

**DECISION AND FINDINGS BY THE U.S. UNDER SECRETARY OF COMMERCE  
FOR OCEANS AND ATMOSPHERE IN THE CONSISTENCY APPEAL OF  
WESTERNGECO FROM AN OBJECTION BY THE STATE OF SOUTH CAROLINA**

**JUNE 15, 2020**

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	BACKGROUND .....	2
A.	Statutory Summary .....	2
B.	Factual Summary .....	3
1.	WesternGeco’s Proposed Survey .....	3
2.	G&G Survey Permit Application and Environmental Reviews .....	4
3.	South Carolina’s Consistency Review .....	6
C.	Background .....	7
III.	STANDARD OF REVIEW .....	7
IV.	THRESHOLD ISSUES .....	8
V.	THE PROJECT IS CONSISTENT WITH THE OBJECTIVES OR PURPOSE OF THE CZMA .....	10
A.	Element 1: The Proposed Survey Furthers the National Interest, as Articulated in Sections 302 or 303 of the CZMA, in a Significant or Substantial Manner. ....	10
1.	The Proposed Survey Furthers the National Interest in Developing the Resources of the Nation’s Coastal Zone.....	12
2.	The Proposed Survey Furthers the National Interest in Attaining a Greater Degree of Energy Self-Sufficiency.....	14
3.	The Proposed Survey Furthers the National Interest in Priority Consideration Being Given to Coastal-Dependent Uses and Orderly Processes for Siting Major Facilities Related to Energy. ....	15
4.	The Proposed Survey Furthers Certain National Policies in a Significant and Substantial Manner.....	16

B.	Element 2: The National Interest Furthered by the Project Outweighs the Project's Adverse Coastal Effects.....	19
1.	Sufficiency of Evidence in the Record.....	19
2.	Adverse Coastal Effects .....	20
	a) Commercial and Recreational Fisheries and Invertebrates.....	21
	b) Sea Turtles.....	24
3.	Balancing - The National Interest Furthered by the Project Outweighs the Project's Adverse Coastal Effects.....	26
C.	Element 3: There is no Reasonable Alternative Available Which Would Permit the Project to be Conducted in a Manner Consistent with the Enforceable Policies of the State Management Program.....	27
VI.	CONCLUSION.....	29

## I. INTRODUCTION

WesternGeco has appealed the consistency objection of the State of South Carolina<sup>1</sup> (“the State”) to the WesternGeco’s proposed Bureau of Ocean Energy Management (“BOEM”) permit to conduct a geological and geophysical seismic survey for oil and gas exploration in the Mid- and South Atlantic Outer Continental Shelf (“OCS”).<sup>2</sup> The State found that WesternGeco’s proposed survey was inconsistent with state enforceable policies because of adverse effects to recreational and commercial fisheries and sea turtles. WesternGeco appeals, requesting that the National Oceanic and Atmospheric Administration (“NOAA”) Administrator, as delegated,<sup>3</sup> override the State’s objection.

The Coastal Zone Management Act (“CZMA”), 16 U.S.C. §§ 1451, *et seq.*, provides states with federally approved coastal management programs the opportunity to review a proposed project requiring federal licenses or permits if the project would affect any land or water use or natural resource of the state’s coastal zone. A timely objection raised by a state precludes federal agencies from issuing licenses or permits for such projects, unless, on appeal by the applicant, the NOAA Administrator finds that the activity is either consistent with the objectives of the CZMA or necessary in the interests of national security. 16 U.S.C. § 1456(c)(3)(A). If the NOAA Administrator finds that the activity is consistent with the objectives of the CZMA or necessary in the interest of national security, the federal agency may approve the proposed activity.

After considering the Parties’ briefs, past precedent, and the decision record, NOAA overrides the State’s objection. The proposed survey, which would collect information to support informed decision-making on energy development, furthers the national interest as articulated in sections 302 and 303 of the CZMA in a significant and substantial manner that outweighs any potential short-term, limited, and localized adverse coastal effects to fisheries and sea turtles, both separately and cumulatively. Additionally, the State failed to describe any reasonable alternatives that are consistent with enforceable policies pursuant to the requirements of the CZMA implementing regulations.

---

<sup>1</sup> WesternGeco likewise appeals the consistency objection by the State of North Carolina for the same proposed survey. While the appeals are substantially similar, the appeals are reviewed separately. Information on the North Carolina appeal is available at <https://www.regulations.gov/docket?D=NOAA-HQ-2019-0089>.

<sup>2</sup> The OCS begins at a state’s 3-mile seaward boundary and extends to the 200-mile exclusive economic zone boundary. 43 U.S.C. § 1331(a).

<sup>3</sup> Under Department Organizational Order 10-15 Section 3.01.u, NOAA is delegated the authority to perform functions prescribed in the Coastal Zone Management Act, 16 U.S.C. §§ 1451, *et seq.*, including administering and deciding consistency appeals.

## **II. BACKGROUND**

### **A. Statutory Summary**

Section 307 of the CZMA requires that federal actions, within and outside the coastal zone, which have reasonably foreseeable effects on any coastal use (land or water) or natural resource of the coastal zone, be consistent with the enforceable policies of a state's federally approved coastal management program. 16 U.S.C. § 1456. Federal license or permit activities that are listed in a state's federally approved coastal management program and that would occur within a state's coastal zone are subject to federal consistency review. 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.53. If the state agency chooses to review federal license or permit activities conducted outside of the coastal zone with reasonably foreseeable coastal effects, it must generally describe the geographic location of such activities in its coastal management program. 15 C.F.R. § 930.53. If an activity is unlisted, or outside of the geographic location description, a state must request approval from NOAA's Office of Coastal Management ("OCM") to review the activity. 15 C.F.R. §§ 930.53, 930.54.

If OCM approves the state's request to review an unlisted activity, the license or permit applicant commences the federal consistency review by sending the state a certification that its activity is consistent with the state's enforceable policies (referred to as a consistency certification), accompanied by any necessary data and information. 15 C.F.R. §§ 930.57, 930.58, 930.60. The state then has six months from OCM's approval, or three months from receipt of the applicant's consistency certification and necessary data and information, whichever is later, to concur, concur with conditions, or object. 15 C.F.R. §§ 930.54, 930.60. If the state issues an objection, the federal agency may not issue the license or permit sought by the applicant unless the Secretary of Commerce finds that the activity is consistent with the objectives of the CZMA or is otherwise necessary in the interest of national security. 16 U.S.C. § 1456(c)(3)(A).

An applicant may obtain Secretarial review of a state agency objection by filing a notice of appeal with the Secretary within 30 days of receipt of a state agency objection. 15 C.F.R. § 930.125.

The CZMA provides an expedited timeline for the Secretary to review an appeal for an "energy project." The CZMA regulations define "energy project" as "projects related to the siting, construction, expansion, or operation of any facility designed to explore, develop, produce, transmit or transport energy or energy resources that are subject to review by a coastal State under subparts D, E, F or I of this part." 15 C.F.R. § 930.123(c). The distinction between energy projects and non-energy projects in the CZMA regulations responds to the Energy Policy Act of

2005, P.L. 109-58, which codified deadlines for consistency appeals and required the filing of a consolidated record for “energy project” appeals.<sup>4</sup>

Under 15 C.F.R. § 930.127(i)(1), the initial record for a consistency appeal of an energy project is the consolidated record maintained by the lead federal permitting agency. 16 U.S.C. § 1466; 15 C.F.R. § 930.127(i)(1). The notice of appeal must be accompanied by the consolidated record. 15 C.F.R. § 930.127(i)(2).

The Administrator of NOAA is delegated the responsibility for deciding consistency appeals filed under the CZMA. NOAA’s Office of the General Counsel assists the Administrator in carrying out this responsibility and has been delegated certain functions associated with processing consistency appeals, including issuing procedural orders and establishing schedules.

## **B. Factual Summary**

### **1. WesternGeco’s Proposed Survey**

WesternGeco is a private company that collects and processes geophysical data to support oil and gas exploration and development. WesternGeco proposes to conduct a marine, two-dimensional (“2D”) seismic survey. 2D surveys acquire subsurface, geological data over a large area to identify areas of potential oil and gas resources for further, more detailed exploration.

WesternGeco would use one vessel to tow an array of 24 airguns. These airgun arrays emit sound waves that penetrate the subsurface and are reflected off the different subsurface rock layers back up to receivers (hydrophones) that are also towed behind the survey vessel. SCR 4 at SC0008105; CR 20 at SC000793; 83 Fed. Reg. 63,268, 63,269 (Dec. 7, 2018) (also available as CR 26 at SC002973). WesternGeco’s proposed survey would be conducted from approximately 30 kilometers (km) (~19 miles [mi]) offshore of the southeast coast of Maryland south to 80 km (~50 mi) offshore of St. Augustine, Florida. SCR 4 at SC008102–8103. Seismic operations are estimated to occur during 208 days over a period of about one year. *Id.* at SC008102.<sup>5</sup>

---

<sup>4</sup> See, e.g., Coastal Zone Management Act Federal Consistency Regulations, 71 Fed. Reg. 788, at 788–789 (Jan. 5, 2006).

<sup>5</sup> The prefix “CR” is used for the Common Record portion of the Consolidated Record. The South Carolina portion of the Consolidated Record is identified as “SCR.” WesternGeco’s supplemental documents are identified by the prefix “SR,” and the State’s supplemental documents are identified by the prefix “DSR.” The portion of the record supplemented by NOAA is identified as “NOAA SR.” The docket for this appeal, including the final decision record, is available at <https://www.regulations.gov/docket?D=NOAA-HQ-2019-0118>.

## 2. G&G Survey Permit Application and Environmental Reviews

In April 2014, WesternGeco applied for an exploration permit from the Department of the Interior’s BOEM to conduct a seismic survey in federally managed waters off the coasts of the Mid- and South Atlantic (“proposed survey”). CR 20 at SC000793. BOEM authorizes exploration permits for geological and geophysical (“G&G”) surveys, including seismic surveys, under the Outer Continental Shelf Lands Act (“OCSLA”). 43 U.S.C. §§ 1331, *et seq.* BOEM has not approved seismic surveys permits involving air guns in the Atlantic OCS for several decades, in part, due to public opposition to oil and gas development in the Atlantic OCS. *See, e.g.*, CR 23 at SC000877–0878; CR 9 at SC000754–0755; CR 29–31 at SC006732–8081. Between 1990 and 2008, Congress maintained a moratorium on oil and gas leasing on the Mid- and South Atlantic Planning Areas. CR 23 at SC000877. Since the moratorium expired in 2008, BOEM has sought the public’s input as to whether to authorize G&G seismic survey permits in the Mid- and South-Atlantic OCS. CR 17 at SC000787; CR 18 at SC000788–0789.

In 2014, BOEM completed a Programmatic Environmental Impact Statement (“PEIS”) pursuant to the National Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C. §§ 4321, *et seq.*, which requires federal agencies to prepare an Environmental Impact Statement (“EIS”) for major federal actions that significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C); CR 23–25 at SC000815–2972. The PEIS assesses the environmental impacts of permitting a broad range of G&G survey activities, including seismic surveys, anticipated within the Mid-Atlantic and South Atlantic OCS from 2012 through 2020 for oil and gas, renewable energy, and marine minerals. CR 23 at SC000822. The PEIS is programmatic in that it does not examine any specific G&G application, but provides the framework for subsequent project-specific environmental documents that would be completed prior to issuance of specific permits. CR 23 at SC000822.<sup>6</sup>

On February 17, 2016, WesternGeco submitted a request to NOAA’s National Marine Fisheries Service (“NMFS”) for an incidental harassment authorization under the Marine Mammal Protection Act of 1972 (“MMPA”), 16 U.S.C. §§ 1361 *et seq.*, for its proposed survey. CR 2 at SC000011–0207. Under the MMPA, U.S. citizens who engage in a “specified activity (other than commercial fishing) within a specific geographic region” may request authorization for the “taking by harassment of small numbers of marine mammals of a species or population stock” pursuant to that activity for a period of no more than one year, where such harassment will have a “negligible impact” on the species or stocks. 16 U.S.C. § 1371(a)(5)(D)(i)(I). This authorization is referred to as an IHA.

---

<sup>6</sup> As stated in the 2014 PEIS, BOEM would also prepare a project-specific assessment for Essential Fish Habitat (“EFH”) and conduct EFH consultation if warranted, pursuant to Section 305(b) of the Magnuson Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act”), 16 U.S.C. § 1855(b). CR 23 at SC000884.

On January 6, 2017, BOEM denied all pending seismic survey applications involving airguns in the Atlantic, including WesternGeco’s application. CR 9 at SC000750–0758. BOEM stated it was denying the applications “based on the diminished immediate need for seismic survey information in light of the Secretary’s decision to remove the Atlantic Program Area from the 2017-2022 Five Year Oil and Gas Program and the promise of emerging noise-quieting technologies.” CR 9 at SC000752. BOEM also noted that, in light of the decision to stop considering leasing in the Atlantic and the effects analyzed in the PEIS, “the value of obtaining the information from the surveys does not outweigh the risks of obtaining said information.” *Id.*

On April 28, 2017, President Trump signed Executive Order 13795, Implementing an America-First Offshore Energy Strategy, requiring BOEM to give full consideration to revising the National OCS Oil and Gas Leasing Program (“National OCS Program”) and requiring BOEM and NMFS to expedite their consideration of seismic survey applications in the Atlantic OCS under OCSLA and the MMPA. 82 Fed. Reg. 20815, 20817 (Apr. 28, 2017).<sup>7</sup> On May 1, 2017, the Secretary of the Interior issued Order No. 3350<sup>8</sup> to implement Executive Order 13795, directing BOEM to expedite consideration of appealed, new, or resubmitted seismic permitting applications for the Atlantic. CR 10 at SC000759. On May 16, 2017, BOEM notified WesternGeco that BOEM was rescinding the denial of its permit application and the January 5, 2017 memorandum. *Id.*

On November 30, 2018, NMFS’s Office of Protected Resources (“OPR”) issued IHAs under the MMPA for five applicants, including WesternGeco, who applied for IHAs for similar seismic surveys permits. 83 Fed. Reg. 63,268. These applicants include WesternGeco, Spectrum Geo, Inc. (“Spectrum”), TGS-NOPEC Geophysical Company (“TGS”), ION GeoVentures/GXT Technologies (“ION/GXT”)<sup>9</sup>, and CGG Services Inc. (“CGG”). NMFS also prepared an Environmental Assessment (“EA”) and Finding of No Significant Impact (“FONSI”) under NEPA for the issuance of the IHAs, in which NMFS determined that the issuance of the IHAs would not result in significant direct, indirect, or cumulative impacts to the human environment. CR 4 at SC000226, SC000308; CR 5 at SC000324.

On November 28, 2018, following completion of formal ESA Section 7 consultation, NMFS’ OPR, Interagency Cooperation Division, issued to BOEM and NMFS OPR, Permits and

---

<sup>7</sup> In *League of Conservation Voters v. Trump*, the district court vacated Section 5 of Executive Order 13795. 363 F. Supp. 3d 1013, 1031 (D. Alaska. 2019), appeal filed May 29, 2019. Section 5 of Executive Order 13795, “Modification of the Withdrawal of Areas of the Outer Continental Shelf from Leasing Disposition,” is not at issue in this decision. Rather, the following sections of Executive Order 13795 are relevant: Section 1, “Findings”; Section 2, “Policy;” and Section 3, “Implementing an America-First Offshore Energy Strategy.”

<sup>8</sup> Available at <https://www.doi.gov/sites/doi.gov/files/press-release/secretarial-order-3350.pdf>.

<sup>9</sup> As a Notice from NMFS explains, the IHA application incorrectly listed ION as the IHA applicant, when ION’s subsidiary “GX Technology Corporation” should have been listed instead. 83 Fed. Reg. 66,175 (Dec. 3, 2019).



Conservation Division, a final Biological Opinion (“BiOp”) including an Incidental Take Statement (“ITS”) for BOEM’s proposed issuance of the five seismic survey permits under the OCSLA, and NMFS’s proposed issuance of associated IHAs under the MMPA. CR 7 at SC000346. Section 7(a)(2) of the ESA directs each federal agency to ensure, in consultation with NMFS or the U.S. Fish and Wildlife Service (“FWS”) (the “consulting agency”), that “any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of” any listed species<sup>10</sup> or destroy or adversely modify designated critical habitat. 16 U.S.C. § 1536(a)(2). If formal consultation is conducted, the consulting agency (in this case, NMFS) must prepare a BiOp stating its expert opinion on whether the proposed action is likely to “jeopardize the continued existence of” any listed species, or destroy or adversely modify critical habitat. *Id.* § 1536(a)(2); 50 C.F.R. § 402.14(h)(3). If NMFS issues a “no jeopardy” opinion, but determines that the action may incidentally take members of a listed species, the agency must include an ITS in the BiOp specifying the amount or extent of anticipated take, reasonable and prudent measures that are necessary or appropriate to minimize the impact of the take, and mandatory terms and conditions to implement the reasonable and prudent measures. 16 U.S.C. § 1536(b)(4). Any incidental take in compliance with the terms and conditions of the ITS is exempt from ESA Section 9’s take prohibition. *Id.* § 1536(o)(2).

As of the date of this decision, BOEM has not approved any of the five pending seismic survey permits that are the subject of the IHAs and BiOp, including WesternGeco’s proposed survey.<sup>11</sup>

### 3. South Carolina’s Consistency Review

On August 25, 2014, the State requested approval from OCM to review, as unlisted activities, seven federal permit applications for seismic surveys, including WesternGeco, ION/GXT, TGS, CGG, and Spectrum. SCR 7 at SC008191. On November 18, 2014, OCM granted the State’s request to review the proposed surveys of five of the seven applicants (including WesternGeco, Spectrum, ION/GXT, and CGG), after finding the State met its burden to allege reasonable and foreseeable effects on coastal uses (commercial and recreational fishing) and coastal resources (sea turtle nesting). SCR 3 at SC008099.

In 2015, three seismic survey applicants (ION/GXT, CGG, and Spectrum) submitted Consistency Certifications to the State. *See* SR A–C at SC008427–8437. The State concurred with each, conditioned on the applicants agreeing to certain mitigations for sea turtles and marine protected areas, and agreeing to coordinate with federal and state fishery management officials

---

<sup>10</sup> The ESA provides for the listing of species as endangered or threatened. 16 U.S.C. § 1533.

<sup>11</sup> As of the date of this decision, BOEM has not completed a project-specific NEPA analysis, or initiated EFH consultation, for any of the five seismic survey applicants, including WesternGeco.

before and during surveys to avoid user conflicts. SR A–C at SC008427–8437; *see, e.g.*, SR A at SC008429 (summary of conditions).

On March 12, 2019, WesternGeco submitted a Consistency Certification to the State for its proposed seismic survey, wherein WesternGeco committed to comply with the fishery user conflict conditions imposed on the other three surveys. SCR 4 at SC008106.<sup>12</sup> On July 8, 2019, the State objected to WesternGeco’s consistency certification. SCR 5 at SC008110.

### **C. Procedural Background**

On September 20, 2019, WesternGeco submitted to NOAA a timely “Notice of Appeal of South Carolina’s Coastal Zone Management Act Consistency Objection,” which included the consolidated record of BOEM,<sup>13</sup> the lead federal permitting agency for WesternGeco’s proposed permit. Over the next several months, the matter was fully briefed by the Parties.<sup>14</sup> After other Federal agencies were invited to comment, and the Parties’ requests to supplement the consolidated record were resolved, the record closed on April 27, 2020. 85 Fed. Reg. 23,328.

### **III. STANDARD OF REVIEW**

To override the State’s consistency objection, it is necessary to find that the activity is either consistent with the objectives of the CZMA or necessary in the interests of national security.<sup>15</sup> 16 U.S.C. § 1456(c)(3)(A). An activity is consistent with the objectives of the CZMA if it furthers the national interest as articulated in the CZMA in a significant or substantial manner (referred to herein as “Element 1”), if the national interest furthered by the activity outweighs the activity’

---

<sup>12</sup> WesternGeco did not need to commit to the time-area closure or measures in MPAs due to more restrictive measures imposed by NMFS in the IHA.

<sup>13</sup> WesternGeco’s proposed survey is an “energy project” within the meaning of the CZMA regulations. 15 C.F.R. § 930.123(c).

<sup>14</sup> WesternGeco submitted its principal brief (“WG Br.”) on October 21, 2019, and the State submitted its principal brief (“SC Br.”) on December 3, 2019.

<sup>15</sup> A proposed activity is necessary in the interest of national security if “a national defense or other national security interest would be significantly impaired were the activity not permitted to go forward as proposed.” 15 C.F.R. § 930.122. Neither WesternGeco nor the State have raised any arguments regarding the national security prong. Comments were solicited from the Departments of Defense, Homeland Security, Justice, State, and Energy, as well as from the Homeland Security Council, National Security Council, and Coast Guard. None of these federal agencies raised any national defense or other national security concerns with respect to the proposed survey. Indeed, the Department of Defense stated that, although it had made no determinations as to whether the proposed survey would have an adverse impact on military operations or readiness or whether it would result in an unacceptable risk to national security of the United States, “DoD has no reason to conclude that WesternGeco’s proposed activity is necessary in the interest of national security, within the meaning of 15 C.F.R. § 930.122.” NOAA SR 17 at SC009411. For these reasons, WesternGeco has not demonstrated that the proposed seismic survey is necessary in the interests of national security, and this decision does not further discuss the national security issue.

adverse coastal effects, considered separately or cumulatively (“Element 2”), and if there is no reasonable alternative available that would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program (“Element 3”). 15 C.F.R. § 930.121.

The review on the merits is de novo<sup>16</sup>—on appeal NOAA reviews the proposed project based on national interest and coastal effects considerations specified in the CZMA and NOAA’s regulations, and does not review the correctness of the state’s consistency review. *Chevron 1990* at 5–7.<sup>17</sup> The Appellant bears the burden of proof on the preponderance of the evidence. *Id.* at 5; *Mobil 1993* at 11.<sup>18</sup>

#### IV. THRESHOLD ISSUES

Procedural challenges to a state’s federal consistency review are reviewed as a threshold matter (e.g., prior to reaching the merits of the appellant’s arguments). NOAA shall override a state’s objection if the appellant demonstrates that the state’s consistency objection is in violation of the federal consistency provisions of the CZMA and its implementing regulations. 15 C.F.R. § 930.129(b). The threshold review does not provide an avenue for an appellant to challenge the merits, or substance, of a state’s objection because NOAA presumes the substantive validity of a state’s objection on appeal. *Chevron 1990* at 7.

WesternGeco argues that the State’s consistency objection fails to comply with section 930.63(b) of the CZMA regulations, with requires the state to “describe how the proposed activity is inconsistent with specific enforceable policies of the management program.”<sup>19</sup> First, WesternGeco argues that the State’s objections do not provide a “nexus” between its concerns and inconsistencies with specific enforceable policies. WG Br. at 5–6. Second, WesternGeco asserts that the State’s objections do not describe how any new information justifies changing its position from when the state issued conditional consistency concurrences for substantially similar surveys in 2015. WG Br. at 6–7. WesternGeco contends that the State failed to explain

---

<sup>16</sup> “De novo” means new, Black’s Law Dictionary (11th ed. 2019), which means that the Administrator assesses the proposed project for the first time, rather than reviewing a state’s determination with any deference, such as would be the case under an arbitrary and capricious standard of review under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(a)(2)(A).

<sup>17</sup> *Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of Chevron U.S.A. Inc. from an Objection by the State of California*, October 29, 1990 (“*Chevron 1990*”). NOAA’s CZMA appeal decisions cited here are available at <https://coast.noaa.gov/czm/consistency/appeals/fcappeldecisions/> (last visited Apr. 30, 2020).

<sup>18</sup> *Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S. Inc. from an Objection by the State of Florida*, Jan. 7, 1993 (“*Mobil 1993*”).

<sup>19</sup> 15 C.F.R. § 930.63(b).

how allegedly new information created inconsistencies with enforceable policies. *Id.* at 7. Instead, WesternGeco contends that the change reflects a political change in the State government leadership rather than inconsistency with the State’s enforceable policies. *Id.*; WG Reply Br. at 1.

WesternGeco has not demonstrated that the State failed to meet the CZMA procedural requirement in 15 C.F.R. § 930.63(b). Accordingly, and as described below, a threshold override of the State’s objections is not warranted.

Section 930.63(b) requires that a state describe how the proposed project is inconsistent with specific, enforceable elements of the coastal management program. 15 C.F.R. § 930.63(b). This provision requires nothing more than is in its plain meaning—the state’s objection must simply identify specific enforceable policies and must describe how the proposed project is inconsistent with those policies. *Colon* at 4;<sup>20</sup> *Asociación De Propietarios De Los Indios* at 6.<sup>21</sup> The appellant must demonstrate that the state has outright failed to meet this minimal procedural bar, and disagreements with the substance of this description are irrelevant to the analysis.

The State, in its objection, identified specific enforceable policies and described how the proposed project is inconsistent with those policies. First, the State identified two sets of enforceable policies from its approved management program pertaining to impacts to wildlife and fisheries resources or their habitat, SCR 5 at SC008111, and avoiding activities that may cause irretrievable impacts to endangered or threatened species, *id.* at SC008119. Second, the State described adverse impacts to commercial and recreational fisheries, listed sea turtles, and their habitats from seismic activities, and provided citations to supporting scientific literature. *Id.* at SC008114–8121. Third, WesternGeco has not demonstrated why further explanation is needed to make the connection between the State’s identified enforceable policies and alleged adverse impacts. Indeed this argument appears to be an invitation to re-examine and second-guess the analysis underlying the State’s objection, which, as explained above, is simply not germane to this proceeding. The State satisfies the minimum requirements of 15 C.F.R. § 930.63(b).

Second, the State has explained why it objected to WesternGeco’s proposed survey, but concurred with similar surveys in 2015, and the State’s explanation is sufficient for purposes of this threshold procedural review. The State explained that new information had come to light since it concurred with similar proposed surveys in 2015. SCR 5 at SC008111. The State then identified several published studies that post-date 2015, and described how these studies provide a basis for the State’s objection. *Id.* at SC008114–8121. WesternGeco takes issue with whether

---

<sup>20</sup> *Decision and Findings in the Consistency Appeal of Carlos A. Cruz Colon From an Objection By the Puerto Rico Planning Board*, Sept. 27, 1993 (“*Colon*”).

<sup>21</sup> *Decision and Findings in the Consistency Appeal of the Asociación De Propietarios De Los Indios, Inc. From an Objection By the Puerto Rico Planning Board*, February 19, 1992 (“*Asociación De Propietarios De Los Indios*”).

these studies contain any “new” scientific information, WG Br. at 7, 18, or provide any “actual evidence” of adverse effects. WG Br. at 16. But WesternGeco’s arguments amount to disagreements with the substance of the State’s finding of adverse effects, rather than allegations of a procedural deficiency. *Chevron 1993* at 4 (Rejecting threshold argument that the state’s consistency objection was improper because the state found similar surveys consistent, because the Secretary does not review the merits of the state’s objection).<sup>22</sup>

In sum, WesternGeco has failed to identify a threshold procedural violation warranting a procedural override of the State’s consistency objection.

## **V. THE PROJECT IS CONSISTENT WITH THE OBJECTIVES OR PURPOSE OF THE CZMA**

### **A. Element 1: The Proposed Survey Furthers the National Interest, as Articulated in Sections 302 or 303 of the CZMA, in a Significant or Substantial Manner.**

To satisfy Element 1, WesternGeco must demonstrate that its proposed survey furthers the national interest, as articulated in Sections 302 or 303 of the CZMA, in a significant or substantial manner. 15 C.F.R. § 930.121(a). WesternGeco invokes the following national interests set forth in the CZMA Section 302 and 303:

- “There is a national interest in the effective management, beneficial use, protection, and development of the coastal zone.” 16 U.S.C. § 1451(a). (CZMA § 302(a)).
- “The national objective of attaining a greater degree of energy self-sufficiency would be advanced by providing Federal financial assistance to meet state and local needs resulting from new or expanded energy activity in or affecting the coastal zone.” 16 U.S.C. § 1451(j). (CZMA § 302(j)).
- “[P]riority consideration being given to coastal-dependent uses and orderly processes for siting major facilities related to . . . energy . . . .” 16 U.S.C. § 1452(2)(D). (CZMA § 303(2)(D)).

WesternGeco argues that its proposed survey “balances the competing policies of the national interest” in the protection and development of the coastal zone by providing data to assess resource potential on the Atlantic OCS with minimal physical impact. WG Br. at 10.

WesternGeco argues that its proposed survey would further the national interest in attaining a greater degree of energy self-sufficiency by gathering scientific information necessary to locate energy resources that, if developed, could help increase domestic resources on a national scale

---

<sup>22</sup> *Decision and Findings in the Consistency Appeal of Chevron U.S.A. Inc. From an Objection By the State of Florida*, Jan. 8, 1993 (“*Chevron 1993*”).

and obviate unnecessary exploration activities where resources are absent. WG Br. at 9, 13. And it argues that “[c]ollection of seismic data is one of the first steps in [energy facility] siting processes.” WG Br. at 10.

The State argues that there is no immediate need for G&G data because BOEM has no immediate plans to offer lease sales in the Mid- and South Atlantic OCS, that there is low potential of oil and gas development offshore South Carolina, and the Atlantic OCS, and the U.S. has already achieved energy independence.<sup>23</sup> SC Br. at 5–7.

The CZMA provides, “[t]here is a national interest in the effective management, beneficial use, protection, and development of the coastal zone.” 16 U.S.C. § 1451(a) (CZMA Sec. 302(a)). It further establishes a national policy “to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation’s coastal zone for this and succeeding generations.” 16 U.S.C. § 1451(a) (CZMA Sec. 303(1)). Stated broadly, Congress has defined the national interest in coastal zone management to include both protection and development of coastal resources. *Broadwater*<sup>24</sup> at 7. Past consistency appeal decisions have held that oil and gas exploration and development on the OCS furthers the national interest sufficiently for CZMA purposes.<sup>25</sup>

After carefully considering the Parties’ arguments, past precedent, and the findings specific to the proposed survey as set forth below, the preponderance of the evidence in the record establishes that the proposed survey—which would result in data collection that would help inform policy decisions regarding oil and gas exploration and development—would, as a whole, further the national interest set forth in Sections 302 and 303 of the CZMA in a significant and substantial manner.

---

<sup>23</sup> The State asserts that it does not challenge whether the proposed seismic survey furthers the national interest for the purpose of Element 1. SC Br. at 4, fn. 6. Instead, the State says that it is presenting arguments on the national interest pursuant to Element 2, wherein the appellant must demonstrate that national interest outweighs adverse coastal effects. However, to reach Element 2, it is necessary to analyze whether and how WesternGeco’s survey furthers the national interest in a significant and substantial manner.

<sup>24</sup> *Decision and Findings in the Consistency Appeal of Broadwater Energy LLC and Broadwater Pipeline LLC From An Objection By State of New York*, Apr. 13, 2009 (“*Broadwater*”).

<sup>25</sup> See, e.g., *Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S. Inc. from an Objection by the State of Florida*, June 20, 1995 (“*Mobil Oil 1995*”); *Mobil Oil 1993*; *Decision and Findings in the Consistency Appeal of Amoco Production Company from an Objection by the Division of Governmental Coordination of the State of Alaska*, July 20, 1990 (“*Amoco 1990*”); *Decision and Findings in the Consistency Appeal of Texaco, Inc. from an Objection by the California Coastal Commission*, May 19, 1989 (“*Texaco 1989*”).

## 1. The Proposed Survey Furthers the National Interest in Developing the Resources of the Nation's Coastal Zone.

WesternGeco argues that its proposed survey “balances the competing policies of the national interest” in the protection and development of the coastal zone by providing data to assess resource potential on the Atlantic OCS with minimal physical impact. WG Br. at 10.

Development, as articulated in the national policies of the CZMA, has been understood in past consistency appeal decisions to encompass a wide variety of activities, including oil and gas exploration, development, and production activities. *Broadwater* at 9; *see also AES Sparrows Point*<sup>26</sup> at 12–13 (noting that oil and gas exploration has previously been determined to develop the resources of the coastal zone), *Mobil 1993* at 12 (“Previous consistency appeal decisions have also noted that OCS exploration, development and production activities and their effects on land and water uses of the coastal zone are included within the objectives and purposes of the CZMA.”), *Amoco* at 14 (“In all previous appeals involving oil and gas exploration or development, there has been the finding that OCS exploration, development and production activities and their effects on land and water uses of the coastal zone are encompassed by the objectives and purposes of the CZMA.”).

The record demonstrates that WesternGeco’s proposed survey would further the national interest in developing the resources of the nation’s coastal zone by acquiring and providing subsurface, geological and geophysical data over a large area to identify areas of potential oil and gas resources and to inform potential policy decisions regarding further exploration and development.

First, the purpose of the proposed survey is to identify areas of potential oil and gas resources, which would contribute to BOEM’s statutory mission under the OCSLA “to insure that the extent of oil and natural gas resources of the Outer Continental Shelf is assessed at the earliest practicable time.” 43 U.S.C. § 1802(9). BOEM’s PEIS evaluating proposed Atlantic G&G seismic survey permitting states that the purpose of the proposed surveys is to gather “data about the ocean bottom and subsurface. This data, collected through G&G surveys, would provide information about the location and extent of oil and gas reserves, bottom conditions for oil and gas or renewable energy installations, and marine minerals off the Atlantic coast of the U.S.” CR 23 at SC000877–0878. BOEM further states, “[c]ertain G&G surveys are required . . . for operators to determine sea bottom conditions; the physical extent or economic valuation of oil, gas, or minerals on their lease; efficient production from their leases; or completion of decommissioning activities.” *Id.* at SC000877.

---

<sup>26</sup> *Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of AES Sparrows Point LNG, LLC and Mid-Atlantic Express, L.L.C. from an Objection by the State of Maryland*, June 26, 2008 (“*AES Sparrows Point*”).

This survey information is also needed by BOEM to prepare and maintain the National OCS Program pursuant to the requirements of the OCSLA. Every five years the Secretary of the Interior must create a schedule of lease sales that “will best meet national energy needs.” 43 U.S.C. § 1344(a). In developing that program, the Secretary must consider information concerning the geological characteristics and the oil and gas bearing potential of the areas of the OCS in making his leasing decisions. Having this information is therefore important before BOEM makes a decision to lease at even the earliest stages of leasing program development.

The State disagrees. The State argues there is no immediate need for acquiring G&G data in the OCS because there is no guarantee that the Atlantic will be included in BOEM’s National OCS Program. SC Br. at 5, fn. 9. The State relies on BOEM’s decision in January 2017 denying all pending seismic survey applications involving airguns in the Atlantic, including WesternGeco’s application, following the Secretary’s decision to remove the Atlantic from consideration for leasing until 2022. *Id.*, citing CR 9 at SC000750–0751, SC000757. BOEM notes in its memorandum attached to the 2017 permit denial that “[t]he range, number, and nature of conflicts in the Atlantic are unique to the region and require extensive work to address these conflicts prior to including a lease sale in the program.” CR 9 at SC000755. BOEM additionally warns that data could become outdated if it is collected and leasing does not occur until too far into the future. *Id.* at SC000750–751, SC000757; SC Br. at 5.

Since the 2008 lapse of the Congressional moratorium on leasing, BOEM has yet to issue any leases, and efforts to propose leasing in the Mid- and South-Atlantic have been met with vigorous opposition from the coastal states. That said, WesternGeco’s argument is more compelling that recent and accurate information on the resource potential of the Atlantic OCS is important not only to support BOEM’s planning process, CR 23 at SC000878, but “without it, time and energy is spent on policy debates without the benefit of scientific data to reveal the resource potential.” WG Br. at 13. Existing data is lacking to support decisionmaking. As BOEM explains, the existing data was last collected in the 1970’s and 1980’s and has “been eclipsed by newer instrumentation, technology, and data processing that make seismic data of that time period inferior for making business decisions.” CR 23 at SC000878. New up-to-date information is needed by industry and BOEM to inform decision-making. Additionally, shortly after BOEM denied the permit applications in 2017, President Trump issued Executive Order 13795, Implementing an America-First Offshore Energy Strategy. 82 Fed. Reg. 20,815. The Executive Order directs the Secretary of the Interior to develop and implement, in coordination with the Secretary of Commerce, a streamlined permitting approach for “privately funded seismic data research and collection aimed at expeditiously determining the offshore energy resource potential of the United States.” Executive Order 13795 Sec. 3(b). The Executive Order demonstrates an immediate need for surveys of offshore energy resource potential, exactly the purpose of WesternGeco’s proposed survey.



For these reasons, the proposed survey furthers the national interest in developing the resources of the coastal zone.

## **2. The Proposed Survey Furthers the National Interest in Attaining a Greater Degree of Energy Self-Sufficiency.**

WesternGeco argues that its proposed survey would further the national interest in attaining a greater degree of energy self-sufficiency by gathering scientific information necessary to locate energy resources that, if developed, could help increase domestic resources on a national scale and obviate unnecessary exploration activities where resources are absent. WG Br. at 9, 13.

The State argues that oil and gas development is unnecessary off the South Carolina coast at this time “as the United States set new records in natural gas production, consumption, and exports in 2018 and that recent reports indicate that by 2023, the United States will rival Saudi Arabia in oil exports. SC Br. at 6. The State further argues that development is unnecessary because the area of the OCS off the South Atlantic has the lowest potential of any of the OCS areas for undiscovered, technically recoverable oil and gas. SC Br. at 5, citing DSR 2 at SC008789-08791; DSR 3 at SC008810–8811. Additionally, the Atlantic OCS only accounts for 6.5 percent of potentially undiscovered, technically recoverable oil and gas resources. SC Br. at 6, citing DSR 7 at SC008862.

WesternGeco has demonstrated that its proposed survey, the purpose of which would be to ascertain information regarding available oil and gas reserves in the Atlantic OCS, would further the national interest in energy self-sufficiency. *See Texaco 1989* at 30–31 (the national interest in attaining energy self-sufficiency is furthered by “ascertaining information concerning the oil and gas reserves actually available for production.”). As stated in BOEM’s PEIS:

Certain G&G surveys are required before operators may lease Federal land, and after leasing for operators to determine sea bottom conditions; the physical extent or economic valuation of oil, gas, or minerals on their lease; efficient production from their leases; or completion of decommissioning activities. Orderly development of the Mid- and South Atlantic may help reduce the Nation’s need for oil imports and lessen our dependence on foreign oil.

CR 23 at SC000877–0878.

The link between the information-gathering purpose of G&G seismic survey exploration in the Atlantic and energy self-sufficiency is further identified in Executive Order 13795, *Implementing an America-First Offshore Energy Strategy*. 82 Fed. Reg. 20,815. Executive Order 13795 finds that “[i]ncreased domestic energy production on Federal lands and waters strengthens the Nation’s security and reduces reliance on imported energy.” Executive Order 13795 Sec. 1. It also establishes the policy of the United States “to encourage energy exploration

and production, including on the Outer Continental Shelf, in order to maintain the Nation's position as a global energy leader and foster energy security and resilience for the benefit of the American people, while ensuring that any such activity is safe and environmentally responsible." EO 13795 Sec. 2.

The record suggests, based on available information, that the oil and gas potential of the Atlantic OCS when compared to other OCS regions is proportionally smaller. *See, e.g.*, DSR 3 at SC008809. The record also demonstrates that geological and geophysical information for the Atlantic is decades out of date. CR 23 at SC000877–0878. Nonetheless, the test for the national interest is whether the project “contributes to” energy self-sufficiency. It is unnecessary to demonstrate that the survey is guaranteed to result in the discovery of significant, previously undiscovered recoverable reserves of oil and gas that will ensure energy independence for decades to come. Instead, the collection of accurate data supports energy security by allowing our Nation to focus its planning efforts on the orderly development of the nation's known oil and gas supplies. And even if the amount of oil and gas potential is proportionally smaller than other OCS regions like the Gulf of Mexico and Alaska, the available data in the record demonstrates that the region has potential to contribute resources to achieving and maintaining energy self-sufficiency. *Id.* Additionally, we note that data on oil and gas potential in the Atlantic is, as BOEM has explained, based on obsolete data collected in the 1970's and 1980's. New data is needed to properly characterize the resource potential of this area. CR 23 at SC000878. Finally, while the State provides evidence that with the recent increases in natural gas production, the U.S. has been on a trajectory to increasing its energy production and exports, this fact does not demonstrate that the U.S. has achieved long-term, and stable energy self-sufficiency.

In light of this material, the preponderance of the record evidence demonstrates that the proposed survey furthers the national interest in attaining a greater degree of energy self-sufficiency.

### **3. The Proposed Survey Furthers the National Interest in Priority Consideration Being Given to Coastal-Dependent Uses and Orderly Processes for Siting Major Facilities Related to Energy.**

WesternGeco argues that the CZMA establishes a national policy of priority consideration for orderly processes for siting major energy facilities, and that the collection of seismic data is one of the first steps in the siting process. WG Br. at 10. The State argues that there is no guarantee that the Mid- and South Atlantic will be part of the next leasing program. SC Br. at 5.

Based on past precedent and the CZMA regulatory history, the CZMA sets forth a national interest in the siting of major energy projects. *AES Sparrows Point* at 12 (“[T]he national interest set forth in the CZMA to give ‘priority consideration’ to ‘orderly processes’ for the siting of major coastal-dependent energy facilities has been interpreted in past decisions to encompass the actual siting of major energy projects rather than mere expedited processing.”). The interpretive

guidance in the preamble to the 2000 CZMA regulatory amendments states, “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.” 65 Fed. Reg. 77,124, 77,150 (Dec. 8, 2000).

WesternGeco’s proposed survey would further the national interest in siting major energy facilities. As BOEM has stated, “G&G data and information are required for business decisions in furtherance of prospecting for OCS oil and gas in an orderly manner, assessing sites for renewable energy facilities, or using marine mineral resources in the Mid- and South Atlantic Planning Areas.” CR 23 at SC000878.

Because the collection of G&G data is an important early step in the process of making business decisions in furtherance of OCS oil and gas prospecting—and, therefore, an important early step in the process of siting potential major energy facilities on the Atlantic OCS—the proposed survey furthers the national interest in priority consideration being given to coastal-dependent uses and orderly processes for siting major facilities related to energy.<sup>27</sup>

#### **4. The Proposed Survey Furthers Certain National Policies in a Significant and Substantial Manner.**

Not only must the Project further the national interest as articulated in Sections 302 or 303 of the CZMA, it must do so in a significant or substantial manner. 15 C.F.R. § 930.121(a). In the preamble to the Department’s 2000 CZMA regulatory amendments, the term “significant” is interpreted to encompass projects that provide a valuable or important contribution to a national interest, without necessarily being large in scale or having a large impact on the national economy. 65 Fed. Reg. at 77,150. The term “substantial” is interpreted to encompass projects that contribute to a CZMA objective to a degree that has a value or impact on a national scale. *Id.*

---

<sup>27</sup> WesternGeco also invokes various other provisions of CZMA sections 302 and 303: 16 U.S.C. § 1451(c) (CZMA § 302(c)) (establishing a finding of Congress regarding the increasing and competing demands on the nation’s coastal zone); 16 U.S.C. § 1451(f) (CZMA § 302(f)) (establishing a finding of Congress regarding new and expanding demands for energy and other resources). WesternGeco argues that its proposed survey would balance the competing policies of the national interest in both development and conservation of the coastal zone, and that it would contribute to environmental conservation in a significant way because it would be a more targeted and less invasive option for identifying potential oil and gas reservoirs. WG Br. at 9–10, 12–13. Ultimately, WesternGeco has not met its burden of demonstrating based on record evidence that its proposed survey would further the national interest of protecting and preserving the resources of the coastal zone. WesternGeco does not identify record evidence regarding the extent of exploratory drilling that would occur in the absence of the proposed seismic survey or the impacts of exploratory drilling compared with seismic surveys; moreover, the potential adverse impacts of exploratory drilling are not an issue in this appeal.

Together, these terms encompass both the import and scale of a proposed activity.<sup>28</sup> *Broadwater* at 10–11; *AES Sparrows Point* at 14; *Weaver’s Cove 2008* at 10–11.<sup>29</sup>

The regulations provide examples of activities that significantly or substantially further the national interest, such as the siting of energy facilities or oil and gas development on the OCS. 65 Fed. Reg. at 77,150. Such activities have economic implications beyond the immediate locality where they are located. Other activities, such as a marina, may contribute to the economy of the coastal municipality or state, but may not provide significant or substantial economic contributions to the national interest as defined by the objectives in Sections 302 or 303 of the CZMA. *Broadwater* at 11; *AES Sparrows Point* at 14; *Weaver’s Cove 2008* at 10–11.<sup>30</sup> Whether a project significantly or substantially furthers the national interest in the objectives of Sections 302 or 303 will depend on the evidence in the decision record. 65 Fed. Reg. at 77,150.

Here, the proposed survey is both significant and substantial in acquiring information about the resource potential of the Atlantic OCS to contribute to development of the resources of the coastal zone and attain a greater degree of energy self-sufficiency. The recent and accurate information on the resource potential of the Atlantic OCS is important not only to support BOEM’s energy planning, CR 23 at SC000877–0878, but also to inform significant policy debates on development in the Atlantic OCS.

The proposed survey is substantial given its anticipated contribution of up-to-date data and information on potential resources in the Atlantic OCS, an area that was most recently surveyed decades ago. In its PEIS, BOEM articulated the existing data gaps and the need for proposed G&G survey permitting in the Atlantic:

The G&G surveys acquired during the period when Atlantic oil and gas leasing took place in the 1970’s and 1980’s have been eclipsed by newer instrumentation, technology, and data processing that make seismic data of that time period inferior for making business decisions. More up-to-date data would reduce risk involved with all leasing, drilling, and development on these OCS lands and help to evaluate the environmental impacts of future potential leasing, drilling, and development. The need for the proposed action is to use the information obtained by the G&G surveys to make informed business decisions regarding

---

<sup>28</sup> The definitions articulated in the preamble apply to the terms “significant” and “substantial” only for purposes of the Element 1 discussion.

<sup>29</sup> *Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeals of Weaver’s Cove Energy, L.L.C. and Mill River Pipeline, L.L.C. From an Objection by the State of Massachusetts*, June 26, 2008 (“*Weaver’s Cove 2008*”).

<sup>30</sup> In the preamble to the 2006 CZMA regulatory amendments, NOAA stated, “at this time, it cannot foresee a case where OCS oil and gas activities do not further the national interest in a significant or substantial manner. NOAA cannot, however, say that this will always be the case or will be the case in any particular situation.” 71 Fed. Reg. at 803.

oil and gas reserves, engineering decisions regarding the construction of renewable energy projects, and informed estimates regarding the composition and volume of marine mineral resources. This information would also be used to ensure the proper use and conservation of OCS energy resources and the receipt of fair market value for the leasing of public lands.

*Id.* at SC000878. The value and impact on a national scale of the proposed survey and the anticipated data it would generate are further supported by the policy statements in Executive Order 13795, which identified a national policy of developing and implementing streamlined permitting for privately funded seismic data research and collection in the Mid-Atlantic and South Atlantic.<sup>31</sup>

In light of past precedent and the foregoing record, the proposed survey would further the national interest in developing the resources of the coastal zone, in attaining a greater degree of energy self-sufficiency, and in priority consideration being given to coastal-dependent uses and orderly processes for siting major facilities related to energy. The record also establishes that the proposed survey would further these first two national interests in a significant and substantial manner. As such, the proposed survey would, as a whole, further the national interest as articulated in sections 302 and 303 of the CZMA in a significant and substantial manner.

---

<sup>31</sup> By contrast, the record is insufficient to conclude that the proposed survey furthers, in a significant and substantial manner, the national interest in priority consideration for orderly processes for siting major energy facilities because WesternGeco has not demonstrated that its proposed survey involves the siting of a major, coastal-dependent energy facility. Prior appeals evaluating this factor have specifically considered whether an appellant is able to demonstrate its project is related to the siting of an actual, particular facility. *See, e.g., Broadwater* at 7–9 (determining that the proposed liquified natural gas project would constitute a major coastal-dependent energy facility, considering the capacity and coastal-dependent nature of the proposed structures); *AES Sparrows Point* at 12 (“[T]he national interest set forth in the CZMA to give ‘priority consideration’ to ‘orderly processes’ for the siting of major coastal-dependent energy facilities has been interpreted in past decisions to encompass the actual siting of major energy projects rather than mere expedited processing.”); *Weaver’s Cove 2008* at 8 (determining that “[t]he Project would constitute a major coastal-dependent energy facility that would be sited in an area where similar industrial activities currently exist”); *Decision and Findings in the Consistency Appeal of Islander East Pipeline Co., L.L.C. From an Objection By the State of Connecticut*, May 4, 2004 at 4–9 (considering the siting of a natural gas pipeline and determining that the proposed project involved the location of a coastal dependent major energy facility in the coastal zone). Although the proposed survey could provide valuable data informing the future siting of oil and gas facilities, WesternGeco admits that its proposed survey could reveal that resources are not present in the survey area such that further time and investment are not warranted, WG Br. at 13–14, a situation in which, presumably, no siting of major energy facilities would occur. This conclusion is consistent with the finding in the August 5, 2019 Order that the proposed survey is an “energy project” within the meaning of the CZMA regulations. That Order determined that the vessel and associated equipment for the proposed survey fit within the CZMA’s definition of “energy facilities” (although the Order did not opine on whether the vessel and equipment was a major energy facility or on energy facilities in the context of the national interest determination) and that it was foreseeable that the proposed survey could lead to the siting of an energy facility. Order at 3–4. This determination is consistent with the findings here that the proposed survey furthers the national interest in priority consideration for siting major energy facilities but that there is insufficient information to conclude that the proposed survey provides a significant and substantial contribution to this factor, because the proposed survey is not tied to the siting of a particular major energy facility.

## **B. Element 2: The National Interest Furthered by the Project Outweighs the Project's Adverse Coastal Effects.**

To satisfy Element 2, WesternGeco must demonstrate that the national interest furthered by the project outweighs the project's adverse coastal effects. 15 C.F.R. § 930.121(b). The Parties' arguments pertaining to the national interest are discussed above, and this section addresses the Parties' arguments on adverse coastal effects, followed by balancing the national interest with the adverse coastal effects.

As an initial matter, both Parties rely on scientific uncertainty to support their arguments. As such, the analysis begins with a discussion of the sufficiency of the record.

### **1. Sufficiency of Evidence in the Record**

Both Parties rely on scientific uncertainty to support their arguments. The State argues it is, "in part, these information gaps and uncertainty that provides the basis of [its] objections." SC Br. at 9. It argues that due to these uncertainties, WesternGeco cannot carry its burden to demonstrate that adverse impacts will be outweighed by national interest, *id.*, and reminds us of our prior holdings which explain that, "[i]f the record lacks sufficient information as to the Project's adverse coastal effects, the balancing [of the national interest and adverse coastal effects] cannot occur and the state's objection must be sustained." *Weaver's Cove 2008* at 13.

The State is correct that the burden is on WesternGeco to demonstrate, by a preponderance of the evidence in the record, that the national interest outweighs any adverse coastal effects. *Chevron 1990* at 5; *Mobil 1993* at 11. In the absence of information on effects, the appellant will not carry its burden of proof and persuasion that its activity is consistent with the objectives of the CZMA. The legal standard requires weighing the information in the record to determine the nature and severity of adverse coastal effects against the national interest, which includes considering the "completeness and the scientific quality of the information." *Weaver's Cove 2008* at 13.

Here, the record is sufficient to analyze coastal adverse effects. *See e.g., Weaver's Cove 2008* at 16. BOEM and NMFS have provided detailed and extensive analyses of the potential effects of seismic surveys on commercial and recreational fisheries, sea turtles, and their habitats. CR 23–25 at SC000815–2972; CR 22 at SC000803; DSR 14 at SC009010; CR 26 at SC002973; CR 7 at SC000346; CR 4–5 at SC000226–0335. The information is reliable in that it discusses likely effects with a high level of scientific rigor. Moreover, with respect to NMFS's analyses, NMFS

is a resource agency with expertise in fisheries and sea turtles. These are the same resources the potential effects to which are contested in this appeal.<sup>32</sup>

All of the Parties' requests to submit supplemental record materials have been granted, including scientific declarations, in order to support the analysis of adverse coastal effects. SR A–E at SC008427–8540; DSR 1–14 at SC008542–9379; SR E (Gisiner Decl) at SC008461; DSR 8 at SC008867–8915 (Rice Decl.). And NOAA sought the input of several federal agencies with expertise and interests at stake in both energy exploration and development, and environmental impacts of these activities. NOAA SR 1–28 at SC009380–9481. As such, the record contains sufficient evidence to allow us to analyze the adverse effects.<sup>33</sup>

## 2. Adverse Coastal Effects

The State argues that WesternGeco's seismic survey will adversely affect<sup>34</sup> coastal resources of commercial and recreational fisheries, endangered sea turtles, and their habitats. The State relies on studies and literature published after 2015 that, it alleges, demonstrate information gaps and uncertainty of the impacts of seismic surveys. WesternGeco, in turn, argues that the adverse coastal effects alleged by the State are "speculative" and based on flawed studies. WesternGeco relies on BOEM and NMFS analyses of impacts to argue that there will be no adverse coastal effects.

---

<sup>32</sup> Throughout this analysis of adverse coastal effects, the analysis of NMFS and BOEM in documents those agencies prepared under MMPA, ESA, and NEPA is considered. Because each statute has a different analytical standard, the agencies' underlying analysis—and not just the statutory conclusions—is closely reviewed, evaluated, and applied to make findings on the question of adverse coastal effects.

<sup>33</sup> In its Motion for Reconsideration, the State additionally argues that NOAA must order the release of proprietary information in WesternGeco's seismic survey application, CR 8, because this information is necessary for us to review the effects of the survey. Specifically, it argues that this withheld information contains: "heat flow measurements, the size of the airguns, decibel information of the equipment used, the depths at which the airguns will be used, the ping rate and duration, and the maps and other documentation showing the actual location where this study will be conducted." SC Mot. Reconsid. at 1–2. The State's motion was denied, Order Denying Mot. Reconsid. May 5, 2020, but it is notable that this and other project description information is contained in several documents in the decision record. CR 2 at SC000025–0031; 83 Fed. Reg. at 63,272; CR 7 at SC000376–0378.

<sup>34</sup> "Effect on any coastal use or resource (coastal effect)" means "any reasonably foreseeable effect on any coastal use or resource resulting from a Federal agency activity or federal license or permit activity. . . . Effects include both direct effects which result from the activity and occur at the same time and place as the activity, and indirect (cumulative and secondary) effects which result from the activity and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects are effects resulting from the incremental impact of the federal action when added to other past, present, and reasonably foreseeable actions, regardless of what person undertakes such actions." 15 C.F.R. § 930.11(g). "Coastal zone" means "the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states, and includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches." 16 U.S.C. § 1453(1).

a) Commercial and Recreational Fisheries and Invertebrates.

The State argues that the proposed survey may adversely affect coastal recreational and commercial fisheries. These fisheries are economically significant to the State, generating \$329 million each year in economic benefits. SCR 5 at SC008113. The State identifies important offshore habitat areas that could be at particular risk, including the “Charleston Bump,” which provides spawning areas for Snapper-Grouper complex and wreckfish. Additional offshore areas of importance include the Edisto Marine Protected Area (“MPA”), Northern South Carolina MPA and the Charleston Deep Artificial Reef MPA. SCR 5 at SC008115–8116. Seismic surveys, according to the State, may adversely affect fisheries indirectly by threatening the foundation of the food chain, zooplankton, and directly, by killing, injuring, and displacing finfish and billfish from important habitats and fishing grounds, resulting in decreased catch rates. SCR 5 at SC008114–8118.

WesternGeco rebuts that the designs of the studies relied on by the State are flawed and the results inconclusive. WG Br. at 16-17. WesternGeco argues that the available science, including that relied upon by NMFS, demonstrates that adverse impacts on fisheries would be minor and temporary. WG Br. at 20-21.

In the face of a scientific dispute over the impacts of acoustics on marine fish and fish habitat and prey species, it is appropriate to turn to the expert agency, NMFS.<sup>35</sup> While BOEM has not initiated consultation for impacts to essential fish habitat under the Magnuson-Stevens Act, NMFS has had several occasions to analyze impacts of seismic surveys on fish pursuant to ESA, MMPA, and NEPA. DSR 14 at SC009226; CR 4 at SC000293–0294; CR 7 at SC000407–0412, SC000423-0424, SC000540-0541, SC000548-0551; 83 Fed. Reg. at 63,274, 63,279–280. NMFS’s analyses rely on the best available literature on the impacts of seismic surveys on fish, including literature the State relies on, Carroll, 2017, which compiles over 70 studies pertaining to seismic survey impacts on fish. CR 7 at SC000540-0541. The NMFS analysis demonstrates that there is a large body of literature available on the impacts of seismic surveys on fish. This literature reflects the variation and complexity of responses of fish to seismic surveys, and not an absence of study. As explained below, NMFS considers the variation and draws conclusions from the majority of the studies that the most likely impacts of seismic survey would be minor, temporary avoidance behaviors.

---

<sup>35</sup> See 15 C.F.R. § 930.127 (“As noted in § 930.128(c)(1), the Secretary gives deference to the views of interested Federal agencies when commenting in their areas of expertise and takes notice of relevant administrative decisions, including licenses or permits, related to an appellant’s proposed activity when submitted to the appeal decision record.”); 71 Fed. Reg. 788 (Jan. 5, 2006) (“The views of the Fish and Wildlife Service and NMFS would be accorded greater weight than the authorizing Federal agency, or another Federal agency who might also happen to comment on the ESA or MMPA issues.”).



While NMFS performed its analyses pursuant to the specific statutory criteria provided in the ESA and MMPA, *see, e.g.*, SR 28 at SC009479, its underlying analyses and conclusions are applicable to the analysis of adverse coastal effects under the CZMA. In particular, in order to come to these conclusions on the impacts of the surveys on marine mammals and sea turtles under the MMPA and ESA, NMFS analyzed impacts on the prey species, including zooplankton, invertebrates, and fish.

First, NMFS analyzed the study by McCauley et al. 2017 that concluded that the acoustic energy emitted by seismic surveys can lead to a significant reduction in zooplankton as far as 1.2 km from the survey equipment, potentially having cascading effects through all levels of the food chain. CR 7 at SC000550; 83 Fed Reg at 63,327. NMFS found that the results of this study are inconsistent with a large body of research that finds limited spatial and temporal impacts to zooplankton (e.g., Dalen and Knutsen, 1987; Payne, 2004; Stanley et al., 2011). *Id.* NMFS also considered a more recent study by Richardson et al. 2017 that extrapolated the results of McCauley et al. 2017 to a hypothetical full-scale seismic survey. Richardson determined that the effects found by McCauley would be minimized by ocean currents and the short-life cycle of copepods. SCR 7 at SC000548; 83 Fed. Reg. at 63,327. NMFS also considered that effects to zooplankton would be less for 2-D surveys, compared to the more intensive 3-D surveys analyzed by McCauley, which involve the use of multiple overlapping tracklines to extensively and intensively survey a particular area. CR 7 at SC000423. NMFS concluded that reductions in zooplankton would be temporary and spatially-limited, and, as such, would not likely translate into impacts up the food chain, including to fish (prey species for protected sea turtles and whales).<sup>36</sup> CR 7 at SC000548–0549; SC000550–0551.

Second, NMFS also analyzed physical and behavioral effects of air guns directly to fish (as opposed to through its prey, zooplankton) and concluded that effects of seismic surveys would be limited to temporary, localized, and minor reduction in fish abundance near an airgun array CR 7 at SC000540–0541; 83 Fed. Reg. at 63,279–63,280; CR 4 at SC000293–0294. Specifically,

---

<sup>36</sup> In response to the NOAA Administrator's request for input on this appeal, NMFS reviewed a study performed by Fields et al. 2019, which supports NMFS's earlier conclusions. NOAA SR 28 at SC009480. Fields produced results inconsistent with those of McCauley et al. 2017, finding that seismic blasts have limited effects on the mortality or displacement of zooplankton within close proximity of the blast (less than 10 m) and no measurable impact at greater distances. NOAA SR 27 at SC009467. The State has also submitted to the record a declaration rebutting to the conclusion of Fields 2019. DSR 15 at SC009485–9492, Decl. of Douglas Nowacek, Ph.D., In Support of the State of North Carolina's Opposition to WesternGeco's Request to Override its Coastal Zone Management Act Consistency Determination (April 29, 2020). The declarant, Dr. Nowacek, critiques the methodology of the Fields study and asserts that the methodology in McCauley was more representative of realistic exposure levels than was Fields. *Id.* at SC009489–9490. Dr. Nowacek asserts that Fields' methodology of exposing zooplankton to a single airgun shot is a significant shortcoming, and states that the two studies are not necessarily inconsistent. *Id.* The Fields study and Dr. Nowacek's declaration are informative, but as before, in the face of a scientific dispute, NOAA turns to the expert agency, NMFS. NMFS's conclusion is persuasive that reductions in zooplankton would be temporary and spatially-limited and would not likely translate into impacts up the food chain.

NMFS considered Carroll et al. 2017, relied upon by Dr. Rice. DSR 1(l) at SC008673. As for physical impacts, NMFS concluded that “some fishes and invertebrates may experience physical and physiological effects, including mortality, but in most cases, such effects are only expected at relatively close distances to the seismic source.” CR 7 at SC000540–0541. As to behavioral responses, NMFS explained that Carroll’s review of literature demonstrates “considerable variation exists in how fishes behaviorally respond to seismic activity, with some studies indicating no response and others noting startle or alarm responses and/or avoidance behavior.” CR 7 at SC000541. But, NMFS found that the “bulk of studies indicate no or slight reaction to noise,” 83 Fed. Reg. at 63,327, and “no effects to foraging or reproduction have been documented.” CR 7 at SC000541.

Third, among these studies showing a variation of responses, NMFS considered studies addressing changes in fish abundance following a seismic survey, including Paxton et al. 2017. 83 Fed. Reg. at 63,279–80, 63,327. Again, NMFS found a variation of effects in the literature, explaining that “while a few studies found negative effects of seismic activity on catch rates, most found no effects, and a few even found that surprisingly seismic activity lead [sic] to an increase in catch rates.” CR 7 at SC000548. As for the studies finding reductions in fish abundance, NMFS found that any reductions were short term, with fish abundance quickly returning to normal after the survey vessel exited an area. 83 Fed. Reg. at 63,279–80. Ultimately, NMFS concluded that “while the potential for disruption of spawning aggregations or schools of important prey species can be meaningful on a local scale, the mobile and temporary nature of the surveys and the likelihood of temporary avoidance behavior suggest that impacts would be minor.” 83 Fed. Reg. at 63,280.

NMFS's analyses and conclusions discussed here are consistent with BOEM’s determinations from the 2014 PEIS that proposed G&G seismic surveys in the Atlantic have the potential for negligible to minor impacts on commercial and recreational fisheries. CR 23 at SC000815.<sup>37</sup> With respect to commercial fisheries, BOEM stated that active acoustic sound produced by anthropogenic sources such as airguns can affect fish in a variety of ways, including “short-term effects such as temporary avoidance of or movement out of specific areas.” CR 23 at SC001182. BOEM further concluded that commercial fisheries would be temporarily affected by acoustic noise of G&G seismic surveys, and that catch rates “would potentially decline but would be expected to return to normal levels following the cessation of the seismic operation.” CR 23 at SC001183. BOEM determined that potential impacts to commercial fisheries from acoustic

---

<sup>37</sup> NMFS was a cooperating agency on the 2014 BOEM PEIS. CR 23 at SC000878–0879; CR 5 at SC000325. Under the NEPA regulations, cooperating agencies participate in the NEPA process of the lead agency for those actions that the other agency has jurisdiction by law or special expertise to any environmental issue addressed in the statement. 40 C.F.R. § 1501.6. NMFS also “adopted” the 2014 BOEM PEIS, CR 6 at SC000336, and relied on it in its 2018 EA and FONSI for NMFS’s issuance of the MMPA IHAs. CR 5 at SC000326. Under the NEPA regulations, if the actions covered by an original EIS, in this case, the 2014 BOEM PEIS, are “substantially the same” as the agency’s, in this case, NMFS’s, proposed action, the adopting agency may rely on that EIS as its own without recirculating the EIS for public comment. 40 C.F.R. § 1506.3.

sources would be “minor, with no population-level effects.” CR 23 at SC001183. “Impacts, including behavioral changes and avoidance, are expected at a few locations, with likely impacts being intermittent, temporary, and short-term,” and “an increased potential for a localized and temporary decrease in catchability of one or more commercial fish species.” CR 23 at SC001183.

Similarly, BOEM determined that the potential impacts of active acoustic sound sources from proposed G&G seismic surveys on recreational fisheries were negligible. CR 23 at SC001191–1192. BOEM determined that the proposed surveys were unlikely to cause serious injury or mortality to reef-type fishes, inshore fishes, or pelagic fishes, in part due to the seasonal restrictions on the proposed surveys. CR 23 at SC001191–1192. BOEM concluded that, “[g]iven the absence of serious injury or mortality to recreational fishes and the potential for behavioral changes from active acoustic sound exposure, it is likely that potential impacts would be intermittent, temporary, and short-term in terms of duration or frequency.” *Id.* at SC001192.

Based on the foregoing, the preponderance of the evidence demonstrates that the adverse coastal effects to commercial and recreational fishing would be localized, minor, and temporary.

#### b) Sea Turtles.

The State argues that the proposed seismic survey would adversely affect threatened and endangered turtle species, including the Loggerhead, Kemp's ridley, Green and Leatherback. SC Br. at 10–11. The State's beaches serve as important nesting sites for a subpopulation of Loggerhead sea turtles, the Northern Recovery Unit, a subgroup of the Northwest Atlantic Distinct Population Segment. *Id.* at 11. The State argues that sea turtles rely on frequency detection and hearing to perceive important biological signals, navigate, communicate, avoid predators, and identify nesting beaches. Acoustic disturbances in the environment could interfere with these important behaviors. But, the State argues, little is known about the levels of acoustic disturbance that could interfere with sea turtle hearing and behavior, and WesternGeco has not provided scientific information to demonstrate that there will be no adverse effects from its survey on sea turtles. *Id.* at 11–13. Additionally, while WesternGeco has agreed to comply with all mitigation measures in NMFS's BiOp, the State argues there is no scientific basis to demonstrate that this mitigation would be effective. *Id.* at 13.

WesternGeco argues that the State relies on only one study, Nelms 2013, to challenge NMFS's findings on sea turtles in the BiOp, and that study merely suggests that more research into turtle mitigation policies is needed. WG Br. at 22–23. WesternGeco also argues that it has committed to a time-area closure which will keep all survey activities at least 40 nautical miles off of South Carolina's coastline during prime sea turtle nesting season. *Id.* at 23.

NMFS, in fulfilling its statutory duties under the ESA, thoroughly analyzed the best available information and determined that sea turtles are expected to experience minor and temporary hearing loss (temporary threshold shifts, or “TTS”) and behavioral and stress responses. CR7 at

SC000557–0558. NMFS concluded that these responses were not likely to result in negative consequences to the fitness of any individual sea turtle, and therefore, they are also unlikely to have any population-level consequences for sea turtle species. *Id.* at SC000558.

In conducting its analysis, NMFS acknowledges that, “[c]ompared to cetaceans, much less data exist on how anthropogenic sound may impact sea turtles.” *Id.* at SC000549. But NMFS concludes that “nearly all data that do exist suggest that sea turtles are much less sensitive to anthropogenic sound than cetaceans. This may be in part because sea turtles appear to be less reliant on sound.” *Id.*, NMFS likewise explains that “sea turtles do not appear particularly sensitive to seismic airguns,” *id.* at SC000521, and that, based on the available data, in response to exposures to seismic surveys, NMFS “anticipate[s] some change in swimming patterns” and “expect[s] only temporary displacement of exposed individuals from some portions of the action area as seismic vessels transit through.” *Id.* at SC000539.

The State argues that NMFS relies on only one study, Moein 1994, as the basis for its conclusions of all adverse effects on sea turtles. SC Br. at 12. NMFS does discuss that Moein conducted the only available study to observe temporary threshold shifts (temporary hearing loss) in sea turtles in a controlled experiment, and the sea turtle recovered its full range of hearing within one day. CR7 at SC000538. But, in conducting its exposure analysis for potential hearing loss in sea turtles, NMFS relied instead on a Navy technical report prepared in 2017. The Navy compiled all available audiograms of sea turtle hearing, and data from fishes because fish hearing is more similar to sea turtles than marine mammals. CR7 at SC000521. Ultimately, NMFS concluded that for WesternGeco’s survey, the distance to TTS was so close that NMFS found it is “extremely unlikely” that sea turtles would come close enough to experience a TTS, because they would hear and see the array and avoid it. *Id.* at SC000521.

Additionally, NMFS relies on numerous studies to derive its conclusions of the full range of potential effects to sea turtles, including the risk of hearing loss, behavioral responses, stress, and prey reduction. *Id.* at SC000519–0526, SC000538–0540, SC000549–0550. As part of this analysis, NMFS also considered Nelms 2016, *id.* at SC000549, which compiled the results of 29 studies on sea turtles in order to identify research gaps and policy recommendations for mitigation. DSR 1(n) at SC008697. Ultimately, while the literature available on sea turtles is more limited than that available on fish and marine mammals, the best available information is sufficient to conclude that impacts to sea turtles from the proposed survey are likely to be minor and temporary behavioral harassments.

The State raises concerns about the effectiveness of mitigation measures for sea turtles, but, after reviewing NMFS’s analysis, it is clear that mitigation bears little weight because sea turtles simply have not been demonstrated to be particularly sensitive to seismic airguns. For instance, the State raises concerns about mitigation measures dependent on the ability to sight sea turtles. NMFS considered a voluntary measure to pause firing of airguns in the event of a sea turtle

sighting within a certain distance from the vessel. NMFS recommended that BOEM mandate this measure, but in making this recommendation, NMFS explained: “[w]hile we do not believe auditory injury . . . [is] likely to result from the proposed action, these simple measures, which many G&G companies appear to already take, further reduce the likelihood of adverse effects to ESA-listed sea turtles and do not appear to affect the quality of seismic data obtained.” CR 7 at SC000566–0567. Because NOAA concurs the preponderance of the evidence supports NMFS’s assessment that sea turtles w experience minor, temporary behavioral harassments from seismic surveys, the State’s arguments challenging the effectiveness of mitigation measures does not influence the weighing of adverse effects.

In conclusion, the preponderance of the evidence demonstrates that the adverse coastal effects of the proposed survey on sea turtles would be minor, and temporary behavioral harassments.

### **3. Balancing - The National Interest Furthered by the Project Outweighs the Project’s Adverse Coastal Effects.**

For WesternGeco to succeed on Element 2, the national interests furthered by the proposed survey must outweigh its adverse coastal effects, when those effects are considered separately or cumulatively. 15 C.F.R. § 930.121(b). The balancing of the national interest against the adverse coastal effects of a project, both separately and collectively, is a discretionary judgment based upon a preponderance of the evidence. *Broadwater* at 34–35; *AES Sparrows Point* at 41.

As discussed above, the proposed survey furthers two national interests articulated in sections 302 or 303 of the CZMA in a significant and substantial manner. The proposed survey would further the national interests in developing the resources of the nation’s coastal zone and in attaining a greater degree of energy self-sufficiency in a significant and substantial manner. The proposed survey is significant because the information it would gather would be an important component of energy policy analysis and would be required for informed business decisions regarding prospecting for oil and gas on the Atlantic OCS. The proposed survey is substantial given its anticipated contribution of up-to-date data and information on potential resources in the Atlantic OCS, an area that was most recently surveyed decades ago.

On the other hand, the record does not show any significant adverse coastal effects. The determinations in this decision with respect to adverse coastal effects are based on, among other things, the judgment of NMFS as a resource agency with expertise in fisheries and sea turtles cited by the State as the basis for its alleged adverse coastal effects. For the reasons described in detail above, the preponderance of evidence demonstrates that adverse coastal effects to commercial and recreational fishing would be localized, minor, and temporary, with acoustic energy from the proposed survey resulting in limited spatial and temporal impacts to zooplankton, temporary, localized, and minor reduction in fish abundance, and the potential for minor impacts relating to disruption of spawning aggregations or schools of important prey

species. The preponderance of evidence demonstrates that the adverse coastal effects of the proposed survey on sea turtles would be minor and temporary behavioral harassments.

Short-term, minor, limited, and localized adverse effects are outweighed by the national interests in collecting information to support informed decision-making on energy development. *See Union Oil 1984*<sup>38</sup> at 13, 17–20 (relying on opinions of FWS and NMFS to determine that the uncertainty of risk of harm to endangered pelicans from exploratory well drilling is outweighed by the national interest in oil and gas development); *Texaco 1989* at 31 (finding national interest in attaining energy self-sufficiency by ascertaining information concerning oil and gas reserves available for production outweighs potential for adverse impacts to resources, including gray whales, based in part on NMFS findings and mitigation measures).

In conclusion, the preponderance of the evidence in the record demonstrates that the national interests furthered by the proposed survey outweigh the proposed survey's adverse coastal effects.

**C. Element 3: There is no Reasonable Alternative Available That Would Permit the Project to be Conducted in a Manner Consistent with the Enforceable Policies of the State Management Program.**

For WesternGeco to succeed on Element 3, there must be “no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program.” 15 C.F.R. § 930.121(c). The State did not present any alternatives to the proposed survey in its consistency objection. Instead, the State argues that it does not have a burden to offer reasonable alternatives, and it is the appellant's burden to demonstrate the absence of viable alternatives. SC Br. at 13. The State identifies the following potential alternatives that, it asserts, WesternGeco must demonstrate are not reasonable: “airborne geophysical surveys to measure the earth's magnetic field, resistivity or other electromagnetic properties, or gamma ray emissions” and the “re-analysis of existing geophysical data using modern techniques.” *Id.* at 14.

WesternGeco argues that the State failed to describe any reasonable alternative that is consistent with South Carolina's enforceable policies pursuant to the requirements under 15 C.F.R. § 930.121(c). WG Br. at 22.

Ultimately, WesternGeco is correct that the State has failed to meet the appeal requirements to describe alternatives. The regulations at 15 C.F.R. § 930.121(c) states that “NOAA shall not consider an alternative unless the state agency submits a statement, in a brief or other supporting material, . . . that the alternative would permit the activity to be conducted in a manner consistent

---

<sup>38</sup> *Decision and Findings in the Consistency Appeal of Union Oil Company of California to an Objection from the California Coastal Commission*, November 9, 1984 (“*Union Oil 1984*”).

with the enforceable policies of the management program.” While the State has provided a list of potential alternatives in its brief, the State declares that it merely “is aware” of these alternatives, and does not purport to have assessed these alternatives for consistency. SC Br. at 14. In accordance with the plain language requirement in section 930.121(c), NOAA cannot consider these alternatives because the State has failed to provide the required statement.

Additionally, the State incorrectly describes the respective burdens on the Parties regarding alternatives. It is true that the process of identifying alternatives is helpful, but not required, for a state during the consistency review process. But, if the State wishes to prevail on Element 3 on appeal, it must comply with section 930.63(d) by describing alternatives with sufficient specificity in its objection letter, or, with section 930.121(c), by providing a statement in its appeal brief that the alternative is consistent with the State’s enforceable policies. *See also* 65 Fed. Reg. at 77,141–42; 71 Fed. Reg. at 798. Only then does the burden shift to appellant to demonstrate the alternative is unreasonable or unavailable. *Korea Drilling* at 23;<sup>39</sup> 71 Fed. Reg. at 799.

The preponderance of the evidence in the record demonstrates that there is no reasonable alternative available that would permit the activity to be conducted in a manner consistent with the State’s enforceable policies.

---

<sup>39</sup> *Decisions and Findings of the Secretary of Commerce in the Consistency Appeal of The Korea Drilling Co., Ltd. From an Objection by the California Coastal Commission*, Jan. 19, 1989 (“Korea Drilling”).

## VI. CONCLUSION

NOAA overrides the State's objection to the proposed survey. For the reasons set forth above, the record establishes that the proposed survey is consistent with the objectives of the CZMA: it furthers the national interest in a significant or substantial manner; the national interest furthered by the proposed survey outweighs the proposed survey's adverse coastal effects; and there is no reasonable alternative available for the proposed survey. Given this decision, the State's objection to the proposed survey no longer operates as a bar under the CZMA to federal agencies issuing, in accordance with all applicable law, licenses or permits necessary to conduct the proposed survey. The decision to override the State's objection does not supplant other state and federal license and permit requirements and review processes.



---

Assistant Secretary of Commerce for  
Environmental Observation and Prediction,  
performing the duties of Under Secretary of  
Commerce for Oceans and Atmosphere