planning time, or time necessitated by other administrative actions.

Regulatory Impact

The regulations proposed herein would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this proposal would not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this proposed regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

McDonnell Douglas: Docket 2002–NM–103–AD.

Applicability: Model MD–90–30 airplanes, as listed in Boeing Alert Service Bulletin MD90–24A081, Revision 01, dated March 7, 2003; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent internal overheating and arcing of circuit breakers and airplane wiring due to long-term use and breakdown of internal components of the circuit breakers, which could result in smoke and fire in the flight compartment and main cabin, accomplish the following:

Inspection and Replacement

(a) Within 18 months after the effective date of this AD: Perform a one-time general visual inspection of the circuit breakers to determine if discrepant circuit breakers are installed (includes circuit breakers manufactured by Wood Electric and Wood Electric Division of Brumfield Potter Corporations, and incorrect circuit breakers installed per Boeing Alert Service Bulletin MD90–24A081, dated February 14, 2002), per Boeing Alert Service Bulletin MD90–24A081, Revision 01, dated March 7, 2003.

Note 1: For the purposes of this AD, a general visual inspection is defined as: ''A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made from within touching distance unless otherwise specified. A mirror may be necessary to enhance visual access to all exposed surfaces in the inspection area. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or droplight and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked.''

(1) If no discrepant circuit breaker is found: No further action is required by this paragraph.

(2) If any discrepant circuit breaker is found: Before further flight, replace the circuit breaker with a new, approved circuit breaker, per the service bulletin.

Part Installation

(b) As of the effective date of this AD, no person shall install a circuit breaker manufactured by Wood Electric Corporation or Wood Electric Division of Potter Brumfield Corporation on any airplane.

Alternative Methods of Compliance

(c) In accordance with 14 CFR 39.19, the Manager, Los Angeles Aircraft Certification Office, FAA, is authorized to approve alternative methods of compliance for this AD.

Issued in Renton, Washington, on June 5, 2003.

Ali Bahrami,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 03–14674 Filed 6–10–03; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 930

[Docket No. 030604145–3145–01]

RIN 0648–AR16

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: Proposed rule.

SUMMARY: The National Oceanic and Atmospheric Administration (NOAA) proposes to revise the Federal Consistency regulations under the Coastal Zone Management Act of 1972 (CZMA). NOAA is proposing this rule to address the CZMA-related recommendations of the Report of the National Energy Policy Development Group (Energy Report) as described in NOAA's July 2, 2002, Advanced Notice of Proposed Rulemaking (67 FR 44407–44410) (ANPR). This proposed rule seeks to make improvements to the Federal Consistency regulations to clarify some sections and provide greater transparency and predictability to the Federal Consistency regulations.

DATES: Comments on this document must be received by July 11, 2003.

ADDRESSES: Please send comments as an attachment to an email in either WordPerfect or MSWord, or in the body of an email, to *CZMAFC.ProposedRule@noaa.gov.*

Address all comments regarding this notice to David Kaiser, Federal Consistency Coordinator, Coastal Programs Division, Office of Ocean and Coastal Resource Management, NOAA, 1305 East-West Highway, 11th Floor, Silver Spring, MD 20910. Written comments may also be sent to this address.

All comments received by the comment deadline, this **Federal Register** notice, and an underline/strikeout version of the sections of the regulations proposed to be revised will be posted at OCRM's Federal Consistency Web page at: *http://coastalmanagement.noaa.gov/czm/federal_consistency.html.*

FOR FURTHER INFORMATION CONTACT: David Kaiser, Federal Consistency Coordinator, OCRM/NOAA, 301–713–3155 ext. 144, *david.kaiser@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

For nearly 30 years the CZMA has met the needs of coastal States, Great Lake States and United States Trust Territories and Commonwealths (collectively referred to as ''coastal States'' or ''States''), Federal agencies, industry and the public to balance the protection of coastal resources with coastal development, including energy development. When States develop and amend their Coastal Management Programs (CMPs), and when making coastal management decisions, the CZMA requires the States to adequately consider the national interest in the CZMA objectives and to give priority consideration to coastal dependant uses and processes for facilities related to national defense, energy, fisheries, recreation, ports and transportation.

States have collaborated with industry on a variety of energy facilities, including oil and gas pipelines, nuclear power plants, hydroelectric facilities, and alternative energy development. States have reviewed and approved thousands of offshore oil and gas facilities and related onshore support facilities. On December 8, 2000, NOAA issued a comprehensive revision to the Federal Consistency regulations, which reflected substantial effort and participation by Federal agencies, States, industry, and the public, over a five year period. Given this recent broad-based review, NOAA is not re-evaluating the 2000 final rule, rather it is making improvements to address the issues raised in the ANPR and to make other technical modifications.

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

The Energy Report contains numerous recommendations for obtaining a long-term, comprehensive energy strategy to advance new, environmentally beneficial technologies to increase energy supplies and encourage less polluting, more efficient energy use. The CZMA and the Outer Continental Shelf Lands Act (OCSLA), a statute administered by the Minerals Management Service (MMS) within the Department of the Interior (Interior), are specifically mentioned. The Energy Report found that the effectiveness of Commerce and Interior programs are ''sometimes lost through a lack of clearly defined requirements and information needs from federal and state entities, as well as uncertain deadlines during the process.'' To address these issues, the Energy Report recommended that Commerce and Interior ''re-examine the current federal legal and policy regime (statutes, regulations, and Executive Orders) to determine if changes are needed regarding energy-related activities and the siting of energy facilities in the coastal zone and on the Outer Continental Shelf (OCS).'' Energy Report at 5–7.

In July 2002, NOAA published the ANPR seeking comments on whether improvements could be made to NOAA's Federal Consistency regulations. This proposed rulemaking is the product of recommendations contained in the Energy Report and comments received in response to the ANPR.

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

The CZMA was enacted in 1972 to encourage States to be proactive in managing natural resources for their benefit and the benefit of the Nation. The CZMA recognizes a national interest in the resources of the coastal zone and in the balancing of competing uses of those resources. The CZMA is a voluntary program for States. If a State elects to participate it must develop and implement a CMP pursuant to Federal guidelines. State CMPs are comprehensive management plans that describe the uses subject to the management program, the authorities and enforceable policies of the management program, the boundaries of the State's coastal zone, the organization of the management program, and other State coastal management concerns. The State CMPs are developed with the participation of Federal agencies, industry, other interested groups and the public. Thirty-five coastal States are eligible to participate. Thirty-four of the eligible States have federally approved CMPs. Illinois is not currently participating.

Once NOAA approves a State's CMP, then the CZMA Federal Consistency provision applies. Federal Consistency is a limited waiver of Federal supremacy and authority. Federal agency activities that have coastal effects must be consistent to the maximum extent practicable with the federally approved enforceable policies of the State's CMP. In addition, non-Federal applicants for Federal authorizations and funding must be fully consistent with the enforceable policies of State CMPs. The Federal Consistency provision is a cornerstone of the CZMA program and a primary incentive for States to participate. While States have negotiated changes to thousands of Federal actions over the years, States have concurred with approximately 93% of all Federal actions reviewed.

NOAA's Federal Consistency regulations, first promulgated in 1979, are designed to provide reliable procedures and predictability to the implementation of Federal Consistency. In general, the regulations operate well for the Federal and State agencies and permit applicants and provide a reasonable interpretation of the CZMA's broad requirements. When Congress amended the CZMA in 1990, it specifically endorsed NOAA's consistency regulations and interpretation of the CZMA. However, changes to the CZMA in 1990 and 1996 also necessitated revisions to the regulations.

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

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

III. The Role of the CZMA in OCS Energy Development

The CZMA and the OCSLA interact both by explicit cross-reference in the statutes and through their regulatory implementation. Both statutes mandate State review of OCS oil and gas Exploration Plans (EP's) and Development and Production Plans (DPP's). Both statutes and their corresponding regulations provide a

compatible and interrelated process for States to review EP's and DPP's.

When MMS offers an OCS lease sale, it is considered a Federal agency activity. If MMS determines that the lease sale will have reasonably foreseeable coastal effects, then MMS provides a CZMA consistency determination to the affected State(s) stating whether the lease sale is ''consistent to the maximum extent practicable'' with the enforceable policies of the State's CMP. If the State objects, MMS may still proceed with the lease sale if MMS' administrative record and the OCSLA shows that it is fully consistent or consistent to the maximum extent practicable.

The CZMA requires that when a lessee seeks MMS approval for its EP or DPP, the lessee must certify to the affected State(s) that the activities authorized by the licenses or permits described in the plans are fully consistent with the enforceable policies of the State's CMP. If the State objects to the consistency certification, then MMS is prohibited from approving the license or permits described in detail in the EP or DPP. The lessee may appeal to the Secretary of Commerce to override the State objection and allow MMS to issue its approvals described in the plan. When deciding an appeal, the Secretary, among other elements, balances the national interest in energy development against adverse effects on coastal resources and coastal uses.

The CZMA and NOAA's regulations ensure that the national interest in the CZMA objectives are furthered. These safeguards are discussed below using OCS oil and gas activities to illustrate.

The ''*Effects Test.*'' As discussed above, Federal Consistency review is triggered only when a Federal action has reasonably foreseeable coastal effects, referred to as the ''effects test.'' Consistency does NOT apply to every action or authorization of a Federal agency, or of a non-Federal applicant for Federal authorizations.

For OCS oil and gas lease sales, MMS determines if coastal effects are reasonably foreseeable and provides affected States with a Consistency Determination. For example, MMS has established the Eastern Planning, Central Planning and Western Planning Areas for the Gulf of Mexico. MMS may determine that lease sales in the Eastern Planning Area will not have reasonably foreseeable effects on coastal uses or resources within the Central Planning Area. Therefore, MMS may choose not to provide States adjacent to the Central Planning Area with a Consistency Determination. MMS could also determine that a lease sale held far offshore in the Eastern Planning Area would not have coastal effects on Florida or Alabama coastal uses or resources.

For OCS EP's and DPP's the CZMA mandates, as a general matter, State consistency review. However, as with Federal agency activities, a coastal State's ability to review the Plans stops where coastal effects are not reasonably foreseeable. For OCS EP's and DPP's located far offshore, this would be a factual matter to be determined by the State, applicant and MMS on a case-by-case basis.

Under NOAA's regulations, if a State wanted to ensure that OCS EP's and DPP's located in a particular offshore area would automatically be subject to State CZMA review, a State could, if NOAA approved, amend its CMP to specifically describe a geographic location outside the State's coastal zone where such plans would be subject to State review. *See* 15 CFR 930.53. Or, if a State wanted to review an EP or DPP where the applicant and/or MMS have asserted that coastal effects are not reasonably foreseeable, the State could request approval from NOAA to review such plans on a case-by-case basis. See 15 CFR 930.54 (unlisted activities). In both situations, NOAA would approve only if the State could make a factual showing that effects on its coastal uses or resources are reasonably foreseeable as a result of a particular EP or DPP.

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

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

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

Since 1978, MMS has approved over 10,600 EP's and over 6,000 DPP's. States have concurred with nearly all of these plans. In the 30-year history of the CZMA, there have been only 14 instances where the oil and gas industry appealed a State's Federal Consistency objection to the Secretary of Commerce and the Secretary issued a decision (there were several appeals where the Secretary did not issue a decision because the appeals were withdrawn due to settlement negotiations between the State and applicant or a settlement agreement between the Federal government and the oil companies involved in the projects). Of the 14 decisions (1 DPP and 13 EP's), there were 7 decisions to override the State's objection and 7 decisions not to override the State.

Since the 1990 amendments to the CZMA, there have been several OCS oil and gas lease sales by MMS and only one State objection. In that one objection OCRM determined that the State's objection was not based on enforceable policies, MMS determined that it was consistent to the maximum extent practicable with the State's CMP, and the lease sale proceeded. Thus, all lease sales offered by MMS since the 1990 amendments have proceeded under the CZMA Federal Consistency provision. In addition, since 1990, there have been six State objections to OCS plans. In three of those cases, the Secretary did not override the State's objection. In two of the cases the Secretary did override the State allowing MMS approval of the permits

described in the plans, and in one case the State objection was withdrawn as a result of a settlement agreement between the Federal government and the oil companies involved in the project.

Presidential Exemption. After any final judgement, decree, or order of any Federal court, the President may exempt from compliance the elements of a Federal agency activity that are found by a Federal court to be inconsistent with a State's CMP, if the President determines that the activity is in the paramount interest of the United States. CZMA § 307(c)(1)(B). This exemption was added to the statute in 1990 and has not yet been used.

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

IV. Explanation of Proposed Changes to the Federal Consistency Regulations

Rule Change 1: § 930.1(b) Overall Objectives. This proposed change moves the parenthetical with the description of ''Federal action'' from § 930.11(g) to the first instance of the term. Federal action is used throughout the regulations to refer, when appropriate, to subparts C, D, E, F and I.

Rule Change 2: § 930.10 Definitions Table of Contents. Definition of Failure Substantially to Comply with an OCS Plan. The reference to section 930.86(d) is incorrect. There is no 930.86(d). The reference should be to 930.85(d) under the 2000 rule, and what is now proposed as 930.85(c).

Rule Change 3: § 930.11(g) Definitions. Effect on any coastal use or resource (coastal effects). This proposed change moves the parenthetical for ''Federal actions'' to the first instance of Federal action in § 930.1(b) and proposes to insert more specific language for Federal agency activity and federal license or permit activity.

Rule Change 4: § 930.31(a) Federal agency activity. This proposed change would not alter the current application of the definition of Federal agency activity, but would clarify that a ''function'' by a Federal agency refers to an actual *proposal for action.* The examples included would also be re-written to emphasize that a proposed action is an essential element of the definition.

It has always been NOAA's view that Federal Consistency applies to proposals to take an action or initiate a series of actions that have reasonably foreseeable coastal effects, and not to agency deliberations or internal tasks related to a proposed agency action. Thus, a planning document that explores possible projects or priorities for an agency is not a Federal agency activity, as there is no action proposed. However, as included in the proposed revised example, a Federal agency plan or rulemaking that documents a decision or proposes a new action would be a Federal agency activity subject to the effects test.

Once a Federal agency proposes an action, it is the proposal for action that is the subject of the consistency review. The State only reviews the proposed action and does not review all tasks, ministerial activities, meetings, discussions, and exchanges of views incidental or related to a proposed action, and does not review other aspects of a Federal agency's deliberative process. In addition, Federal agency activities do not include interim or preliminary activities incidental or related to a proposed action for which a consistency determination has been or will be submitted and which do not make new commitments for actions with coastal effects. Such interim or preliminary activities do not propose independent actions that are subject to Federal Consistency review.

For example, where a Federal agency has not yet submitted a consistency determination to a State or where a State has concurred with a Federal agency's consistency determination for a proposed action, planning activities may occur before or after the State's Federal Consistency review that are incidental to the proposed action and which are related to the agency's deliberative process. In these cases the interim or preliminary activity would not be subject to Federal Consistency review.

In the OCS oil and gas context, examples of interim or preliminary activities that are not Federal agency activities include the publication of OCS 5-Year programs, as discussed below; or rulemakings that establish administrative procedures for OCS-related activities that do not affect coastal uses or resources (*e.g.*, rulemaking prescribing the completion and submission of forms). Consistent with the Ninth Circuit's decision in *California ex rel. Cal. Coastal Comm'n* v. *Norton,* 150 F. Supp.2d 1046 (N.D. Cal. 2001), *aff'd,* 311 F.3d 1162 (9th Cir. 2002), granting or directing suspensions of OCS operations or production by MMS would be interim or preliminary activities and would not be Federal agency activities when a lease suspension would either not have coastal effects or, if the lease suspension set forth milestones that would have coastal effects, the State had previously reviewed the lease sale for Federal Consistency. (The Ninth Circuit emphasized that the leases at issue in *California* v. *Norton* had never been reviewed by California.) *See* NOAA's response to COMMENT 33 for further discussion on lease suspensions and *California* v. *Norton* and NOAA's conclusion that in all foreseeable instances, lease suspensions would not be subject to Federal Consistency review since (1) in general, they do not authorize activities with coastal effects, and (2) if they did contain activities with coastal effects, the activities and coastal effects would be covered in a State's review of a lease sale, an EP or a DPP. If a State believes that a particular lease suspension should be subject to Federal Consistency, the State could notify MMS. MMS could determine that the lease suspension is an interim activity that does not propose a new action with coastal effects and/or provide the State with a negative determination pursuant to 15 CFR § 930.35.

Not all ''planning'' or ''rulemaking'' activities are subject to Federal Consistency since such planning or rulemaking may merely be part of the agency's deliberative process. Likewise, the plan or rulemaking may not propose an action with reasonably foreseeable coastal effects and would therefore not be subject to Federal Consistency. If, however, an agency's administrative deliberations result in an actual plan to take an action, then that plan could be subject to Federal Consistency if coastal effects are reasonably foreseeable. For example, in the OCS oil and gas program, MMS produces a 5-year Leasing Program ''Plan.'' MMS has informed NOAA that the 5-Year Program Plan is a preliminary activity that does not set forth a proposal for action and thus, coastal effects cannot be determined at this stage. Accordingly, MMS' proposal for action would occur when MMS conducts a particular OCS oil and gas lease sale.

In another example of what is subject to State consistency review, consider the situation when the Navy proposes to construct a pier. The project involves compliance with numerous federal laws, *e.g.*, National Environmental Policy Act (NEPA) documents,

Endangered Species Act (ESA) section 7 consultation, a Rivers and Harbors Act section 10 permit from the Army Corps of Engineers (Corps), contracts with a construction company to build the pier, etc. These various authorizations and activities related to the Navy's proposal to build the pier are not separate Federal agency activities subject to Federal Consistency. The Federal agency activity for purposes of 15 CFR 930.31 is the proposal to build the pier. The State reviews the pier proposal. The State uses the information provided by the Navy, pursuant to 15 CFR 930.39(a), that is necessary to evaluate coastal effects and determine consistency with the State's enforceable policies. The State may request, or the Navy may provide, the Corps section 10 permit application, or the Biological Opinion under the ESA or the NEPA EIS, with the Navy's consistency determination. Or information in these documents may be used as part of the necessary information required by 15 CFR 930.39, but they are not required to be part of the information required in § 930.39(a) and are not reviewed as the proposed Federal agency activity for consistency.

NOAA has proposed to change ''event(s)'' to ''activity(ies)'' since the term ''activities'' more closely follows the statute and NOAA's regulations.

Rule Change 5: § 930.31(d) Federal agency activity. General Permits. In the 2000 rule, NOAA acknowledged the hybrid nature of general permits and gave Federal agencies the option of issuing a general permit under either CZMA § 307(c)(1) (Federal agency activity) or CZMA § 307(c)(3)(A) (Federal license or permit activity), even though NOAA has opined that, for CZMA purposes, a general permit was more appropriately treated as a Federal agency activity. In this proposed rule, NOAA would remove the option to allow Federal agencies to treat their general permits as a Federal license or permit activity for purposes of complying with CZMA § 307 and 15 CFR part 930. If a general permit is proposed by a Federal agency and coastal effects are reasonably foreseeable, then the general permit would be treated as a Federal agency activity under CZMA § 307(c)(1) and 15 CFR part 930, subpart C. NOAA's determination that general permits are Federal agency activities and not Federal license or permit activities under CZMA § 307 is for CZMA purposes only and does not affect the status of general permits under the Administrative Procedure Act or under any other Federal statute.

There are several reasons why a general permit cannot be a Federal license or permit activity under CZMA § 307. Under NOAA's regulations, Federal agencies are not ''applicants'' within the meaning of 15 CFR 930.52. *See* 65 FR 77145 (col 1&2) (Dec. 8, 2000). Even if NOAA were to change its regulations to allow a Federal agency to be an ''applicant,'' the Federal agency could not appeal the State's objection to the Secretary of Commerce.

Further, even if a general permit were treated as a Federal license or permit activity for CZMA § 307 purposes and a State objected, the potential users of a general permit could not appeal the State's objection since there would be no case specific factual inquiry on which the Secretary could base her decision.

Other changes would clarify that if a State objects to a Consistency Determination for a general permit, the general permit would still be in legal effect for that State, but that 15 CFR part 930, subpart C of the consistency regulations would no longer apply. Thus, a State objection to a Consistency Determination for the issuance of a general permit would alter the form of CZMA compliance required, transforming the general permit into a series of case-by-case CZMA decisions and requiring each potential user of the general permit to submit an individual consistency certification in compliance with 15 CFR part 930, subpart D.

NOAA reiterates that if a State concurs with a consistency determination for general permit, then the State may not subsequently review individual uses of the general permit under subpart C or D. For example, in the OCS oil and gas context, if a State has concurred with the Environmental Protection Agency's Consistency Determination for an OCS National Pollutant Discharge Elimination System (NPDES) general permit under the Clean Water Act, then the State may not review the use of the NPDES general permit for consistency at the OCS EP or DPP stage of reviews or when a facility files a notice of intent to be covered by a general permit under the NPDES regulations. If, however, a State objects to the OCS NPDES general permit, then each user, or ''applicant'' in CZMA parlance, must file a consistency certification with the State and obtain the State's concurrence before the applicant may avail itself of the NPDES general permit.

Rule Change 6: § 930.35(d) General Negative Determination. Section 930.35(d) would be changed to (e) and a new section 930.35(d) would be added. The General Negative Determination (General ND) would be an administrative convenience for Federal agencies to use when they undertake repetitive activities that, either on an individual, case-by-case basis or cumulatively, do not have coastal effects. The General ND would not diminish the factual basis required for Federal Consistency reviews. The Federal agency must still make a factual effects analysis for the repetitive activities. It is proposed as an analogue to the existing General Consistency Determinations (15 CFR 930.36(c)), for repetitive activities which do have cumulative effects.

A General ND would not affect the application of the ''effects test'' and the requirement for Federal agencies to provide Consistency Determinations to coastal States when there are reasonably foreseeable coastal effects. For example, a General ND may apply to activities far away from the coastal zone because coastal effects are not foreseeable, but might not apply to the same activities proposed in or near the coastal zone where the proximity to coastal uses or resources may have coastal effects and require a General Consistency Determination or Consistency Determination.

A Federal agency would not be required to use a General ND. If any of the conditions for a negative determination are met, then a Federal agency could choose to provide the State with either a Negative Determination, or if applicable, a General ND. The conditions for a Negative Determination are when a Federal agency determines that there will not be coastal effects and the activity is listed in the State's program, the State has notified the Federal agency that it believes coastal effects are reasonably foreseeable, the activity is the same as or is similar to activities for which consistency determinations have been prepared in the past, or the Federal agency undertook a thorough consistency assessment and developed initial findings on the coastal effects of the activity. *See* 15 CFR 930.35(a)(1)–(3).

If a State subsequently finds that a General ND may no longer be applicable, the State agency may request that the Federal agency reassess the General ND. In the case of a disagreement between the State and the Federal agency, the conflict resolution provisions of subpart G are available.

Rule Change 7: § 930.41(a) State agency response. This change would clarify when the State's consistency review period begins for Federal agency activities. The proposed changes provide additional clarification to States that the State's determination of whether the information provided by

the Federal agency pursuant to 15 CFR 930.39(a) is complete, is not a substantive review. Instead, it is a ''checklist'' review to see if the description of the activity, the coastal effects, and the evaluation of the State's enforceable policies are included in the submission to the State agency. If the items required by § 930.39(a) are included, then the 60-day review starts. This review does not determine or evaluate the *substantive adequacy* of the information. The adequacy of the information is a component of the State's substantive review which occurs during the 60-day review period.

To help resolve disputes as to when the 60-day review period started when a State later claims that required information was not provided, NOAA proposes to replace the requirement to ''immediately'' notify the Federal agency that information required by § 930.39(a) is missing with a 14-day notification period. If the State agency has not notified the Federal agency of missing information within this 14-day period, then the State waives the ability to make that claim and the 60-day review period started when the State received the initial determination and information. This would require that State agencies pay close attention to the consistency determinations they receive, but would not affect the State's ability to review the activity or to object for lack of information at the end of the 60-day review period.

Rule Change 8: § 930.51(a) Federal license or permit. The proposed changes would emphasize and clarify NOAA's long-standing view of the elements that are needed to subject a ''federal license or permit'' to State Federal Consistency review. First, Federal law must require that the applicant obtain the federal authorization. Second, the purpose of the federal authorization is to allow a non-federal applicant to conduct a proposed activity. Third, the proposed activity to be federally permitted must have reasonably foreseeable effects on a State's coastal uses or resources, and fourth, the proposed activity was not previously reviewed by the State agency for Federal Consistency (unless the authorization is a renewal or major amendment pursuant to § 930.51(b)). All four of these elements are required for Federal Consistency review.

Federal license or permit does not include, for CZMA Federal Consistency purposes, federal authorizations for activities that do not have coastal effects. Federal Consistency does not apply to a required federal certification of an applicant's ministerial paperwork which is merely incidental or related to an activity that either does not have coastal effects or an activity that is already subject to Federal Consistency review. For example, when MMS makes certain determinations such as the qualification of bidders for OCS lease sales, bonding certifications, certifications of financial responsibility, approvals of departures from regulations in order to enhance safety. Or a Federal agency may be required to certify the equipment to be used for an activity which has already been the subject of a consistency review. Each of these certifications are merely incidental to the activity undertaken by the applicant which has already or will in the near future be the subject of a full Federal Consistency review.

As another example, MMS has ''Notification requirements'' which are not subject to Federal Consistency since they only require the operator to notify MMS of an activity and MMS' approval is not required. Another example would be when a power plant is transporting spent nuclear waste by ship; the plant must provide the U.S. Coast Guard with a transportation plan which the Coast Guard reviews, but Coast Guard approval is not required by Federal law. Because Coast Guard approval was not required and the Coast Guard merely reviewed the transportation plan, there was no Federal Consistency review under CZMA § 307(c)(1) or 307(c)(3)(A).

However, a lease issued by a Federal agency to a non-Federal entity that is the only authorization to use federal property for a non-Federal activity would still be reviewable under the listed and unlisted requirements in §§ 930.53 and 930.54, if the lease was required by law, the proposed activity will have coastal effects, and the State did not previously review a Federal authorization for the same project.

Thus, the proposed change to the rule would ensure that the definition of ''Federal license or permits'' is not overly-inclusive or beyond the commonly understood meaning of license or permit, while at the same time retaining the phrase ''any required authorization'' to capture any form of Federal license or permit that is: (1) Required by Federal law, (2) authorizes an activity, (3) the activity authorized has reasonably foreseeable coastal effects, and (4) the authorization is not incidental to a Federal license or permit previously reviewed by the State. Thus, the removal of the forms of approvals listed in the current language would not exclude a category of Federal authorizations from Federal Consistency, but would emphasize that any form of Federal authorization must have the required elements to be considered a ''Federal license or permit'' for CZMA purposes.

Factual disputes concerning whether a Federal authorization is subject to Federal Consistency can be addressed through NOAA's regulations regarding the review of listed or unlisted federal license or permit activities. 15 CFR 930.53 and 930.54.

The effects test language at the end would be deleted as superfluous since subpart C contains the effects analysis for Federal agency activities.

Rule Change 9: § 930.51(e) Substantially different coastal effects. Section (e) was added in the 2000 rule to emphasize that determining whether the effects from a renewal or major amendment are substantially different is a case-by-case factual determination that requires the input of all parties. NOAA used the phrase ''the opinion of the State agency's views shall be *accorded deference,*'' (emphasis added) to help ensure that the State agency has the opportunity to review coastal effects which may be substantially different than previously reviewed. NOAA expected that the parties would discuss the matter and agree whether effects are substantially different. NOAA did not intend to use the phrase to have the State agency make the decision on whether coastal effects are substantially different. Thus, to provide clarification, NOAA proposes new language stating that the expert permitting Federal agency makes this determination after consulting with the State and applicant. If a State disagrees with a Federal agency's determination of substantially different coastal effects, then the State could either request NOAA mediation or seek judicial review to resolve the factual dispute.

Rule Change 10: § 930.58(a)(1) Necessary data and information. This change would provide a greater level of specificity for information requirements for federal license or permit activities. The purpose of § 930.58 is to identify the information needed to start the six-month consistency review period and to the extent possible, identify the information needed by the State agency to make its concurrence or objection. Thus, the more specific the information requirements are, the more predictable and transparent the process.

Section 930.58(a)(1) would be reorganized to clarify that ''necessary data and information'' includes (1) a copy of the federal application, and (2) all supporting material provided to the Federal agency in support of the application, (3) information that is required and specifically described in the State's management program, and (4) if not included in 1 or 2, a detailed

description of the activity, its associated facilities and the coastal effects.

NOAA proposes to remove the clause in § 930.58(a)(1) that says ''and comprehensive data and information sufficient to support the applicant's consistency certification.'' This clause is not needed since the rest of the section, especially as changed, describes the information NOAA determined necessary and § 930.58(a)(2) allows the State to describe in its CMP necessary information in addition to that required by NOAA regulations. The language proposed to be removed is ambiguous as it could refer to the other paragraphs in this section or to other undefined information, and could create uncertainty in the determination of when the six-month review period starts.

These changes would not affect a State's ability to specifically describe ''necessary data and information'' in the State's federally approved management program (§ 930.58(a)(2)), or to request additional information during the six-month review period (§ 930.60(b)), or to object for lack of information (§ 930.63(c)).

Rule Change 11: § 930.58(a)(2) Necessary data and information (State permits). In the 2000 rule, NOAA allowed States to describe State permits as necessary data and information. Unfortunately, implementation of this provision had the potential to require applicants to obtain State permit approval before the six-month consistency review period could begin. NOAA does not believe the statutorily defined six-month review process anticipated such a conundrum. While it may be appropriate or necessary for a State to include complete State permit *applications* as necessary data and information, it is not appropriate to require an approved permit. Thus, NOAA proposes to remove ''State permits'' as eligible necessary data and information, but has retained State permit applications.

Rule Change 12: § 930.60 Commencement of State agency review. This change would clarify when the State's consistency review period begins for federal license or permit activities. The changes would provide additional clarification to States that the State's determination of whether the information provided by the applicant pursuant to 15 CFR 930.58 is complete, is not a substantive review. Instead it is a ''checklist'' review to see if the application, description of the activity, the coastal effects, the evaluation of the State's enforceable policies, and specific information described in the State's federally approved program are included in the submission to the State agency. If the items required by § 930.58 are included, then the six-month review starts. This review does not determine or evaluate the *substantive adequacy* of the information. The adequacy of the information is a component of the State's substantive review which occurs during the six-month review period. The change would also further clarify that a State may not stop, stay or otherwise alter the consistency timeclock once it begins, unless the applicant agrees in writing to stay the time period for a specific or defined amount of time. NOAA proposes to delete the word ''extend'' because the six-month period is set by statute and cannot be extended by rule. Thus, the State agency and applicant can stay or ''toll'' the running of the six-month period for an agreed upon time, after which the remainder of six-month statutory period would continue.

NOAA reiterates that if a State wants to require certain information prior to starting the six-month review period, the only way it can do so is to amend the State's management program to identify specific ''necessary data and information'' pursuant to § 930.58(a)(2).

NOAA also proposes to change the section to remove a State's option of starting the six-month review period when a consistency certification has not been submitted. *See* below under *Collier Decision* for further information.

The proposed re-write of paragraph (a)(2) is not a substantive change, but is merely a more clear restatement of the existing paragraph.

The Collier Decision. Under the 2000 rule, § 930.60(a)(1)(ii) allowed a State to start the six-month consistency review period even if the applicant had not provided a consistency certification or the necessary data and information. However, now, as described in *Collier,* NOAA has determined that a State could not start the six-month review without the applicant's consistency certification. *See* NOAA's Dismissal Letter in the Consistency Appeal of Collier Resources Company (April 17, 2002). In *Collier,* NOAA determined that:

> An applicant's failure to provide a state with a consistency certification cannot divest a state of its authority pursuant to CZMA section 307(c)(3)(A). However, filing a state objection without an underlying consistency certification provided by the applicant is neither a remedy for the applicant's failure to comply with the CZMA, nor a valid exercise of [the State's] own CZMA authorities.
>
> The statutory language and scheme of the CZMA presumes that the applicant has the first opportunity to demonstrate that its activity is consistent with the enforceable policies of the state CMP. Section 307(c)(3)(A) provides in pertinent part: ''[a]t the earliest practicable time, the state or its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's certification.'' The NOAA regulations also require a state objection be made in response to the applicant's consistency certification. 15 CFR 930.64. Likewise, consistency cannot be presumed without the receipt of a consistency certification. 16 U.S.C. 1456(c)(3)(A) and 15 CFR 930.63. Finally, NOAA's regulations anticipate that the applicant will have the first opportunity to provide the state with the necessary information and data to demonstrate consistency with the state CMP and that only after the receipt of that information can the state consistency review process begin. *See* 15 CFR 930.58.
>
> Given the language and structure of the statute and NOAA's implementing regulations, it is clear that an applicant's consistency certification is essential to a state's Federal consistency review. Therefore, I conclude that a State may not ''object'' within the meaning of the CZMA, to an application for a Federal license or permit when no consistency certification has been submitted. Florida's objection in this case has no effect or is not valid.
>
> A coastal state is not without remedy, however, when a recalcitrant applicant declines to provide the necessary consistency certification. First, both the statute and the regulations make it clear that a Federal agency cannot issue a license or permit until ''the state or its designated agency has concurred with the applicant's consistency certification or until by the state's failure to act, the concurrence is conclusively presumed.'' 16 U.S.C. 1456(c)(3)(A). In addition, a state may seek enforcement of the CZMA in Federal court. Unlike the Secretary of Commerce, the Federal courts have the authority to require compliance with Federal law through the issuance of mandamus, injunction and other relief.
>
> Optimally, in matters such as this, where an applicant disagrees that its permit or license activity is subject to the provisions of a state CMP can be resolved through the availability of mediation services of NOAA's Office of Ocean and Coastal Resource Management (OCRM), 15 CFR 930.55, or an advisory letter issued by OCRM pursuant to 15 CFR 930.142 (15 CFR 930.3(2001)). While these informal procedures do not carry the weight of a federal court order, they represent the views of the expert agency charged with the implementation of the CZMA. These informal remedies are also more expedient and less costly than the Secretarial appeals process or federal litigation.

While not central to the decision made in *Collier,* NOAA opined in *Collier* that the six-month review period could also only start after receipt of the necessary data and information. *Id.* However, NOAA has determined that a State could, if it wished to, start the six-month review upon receipt of a consistency certification, but without the necessary data and information (but could not then later stop the six-month

time period without agreement from the applicant). NOAA makes this distinction because, as discussed in *Collier,* a consistency certification is central to the State's jurisdiction and authority under the statute to conduct a consistency review. Allowing necessary data and information to be submitted after the six-month period has begun provides flexibility to the State and applicant to remedy the submission of the necessary data and information during the six-month review.

Rule Change 13: § 930.63(d). The cross reference to 930.121(d) is incorrect. There is no 930.121(d). The reference should be to 930.121(c).

Rule Change 14: § 930.76(a) and (b) Submission of an OCS plan, necessary data and information and consistency certification. These proposed changes would address information requirements for OCS plans. The changes would provide a more specific list of the information required. Clean Air Act and Clean Water Act permits are not added to NOAA's regulations as these permits are already required to be ''described in detail'' in OCS plans and are covered under the State's review of the OCS plan. *See* 30 CFR 250.203(b)(4), 203(b)(19), 204(b)(8)(ii) and 204(b)(14). Thus, States should not review CWA and CAA permit applications independently of the OCS plan review.

While the status of the completion of NEPA documents is an issue raised by coastal States when performing consistency reviews, NOAA is not adding language requiring that NEPA documents be included as information necessary to start the six-month review period. A requirement that NEPA documents (draft or final) be completed prior to the start of the six-month review period would be incompatible with statutory requirements in the OCSLA. MMS must make its decision whether to approve an EP within 30 days of receipt of the EP. Within that 30-day period, MMS completes its Environmental Assessment (EA). Thus, to meet OCSLA requirements and not to delay the CZMA process, MMS submits the EP and accompanying information to the State within days of receipt of the EP. The six-month review period starts when the State receives that information. MMS sends the EA to the State when the EA is completed. Since the State receives the EA within a very short period (20–30 days) after the start of the six-month review period, there is no harm to the State and the CZMA process is not delayed unnecessarily.

For DPP's, where MMS prepares a new Environmental Impact Statement (EIS), there is additional time in the process and States, if they want a draft EIS prior to starting the six-month consistency review process, can amend their programs, pursuant to 15 CFR 930.58(a)(2), to include draft EIS' and other information as data and information necessary to start the six-month review. States will not be able to amend their programs to require final EIS' for OCSLA purposes as part of the necessary data and information because the OCSLA requires MMS to approve or deny a DPP within 60 days after completion of the final EIS. *See* 43 U.S.C. 1351(h) and 30 CFR 250.204(l). This would not provide sufficient time for the CZMA process.

Paragraph (a) is proposed to be deleted and combined with (b) as (a) is redundant with (b), particularly (1) and (3).

Rule Change 15: § 930.77(a) Commencement of State agency review and public notice. This change would clarify when the State's consistency review period begins for OCS plans. The proposed changes would provide additional direction to States that the State's determination of whether the information provided by the person pursuant to 15 CFR 930.76 is complete, is not a substantive review. Instead, it is a ''checklist'' review to see if the OCS plan, description of the activity, the coastal effects, the evaluation of the State's enforceable policies, specific information described in the State's federally approved program, and information required by Interior's regulations are included in the submission to the State agency. If the items required by § 930.76 are included, then the six-month review starts. This review does not determine the *substantive adequacy* of the information. The adequacy of the information is a component of the State's substantive review which occurs during the six-month review period.

The proposed changes would also clarify that if the State wants to require additional information for its review of OCS plans, it must describe such information in its program, pursuant to § 930.58(a)(2).

This section would also be changed to address the circumstances where a State believes the information submitted pursuant to NOAA's regulations is insufficient (*e.g.*, either the analysis was substantively inadequate, or that the OCS plan addresses new activities or effects not foreseen and for which information was not provided). In such a case a State may request additional information. The proposed change would require that such a request be made within the first three months of the six-month review period. A request for additional information does not stop, stay or otherwise alter the six-month review period.

Rule Change 16: § 930.82 Amended OCS plans. To be consistent with § 930.76(c), this proposed change would clarify that it is Interior, not the person, that submits the consistency certification and information to the State for amended OCS plans.

Rule Change 17: § 930.85(c) Failure to comply substantially with an approved OCS plan. While this section existed prior to the 2000 rule revisions, NOAA proposes this change to more closely coordinate CZMA and OCSLA requirements. Under NOAA's regulations and the OCSLA program, it is MMS that determines whether a change to an OCS plan is ''significant'' and thus, whether the change requires CZMA Federal Consistency review. This determination should be the same for failure to substantially comply with an approved OCS plan. This change would be consistent with CZMA section 307(c)(3)(B), and in fact the language is taken directly from the statute. The previous language was developed in the 1979 regulations as a means of determining when a person has substantially failed to comply. However, the existing section has not been used and NOAA believes that such determinations should be made by MMS. Also, to be consistent with § 930.76(c), this change would clarify that it is Interior, not the person, that submits the consistency certification and information to the State for OCS plans.

Rule Change 18: § 930.121(c) Alternatives on appeal. This provision was amended in the 2000 rule to address ''confusion as to when alternatives may be raised, the consequences of a State agency not providing alternatives or [sic] when it issues its objection, and the level of specificity that the State agency needs to provide to satisfy the element on appeal.'' 65 FR 77151 (December 8, 2000). Implementation of this change has prompted NOAA to propose several refinements in the language. The word ''new'' would be struck to clarify that all information submitted to the Secretary during the appeal may be considered in determining whether an alternative is reasonable and available. The word ''submitted'' would be substituted for the word ''described'' to reflect more accurately the manner in which information becomes part of the decision record of an appeal.

The last sentence has been proposed to make clear that the Secretary would not substitute the Secretary's judgement for that of the State in determining whether an alternative is consistent

with the enforceable policies of the management program. This is not a change in standards or practice, only a clarification. As in the 2000 rule, both the State and appellant and commenters on the appeal will be able to provide the Secretary with information concerning an alternative. The addition of this sentence, however, would make clear that any alternative, whether submitted to the Secretary by the appellant, the State, a third party, or identified by the Secretary from previous appeal decisions, will not be considered by the Secretary as ''reasonable'' or ''available'' unless the State submits a statement to the administrative record of the appeal that the alternative will allow the activity to be conducted in a manner consistent with the enforceable policies of the management program. To allow otherwise would require the Secretary to make a finding that the alternative would be consistent with the management program and would effectively substitute the Secretary's judgement for that of the State. The Secretarial appeals process is a *de novo* consideration of whether a proposed activity is consistent with the objectives of the CZMA or otherwise necessary in the interest of national security. It does not review whether the proposed activity is consistent with the State's enforceable policies. Likewise, the Secretary relies on the State to determine whether an alternative is consistent with the enforceable policies of the management program.

Rule Change 19: § 930.125 Notice of appeal and application fee to the Secretary. In order to process an appeal within the proposed time frames under § 930.130, necessary changes are proposed to various sections (§§ 125, 127, 128, 129 and 130) to ensure that briefs, information, and public and Federal agency comment periods accommodate a shorter time period for developing the decision record and issuing a decision. These proposed procedures will provide sufficient due process to all parties, but will be strictly adhered to, otherwise NOAA will not be able to meet the proposed appeal time frames.

Rule Change 20: § 930.127 Briefs and Supporting Materials. The proposed changes in § 930.127 are to reflect changes in practice necessary to accommodate the proposed time frames for the closure of the decision record in § 930.130 and to make the administration of the appeals process more efficient and transparent to the public, States and potential appellants. These changes would likely mean that States, appellants, Federal agencies and the public will have to be more diligent in providing thorough and complete information to the Secretary in a shorter amount of time. The proposed changes would allow each party and the public, in most cases, only one opportunity to provide their arguments to the Secretary. The proposed changes reflect the fact that the Secretary needs only sufficient time and information required to make a rational and well-reasoned determination of each of the elements in 15 CFR 930.121 or 930.122.

The proposed change to § 930.127(d) would move language from § 930.130(d) regarding the appellant's burden to support its appeal, and makes clear the State's burden of submitting evidence when asserting an alternative to the proposed action is reasonable, available and consistent with the State management program. This has been the Secretary's long-standing practice in accordance with the Secretary's decision in Korea Drilling Inc. (1989). This change would codify existing practice and consistency appeal precedent.

Rule Change 21: § 930.128 Public notice, comment period, and public hearing. The proposed changes to § 930.128 would accommodate the proposed 270-day period to develop the decision record in § 930.130. Other changes are intended to promote clarity and efficiency, obtaining comments from the public and interested Federal agencies, and in processing the appeal. In addition, NOAA proposes to make explicit the Secretary's practice of giving additional weight to Federal agencies' comments when they concern topics within the area(s) of the Federal agency's technical expertise.

Rule Change 22: § 930.129 Dismissal, remand, stay, and procedural override. The proposed additions to 930.129 would accommodate the proposed 270-day period to develop the decision record in § 930.130.

Rule Change 23: § 930.130 Closure of the decision record and issuance of decision. This proposed change would provide 270 days as a definitive date by which the Secretary shall close the decision record in appeals filed from State objections under 15 CFR part 930, subparts D, E and F. Three exceptions to the 270-day period are proposed to allow the parties to mutually agree to stay the 270-day period and to ensure that the Secretary has relevant NEPA and ESA documents, if the Secretary determines that such information is needed to decide the appeal. These exceptions would not mean that the Secretary would create NEPA or ESA documents for the appeal. The stay of the 270-day decision record period would apply *only* when the NEPA and/or ESA documents are *required* to issue for the Federal agency authorization or funding subject to the appeal. If the parties to an appeal wanted to provide comments on the NEPA and/or ESA document to the Secretary as part of the decision record for an appeal, then the parties could avail themselves of proposed section 930.130(a)(2)(i) and mutually agree to stay the closing of the decision record.

Other changes are proposed to more accurately track the existing statutory language.

V. Comments Received by NOAA on the ANPR

NOAA issued an ANPR on July 2, 2002, primarily to address issues raised by the Energy Report related to the scope of information needed by the States and the Secretary in their respective reviews of OCS oil and gas activities. In the ANPR NOAA sought public comment on the following six questions:

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

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

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

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

5. Whether guidance or regulatory action is needed to assist Federal agencies and State CMPs in determining when activities undertaken far offshore from State waters have reasonably foreseeable coastal effects and whether the ''listing'' and ''geographic location''

descriptions in 15 CFR 930.53 should be modified to provide additional clarity and predictability to the applicability of State CZMA Federal Consistency review for activities located far offshore.

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

NOAA received comments from States, environmental groups, industry, the public, members of Congress, and Federal agencies. This proposed rule is based on NOAA's evaluation of the ANPR issues, comments submitted in response to the ANPR, and some technical and clarifying changes that should be made to the regulations. Below are NOAA's response to comments on the ANPR.

General Comments. All commenters except two Federal agencies and the oil and gas industry representatives urged NOAA to take no action because the recent 2000 rulemaking was comprehensive and further rulemaking is unwarranted as no problems have emerged with the existing regulations. The majority of the commenters urged additional stakeholder meetings first, and noted that Congress has sought to broaden, not narrow, the scope of CZMA review. They also stated that the consistency process has worked well for many years, and that any controversy was not the result of the CZMA process, but the proposed projects and their effects on coastal uses and resources were themselves controversial. Commenters also suggested that any lack of effectiveness in CZMA–OCSLA interactions is the result of a project proponent's lack of early coordination, familiarity and experience with the CZMA. Further, these commenters urged NOAA to commit additional resources to its Federal Consistency education and outreach efforts. Many of these commenters also felt that changes to address many of the ANPR questions could jeopardize the CZMA effects test and public review. A few of these commenters, while generally opposing any changes, did offer some rulemaking suggestions on the six ANPR questions.

Federal agency and industry comments urged NOAA to make many changes to the regulations to refine and improve the partnership between Federal and State agencies. These commenters believe that NOAA's 2000 rule was overly broad and inconsistent with the CZMA's objective to consider the national interest. Further, the two Federal agencies that commented believe that States can use the CZMA for the cancellation of energy projects, even after a Federal agency has approved the project. NOAA's proposed changes address Federal agency and industry concerns.

NOAA Response to General Comments. As stated in the ANPR, NOAA is not seeking to alter the balance of State and Federal interests provided for in the CZMA and the 2000 rule. Neither the Energy Report nor the ANPR suggest changing the States' or public's rights under the CZMA or 2000 rule. NOAA does believe, however, that there are some improvements that can be made to the Federal Consistency regulations.

NOAA agrees that the Federal Consistency process is not primarily a source of conflict, but that the projects reviewed through the CZMA process are often controversial. Most projects are approved by the coastal States and there is little litigation.

Early coordination was stressed in NOAA's 2000 revision to the regulations and in recent Federal Consistency Workshops conducted by NOAA. NOAA hopes to continue its education and outreach efforts, as budget and resources allow. Through workshops and web based information NOAA intends help stakeholders avoid problems arising from inadequate knowledge of the consistency requirements, limited experience with consistency, or insufficient State-federal coordination.

NOAA agrees that some improvements can be made to the regulations, but does not believe that NOAA's regulations are overly broad. The 2000 rulemaking reflects CZMA directives and Congressional intent and was finalized after four years of coordination and collaboration with all stakeholders. It may be that some of the issues raised in the comments are not really problems with NOAA's regulations, but result from requirements and policy set forth by Congress in the statute. For example, NOAA does not have the authority to exempt federal actions from CZMA review and States have the authority to object to the issuance of federal licenses or permits to be issued by Federal agencies.

The figures discussed above and those provided by some of the State commenters demonstrate that offshore oil and gas exploration and development not only continues to occur, but flourishes. Coastal States continue to ensure that both the CZMA's energy development and resource protection objectives are met. There has, of course, been negotiation between coastal States, MMS and industry, and there have been some issues. NOAA is attempting to address some of those issues through this rulemaking.

NOAA appreciates the concern raised in the example provided by industry where a State required changes to oil and gas project to be located on an ice-platform. It may be that some of the changes proposed by NOAA will address those concerns or that better coordination is needed between the State, industry and MMS. However, the State's use of consistency to ensure that the ice-platform met State enforceable policies is in fact how a State is authorized by Congress to use Federal Consistency. Through the CZMA, Congress gave the States the ability to review federal actions, independent of the Federal agencies' reviews. It is important to note the statistics referred to above and acknowledge that States concur with most projects reviewed, including oil and gas projects.

ANPR Questions

Information Needs

Comment 1. Existing provisions in the CZMA regulations address information needs for most projects. Describing specific documents in the regulations that a State may need would be ineffective and cumbersome because information needs change from project-to-project. The type of information needs of a State can vary from project-to-project depending on how detailed the EP or DPP is and the complexity of a project. One of the fundamental attributes of the CZMA is that it allows each State to develop its own coastal management program in light of the individual characteristics and priorities of the States. Thus, the development and imposition of detailed nationwide information requirements appears to be incompatible with the statutory framework of the CZMA.

Most of the OCSLA information requirements ask for fairly specific and physical descriptions, while the CZMA requires an analysis of the proposed project's consistency with the enforceable policies of a State's CMP. Where there is a problem, the proper remedy is the development of guidance or memoranda of understanding coordinating information requirements between the State and Federal agencies. There have been few instances where the lack of availability of an EIS or other NEPA document led to an objection based on lack of information. If

information problems (such as lack of NEPA documents) do occur, they can be resolved using the procedures available under 15 CFR 930.60, adopted when the Federal Consistency regulations were updated in 1990, which clarified when the consistency time clock may begin. If OCRM does revise the information requirements aspect of the regulations, California stated it would not oppose language analogous to that of § 930.37 being placed in subparts D and E of the regulations.

NOAA Response to Comment 1. NOAA's regulations at 15 CFR 930.58 and 930.76, and MMS' regulations already provide ''national standards'' for information needs for OCS oil and gas plans. NOAA's regulations also provide the mechanism for addressing individual State information needs, both through each State's enforceable policies which are approved by NOAA and the ''necessary data and information'' specifically identified in a State's federally approved management program, pursuant to 15 CFR 930.58(a)(2). Section 930.76(b) and includes the information requirements of § 930.58.

These information requirements provide adequate guidance for most projects. Issues have been raised regarding OCS oil and gas projects and whether MMS and NOAA regulations provide enough detail about the information needed or whether additional information should be described in the regulations. In addressing these issues, NOAA recognizes that information required for MMS' purposes may not be sufficient for State CZMA purposes. Thus, NOAA is not proposing to eliminate 15 CFR 930.58(a)(2), but, rather encourages States to make better use of the section so that State information needs will be known before CZMA review begins and the applicant and Federal agency will be able to plan for the State information needs when developing the project. NOAA has proposed various improvements to increase clarity and efficiency to the Federal Consistency regulations concerning information needs.

NOAA agrees that States and Federal agencies should have flexibility to coordinate NEPA information issues.

Comment 2. MMS' comprehensive Notice to Lessees for the Gulf of Mexico addresses many of the same issues as NOAA's proposed rule-making and can be used as a model for those States and regions outside the Gulf region, precluding the need for NOAA to further revise the regulations on these issues.

NOAA Response to Comment 2. Neither the current nor the proposed regulations would prohibit State-Federal memoranda of understanding on information needs, such as the recent effort by MMS and the Gulf States. NOAA will continue to encourage such agreements.

Comment 3. For Virginia's Chesapeake Bay Preservation Act Program, the State would like detailed maps showing (1) the layout of proposed on shore facilities and other elements of the project (*i.e.*, transmission lines, reservoirs, borrow areas, waste disposal locations, etc.); and (2) delineation of Chesapeake Bay Preservation Areas on the properties under study.

NOAA Response to Comment 3. The State could amend its management program to describe the information as being ''necessary data and information,'' pursuant to 15 CFR 930.58(a)(2) and (c), and thus required of the applicant. If States include detailed information requirements in their management programs pursuant to § 930.58(a)(2), then problems associated with unpredictable State requests for additional information will dissipate.

Comment 4. States are allowed to request additional data and information during the CZMA process even though they may have already received this information, through MMS, in the documents prepared and submitted to the federal permitting authority by a company. Since MMS has very thorough environmental review regulations, information generated for this process should be honored by the States and not requested anew. States should work with the federal permitting agency and MMS to identify what information is necessary at the beginning of the OCSLA and CZMA processes.

NOAA Response to Comment 4. All parties should identify information needs as early as possible. This should occur before CZMA review begins. There should not be a need to develop information in addition to that required by MMS regulations and 15 CFR 930.58 and 930.76(b) once the CZMA review begins, except in limited, unforeseen circumstances and/or where issues regarding the substantive adequacy or completeness of the information submitted have arisen. Once the CZMA review begins, coastal States need to allow sufficient time for industry or MMS to respond to any requests for additional information. Thus, NOAA proposes to clarify information needs and, for OCS plans, proposes a cut off date at the three month period after which no additional information can be requested by a State.

Comment 5. A better description of the scope and nature of information will be beneficial. Preparation of a list of the specific information that is required to complete the CZMA process for energy projects is encouraged. The applicants should have access to these lists of informational needs when they are preparing the necessary applications. This approach would assure that all the players understand the type and extent of the information that must be submitted prior to the submission of any application. The information requirements should be keyed to the approved coastal management plan and enforceable policies of the plan. By ensuring that the information requests are firmly grounded in the approved plan, NOAA can encourage States to keep their plans current.

NOAA Response to Comment 5. NOAA agrees that one reason for information uncertainty is that some States do not list information needs pursuant to 15 CFR 930.58(a)(2). Another reason for uncertainty is that many States have not kept their management programs up to date by submitting program changes to NOAA. NOAA has begun to address this issue with the States. In addition, NOAA is looking for ways to facilitate the process to update State programs, which is primarily a resource issue for both the States and NOAA.

Comment 6. NOAA's regulation at 15 CFR 930.58(a)(1) includes: ''comprehensive data and information sufficient to support the applicant's consistency certification.'' This language is too broad and has been used as a basis for continual requests by States for additional information. Information required by MMS regulations should be adequate for the States to determine consistency. Unreasonable requests for more information result in substantial costs and delays, create differing requirements among the States and this unpredictability has a dampening effect on OCS energy projects.

NOAA Response to Comment 6. NOAA agrees that the language in § 930.58(a)(1) which says ''and comprehensive data and information sufficient to support the applicant's consistency certification'' is not needed since the section describes the information needed and § 930.58(a)(2) allows the State to describe any necessary information in addition to that required by NOAA regulations. The language proposed to be removed is ambiguous and could create uncertainty in the determination of when the six-month review period starts. NOAA proposes to remove this clause from

§ 930.58(a)(1) and replace it with a requirement for ''information, if any, relied on by the applicant.'' This phrase describes a set of information that can be specifically defined and does not require additional evaluation by the applicant. NOAA also proposes restructuring the section to provide greater clarity.

Comment 7. More and more frequently, States are delaying the issuance of the consistency concurrence until the NEPA process is completed. If a final NEPA document contains no further analysis of coastal effects, the information in it is irrelevant to the State's concurrence or objection to the consistency determination. Furthermore, by withholding a State response to the consistency determination until a final NEPA document is published, the State denies the Federal agency any benefit the agency might get from the State's comments on the consistency determination. We recommend that States not be allowed to delay their responses to consistency determinations under the ruse of the need for additional information. States should be held to the timelines established in 15 CFR part 930. To accomplish this, NOAA should clarify the purpose of the consistency analysis, and the importance of a timely State response, so that Federal agencies can address that response in any final NEPA documentation.

NOAA Response to Comment 7. States cannot delay their consistency responses for any reason, unless the State, Federal agency and, if applicable, the applicant agree. If a State does not concur or object within the regulatory time frames, the State's concurrence is presumed, and the Federal agency may proceed. Requests for additional information do not toll or stay the regulatory time periods. For Federal agency activities under CZMA section 307(c)(1), the Federal agency makes the determination of coastal effects, consistency with the State's enforceable policies and whether the Federal agency has sufficient information to make such determinations, pursuant to 15 CFR part 930, subpart C. The State may request additional information or object, but the Federal agency is not obligated to provide information in addition to that required by 15 CFR 930.39, or to extend the regulatory review period. NOAA agrees that a final NEPA document may not be needed for CZMA review, unless there is a substantial change between a draft and final document.

Comment 8. A State agency may effectively extend the required 60-day consistency determination review period merely by requesting additional information from the submitting Federal agency. The State agency is under no obligation to make its information request(s) in a timely manner.

NOAA Response to Comment 8. As discussed above and stated in the regulations, States cannot unilaterally alter the CZMA review periods. In this proposed rule NOAA has further clarified this fact. Section 930.39 sets out information requirements for consistency determinations. It is up to the Federal agency to determine the information necessary to support its consistency determination. NOAA's Federal Consistency regulations provide general information guidelines, but do not, and could not, presume to determine when another Federal agency's administrative record is complete and sufficient to support a consistency determination. Given the 60-day time period for review of Federal agency activities, NOAA proposes to require States to notify Federal agencies within 14 days of receipt of a consistency determination if the State believes the Federal agency has not submitted the information described in § 930.39. Otherwise, a Federal agency's submission is presumed complete and by operation of the NOAA rule, the 60-day review period began when the State received the consistency determination. If the Federal agency believes it has provided sufficient information to the State, the Federal agency can make a fully consistent finding or consistent to the maximum extent practicable finding based on its own administrative record.

Comment 9. Public participation is not required for State action on Federal Consistency determinations (*See* 16 U.S.C. 1456(c)(1) and (2)). There are times when, from the perspective of the Federal agency submitting information to a State agency, maintaining information security, especially handling of sensitive infrastructure and operational information (*e.g.,* anti-terrorist/force protection related projects), is a critical concern. Consequently, NOAA should revise its rules or provide guidance that clarifies that Federal agencies, not State reviewing agencies, should make final determinations concerning the release of sensitive infrastructure or operational information that is submitted in support of a consistency determination under 16 U.S.C. 1456(c)(1) or (2).

NOAA Response to Comment 9. Public participation is required for State review of a Federal agency's consistency determination for Federal agency activities. CZMA section 306(d)(14), 15 CFR 930.42; *see* 65 FR 77126, 77141 (Dec. 8, 2000). NOAA's regulations provide ample means for Federal agencies to deal with emergencies and sensitive information. *See* 15 CFR 930.32(a), (b) and (c). Section 930.32(c) on classified activities and information was added in 2000 with the assistance of the U.S. Navy.

Comment 10. Section 121(c), regarding the evaluation of alternatives on appeal to the Secretary, should be amended to require the Secretary to consult with expert Federal agencies regarding the availability or reasonableness of any alternatives considered by the Secretary.

NOAA Response to Comment 10. NOAA's regulations provide for Federal agency comment into all substantive aspects of a consistency appeal under § 930.121(a), (b) and (c) and Federal agency comments are a part of the Secretary's decision record. NOAA's regulation at 15 CFR 930.128(c) specifically provides for Federal agency comment. NOAA proposes to amend § 930.128 to clarify its historic practice regarding weight given to comments by Federal agencies.

Comment 11. A State can delay the start of the consistency review period for Federal agency activities by claiming the Federal agency's submission is incomplete or otherwise insufficient.

NOAA Response to Comment 11. NOAA proposes to clarify when the State's consistency review period begins for Federal agency activities.

Appeal Time Frames

Comment 12. States do not object to most Federal actions reviewed. No deadline for a Secretarial decision should be allowed to undermine the already well-established methods for resolving disputes in § 930.129(c) and (d) of the CZMA regulations. Retaining flexibility available under current regulations serves the interests of both applicants and regulatory agencies. The only way to further shorten the time frame for appeals would be to have a limited time period for development of the record, once an appeal is filed. However, this would prevent the Secretary from arriving at a decision based on all available information. It would also prejudice the States, because the State is the respondent to the appeal, which usually contains new information supplied by the appellant. If it is decided that a definitive date is necessary, it should not preclude consideration of federal environmental reviews, that include relevant information, in the administrative record.

NOAA Response to Comment 12. NOAA agrees that the States do not object to the great majority of projects reviewed and that of the few objections

there are very few appeals to the Secretary. However, NOAA believes that improvements can be made to the regulations governing the consistency appeals process and still allow the Secretary to develop an adequate record under the Administrative Procedure Act (APA). NOAA's proposed change to § 930.130 would provide parties to an appeal with the flexibility to agree to stay the appeal process in order to negotiate a resolution. Under these parameters, no party would be prejudiced. NOAA's proposed change to close the decision record 270 days after it issues a Notice of Appeal (notice issued within 30 days of the filing of an appeal) would provide a workable time frame for OCS appeals, so long as NOAA makes the procedural adjustments proposed in the other sections of subpart H.

Comment 13. A definitive time frame within which the Secretary of Commerce must issue a decision can be established. At minimum, a known action time frame would give the appellant applicant an understanding of the term of the process. Additional environmental reviews should not be required for a consistency appeal. A copy of the completed EA or EIS should be included as part of the administrative record, since many of the criteria for a secretarial override involve consideration of environmental issues. It should be clear, however, that the Secretary's role does not involve review of the legal sufficiency of the EA or EIS. Rather, the Secretary should rely on the conclusions of the EA or EIS with respect to environmental impacts and mitigations, and should accept the document as sufficient unless a court determines otherwise.

NOAA Response to Comment 13. NOAA has proposed a limited consistency appeal review period. *See* proposed change to § 930.130. The Secretary may rely on relevant materials such as NEPA documents. NOAA is not suggesting that the Secretary create new NEPA or ESA documents. In some appeals the NEPA and ESA documents being prepared to support the decision on the Federal authorization will be needed for the Secretary's review. The Secretary needs flexibility to adjust the closure of the decision record to accommodate the Federal agency preparing the necessary document(s).

Comment 14. It is not the function of the Secretary, in deciding an appeal, to adjudicate the merits of the underlying activity. For OCS plans, that function is with MMS. If the Secretary overrides a State's objection, then MMS may approve the plan and is still required to complete environmental clearances required by law. MMS supplies the Secretary with all relevant information including NEPA documents. Information contained in an EA or a draft EIS, added to the information provided by an applicant, is sufficient information for the Secretary to evaluate an appeal. An appeal before the Secretary will also include all the information that was before the State. We see no reason why the appeal process should be delayed in order to obtain additional information to add to that administrative record.

NOAA Response to Comment 14. The Secretary's review is *de novo*, to determine if the project is consistent with the CZMA or in the interest of national security. It is not a review of the basis for the State's objection or the basis for issuing the Federal agency authorization. The Secretary does not substitute the Secretary's judgement for that of the authorizing Federal agency regarding the merits of the project, nor does the Secretary determine whether a proposed project complies with other Federal law. However, because of the multiple national interest requirements of the CZMA, the Secretary must evaluate an authorization of a project in light of competing CZMA objectives. Varying levels of information and detail are required to make these determinations which are dictated by many factors such as the nature of the project, scale and scope of effects on coastal uses and resources, alterations to the proposal, etc. Normally, when the Secretary needs information, he waits for the authorizing Federal agency to complete some level of environmental review or generate a document. Since these documents are required by other federal law, there is no delay to the applicant or Federal agency.

Coordinated Federal Documents

Comment 15. While the CZMA regulations make an admirable attempt to coordinate CZMA and OCSLA requirements, problems with coordination of federal environmental review documents occur because of unrealistic timeframes imposed by OCSLA and its implementing regulations. The most troublesome requirement relates to comment deadlines imposed by OCSLA and the related regulations for reviews of EP's and DPP's. For EP's, the MMS has 30 days and for DPP's 60 days, to approve, disapprove or request modifications from the date the plan was deemed complete (30 CFR 250.204(i)). A change to OCSLA to allow the MMS to have a longer comment period before making a decision would alleviate this problem.

NOAA Response to Comment 15. While a change to the OCSLA timeframes might improve the CZMA-OCSLA interaction, that is beyond the scope of this rulemaking, which is to determine if there are improvements that can be made to NOAA's regulations.

Comment 16. Coordination is already a cornerstone of the Federal Consistency review process, and in practice it is the norm. Consistency reviews occur simultaneously with MMS and NEPA reviews to the degree practical under relevant statutes. If information problems (such as lack of NEPA documents) do occur, they can be resolved using the procedures available under 15 CFR 930.60, which clarify when the consistency time clock may begin. General consistency concurrences with the MMS help minimize the scope and duration of the review of an OCS plan for consistency. Coordination is best accomplished through the interaction of individual States and Federal agencies and this is what the CZMA consistency regulations recognize and encourage. Ambiguity and uncertainty can be eliminated by improved education on the part of the applicants as to the States' information requirements and consistency procedures.

States can use the analyses in the lease sale EIS to calibrate impacts from individual projects. Additionally, MMS has given notice of the preparation of a programmatic environmental assessment (EA) for exploratory drilling and associated activities in the Eastern Planning Area of the Gulf of Mexico. This programmatic EA is intended to consider the area wide environmental impacts of exploratory drilling. Subsequent site-specific EA's prepared by MMS for an operator's Exploration Plan can then be tiered from the programmatic EA and the analyses can be focused on specific activities proposed. This is a good example of a Federal agency working within the statutory framework of CZMA and OCSLA to coordinate the completion of environmental review documents with the information needs of the States. Industry recommends that this approach be adopted in the Federal Consistency requirements. Effective coordination is best achieved by maintaining the freedom and flexibility to enter into agreements and discussions among the parties. A regulatory mandate for such coordination may have a dampening effect and hinder the parties from negotiating resolution to specific cases.

NOAA Response to Comment 16. NOAA will continue to encourage early coordination between Federal agencies

and States. This early coordination is important for identifying information needs and coordinating reviews with completed documents. The MMS Gulf of Mexico Region's recent efforts to coordinate reviews and information needs may provide a useful model. NOAA also agrees that the tiering of NEPA documents is beneficial, especially when the documents are ready as the State starts its CZMA review.

Comment 17. The regulations at section 930.60 contain a consistency review ''start'' provision, which begins when the State receives the consistency determination and supporting information under section 930.58. The problem is that unlimited requests for additional information can delay the start of this review period indefinitely. The regulations should be revised to provide that a State's requests for information do not stop the timeline without NOAA approval. The State should not be the final arbiter of when the timeline begins.

NOAA Response to Comment 17. NOAA proposes to clarify that consistency starts when the certification and necessary data and information described in § 930.58 are received by the State.

General Negative Determination

Comment 18. We are not aware of repetitive Federal agency activities related to the OCS, so it appears that no efficiency would be gained by this provision. The flexibility already exists in the existing regulations for negative determinations that would enable submittals covering multiple activities.

We support a regulatory provision for a general negative determination, similar to the existing regulation for general consistency determinations. This would improve the efficiency of the Federal Consistency process.

No objection provided scope of the activity covered and geographical area are agreed upon with the State and Federal agency.

NOAA Response to Comment 18. NOAA's regulations provide for a ''general consistency determination'' (general CD) which result in one State review for multiple occurrences of an activity where the actions are repetitive, do not have coastal effects when performed separately, but have cumulative effects. The general CD was created in 1979 as an administrative efficiency so that Federal agencies may avoid the necessity of issuing separate CD's for each repetitive action. There may be times when a Federal agency proposes repetitive activities that do not have coastal effects, when performed separately or cumulatively. In such cases where an individual ND is required under 15 CFR 930.35, NOAA believes that the Federal agency should be able to issue a General Negative Determination (general ND). The Federal agency would have to provide supporting information as is the case for a ND. Since the use of a general ND would be an effects determination made by the Federal agency, as is the case for a CD, general CD or ND, State agreement to use a general ND would not be required. If a State objected, the resolution provisions of 15 CFR part 930, subpart C would apply.

Comment 19. We recommend that the Federal Consistency regulations be amended to grant ''Negative Determination'' status to any Federal agency activity meeting the definition of a categorical exclusion under its own agency's NEPA regulations. Second, we recommend that NOAA implement the proposed ''General Negative Determination'' process, but reserve it only for those Federal agency activities that are not covered by a NEPA Categorical Exclusion but still may be determined by the Federal agency to be repetitive and not reasonably likely to have either individual or cumulative coastal effects.

NOAA Response to Comment 19. A general ND would not be an exemption for any type of activity, including an ''environmentally non-adverse'' activity. Such an exemption, as discussed in the 2000 NOAA rulemaking, would not be authorized under the CZMA. Changing the CZMA Federal Consistency effects test to equate it with the NEPA test is not authorized by the CZMA because the NEPA test is different than the CZMA effects test (a categorical exclusion (CE) under NEPA is available when there is no potential for effects on the human environment, 40 CFR 1508.4). Like a CE, a general ND would still require a factual determination of coastal effects. (A CE is not an exemption from NEPA like an ND or general ND for the purposes of compliance with the CZMA, a CE is compliance with NEPA and a determination of no effect. *See* 65 FR 77124–77125, 77130–77133 (Dec. 8, 2000)(discussing effects test).

Comment 20. A general negative determination could obviate the need to revisit non-resolved issues and result in considerable savings to the Federal agencies and the States. Any such regulation must preserve the fact that the Federal agency determines whether there are coastal effects. NOAA's overly-broad definitions of some terms may hamper the use of a general negative determination.

NOAA Response to Comment 20. As discussed in NOAA's response to the general comments, NOAA disagrees that NOAA's CZMA consistency regulations are ''over-broad.'' As noted in the preamble to the 2000 rule, consistency is based on the ''effects test'' and there are no exceptions to this Congressionally mandated principle. NOAA's regulations would not hamper the use of a general ND. If a Federal agency determines a project will have no coastal effects, and a negative determination (ND) is not required, then the Federal agency does not have to coordinate with the State at all. 15 CFR 930.35, 930.33(a)(2). Administrative activities have not been subjected to consistency review in the past, probably because they do not propose an action with coastal effects. Even in the rare case where a State requested consistency review for such an activity, NOAA's regulation provides the solution: a negative determination. NOAA has also addressed administrative actions in the proposed change to the definition of Federal agency activities in § 930.31.

Geographic Considerations

Comment 21. The CZMA establishes an *effects-based* evaluation process rather than categorizing activities based on geographic location or type. It would be particularly difficult to develop geographic criteria for activities conducted in the open ocean, where effects can occur hundreds of miles from the point of origin. The existing regulations adequately address this question. State agencies are already required to describe geographic areas within which federally permitted activities beyond State waters are subject to consistency review. Moreover, as the ANPR points out (at p. 44409), a coastal State's ability to review the activities stops where coastal effects are not reasonably foreseeable.

NOAA Response to Comment 21. NOAA has not proposed a regulatory change to address State review of OCS plans located far offshore. NOAA has determined that conflicts are isolated examples, would most likely only occur in the Gulf of Mexico, and can be dealt with on a case-by-case basis should an issue arise. To create a new regulatory process to determine when an OCS plan will have coastal effects on a particular State would be difficult to develop and would likely increase administrative and fact-finding burdens on industry, the States and Federal agencies.

The determination of coastal effects for federal license or permit activities is made by NOAA, in coordination and consultation with the States and the

Federal agency. This is done through the listing and geographical location description requirements in NOAA's regulations at 15 CFR 930.53. States are required to list the federal license or permit activities that the State believes will have coastal effects in their management programs. The State either develops this list as part of management program development or after management program approval through NOAA's program change procedures. *See* 15 CFR 930.53(c), and 15 CFR part 923, subpart H. When listing Federal license or permit activities, States determine whether it is reasonably foreseeable that the activity, when conducted inside the coastal zone, will affect coastal resources. Once listed in the State's federally approved program, all applications for the listed Federal authorization in the coastal zone are automatically subject to the consistency process.

To review activities located outside the coastal zone, NOAA must approve or deny a State's request to describe a geographic location outside its coastal zone where activities will be presumed to have coastal effects. A State must describe with specificity the geographic areas from which it is reasonably foreseeable that activities will affect coastal uses or resources. Federal agencies and other interested parties may comment to NOAA. NOAA's approval is based on whether effects on the coastal zone are reasonably foreseeable.

A State can also review a listed activity located outside the coastal zone that is not in a described geographic location as an ''unlisted'' activity on a case-by-case basis, pursuant to 15 CFR 930.54. NOAA approval is required in such circumstances and NOAA's approval is also based on whether coastal effects are reasonably foreseeable.

The purpose of these listing requirements is to provide predictable procedures to determine when a Federal license or permit activity is subject to CZMA Federal Consistency review. These procedures provide reasonable notice to Federal agencies and applicants for federal authorizations as to when and how consistency applies. These requirements have been in place since 1979.

However, the geographic location description requirement for Federal license or permit activities has not applied to Federal authorizations described in detail in OCS plans because these activities are specifically described in the CZMA, 16 U.S.C. 1456(c)(3)(B), if coastal effects are reasonably foreseeable. In the past, most OCS oil and gas plans were for projects located near shore and coastal effects were readily identified. Now, however, technology allows industry to drill for oil and gas far offshore and the connection between a project and effects to a particular coastal State is not as clear. In these cases a person could assert that its project will not have coastal effects on a particular State. If MMS agreed with the person's assertion and factual basis but a coastal State still believed the OCS activity will have coastal effects, then the factual matter may be resolved through the mediation provisions of the CZMA, OCSLA provisions and/or litigation.

Comment 22. The 1990 amendments to the CZMA did not give *carte blanche* to the States to assert consistency review over all OCS leasing activities no matter how far beyond a State's coastal zone they take place. Rather, ''effects'' must still be demonstrated. Moreover, this legislative history does not apply to the entirely separate provisions regarding consistency review for federal permits in section 307(c)(3)(A), or OCS plans in section 307(c)(B). Congress made it very clear that technical amendments to the provision calling for State review of private permits were made solely to conform this provision to changes made to the Federal agency activity provision, and did not expand a State's scope of consistency review. Despite the clear legislative history, Commerce's preamble blurs the distinction between ''Federal agency activities'' and ''Federal activities,'' in general, *e.g.*, approval of private permits/licenses, and OCS plans, and incorrectly emphasizes the 1990 amendments' expansion of consistency review for ''Federal activities.'' (65 FR 77125 middle column, December 8, 2000). Such statements should be corrected.

NOAA Response to Comment 22. The 1990 CZMA amendments apply to all the consistency requirements. The ''technical amendments'' were to conform all of CZMA section 307 with the changes made to CZMA § 307(c)(1). Moreover, ''direct'' effects were not a limiting factor to the pre-1990 CZMA application of Federal Consistency for Federal license or permit activities. As noted by the comment, the effects test is the controlling factor. Thus, the preamble to the 2000 final rule at 65 FR 77125, 2d col, needs no correction.

The effects test, discussed in the Conference Report and other legislative history, speak to a cause and effect analysis, or the so-called series or chain of events analysis. If a Federal agency activity will have reasonably foreseeable effects, then consistency applies. Thus, as discussed in the preamble to the 2000 rule, the type of Federal agency activity is not the determinative factor. *Id.*

Comment 23. The term ''foreseeable coastal effects'' is ambiguous, recommend that guidance be developed to assist in making this determination.

NOAA Response to Comment 23. NOAA need not further define reasonably foreseeable coastal effects. The varied State programs, the analysis of effects, and the case-by-case nature of Federal Consistency precludes rigid definitions of effects and what is reasonably foreseeable. 65 FR 77130, 2d col. (Dec. 8, 2000). Further, as described above under the general comments and in detail in the preamble to the 2000 rule, the definitions of coastal effects and coastal uses and resources have not been expanded beyond what was already required by the statute, particularly the 1990 amendments to the CZMA.

Comment 24. NOAA should monitor the States' interpretations of the ''effects test,'' and the implementation of the ''listing and geographic location'' regulations found at 930.53, to ensure that States assert a right of consistency review in a reasonable manner. This is particularly applicable for projects at increasing distance from a State's coastal zone.

NOAA Response to Comment 24. NOAA monitor's the States' use of Federal Consistency through (1) day-to-day interactions with States, Federal agencies, industry and others; (2) periodic evaluations of the States' programs, pursuant to CZMA § 312; and (3) the Secretary of Commerce's review of consistency appeals.

Comment 25. NOAA should revise the definition of ''Coastal Use or Resource'' at § 930.11. By adding terms such as ''scenic and aesthetic enjoyment'' and ''air'', this definition goes far beyond the statutory definition of coastal use or resource, and inappropriately extends the ''reach of reasonably foreseeable effects.''

NOAA Response to Comment 25. NOAA need not revise the definition of ''coastal use or resource'' at § 930.11. The definition in the 2000 rule did not create new thresholds, but is based on the effects test as described in the statute and the Conference Report to the CZMA 1990 amendments, as discussed in the preamble to the 2000 rule.

Comment 26. Commerce regulations should delete the provision that an action with minimal or no environmental effects may affect coastal use. Requiring consistency review without regard to significance of environmental impact is not good public policy.

NOAA Response to Comment 26. As discussed throughout this proposed rule and the preamble to the 2000 rule, the CZMA applies to federal actions that have reasonably foreseeable coastal effects. The CZMA does not provide a ''significance'' threshold for such effects, and in fact the 1990 CZMA amendments removed thresholds by removing ''direct'' effects from the statute. Thus, NOAA has no authority to exempt an activity from consistency review. Likewise, regarding the ''significance'' of a coastal effect, the CZMA prohibits such a distinction. *See* 65 FR 77125, 2d col., 77129–77130, 77135–77136 (Dec. 8, 2000). The policy purposes of the CZMA are best fulfilled by the required analysis of the relationship between coastal effects and the State's enforceable policies.

Comment 27. We strongly object to the development of guidance or regulations that would extend State review to any Federal maritime activities that occur well beyond a State's lawful jurisdiction.

NOAA Response to Comment 27. NOAA is not extending in any way State review to activities that do not have coastal effects. Federal Consistency applies to a Federal agency activity, regardless of location, if coastal effects are reasonably foreseeable. NOAA's existing regulations provide geographic location considerations for the application of the effects test.

Consolidated Permit Reviews

Comment 28. Existing regulations already encourage, and many States already implement, to the extent practical, substantial interagency coordination and multiple-permit consolidated reviews. The requirements of the CZMA are independent of other Federal requirements, and mandatory consolidation would be inconsistent with the CZMA. In addition, industry often will not invest resources into the level of detailed design required for some permits, such as air permits, until they have secured overall discretionary approvals first.

Comment 29. Acceptable if sufficient information were available to inform of all the permits.

Comment 30. Multiple Federal authorizations should be consolidated into a single review process in order to reduce procedural delays.

Comment 31. A single consistency certification for an OCS EP or DPP should cover associated approvals such as air and water permits necessary to the EP or DPP. Ideally, MMS should issue a directive making it clear that air and water permits are required to be described in detail in the OCS plan, and are therefore covered under one consistency certification. Likewise, Federal Consistency regulations should be revised to clarify that the States must provide consistency review and, if applicable, Commerce should issue a decision on an override appeal of the OCS plan and OCS-related activities at the same time.

Comment 32. Such consolidation may prove impractical for a number of reasons. When a DPP is submitted to a State, the CZMA time clock starts. In order to consolidate reviews of all permits, the lessee would have had to submit all its applications to the appropriate agencies and certifications to the States at the same time. There would be a problem if not all applications were ready to go or if there was a problem with just one. It would not be appropriate to withhold consistency on all permits or the DPP while a State's objection for one permit was appealed to the Secretary.

NOAA Response to Comments 28–32. NOAA agrees that consolidation may not be practicable or desirable in some cases. One way to address consolidating as many permits as is practicable is to ensure that the permits ''described in detail'' in EP's and DPP's include air and water permits and other applicable federal authorizations, appropriate for inclusion in the EP's or DPP's as described in detail.

NOAA notes that the existing regulations allow Federal agencies to issue permits described in detail in an EP or DPP determined by the State agency to be consistent, even though the State may have objected to other permits in an OCS plan. *See* 15 CFR 930.81(b)(2).

Comment 33. The definition of ''Federal license or permit'' is too broad and the use of the term ''certification'' may encompass ministerial paperwork that does not grant any authorization to anyone to do something that otherwise would be impermissible. Also, the definition exposes other OCS approvals to the consistency process and includes OCS lease suspensions.

NOAA Response to Comment 33. The definition of Federal license or permit in § 930.51(a) does not expand the definition based on the 1990 CZMA amendments. The term ''required'' in the definition is self-explanatory: a Federal authorization is subject to consistency only if Federal law requires the applicant to obtain that Federal authorization in order to conduct the activity. As for OCS oil and gas approvals, all Federal authorizations described in detail in an EP or DPP are covered under the States' review of the plans under 15 CFR part 930, subpart E. Subpart E only applies to Federal authorizations described in detail in the OCS EP or DPP.

If an offshore operator is also required by Federal law to obtain a Federal authorization that is not described in detail in an EP or DPP, and the activity covered by the authorization will have coastal effects, then that Federal authorization may also be subject to State consistency review under 15 CFR part 930, subpart D, if the State has either listed the Federal authorization in its federally approved management program, or NOAA has approved the State's review on a case-by-case basis as an ''unlisted activity'' under 15 CFR 930.54. In both cases, the State would have to show, and NOAA would have to find, that the activity to be allowed under the Federal authorization would have reasonably foreseeable coastal effects. If the authorization is a ''purely ministerial paperwork,'' then it is extremely unlikely NOAA would approve the State's proposed listing of the Federal authorization or request to review as an unlisted activity because coastal effects would not be reasonably foreseeable and the ministerial action would be incidental or related to an action receiving Federal Consistency review.

However, as provided in the proposed change to § 930.51(a) and discussed in the accompanying explanation, NOAA proposes to remove the various descriptions of Federal license or permit types and have the phrase ''any required authorization'' become a catch-all for a Federal license or permit for an activity that would have a coastal effect. Further, NOAA notes that there are ministerial certifications which do not have coastal effects or are incidental/related to a Federal license or permit activity that was already reviewed by a State, and therefore would not be reviewed as a ''Federal license or permit.''

The Energy Report directs Commerce and Interior to re-examine CZMA and OCSLA requirements. While the OCSLA is under the purview of Interior and changes to the OCSLA or Interior's regulations are best left to Interior, Interior could help improve the efficiency and effectiveness of the OCSLA programs by including more Federal authorizations as ''described in detail'' in OCS plans.

In the preamble to the 2000 rule, NOAA posited that lease suspensions granted by Interior are Federal license or permit activities. Lease suspensions are not listed in any State's management program and NOAA has never approved a request to review a lease suspension as an unlisted activity (there was only

one such request made which was withdrawn). Activities covered under a lease suspension could either have been already covered under the State's review of the lease sale, EP or DPP. Thus, while NOAA could not exempt lease suspensions from potential consistency review, NOAA does not currently anticipate approving any State's request to either list lease suspensions or to review lease suspensions on a case-by-case basis as an unlisted activity, except in some rare, limited circumstance.

Further, NOAA's view on lease suspensions as federal license or permit activities has been superceded by the Ninth Circuit, at least for the lease suspensions that were the subject of the California litigation. *California ex rel. Cal. Coastal Comm'n* v. *Norton,* 150 F. Supp.2d 1046 (N.D. Cal. 2001), *aff'd,* 311 F.3d 1162 (9th Cir. 2002). On June 20, 2001, the U.S. District Court for Northern California ordered Interior to provide California with a consistency determination pursuant to CZMA section 307(c)(1) for the lease suspensions it issued for 36 leases located offshore California. The Court also ordered Interior to provide, pursuant to NEPA, a reasoned explanation for its reliance on a categorical exemption for the lease suspensions.

On appeal by the United States, the Ninth Circuit affirmed the District Court's finding that the lease suspensions, in the case of these 36 leases, whether granted or directed by Interior, were Federal agency activities under CZMA section 307(c)(1), and not ''Federal license or permit activities'' under CZMA section 307(c)(3)(A). The Ninth Circuit found that the suspensions allowed the leases to continue for lengthy additional terms and, more importantly, these leases had not been previously reviewed by California under the CZMA. The Court viewed the suspensions as an extension of the leases and thus any suspension of the lease was, in the Court's view, a Federal agency activity under CZMA section 307(c)(1). The Ninth Circuit further found that the lease suspensions at issue would have coastal effects since, among other things, the suspensions required lessees to engage in certain milestone activities which could affect coastal resources. The Ninth Circuit also determined that the effect of the 1990 amendments to the CZMA in overturning the decision of the Supreme Court in *Secretary of the Interior* v. *California,* 464 U.S. 312 (1984), is that lease suspensions are not subsidiary to exploration plans and development and production plans (and thus are not barred from consistency review by CZMA section 307(c)(3)(B)), and that activities with coastal effects preceding exploration plans and development and production plans are subject to consistency review. In making this finding, the Ninth Circuit stated:

> In subjecting lease sales to consistency review, Congress has made it clear that the statute [CZMA] does not prohibit consistency review of federal agency activities that are not subsidiary to exploration and development and production plans. The exploration and development and production plan stages are *not* the only opportunities for review afforded to States under the statutory scheme.

Referring to the fact-specific inquiry necessary to determine if a Federal action has coastal effects and, thus, is subject to Federal Consistency review, the Ninth Circuit, quoting from NOAA's preamble to its 2000 final rule, agreed ''with the reasoning of the National Oceanic and Atmospheric Administration that a lease suspension or set of lease suspensions might 'affect the uses or resources of the State's coastal zone, and thus CZMA bars * * * categorically exempting suspensions from consistency [review.]' ''

It is NOAA's view that the *California* v. *Norton* decision is limited to the 36 leases in that case and that in all foreseeable instances, lease suspensions would not be subject to Federal Consistency review since (1) as a general matter, they do not authorize activities with coastal effects, and (2) if they did contain activities with coastal effects, the activities and coastal effects should be covered in a State's review of a lease sale, an EP or a DPP. If a State believes that a particular lease suspension should be subject to Federal Consistency, the State could notify MMS. MMS could determine that the lease suspension is an interim activity that does not propose a new action with coastal effects and/or provide the State with a negative determination pursuant to 15 CFR 930.35.

Comment 34. Section 930.85(c) should be amended to ensure that Interior first determines that an amended plan meets the requirements of the OCSLA, before it is sent to the State agency.

NOAA Response to Comment 34. NOAA agrees that Interior should decide first that an amended OCS plan meets OCSLA requirements before sending to the State agency. The same technical change should also be made to § 930.82. In this way, Interior ensures completeness with the OCSLA prior to sending an amended plan to the State agency, as is the case for initial OCS plan review under § 930.76(c).

Other Comments

Comment 35. Delete Conditional Concurrence Procedures or Narrow the Conditions that Can be Imposed. Conditional Concurrences create an unclear process, neither a concurrence nor objection, and could delay or terminate OCS projects. Conditions may usurp Federal permitting authority.

NOAA Response to Comment 35. The new conditional concurrences section, § 930.4, contains adequate standards to ensure State conditions are based on specific enforceable policies. If the requirements for a conditional concurrence are not met, then it is automatically treated as an objection pursuant to 15 CFR 930.4. Thus, if an applicant does not agree with a condition and does not amend its application to the Federal agency, then it is automatically an objection. Likewise, if a Federal agency finds a condition is contrary to its statutory mandate and refuses to accept the condition, then it is automatically an objection. The benefit of the conditional concurrence is that if the requirements are met, and the conditions are acceptable to the applicant and the Federal agency, then the Federal agency can approve the project. If conditional concurrences were not allowed, then the State would simply object. All of this happens within the State consistency review time frames established by the CZMA and NOAA's regulations. Thus, there is no delay and there is very clear direction regarding time frames, the substance of the conditions, and whether the State has objected or concurred.

NOAA, the States and the Federal agencies spent considerable time discussing the pros and cons of conditional concurrences as part of the 2000 rulemaking. NOAA does not anticipate proposed changes to this section until such time as a problem arises in implementing the section.

Comment 36. Clarify that the determination of whether a Federal agency activity has coastal effects is in the purview of the Federal agency conducting the activity. Commerce has insisted that pre-lease activities such as the 5-Year OCS lease plan are ''development projects'' under section 930.33 and are subject to consistency review.

NOAA Response to Comment 36. NOAA has not declared that Interior's pre-lease activities are ''development projects'' under 15 CFR 930.33. All that NOAA has said is that a Federal agency activity is subject to consistency if there are coastal effects. This is required by the CZMA. *See* 65 FR 77125, 77129–

77133 (Dec. 8, 2000). NOAA defers to Interior regarding the determination of effects for any specific Interior activity.

Comment 37. Delete the Interstate Consistency regulations. A logical implementation of the new consistency review for activities ''outside of the coastal zone'' contained in the 1990 amendments does not lead to interstate review. These regulations also raise constitutional issues as to whether one State's policies can be legally enforceable against Federal activities taking place entirely in a different State.

NOAA Response to Comment 37. Interstate consistency review is authorized by the CZMA effects test. *See* 65 FR 77125, 77129–77133, 77152–77153 (Dec. 8, 2000) (discussion of the effects test and application to interstate review).

Comment 38. Commerce regulations at section 930.121 require that an activity must ''significantly or substantially'' further the national interest before the Secretary can override an objection based on the statutory ''national interest'' criteria. This change can potentially be very problematic. While the preamble to the 2000 regulations state that ''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,'' there is no such statement of intent with regard to oil and gas *exploration.* The preamble should be revised to make it clear that exploration meets the new override criteria otherwise the term ''significantly or substantially'' should be deleted from the regulations.

NOAA Response to Comment 38. The use of the phrase ''oil and gas development'' in the preamble to the 2000 rule when discussing the phrase ''significantly or substantially'' in 15 CFR 930.121, was intended as an example and not meant to apply only to DPP's. The term ''development'' was used as a general descriptor for OCS oil and gas activities. At this time, NOAA cannot foresee a case where OCS oil and gas activities do not further the national interest in a significant or substantial manner, inclusive of the exploration, development and production phases.

Comment 39. Section 930.3 imposes a requirement on OCRM to conduct a continuing review of approved management programs. This is a critical part of the Federal Consistency program and one that should receive sufficient resources and funding within OCRM to fully effectuate. OCRM should carefully monitor the States' application of their management programs to evaluate whether a State is inappropriately singling out a particular proposed federal activity in or outside its coastal zone, and objecting to such an activity on its face, without any demonstration that such activity may impact a State's coastal zone. We recommend that Commerce amend section 930.3 as follows: (1) To require that OCRM conduct a continuing review of the States' application of their enforceable programs on at least a semiannual basis, (2) the goal of such review would be, among others, to ensure that the States have supporting documentation and justification for an objection to a proposed federal activity, and that the States are not using their CZM programs to prevent a certain category of activity from taking place in or outside their coastal zone, and (3) the definition of ''enforceable policy'' in section 930.11 be changed to delete the statement that ''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.''

NOAA Response to Comment 39. NOAA conducts a statutorily mandated continuing review of State programs under CZMA § 312. As part of these section 312 evaluations, NOAA looks closely at the State's implementation of Federal Consistency. These reviews occur every three years. NOAA also scrutinizes State use of consistency on a case-by-case basis when called for and, as a threshold matter, on appeal of a State's objection to the Secretary. Conducting a more formalized review semi-annually or annually, would require substantial additional resources, with little foreseeable benefit.

NOAA also ensures that State programs continue to adequately address the national interest in, among other priority areas, energy facility siting. This is accomplished through the section 312 reviews and when reviewing proposed changes to a State's federally approved management program. For example, NOAA has denied State requests to include in their management programs State policies that ban all offshore oil and gas activities as inconsistent with the CZMA's national interest requirements.

The definition of enforceable policy in NOAA's regulations is based on the statutory definition and on *American Petroleum Institute* v. *Knecht*, 456 F. Supp. 889 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979). *See* 65 FR 77130, 2d col., (Dec. 8, 2000) (discussion of ''enforceable policy'').

Comment 40. A State can delay the start of the consistency review period for Federal agency activities by claiming the Federal agency's submission is incomplete or otherwise insufficient.

NOAA Response to Comment 40. If the Federal agency has provided the consistency determination and information required by 15 CFR 930.39, then the 60-day State review period begins on the date of the State's receipt of the information. The State cannot stay, stop or alter the commencement of the 60-day period once it starts, unless the Federal agency and State agency agree to an alternative time period. The State is not the arbiter of completeness; the Federal agency is. If a consistency determination and the information required by § 930.39 are provided, even though the State may believe it needs clarification or additional information, the 60-day period begins when the State received the Federal agency's information. The State has no authority to delay the start of the 60-day period. If the Federal agency provided the information required by § 930.39, then the Federal agency may presume State concurrence if the State has not objected (or requested an extension as allowed under the regulations) within 60 days from the State's receipt of the information. However, NOAA proposes a modification to § 930.41(a) that would ensure that States notify Federal agencies if the State believes the consistency determination is not complete.

Comment 41. Modify the definition of consistent to the maximum extent practicable under § 930.32 to allow the Federal agency to determine that full consistency is not practical due, but not limited to, such factors as logistical impediments, lack of adequate technology, illegality, time and space considerations, conflicts with other statutory law, cost effectiveness, availability of equipment, etc., etc.

NOAA Response to Comment 41. The definition of ''consistent to the maximum extent practicable'' was not significantly changed in 2000. NOAA's definition is long-standing (since 1979) and clearly reflects the language and intent of the CZMA. NOAA's language was specifically endorsed by Congress in the conference report to the 1990 CZMA reauthorization and has been upheld by Courts since then.

The suggested changes would provide Federal agencies with complete discretion as to whether or not they would be consistent with a State's enforceable policies. Such a change would violate the statute and Congressional intent. The change would also cause untold and unwarranted ambiguity in the application of consistency and in legal precedent, particularly court decisions. Congress declared:

NOAA has interpreted the term ''maximum extent practicable'' in a manner which requires strict adherence to the enforceable policies of state programs where a federal agency has discretion (15 CFR 930.32). *The Committee supports this long-standing interpretation.*

Cong. Rec. H 8073, 8076 September 26, 1990 (emphasis added). A recent Federal court decision has addressed NOAA's definition of ''consistent to the maximum extent practicable.'' In *California Coastal Commission* v. *Dept. of the Navy*, 5 F. Supp. 2d. 1106 (S.D. Cal. 1998), the Navy argued that it complied to the ''maximum extent practicable'' with California's dredging and disposal policies because it was obligated to follow a modified § 404 permit issued by the Corps. The court noted that the federal permit was ''not existing Federal law'' that would excuse compliance with the State policies and consistency requirements of the CZMA. *Id.* at 1111.

Congress partially waived the Federal Government's supremacy over State law when it created the CZMA. As such, the only *objective* means to determine ''consistent to the maximum extent practicable'' is based on the legal requirements of Federal agencies and their administrative records. Otherwise, a Federal agency would be making arbitrary decisions, on an agency by agency basis, based on subjective criteria and outside the confines of Federal law applicable to the agency.

The 2000 rule provided clear guidance as to when a Federal agency can proceed over a State's objection: due to an unforeseen circumstance or emergency, or when a Federal agency asserts, based on its own administrative decision record, it is fully consistent, or because of the requirements of other Federal law. NOAA added these provisions in 2000 at Federal agencies' requests.

NOAA has provided, and will continue to provide, advice to Federal agencies on how to effectively use the consistent to the maximum extent practicable standard in connection with their statutes and case-by-case decision records.

Comment 42. The deference to be given a State's determination of ''substantially different coastal effects'' under 15 CFR § 930.51(e), for purposes of determining if a renewal or major amendment of a federal license or permit is an unlawful transfer of Federal authority to the States and could delay OCS permit activities.

NOAA Response to Comment 42. The determination of substantially different coastal effects should be made by input from all the parties. While NOAA's language did not transfer Federal authority to the States, NOAA agrees the section should be revised to reflect NOAA's original intent that the State's view be accorded some weight.

VI. Miscellaneous Rulemaking Requirements

Executive Order 12372: Intergovernmental Review

This program is subject to Executive Order 12372.

Executive Order 13132: Federalism Assessment

NOAA has concluded that this regulatory action is consistent with federalism principles, criteria, and requirements stated in Executive Order 13132. The proposed changes in the Federal Consistency regulations are intended to 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 approved State coastal management programs. The CZMA and these revised implementing regulations promote the principles of federalism articulated in Executive Order 13132 by granting the States a qualified right to review certain Federal actions that affect the land and water uses or natural resources of State coastal zones. Congress partially waived the Federal government's supremacy over State law when it created the CZMA. Section 307 of the CZMA and NOAA's implementing regulations effectively balance responsibilities between Federal agencies and State agencies whenever Federal agencies propose activities or applicants for required federal license or permit propose to undertake activities affecting State coastal uses or resources. Through the CZMA, Federal agencies are required to carry out their activities in a manner that is consistent to the maximum extent practicable with federally approved State management programs and licensees and permittees to be fully consistent with the State programs. The CZMA and these implementing regulations, rather than preempting a State provide a mechanism for it to object to Federal actions that are not consistent with the State's 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 is not significant for purposes of Executive Order 12866.

Regulatory Flexibility Act

The Chief Counsel for Regulation for the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that the proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. This proposed rule will make only minor changes to existing regulations. The existing regulations do not have a significant economic impact on a substantial number of small entities and, thus, these clarifying changes will not result in any additional economic impact on affected entities. To the extent the proposed rule impacts small entities, it is to diminish their regulatory burden and obligations. The proposed rule revises provisions of the Federal Consistency regulations to improve Federal-State coordination of actions affecting the coastal zone, and does not impose any new requirements on States, federal agencies, businesses, or the public.

The term ''small entity'' includes small businesses, small organizations, and small governmental jurisdictions. The Federal Consistency regulations, and the proposed rule, primarily affect States and federal agencies. Federal Consistency also applies to individual land owners proposing certain activities affecting the coastal zone that require federal authorizations. State and Federal agencies and individual landowners are not small entities under the Regulatory Flexibility Act (RFA). Federal Consistency does apply to some small businesses, small organizations and small governmental jurisdictions proposing activities that affect the coastal zone. The RFA defines a small jurisdiction as any government of a district with a population of less than 50,000.

The number of small entities affected by the consistency provisions of the CZMA generally, are insignificant when compared to the total number of small businesses and governmental jurisdictions in the 34 coastal States with approved coastal management programs. State coastal management programs concur with 95–97 percent of all federal license or permit activities, and over 99 percent of all applicable small organization and governmental jurisdiction federal assistance activities. For example, in the State of North Carolina, for the period January 1, 1998,

to December 31, 1998, the State reviewed 26 applications for federal licenses or permits under 15 CFR part 930, subpart D (the existing regulations), for activities that did not require a State permit. Of these 26 applications, no small entities were subject to the State's CZMA Federal Consistency review authority and the existing regulations. During the same period the State also reviewed 90 applications by State agencies and local governments for federal financial assistance. Of these 90 applications, 28 small entities were subject to the State's CZMA Federal Consistency review authority and the existing regulations. The State did not object to any of these financial assistance applications. Moreover, all of these financial assistance activities involved allowing federal funds to improve local infrastructure. North Carolina is a representative State in the use and application of the Federal Consistency requirement and the existing regulations.

In addition, the Federal Consistency appeal process affects very few entities of any kind. Since the CZMA was enacted in 1972, only 39 consistency appeals have been decided by the Secretary of Commerce. Of those 39 consistency appeals, only 5 appeals have involved small entities. In 27 years of implementation, only five small entities have been affected by these regulations governing consistency appeals to the Secretary of Commerce.

Thus, the existing regulations do not, and the proposed rule will not, if adopted, have a significant economic impact on a substantial number of small entities. Accordingly, an initial Regulatory Flexibility Analysis was not prepared.

Paperwork Reduction Act

This proposed rule contains no additional collection-of-information requirement subject to review and approval by OMB under the Paperwork Reduction Act (PRA).

National Environmental Policy Act

NOAA has concluded that this proposed regulatory action does not have the potential to pose significant impacts on the quality of the human environment. Further, NOAA has concluded that this proposed rule, if adopted, would not result in any changes to the human environment. As defined in sections 5.05 and 6.03c3(i) of NAO 216–6, this proposed action is of limited scope, a technical and procedural nature and any environmental effects are too speculative or conjectural to lend themselves to meaningful analysis. Thus, this proposed rule, if adopted, is categorically excluded from further review pursuant to NEPA.

List of Subjects in 15 CFR Part 930

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

Dated: June 5, 2003.

Alan Neuschatz,

Acting Assistant Administrator for Ocean Services and Coastal Zone Management.

For the reasons stated in the preamble, NOAA proposes to revise 15 CFR part 930 as follows:

PART 930—FEDERAL CONSISTENCY WITH APPROVED COASTAL MANAGEMENT PROGRAMS

1. The authority citation continues to read as follows:

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

2. Section 930.1 is proposed to be amended by revising paragraph (b) to read as follows:

§ 930.1 Overall Objectives.

* * * * *

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

* * * * *

3. Section 930.10 is proposed to be amended by amending the table as follows:

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

Term	Section
* * * * *	
Failure substantially to comply with an OCS plan.	930.85(c).
* * * * *	

4. Section 930.11 is proposed to be amended by revising the first sentence of paragraph (g) to read as follows:

§ 930.11 Definitions.

* * * * *

(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 agency activity or federal license or permit activity (including all types of activities subject to the federal consistency requirement under subparts C, D, E, F and I of this part.) * * *

* * * * *

5. Section 930.31 is proposed to be amended by revising paragraphs (a) and (d) as follows:

§ 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, which includes a range of activities where the Federal agency makes a proposal for action which initiates an activity or series of activities and if coastal effects are reasonably foreseeable, *e.g.,* a Federal agency's proposal to physically alter coastal resources, a plan that is used to direct future agency actions, a proposed rulemaking that alters uses of the coastal zone. ''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).

* * * * *

(d) A general permit proposed by a Federal agency is subject to this subpart if the general permit does not involve case-by-case or individual approval of a license or permit by the Federal agency. When proposing a general permit, a Federal agency shall provide a consistency determination to the relevant management programs and request that the State agency(ies) provide the Federal agency with review, and if necessary, conditions that would permit the State agency to concur with the Federal agency's consistency determination. State concurrence shall remove the need for the State agency to review individual uses of the general permit for consistency with the enforceable policies of management programs. Federal agencies shall, to the maximum extent practicable, incorporate State conditions into the general permit. If the State's conditions are not incorporated into the general permit or a State agency objects to the general permit, then the Federal agency shall notify potential users of the general permit that the general permit is not available in that State unless the potential users in those States provide the State agency with a consistency certification under subpart D of this part and the State agency concurs.

* * * * *

6. Section 930.35 is proposed to amended by redesignating paragraph (d) as paragraph (e) and by adding a new paragraph (d) as follows:

§ 930.35 Negative determinations for proposed activities.

* * * * *

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

* * * * *

7. Section 930.41 is proposed to be amended by revising paragraph (a) as follows:

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

* * * * *

8. Section 930.51 is proposed to be amended by revising paragraph (a) and paragraph (e) as follows:

§ 930.51 Federal license or permit.

(a) The term ''federal license or permit'' means any required authorization which any Federal agency is empowered to issue to an applicant that an applicant is required by law to obtain in order to conduct activities affecting any land or water use or natural resource of the coastal zone. The term does not include OCS plans, and federal license or permit activities described in detail in OCS plans, which are subject to subpart E of this part, or leases issued pursuant to lease sales conducted by a Federal agency (*e.g.,* outer continental shelf (OCS) oil and gas lease sales conducted by the Minerals Management Service or oil and gas lease sales conducted by the Bureau of Land Management). Lease sales conducted by a Federal agency are Federal agency activities under subpart C of this part.

* * * * *

(e) The determination of substantially different coastal effects under paragraphs (b)(3), and (c) of this section is made on a case-by-case basis by the Federal agency after consulting with the State agency, and applicant. The Federal agency shall give considerable weight to the opinion of the State agency 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.

* * * * *

9. Section 930.58 is proposed to be amended by revising paragraph (a)(1) and the third sentence of paragraph (a)(2) as follows:

§ 930.58 Necessary data and information.

(a) * * *

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

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

(ii) To the extent not included in paragraphs (a)(1) or (a)(1)(i) of this section, a detailed description of the proposed activity, its associated facilities, the coastal effects, and any other information relied upon by the applicant to make its certification. Maps, diagrams, and technical data shall be submitted when a written description alone will not adequately describe the proposal;

(2) * * * Necessary data and information may include State or local government permit applications which are required for the proposed activity.

* * *

* * * * *

10. Section 930.60 is proposed to be revised as follows:

§ 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 necessary data and information required pursuant to § 930.58.

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

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

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

(2) Within 30 days of receipt of the certification or necessary data and information that was deemed missing, pursuant to paragraph (a)(1) of this section, the State agency shall notify the applicant and Federal agency that the certification and necessary data and

information required pursuant to § 930.58 is complete, the date the information deemed missing was received, and that the State agency's consistency review commenced on the date of receipt.

(3) Once the six-month review period has begun under paragraphs (a), (a)(1) or (2) of this section, State agencies shall not stop, stay, or otherwise alter the consistency timeclock without the applicant's written agreement. State agencies and applicants (and persons under subpart E of this part) may mutually agree to stay the consistency timeclock. Such an agreement shall be in writing and a copy shall be provided to the Federal agency. A Federal agency shall not presume State agency concurrence with an activity where such written agreement exists or where a State agency's review period, under paragraph (a)(1)(i) of this section, has not begun.

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

11. Section 930.63 is proposed to be amended by revising the fourth sentence in paragraph (d) as follows:

§ 930.63 State agency objection to a consistency certification.

* * * * *

(d) * * * See § 930.121(c) for further details regarding alternatives for appeals under subpart H of this part.

* * * * *

12. Section 930.76 is proposed to be amended by removing paragraph (c), redesignating paragraph (d) as paragraph (c), and revising paragraphs (a) and (b) as follows:

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

(a) Any person submitting any OCS plan to the Secretary of the Interior or designee shall submit to the Secretary of the Interior or designee (1) a copy of the OCS plan, (2) the consistency certification, (3) the necessary data and information required pursuant to § 930.58, and (4) the information submitted pursuant to the Department of the Interior's OCS operating regulations (*see* 30 CFR 250.203 and 250.204) and OCS information program regulations (*see* 30 CFR part 252).

(b) The Secretary of the Interior or designee shall furnish the State agency with a copy of the information submitted under paragraph (a) of this section, (excluding proprietary information).

* * * * *

13. Section 930.77 is proposed to be amended by revising paragraph (a) as follows:

§ 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 the information required pursuant to § 930.76(a) and (b). If a person has submitted the documents required by § 930.76(a) and (b), then a State agency's assertion that the information contained in the submitted documents is substantively deficient, or a State agency's request for clarification of the information provided, or information and data in addition to that required by § 930.76 shall not delay or otherwise change the date on which State agency review begins.

(2) To assess consistency, the State agency shall use the information submitted pursuant to § 930.76. If a State agency needs information in addition to the information required pursuant to § 930.76, it shall amend its management program pursuant to § 930.58(a)(2).

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

* * * * *

14. Section 930.82 is proposed to be revised as follows:

§ 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 along with a consistency certification and data and information necessary to support the amended consistency certification. The data and information shall specifically describe modifications made to the original OCS plan, and the manner in which such modifications will ensure that all of the proposed federal license or permit activities described in detail in the amended plan will be conducted in a manner consistent with the management program. When satisfied that the person has met the requirements of the OCSLA and this subpart, the Secretary of the Interior or designee shall furnish the State agency with a copy of the amended OCS plan (excluding proprietary information), necessary data and information and consistency certification.

15. Section 930.85 is proposed to be amended by removing paragraph (d) and revising paragraph (b) and paragraph (c) as follows:

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

* * * * *

(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.

(c) If a person fails substantially to comply with an approved OCS plan, as determined by Minerals Management Service, pursuant to the Outer Continental Shelf Lands Act and applicable regulations, the person shall comply with the approved plan or shall submit an amendment to such plan or

a new plan to Minerals Management Service. When satisfied that the person has met the requirements of the OCSLA and this subpart, the Secretary of the Interior or designee shall furnish the State agency with a copy of the amended OCS plan (excluding proprietary information), necessary data and information and consistency certification. Sections 930.82 through 930.84 shall apply to further State agency review of the consistency certification for the amended or new plan.

16. Section 930.121 is proposed to be amended by revising paragraph (c) as follows:

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

* * * * *

(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. The Secretary may consider but is not limited to considering previous appeal decisions, alternatives described in state objection letters and alternatives and other information submitted during the appeal. An alternative shall not be considered unless the State submits a statement, in a brief or other supporting material, to the Secretary that the alternative would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program.

17. Section 930.125 is proposed to be amended by redesignating paragraphs (b) through (e) as paragraphs (c) through (f), and by adding a new paragraph (b) as follows:

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

* * * * *

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

* * * * *

18. Section 930.127 is proposed to be revised as follows:

§ 930.127 Briefs and Supporting Materials.

(a) Within 30 days of the filing of the Notice of Appeal, the appellant shall submit to the Secretary a brief accompanied by all such supporting documentation and material as the appellant deems necessary for the consideration of the Secretary. Within 30 days of the State's receipt of the Appellant's brief and supporting documentation and material, the State shall submit to the Secretary a brief and all such supporting documentation and material the State deems necessary for the consideration of the Secretary.

(b)(1) Both the appellant and State agency shall send four copies of their briefs and supporting materials to the Office of General Counsel for Ocean Services (GCOS), NOAA, 1305 East West Highway, Room 6111 SSMC4, Silver Spring, Maryland 20910, one of which must be in an electronic format compatible (to the extent practicable) with the website maintained by the Secretary to provide public information concerning appeals under the CZMA.

(2) At the same time that materials are submitted to the Secretary, the appellant and State agency shall serve at least one copy of their briefs, supporting materials and all requests and communications to the Secretary and on each other.

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

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

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

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

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

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

(e) The Secretary may extend the time for submission of briefs and supporting materials only in the event of exigent or unforeseen circumstances.

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

19. Section 930.128 is proposed to be revised as follows:

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

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

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

(c)(1) Notice of the opportunity for interested Federal agencies to comment

on the appeal shall take the same form as Notice required in paragraph (a) of this section and may be provided in the same Notice as the Notice of the filing of the appeal. The Secretary shall accord greater weight to those Federal agencies whose comments are within the areas of their expertise.

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

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

20. Section 930.129 is proposed to be amended by revising paragraph (c) and paragraph (d) as follows:

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

* * * * *

(c) The Secretary may stay the processing of an appeal or extend the period for the development of the Secretary's decision record, in accordance with § 930.130.

(d) The Secretary may remand an appeal to the State agency for reconsideration of the project's consistency with the enforceable policies of the State's management program if significant new information relevant to the State agency's objection, that was not provided to the State agency as part of its consistency review, is submitted to the Secretary by the State agency, the appellant, the public or a Federal agency. The Secretary shall determine a time period for the remand to the State not to exceed 20 days and the time period for remand must be completed within the period described in § 930.130 for the development of the Secretary's decision record. If the State agency responds that it still objects to the activity, then the Secretary shall continue to process the appeal. If the State agency concurs that the activity is consistent with the enforceable policies of the State's management program, then the Secretary shall declare the appeal moot and notify the Federal agency that the activity may be federally approved.

21. Section 930.130 is proposed to be amended by revising paragraphs (a), (b), (c) and (d) as follows:

§ 930.130 Closure of the decision record and issuance of decision.

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

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

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

(ii) as needed to receive, on an expedited basis, the final (A) environmental analyses required under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) for the Federal agency's proposed issuance of a license or permit or grant of assistance; or (B) Biological Opinions issued pursuant to the Endangered Species Act (16 U.S.C. 1531 *et seq.*) for the Federal agency's proposed issuance of a license or permit or grant of assistance.

(b) No later than 90 days after publication of a **Federal Register** notice indicating when the decision record for an appeal has been closed, the 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 a **Federal Register** notice explaining why a decision cannot be issued within the 90-day period.

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

(d) 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 in the decision record supports this conclusion.

* * * * *

[FR Doc. 03–14663 Filed 6–10–03; 8:45 am]

BILLING CODE 3510–08–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–131478–02]

RIN 1545–BB25

Guidance Under Section 1502; Suspension of Losses on Certain Stock Dispositions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Cancellation of notice of public hearing on proposed rulemaking.

SUMMARY: This document cancels a public hearing on proposed regulations under section 1502 of the Internal Revenue Code that redetermine the basis of stock of a subsidiary member of a consolidated group immediately prior to certain transfers of such stock.

DATES: The public hearing originally scheduled for June 20, 2003, at 10 a.m., is cancelled.

FOR FURTHER INFORMATION CONTACT: Sonya M. Cruse of the Regulations Unit, Associate Chief Counsel (Procedure and Administration), at (202) 622–7180 (not a toll-free number).

SUPPLEMENTARY INFORMATION: A notice of proposed rulemaking and notice of public hearing that appeared in the **Federal Register** on Friday, March 14, 2003, (68 FR 12324), announced that a public hearing was scheduled for June 20, 2003, at 10 a.m., in the auditorium, Internal Revenue Service Building, 1111 Constitution Avenue, NW., Washington, DC.

The subject of the public hearing is proposed regulations under section 1502 of the Internal Revenue Code. The public comment period for these regulations expires on June 12, 2003. The outlines of oral testimony were due on May 30, 2003. The notice of proposed rulemaking and notice of public hearing, instructed those interested in testifying at the public hearing to submit a request to speak and an outline of the topics to be addressed. As of Friday, June 6, 2003, no one has requested to speak. Therefore, the public hearing scheduled for June 20, 2003, is cancelled.

Cynthia E. Grigsby,

Chief, Regulations Unit, Associate Chief Counsel (Procedure and Administration).

[FR Doc. 03–14785 Filed 6–10–03; 8:45 am]

BILLING CODE 4830–01–P