee is required under federal law applicable to that agency. One State commented that fees should be allowed. NOAA disagrees. The CZMA does not require Federal agencies to pay processing fees. OCRM cannot require such fees by regulation. Thus, States cannot hold up their consistency reviews or object based on a failure by a Federal agency to pay a fee. Such a requirement would require a change to the CZMA itself, or other federal laws. This is beyond the scope of these revisions to the regulations.

Section 930.42 is moved to section 930.43. New section 930.42 details the public participation requirement for Federal agency activities. Public participation for a State's review of a Federal agency's consistency determination is required by CZMA § 306(d)(14). See NOAA's final guidance on this requirement, 59 Fed. Reg. 30339. The statutory section requires that "[t]he management program provide for public participation in permitting processes, consistency determinations, and other similar decisions." Proposed section 930.42 is sufficiently broad to give States flexibility in developing public participation procedures that meet the intent of § 306(d)(14). NOAA reviews each State's procedures during regularly scheduled evaluations of management programs under CZMA § 312 for compliance with the public participation requirement under § 306(d)(14), and will recommend procedural changes if necessary to meet proposed section 930.42. The purpose of the requirement is to provide the public with an opportunity to comment to the State agency on the program's review of a federal activity for consistency with the enforceable policies of a management program, in addition to commenting on the activity itself. Thus, a Federal agency cannot be required to publish or pay for the notice.

A number of States commented that electronic public notices, including web sites, should be acceptable public notice. Other States had various comments on notice in remote areas, the Federal agency providing names and addresses of interested persons, notice for the affected area, and joint notices. The environmental groups commented that electronic notices should not be a procedural option. Electronic notices cannot be the only form of public notice used. Many people do not yet have ready access to a computer or the Internet. Thus, the regulations have been clarified to exclude electronic notices as the sole notice. They can be used in conjunction with other notices. Electronic means can also be used as the

source of additional information since people can use public libraries and other facilities that have Internet access. In very rural areas where there are no local papers or access to State gazettes, etc., the State will have to use its best judgement as to how to adequately notify the public. In remote areas of Alaska, this may mean posting a notice in a Post Office or other public area. The current regulations allow this flexibility. Federal agencies are under no obligation to fulfill the requirements of this section regarding public comment on the State's review of a consistency determination. Thus, the Federal agency is under no obligation to provide names of interested parties as this may result in an expectation, and demand, that the Federal agency do so. NOAA has changed "in the area" to "for the area" as "for" is broader and provides the State with flexibility for providing adequate public notice, as suggested in the comment. However, NOAA reiterates that electronic notice cannot be the sole method of notice to the public. NOAA has included the language encouraging joint notices as this would not impose an additional burden on the Federal agency, and if used, should be a more efficient use of Federal and State resources.

Section 930.42(a) is re-designated as section 930.43(a) and amended to clarify that State objections must be based on the enforceable policies of an approved management program and that the objection letter must describe and cite the enforceable policies, and must state how the federal activity is inconsistent with the enforceable policy. This section also clarifies that the identification of alternatives by the State is optional, but that State agencies should describe alternatives, if they exist.

Sections 930.43, 930.63(b) and (d). One Federal agency commented that the mandatory nature of the current regulations regarding the identification of alternatives by the State agency be retained. Two commenters said that it is not clear what happens when an applicant adopts a State alternative. Several States commented that States should not have to re-design a project through describing alternatives.

While identifying alternatives is useful to States, Federal agencies and applicants, the CZMA does not require that States identify alternatives. The optional nature of alternatives was recognized in the previous regulations by the phrase "(if any)" and is necessary since the identification of an alternative does not remove the State agency's objection. An applicant would always have to go back to the State agency to

have the State agency remove the objection to allow Federal agency approval (unless the applicant appealed the State agency's objection to the Secretary). NOAA also agrees that State agencies should not be responsible for the design of a project, although States should describe alternatives with sufficient specificity to demonstrate their reasonableness. The regulations recognize this in section 930.63(d) by having the applicant determine its alternative options "in consultation with the State agency: \* \* \*" This would allow the State agency to describe an alternative, but would still require the applicant to "design" the alternative and to consult with the State agency on whether the altered project was consistent. Then, when an applicant adopts a consistent alternative, the State would remove its objection and the Federal agency could approve the activity so long as the approval was consistent with the alternative agreed to between the State and the applicant.

Section 930.43(d) clarifies that, in the event of a State objection, the remainder of the 90-day period should be used to resolve differences and that Federal agencies should postpone agency action after the 90-day period, if differences have not been resolved. It also clarifies that, notwithstanding unresolved issues, after the 90 days a Federal agency may only proceed with the activity over a State's objection if the Federal agency clearly describes, in writing, the federal legal requirements that prohibit the Federal agency from full consistency. Several Federal agencies commented that language contained in the proposed rule regarding Federal agency obligations when the Federal agency asserts it is fully consistent was unworkable and not consistent with the statute. Several States commented that clarifying language was needed regarding when and how the Federal agency should submit its consistent to the maximum extent practicable justification. Two States commented that mediation should be required if there is a dispute and before the Federal agency proceeds with the activity. One State commented that the section should include a statement that the State may institute legal action if not satisfied with the Federal agency's response. The environmental groups commented that a Federal agency should not be able to proceed with an activity over a State's objection.

NOAA understands that there may be disagreements between a State agency and Federal agency as to whether a Federal agency is fully consistent with a management program's enforceable

policies. This is particularly problematic where the State's policy is broadly worded. A Federal agency activity that is fully consistent and has met the consistency requirements should be able to proceed with the activity. A State agency may object based on its interpretation of its policies. In such cases, the State may be requiring consistency for an interpretation that is not set forth in the enforceable policies. This does not make the enforceable policy invalid, but it does create a factual issue regarding full consistency. In such cases, mediation may resolve the matter, or an MOU developed, as was the case between Alaska and the Forest Service. If this does not work, and the Federal agency elects to proceed with the activity after 90 days, then the State may choose to litigate the question of whether the Federal agency is in fact fully consistent. The section has been modified accordingly.

In response to one comment, NOAA agrees that it is the "Federal agency's belief" that it is consistent that controls its action, and has addressed this comment by including the phrase: "the Federal agency has concluded \* \* \*" NOAA has also added a reference to the new language in section 930.39(a), requiring that the Federal agency's consistent to the maximum extent practicable justification be included in the consistency determination if the agency is aware that its activity will not be fully consistent at the time the determination is submitted to the State agency.

The use of the word "cannot" and the use of the suggested "can" may both cause misunderstanding. The intent of section 930.43(d) is to provide an appropriate mechanism for the Federal agency to examine whether it is prohibited by law from acting in a manner consistent to the maximum extent practicable. To be absolutely clear in this very important, and much discussed section, NOAA has not used "can" and has replaced the word "cannot" with specific language from the consistent to the maximum extent practicable standard in section 930.32.

Mediation under the CZMA and NOAA's regulations is optional and non-binding. NOAA cannot, by rulemaking, require a Federal agency to enter into mediation. Likewise, if a State requests mediation, the Federal agency is not required to participate. As for notice to the Federal agency regarding possible State litigation, a State may always sue a Federal agency under the Administrative Procedures Act. It is not necessary to place such language in this section, although the regulations discuss

State enforcement, including legal action, in the new section 930.5.

This section does not refute the basic purpose of the federal consistency requirement. A fundamental component of federal consistency is that a Federal agency, despite a State's objection, may proceed with a Federal agency activity after the 90-day period, so long as the Federal agency describes to the State agency, in writing, the federal legal requirements that prohibit the Federal agency from being fully consistent with the enforceable policies of the State's management program. Section 930.43(d) clarifies this component of the CZMA and existing NOAA regulations. As was suggested by several commenters, the CZMA federal consistency requirement can be thought of as a limited waiver of federal supremacy. (Under Article VI, cl. 2 of the U.S. Constitution, Federal law is the supreme law of the land and State law cannot interfere with the execution of federal law. *See McCulluch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819). Congress, as part of its legislative powers, can limit the Federal Government's supremacy and sovereign immunity.) The waiver of federal supremacy in the CZMA is the requirement to be consistent with State management programs. The limits are defined by the consistent to the maximum extent practicable standard and CZMA §§ 307(e) and (f). CZMA § 307(e) requires that the CZMA does not supersede, modify or repeal existing law. CZMA § 307(f) requires that the CZMA shall not affect the pollution control requirements of the Clean Water Act or Clean Air Act. The CZMA § 307(c)(1) requires that federal activities "be carried out in a manner that is consistent to the maximum extent practicable" with the enforceable policies of a State's management program. The phrase "be carried out" implies that the activity may proceed. The qualifier is that the activity must be carried out in a manner consistent to the maximum extent practicable with a State's enforceable policies. Further, the statute expected that federal activities could proceed after 90 days by stating that Federal agencies provide a consistency determination no later than 90 days "before final approval" of the federal activity. Congress stated that it is not anticipated that there will be many situations where as a practical matter a Federal agency cannot carry out its activities without deviating from approved management programs. H.R. Rep. No. 1049, 94th Cong., 2d Sess. 19 (1972). Congress also found that there may be instances where a Federal agency activity cannot be conducted

fully consistent with a State's enforceable policies and may proceed over a State's objection. *Id.* It is precisely this legislative intent that led, in 1979, to NOAA's regulations requiring full consistency unless full consistency is prohibited based upon existing legal authority applicable to the Federal agency's operations. Deviation from full consistency is allowed due to unforeseen circumstances which present a substantial obstacle preventing complete adherence to the management program. Further evidence of Congressional intent regarding whether a Federal agency activity may proceed over a State's objection is found in the different language in the other CZMA federal consistency sections. CZMA §§ 307(c)(3)(A), (B), and 307(d) all specifically prohibit a Federal agency from issuing its approval or funding if a State agency has objected. Because Congress included such clear language in these three other instances, it follows that Congress intentionally excluded this meaning from other sections, *i.e.*, CZMA § 307(c)(1). If Congress intended to require that a Federal agency activity proceed only with State agency agreement it would have said so.

The Presidential exemption contained in CZMA § 307(c)(1)(B) does not support the view that Federal agencies may not proceed over a State's objection. The Presidential exemption was added to address a situation where a State agency disagrees with a Federal agency's consistency determination, resolution by mediation is not likely, the State agency sues the Federal agency, and the Court finds that the activity is not in compliance with a State's enforceable policies. In those instances, the Secretary may request that the President exempt the specific activity from consistency if the President finds that the activity is in the paramount interest of the United States. The section was added to be consistent with similar extraordinary remedies of other federal statutes and to reinforce the point that no Federal agency activities are categorically exempt from the consistency requirement. Congress would not have couched a requirement that Federal agencies cannot proceed over a State agency's objection in an elaborate Presidential exemption.

NOAA's regulations further define the long-standing interpretation that Federal agencies may proceed with an activity despite a State agency's objection. NOAA's definition of consistent to the maximum extent practicable requires full consistency "unless compliance is prohibited based on the requirements of existing law applicable to the Federal agency's operations." Section

930.32(a)(existing). This interpretation is also supported by a comment to the original regulations where NOAA stated that "Federal agencies are encouraged to suspend implementation of the activity beyond the 90-day period pending resolution of the disagreement." Section 930.42(c) (44 Fed. Reg. 37149, Monday, June 25, 1979) (emphasis added). Thus, if a Federal agency asserts full consistency is prohibited and describes the legal authority which "limits the Federal agency's discretion to comply," the Federal agency may proceed with the activity at the end of the 90-day period. *Id.*; Section 930.34(b) (existing).

Section 930.46 addresses the situation where a proposed activity previously reviewed, but not yet begun, will have coastal effects substantially different than originally described to the management program. A similar section is repeated at the end of subparts D and F. *See* sections 930.66 and 930.101. Two commenters said that the State agency should be required to notify others under subsection (b). Several other States commented that there should be a rebuttable presumption that a project is subject to re-review if the project has not commenced in 5 years. One commenter asserted that this provision would put offshore projects in a never-ending loop of approval and should be re-worked to reduce this uncertainty.

NOAA has not changed the rule, based on these comments. If a proposed project has substantially changed, and the State has not reviewed the changes, then it is a new project, and a new consistency determination is required. Since the consistency test depends on whether coastal effects are reasonably foreseeable, and not on the nature of the activity, substantial new coastal effects would also trigger the consistency requirement. Thus, where an activity has not started, substantial new effects have been discovered, and the State has not had the opportunity to review the activity for consistency in light of these effects, sections 930.46, 930.66 and 930.101 would require a supplemental consistency determination or certification. This is an affirmative duty on the part of Federal agencies and applicants. However, there may be times when Federal agencies or applicants do not provide supplemental consistency statements. In such cases, subsection (b) of these sections allow a State agency to notify the Federal agency or applicant that it believes that a supplemental review is needed. Such notification is at the State agency's discretion, thus "may" is retained and "shall" is not used. States may seek compliance through negotiation, mediation or litigation. This proposed section is

similar to NEPA requirements for supplemental statements. *See* 40 CFR section 1502.9(c)(1). NOAA expects that this section will be little used, but where it is used will eliminate confusion as to the consistency process and brings the regulations into conformance with the changes made by CZARA.

NOAA has not added a rebuttable presumption that if a project has not commenced within a certain amount of time, it should be subject to re-review. Time is not the issue here. The intent of this section is not to give the State agency a second bite at the consistency apple, but rather, to give States the opportunity to review substantial changes in the project or foreseeable coastal effects not previously reviewed by the State.

Finally, NOAA rejects the argument that supplemental review will create a never-ending loop of approval. The sections apply only to activities that have not yet begun and which are substantially different than that which the State previously reviewed. Even without these sections, Federal agency activities meeting these two criteria would be required to provide a new consistency determination and for license or permit activities, in many cases applicants would provide a new consistency certification since such changes would require a modification to the federal application that would require consistency review. Regarding offshore projects, a supplemental coordination section is not added to subpart E, since subpart E and the regulations implementing the Outer Continental Shelf Lands Act already contain a detailed process for supplemental consistency reviews when OCS plans have substantially changed. NOAA is not disturbing this existing coordination between the two statutes.

#### *Subpart D—Consistency for Federal License or Permit Activities*

Sections 930.50 and 930.51(a) are amended to be consistent with the statutory language referring to "required" federal license or permit activities. A required federal approval means that the activity could not be performed without the approval or permission of the Federal agency. The approval does not have to be mandated by federal law, it only has to be a requirement to perform the activity. One commenter suggested adding additional effects language to section 930.50. Additional effects language is not added to this section, because effects are defined in section 930.11(g), and apply throughout the regulations when discussing coastal effects.

Section 930.51(a) clarifies that a federal lease to a non-federal applicant, *e.g.*, to use federal land for a private or commercial purpose, is a form of authorization or permission under the definition of federal license or permit, with the exception of leases issued pursuant to lease sales, *e.g.*, under the Outer Continental Shelf Lands Act, which are Federal agency activities under 15 CFR part 930, subpart C. One Federal agency commented the definition is extremely broad and that it needs to clarify the application of this subpart to OCS plans. The commenter further states that the regulation seems to ignore the importance of effects when determining whether a federal license or permit is subject to consistency. Finally, this Federal agency comment argued that OCS lease suspensions should not be subject to consistency, and the language regarding "lease sales" should be clarified to distinguish lease sales from leases. One State commented that a "lease" is a form of approval regardless of other applicable federal approvals. One State and another commenter suggested that "right-of-way" permits and "easements" be added to the definition. One commenter urged that a decision that no consistency review will take place should be subject to public comment.

The definition of license or permit has been in place and well-understood for over 20 years. In NOAA's view, an inclusive description of federal approvals is necessary to implement Congress' intent that consistency apply to all federal actions that have coastal effects. The statute is clear that OCS plans, and federal approvals described in detail in such plans, are subject to subpart E, and the section now states this.

The term "federal license or permit" refers to any required federal approval. Whether a license or permit activity is subject to the consistency requirement does depend on whether coastal effects are reasonably foreseeable and which is determined by NOAA either when the State agency lists (*see* section 930.53) a particular federal approval in its management program or when a State agency seeks to review an unlisted activity (*see* section 930.54). The same applies to OCS "lease suspensions." As stated in NOAA's letter to the California Coastal Commission, dated November 12, 1999, OCS lease suspensions are federal license or permits under NOAA's regulations. However, NOAA made no determination whether there were coastal effects resulting from the suspensions at issue and, thus, no determination whether consistency applied. If a State agency were to review

a lease suspension for consistency, the State's review would be limited to the effects of the lease suspension itself and any cumulative effects that may flow from the suspension(s). Since a lease suspension is not a renewal of the lease, the State could not review the underlying lease. When requesting a suspension, a lessee is not requesting a re-leasing approval, and MMS does not re-evaluate the lease when granting or directing a suspension. If a lease were to terminate and MMS were to "re-lease" the tracts, then the re-leasing would be subject to consistency under CZMA § 307(c)(1).

In NOAA's November 12, 1999, letter, NOAA concluded that as a general matter, lease suspensions do not affect coastal uses or resources and do not generally authorize activities to occur during the suspension period that can be reasonably expected to affect coastal uses or resources. Therefore, it is highly unlikely that NOAA would approve the listing of lease suspensions in a management program as a federal license or permit subject to consistency, or approve a State agency's request to review a lease suspension as an unlisted activity. In determining whether to approve the review of a lease suspension as an unlisted activity, NOAA would examine the effect of the lease suspension in extending the term of the lease or postponing the coastal effects of the OCS activities to a point in time in the future or such other effects as are reasonably foreseeable from granting of the lease suspension(s). This effects test must be met by the State agency submitting a request to review the lease suspension(s) as an unlisted activity. NOAA cannot completely rule out the possibility that a lease suspension or set of lease suspensions could affect the uses or resources of a State's coastal zone, and thus the CZMA bars NOAA from categorically exempting suspensions from consistency. NOAA also believes that OCS lease suspensions could be removed from possible State agency review under subpart D, if MMS were to describe the expected universe of lease suspensions in detail in the OCS plans. In the alternative, specific suspensions can be addressed between lessees, MMS and coastal States as it was in the Memorandum of Understanding between MMS, Mobil and the State of North Carolina. *See* Appendix I, at I-3, Final Environmental Impact Report on Proposed Exploratory Drilling Offshore North Carolina, August 1990. If MMS were to do this, then a State agency concurrence in an OCS plan under subpart E, would also include

concurrence of any lease suspensions granted for the expected reasons described in the OCS plans.

It is not correct to say that OCS activities are not subject to subpart D. It is correct that OCS plans, and federal licenses or permits described in detail in OCS plans, are subject to subpart E. However, subparts D and E are intertwined, as provided for in the statute (CZMA § 307(c)(3)(B)) which subjects subpart E reviews to CZMA § 307(c)(3)(A). Thus, OCS plans and licenses or permits described in detail in the plans are subject to subpart E, except for some information/procedural items. OCS related federal license or permits not described in detail in OCS plans are subject to subpart D and lease sales themselves are subject to subpart C.

NOAA agrees that the relationship of "leases" and "lease sales" could be clearer and has clarified that the term lease does not include leases issued pursuant to OCS lease sales. NOAA also agrees with the comment that leases that are federal license or permits as defined in this section are federal approvals regardless of whether there are other federal approvals required and has deleted the language referring to other approvals.

Rights of way and easements are not specifically included as the definition is sufficiently broad to cover these actions if they are "required federal approvals." A State agency can always list specific approvals in its management program. Public participation is not added for a decision that consistency review will not occur. A decision that consistency will not occur, either because there are no coastal effects, there is no federal application, or there is no required federal approval, means that the CZMA consistency provision does not apply, and public review is not mandated.

Section 930.51(b)(2) is amended to clarify that "management program amendments" as used in this section means any program change, *i.e.*, amendment or routine program change, approved by OCRM under 15 CFR part 923, subpart H.

Section 930.51(c) clarifies that a major amendment is not a minor change to a previously reviewed activity, but a change that affects any coastal use or resource in a way that is substantially different than effects previously reviewed by the State agency. One State commented that the section as proposed did not apply the definition of major amendment to all contexts used in subsection (b). NOAA agrees that the definition of major amendment needs to apply to all three cases under subsection (b), and has made this change.

Section 930.51(d) clarifies that a "renewal" includes subsequent re-approvals, issuances or extensions. Administrative extensions that are required must be treated like any other renewal or major amendment. Otherwise, some activities that should obtain a renewal continue to operate for years under administrative extensions. These activities may have coastal effects that have not been reviewed by management programs and which need to be consistent with a State's enforceable policies. These activities are, in a sense new activities. Renewals cannot be used to negate the consistency requirement.

Section 930.51(e) describes some parameters for how the determination of major amendments, renewals and substantially different coastal effects in section 930.51 shall be made. Whether the effects from a renewal or major amendment are substantially different is a case-by-case factual determination that requires the input from all parties. However, a State agency's views should be accorded deference to ensure that the State agency has the opportunity to review coastal effects substantially different than previously reviewed.

Section 930.51(f) clarifies the ramifications to the consistency process when an applicant withdraws its application for a federal approval or if the approving Federal agency stays the application review process. If the applicant withdraws its application, then the consistency process stops (since there is no longer a federal application to trigger consistency). If the applicant re-applies, then a new consistency review is required. Likewise, if the Federal agency stays its proceeding, then the consistency review process will be stayed for the same amount of time. This will avoid confusion as to what the consistency review period is in these cases.

Section 930.52 is amended to add to the definition of "applicant" applicants from other nations for a United States required approval, and applicants filing a consistency certification under the proposed general permit consistency process under section 930.31(d). Regarding other nations, the CZMA requires any applicant for a required federal license or permit to certify consistency with management programs. There may be instances where a foreign company or individual must obtain a United States approval.

Two commenters want subpart D to apply to Federal agencies applying for federal permits. Federal agency activities are not subject to CZMA § 307(c)(3) requirements. The CZMA is clear: Federal agency activities are

subject to CZMA § 307(c)(1). CZMA § 307(c)(3) applies to non-federal applicants for federal permits or licenses. Congress declared that CZMA §§ 307(c)(3)(A) and (B) and 307(d) "govern the consistency of private activities for which federal licenses or permits are required" and that the 1990 CZMA changes do "not alter the statutory requirements as currently enforced under [the CZMA]. These requirements are outlined in the NOAA regulations (15 CFR 930.50–930.66) and the conferees endorse this status quo." The Conference Report at 971–72 (emphasis added).

Section 930.53(a) is removed. Thirty-three of the thirty-five eligible coastal States have federally approved management programs and the remaining two States are in the process of developing a management program. Thus, this section is no longer necessary. Also, federal involvement in the identification of federal activities is addressed in the program development regulations. See section 923.53.

Section 930.53(b) is moved to section 930.53(a).

Sections 930.53(a)(1) and (2) are added to clarify the review of listed federal license or permit activities occurring outside of the coastal zone. The geographic location requirement is a means of notifying applicants and Federal agencies of activities with reasonably foreseeable coastal effects and are, subject to consistency review. The most effective way for a State to review listed activities outside the coastal zone is to describe the geographic location of a State's review. States are strongly encouraged to modify their programs to include a description of the geographic location for listed activities occurring outside the coastal zone to be reviewed for consistency. This section also codifies existing administrative policy that treats listed activities outside the coastal zone (for which a State has not described a geographic location), and listed activities outside a geographically described location, as unlisted activities under this subpart. (Because a State's coastal zone boundary is a geographic location description, Federal lands located within the boundaries of a State's coastal zone are sufficiently described for federal license or permit activities occurring on those federal lands.)

Section 930.53(b). Several States commented that listing should not be required for general concurrences. One State commented that the relationship between general concurrences and federal general permit programs is not clear. The environmental groups

commented that "minor" is not defined. One commenter asserted that general concurrences are misused by States and cumulative impact studies should be done with public comment and should be re-reviewed every three years.

NOAA has not changed the listing requirement. General concurrences are encouraged as a matter of administrative convenience and for more efficient consistency reviews of minor activities. If a State agency chooses to develop a general concurrence, applicants for the federal approval must be notified of the general concurrence. Since the general concurrences are tied to the federal license or permit activities listed in the management program, the State's list is an effective place to provide notice of the general concurrences. The regulations recognize that these minor activities can have cumulative effects and that the State agency can develop conditions allowing concurrence for such activities. The section already requires that prior to developing a general concurrence, the State agency provide for public notice and comment pursuant to section 930.61. This section does not affect the Nationwide permit program or other federal general permits (unless the State agency chooses to adopt a general concurrence for federal approvals under these programs). The promulgation of federal general permit programs is a Federal agency activity and is not affected by this section.

Sections 930.53(c), (d) and (e) are moved to sections 930.53(b), (c) and (d), respectively. The addition of sections 930.53(c)(1) and (2) clarify the procedures for consultation with Federal agencies and approval by the Director. One Federal agency commented that the State's notification to the Federal agency needs to adequately describe the proposed change in order for the Federal agency to respond. NOAA agrees that the State agency needs to describe what the proposed change is, thus, the phrase "should describe" is changed to "shall describe."

Section 930.54(a)(1) is amended to clarify where State agencies should look to monitor unlisted activities. Specifically, draft NEPA documents and **Federal Register** notices are key documents State agencies should review. This section also clarifies that State agency notice should be sent to the applicant, the Federal agency, and the Director of OCRM. The term "immediately" has been deleted as there is already specified a 30-day time period in which to respond. Two commenters believe this section should be clearer regarding an "application" to a Federal agency. One State commented that

Federal agencies or applicants be required to provide notice of unlisted activities.

NOAA agrees that the language in subsection (a)(1) is clear that the 30-day time period for State agencies to notify an applicant and the Federal agency is notice of an application that has been submitted. To make this perfectly clear, NOAA has added clarifying language. NOAA has not used the language in the comment since that language could be interpreted to require the State agency to act within 30 days from the date of the submission of the application, rather than 30 days from notice of an application that has been submitted. A State should have the opportunity to request review of an unlisted activity 30 days from receiving notice that an application has been submitted and not just 30 days from when the application was actually submitted to the approving Federal agency. Written notice is not required, however, in subsections (a)(1) or (2), because Federal agencies and applicants are not under an affirmative duty to notify the State agency unless the federal license or permit is listed in the management program. Such notice is encouraged, but cannot be required.

Section 930.54(b) is amended to clarify that the State agency's notification must also include a request for OCRM approval and the State agency's analysis supporting its claim that coastal effects are reasonably foreseeable.

Section 930.54(c) is amended to clarify that the Director's decision deadline may be extended by the Director for complex issues or to address the needs of one or more of the parties. This codifies existing practice which has been useful in resolving issues often leading to the State agency's withdrawal of its request. One Federal agency commented that an extension of NOAA's decision deadline be limited to a specified time.

It is unnecessary to specify a time frame for the Director's decision since the extensions, if any, may need to vary in duration depending on the issues. However, NOAA has added a sentence requiring the Director to consult with the State agency, Federal agency and applicant prior to issuing any extension. Also, the proposed revision states that the Director shall notify the parties of the expected length of the extension, therefore a specified time frame will be established for each extension.

Section 930.54(d). One commenter believes that NOAA should not assess coastal effects, but that States should do so. NOAA does not agree. NOAA's long-standing administrative process implemented through these regulations

determines coastal effects for listed activities or unlisted activities. Listed activities are first approved by NOAA as part of program approval or through a program change. Once NOAA has approved a federal approval as listed in a management program, then effects are assumed. If an activity is unlisted, coastal effects must be determined, and again, it is NOAA's responsibility and role to make such a determination. Congress has endorsed this implementation of the statute and all parties, States, Federal agencies and applicants rely on NOAA to ensure consistency reviews occur only where activities have coastal effects.

Section 930.54(f) provides applicants and State agencies with the flexibility to agree to forego the unlisted activity procedure, have the applicant subject itself to consistency, and expedite the consistency process. This provision will help to resolve coastal management issues informally and avoid delays due to disagreement over whether the application should be subject to State agency consistency review. One State commented that a Federal agency and State agency should be able to agree to subject an unlisted activity to consistency.

NOAA disagrees. The consistency requirements in this subpart are for the State agency, the Federal agency and applicants. The listing requirement puts all on notice that the listed activities are subject to consistency and the State's review. Any other decision, outside of the unlisted process, that would subject an applicant to the consistency requirement, would require agreement by the applicant. The Federal agency and State agency cannot subject an applicant to consistency outside the listed and unlisted procedures. A Federal agency could notify the State agency of an application for an unlisted activity, and then the State agency could initiate the unlisted activity process.

Section 930.56(b) is moved to section 930.58(a)(2). This will consolidate all material on necessary data and information in one section. The last sentence of section 930.56 is added as State agencies need to be able to identify their enforceable policies and have an obligation to identify the applicable policies to Federal agencies and applicants. Also, since many management programs now contain substantial numbers of enforceable policies, it is more efficient and effective if States can identify the applicable policies to the applicants, rather than the applicant having to pick and choose from all the State policies.

Section 930.58 is modified to clarify information requirements and to

consolidate language from other sections. Subsection 930.58(a)(1) (formerly section 930.56(b)) clarifies that the necessary data and information which applicants must provide to the State agency may include State permits or permit applications. One Federal agency commented that subsections (a)(1) and (a)(3) are duplicative and that the section should specify what an applicant should do if not satisfied that there is not adequate protection against disclosure of proprietary information. Two States requested various wording changes. One commenter believes that subsection (a)(2) should be deleted regarding State permits as necessary data and information. One commenter said that subsection (a)(2) and (c) should be integrated.

Subsections (a)(1) and (a)(3) are not duplicative. Subsection (a)(1) is identifying coastal effects and (a)(3) is an evaluation of effects in the context of enforceable policies. Subsection (c) allows applicants to disclose proprietary information if the applicant is satisfied that adequate protection against public disclosure exists. There is no conflict between subsections (a)(2) and (c) regarding proprietary information since (a)(2) is for "required" information and proprietary information is not required. NOAA has added language to subsection (a)(3) to clarify that it is the activity that must be consistent. These sections do not require an applicant to have all State permits. Management programs can, however, require that an applicant have the State permits in hand as the issuance of a State permit is, for some States, the means of demonstrating that an applicant is consistent with the underlying enforceable policies. States that require State permits conduct the federal consistency review at the same time that the State permit is being processed. This is not an obstacle as the six month CZMA review period is still in place.

Section 930.59. One commenter said that this section should require "one stop shopping." The CZMA does not require one-stop-shopping for consistency. Also there are different procedures for different federal and State programs that may not lend themselves to one-stop shopping. In addition, some projects may be complicated long-term projects and information may not be available for later phases. Thus, the later phases would be subject to consistency at a later date.

Sections 930.60(a)(1), (2) and (3) clarify when the consistency time clock may begin; the consequences of an incomplete certification; and State agency notice requirements to the

applicant and the Federal agency. Where the applicant has submitted an incomplete certification and the State begins the consistency time clock, the State agency cannot later stop the time clock unless the applicant agrees. Section 930.60(a)(2) requires State agencies to notify the applicant and the Federal agency of the date when necessary certification or information deficiencies have been corrected, and the State agency's review has begun. Subsection (a)(3) allows States and applicants to mutually agree to alter the review time period.

One Federal agency commented that "certification or information deficiencies" be replaced with "missing certification or information" and that a State agency should be able to determine if information is missing in 15 days, not 30 days. One State commented that a State agency and Federal agency should be able to agree to extend the six-month time period. Another State commented that a State should be able to stop the six-month consistency time period. Several States commented that this section should address the issue of whether there is an active federal permit application. One commenter implied that under the current regulations the Federal agency determines completeness for consistency and that this is changed in the new rule.

NOAA agrees that subsection (a)(1) refers to incomplete certifications or information, and not the adequacy of the information. Thus, "missing certification or information" replaces "deficiencies." NOAA believes that 30 days to determine completeness is reasonable given a project's complexity and some programs may need to check with networked agencies. This completeness check does not extend the six-month period, if submission is complete. Because this subpart affects applicants, the State agency and the Federal agency cannot change the review period without the applicant's agreement. The statute gives States six months to review. States cannot unilaterally stop, stay or otherwise alter the review period without an applicant's agreement. *See* section 930.51(f) regarding Federal agency acceptance and processing which applies to "active" federal applications. Current regulations do not allow the Federal agency to determine completeness for consistency review; only the State agency can make such a determination. If there is a disagreement, the parties can consult and seek mediation by NOAA. This is not changed in the revised regulations.

Section 930.61. One Federal agency commented that the rule should clarify who is responsible for conducting a public hearing. Two commenters offered word changes regarding "reasonable." Three States commented that electronic notification should be allowed. The environmental groups commented that electronic notification should not be the single form of notification. One commenter encouraged NOAA to require public hearings.

NOAA has specified that the State agency is responsible for public hearings and has inserted "reasonably" and removed "reasonable." This change is also made to section 930.78(a). Electronic notification cannot be the sole source of notification. This restriction is added to this section. *See* response to comments on section 930.42 for further discussion. The statute clearly provides that State agencies have the discretion to hold public hearings, thus NOAA cannot require public hearings. CZMA § 307(c)(3)(A).

Section 930.62 is deleted and part of it moved to section 930.61(a). The following section numbers in this subpart are renumbered. One State commented that NOAA should cross-reference section 930.60(a)(3). Another commenter encouraged NOAA to shorten the six-month review period. A cross reference is not needed and would be redundant. NOAA cannot shorten the six-month review period as it is set by statute, CZMA § 307(c)(3)(A).

Section 930.63(a) (redesignated as section 930.62(a)) is amended to clarify that a State agency's objection must be received before or on the last day of the six-month review period.

Section 930.62(c). Two commenters said that Federal agencies should delay denying permits, rather than processing permits. NOAA disagrees. The term "processing" is correct. While States are conducting their consistency review, Federal agencies can, and should, continue processing the federal application (but not approve) to avoid prolonging the federal process if a State concurs.

Section 930.62(d) is moved from section 930.64(c). Two commenters said to change "within three months" to "after three months." Several States commented that the three-month notification may be constructive, electronic, written or verbal.

NOAA has retained "within" three months as it is required by CZMA § 307(c)(3)(B). NOAA has also left the means of notification open as the State agency needs only to be able to document the actual notification. Notice must actual, not constructive notice.

Section 930.63. One commenter recommended that a local government coastal agency be allowed to object to a consistency certification, even if the State agency does not object. NOAA disagrees. Only the State agency can implement the State's federal consistency program. *See* sections 930.6 and 930.11(o).

Section 930.64(b) (redesignated as section 930.63(b)) is amended to clarify that State agency objections must be based on enforceable policies. Sections 930.63(b) and (d) are revised to clarify that identification of alternatives is an option for the State and to provide requirements on descriptions of alternatives if a State agency chooses to identify them. These changes recognize the fact that, even if an applicant proposes to adopt a State agency's alternative, the Federal agency cannot approve the project due to the State agency's objection. Thus, if an applicant wants the federal approval the applicant must consult with the State agency and the State agency must remove its objection, unless an applicant appeals to the Secretary and prevails.

Section 930.64(c) (redesignated as section 930.63(c)). One Federal agency commented that a State should not be able to object based on a lack of information, where the information is in addition to that required by section 930.58. NOAA disagrees. The information required by section 930.58 is the information needed to start the six-month review period. In most cases this information will provide the State agency with all information that the State agency needs for its review. However, the State agency may need additional information regarding coastal effects or the project's design during the period of the State agency's review. This information would allow the State to determine whether the activity will be consistent with the management program's enforceable policies.

Section 930.64(e) (redesignated as section 930.63(e)) is amended to clarify the notification of availability of the Secretarial override process. Since a concurrence with conditions may also become an objection, a conditional concurrence must also include similar appeal language. One State commented that this subsection refers to the CZMA as opposed to the CZMA as amended in 1990. NOAA disagrees. A reference to the "CZMA" is a reference to the existing statute. It is unnecessary to refer to various amendments.

Section 930.66 (redesignated as section 930.65) is amended to provide States with a more meaningful opportunity to address instances where the State agency claims that an activity

once found consistent or not affecting any coastal use or resource, is not being conducted as originally proposed and which will cause effects on a coastal use or resource substantially different than originally proposed. Previously, States could only request that the Federal agency take remedial action. If a Federal agency does not take remedial action the State agency can request that the Director find that the effects of the activity have substantially changed and require the applicant to submit an amended or new consistency certification and supporting information, or comply with the originally approved certification. This change mirrors the existing remedial action section of subpart E (*see* section 930.86) and, like section 930.86, is not expected to be used frequently. However, the procedure exists to ensure that federal license or permit activities continue to be conducted consistent with a management program.

Section 930.66 contains a supplemental coordination for proposed activities provision. *See* discussion of section 930.46.

*Subpart E—Consistency for Outer Continental Shelf (OCS) Exploration, Development and Production Activities*

Section 930.75(b) is deleted as redundant with the changes to section 930.76(b) and with section 930.58. One commenter urged that a local government coastal agency or a citizen could identify additional enforceable policies. NOAA disagrees. Only the State agency can provide a consistency response to an applicant, person or Federal agency and only the State agency can interpret the management program's enforceable policies, including local government policies that are part of the management program. *See* sections 930.6 and 930.11(o). A State agency can provide for public and local government input into its response.

Section 930.77 is deleted, because this information is redundant with section 930.58, which is referenced in section 930.76(b). The rest of the sections in this subpart are renumbered accordingly (with additional minor changes, mostly conforming with changes made in subpart D). One Federal agency commented that references to MMS regulations should be updated and noted that States should not be able to object based on a lack of information where the information is in addition to that required by section 930.58. One commenter recommended that a local government coastal agency be able to object.

The citations in section 930.77 have been updated. The information required by section 930.58 is the information needed to start the six-month review period. In most cases this information will provide the State agency with the information needed to complete its review. However, additional information may be needed regarding coastal effects or the project's design for purposes of the State agency's review.

Only the State agency can provide a consistency response to an applicant, person or Federal agency and only the State agency can interpret the management program's enforceable policies, including local government policies that are part of the management program. A State agency can provide for public and local government input into its interpretation or decision, but the local government cannot make the consistency decision. *See also* sections 930.6 and 930.11(o).

Section 930.78(b) is amended to require that the State agency's response must be received within the six-month response period.

Section 930.79(a). One Federal agency and one other commenter noted that the authority to require revisions to OCS plans rest with the Secretary of the Interior, not Commerce, through the OCSLA. NOAA agrees that the OCSLA and its implementing regulations provide specific directives regarding whether an amended plan is required and whether a consistency review is required for the amended plan.

Section 930.81. One Federal agency commented that language from section 930.62 regarding Federal agency processing should be repeated in subsection (b). One commenter voiced objection to "phasing" of OCS projects. Repeating section 930.62 is not necessary in this section since the procedural requirements of subpart D apply unless modified by subpart E. The section provides for sufficient State agency control of various OCS permits to prevent unwanted "phasing" as suggested by the comment. Thus, it is reasonable and fair to allow a person to obtain a permit with which the State agency has concurred.

Section 930.82. One Federal agency commented that the CZMA does not authorize NOAA to require OCS plan amendments. NOAA disagrees. This is an existing regulatory requirement and is mandated by the CZMA, CZMA § 307(c)(3)(B). Further, this section was clarified by adding that an amended plan is required, if the person still intends to proceed with the activity.

Sections 930.83(b)–(e) (currently section 930.84(b)–(e)) are deleted since they are unnecessary and are replaced

by the new reference in revised section 930.83. One Federal agency commented that the CZMA does not authorize NOAA to require plan amendments. One commenter recommended using a six-month review period instead of three months for plan amendments. NOAA disagrees. This is an existing regulatory requirement and is mandated by CZMA § 307(c)(3)(B). Further, section 930.82 was clarified by adding that an amended plan is required, if the person still intends to proceed with the activity. The three-month review period is required by the CZMA, and cannot be extended by rule to six months. *See* CZMA § 307(c)(3)(B).

Section 930.85. One Federal agency commented that the CZMA does not authorize NOAA to require a new or amended OCS plan. NOAA disagrees. Unlike the previous section where this comment was raised, section 930.82, the CZMA specifically requires an "amended" or "new" plan be submitted to the Secretary of the Interior. CZMA § 307(c)(3)(B). Section 930.85 is an existing section that facilitates such an occurrence.

*Subpart F—Consistency for Federal Assistance to State and Local Governments*

Section 930.94 is amended to clarify that all federal assistance activities that affect any coastal use or resource are subject to the consistency requirement. While the intergovernmental review process is the preferred method for notifying the State agency and for State agency review, the intergovernmental review process may not provide notification for all federal assistance activities subject to the consistency requirement. Sections 930.94(b) and 930.95 provide methods to ensure adequate notification and review, by specifying a listed and unlisted procedure. One State commented that subsection (a) should clarify how this subpart applies to applications for programmatic funding. Two States commented that the subpart should clarify that a State can object for lack of information. One Federal agency commented that subsection (b)(2) should be deleted, and subsection (b)(1) amended to reflect State flexibility in determining which Federal assistance activities will be subject to consistency through the listing procedure.

While it is not clear what the distinction is between programmatic and individual funding, the same consistency requirements would apply: effects test and consistency with enforceable policies. The basis for State agency objections under this subpart are the same as that for subpart D, section

930.63, as referenced in section 930.96(b). NOAA agrees that subsection (b)(2) be deleted and (b)(1) amended.

Section 930.94(c) is added to conform to the statutory requirement that the applicant agency provide an evaluation of consistency with enforceable policies. See CZMA § 307(d).

Sections 930.96(c)–(e) are deleted since the reference to section 930.63 in section 930.63(b) eliminates the need for these subsections. Two commenters recommended that the section clarify that Federal agencies not delay processing an application, “as long as they do not approve” the application, and that language regarding agreeing on conditions may be out of date due to section 930.4. One State commented that a time period for State review needs to be specified.

NOAA agrees that language should be added so that Federal agencies do not inadvertently approve funding pending State agency decisions. Section 930.96(a)(2) is still applicable, even with the addition of section 930.4. State agencies, applicant agencies and Federal agencies should always attempt to agree on conditions that meet both State and Federal requirements. This will provide the applicant agency with greater assurance of State and Federal approval. NOAA agrees that section 930.98(b) is redundant with section 930.97. Thus, section 930.98(b) is deleted. CZMA § 307(d) provides that review periods for federal assistance activities shall be determined pursuant to State intergovernmental review periods. Thus, the regulations do not specify a time period—that is left up to individual State law.

The unlisted activity procedure in section 930.98 follows the unlisted activity procedures found at section 930.54, except that Director approval is not required, because the State agency, through its monitoring and review of federal assistance activities, determines if coastal effects are reasonably foreseeable. Section 930.98(b) is deleted as it is redundant with section 930.97.

Section 930.100 is amended to provide States with more meaningful opportunity to address remedial action for previously reviewed activities. See discussion of section 930.65.

Section 930.101 contains a supplemental coordination for proposed activities provision. See discussion of section 930.46.

#### *Subpart G—Secretarial Mediation*

Only minor changes were made to subpart G. Subpart G provides a process for Federal agencies and coastal States to request that the Secretary of Commerce mediate serious disputes

regarding the federal consistency requirements. Subpart G also provides for more informal mediation by OCRM. Both Secretarial mediation and OCRM mediation require the participation of both agencies and are non-binding.

Section 930.110. One commenter said that including the word “negotiator” could be perceived as an advocate for the Federal agency. NOAA has deleted reference to “negotiation.” It was not the intent of this language to change NOAA’s role, but rather to refer to the next section on informal negotiations. However, to clarify NOAA’s mediation role, “negotiation” is removed from section 930.110, the title of section 930.111 is changed to “OCRM mediation,” and the title of section 930.112 is changed to “Request for Secretarial mediation.”

Section 930.113(a). One commenter said that public hearings should be required for Secretarial mediation. NOAA agrees. For Secretarial mediation the CZMA requires that the Secretary hold “public hearings which shall be conducted in the local area concerned.” CZMA § 307(h)(2). Thus, the language from the original regulations is retained.

#### *Subpart H—Appeal to the Secretary for Review Related to the Objectives of the Act and National Security Interests*

Pursuant to section 307 of the Act, no Federal agency may issue a license or permit for an activity until an affected coastal State has concurred that the activity will be conducted in a manner consistent with the management program unless the Secretary, on his own initiative or on appeal by the applicant, finds that the activity is consistent with the objectives of the Act or is otherwise necessary in the interest of national security. Subpart H sets forth the procedures applicable to such appeals and the requirements for such findings by the Secretary.

Changes were made to section 930.121(a) and (b) to ensure that the Secretary overrides a State’s objection only where the activity significantly or substantially furthers the national interest and that interest outweighs the adverse coastal effects of the activity. Several commenters noted that the changes would improve the appeal process. One commenter said that States are not required to undertake consistency reviews, and said that the criteria needs to be changed so that the Secretary is not substituting his judgement for that of the State when no compelling national interest is at stake, and that there must be a strong presumption in favor of upholding the State’s decision.

NOAA agrees that changes to this section are necessary to clarify the criteria established for the Secretarial override of State objections to consistency certifications. However, NOAA disagrees that the regulations need wholesale revision. The CZMA directs the Secretary to consider whether an activity that a State has determined to be inconsistent with the enforceable policies of its management program is nonetheless consistent with the objectives of the CZMA or otherwise necessary in the interest of national security. An activity is consistent with the objectives of the CZMA only if it satisfies *each* of the three (previously four) elements of section 930.121. The Secretary’s review is an independent assessment of the proposed activity and whether the proposed activity meets the objectives of the CZMA or is necessary in the interest of national security. The Secretary does not review the judgement of the State agency other than to ensure that the State’s objection was properly made within the requirements of subparts D, E, F and I. Although one of the central goals of the CZMA is to encourage State management of coastal resources, the Secretary’s review is available to ensure that proposals that further the national objectives articulated in the Act may be allowed to proceed notwithstanding their inconsistency with the enforceable policies of a management program. See also response to comment on section 930.3.

Section 930.121(a). Several States and the environmental groups commented that the phrase “one or more of” the CZMA objectives is inconsistent with the statutory language and is a mere checklist approach resulting in the appellant automatically satisfying this element. The regulatory language should refer to all the objectives. The States also commented that subsection (c) should be deleted. The States also commented that the phrase “de minimis” did not convey the importance of having the Secretary override a State’s objection only where there is a national interest in the CZMA objective being addressed. One Federal agency commented that “de minimis” was confusing.

NOAA agrees with the majority of commenters that Secretarial overrides should occur only where a project furthers the national interest in a significant or substantial way. Congress acknowledged a national objective in the “effective management, beneficial use, and development of the coastal zone” and specifically chose the States as the best vehicle to further this national interest. CZMA § 302(a). The

language and structure of §§ 302 and 303 make clear that Congress chose the States, in partnership with the federal government, to further the national interest “to preserve, protect, develop and where possible, to restore or enhance, the resources of the Nation’s coastal zone for this and succeeding generations.” CZMA § 303(1). The Secretarial review function is not intended to upend the State management structure by replacing the State agency’s decision with the Secretary’s, for projects which are essentially local government land use decisions and which do not significantly or substantially further the national interest in the CZMA’s objectives. The purpose of the Secretary’s review is to ensure that projects which do significantly or substantially further the national interest in the CZMA’s objectives, and where the national interest outweighs impacts to coastal uses and resources, may be federally approved notwithstanding their inconsistency with the enforceable policies of a management program. NOAA acknowledges the views of several commenters that the application of NOAA’s regulations has presented the Secretary with proposed activities that, while falling under the CZMA’s objectives, did not significantly or substantially contribute to the national interest in the CZMA objectives. This application of the regulations has created the appearance that the Secretary overlooked the intent of the Act to support the States’ use of section 307 to require that federal license or permit activities be consistent with federally approved management programs. The proposed rule attempted to address this concern and the final rule offers the further clarification requested by all commenters.

The proposed rule introduced the concept that a proposed activity have more than a *de minimis* relationship to the national objectives articulated in §§ 302 and 303 of the Act. As stated in the preamble to the proposed rule, the purpose of the change was to allow the Secretary to focus her review on activities of national concern not local land use issues with a minimal connection to the national goals of coastal resource management. 65 Fed. Reg. 20279. However, as all of the commenters pointed out, the use of *de minimis* as a descriptor was insufficient to convey the need to focus the Secretary’s review on proposed activities of a national import.

In response to these comments, NOAA has removed the phrase *de minimis* and replaced it with the phrase

“furthers the national interest \* \* \* in a significant or substantial manner” with the intent of emphasizing the need for an appellant to demonstrate that the proposed activity is of such import to the national goals for coastal resource management that, despite the will of State and local government decision makers, the Secretary of Commerce should independently review the proposed activity to determine its consistency with the CZMA. The final rule uses the same phrase as that contained in 930.121(b), “national interest,” instead of “one or more of the competing objectives and purposes” to clarify the necessity that a proposed activity have a national component to its furtherance of the policies and objectives of the Act.

By adding the words significantly and substantially to describe the degree to which the proposed activity advances the national interest, NOAA intends to emphasize the importance of the relationship between the activity and the national perspective of the goals articulated in §§ 302 and 303. The dictionary definition of substantial includes “considerable in importance, value, degree, amount or extent.” The American Heritage Dictionary, 1976. In other words, the activity must be more than related to one of the category of objectives described in §§ 302 or 303—it must contribute to the national achievement of those objectives in an important way or to a degree that has a value or impact on a national scale. The use of the word significant (which is defined as “important, notable, valuable”) is added to convey NOAA’s view that a project can be of national import without being quantifiably large in scale or impact on the national economy.

Requiring that a proposed activity demonstrate that it significantly or substantially furthers the national interest creates the appropriate relationship between the central objective of the CZMA to encourage State management of coastal resources and the Secretary’s role in ensuring the national interest is fully considered in the implementation of management programs. To determine whether a project significantly or substantially furthers the national interest, NOAA encourages appellants and States to consider three factors: (1) The degree to which the activity furthers the national interest; (2) the nature or importance of the national interest furthered as articulated in the CZMA; and (3) the extent to which the proposed activity is coastal dependent.

An example of an activity that significantly or substantially furthers

the national interest is the siting of energy facilities or OCS oil and gas development. Such activities are coastal dependent industries with economic implications beyond the immediate locality in which they are located. Some activities, such as a house, a restaurant, or a food store, may contribute to the economy of the coastal municipality or State, but are not coastal dependent and may not provide significant or substantial economic contributions to the national interest furthered by the objectives in §§ 302 and 303. It may be more difficult to discern whether other activities significantly or substantially further the national interest. For instance, a marina facility is coastal dependent, furthers the goals of the CZMA in public access and recreation on our coasts, but its economic effects may be purely local. Conversely, the addition of a runway to an international airport may significantly enhance the national economy while not being coastal dependent. Whether a project significantly or substantially furthers the national interest in the objectives of §§ 302 and 303, especially for the latter types of projects (the marina and airport examples), will depend on the Secretary’s decision record.

Section 930.121(b). Several States commented that the national interest in subsection (b) be a compelling national interest and one State commented that the revised language weakens the current language. One State did understand NOAA’s change by commenting that under the current regulation, subsection (b) can be read as meaning that if the State interest, or effects to coastal resources, and the national interest are equal, then the national interest in the activity will take precedence.

NOAA views many of the comments concerning the balancing of the national interest and the effects on coastal uses and resources to have been addressed by the change to section 930.121(a) requiring the proposed activity to further the national interest in a significant or substantial manner. See NOAA response above. In the final rule, NOAA reorganized the clauses in the proposed rule to address the concern that section 930.121(b) is grammatically ambiguous. It is not NOAA’s intent that the cumulative benefits of a proposed activity be weighed against coastal effects. Not only could this lead to the consideration of an endless stream of benefits from the flow of commerce, it could diminish one of the essential purposes of the CZMA to assist States in planning, restoring and conserving coastal resources. The reordered language is intended to make clear that

to override a State's objection the Secretary must find that the national interest found to be furthered in a significant or substantial manner in section 930.121(a), outweighs the potential individual or cumulative effects the proposed activity may have on coastal uses and resources.

Section 930.121(c). Several States and others commented that this section should be deleted, because any activity must comply with the requirements of the Clean Air and Water Acts. NOAA agrees. Removal of this criteria does not alter in any way the Secretary's obligation to evaluate and consider the potential adverse effects of a proposed activity on coastal air and water resources. NOAA will continue to seek the views and comments of the expert agencies charged with implementation of these statutes. The deletion of this criterion simply removes the obligation of the Secretary to develop an administrative finding that a proposed activity will or will not meet the requirements of the Clean Air Act and Clean Water Act. As the commenters point out, that obligation is fulfilled by other State and Federal agencies. As provided for in CZMA § 307(f), States must include water pollution control and air pollution control requirements in their management programs and those requirements may form the basis of a State objection.

Section 930.121(d) was amended to clarify the determination by the Secretary of the availability of alternatives. Currently, under the other elements of section 930.121, the Secretary may consider many factors when determining whether an appellant has met a particular element. Regarding the element on alternatives, there is confusion as to when alternatives may be raised, the consequences of a State agency not providing alternatives or when it issues its objection, and the level of specificity that the State agency needs to provide to satisfy the element on appeal. The changes to section 930.121(d) reflect the independent basis of the Secretary's decision by not restricting the scope of the Secretary's review. These changes will ensure that the Secretary's findings regarding alternatives will not be restricted, but will be informed and based on the Secretary's independent administrative record for each case. In this way, both the State and appellant will be able to provide the Secretary with information on whether an alternative is reasonable and described with sufficient specificity that might not have been available when the State issued its objection. Several States commented that this section should require that the activity can only

be done at the proposed location or that alternatives for other uses of the property be considered. One Federal agency commented that the Federal permitting agency's opinion be given considerable weight when determining whether an alternative is reasonable.

NOAA disagrees with the comments. NOAA intended this provision to make clear that there is a broad range of sources from which the Secretary may draw his examination of the alternatives to the activity as proposed. The Secretary is limited in consideration to reasonable alternatives that meet in whole or at least in part the appellant's purpose. The Secretary does not consider alternatives that are unrelated to or do not meet in some reasonable way the appellant's objective in proposing the activity. NOAA does not intend this provision to deter a State, or other parties, from proposing to move the proposed activity to another site to make better use of existing infrastructure. Nevertheless, alternatives must be "reasonable." NOAA disagrees that the new rule language diminishes or in any way affects the weight the Secretary accords the comments of Federal agencies.

Section 930.125 is revised to make it consistent with the 1990 amendments to the CZMA. The changes include the requirement that an appellant pay a filing fee to the Secretary.

Section 930.126 codifies and explains the statutory requirement for the Secretary to collect fees from appellants to recover the costs of administering and processing appeals. These fees are in addition to the filing fees. *See* CZMA § 307(i).

Section 930.127 clarifies when an appellant must submit supporting data and information. This requirement is necessary so that the Secretary can meet new time limits placed on the Secretary by the 1996 amendments to the CZMA. One commenter urged that rather than listing NOAA's address, it would be better to note a source for finding the correct address. NOAA disagrees. NOAA provides the address of the Assistant General Counsel for Ocean Services for the benefit of appellants using the regulations to form and file their appeals to the Secretary. This office has been in the same location for seven years, and if it moves, mail will be forwarded and the Code of Federal Regulations may be updated in due course.

Section 930.129(a)(6). One commenter objected to subsection (a)(6) regarding dismissal of appeals due to an improperly lodged State objection. One Federal agency commented that this language was confusing and should be

reworded such that if a State improperly lodges its objection, the Secretary would rule in favor of the appellant. NOAA agrees that the language is confusing and has modified the rule accordingly. In addition, this provision is now a separate provision to illustrate its difference with other grounds for dismissal. The purpose of this provision is improve the administration of the appeals process by addressing procedural deficiencies in the issuance of the State's objection early in the process before the parties and the Secretary have invested significant resources in the development of an administrative record. A State's objection is not properly issued if it fails to comply with the requirements of section 307 of the Act or with the regulations contained in subparts D, E, F and I. To dismiss an objection because the State has not followed the proper procedures is actually to override the State's objection on procedural grounds. In the event an appellant claims that a State objection has not been properly issued, the Secretary may review the question as a threshold matter and upon finding that the objection was not properly issued, may override the State's objection.

Section 930.129(d). One Federal agency commented that, while supporting this provision to remand significant new information to the State agency, a three month review period be imposed. One commenter said that this subsection would lengthen the process and be inconsistent with the 1996 CZMA amendments. One State commented that the State should have the full statutory time of six months to review significant new information.

The purpose of this part is to ensure that a State agency has an opportunity to review significant new information to determine whether in light of that new information a proposed project is consistent with the enforceable policies of its management program. The Secretarial review follows the requirements of section 930.121 and does not examine the proposed project for consistency with the management program. When new information is developed that is significant to issues raised by the State, it is appropriate for the Secretary to request the State to determine whether its objection continues or whether in light of the new information the proposed activity is consistent with the management program and the State objection can be removed. Increasingly, appeals to the Secretary result in the development of extensive administrative records containing information never reviewed by the State agency. This provision and

those in section 930.129(b) and (c) are intended to ensure that a State agency has an opportunity to reexamine a proposed activity when significant new information is developed or provided. In addition, NOAA added a time limitation on the remand to the State to a period of three (3) months, since the remand to the State is not another consistency review. Three months is sufficient time for the State agency to review the significant new material and determine if its objection still stands.

Section 930.131(a)(2). One State commented that the Secretary should not have the authority to override a State's objection when the State objected for lack of information. NOAA disagrees. The Secretary may override a State objection based on lack of information if she finds the administrative record before her provides sufficient information to make the findings required by section 930.121. There is no authority to the contrary. This section is moved to section 930.127(d).

Section 930.131 is amended to clarify the procedures applicable to reviews initiated by the secretary on his/her own initiative. Section 930.132(b) is superseded by section 8 of the Coastal Zone Protection Act of 1996, Pub. L. 104-150. Section 8 created a new § 319 of the CZMA concerning the timing of appeals which is reflected in new section 930.130.

Sections 930.133 and 134 are deleted, because these provisions are included in other sections of subpart H.

#### *Subpart I—Assistant Administrator Reporting and Review*

Existing subpart I is deleted. This subpart has never been used, and there are other existing CZMA mechanisms for reporting and review: oversight and monitoring under CZMA section 306, evaluations under CZMA § 312, appeals under CZMA § 307, and unlisted activity review approvals.

In addition, section 930.145 is revised and moved to section 930.3.

#### *Proposed Subpart I—Consistency of Federal Activities Having Interstate Coastal Effects*

The CZARA clarified that the federal consistency trigger is coastal effects, regardless of the geographic location of the federal activity. See CZMA § 307; Conference Report at 970-972. Thus, federal consistency applies to all relevant federal actions, even when they occur outside the State's coastal zone and in another State. For example, State A may review a federal permit application for an activity occurring wholly within State B if State A has a

federally approved coastal management program and the activity will have coastal effects. An example of this type of activity is the placement of a sewage outfall pipe in State B's waters that results in impacts to shellfish harvesting waters in State A. NOAA believes that regulations are needed so that the application of interstate consistency is carried out in a predictable, reasonable, and efficient manner. NOAA is specifically addressing interstate consistency to encourage neighboring States to cooperate in dealing with common resource management issues, and to provide States, permitting agencies, and the public with a more predictable application of the consistency requirement to these activities. Interstate resource management issues are best resolved on a cooperative, proactive basis.

Section 930.151. Two States and one other commenter commented that the CZMA does not authorize interstate consistency. One State commented that section 930.151 should be amended to include all federal activities to take into account activities in the Exclusive Economic Zone.

NOAA strongly disagrees with the comments stating that the CZMA does not authorize interstate consistency. The Secretary has previously made clear that the CZMA authorizes interstate consistency, upholding NOAA's long-standing position. For a detailed analysis on the CZMA and interstate consistency which responds to and refutes all the arguments raised by the commenters, see Secretary of Commerce, Decision and Findings in the Consistency Appeal of the Virginia Electric and Power Company from an Objection by the North Carolina Department of Environment, Health and Natural Resources, at vi and 9-18 (May 19, 1994), upheld in *North Carolina v. Brown*, Civil Action No. 94-1569 (TFH) (D.D.C. Sep. 27, 1994). This decision was based on a 1989 NOAA General Counsel opinion, the language of the CZMA and the Conference Report. See also 136 Cong. Rec. H 8077 (Sep. 26, 1990). At the time of the Secretary's 1994 decision, previous statements by the Army Corps of Engineers and the U.S. Department of Justice (Justice) that were contrary to NOAA's position were reconciled when Justice deferred to NOAA's interpretation of the CZMA regarding the application of consistency to an activity occurring in another State. Justice stated that, "we believe the department of Commerce is the agency with statutorily assigned responsibilities for administering the CZMA and therefore Commerce has the authority in the first instance to interpret the Act."

Letter from Webster L. Hubbell, Associate Attorney General, Justice, to Carol C. Darr, General Counsel, Commerce (Dec. 14, 1993).

Generally, an activity, regardless of its location, that requires federal approval is subject to the CZMA § 307(c)(3)(A). The CZMA requires that: "any applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall \* \* \* [certify] that the proposed activity complies with the enforceable policies of the state's approved program \* \* \*." CZMA § 307(c)(3)(A). Thus, federal consistency is triggered when an activity affects the coastal zone. Project location and political boundaries are, generally, irrelevant. The procedural and substantive dictates that allow the reviewing State to review an activity are the same, whether the activity is within its State boundaries, but outside the coastal zone; or located wholly in another State. Interstate consistency does not expand a coastal State's jurisdiction or affect the sovereignty of other States. Federal consistency applies only to federal actions, not State actions. If State A determines that an activity in State B would affect its coastal resources, but no federal permit or other federal action is required to undertake the activity, State A does not have any authority under the CZMA to review that activity. The CZMA also, even when there is a federal consistency trigger, does not give coastal States the authority to review the application of the laws, regulations, or policies of any other State. The CZMA only allows a State agency to review the federal approval of an activity.

This subpart deals with "interstate" activities. Thus, Federal agency activities or federal license or permit activities occurring in Federal waters are covered under subpart C and D.

Sections 930.153 and 154. One State commented that if a State followed the listing procedures why would the unlisted procedure be needed. One State objected to having to list interstate activities. One Federal agency and one State noted that the listing requirements are essential and fair.

The unlisted activity language is included in section 930.154(e) for two reasons: (1) To clarify that the unlisted procedure is not available until the State first goes through the listing procedure for those permits it wants to review, and (2) to clarify that the unlisted activity procedure is available, even after going through the listing procedure to ensure that the State agency has the opportunity to review activities with

coastal effects that were not foreseen at the time of listing.

A consistency list is a reasonable interpretation of the statute as a means of providing an orderly and predictable process. The proposed interstate consistency notification/consultation/listing procedure does not add a new program requirement. States are already required to have such lists and to define the geographic area outside the coastal zone where the lists will apply. Few States have described this geographic area. To meet the interstate requirement a State may choose to not change its list, but only to add an interstate geographic scope. The proposed procedure also does not mean that a State cannot review a type of federal activity; it means that the State must first consult with neighboring States and notify potential interstate applicants and federal agencies. This consultation procedure does not require that the State prove coastal effects or that neighboring States concur with the listing and geographic location description. Thus, NOAA does not believe that meeting this requirement is burdensome. NOAA believes that it is important that States must first go through the notification and listing procedure. Only then can a State review an interstate activity. This is necessary due to the often controversial nature of reviewing interstate activities. This will help ensure that interstate consistency reviews are carried out in a reliable, predictable and efficient manner, with notification to individuals in other States potentially subject to consistency review.

Sections 930.155(c), 156(a) and (b). One Federal agency commented that there is no statutory requirement for Federal agencies to coordinate with States in developing a proposed activity, beyond the coordination required under CZMA § 307. NOAA agrees. Sections 930.155(c) and 156(a) are deleted as other subparts provide the requirements for coordination through consistency determinations and consistency certifications.

### **VIII. Miscellaneous Rulemaking Requirements**

#### *Executive Order 12372: Intergovernmental Review*

This program is subject to Executive Order 12372.

#### *Executive Order 13132: Federalism Assessment*

NOAA concluded that this regulatory action is consistent with federalism principles, criteria, and requirements stated in Executive Order 13132. The

changes in the federal consistency regulations facilitate Federal agency coordination with coastal States, and ensure that federal actions affecting any coastal use or resource are consistent with the enforceable policies of management programs. The CZMA and these revised regulations promote the principles of federalism articulated in Executive Order 13132 by granting the States a qualified right to review certain federal activities that affect the land and water uses or natural resources of State coastal zones. CZMA § 307 and these regulations effectively transfer power from Federal agencies to State agencies when Federal agencies propose activities or applicants for federal licenses or permits propose to undertake activities affecting State coastal uses or resources. Through the CZMA, Federal agencies carry out their activities in a manner that is consistent to the maximum extent practicable with federally approved management programs and licensees and permittees to be fully consistent with the management programs. The CZMA and these implementing regulations, rather than preempting a State provide a mechanism for it to object to federal activities that are not consistent with the management program. A State objection prevents the issuance of the federal permit or license, unless the Secretary of Commerce overrides the objection. Because the CZMA and these regulations promote the principles of federalism and enhance State authorities, no federalism assessment need be prepared.

#### *Executive Order 12866: Regulatory Planning and Review*

This regulatory action has been determined to be not significant for purposes of Executive Order 12866.

#### *Regulatory Flexibility Act*

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration, when this rule was proposed, that the rule, if adopted, would not have a significant impact on a substantial number of small entities. One comment was received regarding the substance of that certification. One Federal agency commented that there may be additional factors, which may not have been adequately considered, that could have potential impacts on small businesses, and asked that NOAA consider this information. In particular, the infrastructure needed to explore and develop the OCS requires planning in advance of an expected drilling or construction date. For example, certain

types of infrastructure (such as specialized drilling rigs) are in limited supply, requiring that contracts be signed well before permitted activities commence. Many of the changes contemplated in the proposed rule involve new procedures, extensions of time for consistency review, and additional information collection and reporting requirements during the consistency review and appeals processes. These changes may cause unpredictability that could affect a substantial number of small businesses operating on the OCS. Currently, four out of five people who work on the OCS work for contractors, not large oil companies. Many of these contractors employ fewer than 500 people. The issues raised by the commenter were considered in the analysis that provided the factual basis for the certification. With respect to the issues raised in the comment, the analysis found that the changes contained in the proposed, and this final, rule regarding information, appeal and time requirements were minor. The conclusion in the analysis was that these changes should not have a significant economic impact on contractors for the applicant or cause unpredictability since these requirements are, for the most part, already part of doing business under the CZMA federal consistency requirement. Accordingly, the basis for the certification has not changed and neither an initial nor a final Regulatory Flexibility Analysis was prepared.

#### *Paperwork Reduction Act*

This rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA) and which has been approved by OMB under control number 0648-0411. Public reporting burden for this collection of information is estimated to average the following times per response: 8 hours for a State objection and concurrence to consistency certifications or determinations; 12 hours for a State request to review unlisted activities; 1 hour for a public notice requirement; 12 hours for a request for remedial action and supplemental review; 1 hour for a listing notice; 6 hours for a request for Secretarial mediation; and 200 hours for an average appeal to the Secretary of Commerce. These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for

reducing the burden, to NOAA and OMB (see **ADDRESSES**).

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a valid OMB Control Number.

#### *National Environmental Policy Act*

NOAA has concluded that this regulatory action is categorically excluded from NEPA as not having the potential for significant impact on the quality of the human environment pursuant to NAO 216–6.03c3(i). Therefore, an environmental impact statement is not required.

#### **List of Subjects in 15 CFR part 930**

Administrative practice and procedure, Coastal zone, Reporting and record keeping requirements.

Dated: November 30, 2000.

**John Oliver,**

*Chief Financial Officer, National Ocean Service.*

For the reasons set out in the preamble, NOAA has revised 15 CFR part 930 to read:

Final Revision of 15 C.F.R. part 930

### **PART 930—FEDERAL CONSISTENCY WITH APPROVED COASTAL MANAGEMENT PROGRAMS**

#### **Subpart A—General Information**

- 930.1 Overall objectives.
- 930.2 Public participation.
- 930.3 Review of the implementation of the federal consistency requirement.
- 930.4 Conditional concurrences.
- 930.5 State enforcement action.
- 930.6 State agency responsibility.

#### **Subpart B—General Definitions**

- 930.10 Index to definitions for terms defined in part 930.
- 930.11 Definitions.

#### **Subpart C—Consistency for Federal Agency Activities**

- 930.30 Objectives.
- 930.31 Federal agency activity.
- 930.32 Consistent to the maximum extent practicable.
- 930.33 Identifying Federal agency activities affecting any coastal use or resource.
- 930.34 Federal and State agency coordination.
- 930.35 Negative determinations for proposed activities.
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- 930.37 Consistency determinations and National Environmental Policy Act (NEPA) requirements.
- 930.38 Consistency determinations for activities initiated prior to management program approval.

- 930.39 Content of a consistency determination.
- 930.40 Multiple Federal agency participation.
- 930.41 State agency response.
- 930.42 Public participation.
- 930.43 State agency objection.
- 930.44 Availability of mediation for disputes concerning proposed activities.
- 930.45 Availability of mediation for previously reviewed activities.
- 930.46 Supplemental coordination for proposed activities.

#### **Subpart D—Consistency for Activities Requiring a Federal License or Permit**

- 930.50 Objectives.
- 930.51 Federal license or permit.
- 930.52 Applicant.
- 930.53 Listed federal license or permit activities.
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- 930.55 Availability of mediation for license or permit disputes.
- 930.56 State agency guidance and assistance to applicants.
- 930.57 Consistency certifications.
- 930.58 Necessary data and information.
- 930.59 Multiple permit review.
- 930.60 Commencement of State agency review.
- 930.61 Public participation.
- 930.62 State agency concurrence with a consistency certification.
- 930.63 State agency objection to a consistency certification.
- 930.64 Federal permitting agency responsibility.
- 930.65 Remedial action for previously reviewed activities.
- 930.66 Supplemental coordination for proposed activities.

#### **Subpart E—Consistency for Outer Continental Shelf (OCS) Exploration, Development and Production Activities**

- 930.70 Objectives.
- 930.71 Federal license or permit activity described in detail.
- 930.72 Person.
- 930.73 OCS plan.
- 930.74 OCS activities subject to State agency review.
- 930.75 State agency assistance to persons.
- 930.76 Submission of an OCS plan, necessary data and information and consistency certification.
- 930.77 Commencement of State agency review and public notice.
- 930.78 State agency concurrence or objection.
- 930.79 Effect of State agency concurrence.
- 930.80 Federal permitting agency responsibility.
- 930.81 Multiple permit review.
- 930.82 Amended OCS plans.
- 930.83 Review of amended OCS plans; public notice.
- 930.84 Continuing State agency objections.
- 930.85 Failure to comply substantially with an approved OCS plan.

#### **Subpart F—Consistency for Federal Assistance to State and Local Governments**

- 930.90 Objectives.
- 930.91 Federal assistance.

- 930.92 Applicant agency.
- 930.93 Intergovernmental review process.
- 930.94 State review process for consistency.
- 930.95 Guidance provided by the State agency.
- 930.96 Consistency review.
- 930.97 Federal assisting agency responsibility.
- 930.98 Federally assisted activities outside of the coastal zone or the described geographic area.
- 930.99 Availability of mediation for federal assistance disputes.
- 930.100 Remedial action for previously reviewed activities.
- 930.101 Supplemental coordination for proposed activities.

#### **Subpart G—Secretarial Mediation**

- 930.110 Objectives.
- 930.111 OCRM mediation.
- 930.112 Request for Secretarial mediation.
- 930.113 Public hearings.
- 930.114 Secretarial mediation efforts.
- 930.115 Termination of mediation.
- 930.116 Judicial review.

#### **Subpart H—Appeal to the Secretary for Review Related to the Objectives of the Act and National Security Interests**

- 930.120 Objectives.
- 930.121 Consistent with the objectives or purposes of the Act.
- 930.122 Necessary in the interest of national security.
- 930.123 Appellant and Federal agency.
- 930.124 Computation of time.
- 930.125 Notice of appeal and application fee to the Secretary.
- 930.126 Consistency appeal processing fees.
- 930.127 Briefs and supporting materials.
- 930.128 Public notice, comment period, and public hearing.
- 930.129 Dismissal, remand, stay and procedural override.
- 930.130 Closure of the decision record and issuance of decision.
- 930.131 Review initiated by the Secretary.

#### **Subpart I—Consistency of Federal Activities Having Interstate Coastal Effects**

- 930.150 Objectives.
- 930.151 Interstate coastal effect.
- 930.152 Application.
- 930.153 Coordination between States in developing coastal management policies.
- 930.154 Listing activities subject to interstate consistency review.
- 930.155 Federal and State agency coordination.
- 930.156 Content of a consistency determination or certification and State agency response.
- 930.157 Mediation and informal negotiations.

**Authority:** 16 U.S.C. 1451 *et seq.*

#### **Subpart A—General Information**

##### **§ 930.1 Overall objectives.**

The objectives of this part are:  
 (a) To describe the obligations of all parties who are required to comply with the federal consistency requirement of the Coastal Zone Management Act;

(b) To implement the federal consistency requirement in a manner which strikes a balance between the need to ensure consistency for federal actions affecting any coastal use or resource with the enforceable policies of approved management programs and the importance of federal activities;

(c) To provide flexible procedures which foster intergovernmental cooperation and minimize duplicative effort and unnecessary delay, while making certain that the objectives of the federal consistency requirement of the Act are satisfied. Federal agencies, State agencies, and applicants should coordinate as early as possible in developing a proposed federal action, and may mutually agree to intergovernmental coordination efforts to meet the requirements of these regulations, provided that public participation requirements are met and applicable State management program enforceable policies are considered.

(d) To interpret significant terms in the Act and this part;

(e) To provide procedures to make certain that all Federal agency and State agency consistency decisions are directly related to the enforceable policies of approved management programs;

(f) To provide procedures which the Secretary, in cooperation with the Executive Office of the President, may use to mediate serious disagreements which arise between Federal and State agencies during the administration of approved management programs; and

(g) To provide procedures which permit the Secretary to review federal license or permit activities, or federal assistance activities, to determine whether they are consistent with the objectives or purposes of the Act, or are necessary in the interest of national security.

#### **§ 930.2 Public participation.**

State management programs shall provide an opportunity for public participation in the State agency's review of a Federal agency's consistency determination or an applicant's or person's consistency certification.

#### **§ 930.3 Review of the implementation of the federal consistency requirement.**

As part of the responsibility to conduct a continuing review of approved management programs, the Director of the Office of Ocean and Coastal Resource Management (Director) shall review the performance of each State's implementation of the federal consistency requirement. The Director shall evaluate instances where a State agency is believed to have either failed

to object to inconsistent federal actions, or improperly objected to consistent federal actions. This evaluation shall be incorporated within the Director's general efforts to ascertain instances where a State has not adhered to its approved management program and such lack of adherence is not justified.

#### **§ 930.4 Conditional concurrences**

(a) Federal agencies, applicants, persons and applicant agencies should cooperate with State agencies to develop conditions that, if agreed to during the State agency's consistency review period and included in a Federal agency's final decision under subpart C or in a Federal agency's approval under subparts D, E, F or I of this part, would allow the State agency to concur with the federal action. If instead a State agency issues a conditional concurrence:

(1) The State agency shall include in its concurrence letter the conditions which must be satisfied, an explanation of why the conditions are necessary to ensure consistency with specific enforceable policies of the management program, and an identification of the specific enforceable policies. The State agency's concurrence letter shall also inform the parties that if the requirements of paragraphs (a)(1) through (3) of the section are not met, then all parties shall treat the State agency's conditional concurrence letter as an objection pursuant to the applicable subpart and notify, pursuant to § 930.63(e), applicants, persons and applicant agencies of the opportunity to appeal the State agency's objection to the Secretary of Commerce within 30 days after receipt of the State agency's conditional concurrence/objection or 30 days after receiving notice from the Federal agency that the application will not be approved as amended by the State agency's conditions; and

(2) The Federal agency (for subpart C), applicant (for subparts D and I), person (for subpart E) or applicant agency (for subpart F) shall modify the applicable plan, project proposal, or application to the Federal agency pursuant to the State agency's conditions. The Federal agency, applicant, person or applicant agency shall immediately notify the State agency if the State agency's conditions are not acceptable; and

(3) The Federal agency (for subparts D, E, F and I) shall approve the amended application (with the State agency's conditions). The Federal agency shall immediately notify the State agency and applicant or applicant agency if the Federal agency will not approve the application as amended by the State agency's conditions.

(b) If the requirements of paragraphs (a)(1) through (3) of this section are not met, then all parties shall treat the State agency's conditional concurrence as an objection pursuant to the applicable subpart.

#### **§ 930.5 State enforcement action.**

The regulations in this part are not intended in any way to alter or limit other legal remedies, including judicial review or State enforcement, otherwise available. State agencies and Federal agencies should first use the various remedial action and mediation sections of this part to resolve their differences or to enforce State agency concurrences or objections.

#### **§ 930.6 State agency responsibility.**

(a) This section describes the responsibilities of the "State agency" described in § 930.11(o). A designated State agency is required to uniformly and comprehensively apply the enforceable policies of the State's management program, efficiently coordinate all State coastal management requirements, and to provide a single point of contact for Federal agencies and the public to discuss consistency issues. Any appointment by the State agency of the State's consistency responsibilities to a designee agency must be described in the State's management program. In the absence of such description, all consistency determinations, consistency certifications and federal assistance proposals shall be sent to and reviewed by the State agency. A State may have two State agencies designated pursuant to § 306(d)(6) of the Act where the State has two geographically separate federally-approved management programs.

(b) The State agency is responsible for commenting on and concurring with or objecting to Federal agency consistency determinations and negative determinations (*see* subpart C of this part), consistency certifications for federal licenses, permits, and Outer Continental Shelf plans (*see* subparts D, E and I of this part), and reviewing the consistency of federal assistance activities proposed by applicant agencies (*see* subpart F of this part). The State agency shall be responsible for securing necessary review and comment from other State, regional, or local government agencies, and, where applicable, the public. Thereafter, only the State agency is authorized to comment officially on or concur with or object to a federal consistency determination or negative determination, a consistency certification, or determine the

consistency of a proposed federal assistance activity.

(c) If described in a State's management program, the issuance or denial of relevant State permits can constitute the State agency's consistency concurrence or objection if the State agency ensures that the State permitting agencies or the State agency review individual projects to ensure consistency with all applicable State management program policies and that applicable public participation requirements are met. The State agency shall monitor such permits issued by another State agency.

**Subpart B—General Definitions**

**§ 930.10 Index to definitions for terms defined in part 930.**

Term	Section
Act .....	930.11(a)
Any coastal use or resource .....	930.11(b)
Appellant .....	930.123
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**§ 930.11 Definitions.**

(a) *Act*. The term "Act" means the Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1451–1464).

(b) *Any coastal use or resource*. The phrase "any coastal use or resource" means any land or water use or natural resource of the coastal zone. Land and water uses, or coastal uses, are defined in sections 304(10) and (18) of the act, respectively, and include, but are not

limited to, public access, recreation, fishing, historic or cultural preservation, development, hazards management, marinas and floodplain management, scenic and aesthetic enjoyment, and resource creation or restoration projects. Natural resources include biological or physical resources that are found within a State's coastal zone on a regular or cyclical basis. Biological and physical resources include, but are not limited to, air, tidal and nontidal wetlands, ocean waters, estuaries, rivers, streams, lakes, aquifers, submerged aquatic vegetation, land, plants, trees, minerals, fish, shellfish, invertebrates, amphibians, birds, mammals, reptiles, and coastal resources of national significance. Coastal uses and resources also includes uses and resources appropriately described in a management program.

(c) *Assistant Administrator*. The term "Assistant Administrator" means the Assistant Administrator for Ocean Services and Coastal Zone Management, NOAA.

(d) *Associated facilities*. The term "associated facilities" means all proposed facilities which are specifically designed, located, constructed, operated, adapted, or otherwise used, in full or in major part, to meet the needs of a federal action (e.g., activity, development project, license, permit, or assistance), and without which the federal action, as proposed, could not be conducted. The proponent of a federal action shall consider whether the federal action and its associated facilities affect any coastal use or resource and, if so, whether these interrelated activities satisfy the requirements of the applicable subpart (subparts C, D, E, F or I).

(e) *Coastal Zone*. The term "coastal zone" has the same definition as provided in § 304(1) of the Act.

(f) *Director*. The term "Director" means the Director of the Office of Ocean and Coastal Resource Management (OCRM), National Ocean Service, NOAA.

(g) *Effect on any coastal use or resource (coastal effect)*. The term "effect on any coastal use or resource" means any reasonably foreseeable effect on any coastal use or resource resulting from a federal action. (The term "federal action" includes all types of activities subject to the federal consistency requirement under subparts C, D, E, F and I of this part.) Effects are not just environmental effects, but include effects on coastal uses. Effects include both direct effects which result from the activity and occur at the same time and place as the activity, and indirect (cumulative and secondary) effects which result from the activity and are

later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects are effects resulting from the incremental impact of the federal action when added to other past, present, and reasonably foreseeable actions, regardless of what person(s) undertake(s) such actions.

(h) *Enforceable policy*. "The term "enforceable policy" means State policies which are legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions, by which a State exerts control over private and public land and water uses and natural resources in the coastal zone," 16 USC 1453(6a), and which are incorporated in a management program as approved by OCRM either as part of program approval or as a program change under 15 CFR part 923, subpart H. An enforceable policy shall contain standards of sufficient specificity to guide public and private uses. Enforceable policies need not establish detailed criteria such that a proponent of an activity could determine the consistency of an activity without interaction with the State agency. State agencies may identify management measures which are based on enforceable policies, and, if implemented, would allow the activity to be conducted consistent with the enforceable policies of the program. A State agency, however, must base its objection on enforceable policies.

(i) *Executive Office of the President*. The term "Executive Office of the President" means the office, council, board, or other entity within the Executive Office of the President which shall participate with the Secretary in seeking to mediate serious disagreements which may arise between a Federal agency and a coastal State.

(j) *Federal agency*. The term "Federal agency" means any department, agency, board, commission, council, independent office or similar entity within the executive branch of the federal government, or any wholly owned federal government corporation.

(k) *Management program*. The term "management program" has the same definition as provided in section 304(12) of the Act, except that for the purposes of this part the term is limited to those management programs adopted by a coastal State in accordance with the provisions of section 306 of the Act, and approved by the Assistant Administrator.

(l) *OCRM*. The term "OCRM" means the Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration

(“NOAA”), U.S. Department of Commerce.

(m) *Secretary*. The term “Secretary” means the Secretary of Commerce and/or designee.

(n) *Section*. The term “Section” means a section of the Coastal Zone Management Act of 1972, as amended.

(o) *State agency*. The term “State agency” means the agency of the State government designated pursuant to section 306(d)(6) of the Act to receive and administer grants for an approved management program, or a single designee State agency appointed by the 306(d)(6) State agency.

### Subpart C—Consistency for Federal Agency Activities

#### § 930.30 Objectives.

The provisions of this subpart are intended to assure that all Federal agency activities including development projects affecting any coastal use or resource will be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of approved management programs. The provisions of subpart I of this part are intended to supplement the provisions of this subpart for Federal agency activities having interstate coastal effects.

#### § 930.31 Federal agency activity.

(a) The term “Federal agency activity” means any functions performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities. This encompasses a wide range of Federal agency activities which initiate an event or series of events where coastal effects are reasonably foreseeable, *e.g.*, rulemaking, planning, physical alteration, exclusion of uses. The term “Federal agency activity” does not include the issuance of a federal license or permit to an applicant or person (*see* subparts D and E of this part) or the granting of federal assistance to an applicant agency (*see* subpart F of this part).

(b) The term federal “development project” means a Federal agency activity involving the planning, construction, modification, or removal of public works, facilities, or other structures, and includes the acquisition, use, or disposal of any coastal use or resource.

(c) The Federal agency activity category is a residual category for federal actions that are not covered under subparts D, E, or F of this part.

(d) A general permit program proposed by a Federal agency is subject to this subpart if the general permit program does not involve case-by-case approval by the Federal agency, unless

a Federal agency chooses to subject its general permit program to consistency review under subpart D of this part, by providing the State agency with a consistency certification. When proposing a general permit program, a Federal agency shall provide a consistency determination to the relevant management programs and request that the State agency(ies) provide the Federal agency with conditions that would permit the State agency to concur with the Federal agency’s consistency determination. State concurrence shall remove the need for the State agency to review future case-by-case uses of the general permit for consistency with the enforceable policies of management programs. Federal agencies shall, to the maximum extent practicable, incorporate the State conditions into the general permit. If the State conditions are not incorporated into the general permit or a State agency objects to the general permit, then the Federal agency shall notify potential users of the general permit that the general permit is not authorized for that State unless the State agency concurs that the activity is consistent with the enforceable policies of its management program. Accordingly, the applicants in those States shall provide the State agency with a consistency certification under subpart D of this part.

(e) The terms “Federal agency activity” and “Federal development project” also include modifications of any such activity or development project which affect any coastal use or resource, provided that, in the case of modifications of an activity or development project which the State agency has previously reviewed, the effect on any coastal use or resource is substantially different than those previously reviewed by the State agency.

#### § 930.32 Consistent to the maximum extent practicable.

(a)(1) The term “consistent to the maximum extent practicable” means fully consistent with the enforceable policies of management programs unless full consistency is prohibited by existing law applicable to the Federal agency.

(2) Section 307(e) of the Act does not relieve Federal agencies of the consistency requirements under the Act. The Act was intended to cause substantive changes in Federal agency decisionmaking within the context of the discretionary powers residing in such agencies. Accordingly, whenever legally permissible, Federal agencies shall consider the enforceable policies of management programs as

requirements to be adhered to in addition to existing Federal agency statutory mandates. If a Federal agency asserts that full consistency with the management program is prohibited, it shall clearly describe, in writing, to the State agency the statutory provisions, legislative history, or other legal authority which limits the Federal agency’s discretion to be fully consistent with the enforceable policies of the management program.

(3) For the purpose of determining consistent to the maximum extent practicable under paragraphs (a)(1) and (2) of this section, federal legal authority includes Federal appropriation Acts if the appropriation Act includes language that specifically prohibits full consistency with specific enforceable policies of management programs. Federal agencies shall not use a general claim of a lack of funding or insufficient appropriated funds or failure to include the cost of being fully consistent in Federal budget and planning processes as a basis for being consistent to the maximum extent practicable with an enforceable policy of a management program. The only circumstance where a Federal agency may rely on a lack of funding as a limitation on being fully consistent with an enforceable policy is the Presidential exemption described in section 307(c)(1)(B) of the Act (16 USC 1456(c)(1)(B)). In cases where the cost of being consistent with the enforceable policies of a management program was not included in the Federal agency’s budget and planning processes, the Federal agency should determine the amount of funds needed and seek additional federal funds. Federal agencies should include the cost of being fully consistent with the enforceable policies of management programs in their budget and planning processes, to the same extent that a Federal agency would plan for the cost of complying with other federal requirements.

(b) A Federal agency may deviate from full consistency with an approved management program when such deviation is justified because of an emergency or other similar unforeseen circumstance (“exigent circumstance”), which presents the Federal agency with a substantial obstacle that prevents complete adherence to the approved program. Any deviation shall be the minimum necessary to address the exigent circumstance. Federal agencies shall carry out their activities consistent to the maximum extent practicable with the enforceable policies of a management program, to the extent that the exigent circumstance allows. Federal agencies shall consult with

State agencies to the extent that an exigent circumstance allows and shall attempt to seek State agency concurrence prior to addressing the exigent circumstance. Once the exigent circumstances have passed, and if the Federal agency is still carrying out an activity with coastal effects, Federal agencies shall comply with all applicable provisions of this subpart to ensure that the activity is consistent to the maximum extent practicable with the enforceable policies of management programs. Once the Federal agency has addressed the exigent circumstance or completed its emergency response activities, it shall provide the State agency with a description of its actions and their coastal effects.

(c) A classified activity that affects any coastal use or resource is not exempt from the requirements of this subpart, unless the activity is exempted by the President under section 307(c)(1)(B) of the Act. Under the consistent to the maximum extent practicable standard, the Federal agency shall provide to the State agency a description of the project and coastal effects that it is legally permitted to release or does not otherwise breach the classified nature of the activity. Even when a Federal agency may not be able to disclose project information, the Federal agency shall conduct the classified activity consistent to the maximum extent practicable with the enforceable policies of management programs. The term classified means to protect from disclosure national security information concerning the national defense or foreign policy, provided that the information has been properly classified in accordance with the substantive and procedural requirements of an executive order. Federal and State agencies are encouraged to agree on a qualified third party(ies) with appropriate security clearance(s) to review classified information and to provide non-classified comments regarding the activity's reasonably foreseeable coastal effects.

**§ 930.33 Identifying Federal agency activities affecting any coastal use or resource.**

(a) Federal agencies shall determine which of their activities affect any coastal use or resource of States with approved management programs.

(1) Effects are determined by looking at reasonably foreseeable direct and indirect effects on any coastal use or resource. An action which has minimal or no environmental effects may still have effects on a coastal use (e.g., effects on public access and recreational

opportunities, protection of historic property) or a coastal resource, if the activity initiates an event or series of events where coastal effects are reasonably foreseeable. Therefore, Federal agencies shall, in making a determination of effects, review relevant management program enforceable policies as part of determining effects on any coastal use or resource.

(2) If the Federal agency determines that a Federal agency activity has no effects on any coastal use or resource, and a negative determination under § 930.35 is not required, then the Federal agency is not required to coordinate with State agencies under section 307 of the Act.

(3) (i) *De minimis* Federal agency activities. Federal agencies are encouraged to review their activities, other than development projects within the coastal zone, to identify *de minimis* activities, and request State agency concurrence that these *de minimis* activities should not be subject to further State agency review. *De minimis* activities shall only be excluded from State agency review if a Federal agency and State agency have agreed. The State agency shall provide for public participation under section 306(d)(14) of the Act when reviewing the Federal agency's *de minimis* activity request. If the State agency objects to the Federal agency's *de minimis* finding then the Federal agency must provide the State agency with either a negative determination or a consistency determination pursuant to this subpart. OCRM is available to facilitate a Federal agency's request.

(ii) *De minimis* activities are activities that are expected to have insignificant direct or indirect (cumulative and secondary) coastal effects and which the State agency concurs are *de minimis*.

(4) *Environmentally beneficial activities*. The State agency and Federal agencies may agree to exclude environmentally beneficial Federal agency activities (either on a case-by-case basis or for a category of activities) from further State agency consistency review. Environmentally beneficial activity means an activity that protects, preserves, or restores the natural resources of the coastal zone. The State agency shall provide for public participation under section 306(d)(14) of the Act for the State agency's consideration of whether to exclude environmentally beneficial activities.

(5) General consistency determinations, phased consistency determinations, and national or regional consistency determinations under § 930.36 are also available to facilitate federal-State coordination.

(b) Federal agencies shall consider all development projects within the coastal zone to be activities affecting any coastal use or resource. All other types of activities within the coastal zone are subject to Federal agency review to determine whether they affect any coastal use or resource.

(c)(1) Federal agency activities and development projects outside of the coastal zone, are subject to Federal agency review to determine whether they affect any coastal use or resource.

(d) Federal agencies shall broadly construe the effects test to provide State agencies with a consistency determination under § 930.34 and not a negative determination under § 930.35 or other determinations of no effects. Early coordination and cooperation between a Federal agency and the State agency can enable the parties to focus their efforts on particular Federal agency activities of concern to the State agency.

**§ 930.34 Federal and State agency coordination.**

(a)(1) Federal agencies shall provide State agencies with consistency determinations for all Federal agency activities affecting any coastal use or resource. To facilitate State agency review, Federal agencies should coordinate with the State agency prior to providing the determination.

(2) *Use of existing procedures*. Federal agencies are encouraged to coordinate and consult with State agencies through use of existing procedures in order to avoid waste, duplication of effort, and to reduce Federal and State agency administrative burdens. Where necessary, these existing procedures should be modified to facilitate coordination and consultation under the Act.

(b) *Listed activities*. State agencies are strongly encouraged to list in their management programs Federal agency activities which, in the opinion of the State agency, will have reasonably foreseeable coastal effects and therefore, may require a Federal agency consistency determination. Listed Federal agency activities shall be described in terms of the specific type of activity involved (e.g., federal reclamation projects). In the event the State agency chooses to describe Federal agency activities that occur outside of the coastal zone, which the State agency believes will have reasonably foreseeable coastal effects, it shall also describe the geographic location of such activities (e.g., reclamation projects in coastal floodplains).

(c) *Unlisted activities*. State agencies should monitor unlisted Federal agency

activities (e.g., by use of intergovernmental review process established pursuant to E.O. 12372, review of NEPA documents, and the **Federal Register**) and should notify Federal agencies of unlisted Federal agency activities which Federal agencies have not subjected to a consistency review but which, in the opinion of the State agency, will have reasonably foreseeable coastal effects and therefore, may require a Federal agency consistency determination. The provisions in paragraphs (b) and (c) of this section are recommended rather than mandatory procedures for facilitating federal-State coordination of Federal agency activities which affect any coastal use or resource. State agency notification to the Federal agency (by listed or unlisted notification) is neither a substitute for nor does it eliminate Federal agency responsibility to comply with the consistency requirement, and to provide State agencies with consistency determinations for all development projects in the coastal zone and for all other Federal agency activities which the Federal agency finds affect any coastal use or resource, regardless of whether the State agency has listed the activity or notified the Federal agency through case-by-case monitoring.

(d) *State guidance and assistance to Federal agencies.* As a preliminary matter, a decision that a Federal agency activity affects any coastal use or resource should lead to early consultation with the State agency (i.e., before the required 90-day period). Federal agencies should obtain the views and assistance of the State agency regarding the means for determining that the proposed activity will be conducted in a manner consistent to the maximum extent practicable with the enforceable policies of a management program. As part of its assistance efforts, the State agency shall make available for public inspection copies of the management program document. Upon request by the Federal agency, the State agency shall identify any enforceable policies applicable to the proposed activity based upon the information provided to the State agency at the time of the request.

**§ 930.35 Negative determinations for proposed activities.**

(a) If a Federal agency determines that there will not be coastal effects, then the Federal agency shall provide the State agencies with a negative determination for a Federal agency activity:

(1) Identified by a State agency on its list, as described in § 930.34(b), or

through case-by-case monitoring of unlisted activities; or

(2) Which is the same as or is similar to activities for which consistency determinations have been prepared in the past; or

(3) For which the Federal agency undertook a thorough consistency assessment and developed initial findings on the coastal effects of the activity.

(b) *Content of a negative determination.* A negative determination may be submitted to State agencies in any written form so long as it contains a brief description of the activity, the activity's location and the basis for the Federal agency's determination that the activity will not affect any coastal use or resource. In determining effects, Federal agencies shall follow § 930.33(a)(1), including an evaluation of the relevant enforceable policies of a management program and include the evaluation in the negative determination. The level of detail in the Federal agency's analysis may vary depending on the scope and complexity of the activity and issues raised by the State agency, but shall be sufficient for the State agency to evaluate whether coastal effects are reasonably foreseeable.

(c) A negative determination under paragraph (a) of this section shall be provided to the State agency at least 90 days before final approval of the activity, unless both the Federal agency and the State agency agree to an alternative notification schedule. A State agency is not obligated to respond to a negative determination. If a State agency does not respond to a Federal agency's negative determination within 60 days, State agency concurrence with the negative determination shall be presumed. State agency concurrence shall not be presumed in cases where the State agency, within the 60-day period, requests an extension of time to review the matter. Federal agencies shall approve one request for an extension period of 15 days or less. If a State agency objects to a negative determination, asserting that coastal effects are reasonably foreseeable, the Federal agency shall consider submitting a consistency determination to the State agency or otherwise attempt to resolve any disagreement within the remainder of the 90-day period. If a Federal agency, in response to a State agency's objection to a negative determination, agrees that coastal effects are reasonably foreseeable, the State agency and Federal agency should attempt to agree to complete the consistency review within the 90-day period for the negative determination or

consider an alternative schedule pursuant to § 930.36(b)(1). Federal agencies should consider postponing final Federal agency action, beyond the 90-day period, until a disagreement has been resolved. State agencies are not required to provide public notice of the receipt of a negative determination or the resolution of an objection to a negative determination, unless a Federal agency submits a consistency determination pursuant to § 930.34.

(d) In the event of a serious disagreement between a Federal agency and a State agency regarding a determination related to whether a proposed activity affects any coastal use or resource, either party may seek the Secretarial mediation or OCRM mediation services provided for in subpart G.

**§ 930.36 Consistency determinations for proposed activities.**

(a) Federal agencies shall review their proposed Federal agency activities which affect any coastal use or resource in order to develop consistency determinations which indicate whether such activities will be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of approved management programs. Federal agencies should consult with State agencies at an early stage in the development of the proposed activity in order to assess whether such activities will be consistent to the maximum extent practicable with the enforceable policies of such programs.

(b) *Timing of consistency determinations.* (1) Federal agencies shall provide State agencies with a consistency determination at the earliest practicable time in the planning or reassessment of the activity. A consistency determination should be prepared following development of sufficient information to reasonably determine the consistency of the activity with the management program, but before the Federal agency reaches a significant point of decisionmaking in its review process, i.e., while the Federal agency has the ability to modify the activity. The consistency determination shall be provided to State agencies at least 90 days before final approval of the Federal agency activity unless both the Federal agency and the State agency agree to an alternative notification schedule.

(2) Federal and State agencies may mutually agree upon procedures for extending the notification requirement beyond 90 days for activities requiring a substantial review period, and for shortening the notification period for

activities requiring a less extensive review period, provided that public participation requirements are met.

(c) *General consistency determinations.* In cases where Federal agencies will be performing repeated activity other than a development project (e.g., ongoing maintenance, waste disposal) which cumulatively has an effect upon any coastal use or resource, the Federal agency may develop a general consistency determination, thereby avoiding the necessity of issuing separate consistency determinations for each incremental action controlled by the major activity. A Federal agency may provide a State agency with a general consistency determination only in situations where the incremental actions are repetitive and do not affect any coastal use or resource when performed separately. A Federal agency and State agency may mutually agree on a general consistency determination for de minimis activities (see § 930.33(a)(3)) or any other repetitive activity or category of activity(ies). If a Federal agency issues a general consistency determination, it shall thereafter periodically consult with the State agency to discuss the manner in which the incremental actions are being undertaken.

(d) *Phased consistency determinations.* In cases where the Federal agency has sufficient information to determine the consistency of a proposed development project or other activity from planning to completion, the Federal agency shall provide the State agency with one consistency determination for the entire activity or development project. In cases where federal decisions related to a proposed development project or other activity will be made in phases based upon developing information that was not available at the time of the original consistency determination, with each subsequent phase subject to Federal agency discretion to implement alternative decisions based upon such information (e.g., planning, siting, and design decisions), a consistency determination will be required for each major decision. In cases of phased decisionmaking, Federal agencies shall ensure that the development project or other activity continues to be consistent to the maximum extent practicable with the management program.

(e) *National or regional consistency determinations.* (1) A Federal agency may provide States with consistency determinations for Federal agency activities that are national or regional in scope (e.g., rulemaking, national plans), and that affect any coastal use or resource of more than one State. Many

States share common coastal management issues and have similar enforceable policies, e.g., protection of a particular coastal resource. The Federal agency's national or regional consistency determination should, at a minimum, address the common denominator of these policies, i.e., the common coastal effects and management issues, and thereby address different States' policies with one discussion and determination. If a Federal agency decides not to use this section, it must issue consistency determinations to each State agency pursuant to § 930.39.

(2) Federal agency activities with coastal effects shall be consistent to the maximum extent practicable with the enforceable policies of each State's management program. Thus, the Federal agency's national or regional consistency determination shall contain sections that would apply to individual States to address coastal effects and enforceable policies unique to particular States, if common coastal effects and enforceable policies cannot be addressed under paragraph (e)(1). Early coordination with coastal States will enable the Federal agency to identify particular coastal management concerns and policies. In addition, the Federal agency could address the concerns of each affected State by providing for State conditions for the proposed activity. Further, the consistency determination could identify the coordination efforts and describe how the Federal agency responded to State agency concerns.

**§ 930.37 Consistency determinations and National Environmental Policy Act (NEPA) requirements**

A Federal agency may use its NEPA documents as a vehicle for its consistency determination or negative determination under this subpart. However, a Federal agency's federal consistency obligations under the Act are independent of those required under NEPA and are not necessarily fulfilled by the submission of a NEPA document. If a Federal agency includes its consistency determination or negative determination in a NEPA document, the Federal agency shall ensure that the NEPA document includes the information and adheres to the timeframes required by this subpart. Federal agencies and State agencies should mutually agree on how to best coordinate the requirements of NEPA and the Act.

**§ 930.38 Consistency determinations for activities initiated prior to management program approval.**

(a) A consistency determination is required for ongoing Federal agency activities other than development projects initiated prior to management program approval, which are governed by statutory authority under which the Federal agency retains discretion to reassess and modify the activity. In these cases the consistency determination must be made by the Federal agency at the earliest practicable time following management program approval, and the State agency must be provided with a consistency determination no later than 120 days after management program approval for ongoing activities which the State agency lists or identifies through monitoring as subject to consistency with the management program.

(b) A consistency determination is required for major, phased federal development project decisions described in § 930.36(d) which are made following management program approval and are related to development projects initiated prior to program approval. In making these new decisions, Federal agencies shall consider effects on any coastal use or resource not fully evaluated at the outset of the project. This provision shall not apply to phased federal decisions which were specifically described, considered and approved prior to management program approval (e.g., in a final environmental impact statement issued pursuant to NEPA).

**§ 930.39 Content of a consistency determination.**

(a) The consistency determination shall include a brief statement indicating whether the proposed activity will be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of the management program. The statement must be based upon an evaluation of the relevant enforceable policies of the management program. A description of this evaluation shall be included in the consistency determination, or provided to the State agency simultaneously with the consistency determination if the evaluation is contained in another document. Where a Federal agency is aware, prior to its submission of its consistency determination, that its activity is not fully consistent with a management program's enforceable policies, the Federal agency shall describe in its consistency determination the legal authority that prohibits full consistency as required by

§ 930.32(a)(2). Where the Federal agency is not aware of any inconsistency until after submission of its consistency determination, the Federal agency shall submit its description of the legal authority that prohibits full consistency to the State agency as soon as possible, or before the end of the 90-day period described in § 930.36(b)(1). The consistency determination shall also include a detailed description of the activity, its associated facilities, and their coastal effects, and comprehensive data and information sufficient to support the Federal agency's consistency statement. The amount of detail in the evaluation of the enforceable policies, activity description and supporting information shall be commensurate with the expected coastal effects of the activity. The Federal agency may submit the necessary information in any manner it chooses so long as the requirements of this subpart are satisfied.

(b) Federal agencies shall be guided by the following in making their consistency determinations. The activity its effects on any coastal use or resource, associated facilities (e.g., proposed siting and construction of access road, connecting pipeline, support buildings, and the effects of the associated facilities (e.g., erosion, wetlands, beach access impacts), must all be consistent to the maximum extent practicable with the enforceable policies of the management program.

(c) In making their consistency determinations, Federal agencies shall ensure that their activities are consistent to the maximum extent practicable with the enforceable, policies of the management program. However, Federal agencies should give consideration to management program provisions which are in the nature of recommendations.

(d) When Federal agency standards are more restrictive than standards or requirements contained in the management program, the Federal agency may continue to apply its stricter standards. In such cases the Federal agency shall inform the State agency in the consistency determination of the statutory, regulatory or other basis for the application of the stricter standards.

(e) *State permit requirements.* Federal law, other than the CZMA, may require a Federal agency to obtain a State permit. Even when Federal agencies are not required to obtain State permits, Federal agencies shall still be consistent to the maximum extent practicable with the enforceable policies that are contained in such State permit programs that are part of a management program.

#### **§ 930.40 Multiple Federal agency participation.**

Whenever more than one Federal agency is involved in a Federal agency activity or its associated facilities affecting any coastal use or resource, or is involved in a group of Federal agency activities related to each other because of their geographic proximity, the Federal agencies may prepare one consistency determination for all the federal activities involved. In such cases, Federal agencies should consider joint preparation or lead agency development of the consistency determination. In either case, the consistency determination shall be transmitted to the State agency at least 90 days before final decisions are taken by any of the participating agencies and shall comply with the requirements of § 930.39.

#### **§ 930.41 State agency response.**

(a) A State agency shall inform the Federal agency of its concurrence with or objection to the Federal agency's consistency determination at the earliest practicable time, after providing for public participation in the State agency's review of the consistency determination. The Federal agency may presume State agency concurrence if the State agency's response is not received within 60 days from receipt of the Federal agency's consistency determination and supporting information. The 60-day review period begins when the State agency receives the consistency determination and supporting information required by § 930.39(a). If the information required by § 930.39(a) is not included with the determination, the State agency shall immediately notify the Federal agency that the 60-day review period has not begun, what information required by § 930.39(a) is missing, and that the 60-day review period will begin when the missing information is received by the State agency. If a Federal agency has submitted a consistency determination and information required by § 930.39(a), then the State agency shall not assert that the 60-day review period has not begun for failure to submit information that is in addition to that required by § 930.39(a).

(b) State agency concurrence shall not be presumed in cases where the State agency, within the 60-day period, requests an extension of time to review the matter. Federal agencies shall approve one request for an extension period of 15 days or less. In considering whether a longer or additional extension period is appropriate, the Federal agency should consider the magnitude and complexity of the information

contained in the consistency determination.

(c) Final Federal agency action shall not be taken sooner than 90 days from the receipt by the State agency of the consistency determination unless the State concurs or concurrence is presumed, pursuant to paragraphs (a) and (b), with the activity, or unless both the Federal agency and the State agency agree to an alternative period.

(d) *Time limits on concurrences.* A State agency cannot unilaterally place an expiration date on its concurrence. If a State agency believes that an expiration date is necessary, State and Federal agencies may agree to a time limit. If there is no agreement, later phases of, or modifications to, the activity that will have effects not evaluated at the time of the original consistency determination will require either a new consistency determination, a supplemental consistency determination under § 930.46, or a phased review under § 930.36(d) of this subpart.

(e) *State processing fees.* The Act does not require Federal agencies to pay State processing fees. State agencies shall not assess a Federal agency with a fee to process the Federal agency's consistency determination unless payment of such fees is required by other federal law or otherwise agreed to by the Federal agency and allowed by the Comptroller General of the United States. In no case may a State agency stay the consistency review period or base its objection on the failure of a Federal agency to pay a fee.

#### **§ 930.42 Public participation.**

(a) Management programs shall provide for public participation in the State agency's review of consistency determinations. Public participation, at a minimum, shall consist of public notice for the area(s) of the coastal zone likely to be affected by the activity, as determined by the State agency.

(b) *Timing of public notice.* States shall provide timely public notice after the consistency determination has been received by the State agency, except in cases where earlier public notice on the consistency determination by the Federal agency or the State agency meets the requirements of this section. A public comment period shall be provided by the State sufficient to give the public an opportunity to develop and provide comments on whether the project is consistent with management program enforceable policies and still allow the State agency to issue its concurrence or objection within the 60 day State response period.

(c) *Content of public notice.* The public notice shall:

(1) Specify that the proposed activity is subject to review for consistency with the enforceable policies of the management program;

(2) Provide sufficient information to serve as a basis for comment;

(3) Specify a source for additional information, *e.g.*, a State agency web site; and

(4) Specify a contact for submitting comments to the State agency.

(d) Procedural options that may be used by the State agency for issuance of public notice include, but are not limited to, public notice through an official State gazette, a local newspaper serving areas of coastal zone likely to be affected by the activity, individual State mailings, public notice through a management program newsletter, and electronic notices, *e.g.*, web sites.

However, electronic notices, *e.g.*, web sites, shall not be the sole source of a public notification, but may be used in conjunction with other means. Web sites may be used to provide a location for the public to obtain additional information. States shall not require that the Federal agency provide public notice. Federal and State agencies are encouraged to issue joint public notices, and hold joint public hearings, to minimize duplication of effort and to avoid unnecessary delays, so long as the joint notice meets the other requirements of this section.

#### **§ 930.43 State agency objection.**

(a) In the event the State agency objects to the Federal agency's consistency determination, the State agency shall accompany its response to the Federal agency with its reasons for the objection and supporting information. The State agency response shall describe:

(1) How the proposed activity will be inconsistent with specific enforceable policies of the management program; and

(2) The specific enforceable policies (including citations).

(3) The State agency should also describe alternative measures (if they exist) which, if adopted by the Federal agency, would allow the activity to proceed in a manner consistent to the maximum extent practicable with the enforceable policies of the management program. Failure to describe alternatives does not affect the validity of the State agency's objection.

(b) If the State agency's objection is based upon a finding that the Federal agency has failed to supply sufficient information, the State agency's response must describe the nature of the

information requested and the necessity of having such information to determine the consistency of the Federal agency activity with the enforceable policies of the management program.

(c) State agencies shall send to the Director a copy of objections to Federal agency consistency determinations.

(d) In the event of an objection, Federal and State agencies should use the remaining portion of the 90-day notice period (*see* § 930.36(b)) to attempt to resolve their differences. If resolution has not been reached at the end of the 90-day period, Federal agencies should consider using the dispute resolution mechanisms of this part and postponing final federal action until the problems have been resolved. At the end of the 90-day period the Federal agency shall not proceed with the activity over a State agency's objection unless:

(1) the Federal agency has concluded that under the "consistent to the maximum extent practicable" standard described in section 930.32 consistency with the enforceable policies of the management program is prohibited by existing law applicable to the Federal agency and the Federal agency has clearly described, in writing, to the State agency the legal impediments to full consistency (See §§ 930.32(a) and 930.39(a)), or

(2) the Federal agency has concluded that its proposed action is fully consistent with the enforceable policies of the management program, though the State agency objects.

(e) If a Federal agency decides to proceed with a Federal agency activity that is objected to by a State agency, or to follow an alternative suggested by the State agency, the Federal agency shall notify the State agency of its decision to proceed before the project commences.

#### **§ 930.44 Availability of mediation for disputes concerning proposed activities.**

In the event of a serious disagreement between a Federal agency and a State agency regarding the consistency of a proposed federal activity affecting any coastal use or resource, either party may request the Secretarial mediation or OCRM mediation services provided for in subpart G.

#### **§ 930.45 Availability of mediation for previously reviewed activities.**

(a) Federal and State agencies shall cooperate in their efforts to monitor federally approved activities in order to make certain that such activities continue to be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of the management program.

(b) The State agency may request that the Federal agency take appropriate remedial action following a serious disagreement resulting from a Federal agency activity, including those activities where the State agency's concurrence was presumed, which was:

(1) Previously determined to be consistent to the maximum extent practicable with the management program, but which the State agency later maintains is being conducted or is having an effect on any coastal use or resource substantially different than originally described and, as a result, is no longer consistent to the maximum extent practicable with the enforceable policies of the management program; or

(2) Previously determined not to be a Federal agency activity affecting any coastal use or resource, but which the State agency later maintains is being conducted or is having an effect on any coastal use or resource substantially different than originally described and, as a result, the activity affects any coastal use or resource and is not consistent to the maximum extent practicable with the enforceable policies of the management program. The State agency's request shall include supporting information and a proposal for recommended remedial action.

(c) If, after a reasonable time following a request for remedial action, the State agency still maintains that a serious disagreement exists, either party may request the Secretarial mediation or OCRM mediation services provided for in subpart G of this part.

#### **§ 930.46 Supplemental coordination for proposed activities.**

(a) For proposed Federal agency activities that were previously determined by the State agency to be consistent with the management program, but which have not yet begun, Federal agencies shall further coordinate with the State agency and prepare a supplemental consistency determination if the proposed activity will affect any coastal use or resource substantially different than originally described. Substantially different coastal effects are reasonably foreseeable if:

(1) The Federal agency makes substantial changes in the proposed activity that are relevant to management program enforceable policies; or

(2) There are significant new circumstances or information relevant to the proposed activity and the proposed activity's effect on any coastal use or resource.

(b) The State agency may notify the Federal agency and the Director of proposed activities which the State

agency believes should be subject to supplemental coordination. The State agency's notification shall include information supporting a finding of substantially different coastal effects than originally described and the relevant enforceable policies, and may recommend modifications to the proposed activity (if any) that would allow the Federal agency to implement the proposed activity consistent with the enforceable policies of the management program. State agency notification under this paragraph (b) does not remove the requirement under paragraph (a) of this section for Federal agencies to notify State agencies.

#### **Subpart D—Consistency for Activities Requiring a Federal License or Permit**

##### **§ 930.50 Objectives.**

The provisions of this subpart are intended to ensure that any required federal license or permit activity affecting any coastal use or resource is conducted in a manner consistent with approved management programs. The provisions of subpart I of this part are intended to supplement the provisions of this subpart for federal license or permit activities having interstate coastal effects.

##### **§ 930.51 Federal license or permit.**

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

(b) The term also includes the following types of renewals and major amendments which affect any coastal use or resource:

(1) Renewals and major amendments of federal license or permit activities not previously reviewed by the State agency;

(2) Renewals and major amendments of federal license or permit activities previously reviewed by the State agency which are filed after and are subject to management program changes not in existence at the time of original State agency review; and

(3) Renewals and major amendments of federal license or permit activities previously reviewed by the State agency which will cause an effect on any coastal use or resource substantially different than those originally reviewed by the State agency.

(c) The term "major amendment" of a federal license or permit activity means any subsequent federal approval that the applicant is required to obtain for modification to the previously reviewed and approved activity and where the activity permitted by issuance of the subsequent approval will affect any coastal use or resource, or, in the case of a major amendment subject to § 930.51(b)(3), affect any coastal use or resource in a way that is substantially different than the description or understanding of effects at the time of the original activity.

(d) The term "renewals" of a federal license or permit activity means any subsequent re-issuance, re-approval or extension of an existing license or permit that the applicant is required to obtain for an activity described under paragraph (b) of this section.

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

(f) *This subpart applies to active applications.* If an applicant withdraws its application to the Federal agency, then the consistency process is terminated. If the applicant reapplies to the Federal agency, then a new consistency review process will start. If a Federal agency stops or stays the Federal license or permit application process, then the consistency review period will be stopped or stayed for the same amount of time as for the Federal application process.

##### **§ 930.52 Applicant.**

The term "applicant" means any individual, public or private corporation, partnership, association, or other entity organized or existing under the laws of any nation, State, or any

State, regional, or local government, who, following management program approval, either files an application for a required individual federal license or permit, or who files a consistency certification for a required general federal license or permit under § 930.31(d) to conduct an activity affecting any coastal use or resource. The term "applicant" does not include Federal agencies applying for federal licenses or permits. Federal agency activities requiring federal licenses or permits are subject to subpart C of this part.

##### **§ 930.53 Listed federal license or permit activities.**

(a) State agencies shall develop a list of federal license or permit activities which affect any coastal use or resource, including reasonably foreseeable effects, and which the State agency wishes to review for consistency with the management program. The list shall be included as part of the management program, and the federal license or permit activities shall be described in terms of the specific licenses or permits involved (e.g., Corps of Engineers 404 permits, Coast Guard bridge permits). In the event the State agency chooses to review federal license or permit activities, with reasonably foreseeable coastal effects, outside of the coastal zone, it must generally describe the geographic location of such activities.

(1) The geographic location description should encompass areas outside of the coastal zone where coastal effects from federal license or permit activities are reasonably foreseeable. The State agency should exclude geographic areas outside of the coastal zone where coastal effects are not reasonably foreseeable. Listed activities may have different geographic location descriptions, depending on the nature of the activity and its coastal effects. For example, the geographic location for activities affecting water resources or uses could be described by shared water bodies, river basins, boundaries defined under the State's coastal nonpoint pollution control program, or other ecologically identifiable areas. Federal lands located within the boundaries of a State's coastal zone are automatically included within the geographic location description; State agencies do not have to describe these areas. State agencies do have to describe the geographic location of listed activities occurring on federal lands located beyond the boundaries of a State's coastal zone.

(2) For listed activities occurring outside of the coastal zone for which a State has not generally described the

geographic location of review, States must follow the conditions for review of unlisted activities under § 930.54 of this subpart.

(b) *General concurrences for minor activities.* To avoid repeated review of minor federal license or permit activities which, while individually inconsequential, cumulatively affect any coastal use or resource, the State agency, after developing conditions allowing concurrence for such activities, may issue a general public notice (see § 930.61) and general concurrence allowing similar minor work in the same geographic area to proceed without prior State agency review. In such cases, the State agency must set forth in the management program license and permit list the minor federal license or permit activities and the relevant conditions which are covered by the general concurrence. Minor federal license or permit activities which satisfy the conditions of the general concurrence are not subject to the consistency certification requirement of this subpart. Except in cases where the State agency indicates otherwise, copies of federal license or permit applications for activities subject to a general concurrence must be sent by the applicant to the State agency to allow the State agency to monitor adherence to the conditions required by such concurrence. Confidential and proprietary material within such applications may be deleted.

(c) The license and permit list may be amended by the State agency following consultation with the affected Federal agency and approval by the Director pursuant to the program change requirements found at 15 CFR part 923, subpart H.

(1) Consultation with the affected Federal agency means, at least 60 days prior to submitting a program change request to OCRM, a State agency shall notify in writing the relevant regional or field Federal agency staff and the head of the affected Federal agency, and request comments on the listing change. The notification shall describe the proposed change and identify the regional Federal agency staff the State has contacted for consultation.

(2) A State agency must include in its program change request to OCRM a description of any comments received from the affected Federal agency.

(d) No federal license or permit described on an approved list shall be issued by a Federal agency until the requirements of this subpart have been satisfied. Federal agencies shall inform applicants for listed licenses or permits of the requirements of this subpart.

**§ 930.54 Unlisted federal license or permit activities.**

(a)(1) With the assistance of Federal agencies, State agencies should monitor unlisted federal license or permit activities (e.g., by use of intergovernmental review process established pursuant to E.O. 12372, review of NEPA documents, **Federal Register** notices). State agencies shall notify Federal agencies, applicants, and the Director of unlisted activities affecting any coastal use or resource which require State agency review within 30 days from notice of the license or permit application, that has been submitted to the approving Federal agency, otherwise the State agency waives its right to review the unlisted activity. The waiver does not apply in cases where the State agency does not receive notice of the federal license or permit application.

(2) Federal agencies or applicants should provide written notice of the submission of applications for federal licenses or permits for unlisted activities to the State agency. Notice to the State agency may be constructive if notice is published in an official federal public notification document or through an official State clearinghouse (i.e., the **Federal Register**, draft or final NEPA EISs that are submitted to the State agency, or a State's intergovernmental review process). The notice, whether actual or constructive, shall contain sufficient information for the State agency to learn of the activity, determine the activity's geographic location, and determine whether coastal effects are reasonably foreseeable.

(b) The State agency's notification shall also request the Director's approval to review the unlisted activity and shall contain an analysis that supports the State agency's assertion that coastal effects are reasonably foreseeable. Following State agency notification to the Federal agency, applicant and the Director, the Federal agency shall not issue the license or permit until the requirements of this subpart have been satisfied, unless the Director disapproves the State agency's request to review the activity.

(c) The Federal agency and the applicant have 15 days from receipt of the State agency notice to provide comments to the Director regarding the State agency's request to review the activity. The sole basis for the Director's approval or disapproval of the State agency's request will relate to whether the proposed activity's coastal effects are reasonably foreseeable. The Director shall issue a decision, with supporting comments, to the State agency, Federal agency and applicant within 30 days

from receipt of the State agency notice. The Director may extend the decision deadline beyond 30 days due to the complexity of the issues or to address the needs of the State agency, the Federal agency, or the applicant. The Director shall consult with the State agency, the Federal agency and the applicant prior to extending the decision deadline, and shall limit the extension to the minimum time necessary to make its decision. The Director shall notify the relevant parties of the expected length of an extension.

(d) If the Director disapproves the State agency's request, the Federal agency may approve the license or permit application and the applicant need not comply with the requirements of this subpart. If the Director approves the State agency's request, the Federal agency and applicant must comply with the consistency certification procedures of this subpart.

(e) Following an approval by the Director, the applicant shall amend the federal application by including a consistency certification and shall provide the State agency with a copy of the certification along with necessary data and information (see §§ 930.58, 930.62 and 930.63). For the purposes of this section, concurrence by the State agency shall be conclusively presumed in the absence of a State agency objection within six months from the original Federal agency notice to the State agency (see paragraph (a) of this section) or within three months from receipt of the applicant's consistency certification and necessary data and information, whichever period terminates last.

(f) The unlisted activity procedures in this section are provided to ensure that State agencies are afforded an opportunity to review federal license or permit activities with reasonably foreseeable coastal effects. Prior to bringing the issue before the Director, the concerned parties should discuss coastal effects and consistency. The applicant can avoid delay by simply seeking the State agency's expeditious concurrence rather than waiting for the Director's decision. If an applicant, of its own accord or after negotiations with the State agency, provides a consistency certification and necessary data and information to the State agency, the review shall be deemed to have received the Director's approval, and all of the provisions of this subpart shall apply and the State agency need not request the Director's approval. If an applicant for an unlisted activity has not subjected itself to the consistency process within the 30 day notification period contained in paragraph (a) of this section, the State

agency must adhere to the unlisted activity review requirements of this section to preserve its right to review the activity.

**§ 930.55 Availability of mediation for license or permit disputes.**

In the event of a serious disagreement between a Federal and State agency regarding whether a listed or unlisted federal license or permit activity is subject to the federal consistency requirement, either party may request the OCRM mediation or Secretarial mediation services provided for in subpart G of this part; notice shall be provided to the applicant. The existence of a serious disagreement will not relieve the Federal agency from the responsibility for withholding approval of a license or permit application for an activity on an approved management program list (see § 930.53) or individually approved by the Director (see § 930.54) pending satisfaction of the requirements of this subpart. Similarly, the existence of a serious disagreement will not prevent the Federal agency from approving a license or permit activity which has not received Director approval.

**§ 930.56 State agency guidance and assistance to applicants.**

As a preliminary matter, any applicant for a federal license or permit selected for review by a State agency should obtain the views and assistance of the State agency regarding the means for ensuring that the proposed activity will be conducted in a manner consistent with the management program. As part of its assistance efforts, the State agency shall make available for public inspection copies of the management program document. Upon request by the applicant, the State agency shall identify any enforceable policies applicable to the proposed activity, based upon the information submitted to the State agency.

**§ 930.57 Consistency certifications.**

(a) Following appropriate coordination and cooperation with the State agency, all applicants for required federal licenses or permits subject to State agency review shall provide in the application to the federal licensing or permitting agency a certification that the proposed activity complies with and will be conducted in a manner consistent with the management program. At the same time, the applicant shall furnish to the State agency a copy of the certification and necessary data and information.

(b) The applicant's consistency certification shall be in the following

form: "The proposed activity complies with the enforceable policies of (name of State) approved management program and will be conducted in a manner consistent with such program."

**§ 930.58 Necessary data and information.**

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

(1) A detailed description of the proposed activity, its associated facilities, the coastal effects, and comprehensive data and information sufficient to support the applicant's consistency certification. Maps, diagrams, technical data and other relevant material shall be submitted when a written description alone will not adequately describe the proposal (a copy of the federal application and all supporting material provided to the Federal agency should also be submitted to the State agency);

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

(3) An evaluation that includes a set of findings relating the coastal effects of the proposal and its associated facilities to the relevant enforceable policies of the management program. Applicants shall demonstrate that the activity will be consistent with the enforceable policies of the management program. Applicants shall demonstrate adequate consideration of policies which are in the nature of recommendations. Applicants need not make findings with respect to coastal effects for which the management program does not contain enforceable or recommended policies.

(b) At the request of the applicant, interested parties who have access to information and data required by this section may provide the State agency with all or part of the material required. Furthermore, upon request by the applicant, the State agency shall provide assistance for developing the assessment and findings required by this section.

(c) When satisfied that adequate protection against public disclosure

exists, applicants should provide the State agency with confidential and proprietary information which the State agency maintains is necessary to make a reasoned decision on the consistency of the proposal. State agency requests for such information must be related to the necessity of having such information to assess adequately the coastal effects of the proposal.

**§ 930.59 Multiple permit review.**

(a) Applicants shall, to the extent practicable, consolidate related federal license or permit activities affecting any coastal use or resource for State agency review. State agencies shall, to the extent practicable, provide applicants with a "one-stop" multiple permit review for consolidated permits to minimize duplication of effort and to avoid unnecessary delays.

(b) A State agency objection to one or more of the license or permit activities submitted for consolidated review shall not prevent the applicant from receiving Federal agency approval for those license or permit activities found to be consistent with the management program.

**§ 930.60 Commencement of State agency review.**

(a) Except as provided in § 930.54(e) and paragraph (a)(1) of this section, State agency review of an applicant's consistency certification begins at the time the State agency receives a copy of the consistency certification, and the information and data required pursuant to § 930.58.

(1) If an applicant fails to submit a consistency certification in accordance with § 930.57, or fails to submit necessary data and information required pursuant to § 930.58, the State agency shall, within 30 days of receipt of the incomplete information, notify the applicant and the Federal agency of the missing certification or information, and that:

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

(ii) The State agency's review has begun, and that the certification or information deficiencies must be cured by the applicant during the State's review period.

(2) Under paragraph (a)(1) of this section, State agencies shall notify the applicant and the Federal agency, within 30 days of receipt of the completed certification and information, of the date when necessary certification or information deficiencies have been corrected, and that the State agency's

consistency review commenced on the date that the complete certification and necessary data and information were received by the State agency.

(3) State agencies and applicants (and persons under subpart E of this part) may mutually agree to stay the consistency timeclock or extend the six-month review period. Such an agreement shall be in writing and shall be provided to the Federal agency. A Federal agency shall not presume State agency concurrence with an activity where such an agreement exists or where a State agency's review period, under paragraph (a)(1)(i) of this section, has not begun.

(b) A State agency request for information or data in addition to that required by § 930.58 shall not extend the date of commencement of State agency review.

#### § 930.61 Public participation.

(a) Following receipt of the material described in § 930.60 the State agency shall ensure timely public notice of the proposed activity. Public notice shall be provided for the area(s) of the coastal zone likely to be affected by the proposed activity, as determined by the State agency. At the discretion of the State agency, public participation may include one or more public hearings. The State agency shall not require an applicant or a Federal agency to hold a public hearing. State agencies should restrict the period of public notice, receipt of comments, hearing proceedings and final decision-making to the minimum time necessary to reasonably inform the public, obtain sufficient comment, and develop a decision on the matter.

(b) *Content of public notice.* The public notice shall:

(1) Specify that the proposed activity is subject to review for consistency under the policies of the management program;

(2) Provide sufficient information to serve as a basis for comment;

(3) Specify a source for additional information; and

(4) Specify a contact for submitting comments to the management program.

(c) Procedural options that may be used by the State agency for issuance of public notice include, but are not limited to, public notice through an official State gazette, a local newspaper serving areas of the coastal zone likely to be affected by the activity, individual State mailings, public notice through a management program newsletter, and electronic notices, *e.g.*, web sites. However, electronic notices, *e.g.*, web sites, shall not be the sole source of a public notification, but may be used in

conjunction with other means. Web sites may be used to provide a location for the public to obtain additional information. The State agency may require the applicant to provide the public notice. State agencies shall not require that the Federal agency provide public notice. The State agency may rely upon the public notice provided by the Federal agency reviewing the application for the federal license or permit (*e.g.*, notice of availability of NEPA documents) if such notice satisfies the minimum requirements set forth in paragraphs (a) and (b) of this section.

(d) Federal and State agencies are encouraged to issue joint public notices, and hold joint public hearings, whenever possible to minimize duplication of effort and to avoid unnecessary delays.

#### § 930.62 State agency concurrence with a consistency certification.

(a) At the earliest practicable time, the State agency shall notify the Federal agency and the applicant whether the State agency concurs with or objects to a consistency certification. The State agency may issue a general concurrence for minor activities (*see* § 930.53(b)). Concurrence by the State agency shall be conclusively presumed if the State agency's response is not received within six months following commencement of State agency review.

(b) If the State agency has not issued a decision within three months following commencement of State agency review, it shall notify the applicant and the Federal agency of the status of the matter and the basis for further delay.

(c) If the State agency issues a concurrence or is conclusively presumed to concur with the applicant's consistency certification, the Federal agency may approve the federal license or permit application. Notwithstanding State agency concurrence with a consistency certification, the federal permitting agency may deny approval of the federal license or permit application. Federal agencies should not delay processing applications pending receipt of a State agency's concurrence. In the event a Federal agency determines that an application will not be approved, it shall immediately notify the applicant and the State agency.

(d) During the period when the State agency is reviewing the consistency certification, the applicant and the State agency should attempt, if necessary, to agree upon conditions, which, if met by the applicant, would permit State agency concurrence. The parties shall also consult with the Federal agency

responsible for approving the federal license or permit to ensure that proposed conditions satisfy federal as well as management program requirements (*see also* § 930.4).

#### § 930.63 State agency objection to a consistency certification.

(a) If the State agency objects to the applicant's consistency certification within six months following commencement of review, it shall notify the applicant, Federal agency and Director of the objection. A State agency may assert alternative bases for its objection, as described in paragraphs (b) and (c) of this section.

(b) State agency objections that are based on sufficient information to evaluate the applicant's consistency certification shall describe how the proposed activity is inconsistent with specific enforceable policies of the management program. The objection may describe alternative measures (if they exist) which, if adopted by the applicant, may permit the proposed activity to be conducted in a manner consistent with the enforceable policies of the management program.

(c) A State agency objection may be based upon a determination that the applicant has failed, following a written State agency request, to supply the information required pursuant to § 930.58 or other information necessary for the State agency to determine consistency. If the State agency objects on the grounds of insufficient information, the objection shall describe the nature of the information requested and the necessity of having such information to determine the consistency of the activity with the management program. The objection may describe alternative measures (if they exist) which, if adopted by the applicant, may permit the proposed activity to be conducted in a manner consistent with the enforceable policies of the management program.

(d) *Alternatives.* If a State agency proposes an alternative(s) in its objection letter, the alternative(s) shall be described with sufficient specificity to allow the applicant to determine whether to, in consultation with the State agency: adopt an alternative; abandon the project; or file an appeal under subpart H. Application of the specificity requirement demands a case specific approach. More complicated activities or alternatives generally need more information than less-complicated activities or alternatives. *See* § 930.121(d) for further details regarding alternatives for appeals under subpart H of this part.

(e) A State agency objection shall include a statement to the following effect:

Pursuant to 15 CFR part 930, subpart H, and within 30 days from receipt of this letter, you may request that the Secretary of Commerce override this objection. In order to grant an override request, the Secretary must find that the activity is consistent with the objectives or purposes of the Coastal Zone Management Act, or is necessary in the interest of national security. A copy of the request and supporting information must be sent to the [Name of State] management program and the federal permitting or licensing agency. The Secretary may collect fees from you for administering and processing your request.

**§ 930.64 Federal permitting agency responsibility.**

Following receipt of a State agency objection to a consistency certification, the Federal agency shall not issue the federal license or permit except as provided in subpart H of this part.

**§ 930.65 Remedial action for previously reviewed activities.**

(a) Federal and State agencies shall cooperate in their efforts to monitor federal license or permit activities in order to make certain that such activities continue to conform to both federal and State requirements.

(b) The State agency shall notify the relevant Federal agency representative for the area involved of any federal license or permit activity which the State agency claims was:

(1) Previously determined to be consistent with the management program, but which the State agency later maintains is being conducted or is having an effect on any coastal use or resource substantially different than originally described and, as a result, is no longer consistent with the management program; or

(2) Previously determined not to be an activity affecting any coastal use or resource, but which the State agency later maintains is being conducted or is having coastal effects substantially different than originally described and, as a result, the activity affects any coastal use or resource in a manner inconsistent with the management program.

(c) The State agency notification shall include:

(1) A description of the activity involved and the alleged lack of compliance with the management program;

(2) supporting information; and

(3) a request for appropriate remedial action. A copy of the request shall be sent to the applicant and the Director. Remedial actions shall be linked to

coastal effects substantially different than originally described.

(d) If, after 30 days following a request for remedial action, the State agency still maintains that the applicant is failing to comply substantially with the management program, the governor or State agency may file a written objection with the Director. If the Director finds that the applicant is conducting an activity that is substantially different from the approved activity, the applicant shall submit an amended or new consistency certification and supporting information to the Federal agency and to the State agency, or comply with the originally approved certification.

(e) An applicant shall be found to be conducting an activity substantially different from the approved activity if the State agency claims and the Director finds that the activity affects any coastal use or resource substantially different than originally described by the applicant and, as a result, the activity is no longer being conducted in a manner consistent with the enforceable policies of the management program. The Director may make a finding that an applicant is conducting an activity substantially different from the approved activity only after providing 15 days for the applicant and the Federal agency to review the State agency's objection and to submit comments for the Director's consideration.

**§ 930.66 Supplemental coordination for proposed activities**

(a) For federal license or permit proposed activities that were previously determined by the State agency to be consistent with the management program, but which have not yet begun, applicants shall further coordinate with the State agency and prepare a supplemental consistency certification if the proposed activity will affect any coastal use or resource substantially different than originally described. Substantially different coastal effects are reasonably foreseeable if:

(1) The applicant makes substantial changes in the proposed activity that are relevant to management program enforceable policies; or

(2) There are significant new circumstances or information relevant to the proposed activity and the proposed activity's effect on any coastal use or resource.

(b) The State agency may notify the applicant, the Federal agency and the Director of proposed activities which the State agency believes should be subject to supplemental coordination. The State agency's notification shall

include information supporting a finding of substantially different coastal effects than originally described and the relevant enforceable policies, and may recommend modifications to the proposed activity (if any) that would allow the applicant to implement the proposed activity consistent with the management program. State agency notification under subsection (b) does not remove the requirement under subsection (a) for applicants to notify State agencies.

**Subpart E—Consistency for Outer Continental Shelf (OCS) Exploration, Development and Production Activities**

**§ 930.70 Objectives.**

The provisions of this subpart are intended to ensure that all federal license or permit activities described in detail in OCS plans and which affect any coastal use or resource are conducted in a manner consistent with approved management programs.

**§ 930.71 Federal license or permit activity described in detail.**

The term "federal license or permit activity described in detail" means any activity requiring a federal license or permit, as defined in § 930.51, which the Secretary of the Interior determines must be described in detail within an OCS plan.

**§ 930.72 Person.**

The term "person" means any individual, corporation, partnership, association, or other entity organized or existing under the laws of any State; the federal government; any State, regional, or local government; or any entity of such federal, State, regional or local government, who submits to the Secretary of the Interior, or designee following management program approval, an OCS plan which describes in detail federal license or permit activities.

**§ 930.73 OCS plan.**

(a) The term "OCS plan" means any plan for the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act (43 U.S.C. 1331 *et seq.*), and the regulations under that Act, which is submitted to the Secretary of the Interior or designee following management program approval and which describes in detail federal license or permit activities.

(b) The requirements of this subpart do not apply to federal license or permit applications filed after management program approval for activities described in detail in OCS plans approved by the Secretary of the Interior

or designee prior to management program approval.

**§ 930.74 OCS activities subject to State agency review.**

Except for States which do not anticipate coastal effects resulting from OCS activities, management program lists required pursuant to § 930.53 shall include a reference to OCS plans which describe in detail federal license or permit activities affecting any coastal use or resource.

**§ 930.75 State agency assistance to persons.**

As a preliminary matter, any person intending to submit to the Secretary of the Interior an OCS plan which describes in detail federal license or permit activities affecting any coastal use or resource should obtain the views and assistance of the State agency regarding the means for ensuring that such activities will be conducted in a manner consistent with the management program. As part of its assistance efforts, the State agency shall make available for inspection copies of the management program document. Upon request by such persons, the State agency shall identify any enforceable policies applicable to the proposed activities, based upon the information submitted to the State agency.

**§ 930.76 Submission of an OCS plan, necessary data and information and consistency certification.**

Any person submitting any OCS plan to the Secretary of the Interior or designee shall:

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

(b) Submit necessary data and information pursuant to § 930.58;

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

(d) The person's consistency certification shall be in the following form:

The proposed activities described in detail in this plan comply with (name of State(s)) approved management program(s) and will be conducted in a manner consistent with such program(s).

**§ 930.77 Commencement of State agency review and public notice.**

(a)(1) Except as provided in § 930.60(a), State agency review of the person's consistency certification begins at the time the State agency receives a copy of the OCS plan, consistency certification, and required necessary data and information. A State agency request for information and data in addition to that required by § 930.76 shall not extend the date of commencement of State agency review.

(2) To assess consistency, 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).

(b) Following receipt of the material described in paragraph (a) of this section, the State agency shall ensure timely public notice of the proposed activities in accordance with § 930.61.

**§ 930.78 State agency concurrence or objection.**

(a) At the earliest practicable time, the State agency shall notify in writing the person, the Secretary of the Interior or designee and the Director of its concurrence with or objection to the consistency certification. State agencies should restrict the period of public notice, receipt of comments, hearing proceedings and final decision-making to the minimum time necessary to reasonably inform the public, obtain sufficient comment, and develop a decision on the matter. If the State agency has not issued a decision within three months following commencement of State agency review, it shall notify the person, the Secretary of the Interior or designee and the Director of the status of review and the basis for further delay in issuing a final decision. Notice shall be in written form and postmarked no later than three months following the commencement of the State agency's review. Concurrence by the State agency shall be conclusively presumed if the notification required by this subparagraph is not provided.

(b) Concurrence by the State agency shall be conclusively presumed if the State agency's response to the consistency certification is not received within six months following commencement of State agency review.

(c) If the State agency objects to one or more of the federal license or permit activities described in detail in the OCS plan, it must provide a separate discussion for each objection in accordance with § 930.63.

**§ 930.79 Effect of State agency concurrence.**

(a) If the State agency issues a concurrence or is conclusively presumed to concur with the person's consistency certification, the person will not be required to submit additional consistency certifications and supporting information for State agency review at the time federal applications are actually filed for the federal licenses or permits to which such concurrence applies.

(b) Unless the State agency indicates otherwise, copies of federal license or permit applications for activities described in detail in an OCS plan which has received State agency concurrence shall be sent by the person to the State agency to allow the State agency to monitor the activities. Confidential and proprietary material within such applications may be deleted.

**§ 930.80 Federal permitting agency responsibility.**

Following receipt of a State agency objection to a consistency certification related to federal license or permit activities described in detail in an OCS plan, the Federal agency shall not issue any of such licenses or permits except as provided in subpart H of this part.

**§ 930.81 Multiple permit review.**

(a) A person submitting a consistency certification for federal license or permit activities described in detail in an OCS plan is strongly encouraged to work with other Federal agencies in an effort to include, for consolidated State agency review, consistency certifications and supporting data and information applicable to OCS-related federal license or permit activities affecting any coastal use or resource which are not required to be described in detail in OCS plans but which are subject to State agency consistency review (*e.g.*, Corps of Engineer permits for the placement of structures on the OCS and for dredging and the transportation of dredged material, Environmental Protection Agency air and water quality permits for offshore operations and onshore support and processing facilities). In the event the person does not consolidate such OCS-related permit activities with the State agency's review of the OCS plan, such activities will remain subject to individual State agency review under the requirements of subpart D of this part.

(b) A State agency objection to one or more of the OCS-related federal license or permit activities submitted for consolidated review shall not prevent

the person from receiving Federal agency approval:

(1) For those OCS-related license or permit activities found by the State agency to be consistent with the management program; and

(2) For the license or permit activities described in detail in the OCS plan provided the State agency concurs with the consistency certification for such plan. Similarly, a State agency objection to the consistency certification for an OCS plan shall not prevent the person from receiving Federal agency approval for those OCS-related license or permit activities determined by the State agency to be consistent with the management program.

**§ 930.82 Amended OCS plans.**

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

**§ 930.83 Review of amended OCS plans; public notice.**

After receipt of a copy of the amended OCS plan, consistency certification, and necessary data and information, State agency review shall begin. The requirements of §§ 930.77, 930.78, and 930.79, apply to the review of amended OCS plans, except that the applicable time period for purposes of concurrence by conclusive presumption shall be three months instead of six months.

**§ 930.84 Continuing State agency objections.**

If the State agency objects to the consistency certification for an amended OCS plan, the prohibition in § 930.80 against Federal agency approval of licenses or permits for activities described in detail in such a plan

applies, further Secretarial review pursuant to subpart H of this part may take place, and the development of an additional amended OCS plan and consistency certification may be required pursuant to §§ 930.82 through 930.83.

**§ 930.85 Failure to comply substantially with an approved OCS plan.**

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

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

(c) If, after 30 days following a request for remedial action, the State agency still maintains that the person is failing to comply substantially with the OCS plan, the governor or State agency may file a written objection with the Director. If the Director finds that the person is failing to comply substantially with the OCS plan, the person shall submit an amended or new OCS plan along with a consistency certification and supporting information to the Secretary of the Interior or designee and to the State agency. Following such a finding by the Director, the person shall comply with the originally approved OCS plan, or with interim orders issued jointly by the Director and the Minerals Management Service, pending approval of the amended or new OCS plan. Sections 930.82 through 930.84 shall apply to further State agency review of the consistency certification for the amended or new plan.

(d) A person shall be found to have failed substantially to comply with an approved OCS plan if the State agency claims and the Director finds that one or more of the activities described in detail in the OCS plan which affects any coastal use or resource are being conducted or are having an effect on any coastal use or resource substantially different than originally described by

the person in the plan or accompanying information and, as a result, the activities are no longer being conducted in a manner consistent with the management program. The Director may make a finding that a person has failed substantially to comply with an approved OCS plan only after providing a reasonable opportunity for the person and the Secretary of the Interior to review the State agency's objection and to submit comments for the Director's consideration.

**Subpart F—Consistency for Federal Assistance To State and Local Governments**

**§ 930.90 Objectives.**

The provisions of this subpart are intended to ensure that federal assistance to applicant agencies for activities affecting any coastal use or resource is granted only when such activities are consistent with approved management programs. The provisions of subpart I of this part are intended to supplement the provisions of this subpart for federal assistance activities having interstate coastal effects.

**§ 930.91 Federal assistance.**

The term "federal assistance" means assistance provided under a federal program to an applicant agency through grant or contractual arrangements, loans, subsidies, guarantees, insurance, or other form of financial aid.

**§ 930.92 Applicant agency.**

The term "applicant agency" means any unit of State or local government, or any related public entity such as a special purpose district, which, following management program approval, submits an application for federal assistance.

**§ 930.93 Intergovernmental review process.**

The term "intergovernmental review process" describes the procedures established by States pursuant to E.O. 12372, "Intergovernmental Review of Federal Programs," and implementing regulations of the review of federal financial assistance to applicant agencies.

**§ 930.94 State review process for consistency.**

(a) States with approved management programs should review applications from applicant agencies for federal assistance in accordance with E.O. 12372 and implementing regulations.

(b) The applicant agency shall submit an application for federal assistance to the State agency for consistency review, through the intergovernmental review

process or by direct submission to the State agency, for any proposed federal assistance activity that is listed in the management program as a type of activity that will have a reasonably foreseeable effect on any coastal use or resource and occurring within the coastal zone (*see* § 930.95(a)) or within a described geographic area outside of the coastal zone (*see* § 930.95(b)).

(c) *Applicant agency evaluation.* The applicant agency shall provide to the State agency, in addition to the federal application, a brief evaluation on the relationship of the proposed activity and any reasonably foreseeable coastal effects to the enforceable policies of the management program.

**§ 930.95 Guidance provided by the State agency.**

(a) State agencies should include within the management program a listing of specific types of federal assistance programs subject to a consistency review. Such a listing, and any amendments, will require prior State agency consultation with affected Federal agencies and approval by the Director as a program change.

(b) In the event the State agency chooses to review applications for federal assistance activities outside of the coastal zone but with reasonably foreseeable coastal effects, the State agency shall develop a federal assistance provision within the management program generally describing the geographic area (*e.g.*, coastal floodplains) within which federal assistance activities will be subject to review. This provision, and any refinements, will require prior State agency consultation with affected Federal agencies and approval by the Director as a program change. Listed activities may have different geographic location descriptions, depending on the nature of the activity and its effects on any coastal use or resource. For example, the geographic location for activities affecting water resources or uses could be described by shared water bodies, river basins, boundaries defined under the coastal nonpoint pollution control program, or other ecologically identifiable areas.

(c) The State agency shall provide copies of any federal assistance list or geographic provision, and any refinements, to Federal agencies and units of applicant agencies empowered to undertake federally assisted activities within the coastal zone or described geographic area.

(d) For review of unlisted federal assistance activities, the State agency shall follow the same procedures as it would follow for review of listed federal

assistance activities outside of the coastal zone or the described geographic area. (*See* § 930.98.)

**§ 930.96 Consistency review.**

(a)(1) If the State agency does not object to the proposed activity, the Federal agency may grant the federal assistance to the applicant agency. Notwithstanding State agency consistency approval for the proposed project, the Federal agency may deny assistance to the applicant agency. Federal agencies should not delay processing (so long as they do not approve) applications pending receipt of a State agency approval or objection. In the event a Federal agency determines that an application will not be approved, it shall immediately notify the applicant agency and the State agency.

(2) During the period when the State agency is reviewing the activity, the applicant agency and the State agency should attempt, if necessary, to agree upon conditions which, if met by the applicant agency, would permit State agency approval. The parties shall also consult with the Federal agency responsible for providing the federal assistance to ensure that proposed conditions satisfy federal requirements as well as management program requirements.

(b) If the State agency objects to the proposed project, the State agency shall notify the applicant agency, Federal agency and the Director of the objection pursuant to § 930.63.

**§ 930.97 Federal assisting agency responsibility.**

Following receipt of a State agency objection, the Federal agency shall not approve assistance for the activity except as provided in subpart H of this part.

**§ 930.98 Federally assisted activities outside of the coastal zone or the described geographic area.**

State agencies should monitor proposed federal assistance activities outside of the coastal zone or the described geographic area (*e.g.*, by use of the intergovernmental review process, review of NEPA documents, **Federal Register**) and shall immediately notify applicant agencies, Federal agencies, and any other agency or office which may be identified by the State in its intergovernmental review process pursuant to E.O. 12372 of proposed activities which will have reasonably foreseeable coastal effects and which the State agency is reviewing for consistency with the management program. Notification shall also be sent by the State agency to the Director. The

Director, in his/her discretion, may review the State agency's decision to review the activity. The Director may disapprove the State agency's decision to review the activity only if the Director finds that the activity will not affect any coastal use or resource. The Director shall be guided by the provisions in § 930.54(c). For purposes of this subpart, State agencies must inform the parties of objections within the time period permitted under the intergovernmental review process, otherwise the State agency waives its right to object to the proposed activity.

**§ 930.99 Availability of mediation for federal assistance disputes.**

In the event of a serious disagreement between a Federal agency and the State agency regarding whether a federal assistance activity is subject to the consistency requirement either party may request the OCRM mediation or Secretarial mediation services provided for in subpart G of this part. The existence of a serious disagreement will not relieve the Federal agency from the responsibility for withholding federal assistance for the activity pending satisfaction of the requirements of this subpart, except in cases where the Director has disapproved a State agency decision to review an activity.

**§ 930.100 Remedial action for previously reviewed activities.**

(a) Federal and State agencies shall cooperate in their efforts to monitor federal assistance activities in order to make certain that such activities continue to conform to both federal and State requirements.

(b) The State agency shall notify the relevant Federal agency representative for the area involved of any federal assistance activity which the State agency claims was:

(1) Previously determined to be consistent with the management program, but which the State agency later maintains is being conducted or is having an effect on any coastal use or resource substantially different than originally described and, as a result, is no longer consistent with the management program, or

(2) Previously determined not to be a project affecting any coastal use or resource, but which the State agency later maintains is being conducted or is having an effect on any coastal use or resource substantially different than originally described and, as a result the project affects a coastal use or resource in a manner inconsistent with the management program.

(c) The State agency notification shall include:

(1) A description of the activity involved and the alleged lack of compliance with the management program;

(2) supporting information; and

(3) a request for appropriate remedial action. A copy of the request shall be sent to the applicant agency and the Director.

(d) If, after 30 days following a request for remedial action, the State agency still maintains that the applicant agency is failing to comply substantially with the management program, the State agency may file a written objection with the Director. If the Director finds that the applicant agency is conducting an activity that is substantially different from the approved activity, the State agency may reinstate its review of the activity, or the applicant agency may conduct the activity as it was originally approved.

(e) An applicant agency shall be found to be conducting an activity substantially different from the approved activity if the State agency claims and the Director finds that the activity affects any coastal use or resource substantially different than originally determined by the State agency and, as a result, the activity is no longer being conducted in a manner consistent with the management program. The Director may make a finding that an applicant agency is conducting an activity substantially different from the approved activity only after providing a reasonable opportunity for the applicant agency and the Federal agency to review the State agency's objection and to submit comments for the Director's consideration.

#### **§ 930.101 Supplemental coordination for proposed activities.**

(a) For federal assistance activities that were previously determined by the State agency to be consistent with the management program, but which have not yet begun, the applicant agency shall further coordinate with the State agency if the proposed activity will affect any coastal use or resource substantially different than originally described. Substantially different coastal effects are reasonably foreseeable if:

(1) The applicant agency makes substantial changes in the proposed activity that are relevant to management program enforceable policies; or (2) There are significant new circumstances or information relevant to the proposed activity and the proposed activity's effect on any coastal use or resource.

(b) The State agency may notify the applicant agency, the Federal agency

and the Director of proposed activities which the State agency believes should be subject to supplemental coordination. The State agency's notification shall include information supporting a finding of substantially different coastal effects than originally described and the relevant enforceable policies, and may recommend modifications to the proposed activity (if any) that would allow the applicant agency to implement the proposed activity consistent with the management program. State agency notification under paragraph (b) of this section does not remove the requirement under paragraph (a) of this section for applicant agencies to notify State agencies.

### **Subpart G—Secretarial Mediation**

#### **§ 930.110 Objectives.**

The purpose of this subpart is to describe mediation procedures which Federal and State agencies may use to attempt to resolve serious disagreements which arise during the administration of approved management programs.

#### **§ 930.111 OCRM mediation.**

The availability of mediation does not preclude use by the parties of alternative means for resolving their disagreement. In the event a serious disagreement arises, the parties are strongly encouraged to make every effort to resolve the disagreement informally. OCRM shall be available to assist the parties in these efforts.

#### **§ 930.112 Request for Secretarial mediation.**

(a) The Secretary or other head of a Federal agency, or the Governor or the State agency, may notify the Secretary in writing of the existence of a serious disagreement, and may request that the Secretary seek to mediate the disagreement. A copy of the written request must be sent to the agency with which the requesting agency disagrees, to the Assistant Administrator, and to the Director.

(b) Within 15 days following receipt of a request for mediation the disagreeing agency shall transmit a written response to the Secretary, and to the agency requesting mediation, indicating whether it wishes to participate in the mediation process. If the disagreeing agency declines the offer to enter into mediation efforts, it must indicate the basis for its refusal in its response. Upon receipt of a refusal to participate in mediation efforts, the Secretary shall seek to persuade the disagreeing agency to reconsider its decision and enter into mediation efforts. If the disagreeing agencies do

not all agree to participate, the Secretary will cease efforts to provide mediation assistance.

#### **§ 930.113 Public hearings.**

(a) If the parties agree to the mediation process, the Secretary shall appoint a hearing officer who shall schedule a hearing in the local area concerned. The hearing officer shall give the parties at least 30 days notice of the time and place set for the hearing and shall provide timely public notice of the hearing.

(b) At the time public notice is provided, the Federal and State agencies shall provide the public with convenient access to public data and information related to the serious disagreement.

(c) Hearings shall be informal and shall be conducted by the hearing officer with the objective of securing in a timely fashion information related to the disagreement. The Federal and State agencies, as well as other interested parties, may offer information at the hearing subject to the hearing officer's supervision as to the extent and manner of presentation. A party may also provide the hearing officer with written comments. Hearings will be recorded and the hearing officer shall provide transcripts and copies of written information offered at the hearing to the Federal and State agency parties. The public may inspect and copy the transcripts and written information provided to these agencies.

#### **§ 930.114 Secretarial mediation efforts.**

(a) Following the close of the hearing, the hearing officer shall transmit the hearing record to the Secretary. Upon receipt of the hearing record, the Secretary shall schedule a mediation conference to be attended by representatives from the Office of the Secretary, the disagreeing Federal and State agencies, and any other interested parties whose participation is deemed necessary by the Secretary. The Secretary shall provide the parties at least 10 days notice of the time and place set for the mediation conference.

(b) Secretarial mediation efforts shall last only so long as the Federal and State agencies agree to participate. The Secretary shall confer with the Executive Office of the President, as necessary, during the mediation process.

#### **§ 930.115 Termination of mediation.**

Mediation shall terminate:

(a) At any time the Federal and State agencies agree to a resolution of the serious disagreement,

(b) If one of the agencies withdraws from mediation,

(c) In the event the agencies fail to reach a resolution of the disagreement within 15 days following Secretarial conference efforts, and the agencies do not agree to extend mediation beyond that period, or

(d) For other good cause.

#### **§ 930.116 Judicial review.**

The availability of the mediation services provided in this subpart is not intended expressly or implicitly to limit the parties' use of alternate forums to resolve disputes. Specifically, judicial review where otherwise available by law may be sought by any party to a serious disagreement without first having exhausted the mediation process provided for in this subpart.

### **Subpart H—Appeal to the Secretary for Review Related to the Objectives of the Act and National Security Interests**

#### **§ 930.120 Objectives.**

This subpart sets forth the procedures by which the Secretary may find that a federal license or permit activity, including those described in detail in an OCS plan, or a federal assistance activity, which a State agency has found to be inconsistent with the enforceable policies of the management program, may be federally approved because the activity is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security.

#### **§ 930.121 Consistent with the objectives or purposes of the Act.**

A federal license or permit activity, or a federal assistance activity, is "consistent with the objectives or purposes of the Act" if it satisfies each of the following three requirements:

(a) The activity furthers the national interest as articulated in § 302 or § 303 of the Act, in a significant or substantial manner,

(b) The national interest furthered by the activity outweighs the activity's adverse coastal effects, when those effects are considered separately or cumulatively.

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

#### **§ 930.122 Necessary in the interest of national security.**

A federal license or permit activity, or a federal assistance activity, is "necessary in the interest of national security" if a national defense or other national security interest would be significantly impaired were the activity not permitted to go forward as proposed. Secretarial review of national security issues shall be aided by information submitted by the Department of Defense or other interested Federal agencies. The views of such agencies, while not binding, shall be given considerable weight by the Secretary. The Secretary will seek information to determine whether the objected-to activity directly supports national defense or other essential national security objectives.

#### **§ 930.123 Appellant and Federal agency.**

(a) The "appellant" is the applicant, person or applicant agency submitting an appeal to the Secretary pursuant to this subpart.

(b) For the purposes of this subpart, the "Federal agency" is the agency whose proposed issuance of a license or permit or grant of assistance is the subject of the appeal to the Secretary.

#### **§ 930.124 Computation of time.**

(a) The first day of any period of time allowed or prescribed by these rules, shall not be included in the computation of the designated period of time. The last day of the time period computed shall be included unless it is a Saturday, Sunday or a Federal holiday, in which case the period runs until the next day which is not one of the aforementioned days.

#### **§ 930.125 Notice of appeal and application fee to the Secretary.**

(a) To obtain Secretarial review of a State agency objection, the appellant shall file a notice of appeal with the Secretary within 30 days of receipt of a State agency objection.

(b) The appellant's notice of appeal shall be accompanied by payment of an application fee or a request for a waiver of such fees. An appeal involving a project valued in excess of \$1 million shall be considered a major appeal and the application fee is \$500.00. All other appeals shall be considered minor appeals and the application fee is \$200.00.

(c) The appellant shall send the Notice of appeal to the Secretary, Herbert C. Hoover Building, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; a copy of the notice of appeal to the objecting State agency; and to the Assistant General

Counsel for Ocean Services (GCOS), 1305 East West Highway, Room 6111 SSMC 4, Silver Spring, Maryland 20910.

(d) No extension of time will be permitted for the filing of a notice of appeal.

(e) The Secretary shall waive any or all fees if the Secretary concludes upon review of the appellant's fee waiver request that such fees impose an economic hardship on appellant. The request for a waiver and demonstration of economic hardship shall accompany the notice of appeal. If the Secretary denies a request for a waiver and the appellant wishes to continue with the appeal, the appellant shall submit the appropriate fees to the Secretary within 20 days of receipt of the Secretary's denial. If the fees are not received by the 20th day, then the Secretary shall dismiss the appeal.

#### **§ 930.126 Consistency appeal processing fees.**

The Secretary shall collect as a processing fee such other fees from the appellant as are necessary to recover the full costs of administering and processing appeals to the Secretary under section 307(c) of the Act. All processing fees shall be assessed and collected no later than 60 days after publication of the Federal Register Notice closing the decision record. Failure to submit processing fees shall be grounds for extending the time for issuance of a decision pursuant to section 319(a)(2) of the Act (16 USC 1465(a)(2)) and § 930.130 of this subpart.

#### **§ 930.127 Briefs and supporting materials.**

(a) The Secretary shall establish a schedule of dates and time periods for submission of briefs and supporting materials by the appellant and the State agency.

(b) Both the appellant and State agency shall send copies of their briefs, supporting materials and all requests and communications to the Secretary, each other, and to the Assistant General Counsel for Ocean Services (GCOS), NOAA, 1305 East West Highway, Room 6111 SSMC4, Silver Spring, Maryland 20910.

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

(d) Where a State agency objection is based in whole or in part on a lack of information, the Secretary shall limit

the record on appeal to information previously submitted to the State agency and relevant comments thereon, except as provided for in sections 930.129(b) and (c).

**§ 930.128 Public notice, comment period, and public hearing.**

(a) The Secretary shall provide timely public notice of the appeal after the receipt of the notice of appeal, and payment of application fees. At a minimum, public notice shall be provided in the **Federal Register** and the immediate area of the coastal zone likely to be affected by the proposed activity.

(b) The Secretary shall provide an opportunity for public comment on the appeal. The public shall be afforded no less than 30 days to comment on the appeal. Notice of the public comment period shall take the same form as Notice required in paragraph (a) of this section.

(c) The Secretary shall afford interested Federal agencies, including the Federal agency whose proposed action is the subject of the appeal, with an opportunity to comment on the appeal. The Secretary shall afford notice to the Federal agencies of the time for filing their comments.

(d) The Secretary may extend the time for submitting comments on his own initiative or at the written request of a party or interested Federal agency, so long as the request is received prior to the comment date identified in the public notice. A copy of the request for an extension of time shall be sent to the Assistant General Counsel for Ocean Services.

(e) The Secretary may hold a public hearing in response to a request or on his own initiative. If a hearing is held by the Secretary, it shall be guided by the procedures described within § 930.113.

**§ 930.129 Dismissal, remand, stay, and procedural override.**

(a) The Secretary may dismiss an appeal for good cause. A dismissal is the final agency action. Good cause shall include, but is not limited to:

(1) Failure of the appellant to submit a notice of appeal within the required 30-day period.

(2) Failure of the appellant to submit a brief or supporting materials within the required period;

(3) Failure of the appellant to pay a required fee;

(4) Denial by the Federal agency of the federal license, permit or assistance application; or

(5) Failure of the appellant to base the appeal on grounds that the proposed

activity is either consistent with the objectives or purposes of the Act, or necessary in the interest of national security.

(b) If the State agency's consistency objection is not in compliance with section 307 of the Act and the regulations contained in subparts D, E, F, or I of this part, the Secretary shall override the State's objection. The Secretary may make this determination as a threshold matter.

(c) The Secretary may stay the processing of an appeal on her own initiative or upon request of an appellant or State agency for the following purposes:

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

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

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

(d) The Secretary may stay the processing of an appeal and remand it to the State agency for reconsideration of the project's consistency with the enforceable policies of the State's management program if significant new information relevant to the State agency's objection, that was not provided to the State agency as part of its consistency review, is submitted to the Secretary by the appellant, the public or a Federal agency. The Secretary shall determine a time period for the remand to the State not to exceed three months. If the State agency responds that it still objects to the activity, then the Secretary shall continue to process the appeal and shall include the significant new information in the decision record. If the State agency concurs, then the Secretary shall dismiss the appeal and notify the Federal agency that the activity may be federally approved.

**§ 930.130 Closure of the decision record and issuance of decision.**

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

(b) No later than 90 days after the closure of the decision record the Secretary shall issue a decision or publish a notice in the **Federal Register** explaining why a decision cannot be issued at that time. The Secretary shall issue a decision within 45 days of the publication of such notice.

(c) The decision of the Secretary shall constitute final agency action for the

purposes of the Administrative Procedure Act.

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

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

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

**§ 930.131 Review initiated by the Secretary.**

(a) The Secretary may, on her own initiative, choose to consider whether a federal license or permit activity, or a federal assistance activity, is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security. Secretarial review shall only be initiated after the completion of State agency review pursuant to the relevant subpart. The Secretary's decision to review the activity may result from an independent concern regarding the activity or a request from interested parties. If the Secretary decides to initiate review, notification shall be sent to the applicant, person or applicant agency, and to the relevant Federal and State agencies. The notice shall include a statement describing the reasons for the review.

(b) With the exception of application and processing fees, all other provisions under this subpart governing the processing and administering of appeals will apply to Secretarial reviews initiated under this section.

**Subpart I—Consistency of Federal Activities Having Interstate Coastal Effects**

**§ 930.150 Objectives.**

(a) A federal activity may affect coastal uses or resources of a State other than the State in which the activity will occur. Effective coastal management is fostered by ensuring that activities having such reasonably foreseeable interstate coastal effects are conducted consistent with the enforceable policies of the management program of each affected State.

(b) The application of the federal consistency requirement to activities

having interstate coastal effects is addressed by this subpart in order to encourage cooperation among States in dealing with activities having interstate coastal effects, and to provide States, local governments, Federal agencies, and the public with a predictable framework for evaluating the consistency of these federal activities under the Act.

**§ 930.151 Interstate coastal effect.**

The term "interstate coastal effect" means any reasonably foreseeable effect resulting from a federal action occurring in one State of the United States on any coastal use or resource of another State that has a federally approved management program. Effects are not just environmental effects, but include effects on coastal uses. Effects include both direct effects which result from the activity and occur at the same time and place as the activity, and indirect (cumulative and secondary) effects which result from the activity and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects are effects resulting from the incremental impact of the federal action when added to other past, present, and reasonably foreseeable actions, regardless of what person(s) undertake(s) such actions. The term "affects" means have an effect on. Effects on any coastal use or resource may also be referred to as "coastal effects."

**§ 930.152 Application.**

(a) This subpart applies to federal actions having interstate coastal effects, and supplements the relevant requirements contained in 15 CFR part 930, subparts C (Consistency for Federal Agency Activities), D (Consistency for Activities Requiring a Federal License or Permit), E (Consistency for OCS Exploration, Development and Production Activities) and F (Consistency for Federal Assistance to State and Local Governments). Except as otherwise provided by this subpart, the requirements of other relevant subparts of part 930 apply to activities having interstate coastal effects.

(b) Federal consistency is a requirement on federal actions affecting any coastal use or resource of a State with a federally-approved management program, regardless of the activities' locations (including States without a federally approved management program). The federal consistency requirement does not alter a coastal State's jurisdiction. The federal consistency requirement does not give States the authority to review the application of laws, regulations, or

policies of any other State. Rather, the Act allows a management program to review federal actions and may preclude federal action as a result of a State objection, even if the objecting State is not the State in which the activity will occur. Such objections to interstate activities under subparts D, E and F may be overridden by the Secretary pursuant to subpart H of this part.

**§ 930.153 Coordination between States in developing coastal management policies.**

Coastal States are encouraged to give high priority to:

- (a) Coordinating State coastal management planning, policies, and programs with respect to contiguous areas of such States;
- (b) Studying, planning, and implementing unified coastal management policies with respect to such areas; and
- (c) Establishing an effective mechanism, and adopting a federal-State consultation procedure, for the identification, examination, and cooperative resolution of mutual problems with respect to activities having interstate coastal effects.

**§ 930.154 Listing activities subject to routine interstate consistency review.**

(a) *Geographic location of listed activities.* Each coastal State intending to conduct a consistency review of federal activities occurring in another State shall:

- (1) List those Federal agency activities, federal license or permit activities, and federal assistance activities that the State intends to routinely review for consistency; and
- (2) Generally describe the geographic location for each type of listed activity.

(b) In establishing the geographic location of interstate consistency review, each State must notify and consult with the State in which the listed activity will occur, as well as with relevant Federal agencies.

(c) *Demonstrate effects.* In describing the geographic location for interstate consistency reviews, the State agency shall provide information to the Director that coastal effects from listed activities occurring within the geographic area are reasonably foreseeable. Listed activities may have different geographic location descriptions, depending on the nature of the activity and its effects on any coastal use or resource. For example, the geographic location for activities affecting water resources or uses could be described by shared water bodies, river basins, boundaries under the State's coastal nonpoint pollution control program, or other ecologically identifiable areas.

(d) *Director approval.* State agencies shall submit their lists and geographic location descriptions developed under this section to the Director for approval as a routine program change under subpart H of 15 CFR part 923. Each State submitting this program change shall include evidence of consultation with States in which the activity will occur, evidence of consultation with relevant Federal agencies, and any agreements with other States and Federal agencies regarding coordination of activities.

(e) *State failure to list interstate activities.* A coastal State that fails to list federal activities subject to interstate review, or to describe the geographic location for these activities, under paragraphs (a) through (d) of this section, may not exercise its right to review activities occurring in other States, until the State meets the listing requirements. The listing of activities subject to interstate consistency review, and the description of the geographic location for those listed activities, should ensure that coastal States have the opportunity to review relevant activities occurring in other States. States may amend their lists and geographic location descriptions pursuant to the requirements of this subpart and subpart H of 15 CFR part 923. States which have complied with paragraphs (a) through (d) of this section may also use the procedure at § 930.54 to review unlisted activities. States will have a transition period of 18 months from the date this rule takes effect. In that time a State may review an interstate activity pursuant to § 930.54 of this part. After the transition period States must comply with this subpart in order to review interstate activities.

**§ 930.155 Federal and State agency coordination.**

(a) Identifying activities subject to the consistency requirement. The provisions of this subpart are neither a substitute for nor eliminate the statutory requirement of federal consistency with the enforceable policies of management programs for all activities affecting any coastal use or resource. Federal agencies shall submit consistency determinations to relevant State agencies for activities having coastal effects, regardless of location, and regardless of whether the activity is listed.

(b) *Notifying affected States.* Federal agencies, applicants or applicant agencies proposing activities listed for interstate consistency review, or determined by the Federal agency, applicant or applicant agency to have an effect on any coastal use or resource, shall notify each affected coastal State of the proposed activity. State agencies

may also notify Federal agencies and applicants of listed and unlisted activities subject to State agency review and the requirements of this subpart.

(c) *Notice of intent to review.* Within 30 days from receipt of the consistency determination or certification and necessary data and information, or within 30 days from receipt of notice of a listed federal assistance activity, each State intending to review an activity occurring in another State must notify the applicant or applicant agency (if any), the Federal agency, the State in which the activity will occur (either the State's management program, or if the State does not have a management program, the Governor's office), and the Director, of its intent to review the activity for consistency. The State's notice to the parties must be received by

the 30th day after receipt of the consistency determination or certification. If a State fails, within the 30 days, to notify the applicant or applicant agency (if any), the Federal agency, the State in which the activity will occur, and the Director, of its intent to review the activity, then the State waives its right to review the activity for consistency. The waiver does not apply where the State intending to review the activity does not receive notice of the activity.

**§ 930.156 Content of a consistency determination or certification and State agency response.**

(a) The Federal agency or applicant is encouraged to prepare one determination or certification that will satisfy the requirements of all affected

States with approved management programs.

(b) State agency responses shall follow the applicable requirements contained in subparts C, D, E and F of this part.

**§ 930.157 Mediation and informal negotiations.**

The relevant provisions contained in subpart G of this part are available for resolution of disputes between affected States, relevant Federal agencies, and applicants or applicant agencies. The parties to the dispute are also encouraged to use alternative means for resolving their disagreement. OCRM shall be available to assist the parties in these efforts.

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