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Coastal Zone Management Act Federal Consistency Regulations; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 930

[Docket No. 030604145–4038–02]

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Coastal Zone Management Act Federal Consistency Regulations

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

ACTION: Final rule.

SUMMARY: The National Oceanic and Atmospheric Administration (NOAA) revises the federal consistency regulations under the Coastal Zone Management Act of 1972 (CZMA). This final rule addresses the CZMA-related recommendations of the Report of the National Energy Policy Development Group, dated May 2001 (Energy Report) as described in NOAA's June 11, 2003, Notice of Proposed Rulemaking (68 FR 34851–34874) (proposed rule), and comments submitted to NOAA on the proposed rule. In addition, this final rule includes provisions complying with statutory amendments made in the Energy Policy Act of 2005 (Pub. L. 109–58) (Energy Policy Act) that concerned matters addressed in the proposed rule. This final rule continues to provide the balance between State-Federal-private interests embodied in the CZMA, while making improvements to the federal consistency regulations by clarifying some sections and providing greater transparency and predictability to the implementation of federal consistency. This final rule fully maintains the authority and ability of coastal States to review proposed federal actions that would have a reasonably foreseeable effect on any land or water use or natural resource of a State's coastal zone, as provided for in the CZMA and NOAA's regulations, as revised in 2000.

DATES: *Effective date:* These rules shall become effective on February 6, 2006. *Applicability date:* All appeals to the Secretary under 15 CFR part 930, subpart H, filed on or after February 6, 2006, shall be processed in accordance with the procedures and time frames adopted in subpart H of this final rule. For appeals to the Secretary under 15 CFR part 930, subpart H, any procedural or threshold issues which occurred prior to February 6, 2006, shall be governed by the regulations in 15 CFR part 930, subpart D, E, and/or F, in effect at the time the procedural or threshold issue occurred.

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

Additional information on federal consistency can be located at OCRM's federal consistency Web page: *http://coastalmanagement.noaa.gov/czm/federal_consistency.html*.

SUPPLEMENTARY INFORMATION:

I. Background

For nearly 30 years, the CZMA has met the needs of coastal States, Great Lake States and United States Trust Territories and Commonwealths (collectively referred to as ''coastal States'' or ''States''), Federal agencies, industry and the public to balance the protection of coastal resources with coastal development, including energy development. The CZMA requires the States to consider the national interest as stated in the CZMA objectives and give priority consideration to coastal dependant uses and processes for facilities related to national defense, energy, fisheries, recreation, ports and transportation, when adopting and amending their Coastal Management Programs (CMPs), and when making coastal management decisions. CZMA sections 303(2)(D) and 306(d)(8).

Coastal States have collaborated with industry on a variety of energy facilities, including oil and gas pipelines, nuclear power plants, hydroelectric facilities, and alternative energy development. States have reviewed and approved thousands of offshore oil and gas facilities and related onshore support facilities.

On December 8, 2000, NOAA issued a comprehensive revision to the federal consistency regulations, which reflected substantial effort over a five year period and participation by Federal agencies, States, industry, and the public. Given this recent broad-based review, NOAA did not propose a comprehensive re-write of the 2000 final rule; rather, it has made improvements to address the issues raised in the Energy Report, the proposed rule and comments submitted on the proposed rule.

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

The Energy Report contains numerous recommendations for a long-term, comprehensive energy strategy. The Energy Report found that the effectiveness of Commerce and Interior programs are ''sometimes lost through a lack of clearly defined requirements and information needs from Federal and State entities, as well as uncertain deadlines during the process.'' The CZMA and the Outer Continental Shelf Lands Act (OCSLA), a statute administered by the Minerals Management Service (MMS), within the Department of the Interior (Interior), are specifically mentioned in the Energy Report. The Energy Report recommended that Commerce and Interior ''re-examine the current federal legal and policy regime (statutes, regulations, and Executive Orders) to determine if changes are needed regarding energy-related activities and the siting of energy facilities in the coastal zone and on the Outer Continental Shelf (OCS).'' Energy Report at 5–7. There is no explicit reference to other energy programs in this recommendation, but its purpose is reinforced by related Energy Report recommendations which encourage and direct the streamlining of significant energy actions within the jurisdiction of other Federal agencies, including the Federal Energy Regulatory Commission (FERC).

In July 2002, NOAA published an Advanced Notice of Proposed Rulemaking, 67 FR 44407–44410 (July 2, 2002) (ANPR), seeking comments on whether improvements should be made to NOAA's federal consistency regulations. In response to public comments on the ANPR NOAA issued its proposed rule. After review of the comments received on the proposed rule and after waiting for the final report of the U.S. Commission on Ocean Policy (released in Fall 2004), NOAA has decided to issue this final rule.

NOAA emphasizes that the changes to the federal consistency regulations contained in this final rule fully maintain the authority granted to States to review federal actions, pursuant to the CZMA and NOAA's 2000 rule. This final rule does not, in any way, alter the scope of the federal consistency ''effects test'' or the obligation of Federal agencies and non-federal applicants for required federal licenses or permits to comply with the federal consistency requirement. The issue of whether a proposed Federal agency activity under CZMA section 307(c)(1)is subject to

State consistency review is still guided by the Federal agency's determination of reasonably foreseeable coastal effects, in accordance with NOAA's long-standing implementation and as articulated in the 2000 rule. Likewise, the application of State consistency review to federal license or permit activities, OCS plans and Federal financial assistance activities under CZMA sections 307(c)(3)(A) and (B) and 307(d) remains unchanged, i.e., the application of the ''listing'' and ''unlisted'' requirements in 15 CFR 930.53 and 930.54 remains unchanged. The time periods for the States' substantive consistency reviews and decisions remain unchanged (75 days for Federal agency activities, six months for federal license or permit activities and OCS plans, and the time periods established by the States for federal assistance activities). States may continue to amend their CMP's to describe State specific information necessary to start the CZMA review period for federal license or permit activities and OCS plans. States may continue to request additional information during the 75-day and six-month review periods and may still object for lack of information. The final rule does not change these and other important regulatory provisions. At the same time this final rule improves the clarity, transparency and predictability of the regulations within the discretion granted to NOAA by the CZMA.

Although this final rule does not change the fundamental federal consistency process, coastal states are strongly encouraged to coordinate and participate with applicants for energy projects and responsible Federal agencies early in project development. This effort will ensure that the States' ability to require NEPA documentation as necessary data and information does not delay the start of the six-month consistency review period or unnecessarily delay a Federal agency's decision for a proposed project it finds to be in the public interest.

While this rulemaking was pending the House and Senate passed the Energy Policy Act of 2005 (H.R. 6 and S. 10), signed by President Bush on August 8, 2005 (Pub. L. 109–58). Some provisions of the Energy Policy Act directly address matters raised in the proposed rule and comments on the proposed rule related to appeals under subpart H of these regulations. Specifically, the Energy Policy Act established new appeal deadlines: 30 days to publish a notice of appeal, then 160 days to develop a decision record, with provisions to stay the 160-day period for 60 days, and a 60–75 day period to issue a decision after the record is closed. These deadlines are shorter than NOAA proposed, but longer than the deadlines some commenters recommended in comments on the proposed rule. In addition, the Energy Policy Act proscribed the method of developing the Secretary's decision record for appeals of energy projects. These provisions were also similar to comments made on the proposed rule. The changes to subpart H in this final rule are necessary to ensure NOAA's regulations are in compliance with the Energy Policy Act and are within the scope of the provisions contained in the proposed rule and the public comments received on that proposal. Therefore, there was no need to re-propose subpart H for additional comment.

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

The CZMA was enacted in 1972 to encourage States to be proactive in managing natural resources for their benefit and the benefit of the Nation. The CZMA recognizes a national interest in the resources of the coastal zone and in the importance of balancing the competing uses of those resources. The CZMA is a voluntary program for States. If a State elects to participate it must develop and implement a CMP pursuant to federal requirements. *See* CZMA section 306(d); 15 CFR part 923. State CMPs are comprehensive management plans that describe the uses subject to the management program, the authorities and enforceable policies of the management program, the boundaries of the State's coastal zone, the organization of the management program, and related State coastal management concerns. The State CMPs are developed with the participation of Federal agencies, industry, other interested groups and the public. Thirty-five coastal States are eligible to participate in the federal coastal management program. Thirty-four of the eligible States have federally approved CMPs. Illinois is not currently participating.

The CZMA federal consistency provision is a cornerstone of the CZMA program and a primary incentive for States' participation. Federal consistency is a limited waiver of federal supremacy and authority. Federal agency activities that have coastal effects must be consistent to the maximum extent practicable with the federally approved enforceable policies of the State's CMP. In addition, non-federal applicants for federal authorizations and funding must be fully consistent with the enforceable policies of State CMPs. While States have negotiated changes to thousands of federal actions over the years, States have concurred with approximately 93%–95% of all federal actions reviewed.

NOAA's federal consistency regulations were first promulgated in 1979. In late 1996, OCRM began a process to comprehensively revise the regulations in consultation with Federal agencies, States, industry, Congress, and other interested parties. NOAA published a proposed rule in April 2000 and a final rule on December 8, 2000, which became effective on January 8, 2001. Most of the changes in the revised 2000 regulations were dictated by changes in the CZMA or by specific statements in the accompanying legislative history. For instance, the 2000 regulations added language concerning the scope of the federal consistency ''effects test.'' Prior to the CZMA 1990 amendments, Federal agency activities ''directly affecting'' the coastal zone were subject to federal consistency. The 1990 CZMA amendments broadened this language by dropping the word ''directly'' to include actions with ''effects'' on any land or water use or natural resource of the coastal zone. Other changes to the original 1979 regulations improved and clarified procedures based on long-standing interpretive practice.

There are several basic statutory tenets to federal consistency. These are:

1. A federal action is subject to federal consistency if it has reasonably foreseeable coastal effects: the ''effects test.'' CZMA section 307.

2. Federal actions cannot be categorically exempted from federal consistency—the effects test determines the application of the CZMA. CZMA section 307.

3. There are no geographical boundaries to the application of the effects test. CZMA section 307.

4. Early coordination between Federal agencies, applicants and States is encouraged. CZMA section 307.

5. State federal consistency decisions must be based on enforceable policies that are approved by NOAA as part of the State's federally approved CMP. CZMA section 307.

6. States must provide for public comment on their federal consistency decisions. CZMA sections 307; 306(d)(14).

7. Federal development projects within a State's coastal zone are automatically subject to federal consistency. CZMA section 307(c)(2).

8. The Federal agency determines whether a Federal agency activity has coastal effects, and, if there are coastal effects, must provide a consistency determination to the affected State(s) no

later than 90 days before final approval unless the Federal agency and the State agree to a different schedule. CZMA section 307(c)(1).

9. A Federal agency activity must be carried out in a manner consistent to the maximum extent practicable with the enforceable policies of a State's CMP. However, a Federal agency may proceed over a State's objection if the Federal agency provides the State a written statement showing that its activity is consistent to the maximum extent practicable. CZMA section 307(c)(1), (2).

10. States and Federal agencies may seek mediation by the Secretary to resolve serious federal consistency disputes. CZMA section 307.

11. An activity proposed by a non-Federal entity for a required federal license or permit (including an OCS oil and gas plan) is subject to federal consistency if the activity will have reasonably foreseeable coastal effects. CZMA section 307(c)(3)(A) and (B).

12. An applicant for a required federal license or permit activity resulting in coastal effects, including OCS plans, must provide affected States with a consistency certification and necessary information and data supporting the certification. The State must object to or concur with the certification within six months or its concurrence is presumed. For review of OCS plans States must first provide a three-month notice as to the status of its review and if the three-month notice is not provided, then concurrence is presumed. CZMA section 307(c)(3)(A) and (B).

13. An applicant can appeal the State's objection to the Secretary of Commerce, who can override the State's objection if the Secretary finds that the activity is consistent with CZMA objectives or is otherwise necessary in the interest of national security. The Secretary, in making a decision on an appeal, must provide a reasonable opportunity for detailed comments from the Federal agency involved and from the State. CZMA section 307(c)(3)(A).

14. The authorizing Federal agency cannot approve a federal license or permit for an activity with reasonably foreseeable coastal effects unless the State concurs or the Secretary overrides the State's objection. CZMA section 307(c)(3)(A) and (B).

15. State agencies and local governments applying for Federal funds for activities that have reasonably foreseeable coastal effects must provide the State with a consistency certification and the authorizing Federal agency cannot issue the funds unless the State concurs. Applicant agencies can also appeal State objections to the Secretary. CZMA section 307(d).

16. Federal consistency does not supersede, modify or repeal existing laws applicable to Federal agencies. CZMA section 307(e).

17. Federal consistency does not affect the requirements of the Clean Water Act or the Clean Air Act established by the Federal Government or the States and such requirements are part of the States' federally approved CMPs. CZMA section 307(f).

18. The Secretary shall have 30 days to publish a notice of appeal, then 160 days to develop a decision record, and may stay the 160-day period for 60 days, and has a 60–75 day period to issue a decision after the record is closed. CZMA section 319.

These are the statutory parameters of federal consistency. Since 1979, NOAA's federal consistency regulations have interpreted CZMA requirements and provided reliable procedures and predictability for the implementation of federal consistency. Even though the Secretary has discretion in the establishment of procedures to implement the CZMA's statutory provisions, NOAA, in this final rule, as in the 2000 rule, is not altering its long-standing interpretations of the major regulatory definitions set forth in the 1979 regulations, endorsed by Congress in the 1990 reauthorization of the CZMA, relied on in court decisions and as described in the 2000 rule. Consistent with the statute, the 2000 rule and court decisions, NOAA has retained these fundamental and well-established regulatory interpretations. The improvements contained in this final rule change the language of some regulatory provisions to provide greater clarity, transparency and predictability to federal consistency procedures, while retaining NOAA's long-standing interpretations of the CZMA. NOAA's regulations have operated well for the Federal and State agencies and permit applicants and the changes in this final rule will allow them to continue to do so more efficiently and effectively.

III. The Role of the CZMA in OCS and Other Energy Development

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

When MMS offers an OCS lease sale, it is a Federal agency activity. If MMS determines that the lease sale will have reasonably foreseeable coastal effects, then MMS must provide a CZMA consistency determination to the affected State(s) examining whether the lease sale is ''consistent to the maximum extent practicable'' with the enforceable policies of the State's CMP. If the State objects, MMS may still proceed with the lease sale if MMS' administrative record and the OCSLA show that it is fully consistent or consistent to the maximum extent practicable. The ability of a Federal agency to proceed over a State's objection to a proposed Federal agency activity existed prior to the 2000 rule, was further clarified in the 2000 rule and remains unchanged by this final rule.

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

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

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

For OCS oil and gas lease sales, MMS determines whether coastal effects are reasonably foreseeable and provides affected States with a consistency determination. For example, MMS has established the Eastern Planning, Central Planning and Western Planning Areas for the Gulf of Mexico. MMS may determine that lease sales in the Eastern Planning Area will not have reasonably foreseeable effects on State coastal uses or resources within the Central Planning Area. Therefore, MMS may choose not to provide States adjacent to the Central Planning Area with a consistency

determination. MMS could also determine that a lease sale held far offshore in the Eastern Planning Area would not have foreseeable coastal effects on Florida or Alabama coastal uses or resources.

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

If a State wanted to ensure that OCS EP's and DPP's located in a particular offshore area would be subject to State CZMA review automatically, a State could, if NOAA approved, amend its CMP to specifically describe a geographic location outside the State's coastal zone where such plans would be presumed to affect State coastal uses or resources. *See* 15 CFR 930.53. Or, if a State wanted to review an EP or DPP where the applicant and/or MMS have asserted that coastal effects are not reasonably foreseeable, the State could request approval from NOAA to review such plans on a case-by-case basis. *See* 15 CFR 930.54 (unlisted activities). In both situations, NOAA would approve only if the State made a factual demonstration that effects on its coastal uses or resources are reasonably foreseeable as a result of activities authorized by a particular EP or DPP. Similarly, where the applicant or FERC has asserted that a proposed project located outside the coastal zone or outside a geographic location described in a state's management program pursuant to 15 CFR 930.53, will not have reasonably foreseeable coastal effects, NOAA would not approve a State request to review the project unless the State made a factual demonstration that the project has reasonably foreseeable coastal effects. This final rule does not change that process.

NOAA Approval of State CMPs. NOAA, with substantial input from Federal agencies, local governments, industry, non-governmental organizations and the public, must approve State CMPs and their enforceable policies, including subsequent changes to a State's CMP. NOAA's required approval ensures consideration of Federal agency activities and federal license or permit activities, including OCS plans. For example, NOAA has denied State requests to include policies in its federally approved CMP that would prohibit all oil and gas activities off its coast because such policies conflict with the CZMA requirements to consider the national interest in energy development, *see* CZMA sections 303(2)(D) and 306(d)(8), and to balance resource protection with coastal uses of national significance.

Consistent to the Maximum Extent Practicable and Fully Consistent. For Federal agency activities under CZMA section 307(c)(1), such as OCS Lease Sales, a Federal agency may proceed with the activity over a State's objection if the Federal agency determines its activity is consistent to the maximum extent practicable with the enforceable policies of the State's CMP. This means that even if a State objects, MMS may proceed with an OCS lease sale when MMS provides the State with the reasons why the OCSLA and MMS's administrative record supporting the lease sale decisions prohibit MMS from fully complying with the State's enforceable policies. MMS could also proceed if it determined that its activity was fully consistent with the State's enforceable policies. Under NOAA's regulations, the consistent to the maximum extent practicable standard also allows Federal agencies to deviate from State enforceable policies and CZMA procedures due to unforeseen circumstances and emergencies. This final rule does not change the application of the consistent to the maximum extent practicable standard.

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

Since 1978, MMS has approved over 10,600 EP's and over 6,000 DPP's. States have concurred with nearly all of these plans. In the 30-year history of the CZMA, there have been only 18 instances where the offshore oil and gas industry appealed a State's federal consistency objection to the Secretary of Commerce. The Secretary issued a decision in 14 of those cases. The Secretary did not issue a decision for the other 4 OCS appeals because the appeals were withdrawn due to settlement negotiations between the State and applicant or a settlement agreement between the Federal Government and the oil companies involved in the projects. Of the 14 decisions (1 DPP and 13 EP's), there were 7 decisions to override the State's objection and 7 decisions not to override the State.

Since the 1990 amendments to the CZMA, there have been several OCS oil and gas lease sales by MMS and only one State objection. In that one objection OCRM determined that the State's objection was not based on enforceable policies, MMS determined that it was consistent to the maximum extent practicable with the State's CMP, and the lease sale proceeded. Thus, all lease sales offered by MMS since the 1990 amendments have proceeded after State federal consistency review. In addition, since 1990, there have been six State objections to OCS plans. In three of those cases, the Secretary did not override the State's objection. In two of the cases the Secretary did override the State allowing MMS approval of the permits described in the plans, and in one case the State objection was withdrawn as a result of a settlement agreement between the Federal Government and the oil companies involved in the project.

With respect to FERC jurisdictional matters, there have been two State objections in the past three years to applications for certificates of public convenience and necessity to construct and operate natural gas pipelines. In one of these cases, the Secretary ruled the project did not meet the requirements for overriding State objections. In the other, the Secretary overrode State objections and ruled the project could proceed.

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

Mediation. Mediation has been used to resolve federal consistency disputes and allowed federal actions to proceed. In the event of a serious disagreement between a Federal agency and a State, either party may request that the Secretary of Commerce mediate the dispute. NOAA's regulations also provide for OCRM mediation to resolve disputes between States, Federal agencies, and other parties.

IV. Explanation of Proposed Changes to the Federal Consistency Regulations

Rule Change 1: § 930.1(b) and (c) Overall Objectives. This change moves the parenthetical with the description of ''federal action'' from § 930.11(g) to the first instance of the term in § 930.1(b). Federal action is used throughout the regulations to refer, when appropriate, to subparts C, D, E, F and I. The final rule adds a statement to § 930.1(c) to encourage states to participate in the administrative processes of federal agencies. This would strengthen the early coordination objectives of the CZMA and enhance the ability of federal agencies to address the enforceable policies of a state's management program.

Rule Change 2: § 930.10 Definitions Table of Contents—Definition of Failure Substantially to Comply with an OCS Plan. The reference to section 930.86(d) is incorrect. There was no 930.86(d). The reference is now to 930.85(c). There is no change from the proposed rule.

Rule Change 3: § 930.11(g) Definitions—Effect on any coastal use or resource (coastal effects). This change moves the parenthetical for ''federal actions'' to the first instance of federal action in § 930.1(b) and inserts more specific language for Federal agency activity and federal license or permit activity. There is no change from the proposed rule.

Rule Change 4: § 930.31(a) Federal agency activity. This change does not alter the current application of the definition of Federal agency activity, but clarifies that a ''function'' by a Federal agency refers to a *proposal for action.* The examples included are also re-written to emphasize that a proposed action is an essential element of the definition. In response to commenters' concerns that Federal agencies may view this change as a basis to exempt some activities from the effects test, NOAA reiterates that this change does *not* affect the application of the effects test. Congress amended the CZMA in 1990 to make it clear that no federal actions are categorically exempt from federal consistency and that the determination of whether consistency applies is a case-by-case analysis of whether a Federal agency activity will have reasonably foreseeable effects on any coastal use or resource. *See* H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 968–975, 971; 136 Cong. Rec. H 8076 (Sep. 26, 1990); and 65 FR 77125 (December 8, 2000). The change to this section is consistent with Congressional directives.

It has always been NOAA's view that federal consistency applies to proposals to take an action or initiate a series of actions that have reasonably foreseeable coastal effects, and not to agency deliberations or internal tasks related to a proposed agency action. *See e.g.*, sections in NOAA's 2000 regulations that refer to ''proposed'' activities: 15 CFR 930.36(a), 930.35, 930.39(a), 930.46(a), 930.1(c), 930.11(d). *See also* discussion in the preamble to the 2000 final rule: 65 FR 77130, Col. 2–3 (December 8, 2000). Thus, a planning document that explores possible projects or priorities for an agency is not a Federal agency activity, as there is no action proposed. However, a Federal agency plan or rulemaking proposing a new action is a Federal agency activity subject to the effects test.

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

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

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

In the OCS oil and gas context, examples of interim or preliminary activities which are not Federal agency activities include the publication of OCS 5-Year programs, as discussed above; or rulemakings establishing administrative procedures for OCS-related activities that do not affect coastal uses or resources (*e.g.*, rulemaking prescribing the completion and submission of forms). Consistent with the Ninth Circuit's decision in *California ex rel. Cal. Coastal Comm'n* v. *Norton,* 150 F. Supp.2d 1046 (N.D. Cal. 2001), *aff'd,* 311 F.3d 1162 (9th Cir. 2002), MMS action to grant or direct suspensions of OCS operations or production is an interim or preliminary activity and not a Federal agency activity subject to federal consistency when the lease suspension would not have reasonably foreseeable coastal effects. If the State had previously reviewed any reasonably foreseeable coastal effects of a lease suspension during the State's review of the lease sale, EP or DPP for federal consistency, then the lease suspension would not be the subject of a new consistency review. In this sense, the lease suspension is an interim or preliminary activity. *See* NOAA's response to comments 25 and 26 for further discussion on lease suspensions and *California* v. *Norton* and NOAA's conclusion that in all foreseeable instances, lease suspensions would not be subject to federal consistency review since (1) in general, they do not authorize activities with coastal effects, and (2) if they did contain activities with coastal effects, the activities and coastal effects would be covered in a State's review of a previous lease sale, an EP or a DPP. If a State believes that a particular lease suspension should be subject to federal consistency, the State should notify MMS. MMS could (1) agree with the State that coastal effects are reasonably foreseeable and provide the State with a consistency determination; (2) provide the State with a negative determination pursuant to 15 CFR 930.35; and/or (3) determine that the lease suspension is an interim activity that does not propose a new action with coastal effects.

In another example of what is subject to State consistency review, consider

the situation when the Navy proposes to construct a pier. The project involves compliance with numerous federal laws, *e.g.*, National Environmental Policy Act (NEPA) documents, Endangered Species Act (ESA) section 7 consultation, a Rivers and Harbors Act section 10 permit from the Army Corps of Engineers (Corps), contracts with a construction company to build the pier, etc. These various authorizations and activities related to the Navy's proposal to build the pier are not separate Federal agency activities subject to federal consistency. The Federal agency activity for purposes of 15 CFR 930.31 is the proposal to build the pier. Under 15 CFR 930.36(b), the Federal agency determines when it has sufficient information to provide the State with a consistency determination. For instance, in this example of the Navy pier, the Navy could conclude that under Navy procedures the pier is not a proposed action until the proposed activity requires analysis under NEPA. The State reviews only the pier proposal. The State uses the information provided by the Navy, pursuant to 15 CFR 930.39(a), to evaluate coastal effects and determine consistency with the State's enforceable policies. The State may request, or the Navy may provide, the Corps section 10 permit application, or the Biological Opinion under the ESA or the NEPA document, in addition to the Navy's consistency determination. Information in these documents may be used as part of the necessary information required by 15 CFR 930.39, but they are not required to be part of the information required in § 930.39(a) and are not reviewed as the proposed Federal agency activity for consistency.

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

The final rule makes minor changes from proposed rule. There is no change in meaning from the proposed rule. The first sentence in this section in the proposed rule language was grammatically awkward. The final rule merely breaks the first sentence into two sentences and makes minor grammatical corrections to the second sentence.

Rule Change 5: § 930.31(d) Federal agency activity—General Permits. In the 2000 rule, NOAA acknowledged the hybrid nature of general permits and gave Federal agencies the option of issuing a general permit under either CZMA § 307(c)(1) (Federal agency activity) or CZMA § 307(c)(3)(A) (federal license or permit activity), even though NOAA has opined that, for CZMA purposes, a general permit was more appropriately treated as a Federal agency activity. In this final rule, NOAA has removed the option to allow Federal agencies to treat their general permits as a federal license or permit activity for purposes of complying with CZMA § 307 and 15 CFR part 930. If a general permit is proposed by a Federal agency and coastal effects are reasonably foreseeable, then the general permit is a Federal agency activity under CZMA § 307(c)(1) and 15 CFR part 930, subpart C. NOAA's determination that general permits are Federal agency activities and not federal license or permit activities under CZMA § 307 is for CZMA purposes only and is based on the reasons described below, which are specific to the requirements of the CZMA. Therefore, this determination does not affect the status of general permits under the Administrative Procedure Act or under any other federal statute. For example, while general permits issued under the Clean Water Act are Federal agency activities under these revised regulations, NOAA recognizes that EPA continues to consider those same permits to be licenses or permits for purposes of the APA and for purposes of State certification under Clean Water Act section 401.

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

Further, even if a general permit were treated as a federal license or permit activity for CZMA § 307 purposes and a State objected, it would be problematic for the potential users of a general permit to appeal the State's objection since there would be no case specific factual inquiry on which the Secretary could base an appeal decision.

Other changes clarify that if a State objects to a consistency determination for a general permit, the general permit would, pursuant to the consistent to the maximum extent practicable standard as described in 15 CFR 930.32, still be in legal effect for that State, but that 15 CFR part 930, subpart C of the consistency regulations would no longer apply. Thus, a State objection to a consistency determination for the issuance of a general permit would alter the form of CZMA compliance required, transforming the general permit into a series of case-by-case CZMA decisions and requiring an individual who wants to use the general permit to submit an individual consistency certification to the State agency in compliance with 15 CFR part 930, subpart D. However, all provisions of the license or permit sections would apply, including the ''listing,'' ''unlisted,'' and ''geographic location description'' requirements in §§ 930.53 and 930.54. Once the State concurs with the certification, then an individual user may undertake the activity(ies) authorized by the general permit in accordance with the State's concurrence. If the State objects to the individual user's (now an applicant under subpart D) consistency certification, then the individual cannot undertake the activity(ies) authorized by the general permit, unless the individual user (now the applicant) appeals the State's objection to the Secretary of Commerce, pursuant to subpart H, and the Secretary overrides the State's objection.

NOAA reiterates that if a State concurs with a consistency determination for a general permit, then the State has no authority under the CZMA to review individual uses of the general permit under subpart C or D. For example, in the OCS oil and gas context, if a State has concurred with the Environmental Protection Agency's consistency determination for an OCS National Pollutant Discharge Elimination System (NPDES) general permit under the Clean Water Act, then the State may not review the use of the NPDES general permit for consistency at the OCS EP or DPP stage of reviews or when a facility files a notice of intent to be covered by a general permit under the NPDES regulations. If, however, a State objects to the OCS NPDES general permit, then each user, or ''applicant'' in CZMA parlance, must file a consistency certification with the State pursuant to subpart D, and obtain the State's concurrence before it may undertake the activities authorized by the NPDES general permit.

Minor editorial changes were made from the proposed rule with no change in meaning. The term ''approval'' was replaced with ''issuance'' since issuance more accurately describes the distinction between a general permit and case-by-case permits. The last sentence was not clear regarding when someone had to provide the State with a certification after a State objected to a general permit. The change provides a clearer statement that only applicants and persons who want to use a general permit would have to provide the certification, and not all potential users in the State. The general permit section

would only apply to subpart D and E applicants.

Rule Change 6: § 930.35(d) General negative determination. Section 930.35(d) is changed to (e) and a new section 930.35(d) is added. The general negative determination (General ND) has been developed as an administrative convenience when Federal agencies undertake repetitive activities that, either on an individual, case-by-case basis or cumulatively, do not have coastal effects. The General ND does not alter the factual basis required for federal consistency reviews.

A General ND does not alter the requirement for Federal agencies to provide consistency determinations to coastal States when there are reasonably foreseeable coastal effects, the ''effects test.'' The Federal agency must still make an analysis of coastal effects for the repetitive activities, individually and cumulatively. The General ND is an analogue to the existing General consistency determinations (15 CFR 930.36(c)) (which is for repetitive activities which do have cumulative effects). For example, a General ND may apply to activities far away from the coastal zone because coastal effects are not foreseeable, but might not apply to the same set of activities if proposed in or near the coastal zone where the proximity of the activities to coastal uses or resources may have coastal effects and require a General consistency determination or individual consistency determination.

A Federal agency is not required to use a General ND. If any one of the conditions for a negative determination are met, then a Federal agency could choose to provide the State with either an individual Negative Determination, or if applicable, a General ND. The conditions for a Negative Determination are when a Federal agency determines that its proposed action will not have coastal effects and the activity is (1) listed in the State's program or the State has notified the Federal agency that it believes coastal effects are reasonably foreseeable, (2) the activity is the same as or is similar to activities for which consistency determinations have been prepared in the past, or (3) the Federal agency undertook a thorough consistency assessment and developed initial findings on the coastal effects of the activity. *See* 15 CFR 930.35(a)(1)–(3).

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

A minor editorial change was made from the proposed rule. NOAA replaced the word ''specified'' with ''specific.''

Rule Change 7: § 930.37 Consistency determinations and National Environmental Policy Act (NEPA) requirements. The change clarifies information needs related to NEPA documents by providing more specific direction of the long-standing understanding of the distinction between NEPA and CZMA. Federal agencies are required to submit information to support a consistency determination, pursuant to the requirements in § 930.39, and may do so in any manner it chooses. Thus, even though a Federal agency may provide a NEPA document to support its consistency determination, States cannot require Federal agencies to do so.

Rule Change 8: § 930.41(a) State agency response. This change clarifies when the State's consistency review period begins for Federal agency activities. The changes provide additional clarification that the State's determination of whether the information provided by the Federal agency pursuant to 15 CFR 930.39(a) is complete, is not a substantive review. Instead, it is a ''checklist'' review to see if the description of the activity, the coastal effects, and the evaluation of the State's enforceable policies are included in the submission to the State agency. If the items required by § 930.39(a) are included, then the 60-day review starts. This review does not determine or evaluate the *substantive adequacy* of the information. The adequacy of the information is a component of the State's substantive consistency review which occurs during the 60-day review period.

To help resolve disputes as to when the 60-day review period started when a State later claims that required information was not provided, NOAA replaced the requirement to ''immediately'' notify the Federal agency that information required by § 930.39(a) is missing with a 14-day notification period. If the State agency has not notified the Federal agency of missing information within this 14-day period, then the State waives the ability to make that claim and the 60-day review period is deemed to have started when the State received the initial determination and information. This means that State agencies should pay close attention to the date they receive consistency determinations. States retain the ability to conduct a full 60-day review (or 75-day review with extension), request additional information during the State's 60-day review, or object for lack of information at the end of the 60-day review period.

A minor editorial change was made from the proposed rule. The last sentence was grammatically awkward so it was broken into two sentences, with no change in meaning.

Rule Change 9: § 930.51(a) Federal license or permit. The language changes emphasize and clarify NOAA's long-standing view of the elements needed determine that an authorization from a Federal agency is a ''federal license or permit'' within the meaning of the CZMA and therefore subject to State federal consistency review. First, Federal law must require that the applicant obtain the federal authorization. Second, the purpose of the federal authorization is to allow a non-federal applicant to conduct a proposed activity. Third, the activity proposed must have reasonably foreseeable effects on a State's coastal uses or resources, and fourth, the proposed activity was not previously reviewed for federal consistency by the State agency (unless the authorization is a renewal or major amendment pursuant to § 930.51(b)). All four of these elements are required to trigger federal consistency review.

For CZMA federal consistency purposes, ''federal license or permit'' does not include federal authorizations for activities that do not have coastal effects. Federal consistency does not apply to a required federal certification of an applicant's ministerial paperwork which is merely incidental or related to an activity that either does not have coastal effects or an activity that is already subject to federal consistency review. Ministerial certifications which are merely incidental to an activity undertaken by the applicant and which has already or will soon be the subject of a full federal consistency review are not federal license or permit activities for subpart D purposes. The following examples are authorizations which are not a ''federal license or permit'' under the CZMA:

Example 1. MMS makes certain determinations such as the qualification of bidders for OCS lease sales, bonding certifications, certifications of financial responsibility, approvals of departures from regulations in order to enhance safety.

Example 2. A Federal agency certifies equipment to be used for an activity where the activity has already been the subject of a consistency review.

Example 3. MMS issuance of ''Notification requirements'' which merely require the operator to notify MMS of an activity and where MMS' approval is not required are not subject to federal consistency.

Example 4. When the Coast Guard merely reviews the transportation plan of an energy company transporting spent nuclear waste by ship, there is no ''license or permit'' under CZMA section 307(c)(3)(A) because Coast Guard authorization is not required by Federal law. *See New Jersey* v. *Long Island Power Authority,* 30 F.3d 403 (3d Cir. 1994) (Coast Guard review of vessel transportation plans was not a Federal agency activity or federal license or permit activity).

However, a lease issued by a Federal agency to a non-federal entity which is the only federal authorization for the use of the federal property for a non-federal activity is a ''federal license or permit,'' pursuant to section 307(c)(3)(A), if the applicant is required to obtain a lease from the Federal agency for use of the Federal property, the proposed activity will have coastal effects, and the State did not previously review a required federal authorization for the same activity.

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

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

The effects test language previously at the end of the definition is deleted as superfluous since subpart C contains the effects analysis for Federal agency activities.

A minor editorial change was made from the proposed rule with no change in meaning. The proposed language was somewhat redundant and awkward. NOAA moved the end of the first sentence to the beginning, providing a clearer flow for the sentence. In addition, a minor correction was made to add the phrase ''federal license or permit'' to the second sentence.

Rule Change 10: § 930.51(e) Substantially different coastal effects. Section (e) was added in the 2000 rule to emphasize that determining whether the effects from a renewal or major amendment are substantially different is a case-by-case factual determination requiring the input of all parties. NOAA used the phrase ''the opinion of the State agency shall be *accorded deference,*'' (emphasis added) to help ensure that the State agency has the opportunity to review coastal effects which may be substantially different than previously reviewed. NOAA expected that the parties would discuss the matter and agree whether effects are substantially different. NOAA did not intend to use the phrase to have the State agency make the decision on whether coastal effects are substantially different. Thus, to provide clarification, NOAA has amended the section so that the Federal permitting agency makes this determination after consulting with the State and applicant. If a State disagrees with a Federal agency's determination concerning substantially different coastal effects, then the State could either request NOAA mediation or seek judicial review to resolve the factual dispute.

A minor editorial change was made from the proposed rule breaking the second sentence into two sentences, with no change in meaning.

Rule Change 11: § 930.58(a)(1) Necessary data and information. This change provides more specific information requirements for federal license or permit activities. The purpose of § 930.58 is to identify the information needed to start the six-month consistency review period and to the extent possible, identify the information needed by the State agency to make its concurrence or objection. Thus, the more specific the information requirements are, the more predictable and transparent the process.

Section 930.58(a)(1) is reorganized to clarify that ''necessary data and information'' means (1) a copy of the federal application, (2) all supporting material provided to the Federal agency in support of the application, (3) information that is required and specifically described in the State's management program, and (4) if not included in 1 or 2, a detailed description of the activity, its associated facilities and the coastal effects of the activity. The evaluation of the State's enforceable policies is retained under § 930.58(a)(3).

NOAA removed the clause in § 930.58(a)(1) that said ''and comprehensive data and information sufficient to support the applicant's consistency certification.'' The language removed is viewed as ambiguous because it could refer to the other paragraphs in this section or to other undefined information, and could create uncertainty in the determination of when the six-month review period starts. Section 930.58(a)(2) allows the State to describe in its CMP the necessary specific information in addition to that required by NOAA regulations.

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

There is no change from the proposed rule.

Rule Change 12: § 930.58(a)(2) Necessary data and information (State permits). In the 2000 rule, NOAA allowed States to describe State permits as necessary data and information. Unfortunately, implementation of this provision revealed the potential for States to require applicants to obtain State permit approval before the six-month consistency review period could begin. This could result in a State consistency decision *before* the six-month review period even begins, thus potentially defeating the statutory time frames in the CZMA. In addition, the public comment on federal consistency could be rendered moot because necessary State approvals would already have been obtained. NOAA did not intend the 2000 rule to create a potential conflict between the statutorily defined six-month consistency review process and State permit requirements. While it may be appropriate or necessary for a State to require completed State permit *applications* as necessary data and information, it is not appropriate to require a State approved or issued permit. Therefore, NOAA has removed ''State permits'' as eligible necessary data and information requirements, but has retained State permit applications. This change, as described in the proposed rule, contemplated ''complete'' State permit applications, and NOAA has included ''complete'' in the final rule. When appropriate, the applicant and the State could agree, pursuant to § 930.60, to stay the six-month period until a specific date to allow for issuance of the State permit. A State, at the end of the six-month review period may, of course, object if the applicant has not yet received the State permit.

In addition, NOAA added language to clarify that when a Federal statute requires a Federal agency to initiate the CZMA review prior to its completion of NEPA compliance, NEPA documents will not be considered necessary data and information pursuant to § 930.58(a)(2). For example, when the operation of a Federal statute precludes a Federal agency from delaying the start of the CZMA process because the NEPA document is not complete, NEPA documents listed in a State's management program cannot be considered necessary data and information. This issue has come to light in the case of the Outer Continental Shelf Lands Act (OCSLA). *See* explanation of rule change 15: § 930.76(a) and (b) Submission of an OCS plan, necessary data and information and consistency certification. In addition, neither the CZMA nor NEPA require the Federal agency to include CZMA consistency determination information in NEPA documents. Therefore, States cannot delay the start of the CZMA review period because CZMA consistency information is not included in a NEPA document.

Two minor changes were made from the proposed rule. As discussed in the preamble to the proposed rule and in this final rule NOAA intended the rule to refer to ''completed'' State permit applications. Thus, ''completed'' is added to the third sentence. The second change is the language regarding NEPA documents discussed above.

Rule Change 13: § 930.60 Commencement of State agency review. These changes clarify when the State's six-month review period begins for federal license or permit activities. The changes clarify that the State's determination of whether the information provided by the applicant pursuant to 15 CFR 930.58 is complete is not a substantive review. Instead it is a ''checklist'' review to see if the application, description of the activity, the coastal effects, the evaluation of the State's enforceable policies, and specific information described in the State's federally approved program are included in the submission to the State agency. If the items required by § 930.58 are included, then the six-month review starts. This review does *not* determine or evaluate the *substantive adequacy* of the information. The adequacy of the information is a component of the State's substantive review which occurs during the six-month review period. The change also further clarifies that a State may not stop, stay or otherwise alter the consistency review period once it begins, unless the applicant agrees in writing to stay the review period until a specific end date. NOAA deleted the word ''extend'' to avoid potential conflicts with the six-month period set by statute. Thus, the State agency and applicant can stay or ''toll'' the running of the six-month review period for an agreed upon time ending on a specific date, after which the remainder of the six-month review period would continue. Such agreements must be set forth in writing so that it is clear there is a meeting-of-the-minds between the State and the applicant. Ideally, the written agreement should be one document that both parties sign. The written agreement for a stay must refer to a specific end date and should not be written to require a later event or condition to be satisfied to end the stay.

If a State wants to require information in addition to that required by NOAA in § 930.58(a) prior to starting the six-month review period, the only way the State can do so is to amend its management program to identify specific ''necessary data and information'' pursuant to § 930.58(a)(2). This is not a new requirement, but was required in the 1979 rule and clarified in the 2000 rule.

NOAA also has removed a State's option of starting the six-month review period when a consistency certification has not been submitted. *See* below under *Collier Decision* for further information. The rest of the re-write of the section more clearly sets forth the existing provisions for starting the six-month review period when (1) the applicant has not provided a consistency certification, but has provided the necessary data and information described in § 930.58(a), (2) the applicant has provided the consistency certification, but not all necessary data and information described in § 930.58(a), or (3) the applicant has not provided either the consistency certification or all necessary data and information. The paragraphs have been renumbered accordingly.

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

An applicant's failure to provide a state with a consistency certification cannot divest a state of its authority pursuant to CZMA section 307(c)(3)(A). However, filing a state objection without an underlying consistency certification provided by the applicant is neither a remedy for the applicant's failure to comply with the CZMA, nor a valid exercise of [the State's] own CZMA authorities.

The statutory language and scheme of the CZMA presumes that the applicant has the first opportunity to demonstrate that its activity is consistent with the enforceable policies of the state CMP. Section 307(c)(3)(A) provides in pertinent part: ''[a]t the earliest practicable time, the state or its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's certification.'' The NOAA regulations also require a state objection be made in response to the applicant's consistency certification. 15 CFR 930.64. Likewise, consistency cannot be presumed without the receipt of a consistency certification. 16 U.S.C. 1456(c)(3)(A) and 15 CFR 930.63. Finally, NOAA's regulations anticipate that the applicant will have the first opportunity to provide the state with the necessary information and data to demonstrate consistency with the state CMP and that only after the receipt of that information can the state consistency review process begin. *See* 15 CFR 930.58.

Given the language and structure of the statute and NOAA's implementing regulations, it is clear that an applicant's consistency certification is essential to a state's Federal consistency review. Therefore, I conclude that a State may not ''object'' within the meaning of the CZMA, to an application for a federal license or permit when no consistency certification has been submitted. Florida's objection in this case has no effect or is not valid.

A coastal state is not without remedy, however, when a recalcitrant applicant declines to provide the necessary consistency certification. First, both the statute and the regulations make it clear that a Federal agency cannot issue a license or permit until ''the state or its designated agency has concurred with the applicant's consistency certification or until by the state's failure to act, the concurrence is conclusively presumed.'' 16 U.S.C. 1456(c)(3)(A). In addition, a state may seek enforcement of the CZMA in federal court. Unlike the Secretary of Commerce, the federal courts have the authority to require compliance with federal law through the issuance of mandamus, injunction and other relief.

Optimally, in matters such as this, where an applicant disagrees that its permit or license activity is subject to the provisions of a state CMP can be resolved through the availability of mediation services of NOAA's Office of Ocean and Coastal Resource Management (OCRM), 15 CFR 930.55, or an advisory letter issued by OCRM pursuant to 15 CFR 930.142 (15 CFR 930.3(2001)). While these informal procedures do not carry the weight of a federal court order, they represent the views of the expert agency charged with the implementation of the CZMA. These informal remedies are also more expedient and less costly than the Secretarial appeals process or federal litigation.

While not central to the decision made in *Collier,* NOAA opined in *Collier* that the six-month review period could also only start after receipt of the necessary data and information. *Id.* However, NOAA has determined that a State could, if it wished to, waive the requirement that all necessary data and information be received and start the six-month review upon receipt of a consistency certification, but without the necessary data and information (but could not then later stop the six-month time period without agreement from the applicant). NOAA makes this distinction because, as discussed in *Collier,* a consistency certification is central to the State's jurisdiction and authority under the statute to conduct a consistency review. Allowing necessary data and information to be submitted after the six-month period has begun provides flexibility to the State and applicant.

Various edits to § 930.60 were made from the proposed rule. These edits do not change the meaning of the proposed rule and do not add or remove requirements that were not described in the proposed rule. Some of the changes to this section in the proposed rule were difficult to follow. Therefore, the final rule somewhat reorganizes and restates the requirements described in the proposed rule. The final rule replaces ''information'' in this section with ''necessary data and information'' to be clear that the section refers to the necessary data and information described in § 930.58(a), and not to other information the State may want during the six-month review. Also, the final rule uses ''review period'' as a more accurate description than ''timeclock.''

In paragraph (a), the reference to 930.54(e) is removed because there is no exception in § 930.54(e), as changed in the 2000 rule. Paragraph (a)(1) is rewritten to be clear that this paragraph describes the requirement that a certification must be submitted to start the review period. Paragraph (a)(2) more clearly describes the cases where either the necessary data and information was not received or both the consistency certification and the necessary data and information are missing. The last clause in paragraph (a)(2) addresses the scenario where both the certification and the necessary data and information are missing by clarifying that a certification must be submitted, even if the State elects to start the review period without all necessary data and information. The requirements that were in paragraphs (a)(1)(i) and (ii) in the proposed rule are now more clearly described in paragraphs (a)(1) and (2).

The waiver and last statement in paragraph (a)(2) more clearly describes the requirements that were in (a)(1)(ii), allowing the State to choose to start the review period before receiving all necessary data and information. The last sentence in paragraph (a)(3) is needed when the State starts the six-month review period before receiving all necessary data and information (i.e., the ''waiver'' described in (a)(2)) to make clear that the review period does not start anew when the State receives the missing necessary data and information.

Minor edits were made to paragraph (a)(3), which was (a)(2) in the proposed rule; paragraph (b), which was (a)(3) in the proposed rule; and paragraph (c), which was (b) in the proposed rule.

Rule Change 14: § 930.63(d). The cross reference to 930.121(d) is incorrect. There is no 930.121(d). The reference is to 930.121(c). There is no change from the proposed rule.

Rule Change 15: § 930.76(a) and (b) Submission of an OCS plan, necessary data and information and consistency certification. These changes address information requirements for OCS plans. The changes provide a more specific list of the information required. Clean Air Act and Clean Water Act permits are not included in NOAA's regulations as these permits are already required to be ''described in detail'' in OCS plans and are covered under the State's review of the OCS plan. *See* 30 CFR 250.203(b)(4), 203(b)(19), 204(b)(8)(ii) and 204(b)(14). Thus, States should review CWA and CAA permit applications concurrently with the OCS plan review. If the CWA and CAA information is not described in detail in an OCS plan, then subpart D applies.

While the status of the completion of NEPA documents is an issue raised by coastal States when performing consistency reviews, NOAA is not adding language requiring that NEPA documents be included as information necessary to start the six-month review period. A requirement that NEPA documents (draft or final) be completed prior to the start of the six-month review period is incompatible with statutory requirements in the OCSLA. 43 U.S.C. 1340(c)(1) and 1351(h). MMS must make its decision whether to approve an EP within 30 days of receipt of the EP. Within that 30-day period, MMS completes its Environmental Assessment (EA). Interior has informed NOAA that, MMS submits the EP and accompanying information to the State within days of receipt of the EP to meet OCSLA requirements and to avoid delay in the CZMA process. The six-month review period starts when the State receives that information. MMS sends the EA to the State when the EA is completed. Since the State receives the EA within a very short period (20–30 days) after the start of the six-month review period, the CZMA process is not delayed unnecessarily.

For DPP's, States can amend their programs, pursuant to 15 CFR 930.58(a)(2), to include draft NEPA documents as data and information necessary to start the six-month review, because there is additional time in the OCSLA process. *See* 43 U.S.C. 1351(h) and 30 CFR 250.204(1). States can not amend their programs to require final NEPA documents for OCSLA purposes as part of the necessary data and information because the OCSLA requires MMS to approve or deny a DPP within 60 days after completion of the final EIS. Id. This 60-day OCSLA period does not provide sufficient time for the six-month CZMA consistency review period.

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

There is a minor correction from the proposed rule. The term ''confidential'' is added at the of § 930.76(b), because the phrase used throughout the regulations is ''confidential and proprietary information.''

Rule Change 16: § 930.77(a) Commencement of State agency review and public notice. This change clarifies the time when the State's consistency review period begins for OCS plans. The changes provide additional direction that the State's determination of whether the information provided by the person pursuant to 15 CFR 930.76 is complete, is not a substantive review. Instead, it is a ''checklist'' review to see if the OCS plan, description of the activity, the coastal effects, the evaluation of the State's enforceable policies, specific information described in the State's federally approved program, and information required by Interior's regulations are included in the submission to the State agency. If the items required by § 930.76 are included, then the six-month review starts. This review does not determine the *substantive adequacy* of the information. The adequacy of the information is a component of the State's substantive review which occurs during the six-month review period.

The changes also clarify that if the State wants to require additional information in addition to that required by § 930.76 for its review of OCS plans, it would have to describe such information in an amendment to its management program, pursuant to § 930.58(a)(2). This is not a new

provision, but was provided in the 1979 rule and restated in the 2000 rule.

This section is changed to address the circumstances where a State believes the information submitted, as required by NOAA's regulations, is insufficient (e.g., either the analysis is substantively inadequate, or that the OCS plan addresses new activities or effects not foreseen and for which information was not provided). In such a case a State may request additional information. The rule change requires that such a request be made within the first three months of the six-month review period. A change is made from the proposed rule such that, if after the three-month period, new activities or coastal effects not previously described and for which information was not provided become part of the OCS plan, then the State may request additional information on the new activities or effects. A request for additional information does not stop, stay or otherwise alter the six-month review period. As discussed in rule change 26, a consistency concurrence is limited to the scope of the activities and effects reviewed by the State.

In addition to the minor substantive change from the proposed rule discussed above, two minor editorial changes were made, with no change in meaning. The first was to add the term ''certification'' to the first sentence of § 930.77(a)(1) since the proposed language could be incorrectly interpreted to mean that the six-month review period could start with the necessary data and information, but not a certification. The second editorial change is to rewrite the second sentence of § 930.77(a)(2). The original sentence, while referring to the necessary data and information section for OCS plans, 930.76, it is not clear that this is a reference to the need to amend the State's program if the State wants to require additional necessary data and information to start the six-month review period as opposed to a State's request for additional information after the six-month review period has started.

Rule Change 17: § 930.82 Amended OCS plans. To be consistent with § 930.76(c), this change clarifies that it is Interior, not the person, that submits the consistency certification and information to the State for amended OCS plans.

There is a minor correction from the proposed rule. The term ''confidential'' is added at the end of § 930.82, because the phrase used throughout the regulations is ''confidential and proprietary information.''

Rule Change 18: § 930.85 Failure to substantially comply with an approved OCS plan. While this section existed prior to the 2000 rule revisions, NOAA makes this change to more closely coordinate CZMA and OCSLA requirements. Under NOAA's regulations and the OCSLA program, it is MMS that determines whether a change to an OCS plan is ''significant'' and thus, whether the change requires CZMA federal consistency review. This determination should be the same for failure to substantially comply with an approved OCS plan. This change would be consistent with CZMA section 307(c)(3)(B), and in fact the language is taken directly from the statute. The previous language was developed in the 1979 regulations as a means of determining when a person has failed to substantially comply. However, CZMA does not provide authorization to NOAA to make such determinations, which should be made by MMS, pursuant to the OCSLA and MMS regulations. Also, to be consistent with § 930.76(c), this change clarifies that it is Interior, not the person, that submits the consistency certification and information to the State for OCS plans.

Three minor changes were made to paragraph (c) from the proposed rule with no change in meaning. Grammar was corrected in the first sentence by reversing ''substantially to'' to ''to substantially'' and ''comply'' was changed to ''come into compliance.'' A third change was made to the second sentence to acknowledge the applicable process under Interior's regulations.

Rule Change 19: § 930.121(c) Alternatives on appeal. This provision was amended in the 2000 rule to address ''confusion as to when alternatives may be raised, the consequences of a State agency not providing alternatives or [sic] when it issues its objection, and the level of specificity that the State agency needs to provide to satisfy the element on appeal.'' 65 FR 77151 (December 8, 2000). Implementation of this change has prompted NOAA to make several refinements in the language. The word ''new'' is struck to clarify that all information submitted to the Secretary during the appeal may be considered in determining whether an alternative is reasonable and available. The word ''submitted'' is substituted for the word ''described'' to reflect more accurately the manner in which information becomes part of the decision record of an appeal.

The last sentence is added to make clear that the Secretary does not substitute his judgement for that of the State in determining whether an alternative is consistent with the enforceable policies of the State management program. This is not a change in standards or practice, only a clarification. As described in the 2000 rule, both the State and appellant and commenters on the appeal will be able to provide the Secretary with information concerning an alternative. The addition of this sentence, however, makes clear that no alternative, whether submitted to the Secretary by the appellant, the State, a third party, or identified by the Secretary will be considered by the Secretary unless the State submits a written statement that the alternative will allow the activity to be conducted in a manner consistent with the enforceable policies of the management program. Otherwise, the Secretary would be required to make a finding that the alternative is consistent with the management program and effectively substitute the Secretary's judgement for that of the State. The Secretarial appeals process does not review whether the proposed activity is consistent with the State's enforceable policies, but is a *de novo* consideration of whether a proposed activity is consistent with the objectives of the CZMA or otherwise necessary in the interest of national security. Therefore, the Secretary relies on the State to determine whether an alternative would allow the project to proceed in a manner consistent with the enforceable policies of the management program. If a State determines an alternative is consistent with its CMP and the Secretary does not override the State's objection to the proposed activity, then the applicant may pursue the identified alternative approved by the State without further CZMA review by the State.

A minor editorial change with no change in meaning was made from the proposed rule in the beginning of the third sentence.

Rule Change 20: § 930.123 Definitions. Section 930.123 previously defined only ''appellant'' and ''Federal agency'' for appeal purposes. The Energy Policy Act described three other terms related to CZMA appeals that NOAA will use in subpart H and need to be defined as well. These three terms are ''energy project,'' ''consolidated record,'' and ''lead Federal permitting agency.'' The definition of ''energy project'' is broad to cover foreseeable energy facilities related to delivery of energy, e.g., electricity transmission, and development of energy resources, e.g., crude oil and natural gas. For example, energy project would include: nuclear power plants; offshore oil and gas exploration, development, and production facilities; natural gas pipelines; Liquefied Natural Gas (LNG) terminals; hydroelectric facilities; wind power facilities; wave and tidal energy

projects; ocean thermal energy conversion projects; where these projects would require a federal authorization under numerous federal statutes such as the Nuclear Energy Act, OCSLA, Natural Gas Act, Federal Power Act, etc.

The Energy Policy Act defined ''consolidated record,'' and NOAA has adopted that definition in the regulations as the record of all decisions made or actions taken by the lead Federal permitting agency or by another Federal or State administrative agency or officer, maintained by the lead Federal permitting agency, with the cooperation of Federal and State administrative agencies, related to any federal authorization for the permitting, approval or other authorization of an energy project.

The term ''lead Federal permitting agency'' as used in the Energy Policy Act, is meant to apply to the Federal agency required to issue authorizations under the various energy-related statutes and which would be subject to a federal license or permit under subparts D or I, approval of an OCS plan under subpart E, or federal financial assistance under subparts F or I, of this part for an energy project.

Rule Change 21: § 930.125 Notice of appeal and application fee to the Secretary. In order to process an appeal within the time frames required by the Energy Policy Act, as described in § 930.130, changes are made to various sections (§§ 125, 127, 128 129 and 130) to ensure that briefs, information, and public and Federal agency comment periods accommodate a restricted time period for developing the decision record and issuing a decision. These procedures will provide due process and fair opportunity for comment to all parties and the public.

Changes were made from the proposed rule. The changes are meant to further highlight that, given the 160-day deadline to close the decision record, a 60-day limit on a stay of the 160-day period, and a 60–75 day period to issue a decision after the decision record closes, the appellant's notice of appeal must, at least, raise all issues to be addressed. These issues can be further explored in the appellant's brief, but they must at least be raised in the notice of appeal in order to be considered by the Secretary.

NOAA also changed the deadline in paragraph (f) that an appellant must submit the appeal fee if the Secretary denies a fee waiver request from 20 days to 10 days. This change is necessary to meet the new appeal deadlines established by the Energy Policy Act. Otherwise, NOAA would likely have to publish its 30-day notice of the appeal in the **Federal Register** before knowing whether appellant wanted to continue with the appeal.

Rule Change 22: § 930.127 Briefs and Supporting Materials. The changes in § 930.127 reflect changes in practice necessary to accommodate the time frames for the closure of the decision record in § 930.130 and to make the administration of the appeals process more efficient and transparent to the public, States and potential appellants. These changes will likely mean that States, appellants, Federal agencies and the public will have to be more diligent in providing thorough and complete information to the Secretary in a shorter amount of time. The changes allow each party and the public, in most cases, only one opportunity to provide their information and arguments to the Secretary. The changes reflect the fact that the Secretary needs only sufficient time and information to make a rational and well-reasoned determination of each of the elements in 15 CFR 930.121 or 930.122.

NOAA has retained the requirement from the proposed rule that the appellant's brief is due within 30 days of the filing of the notice of appeal and the State's brief will be due 60 days after appellant's filing of the notice of appeal. It was necessary to retain these time periods in order to meet the 160-day period established by the Energy Policy Act. In addition, NOAA provided a 20-day period for the appellant to file a reply brief to the State agency's brief. NOAA is including the appellant's reply brief, but not a reply brief from the State agency for the following reasons. It is standard appellate procedure and is predicated on the fact that the State agency's principal brief is a reply to the appellant's principal brief. Since the State agency may raise issues not addressed by appellant, appellant should be able to reply since appellant bears the burden of persuasion on the appeals. Further, NOAA's regulations do provide the Secretary with flexibility to require supplemental briefs if deemed necessary. Therefore, if a State agency wanted to reply to a particular matter raised in appellant's reply brief, it could request that the Secretary authorize such a brief.

NOAA has added new §§ 930.127(b) and (c). In paragraph (b) NOAA establishes page limits for briefs and in (c) a slightly different way for the appellant and State agency to organize the supporting documentation and material. By establishing an ''appendix,'' as is done for judicial proceedings, the parties and the Secretary would have a common record to cite to. These changes are provided to encourage the appellant and State agency to help the Secretary meet the deadlines established in the Energy Policy Act.

The change to § 930.127(f) would move language from § 930.130(d) regarding the appellant's burden to support its appeal. NOAA has removed language that was in the proposed rule regarding the State's burden of persuasion for alternatives. This is a minor change, since the proposed rule appeared to misstate the Secretary's long-standing practice in accordance with the Secretary's decision in *Korea Drilling Inc.* at 23 (1989) (''If a State describes one or more consistent alternatives in its objection, the burden shifts to the appellant. In order to prevail on Element [three], the appellant must then demonstrate that the alternative(s) is unreasonable or unavailable''). Thus, the State's burden regarding alternatives is described in sections 930.63(d) (describing alternatives with sufficient specificity), and 930.121(c) (determining if the alternative is consistent with the State's enforceable policies).

NOAA also amended paragraph (c)(1) to more clearly describe the content of the decision record and that the Secretary takes notice of the administrative decisions and records of the authorizing Federal agency, when the information is submitted to the Secretary's appeal decision record.

Paragraph (g) is amended to allow the Secretary to extend the time for submission, and length, of briefs and supporting materials for good cause.

NOAA has added paragraph (i) to comply with provisions in the Energy Policy Act specifying the content of the Secretary's decision record for energy projects, including projects requiring an authorization under section 3 or a certificate of public convenience and necessity under section 7 of the Natural Gas Act (15 U.S.C. 717b and 717f). The Energy Policy Act requires that the lead Federal permitting agency, with the cooperation of Federal and State administrative agencies, maintain a consolidated record of all decisions made or actions taken by the lead agency or by another Federal or State administrative agency or officer. The Secretary must use this consolidated record for CZMA appeals. The Secretary may supplement the consolidated record pursuant to CZMA section 319, as amended by the Energy Policy Act and as described in § 930.130(a)(2) of this final rule. The Secretary may require any supplemental information specifically requested by the Secretary to complete a consistency review under

the CZMA, or any clarifying information submitted by a party to the proceeding related to information in the consolidated record compiled by the lead Federal permitting agency.

The intent of the Energy Policy Act and paragraph (i) is to provide a more efficient and less time consuming process to develop a decision record for CZMA appeals. Relying principally on the lead Federal permitting agency's consolidated record should help. NOAA has determined that in order to effectively and efficiently frame and evaluate CZMA arguments needed to decide the grounds for appeal described in § 930.121 for an appeal of an energy project, briefs required in § 930.127(a), (b) and (c) are required. This is consistent with Energy Policy Act requirements for the consolidated record. NOAA recognizes that the Energy Policy Act is a limitation on the Secretary's evidentiary record. NOAA does not believe such limitation includes appeal briefs. The consolidated record is the background materials and comments compiled as part of the lead Federal permitting agency, other Federal and State agency processes, and maintained by the lead Federal permitting agency. The CZMA appeal briefs are needed so appellants and State agencies can use the consolidated record and argue their case before the Secretary; otherwise, parties would not be able to argue their CZMA case. Moreover, the Energy Policy Act clearly expects CZMA appeals to be processed since it describes decision record deadlines. If no briefs were allowed there would be no reason to have any decision record deadlines for energy projects.

Further, in order for the Secretary to have sufficient time within the 160-day decision record period to evaluate the decision record, the appellant must submit the lead Federal permitting agency's consolidated record along with appellant's notice of appeal. NOAA has provided that, notwithstanding § 930.125(e), the Secretary, for good cause shown, may extend the time required for filing a notice of appeal for an energy project to allow appellant time to prepare the consolidated record for filing.

Finally, in keeping with the timeframes mandated by the Energy Policy Act, NOAA will not provide a public or Federal agency comment period for appeals of energy projects. The appellant, State agency, Federal agencies or the public may only submit supplemental materials when the Secretary requests such information after a determination that the information is needed pursuant to § 930.130(a)(2). Therefore, to have their views included in the consolidated record, interested parties should submit comments on energy projects when the lead Federal permitting agency provides such comment periods according to applicable Federal law, and through the State agency's CZMA review, including comments related to the CZMA and potential appeals to the Secretary.

Rule Change 23: § 930.128 Public notice, comment period, and public hearing. The changes to § 930.128 would accommodate the 160-day period to develop the decision record in § 930.130. Other changes promote clarity and efficiency in obtaining comments from the public and interested Federal agencies, and in processing the appeal. In addition, NOAA makes explicit the Secretary's practice of giving additional weight to a Federal agency's comments when the comments concern topics within the area(s) of the agency's technical expertise.

Other changes were made from the proposed rule. In paragraph (b), NOAA established a definitive 30-day comment period for both the public and Federal agencies. Pursuant to the requirements of the Energy Policy Act, NOAA will not provide a public or Federal agency comment period for appeals of energy projects. Supplemental public or Federal agency comment during the Secretary's review of an appeal for an energy project may only be provided if the Secretary determines such opportunity for comment is needed pursuant to § 930.130(a)(2). The 30-day comment period will be noticed in the Secretary's Notice of Appeal. This is needed to accommodate the 160-day period to develop the decision record. The Secretary will be able to provide a longer comment period, if necessary, pursuant to § 930.127. Minor edits were made to the last sentence of paragraph (c)(1) to be more precise about comments from Federal agencies. A minor change was made to paragraph (d) changing the time period from 45 days to 30 days for submitting a request for a public hearing. In addition, NOAA clarified that if a public hearing is held, the comment period shall be reopened and public and Federal agency comments must be submitted 10 days after the hearing. These changes will help the Secretary process appeals in a timely manner.

Rule Change 24: § 930.129 Dismissal, remand, stay, and procedural override. The additions to 930.129 accommodate the 160-day period to develop the decision record in § 930.130. Two changes were made from the proposed rule. In paragraph (c), NOAA deleted the proposed language regarding ''extending'' the appeal process. By establishing the new 160-day period for closing the decision record, the Secretary would not ''extend'' the processing of the appeal beyond the 160 days, but would stay (or ''toll'' the running of) the 160-day period, pursuant to the stay provisions in 930.130. In paragraph (d) NOAA removed the ''20-day'' period giving the Secretary more flexibility to determine the time period for remand back to the State during the 160-day period to develop the decision record.

Rule Change 25: § 930.130 Closure of the decision record and issuance of decision. NOAA's proposed 270-day period to develop the decision record, and the stays for NEPA and ESA purposes, were superceded by the Energy Policy Act. The provisions in § 930.130 now follow the wording of the Energy Policy Act. The section now provides 160 days as a definitive date by which the Secretary shall close the decision record in appeals filed from State objections under 15 CFR part 930, subparts D, E and F. The Secretary may stay the 160-day period for a period not to exceed 60 days: (1) If the parties mutually agree to stay the 160-day period or, (2) to ensure that the Secretary has any supplemental information specifically requested by the Secretary to complete a consistency review under the CZMA, or any clarifying information submitted by a party to the proceeding related to information in the consolidated record compiled by the lead Federal permitting agency. This could include relevant NEPA and ESA documents, if the Secretary determines that such information is needed to decide the appeal. NOAA continues to emphasize that if NEPA or ESA documents are needed, this does not mean that the Secretary would create NEPA or ESA documents for the appeal. The Secretary would only be seeking NEPA and/or ESA documents required for the Federal agency authorization or funding which is the subject of the appeal. The Secretary's action in deciding a consistency appeal does not require the preparation of environmental analyses pursuant to NEPA and ESA.

Other changes are made to more accurately track the existing statutory language. Minor grammatical edits were made from the proposed rule, with no change in meaning.

Rule Change 26: §§ 930.46(a)(3), 930.66(a)(3), 930.101(a)(3) Supplemental coordination for proposed activities. The changes to these sections were not in the proposed rule. However, these changes address

the objectives and proposed changes in the proposed rule to improve the clarity of the consistency process related to commencement of the States' review periods and changes to information needs. This change recognizes the fact that if a State concurs or concurrence is presumed, the concurrence is valid only for the activities and effects described by the Federal agency, applicant or applicant agency submitted to the State during the State's review. This change addresses the problem posed by a State concurrence for a project which was substantially changed during the State's review period, but the State was not privy to the change, the change would have coastal effects and the State has enforceable policies applicable to the change or its effects. The rule also reflects the importance of ensuring that the State is provided with timely notice of project changes and related information during the States review periods. This rule change does not apply to subpart E because amended OCS plans are already covered under § 930.82.

V. Comments Received by NOAA on the Proposed Rule

NOAA received 3066 comments on the proposed rule from the House of Representatives, the Senate, States, the Energy Industry, Environmental Groups, Federal agencies, and the public. Most comments strongly oppose any changes to NOAA's rules. NOAA appreciates these comments and understands, and agrees with, the concern that NOAA not ''weaken'' the federal consistency authority as provided in the CZMA and the 2000 rule. However, NOAA believes that neither the proposed rule nor this final rule affect a State's ability to review federal actions that have coastal effects. In addition, it is NOAA's view that the clarifications and improvements in this final rule do not change the agency's long-standing interpretation of the CZMA. NOAA carefully reviewed each comment in developing this final rule. Below are NOAA's responses to comments on the proposed rule. Comments 1–19 are general comments on the proposed rule. Comments 20–113 are comments on specific sections of NOAA's consistency regulations. A list of commenters by comment will be posted on OCRM's Federal Consistency Web site: *http://coastalmanagement.noaa.gov/czm/federal_consistency.html*.

General Comments

Comment 1. Overall, we feel that the proposed changes will go far to clarify the confusion which exists in the current regulations.

Comment 2. We find many of the changes to be worthwhile both in terms of clarity and streamlining the consistency process. In particular we note that many of the proposed changes are intended to speed the appeals process; we recognize the need, for all parties involved, for an efficient and predictable process. We support NOAA's rule modification and guidance to develop an expedited appeals process that is fair and equitable both to States and to applicants.

NOAA Response to Comments 1 and 2. NOAA notes these comments.

Comment 3. The proposed changes are inconsistent with, and fail to implement, the CZMA and would substantially weaken the States' abilities to safeguard their coastal resources. For example, the proposed changes would:
—Make it more difficult for a State to obtain the information it needs to evaluate a proposed plan, and impose unrealistic deadlines for State review;
—Reduce the weight given to a State's opinion on the application of consistency to a federal action;
—Potentially exempt major proposals from State review, such as offshore oil and gas development, even though the projects may impact the coastal zone of the affected State;
—Virtually eliminate States from the process of considering appeals from States' objections to CZMA approvals; and
—Overturn recent Federal court decisions upholding States' authority to review certain Federal offshore oil drilling decisions.

Taken together, these changes would essentially strip the coastal States of any meaningful authority to control the ways in which their coastal areas are used. The proposed changes would turn the CZMA into a partnership between the Federal Government and oil and gas interests, to the detriment of coastal States. The proposed rule is a clear attempt to short-circuit procedures designed to ensure State participation in decision-making. The rule changes will strip States of an equal voice in decisions that could have significant adverse effects on local coastal communities and coastal resources. The proposed rules will, if enacted, do irreparable harm to this Federal-State partnership so effectively implemented during the past three decades. Therefore, we strongly urge you to withdraw the proposed rule changes.

Comment 4. There is no demonstrated need for these rule changes particularly when comprehensive consistency rule changes were approved just over two years ago. To the extent that changes are made, they must be targeted only to address ''limited and specific procedural changes or guidance'' as called for in the ANPR and as needed to clarify offshore energy activity and siting information needs and deadlines. There is a danger, if not likelihood, that resorting to regulatory changes to ''solve'' perceived problems or to ''clarify'' well established language from current regulations will result in creating unforeseen conflicts, confusion, and possibly increase litigation. Ad hoc regulatory changes should be avoided and more resources should be dedicated to developing memoranda of understanding with the States, working with States and assisting agencies and applicants with understanding their consistency responsibilities.

Comment 5. For many years, this legislative delegation has fought off numerous attempts by government and private industry groups whose planned actions would have caused detrimental effects to the water quality of the Atlantic Ocean, the ocean floor, the air above and our shoreline. New Jersey's tourism industry, as well as our overall environment, would suffer greatly if the Federal Government would allow the oil and gas industries to explore our ocean waters. We share the Federal Government's desire for this great nation to be less dependent on foreign oil, but not at the high price of ocean and coastal water quality. We strongly urge NOAA to withdraw the proposed changes that would expedite the issuance of permits to those who would ravage our ocean waters and shorelines. Reducing the review time which States and local governments have to properly and thoroughly investigate ocean drilling applications would certainly send the wrong signal to citizens of the United States of America, as well as the entire world, that the USA is a rubber-stamp for energy interests, not for its citizens nor its natural beauty.

NOAA Response to Comments 3, 4 and 5. NOAA concludes that the changes in the final rule do not, in any way, change the authority granted to States to review Federal actions affecting the coastal zone. Neither do the changes short-circuit procedures, reduce the State review period or otherwise diminish the ability of States, or other interested parties, from participating in the Federal consistency process as provided for in NOAA's 2000 rule and the Energy Policy Act. The CZMA State-Federal partnership is strengthened by bringing greater clarity, transparency and predictability to NOAA's CZMA regulations.

In drafting the proposed rule and in issuing this final rule NOAA has carefully sought to avoid upsetting the

long-standing, basic tenets of Federal consistency. State CZMA review authority is, and has always been, centered on a Federal agency activity or Federal license or permit activity having coastal effects. The rule changes steadfastly retain this ''effects test''; continues to emphasize early coordination between Federal agencies, applicants and States; maintains the time frames for State review; further emphasizes the ability of States to define information needs specific to their State; does not exempt any Federal action from the ''effects test''; does not significantly alter the States' ability to participate in appeals to State objections; and is fully consistent with recent Federal court decisions.

While NOAA completed a comprehensive rulemaking in 2000, NOAA determined that some targeted improvements could be made based on the Energy Report and comments received on the ANPR questions. Some of the improvements addressing these issues, while initiated to respond to energy matters, will improve the consistency process in general, while other changes affect only the OCS subpart of the regulations.

Comment 6. CZMA section 307(c) has evolved into a program that, in many States, is used to ''regulate'' Federal activities through the consistency review process.

NOAA Response to Comment 6. The CZMA does not authorize States to regulate Federal agency activities. States may review Federal agency activities with reasonably foreseeable coastal effects and concur with or object to an activity, but the CZMA does not give the States any regulatory or enforcement authority over Federal agencies.

Comment 7. NOAA has made some progress in clarifying the ambiguities of the 2000 final rule. However, because of the great degree of latitude given States in interpreting what are reasonable and practicable information needs, Corps project managers are having difficulty meeting navigation project maintenance schedules established by the Congress through the budget process, while complying with coastal zone management programs. The fundamental question for Corps operations and maintenance activities becomes one of how, rather than whether, the project can be accomplished. Often, Federal agencies have little discretion to modify projects re-authorized by the Congress through the annual budget process.

NOAA Response to Comment 7. The comment demonstrates the need for Federal agencies and States to coordinate as early as possible in the planning of a Federal agency activity. Early coordination and identification of applicable State CMP enforceable policies should help determine what measures, if any, need to be taken so that the activity is consistent with the State policies. If a Federal law provides little discretion to modify a Federal agency activity, then the Federal agency should be better able to demonstrate that it is consistent to the maximum extent practicable.

Comment 8. We concur with NOAA's changes and explanations for § 930.31(a) (Federal agency activity); § 930.35(d) general negative determination); § 930.51(a) (Federal license or permit); § 930.58(a)(1) (Necessary data and information); and subpart H (Appeals to the Secretary).

NOAA Response to Comment 8. NOAA notes this comment.

Comment 9. NOAA should clarify its response to General Comment 3 in the proposed rule regarding Virginia's statement describing information needs related to Virginia's Chesapeake Bay Preservation Act Program.

NOAA Response to Comment 9. In the proposed rule NOAA informed the State that for Federal license or permit activities under 15 CFR part 930, subpart D, the State could amend its program to require that the detailed maps and delineation of Chesapeake Bay Preservation Areas on non-Federal lands be included as ''necessary data and information,'' pursuant to 15 CFR 930.58(a)(2). NOAA emphasizes that this is only for Federal license or permit activities and does not apply to required information for Federal agency activities. Thus, a Federal agency could not be required to provide this information to Virginia for a Federal agency activity. For Federal agency activities, a Federal agency is only required to provide the information described in 15 CFR 930.39, necessary to support its consistency determination. Since the CZMA does not grant States authority to regulate activities on Federal lands, there would be no Chesapeake Bay Preservation Areas to delineate on Federal lands located within Virginia.

Comment 10—Geographical Considerations. The rule does not make any revisions regarding the identification of offshore projects having reasonably foreseeable coastal effects. Considering NOAA's repeated observations that State reviews of OCS projects at distances far from a State's coastline would entail ''case-by-case'' consideration, API believes it would be inappropriate for NOAA to ever allow a State to amend its program to automatically include such a general geographic area of review. The right of such review, if ever justified by actual ''effects,'' should be confined instead to a case-by-case consideration under the procedures provided in 15 CFR 930.54 (review of unlisted activities). We urge NOAA and MMS to implement an MOA process whereby objective criteria can be employed to determine what are ''reasonably foreseeable effects.''

NOAA Response to Comment 10. NOAA continues to believe that a regulatory change is not needed to address State review of OCS plans located far offshore. As discussed in the proposed rule, such conflicts are isolated examples and can be dealt with on a case-by-case basis should an issue arise. A new regulatory process to determine when an OCS plan will have reasonably foreseeable coastal effects on a particular State would likely increase administrative and fact-finding burdens on industry, the States and Federal agencies. Finally, the case-by-case nature of Federal consistency review precludes rigid definitions of effects and what is reasonably foreseeable. 65 FR 77130, 2d col. (Dec. 8, 2000).

The determination of coastal effects for Federal license or permit activities is made by NOAA through the listing and geographical location description requirements in NOAA's regulations at 15 CFR 930.53. Each State must list the Federal license or permit activities it believes will affect its coastal uses or resources. The list becomes part of the State's management program development and may be revised through NOAA's program change procedures. *See* 15 CFR 930.53(c), and 15 CFR part 923, subpart H. When listing Federal license or permit activities, States must demonstrate whether the activity to be listed would have reasonably foreseeable coastal effects, when conducted inside the coastal zone. Once listed in the State's federally approved program, all applications for the listed Federal authorizations in the coastal zone are automatically subject to the consistency process.

States interested in reviewing activities located outside the coastal zone must provide to NOAA for approval a description of the geographic location outside its coastal zone where activities will be presumed to have coastal effects. Federal agencies and other interested parties may comment to NOAA during the approval process. NOAA's approval is based on whether effects on the coastal zone from the described geographic area are reasonably foreseeable.

A State may also review a listed activity located outside the coastal zone

that is not in a described geographic location as an ''unlisted'' activity on a case-by-case basis, pursuant to 15 CFR 930.54. NOAA's approval is required and is based on whether coastal effects of the proposed activity are reasonably foreseeable.

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

The geographic location description requirement for Federal license or permit activities has not been used for Federal authorizations described in detail in OCS plans when coastal effects are reasonably foreseeable because these activities are specifically described in the CZMA. 16 U.S.C. 1456(c)(3)(B). In the past, most OCS oil and gas plans were for projects located near shore and coastal effects were readily identifiable. Now, however, technology allows oil and gas projects to be located far offshore and the connection between a project and its effects on a State's coastal uses or resources is less certain. In cases where a person demonstrates that its project will not have coastal effects and the State disagrees, then the question of whether the ''effects test'' is met can be resolved through the mediation provisions of the CZMA, OCSLA provisions and/or litigation. Of course, this does not preclude the ability of a State to seek NOAA approval to describe an offshore area for OCS plans under § 930.53, or request to review a project as an unlisted activity under § 930.54.

Comment 11—Geographical Considerations. The rule overlooks the distinction made in the legislative history of the 1990 amendments between Congress's focus on the reversal of the *California* v. *Watt* decision and the expansion of State review of Federal agency activity to include lease sales, and the corresponding recognition by Congress that there would be no change in the status quo for State review of private permitting activity. We continue to take issue with NOAA's reading of the Congressional history of the 1990 amendments and Congress's various ''endorsements'' of NOAA's consistency policies at that time.

NOAA Response to Comment 11. NOAA disagrees. The 1990 CZMA amendments apply to all the consistency requirements. The ''technical amendments'' were to conform all of CZMA section 307 with the changes made to CZMA § 307(c)(1). Moreover, ''direct'' effects were not a limiting factor to the pre-1990 CZMA application of Federal consistency for Federal license or permit activities—the ''effects test'' was always the controlling factor. The Conference Report contains authority for NOAA's position, which is also supported by the discussion in the September 26, 1990, Congressional Record, incorporated by reference into the Conference Report.

Comment 12—Geographical Considerations. Earlier comments to the ANPR also questioned NOAA's revisions to the definition of a ''coastal use or resource'' within 15 CFR 930.11. NOAA has taken no specific action to remedy this overbroad definition and in the proposal does not acknowledge that adding terms such as ''scenic and aesthetic enjoyment'' broadens this definition, and thereby inappropriately expands the reach of the effects test.

NOAA Response to Comment 12. The definition of coastal use or resource did not create new thresholds, but is based on the effects test as described in the CZMA and the Conference Report for the CZMA 1990 amendments. *See* 65 FR 77123–77133 (Dec. 8, 2000).

Comment 13—Secretarial Appeal Criteria and Past Secretarial Appeal Decisions. In the June 11th notice, NOAA comments that the term ''development'' was used as a ''general descriptor for OCS oil and gas activities'', and further, that: ''[a]t this time, NOAA cannot foresee a case where OCS oil and gas activities do not further the national interest in a significant or substantial manner, inclusive of the exploration, development and production phases.'' While NOAA's comment is a positive statement, its position is still modified by the critical words ''[a]t this time,'' and remains in marked conflict with the precedential finding in the *Manteo* Secretarial override decisions that an OCS exploration plan targeting a potential natural gas reserve of 5 trillion cubic feet—which would constitute the largest find of domestic hydrocarbons since Prudhoe Bay—would make only a ''minimal'' contribution to the national interest. Because this inconsistency cannot be reconciled, the particular *Manteo* findings should be formally rescinded by the Secretary of Commerce in order to conform to NOAA's current articulation of CZMA national policy. Although Interior officials were quoted as describing the *Manteo* EP as the *most comprehensive exploration plan* prepared in the history of the U.S. offshore program, the Secretary refused to override based on the State's ''lack of information'' contentions. This experience seems to belie NOAA's insistence found elsewhere in its June 11th notice that the Secretary has given, and will continue to give, particular deference to comments from agencies with expertise over the activities which are the subject of the override appeals.

NOAA Response to Comment 13. NOAA maintains that, 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. NOAA can only speak, as a general matter and to the foreseeable future. As for the *Manteo* decision, all Secretarial appeal decisions are made on a case-by-case basis and rely on the record developed for that case. NOAA does not anticipate that the Secretary will reexamine the *Manteo* decision. Further, as discussed in response to comment 100, the Secretary gives the expert Federal agency's view more weight in the areas of its technical expertise than the views of other commenting Federal agencies. NOAA reiterates that each Secretarial decision is based on its individual decision record and evidence in that record may controvert an agency opinion.

Comment 14. API supports NOAA's acknowledgment of its responsibility under the President's National Energy Policy (NEP) to promote coordination between NOAA and MMS in OCS energy development. We believe, however, that the agency should more fully implement the requirement that the Departments of the Interior and Commerce work together to solve interagency conflicts and develop mechanisms to address differences in the OCSLA and the CZMA. API reiterates that any revisions to the Federal consistency process should incorporate a permanent mechanism for close consultation and coordination between NOAA and MMS such as a formal Memorandum of Agreement (MOA). The MOA could outline the respective responsibilities of the two agencies, institute procedures for ensuring decisions consistent with national energy policy and explain how each agency would meet the objectives of the NEP and Executive Order 13211, on streamlining energy project permitting, (Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use, May 18, 2001), and Executive Order 13212 stressing the importance of assessing impacts of government decisions on energy supplies (Actions to

Expedite Energy-Related Projects, May 18, 2001).

NOAA Response to Comment 14. As described earlier, this rulemaking is designed to address the CZMA recommendations in the Energy Report. Specifically, that report directed the Secretaries of Commerce and Interior to ''re-examine the current Federal legal and policy regime (statutes, regulations, and Executive Orders) to determine if changes are needed regarding energy-related activities and the siting of energy facilities in the coastal zone and on the Outer Continental Shelf (OCS).'' Energy Report at 5–7. This rulemaking similarly implements Executive Order 13212, which mandates that ''agencies shall expedite their review of permits or take other actions as necessary to accelerate the completion of such projects, while maintaining safety, public health, and environmental protections.'' NOAA is also coordinating with the President's Council on Environmental Quality on implementation of this Executive Order. Executive Order 13211 requires that agencies prepare and submit a Statement of Energy Effects to the President's Office of Management and Budget for certain actions, and NOAA continues to comply with this requirement when applicable. (Please see the Classification section, below.)

Neither executive order has created a need for a separate MOU with Interior or with other Federal agencies. An MOU is not necessary between MMS and NOAA on CZMA-OCSLA interaction, as the agencies have already established an interagency working group and policy decision group to facilitate interagency coordination concerning the CZMA and OCSLA. NOAA will maintain this effective arrangement.

Comment 15. We question NOAA's characterizations in its June 11th notice of the widespread success of the CZMA consistency process in the review of OCS activity. NOAA's statements do not make clear that the scope of offshore activity since 1990—and for that matter since the mid-1980s—has been severely curtailed. Indeed, the ''offshore statistics'' promoted by NOAA have been overwhelmingly generated by activities mainly occurring offshore Texas, Louisiana, Mississippi, and Alabama—four States with combined coastlines barely exceeding seven per cent of the length of the entire coastal shoreline of the continental United States. It cannot be accurately represented that the CZMA consistency review process for OCS activity serves the national interest unless and until that process is realistically employed and tested against offshore activities proposed to be conducted off of the East and West coasts—where, indeed, quite heated consistency battles have occurred in the past. Certainly, there are no ''flourishing'' OCS operations along coastal North Carolina, Florida, California, or New England.

NOAA Response to Comment 15. The CZMA requires States to consider the national interest when developing their management programs. When approving State programs and when evaluating proposed changes to State programs NOAA carefully considers elements of management program that may affect the national interest, particularly in energy facility siting. There is a large offshore oil and gas presence in the Gulf, and thus, statistics from MMS are undoubtedly representative of the OCS activities in the Gulf. However, OCS EPs and DPPs have been regularly approved off Alaska and California as well. Even after the Supreme Court's decision in 1984 that OCS lease sales were not subject to Federal consistency review, California found that most of the 150 or so wells associated with the Court's decision were consistent with the State's CMP. In addition, in the limited instances where a State has raised a CZMA objection, the Secretarial appeals process provided an appropriate remedy. Thus, the CZMA *does* support the national energy policy. Moratoria that currently preclude OCS oil and gas exploration in offshore areas are the result of Executive Orders or congressional enactments, and do not result from the CZMA.

Comment 16. Rule changes should not be based on unseen information. The preamble states that the proposed rule will implement recommendations of the Energy Report prepared by the National Energy Policy Development Group that was established by Vice President Cheney. The process that led to the preparation of the Energy Report often was not a public process and, indeed, the United States Department of Energy still refuses to release many of the documents that were created for and considered by the Task Force. If the recommendations of the Energy Report are to be the basis for the rule amendments, then all documents and records relevant to the Energy Report's preparation and recommendations must be made available to the public as part of the public docket for this rulemaking action and the comment period must be extended to afford members of the public an opportunity to review and comment on this information and evidence. The County is particularly interested in any documents that detail the need for the changes to the NOAA regulations that are now being proposed. For NOAA to proceed without disclosing such documents will be in violation of the Federal Administrative Procedure Act (5 U.S.C. 551 *et seq.*).

NOAA Response to Comment 16. NOAA's rulemaking implements the recommendations stated in the publicly available Energy Report (*http://www.whitehouse.gov/energy/index.html*). The rulemaking is not based on any particular information underlying the Energy Report. NOAA has developed its own administrative record to support this rulemaking. That record includes the ANPR, which asked what changes, if any, should be made in response to the Energy Report recommendations. In addition, the proposed rule sought public comment on NOAA's proposed changes. This final rule is based on public comments to the proposed rule and NOAA's analysis of its administrative record.

Comment 17. The preamble to the proposed rule says that in certain instances, OCS oil and gas lease sales may not affect the coastal zone, thereby suggesting that there will be a case-by-case review of whether lease sales require a consistency analysis. The County's position is that, given the impacts eventually caused by the development that follows lease sales, it will always be reasonably foreseeable that such lease sales will adversely affect the coastal zone in a manner that will require a consistency review. The development implications of lease sales are far too great to ever support a finding that they would have no adverse impact on the coastal zone.

NOAA Response to Comment 17. All Federal agency activities are subject to the effects test. The CZMA does not obligate MMS to automatically provide States with a consistency determination for all OCS lease sales, but, rather, requires that MMS determine whether a particular lease sale will have reasonably foreseeable coastal effects. If MMS determines coastal effects are reasonably foreseeable, it must provide the affected State(s) with a consistency determination.

Comment 18. In *Skokomish Indian Tribe* v. *Fitzsimmons*, 97 Wn. App. 84, 982 P.2d 1179 (1999), the Washington Court of Appeals invalidated the Department of Ecology's ''waiver'' of its right to object to the City of Tacoma's consistency certification, while simultaneously objecting to the adverse coastal effects of Tacoma's proposed hydroelectric license for the Cushman Dam project. The court held that a State CMZA agency illegally ''renders meaningless'' the federal and State CZMA regulatory schemes, when it ''choose[s] not to follow procedures

prescribed by law to ensure'' that federally licensed projects comply with State CZMA laws. *Id.* at 95. The Washington Supreme Court unanimously denied Ecology's petition for review. 143 Wn.2d 1018 (2000). NOAA's proposed rule must incorporate this principle, which (1) is fully consistent with the CZMA, and (2) carries out NOAA's desired effect in its rule change of providing greater ''transparency and predictability'' to the federal consistency regulations. First, NOAA should amend its rules to clarify that State agencies must either *clearly* concur (through express statement or by complete silence) or object to consistency certifications. Second, the rules must clarify that State CMZA agencies cannot expressly waive their CZMA rights if they have previously raised objections regarding coastal impacts that the proposed license does not address. Third, the rules must expressly acknowledge NOAA's and the federal licensing agency's respective duties to actively inquire into the legality of a State CZMA concurrence or objection that circumvents or contradicts the CZMA's goals and procedures, before the six month window closes. Fourth, the rules must provide an appeal and/or mediation mechanism for the licensing agency, NOAA, and the participating public to challenge illegal State maneuvers.

Comment 19. NOAA should adopt regulations to provide a mechanism for applicants to invoke NOAA's intervention and effective oversight during consistency review if a State attempts to request information beyond what is specified in NOAA and MMS requirements.

NOAA Response to Comments 18 and 19. A rule change is not needed to address this issue as the current rules provide sufficient guidance. NOAA agrees that States cannot expressly waive their consistency responsibilities. The State has an obligation to enforce its federally-approved CMP and to provide public input into those decisions. The preamble to the 2000 final rule discussed at length the requirement that States implement their programs and to conduct federal consistency reviews. *See* 65 FR 77126–77127 (Dec. 8, 2000). Likewise the 2000 rule discussed the need for States to either concur with or object to a proposed activity for which a State received a consistency certification (or concur with conditions pursuant to § 930.4).

NOAA and the authorizing Federal agency do not, however, have the authority to dictate to a State its interpretation of its own State law. Thus, a new CZMA appeal process cannot be developed to challenge ''illegal State maneuvers.'' If there is a CZMA procedural issue, any party can raise the issue to NOAA and NOAA may offer its views on the CZMA and its implementing regulations. *See* 15 CFR 930.3. The CZMA does not grant NOAA enforcement authority to override a State's decision during the six-month review period. NOAA can require the State to take corrective actions as part of the CZMA section 312 evaluation process and/or the Secretary can override a State's objection on procedural grounds if a State's objection is appealed to the Secretary.

Section Specific Comments

Section 930.3—Review of the Implementation of the Federal Consistency Requirement

Comment 20. We continue to propose that NOAA should undertake a more active review of State programs than the current three-year rotation undertaken pursuant to 15 CFR 930.3, and specifically suggest that such review should be conducted on a semi-annual basis. NOAA asserts that it does not review the validity of the State's underlying objection in a consistency appeal, but rather in a State program review. NOAA's ''de novo'' approach to appeals does not include a review of the underlying State's objection should be reevaluated in light of NOAA's statements regarding resource constraints NOAA says it faces in conducting section 312 program reviews. An important oversight function of the statutory scheme is not being effectuated, if the State's manner of carrying out their consistency responsibilities is not undergoing thorough review under section 312, as well as not reviewed as part of the consistency appeal process.

NOAA Response to Comment 20. As discussed in the proposed rule, the CZMA section 312 evaluation process is the primary means for NOAA to review State programs. When conducting these reviews, NOAA, among other things, evaluates the State's use of federal consistency. As for the Secretarial appeals, the CZMA specifically sets out the criteria for override. In addition, the Secretary reviews State procedural compliance as an aspect of the appeal process, *e.g.*, did the State meet the statutory and regulatory time frames. Additional oversight can be, and often is, provided on a day-to-day basis when a Federal agency, State or applicant bring a specific consistency issue to the attention of NOAA. NOAA may then investigate the matter and either provide its view or seek to mediate an agreement.

Section 930.4—Conditional Concurrences

Comment 21. The proposed rules do not address the States' use of conditional concurrences. We would like OCRM to clarify in the regulations that conditional concurrences are simply not contemplated under the CZMA.

NOAA Response to Comment 21. NOAA determined in the 2000 rule that conditional concurrences were allowable under the CZMA within certain parameters. NOAA's regulation, § 930.4, contains adequate standards to ensure State conditions are based on specific enforceable policies. If the requirements for a conditional concurrence are not met within the six-month review period, then the State decision is automatically treated as an objection. For instance, if an applicant does not agree with a condition and does not amend its application to the Federal agency, then the State decision is automatically an objection. Likewise, if a Federal agency finds a condition is contrary to its statutory mandate and refuses to accept the condition, then the State decision is automatically an objection. The benefit is that it allows a State to concur when it might otherwise object. If the conditions are acceptable to the applicant and the Federal agency, then the Federal agency can approve the project. All elements of the conditional concurrence process must be completed prior to the expiration of the State agency's review period. If each element in the conditional concurrence process is not complete prior to the expiration of the State's review period, the conditional concurrence becomes an objection automatically. NOAA's regulations, section 930.4(a)(1–3), set forth each element necessary to make the conditional concurrence effective. First, the State agency must state in its concurrence letter each of the conditions to be met and identify and explain how and why each condition is necessary to satisfy the enforceable policies of the State's CMP. Second, the Federal agency (subpart C) or applicant (subpart D, E, F or I) must change or modify its proposed activity, application or plan to incorporate and satisfy the conditions set forth in the concurrence letter. Third, the Federal agency (subparts D, E, F or I) must approve the *amended* application or amend its approval to include the conditions set forth in the concurrence letter. If these three elements are not satisfied within the State agency's review period, the State's conditional

concurrence letter automatically becomes an objection and the State's concurrence is not presumed pursuant to CZMA section 307(c). Thus there is no delay in the six month review period and there is clear direction regarding time frames, the substance of the conditions and whether the State has objected or concurred.

If a State agency issues a conditional concurrence under subpart D, but there is no response from the applicant and/or the authorizing Federal agency within the six-month review period, then the State's conditional concurrence automatically becomes an objection. If a State agency issues an objection within the six-month review period, then subsequently issues a conditional concurrence, the State's original objection remains in effect and the Federal agency cannot issue its authorization unless the objection is withdrawn by the State agency (or the Secretary, on appeal by the applicant, overrides the State's objection). A conditional concurrence letter issued subsequent to an objection letter after the six-month review period has expired has no effect upon the objection.

For purposes of an appeal to the Secretary pursuant to CZMA section 307(c)(3), an applicant's time to file a notice of appeal (or person's under subpart E or applicant agency's under subpart F) begins under one of the following three scenarios: (1) 30 days after receipt of the State agency's conditional concurrence if the applicant does not agree with the conditions; (2) 30 days after receiving notice from the Federal agency that the application for the approval as amended to meet the State agency's conditions is not approved; or (3) 30 days after the end of the State's six-month review period if neither the applicant nor the Federal agency respond to the conditional concurrence within the six-month review period.

Section 930.11(g)—Definitions—Effect on Any Coastal Use or Resource

Comment 22. We believe that the proposed change is unusually complicated and therefore oppose it. We suggest that because OCRM proposes to move the definition of ''federal action'' to § 930.1(b), the use in § 930.11(g) of the previously defined term ''federal action'' would be sufficient. As drafted, the language is confusing because it appears to use two distinct phrases, *i.e.* ''federal action'' and ''Federal agency activity or federal license or permit activity'' to refer to the same thing.

NOAA Response to Comment 22. Federal agency activity and federal license or permit activity are well-defined terms in the regulations and should pose no confusion. NOAA believes that in this particular section using the more specific terms as opposed to the general ''federal action'' term is more appropriate.

Section 930.31(a)—Federal Agency Activity

Comment 23. This section is all-inclusive and could mean ''any'' Federal agency activity. We do not believe the Congress intended for routine maintenance or other non-consequential activities to be subject to State consistency review. The language as proposed could give States authority to determine colors of paint for Government buildings or where Government employees might park on government property, for example. At subsection 930.51 of the proposed rule OCRM defined certain categories of federal license and permit activities that do not meet the test for requiring consistency determinations. Similar language should be included in this proposed subsection as well.

NOAA Response to Comment 23. This final rule does not identify categories of federal license or permit activities that are exempt from consistency. NOAA emphasizes, again, that the effects test is the determinative factor. Congress clearly intended for ''Federal agency activities'' to be interpreted broadly. NOAA did clarify in the proposed rule and in this final rule that a Federal agency activity is a proposal for action that has coastal effects. This is discussed in detail above. This clarification is not a new standard, but emphasizes long-standing agency interpretation.

Comment 24. The proposed section's recitation of a ''plan'' as an example of an action requiring a consistency analysis would introduce considerable ambiguity into the interpretation of the regulations. A ''plan'' can be many things to many people, as can something that ''direct[s] Federal agency action.'' As a practical matter, any proposal would have to have a certain degree of specificity in order for a meaningful coastal consistency analysis to be undertaken at all. The revised rule's proposed language of ''proposal for action which initiates an activity or series of activities * * *'' adequately captures those plans that would be ripe for analysis. Accordingly, the planning example should be stricken from the rule as revised. If NOAA believes it is necessary to retain the current language in the rule, the following statement should be added to the preamble discussion of the Navy pier project on page 34855 of the **Federal Register**, following ''The Federal agency activity for purposes of 15 CFR 930.31 is the proposal to build the pier.'' (add): ''Until this activity is sufficiently concrete to require analysis under the National Environmental Policy Act, it is not subject to a consistency determination.''

NOAA Response to Comment 24. Plans have always been included in the definition of Federal agency activity. The retention of plans as a Federal agency activity does not add ambiguity and the revisions to this section make the application of consistency to plans more clear. As described above in the explanation for the changes to this section, some federal plans will be used to initiate a proposal for action and some federal plans will be part of the Federal agency's pre-decisional deliberations and not be subject to federal consistency. NOAA cannot add the suggested sentence to the preamble since the application of NEPA is not necessarily a trigger for federal consistency. However, NOAA has added the following two sentences to the Navy example in the explanation for rule change 4: ''Under 15 CFR 930.36(b), the Federal agency determines when it has sufficient information to provide the State with a consistency determination. For instance, in this example of the Navy pier, the Navy could conclude that under Navy procedures the pier is not a proposed action until the proposed activity requires analysis under NEPA.''

Comment 25. The proposed changes would narrow the definition of federal activities. The addition of the phrase ''makes a proposal for action'' is troublesome since it could reduce the type of federal activity which may be subject to review for consistency. In the preamble, NOAA explains that the change is intended to eliminate review of pre-decisional activities such as planning documents. However, the explanation goes on to mischaracterize the recent Ninth Circuit Court of Appeals decision, *State of California* v. *Norton*, 311 F.3d 1162 (9th Cir. 2002), in which the Court embraced a broad definition of federal activities subject to federal consistency review. The change appears to be a thinly veiled attempt to eliminate review of certain activities, such as lease suspensions, in direct contravention of the Ninth Circuit's decision. NOAA characterizes such federal activities as interim or preliminary and thus not rising to the level of a federal activity for purposes of consistency review. The Ninth Circuit expressly rejected the argument that lease suspensions do not grant new rights or authority and are merely ministerial. The Court held that the

lease suspensions are discretionary and their approval involves the exercise of judgment and implicates policy choices. Because the decision to extend leases through the suspension process is discretionary, it does grant new rights to the lessees when, absent the suspensions, all rights would have terminated. (*State of California* v. *Norton*, *supra*, at p. 1173, fn. 6.) The proposed change is also contrary to Congress's express statement in the 1990 amendments in which Congress unequivocally stated its intent to adopt a broad interpretation of federal activity subject to consistency review. NOAA should not undermine Congressional intent by adopting a crabbed interpretation of Federal agency activity.

Comment 26. NOAA is not required to adopt a decision of the Ninth Circuit (*California* v. *Norton*) and extend such decision nationwide.

NOAA Response to Comments 25 and 26. On June 20, 2001, the U.S. District Court for Northern California ordered Interior to provide California with a consistency determination pursuant to CZMA section 307(c)(1) for the lease suspensions it issued for 36 leases located offshore California. *California ex rel. Cal. Coastal Comm'n* v. *Norton*, 150 F. Supp.2d 1046 (N.D. Cal. 2001), *aff'd*, 311 F.3d 1162 (9th Cir. 2002). The Court also ordered Interior to provide, pursuant to NEPA, a reasoned explanation for its reliance on a categorical exemption for the lease suspensions. On appeal by the United States, the Ninth Circuit affirmed the District Court's finding that the lease suspensions, in the case of these 36 leases, whether granted or directed by Interior, were Federal agency activities under CZMA section 307(c)(1), and not ''federal license or permit activities'' under CZMA section 307(c)(3)(A). The Ninth Circuit found that the suspensions allowed the leases to continue for lengthy additional terms and, more importantly, these leases had not been previously reviewed by California under the CZMA. The Court viewed the suspensions as an extension of the leases and thus any suspension of the lease was, in the Court's view, a Federal agency activity under CZMA section 307(c)(1). The Ninth Circuit further found that the lease suspensions at issue would have coastal effects since, among other things, the suspensions required lessees to engage in certain milestone activities which could affect coastal resources. The Ninth Circuit also determined that the effect of the 1990 amendments to the CZMA in overturning the decision of the Supreme Court in *Secretary of the Interior* v. *California*, 464 U.S. 312 (1984), is that lease suspensions are not subsidiary to exploration plans and development and production plans (and thus are not barred from consistency review by CZMA section 307(c)(3)(B)), and that activities with coastal effects preceding exploration plans and development and production plans are subject to consistency review. In making this finding, the Ninth Circuit stated:

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

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

As described above in the explanation of the changes to § 930.31(a), and elsewhere in this preamble, NOAA has not altered the consistency effects test nor has it altered the long-standing application of federal consistency to Federal agency activities. The revisions to the definition in no way narrow or limit the types of Federal agency activities subject to review. The changes more clearly state the long-standing NOAA interpretation of this section: that consistency applies to proposed activities and not to what a Federal agency might be thinking about doing. Likewise, the change does not eliminate planning activities from the ''effects test.'' Indeed, the preamble to the proposed rule and this final rule clearly state that some planning activities will be used by Federal agencies to propose an action with coastal effects and at other times the planning activities will not, but will be part of an agency's deliberative process to determine whether it will propose an activity. The definition of Federal agency activity articulated by the Ninth Circuit is not affected by these changes.

NOAA's view and the changes in this final rule are consistent with the Ninth Circuit's decision. NOAA is not exempting lease suspensions from consistency review and is not determining whether the lease suspensions at issue in *California* v. *Norton* are subject to consistency review.

The heart of the Ninth Circuit's decision is that lease suspensions cannot be categorically exempt from CZMA review. Applying the CZMA ''effects test,'' the Ninth Circuit found that the 36 lease suspensions at issue had coastal effects. It is NOAA's view that the Ninth Circuit's coastal effects determination is limited to the 36 leases in that case. NOAA believes that in all other foreseeable instances, lease suspensions would not be subject to federal consistency review since (1) they do not generally authorize activities with coastal effects, and (2) if lease suspensions did result in activities with coastal effects, they should be addressed in a State's consistency review of the lease sale, EP or DPP.

Comment 27. In its earlier ANPR comments, API pointed out that NOAA's previous remarks treating MMS activities such as five-year leasing plans as potential ''Federal agency actions subject to consistency review'' were not only inconsistent with CZMA legislative history, but also an incorrect application of the definition of ''Federal agency activity.'' API notes that NOAA has receded from this position and acknowledges that MMS pre-leasing activity is typically more in the nature of preliminary or interim agency action not considered to have reasonably foreseeable coastal effects. API also notes NOAA's recognition in its June 11th notice that application of the ''effects test'' for purposes of Federal agency consistency determinations is to be conducted by that particular Federal agency. API supports NOAA's articulation of consistency review policy on this issue. API also supports NOAA's deference to an MMS determination that lease suspensions should be considered ''interim activities'' having no coastal effects.

NOAA Response to Comment 27. NOAA has not ''receded'' from previous and long-standing interpretations of Federal agency activity. NOAA's preamble to the proposed rule reported that Interior informed NOAA that the 5-year leasing plan did not propose an action which would have reasonably foreseeable coastal effects. This is consistent with the long-standing definition of Federal agency activity that the Federal agency determines whether coastal effects are reasonably foreseeable. Regarding lease suspensions *see* response to Comments 25 and 26.

Comment 28. Without explanation, the proposed revision deletes ''exclusion of uses'' among listed

examples. We request that you reinstate this example to reflect the full purpose and intent of the CZMA. Conflicts between coastal uses can and do result from some Federal agency activities.

NOAA Response to Comment 28. If a Federal agency activity proposed an action that would exclude uses of the coastal zone, then that activity would have coastal effects and the Federal agency would be required to provide the affected State with a consistency determination. NOAA did not delete this example, but more broadly captured the concept (exclusion of uses) and other aspects of coastal uses in the revised example that says ''a proposed rulemaking that alters uses of the coastal zone.''

Comment 29. The 5-Year Leasing Program is a poor example and its use in this context unreasonably prejudices California's right to seek a determination of consistency. Five-Year Leasing Programs culminate in a formal decision pursuant to the OCSLA, as to the location, concentration and timing of OCS leasing nationwide that is believed necessary to meet the nation's energy needs. By law, this decision is based upon several factors, explicitly including a determination of coastal effects. Each 5-Year Leasing Program is accompanied by an Environmental Impact Statement, which assesses impacts of different leasing alternatives that affect the distribution and concentration of proposed lease sales around the nation. Additionally, each program is subject to a formal public review and comment process that does not meet the narrow exceptions of ''agency deliberations or internal tasks.'' Subsequent lease sales provide an opportunity to address the effects on coastal resources from developing only those leases involved in the lease sale. However, the lease sale is not the earliest time where consultation should commence and it occurs too late to consider alternative distributions and concentrations of leasing to best balance the nation's energy needs with protection of coastal resources. Those alternatives were finalized in the 5-Year Leasing Program. Accordingly, Santa Barbara County believes much earlier consultation on issues, which the federal consistency review process is intended to address and resolve through better alternatives, can and should occur during the 5-Year Leasing Program. The 5-Year Leasing Program does initiate a series of actions with reasonably foreseeable coastal effects. If it did not, it would not comply with the requirements of the OCSLA.

NOAA Response to Comment 29. NOAA agrees that an important objective of federal consistency is to facilitate early State-Federal coordination. Many of the modifications in this final rule are, however, made to clarify when consistency must attach. As pointed out in the comment, MMS' 5-year planning process is mandated by statute and is an initial exploration into whether and where OCS leasing might occur. As such, the 5-year plan looks at numerous issues, but, according to MMS, does not determine which leases may actually be offered for bid. MMS is the agency conducting the activity and NOAA must continue to rely on MMS's determination that the 5-year program does not propose an action with coastal effects. This is consistent with NOAA's statements regarding the 5-year planning process in the preamble to NOAA's 2000 rule.

Section 930.31(d)—Federal Agency Activity

Comment 30. The primary change proposed in this section is to eliminate the Federal option to treat a proposed general permit as a federal license or permit, rather than as a Federal agency activity. It is not clear whether a Federal agency has ever availed itself of this option or what advantages it might have. The final rule should further explain the significance of this change. In addition, the final rule should clearly affirm that when a State issues a consistency objection to the general permits, or other conditions are imposed on general permits that require case-by-case review, then the applicant must obtain the State's concurrence before relying on the general permit.

NOAA Response to Comment 30. NOAA's explanation of this change is provided in its explanation for rule change 5. Summarizing that explanation, NOAA removed the option to allow Federal agencies to treat their general permits as a federal license or permit activity for purposes of complying with CZMA § 307 and 15 CFR part 930. A State objection to a consistency determination for the issuance of a general permit alters the form of CZMA compliance required, transforming the general permit into a series of case-by-case CZMA decisions and requiring an individual who wants to use the general permit to submit an individual consistency certification as an ''applicant'' in compliance with 15 CFR part 930, subpart D.

Comment 31. We suggest that the phrase ''[i]f the State's conditions are not incorporated into the general permit'' should be clarified. If the language used by the Federal agency to incorporate the State-proposed condition varies in any way from the State-proposed condition or if other conditions of the federal permit conflict with or override the State-proposed condition, this should cause the general federal permit to be a federal licensing or permitting action and not a Federal agency activity. With such clarification, we do not oppose the proposal.

NOAA Response to Comment 31. Section 930.4 is clear that State conditions of concurrence for a general permit must be based on enforceable policies and if the conditions are not, to the maximum extent practicable, included in the general permit, then the State has objected and the general permit will not be available to an individual who wants to use the general permit until the individual user has satisfied the requirements of subpart D.

Comment 32. We have concerns about NOAA's proposed amendments to section 930.31(d) to clarify that if a State objects to a Federal agency's consistency determination for a general permit, all potential users of that general permit would thereafter have to furnish individual consistency certifications for State review. This procedure counters the fundamental purpose of the general permit process. Indeed, NOAA's position conflicts with its own recognition of the nature of the federal approval involved in an MMS lease sale, whereby MMS can with justification proceed to conduct the lease sale even in the face of State consistency objections. NOAA has consistently recognized that individual lessees, in taking their leases from the MMS after such a sale is conducted, would not have to furnish individual consistency certifications.

Comment 33. A general permit may have adverse impacts on the coastal zone that are only revealed on a case-by-case review. Therefore, while a State may not find a basis to object to a general permit, such as an NPDES permit, the actual application to a particular situation involving sensitive coastal resources may make a consistency review appropriate and necessary. The rule amendments should reflect this possibility.

Comment 34. Some general permit conditions necessitate case-by-case reviews to verify that the project meets the requirements for coverage.

NOAA Response to Comments 32, 33 and 34. The purpose of a general permit is to develop conditions of use so as to eliminate individual case-by-case reviews. Thus, if a State concurs with the general permit (including those conditions of use), then the State is not allowed to review case-by-case uses of the general permit. As noted in the explanation to rule change 5, the general

permits are a hybrid between a Federal agency activity and a federal license or permit activity. Thus, NOAA added this section in the 2000 rule requiring that when a State objects to a general permit, even though the general permit is still issued, it is not available for use in that State until an individual who wants to use the general permit provides the State with a consistency certification pursuant to subpart D, and the State concurs or the Secretary overrides a State's objection to the individual consistency certification. There is no conflict with NOAA's regulations. A Federal agency could, pursuant to the consistent to the maximum extent practicable standard, still proceed with issuing a general permit, but individual users could not avail themselves of the general permit if the State objected, until after the requirements of 15 CFR part 930, subpart D are met.

NOAA has modified the proposed language to clarify that it is an individual intending to conduct an activity pursuant to a general permit who would become an ''applicant'' pursuant to subpart D and must provide the consistency certification to the objecting State.

Section 930.32—Consistent to the Maximum Extent Practicable

Comment 35. The proposed rule does not address use of the terms ''consistent to the maximum extent practicable'' and ''fully'' consistent. We interpret the latter term to be absolute. The plain definition of ''fully'' means ''completely.'' We have not found anywhere in the CZMA or subsequent amendments of 1990 and 1996 where the Congress explicitly mandates that Federal agencies comply with every State coastal zone requirement regardless of cost or national implication. We ask that the OCRM revise the proposed rule to clarify that budget authority may limit a Federal agency's ability to be fully consistent.

NOAA Response to Comment 35. The definition of ''consistent to the maximum extent practicable'' clearly reflects the language and intent of the CZMA and was not changed in 2000 from its 1979 definition. NOAA's language was specifically endorsed by Congress in the conference report to the 1990 CZMA reauthorization and has been upheld by Courts since then. In addition, NOAA discussed the relationship between statutory requirements regarding the consistent to the maximum extent practicable standard and appropriations law at length in the preamble to the 2000 rule. *See* 65 FR 77133–77135 (December 8, 2000). The suggested changes would provide Federal agencies with complete discretion as to whether their activities would be consistent with a State's enforceable policies. Such a change would violate the statute and cause ambiguity in the application of the section.

A recent Federal court decision has addressed NOAA's definition of ''consistent to the maximum extent practicable.'' *In California Coastal Commission* v. *Dept. of the Navy*, 5 F. Supp. 2d. 1106 (S.D. Cal. 1998), the Navy argued that it complied to the ''maximum extent practicable'' with California's dredging and disposal policies because it was obligated to follow a modified § 404 permit issued by the Corps. The court noted that the federal permit was ''not existing Federal law'' that would excuse compliance with the State policies and consistency requirements of the CZMA. *Id.* at 1111. Congress partially waived the Federal Government's supremacy over State law when it created the CZMA. As such, the only *objective* means to determine ''consistent to the maximum extent practicable'' is based on the legal requirements of Federal agencies and their administrative records. The 2000 rule, in response to requests by Federal agencies, provided clear guidance as to when a Federal agency can proceed over a State's objection: Due to an unforeseen circumstance or emergency, or when a Federal agency asserts, based on its own administrative decision record, it is fully consistent, or because of the requirements of other Federal law. NOAA has provided, and will continue to provide, advice to Federal agencies on how to effectively use the consistent to the maximum extent practicable standard in connection with their statutes and individual case-by-case decision records.

Section 930.35(d)—General Negative Determination

Comment 36. NOAA should consider written notification response requirements for States under Section 930.35(c) similar to that under § 930.41(a), thereby requiring States to provide written notification to a Federal agency if a State objects to a negative determination. Any such State response should also be required to provide supporting information regarding the State's assertion that coastal effects are reasonably foreseeable.

NOAA Response to Comment 36. The 14-day response in § 930.41(a) is merely a completeness notification to the Federal agency. It is not a substantive response. The substantive response for a consistency determination is the 60-day period in § 930.41(a). This same 60-day period is already included in § 930.35(c).

Comment 37. This provision would shift the emphasis away from a case-by-case consideration of consistency and reasonably foreseeable coastal effects to deciding what are ''repetitive activities.'' The proposed change effectively creates a consistency exemption for an undefined category of ''repetitive activities.'' The proposed rule does not provide adequate parameters to determine what are ''repetitive activities,'' and how similar in nature the activity must be for agencies to avail themselves of this option. There is a concern that issuing a general negative determination may have the practical effect of minimizing full consideration of ''cumulative impacts'' that may be increasingly significant for ongoing activities. Several States also raised a concern that a general negative determination would effectively limit public notice and review of these repetitive activities. There is strong opposition to the lack of adequate procedural safeguards in this proposed change. Any final rule providing for a general negative determination must be amended to provide: (1) A clear definition of what constitutes ''repetitive activities'' and a requirement that Federal agencies closely monitor activities to assure that there are no cumulative or unforeseen impacts; (2) In describing in detail the activity it is not adequate to set out ''expected number of occurrences over a specified period of time.'' Additional safeguards must be added to the final rule requiring agencies to provide sufficient details about when and where the activity would occur, and requiring that the States and public should be advised in advance of the actual occurrence and location of such activity to assure that it is being carried out as originally represented; and (3) Agencies should not have the option (''may'') of periodically reviewing the general negative determination. The final rule must provide that Federal agencies are required (''shall'') to reassess at least every three years or sooner if deemed necessary by the State or Federal agency.

Comment 38. New Jersey's Coastal Management Program does not object to the concept, provided that the Federal agency be required to reassess whether the general negative determination remains applicable every five years.

Comment 39. We do not oppose the concept of a general negative determination, and we generally support the proposed rule text. We do, however, support the concept of a mandatory periodic review of the

general negative determination, but suggest that prior to undertaking each review the Federal agency should be permitted to request an affirmative waiver of the review from each affected State. This should relieve the Federal agency from unnecessary paperwork where there is no disagreement regarding the effects of the activity.

Comment 40. We recommend that this paragraph include consideration of situations in which an activity conducted under a general negative determination actually does have or may have coastal impacts. Specifically, we suggest that the Federal agency should be required to immediately discontinue the use of the general negative determination and conduct a new review of the activities to see whether a general negative determination or an individual consistency determination is more appropriate.

NOAA Response to Comments 37, 38, 39, 40. The general negative determination category does not create an exemption. It can only be used when a series of Federal agency activities do not have coastal effects, either direct, indirect or cumulative. The general negative determination is consistent with the case-by-case analysis embodied in federal consistency reviews because the general negative determination covers a single activity which occurs frequently or repetitive activities related to a single action or project. Likewise, a definition of ''repetitive'' is not needed; this can be determined on a case-by-case basis. The new section, along with the rest of the negative determination section, provides sufficient guidance to Federal agencies for adequately describing the activity at issue.

Federal agencies should not be required to reassess their negative determinations within a specific time frame. Currently, Federal agencies are not required to reassess their consistency determinations, general consistency determinations or negative determinations. Therefore, a reassessment every few years should not be required for general negative determinations. The CZMA does require, of course, that Federal agencies provide States with a consistency determination if its activity, subject to a previous negative determination or general negative determination, later has coastal effects. Such matters would be covered by the pre-existing sections for previously reviewed Federal agency activities under §§ 930.45 and 930.46. If a Federal agency finds that activities covered under a general negative determination are having coastal effects, the Federal agency would be obligated to provide the affected State(s) with a consistency determination under § 930.34(a)(1). A State could also notify the Federal agency if the State later maintains that an activity subject to a previous negative determination is having coastal effects. If the Federal agency agreed, the Federal agency would have to conduct the activity consistent to the maximum extent practicable with the State's enforceable policies.

Comment 41. We endorse and appreciate NOAA's proposed rulemaking establishing a general negative determination option for Federal agencies.

NOAA Response to Comment 41. NOAA notes this comment.

Section 930.41(a)—State Agency Response

Comment 42. We support the requirement for States to provide a written response within 14 days if more information is required pursuant to 930.39(a). Written responses will alleviate the scheduling ambiguity that can occur based on informal discussions.

NOAA Response to Comment 42. NOAA agrees that the 14-day notification will alleviate discrepancies in determining when the 90-day review period has begun.

Comment 43. We understand the intent of OCRM, but this subsection, as written, is likely to cause more confusion than clarity. We recommend that the last full sentence be broken into two separate but modifying sentences to read as follows: ''Thus, if a Federal agency has submitted a consistency determination and information required by 930.39(a), then the State agency shall not assert that the 60-day review period has not begun because the information contained in the items required by 930.39(a) is substantively deficient. Additionally, the failure to submit information that is in addition to that required by 930.39(a) shall not be a basis for asserting that the 60-day review period has not begun.''

NOAA Response to Comment 43. NOAA agrees that breaking the sentence into these two sentences is clearer and has done so in the final rule.

Comment 44. Replacing the word ''immediately'' with a 14-day period is a positive change. This time period is more realistic considering the workloads of State consistency review staff.

NOAA Response to Comment 44. NOAA notes this comment.

Comment 45. The proposed modifications to the regulation purport to clarify the provision in the existing regulations that provides that the time period for a State to review a consistency submittal does not start until the State receives the necessary data and information. However, the proposed change eliminates any meaning of this provision and will allow the time period to begin upon receipt of the submittal in almost all situations, effectively eliminating the States' ability to evaluate the content of a consistency submittal before acting on it. The purpose of this ''clarification'' appears to be removing discretion from States to seek the information requirements they need to analyze Federal agency activities. This clarification would render the information requirements virtually meaningless and contravene their intent. For example, in many cases, a consistency submittal will include an analysis of some of the relevant policies, but fail to consider other relevant provisions of the State's coastal program. The changes will require the State to initiate the time period for consistency review despite the fact that the submittal is missing analysis of important coastal program policies. To date, we have never received any objections or concerns raised by Federal agencies when we have asked for additional information necessary to support the agency's conclusion. Like many of the proposed changes, this change is a solution in search of a problem. The proposal is unnecessary, erodes the State authorities, and renders the information requirements meaningless.

Comment 46. The 14-day period should be 21 or 30 days to assure that States have adequate time to review more complex proposals. It is in both the agency and the State's interest that the consistency determination and supporting information be as complete as possible to assure expeditious and qualitative review. The final rule should also clarify that failure of a State to notify the agency of missing information within 21 or 30 days shall not bar the State from subsequently seeking necessary information and/or objecting to a consistency determination for lack of adequate information.

Comment 47. It is anticipated that, with minor clarification, the proposed 14-day notification to the Federal agency that the 60-day review has not begun due to insufficient information will not impede Texas' review process. It is in both the agency and the State's interest that the consistency determination and supporting information be as complete as possible to assure expeditious and qualitative

review. However, the final rule should clarify that failure of a State to notify the agency of missing information within 14 days shall not prevent the State from subsequently seeking necessary information and/or objecting to a consistency determination for lack of adequate information.

NOAA Response to Comments 45, 46, and 47. The State has 60 days (plus applicable extensions) to issue its consistency concurrence or objection. The State would not have to issue its concurrence or objection during the 14-day ''completeness/checklist'' review. The completeness/checklist review is not the State's substantive review of the activity, and does not preclude the State from requesting additional information during the 60-day review period or objecting for lack of information. Requesting additional information and objecting based on lack of information are covered by § 930.43(b), which is not being changed. The completeness/checklist review is merely to clarify when the 60-day review period begins by determining if the information required by § 930.39(a) is submitted to the State. This would not always result in the time period starting on receipt of whatever the Federal agency provides to the State. Using the commenter's example, if the Federal agency failed to address applicable enforceable policies in the State's federally approved CMP in its consistency determination, then the Federal agency's submission would not be complete. The State could so notify the Federal agency within the 14-day completeness/checklist notification period, and the 60-day review period would not begin until the Federal agency addressed the enforceable policy. If, on the other hand, the Federal agency submitted all information required by § 930.39, including an evaluation of all applicable enforceable policies, then the 60-day review period began when the State received that information, even if the State believed that the Federal agency's analysis was not an adequate evaluation the policies. Otherwise, a State could delay the start of the consistency review period indefinitely by claiming the Federal agency's information was not good enough. Such a result would directly conflict with Congressional intent to balance State needs with federal interests in efficient and timely decision-making. In addition, to further clarify, while the State may request additional information during its 60-day review and may object for lack of information, States have never had the ability to describe information for Federal agency activities needed to start the 60-day review period. For Federal agency activities under CZMA section 307(c)(1), the Federal agency has always made the initial determination of coastal effects and it is the Federal agency's decision that it has sufficient information to provide the State with a consistency determination. *See* 15 CFR 930.36 and 930.39.

Comment 48. NOAA should ensure that the requirements of § 930.39(a) are clear enough to provide a complete project description adequate for State review purposes, as well as the information requirements of the applicants, agencies, and States. NOAA should clarify the relationship between this section and other sections of the regulations that provide information requirements (i.e., § 930.58—necessary data and information, and § 930.60—commencement of State agency review).

NOAA Response to Comment 48. Section 930.39(a) contains a clear statement to Federal agencies of the information they must submit with a consistency determination. There is no relationship between subpart C and subpart D regarding information needs. Subpart C is for Federal agency activities and subpart D for federal license or permit activities. The requirements are distinct because of the different standards in the statute for determining consistency, i.e., consistent to the maximum extent practicable for Federal agency activities and fully consistent for federal license or permit activities. This distinction allows States flexibility to describe ''necessary data and information'' for subpart D and E, whereas it does not for subpart C.

Section 930.51(a)—Federal License or Permit

Comment 49. The revisions do not appear to significantly alter the original intent of the rule. The State does not object to the proposed rule changes.

Comment 50. We support this change because it will ensure that the definition of the term ''federal license or permit'' is clearly and narrowly defined, and will not include activities that have no coastal effects.

NOAA Response to Comments 49 and 50. NOAA notes these comments. NOAA also notes, however, that the change in definition did not ''narrow'' the definition, but clarified NOAA's long-standing interpretation. *See also* response to comment 51.

Comment 51. We do not understand the decision to delete ''certification, approval, lease, or other form of permission'' and the definition of ''lease'' from the existing definition of Federal License or Permit. The proposed deletions do not clarify the definition; therefore, existing language should be retained. Alternatively, the definition of ''lease'' could be transferred to 930.11.

NOAA Response to Comment 51. As described in the explanation for this revision, the change to the rule ensures that the definition of ''federal license or permit'' is not overly-inclusive or beyond the commonly understood meaning of license or permit, while at the same time retaining the phrase ''any required authorization'' to capture *any form* of federal license or permit that is: (1) Required by Federal law, (2) authorizes an activity, (3) the activity authorized has reasonably foreseeable coastal effects, and (4) the authorization is not incidental to a federal license or permit previously reviewed by the State. Thus, the removal of the forms of approvals listed in the current language does not exclude a category of federal authorizations from federal consistency, but emphasizes that any form of federal authorization must have the required elements to be considered a ''federal license or permit'' for CZMA purposes. Thus, ''leases'' are also removed from the rule, but are still a federal authorization if the four-part test is met.

Section 930.51(e)—Substantially Different Coastal Effects

Comment 52. The proposed change would limit the State's review of federally licensed or permitted activities where substantially different effects than those contemplated during consistency review occur and a new or amended submittal is warranted. Where an activity was previously approved, the Federal agency (not the State) would determine whether the effects are substantially different and warrant State review. Although the State's opinion would be given considerable weight, it would not be given any deference. NOAA proposes this change because it considers the Federal agency, rather than the State, to be the expert on whether a permitted activity is having effects different than those effects anticipated during review. However, this change substantially erodes the State's authority and its ability to review federal license or permit or permit activities which are not proceeding as originally represented or which are having unexpected effects. It will likely encourage disagreement and lead to litigation. It is also contrary to Congress's expressed intent that the federal consistency process be a joint and equal partnership between the State and Federal agencies. NOAA states in the preamble that the ''expert permitting Federal agency'' will make the determination about whether the effects are substantially different on the State's

coastal zone. The State, rather than the Federal agency, should be considered the expert on the effects on the State's coastal zone and whether the effects are substantially different than previously reviewed.

NOAA Response to Comment 52. The change to this section does not limit a State's ability to review federal license or permit activities. This change provides a more clear process. This section, added in the 2000 rule, was designed to provide some guidance in determining when a ''renewal'' or ''major amendment'' of a previously reviewed federal authorization would have substantially different coastal effects, and thus the renewal or major amendment would be subject to consistency review. The 2000 language did not establish a decision maker, but encouraged a joint consultation process to make this determination. NOAA, as stated in the proposed rule, meant for the State's view to be accorded considerable weight in making this decision. However, NOAA now believes that there needs to be finality to this determination, requiring a decision-maker, and believes that the authorizing Federal agency is in the best position to make this determination. As provided for in the new section, the Federal agency must consult with the State agency and the applicant, give considerable weight to the State agency's view, and shall broadly construe the effects test to ensure that States have the opportunity to review activities with coastal effects not previously reviewed under the CZMA.

Comment 53. Under the proposed regulations, the Minerals Management Service (MMS) would determine whether a change is significant and would submit the amended plan to the State. The proposed revisions confuse the determination that the MMS makes under section 25(i) of the OCSLA (43 U.S.C. 1351(i)) as to whether or not a proposed modification of a DPP or other OCS plan is or is not ''significant'' for purposes of the OSCLA (see 30 CFR 250.204(q)(2)) with the entirely different standard under sections 930.51(b)(3) and (c) of the CZMA regulations of whether or not a proposed OCS plan modification will have effects ''substantially different than those originally reviewed by the State agency.'' Thus, whether or not a proposed modification of a DPP is or is not ''significant'' for purposes of the OCSLA has little or nothing to do with the completely separate and distinct determination of whether or not the modification satisfies the standard of 15 CFR 930.51(b)(3) and (c).

NOAA Response to Comment 53. This comment raises a connection between determining substantially different coastal effects under § 930.51(e) and amended OCS plans. These sections are not ''entirely different standards,'' but are complementary. The change to § 930.51(e) creates a more consistent standard with changes to OCS plans since, pursuant to the OCSLA, MMS determines whether an amended OCS plan rises to the level where another consistency review is warranted.

Comment 54. We support this improvement because it leaves the decision making relative to a federally issued license or permit with the expert Federal agency that initially issued such permit or license.

NOAA Response to Comment 54. NOAA notes this comment.

Section 930.58—Necessary Data and Information

Comment 55. It is important that the current language in subsection (a)(1)(ii) requiring the applicant to submit information ''sufficient to support the applicant's consistency certification'' be retained. It is not necessarily sufficient, as provided in the proposed revisions, that the applicant ''relied on the information'' or that it was included in permit application material prepared to determine compliance with Federal permit requirements. What if the applicant ''relied on'' information that is unrelated to the applicable enforceable policies or is provided in error to support its consistency determination? It is important to retain the link between information provided by the applicant and the standard that it support an applicant's consistency determination. This reflects an important objective of the CZMA, which is to assure that agency and applicants substantively incorporate applicable State policies into their planning process.

NOAA Response to Comment 55. The necessary data and information described in the revised rule contains specific and clear requirements for information needed to start the six-month review process. These requirements are sufficient to provide for a thorough State review. Applicants must submit any information relied on in making their consistency certification to the State. This requirement is intended to capture all information relevant to the certification, but exclude information an applicant is not able to obtain or is not relevant to the applicant's certification for consistency. The requirement for applicants to consider the State's enforceable policies is not changed by this rulemaking and can be found at § 930.58(a)(3). Likewise, the effects analysis that an applicant must submit is still included. If the State needs information that is in addition to the necessary data and information required by § 930.58(a) prior to the start of consistency reviews, then the State must amend its management program pursuant to § 930.58(a)(2). Once the State's six-month review begins, the State may make a written request for additional information pursuant to § 930.63(c), if the State needs the information to determine consistency with its enforceable policies.

Comment 56. We support the proposed revisions to § 930.58 as adding specificity to what an applicant is required to provide to obtain a State's consistency decision in a timely, responsible fashion. However, we urge NOAA to further amend § 930.58 to clarify that a Federal agency's NEPA process is separate and distinct from the State's CZMA process unless the Federal agency, State, and applicant agree to address consistency requirements in NEPA documentation, and that a State may not delay processing an applicant's consistency certification pending completion of the Federal agency's NEPA or other environmental processes. This change is needed because applicants for FERC certificates have recently experienced problems and delay in trying to obtain consistency decisions for proposed projects. In one particular case, prior to beginning its consistency review, the State required the applicant to submit: (1) A federal consistency Assessment Form; (2) a copy of the application(s) along with any supporting documentation filed with FERC; and (3) a copy of FERC's Draft Environmental Impact Statement (DEIS). Subsequently, the State informed the applicant that FERC's DEIS should include a narrative assessment of the effects of the entire project on, and its consistency with, all of the applicable State Coastal Policies related to land and water uses, natural resources, energy development and cultural resources. The State further stated that its review of the consistency certification would not begin until after this information was received and it determined whether it and all other necessary data and information were adequate to address the effects of the proposal on the coastal zone. At a later date, the State informed the applicant and FERC that it would not begin its consistency review of the project until the FEIS had been issued. In fact, the State did not commence its consistency review until after FERC issued its FEIS.

Tying a State's commencement of its consistency review to a Federal agency's

completion of its NEPA review subverts the six-month time frame provided in the CZMA and harms applicants and Federal agencies in their efforts to review and approve proposed projects in a timely fashion.

Comment 57. API supports NOAA's general recognition that it would be impractical to require any NEPA documents in draft or final form to be included as information necessary to start the six month review period with regard to OCS plans, considering the OCSLA's explicit requirements for MMS to make decisions regarding an EP, as well as a DPP, within shortened time periods. However, the proposal appears inconsistent to then indicate that a State could nevertheless seek to amend its CZM program to require its receipt of any draft EIS prepared in connection with a DPP, in order for its consistency review period to begin.

NOAA Response to Comments 56 and 57. NOAA agrees that the CZMA and NEPA processes are separate and that the effects analyses for CZMA and NEPA are different. NOAA also agrees that, while addressing the requirements of other Federal statutes in NEPA documents is usually administratively efficient and encouraged by NEPA, the CZMA does not authorize States to require that CZMA-related information be included in the NEPA document. However, while States cannot describe necessary data and information for Federal agency activities under CZMA section 307(c)(1), States may do so for federal license or permit activities under CZMA section 307(c)(3). The ability of States to include DEIS's or FEIS's that are required for a federal license or permit activity as necessary data and information under § 930.58(a)(2), does not subvert the two statutes or confuse the separate CZMA and NEPA processes. The NEPA documents are only being included since they contain environmental information that the State believes is important to make its consistency decision. Since the Federal agency cannot make its decision until the NEPA process is complete, there is little or no time lost to the applicant.

However, NOAA added language to clarify that when a Federal statute requires a Federal agency to initiate the CZMA review prior to its completion of NEPA compliance, NEPA documents will not be considered necessary data and information pursuant to § 930.58(a)(2). For example, when the operation of a Federal statute precludes a Federal agency from delaying the start of the CZMA process because the NEPA document is not complete, NEPA documents listed in a State's management program cannot be considered necessary data and information. This issue has come to light in the case of the Outer Continental Shelf Lands Act (OCSLA). *See* explanation of rule change 15: § 930.76(a) and (b) Submission of an OCS plan, necessary data and information and consistency certification. In addition, neither the CZMA nor NEPA require the Federal agency to include CZMA consistency determination information in NEPA documents. Therefore, States cannot delay the start of the CZMA review period because CZMA consistency information is not included in a NEPA document. *See also* explanation to rule change 12.

Comment 58. A State delay in commencing, or completing, consistency review of a project pending an applicant obtaining permits from a county or other local government agency has the potential to unduly delay the approval of projects involving coastal issues.

NOAA Response to Comment 58. NOAA's change to § 930.58(a)(2) removing State permits from necessary data and information addresses this concern.

Comment 59. It is the States' understanding that the elimination of ''permits'' from the list of necessary data and information will not limit the State's right subsequently to object to the consistency determination if an applicant fails to secure necessary permits. The final rule should expressly affirm this understanding.

Comment 60. We disagree with the proposed deletion of the words ''permit or'' in § 930.58(a)(2). As one of many existing networked CZM programs, we base our consistency decisions in part, on the receipt of local or State permits. If a local or State permit exists we need to know. Asking for this information in a subsequent letter will cause time delays. Therefore, providing proof of issued local and State permits is necessary data and information needed to make a timely consistency decision.

Comment 61. Concurrent submissions with no change in the time frames of the respective administrative processes will lead to a State making a decision on the federal consistency application prior to making a decision on the related State permit, and will result in the perception, if not the reality, that the State permit has been pre-judged. This is not likely to be acceptable to the regulated community. Accordingly, we have identified three alternatives, any of which would resolve this issue: 1. Federal consistency review should commence only after the State permit process is complete; 2. Concurrent submissions would only be acceptable if the timeline for federal consistency review is significantly extended to be consistent with the time it actually takes to process State and local permits (anything less than 12–18 months would be unreasonable.); or 3. The rules could be changed to provide States the ability to issue phased federal consistency concurrences with the preliminary or conceptual concurrence.

NOAA Response to Comments 59, 60 and 61. As described in the explanation for rule change 12, elimination of State permits from necessary data and information is needed to address an untenable situation where the six-month review process could only begin at the same time the State determines the activity is consistent by issuing a State permit. Such a procedure has the potential to defeat the statutory six-month review requirement. It would also prejudice both the applicant and the public since it would preclude public comment during the six-month review if the State has already issued a permit representing the State process for determining consistency.

Removing State permits from necessary data and information only affects starting the six-month review period. This change does not affect the States' ability to require that a State permit (which contains State enforceable policies) be issued in order to find a project consistent or object to an activity because the applicant did not obtain the State permit within the six-month period. This does not result in ''pre-judging'' the State permit if the permit is not acted upon within the six-month CZMA review. States may object to the consistency certification while providing that the objection will become a concurrence if the State permit is issued.

NOAA cannot extend the federal consistency review period beyond the statutorily mandated six-month period to accommodate State permit processes. As suggested by the comment, a State could issue a ''preliminary'' decision within the six-month time frame so long as its final decision is issued within the same six-month period. A State and applicant could also agree to stay the six-month period to a date certain, to allow the State's permit process to be completed. *See* discussion of rule change 13, § 930.60, for staying the six-month review period.

Comment 62. If a proposed federal activity has already received State or local government permits, applicants should be required to provide the State with those permits along with the data and information developed during the review and approval of the State or local

government permit. Therefore, additional language is required to clarify that the States can request permitting information for projects that may already be permitted.

NOAA Response to Comment 62. If an applicant received a State permit prior to the six-month consistency review and the State has described ''permit applications'' in its program as necessary data and information pursuant to § 930.58(a)(2), then the applicant would merely have to provide the State with the previously issued permit to show it met the information requirement. No change to the rule is necessary.

Comment 63. API endorses NOAA's attempted clarification of the definition of a ''federal license or permit'' requiring consistency review, as well as the deletion of the confusing phrase ''comprehensive data and information sufficient to support the applicant's consistency certification'' presently appearing in 15 CFR 930.58(a)(1). API requests clarification that the protections now afforded in § 930.58(c) to an applicant's confidential and proprietary information still remain in place if this substituted language is adopted. API would also suggest that NOAA consider restating the protection found in subpart (c) of § 930.58 by rephrasing the substituted language in subpart (a) to read ''any other non-confidential and non-proprietary language relied upon.''

NOAA Response to Comment 63. Section 930.58(c) was not proposed to be modified and the protections afforded by paragraph (c) remain in effect. No re-wording is necessary.

Comment 64. We support the new specific information requirements because they will make the process predictable and more transparent.

NOAA Response to Comment 64. NOAA notes this comment.

Section 930.60—Commencement of State Agency Review

Comment 65. The States reject the characterization that State review is merely a ''checklist.'' The information should be adequate to address applicable State coastal policies, and to ''support the applicant's consistency determination.'' The final rule should also be amended to clarify the relation between the timelines established in subsections (a)(1)(i) and (a)(2). The provisions in (a)(2) provide that the State agency's consistency review commences on the date that any missing information was received by the State agency. The language in (a)(1) should be amended to include a specific cross-reference to the timeline provided in (a)(2). In addition, the applicant should bear the responsibility of promptly responding to a State request for missing information in order to assure that States have adequate time to review all information. It is not sufficient for the applicant to provide the information ''during the review period.'' There is also a concern about the deletion of language requiring that missing information or other deficiencies be ''corrected'' or ''cured'' by the applicant. There is some concern that eliminating these requirements could result in turning the applicant's review from a substantive consideration of State policies into a ministerial action.

NOAA Response to Comment 65. The completeness/checklist review is not the State's substantive review of the activity, and does not preclude the State from requesting additional information during the six-month review period or objecting for lack of information. Requesting additional information and objecting based on lack of information are covered by § 930.63(c), which is not being changed. The checklist review serves only to clarify the date when the six-month CZMA federal consistency review period begins by determining whether the certification and necessary data and information required by § 930.58 has been submitted to the State. Further cross-references are not needed given the clarifying edits made in the final rule. *See* explanation of rule change 13 for a detailed description of the changes made from the proposed rule. Under (a)(1)(ii) of the proposed rule, a time period for the applicant to provide missing information is not needed for two reasons: First, such a time frame would unnecessarily restrict State flexibility and second, starting the review period before receipt of all necessary data and information is an *option* for the State. It would not then make sense to give the State this option and then remove that flexibility by specifying by rule a date by which the missing information must be submitted. If a State is concerned with getting missing information early in the review period, then it should only start the review period when the State receives both certification and all necessary data and information described in § 930.58. It is not clear why the applicant's review of State enforceable policies would become a ''ministerial'' review. The deletion of ''deficiencies must be cured'' in paragraph (a)(1)(ii) is replaced with the requirement that missing necessary data and information must be received in paragraphs (a)(2) and (3). This change provides direction that the missing information must be submitted and received by the State.

Comment 66. Proposed paragraph (a)(2) specifies the State's responsibility of notifying the applicant of the receipt of the necessary data and information. According to the new language, the date the information previously deemed missing is received by the State is the date the State's review begins. Thus, the proposed language at (a)(2) contradicts that of (a)(1)(ii).

Comment 67. The term ''information'' in subsection (a)(1)(i) must be read as something different than ''necessary information and data'' in subsection (ii). After all, subsection (i) specifically says that the clock does not start if the State does not receive the ''certification or information * * *.'' However, this interpretation is incongruous with subsection (ii) which appears to use the term ''information'' as a short form for ''necessary information and data.'' Further, subsection (2) specifically contemplates that the clock will not start if the State has not received the ''necessary data and information.'' The only harmonious reading of this rule is that subsection (ii) is completely optional. That is, if the State has received the certification but not all of the necessary data and information, the State may elect to start the clock anyway and await the information. We believe that having this option removes certainty from the process and would be exercised extraordinarily infrequently if at all. The passage should be redrafted to indicate plainly that the clock does not start until the State receives all necessary data and information required pursuant to § 930.58.

NOAA Response to Comments 66 and 67. Paragraph (a)(2) does not contradict (a)(1)(ii) in the proposed rule. However, this has been clarified in the re-edited final rule to recognize that the State has chosen to start the six-month review period without all of the necessary data and information. See explanation for rule change 13 for a detailed description of the requirements.

Comment 68. It is unclear why ''or extend the six-month review period'' in the first line is proposed for deletion. It seems that ''staying the consistency time clock'' is not the same as extending the review period. The former means ''stopping the time clock'' which presumably re-starts at the agreed upon time or action while the latter is not keyed to the time clock and, thus, it provides additional flexibility and could be beneficial to either the Federal agency or the State agency or, in many instances, both. Provided any alteration of the time frame is agreed to in writing by State agencies and applicants, the

regulations should continue to provide for this flexibility.

NOAA Response to Comment 68. The statute is explicit that there is a six-month period for the State to conduct its review. The statute does not provide the flexibility to extend the six-month review period for federal license or permit activities. Rather, the statute provides that if the State has not objected prior to the expiration of the six-month review period, the State's concurrence with the consistency certification is presumed. As such, staying or ''tolling'' the time clock is allowable as it does not extend the six-month review period. The six-month review period is tolled until a specific date after which the remainder of the six-month review period continues.

Comment 69. The proposed language for this section references ''documents required by section 930.58.'' However, that section does not specify documents that must be submitted, but rather identifies the information that must be provided. The proposed language should be corrected.

NOAA Response to Comment 69. NOAA agrees that the language should be consistent and has made this change.

Comment 70. In order for a State to require additional information for its review process, NOAA suggests a State must amend its State management program and have the amendment approved by NOAA. The County believes the proposal is far too structured and formal a requirement for the States to fulfill for the simple purpose of obtaining the information necessary to review proposed projects. In particular, the County notes that NOAA has not processed many amendments to State approved management programs, nor is NOAA committing to provide the resources necessary to process such amendments. Further, the information needs of the States to review proposed Federal licenses and permits is often driven by developing environmental studies about the character and nature of the coastal environment. Requiring the States to request and NOAA to approve formal amendments to the approved State management plan every time additional informational needs are identified will undercut the effectiveness of the review process by the States. It will actually lengthen the review process as States seek time extensions to obtain needed information to review activities for consistency with coastal management programs. Further, the requirement is unnecessary and, therefore, should not be imposed.

Comment 71. We support these changes because under the current regulations, there is significant uncertainty in determining when the six-month federal consistency review process commences because the States are free to deem an application incomplete as they seek additional data after the application is filed. This delays the running of the time clock. Under the proposed rule, the States would continue to have the ability to request the information they need, so long as they specifically describe such information in their management plans, making all potential applicants aware of the requirements prior to application. Thus, the States would be precluded from delaying federal consistency review either before or after the six-month period begins simply because they want more information.

NOAA Response to Comments 70 and 71. This section does not require States to amend their programs when they need additional information during the six-month review. This section does refer to § 930.58(a)(2), which requires States to amend their programs if they want to require information in addition to the ''necessary data and information'' described in §§ 930.58(a)(1) and (3) to *start* the six-month review period. NOAA strongly encourages States to amend their programs to be more specific regarding information needs, and some States have done so. Once the six-month consistency review period begins, States can request additional information needed to determine consistency with their enforceable policies, but such requests cannot stay or otherwise alter the running of the six-month review period unless the applicant and the State agree in writing to a stay until a specific date, as required in § 930.60.

Comment 72. Current regulations require applicants to provide information deemed necessary for the review to begin, while the proposed revisions provide only that the requested information be received by the State. It is important that States have the opportunity to review and analyze the adequacy of the information provided, and assist the applicant in providing additional information for the review.

NOAA Response to Comment 72. This section is concerned with determining when the six-month review period begins based on when the State has received the consistency certification and necessary data and information described in § 930.58. Thirty days is sufficient time for a State to determine whether the necessary data and information has been submitted. The State has the remainder of the six-month review period to assist the applicant in providing any additional information other than that required by § 930.58(a).

Section 930.71—Federal License or Permit Activity Described in Detail

Comment 73. We appreciate NOAA's general endorsement of API's suggestion that CZMA consistency review of OCS activities described in detail in OCS plans should include federal approvals for individual permits under the Clean Water Act and Clean Air Act, and therefore States should not and need not conduct a separate consistency review for those additional federal permits. While NOAA's preamble comments will provide helpful guidance to the States, API suggests that the MMS, States, and industry would be better served by NOAA building that particular requirement into its consistency regulations, and by the agency preparing special regulatory guidance to prevent any further confusion in this regard. API also points out what inadvertently could be misleading language in the preamble's discussion of the effects of a State's objection to an OCS plan certification. At one point, NOAA remarks that ''[i]f the State objects to the consistency certification, then *MMS is prohibited* from approving the license or permits described in the EP or DPP.'' Of course, in the case of an expanded ''single consistency certification'' including individual air and water permits, the EPA, and not the MMS, could be the subject of the statute's restrictions on approval of the license or permit.

NOAA Response to Comment 73. NOAA continues to emphasize the administrative efficiency gained by including CWA and CAA reviews in the State's review of the OCS plan, and not conducting separate reviews. However, NOAA cannot mandate such a requirement in its regulations. Such a requirement would have to be included by Interior in OCSLA regulations in its description of what federal approvals are ''described in detail'' in OCS plans. As for the federal authorizations described in detail in OCS plans, a State objection to a particular federal authorization precludes the authorizing Federal agency from issuing its approval, not MMS (unless MMS is the authorizing Federal agency).

Section 930.76(a) and (b)—Submission of an OCS Plan, Necessary Data and Information and Consistency Certification

Comment 74. Because the proposed changes would rely on submission of necessary data and information ''required pursuant to § 930.58,'' it is important that the changes

recommended in rule change 10 and the clarification requested in rule change 11 or comparable language be included in the final rule. Without these changes, we would object to the removal of the language in the current subsection (a) for the reasons stated above.

Comment 75. This Change would drop an essential requirement of § 930.76(a), which is to ''identify * * * activities described in detail in the [OCS] plan which require a federal license or permit and which will have reasonably foreseeable coastal effects.''

NOAA Response to Comments 74 and 75. The required assessment of enforceable policies is contained in § 930.58(a)(3). Likewise, the effects analysis that the applicant must submit is also contained under § 930.58(a)(3). These requirements are not changed by this rulemaking.

Comment 76. The changes do not ultimately affect a State's ability, under current CZMA regulations, to make continuing requests for new data and information that increase the uncertainty of the consistency process. As the proposed rule states, these changes ''would not affect a State's ability to specifically describe ''necessary data and information'' in the State's federally approved management program * * * or to request additional information during the six-month review period * * * or to object for lack of information.'' API believes that this open-ended authority in NOAA's regulations is not needed, given that MMS has promulgated extremely thorough environmental review regulations and agency guidance for OCS Plans, and information generated by this process should be honored by the States. MMS developed its requirements in consultation with the Gulf coastal States. API suggests that information now being provided to MMS should be sufficient for the State's purposes. In addition, States should be able to identify in their CZM programs the information that will be required if different from MMS requirements, so that applicants have this information at the beginning of the process. States have enough experience with implementation of their CZM programs over the last 15 years, and the types of projects they evaluate for consistency and do not need to evaluate, on a project-by-project basis, what information is needed.

NOAA Response to Comment 76. Information obtained for Interior's OCSLA purposes may not be sufficient for State CZMA purposes. Thus, States need flexibility to amend their programs to describe necessary data and information for OCS plans. NOAA agrees with the comment that States should be able to describe such information needs in their programs based on years of experience and continues to encourage States to do so.

Comment 77. API urges NOAA to require the States to identify information needs in their CZM programs, not just encourage them to do so. NOAA should also ensure State compliance by recognizing that a failure to timely seek NOAA's ongoing approval of a specific and current list of information needs will prevent a State from requesting supplemental information beyond what is currently described in the State's approved CZM plan, or in the permitting Federal agency's regulations and guidance. Moreover, API asks NOAA to ensure that this process is open to public review. API again urges NOAA to adopt regulations to provide a mechanism for applicants to invoke NOAA's intervention and effective oversight during consistency review if a State attempts to request information beyond what is specified in NOAA and MMS requirements or State CZM plans. To further promote other federal agencies' use of information guidelines such as those now used by MMS, API also suggests that NOAA regulations should be changed to specifically recognize that in cases where the federal permitting agency has promulgated specific consistency review guidance, in consultation with the States, a State will carry the distinct burden of demonstrating a particular need for any supplemental information in conducting its review and that such State coordination with the authorizing Federal agency is not advisory but a required feature for State management programs.

Comment 78. API endorses NOAA's clarification of the State's completeness/checklist review. API submits that the ''checklist'' nature of the completeness review be confirmed in specific regulatory language, so that the States will be required to prepare such a checklist—that is, a checklist submitted to NOAA for approval with input by the appropriate Federal agencies and affected industry—for inclusion in their coastal zone management programs.

NOAA Response to Comments 77 and 78. NOAA does not have the authority to require States to amend their programs. *California Coastal Com'n* v. *Mack*, 693 F. Supp. 821 (N.D. Cal. 1988). NOAA can only require a State to submit a change that the State has made to its Federally approved program. 16 U.S.C. 1455(e). Submission of the necessary data and information, along with the consistency certification, is what triggers the start of six-month review period. States do have to amend their CMPs pursuant to § 930.58(a)(2) if they want to describe necessary data and information in addition to that required by NOAA's regulations. States need the ability to ask for additional information during the review period to address relevant matters not covered in the necessary data and information. *See also* response to comment 79, regarding State requests for information beyond the three-month period when applicants make substantial modifications to projects late in the six-month review period. As for MOU's with Federal agencies or Federal agency ''guidance,'' if States want to bind themselves with MOU's or guidance regarding consistency reviews they can do so. NOAA, of course, throughout the consistency regulations strongly encourages States and Federal agencies to closely coordinate consistency reviews and to develop agreements that will increase the efficiency of the reviews for a particular State or Federal agency. NOAA is not requiring States to submit completeness checklists for NOAA approval, because the information requirements in §§ 930.39, 930.58, and 930.76 contain sufficient guidance as to what information must be submitted to the State in order to start the consistency review periods.

Comment 79. We disagree with NOAA's proposal to require each State to list the NEPA EIS in their State management plan as an informational requirement in order for the State to be able to receive the EIS as part of a complete informational submittal to the State. Where possible, rulemaking should standardize the informational requirements needed for State consistency review. Any EIS prepared for the project will obviously be useful and even essential information for the State's consistency determination. Therefore, the County requests that, for a project that requires an EIS, the draft EIS be submitted as part of the information submitted to the State under this section.

NOAA Response to Comment 79. NOAA has only mandated CZMA-specific information as ''necessary data and information.'' NEPA documents that may be required for a Federal permit action may or may not be included as necessary data and information and some States may want flexibility to develop their own information needs. *See also* explanations to rule change 12 and rule change 15 regarding limitations on listing NEPA documents as necessary data and information. Therefore, NOAA has not mandated that NEPA documents

be included as necessary data and information.

Comment 80. The OCSLA, CZMA and NEPA provide opportunities for a State to review proposed OCS activities. These three acts and implementing regulations contain different requirements and timelines. Before proceeding with any changes to Subpart F of the federal consistency regulations, a complete analysis of the interaction among these three acts should be undertaken. In addition, a meeting of State and federal representatives should be convened to discuss the ramifications of the proposed changes to the federal consistency regulations and how these regulations interrelate with the other two acts and implementing regulations.

NOAA Response to Comment 80. The CZMA regulations, including the regulations as revised by this final rule, in addition to MMS regulations, contain the coordination needed to address the interaction of the CZMA and OCSLA. The NEPA connection was thoroughly discussed in the preamble to the 2000 rule, and further discussed in this final rule. Further analysis of the CZMA–OCSLA–NEPA interactions is not needed. *See* explanation of rule change 15 for further details on the NEPA limitations for OCS plans and CZMA review.

Comment 81. This section requires the applicant to send the State a copy of the OCS Plan when the OCS Plan is submitted to Interior. Receipt of a copy of the initial plan by the State will encourage early cooperation among the State, Interior and the applicant. Early cooperation will help the State respond to concerns and ensure that the consistency review proceeds in a timely manner.

NOAA Response to Comment 81. NOAA cannot require the applicant to send its initial OCS plan to the State. The submission to the State is by Interior once Interior determines the submission to be complete for OCSLA purposes. As it could be changed to comply with OCSLA standards, the initial OCS plan may not be the version that the State will eventually review for consistency. NOAA does, however, *encourage* the applicants to consult early with the State about its proposed OCS activities.

Section 930.77(a)—Commencement of State Agency Review and Public Notice

Comment 82. For OCS activities, which by their very nature are complex and controversial, the proposed rule would limit requests for information by the State to the first three months of the six-month review period, and thus prohibit a State from asking for any information after three months. This change implies that unless a State requests information within the first three months of the review period, it may be prohibited thereafter from objecting based on lack of information. Given the emphasis in the previous regulatory changes on maximizing public participation in the federal consistency process, this proposal represents a policy reversal and would have the effect of stifling public input into the process. It would also clearly diminish State authorities by removing the ability of the State to object based on lack of information (or at a minimum, invite litigation over the question of whether the State retains this authority). It may require states to hold an additional hearing within three months, solely for identifying information needs. Alternatively, it may simply compel a State to act within three months, just to preserve its options, thus halving the effective review period from six months to three. The idea that no new information need could or should arise after three months is not realistic, from a practical perspective gained from reviewing highly complex projects. In addition, interested members of the public may alert the State to impacts or information about which it was not initially aware. We strongly oppose this change as unworkable, impractical, and unrealistic, and one that will lead to increased litigation, rather than a streamlined process.

NOAA Response to Comment 82. The completeness/checklist review is not the State's substantive review of the activity, and does not preclude the State from requesting additional information during the review period or objecting for lack of information. Requesting additional information and objecting based on lack of information are covered by § 930.77(a)(3). The completeness/checklist review merely clarifies when the six-month review period begins by determining whether the information required by § 930.76 has been submitted to the State. As stated in the proposed rule and in this final rule, a primary purpose of this rulemaking is to provide greater clarity, transparency and predictability to the federal consistency process. The final rule meets those objectives by providing clear expectations regarding the start of review periods and information needs. NOAA found these changes were needed because there were increasing instances of State attempts to prolong the six-month review period by continual requests for additional information.

The CZMA is intended to provide States with an opportunity to review federal actions with coastal effects within specific time frames. While the time frames should not limit information necessary for a State to make a reasonable decision, States should not, and by statute, cannot, have unlimited time to review a project. The issue is what is *necessary* for the State's review. NOAA's regulations, since 1979 and as amended in 2000 and now in this final rule, provide reasonable parameters for what is necessary data and information to start the consistency review periods for Federal agency activities, federal license or permit activities and OCS plans. These ''necessary'' information requirements are not significantly changed by this rulemaking. If the information required by NOAA in § 930.58(a)(1) and (3), and information required by the State pursuant to 15 CFR 930.58(a)(2), is not sufficient for the State to complete its review the State can request additional information during the six-month period. In most cases the information submitted pursuant to §§ 930.39, 930.58 and 930.76, should be all the information needed for a State to complete its review. To avoid situations where information requests are made late in the six-month review of OCS plans, States must determine whether additional information is needed in the first three months. However, NOAA has added a caveat to the rule allowing the State to request additional information after the three-month period if the person or Interior changes the OCS plan such that the plan addresses activities or coastal effects not previously described or for which information was not previously provided. This should address the main point of the comment and also foreclose attempts to withhold project changes until after the three-month period. NOAA's consistency regulations have always required that if a State wants to object for lack of information, it must first have provided the applicant/person with a written request for the information and describe why the information is needed to determine consistency with its enforceable policies. 15 CFR 930.63(c). However, a State concurrence is effective for the plan as reviewed by the State and not to changes in the plan not available for review by the State. Therefore, the person should ensure that the State has all information relevant to a consistency certification before the end of the three-month period.

Comment 83. We believe that requiring a program change to get additional information would be unduly burdensome to State agencies, especially in light of the other changes

proposed in the Notice. The proposed new sub-section (a)(3) would require the State coastal agency to provide minute detail, in writing, of the reasons why additional information is requested—shifting the burden of proof to the State agency from the applicant.

NOAA Response to Comment 83. The rules, since 1979, have required States to amend their programs to describe necessary data and information if the State wants information in addition to that described in § 930.58(a) required to start the six-month review period. This procedure was further emphasized in the 2000 rule and is not being changed by this final rule. It has also always been required that if the State wants additional information *during* the State's six-month review, the State must describe the reasons why it needs the information to determine consistency with specific enforceable policies. *See* 15 CFR 930.63(c).

Comment 84. In § 930.58(a)(2), the State ''may'' amend its program to include information needs. In § 930.77(a)(2), the impact of the new requirement providing that if a State needs information in addition to the information required by section 930.76, it ''shall amend its management program'' is not clear. Why is this new requirement added to the regulations when the States already have the option to amend their programs under section 930.58(a)(2)? While it may be a good practice and one that should be encouraged where the information needs are clearly identifiable, a State agency should not be required to amend its program to request additional information that is needed to determine consistency. A State should not be required to amend its program to anticipate potentially unknowable information needs. An effort by the California Coastal Commission, MMS and industry in the early 1990's was abandoned by mutual agreement as potentially not productive because information needs change over time due to changed circumstances. A list could be overly burdensome and wasteful for applicants, if States tried to anticipate every possible concern. A list would be out of date relatively soon after it was compiled. The more comprehensive and relatively simple requirements of the CZMA benefit applicants by enabling them to focus on the relevant issues rather than satisfy an exhaustive and inflexible list of information requirements that would need to be satisfied. Furthermore, a list that is not adequate for all States may lead to more State objections based on lack of information, which would not improve the efficiency of the consistency review process. It is very important that, if this new requirement or some variation thereof is maintained to encourage States to amend their programs, it not be open to interpretation as a bar or limit to the applicant providing or State requesting all necessary information supporting the consistency determination, when it has not been included in an amended program.

NOAA Response to Comment 84. A State is not required to amend its program to describe State specific necessary data and information, thus the term ''may'' was used in § 930.58(a)(2). If, however, a State wants to require ''necessary data and information'' in addition to that described in § 930.58(a) to start the six-month review period, the State must first amend its CMP. That is why ''shall'' was used in § 930.77(a)(2). NOAA has changed the language in § 930.77(a)(2) to better reflect this long-standing interpretation. Obtaining information that is in addition to the necessary data and information required by § 930.76 is described in § 930.77(a)(3).

Section 930.82—Amended OCS Plans

Comment 85. The proposed revision does not appear to substantially change the process for review of amended OCS plans and the State does not object.

NOAA Response to Comment 85. NOAA notes this comment.

Comment 86. This section removes a requirement that the applicant send a copy of the amended OCS plan to the State. This provision should remain because it encourages early cooperation among the State, Interior and the applicant. The second change is an addition that Interior will furnish the State with a copy of an amended OCS plan when it is satisfied that OCSLA and CZMA requirements have been met. While Interior is best suited to determine if the requirements of OCSLA are met, Interior personnel may not have the expertise to decide if requirements of the CZMA regulations are met. There should be a consultation with the State built into this process.

NOAA Response to Comment 86. NOAA's change to this section is not a substantive change. NOAA cannot require the applicant to send its initial plan to the State. The submission to the State is by Interior after Interior determines the submission to be complete for OCSLA purposes. Because an OCS plan could be changed to comply with OCSLA standards, the initial OCS plan may not be the version the State will eventually review for consistency. NOAA does, however, encourage the applicants to consult early with the State about its proposed OCS activities. The amended plan referred to under this section is a plan to which the State objected and the Secretary did not override the State's objection. The provision for Interior to provide the amended plan to the State is merely a determination that the amended plan has met OCSLA requirements and is then ready to be sent to the State.

Section 930.85(b)—Failure To Comply Substantially With an Approved OCS Plan

Comment 87. Although no changes are proposed to this section, this section could be clearer as to who should be responsible for recommended remedial action. We recommend this subsection be clarified through the addition of language at the end of the next to last sentence to read, ''Such claim shall include a description of the specific activity involved and the alleged lack of compliance with the OCS plan, and request for appropriate remedial action by the licensee or permittee.''

NOAA Response to Comment 87. NOAA has not made this change as the remedial action could be taken by either MMS or the person.

Section 930.85(c)—Failure To Comply Substantially With an Approved OCS Plan

Comment 88. The proposed change would shift the authority from the Director of OCRM to MMS to determine whether an OCS plan has not been substantially complied with and whether an amended plan must be reviewed by the State for consistency. NOAA states in the preamble that this is needed to clarify that MMS must make the determination whether a plan has been substantially complied with or not. In the 2000 rule changes to these regulations, NOAA stated in the preamble that one ''federal agency had commented that the CZMA does not authorize NOAA to require OCS plan amendments. NOAA disagrees. This is an existing regulatory requirement and is mandated by the CZMA, CZMA § 307(c)(3)(B).'' Also in the 2000 rule changes, NOAA added § 930.65 which authorizes the State to monitor federally licensed and permitted activities to determine whether they are not being conducted as originally proposed and will cause substantially different effects. NOAA's rationale for adding the remedial § 930.65 now supports retaining § 930.85, the remedial section upon which § 930.65 was modeled. Changing this remedial provision is a huge step backward; it would greatly reduce the State's ability to insure that OCS plans are carried out as proposed

and approved. NOAA should retain the provisions of § 930.86 which provide the State ''with a more meaningful opportunity'' to address instances where the State claims an OCS plan is not being substantially complied with and additional consistency review is mandated. Again, this change is inconsistent with both the letter and the spirit of the CZMA. Rather than fostering cooperation and giving the State a truly meaningful way to insure OCS plans continued compliance with the State's management program, this change would reduce the State's role and abdicate the Director's responsibility in favor of MMS.

Comment 89. The proposed revision to this paragraph eliminates all recourse by the State or by NOAA to seek compliance with the CZMA, in cases where an OCS operator may be acting in a manner that is not in accord with an approved operating plan. MMS certainly should have primary responsibility for ensuring that OCS Plans are followed, however, compliance with the approved State program and the CZMA is also in question should an operator deviate from the approved plan. We recommend that the regulations give MMS a reasonable opportunity to review and act on a report that a person is failing to comply substantially with their OCS plan, but the regulations should retain some mechanism by which the State can seek review and intercession via NOAA authorities.

NOAA Response to Comments 88 and 89. As stated in the proposed rule and this final rule, unlike other Federal statutes, the CZMA specifically addresses the OCSLA oil and gas program and this establishes a unique coordination between the CZMA and the OCSLA. Where the CZMA mandates certain requirements for OCS plans, these are addressed in NOAA's regulations. Where the OCSLA program provides Interior with certain roles not covered by CZMA mandates, NOAA will rely on Interior to implement those roles, consistent with CZMA requirements. This statutory-specific relationship is distinct from other Federal statutes and, thus, the remedial action section, 930.65, is appropriate for other federal authorizations, but not OCS Plans. As such, and as explained in the proposed rule and the explanation in this final rule for § 930.85(c), NOAA's rationale for retaining this section in the 2000 rule did not fully account for CZMA section 307(c)(3)(B) and the CZMA–OCSLA interaction. This rule change is needed to more closely coordinate CZMA and OCSLA requirements. Thus, NOAA cannot ''abidicate'' an authority which never expressly existed and the change is, in fact, consistent with both the CZMA and the CZMA–OCSLA relationship.

Comment 90. To clarify this section, we recommend the following modifications: (1) Insert ''or to the State's request for appropriate remedial action'' between ''and applicable regulations'' and ''the person shall comply with'' in the third line of subsection (c); and (2) insert ''if such has been prepared'' between ''amended OCS plan (excluding proprietary information)'' and ''necessary data and information'' in the last sentence.

NOAA Response to Comment 90. These changes are not needed. Paragraph (c) now applies to instances where MMS determines a person has failed to substantially comply with an approved OCS plan, regardless of whether the State requested remedial action or not. Remedial action is covered in paragraph (b).

Section 930.121(a)—Consistent With CZMA Objectives on Appeal

Comment 91. FERC's issuance of a certificate of public convenience and necessity for an interstate pipeline should by definition be deemed to meet the criteria that an activity significantly and substantially furthers the national interest. A FERC certificate confers on its holder the ability to exercise a federal right of eminent domain. The fact that the Congress in the Natural Gas Act (NGA) saw fit to confer this right on a private applicant acting pursuant to a federal authorization speaks volumes about the national interest furthered by interstate pipeline projects with FERC certificates.

NOAA Response to Comment 91. FERC findings for an interstate pipeline will undoubtedly be an important factor considered by the Secretary to determine whether a project furthers, in a significant or substantial manner, the national interest as articulated in the CZMA. However, an order issued by FERC pursuant to the NGA to authorize the construction and operation of an interstate pipeline remains subject to other federal statutes as FERC itself has recognized. The statutory responsibility for determining whether a project is consistent with the objectives of the CZMA rests solely with the Secretary of Commerce. The question of whether a project furthers the national interest *as articulated in the CZMA* is one aspect of this determination. Findings by FERC under the NGA would be given appropriate consideration by the Secretary and major energy projects, such as an interstate pipeline, may likely be found to significantly or substantially further the national interest for CZMA appeal purposes. However, this conclusion is made by the Secretary and relies on the factual record developed for an individual appeal.

Section 930.121(c)—Alternatives on Appeal

Comment 92. New Jersey's Coastal Management Program supports the proposed rule changes to this section. In particular, we strongly support the language clarifying that an alternative shall not be considered unless the State submits a statement to the Secretary that the alternative would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program.

NOAA Response to Comment 92. NOAA notes this comment. The section's revisions reflect the criterion relied on by the Secretary for determining whether an alternative will allow a proposed activity to be conducted in a manner consistent with a state's coastal management program—as established by numerous CZMA appeal decisions.

Comment 93. The second portion of this section will prohibit the Secretary from considering any alternative that the State had not determined to be consistent with the applicable enforceable policies. It is unreasonable to expect a State to conduct a comprehensive analysis of alternatives to ensure complete consistency especially in complex projects which are not within the expertise of a coastal management agency. Further, it is unfair to require the State to commit to a finding of consistency on an alternative that necessarily will not have been fully developed or analyzed. However, it is often possible to identify alternatives with fewer impacts that, upon further study, may prove to be acceptable. Additionally, the consideration of alternatives should include those identified by the Secretary or any party to the appeal and not be limited to those the State identifies. If the language is adopted as proposed, it seems entirely likely that an applicant for Federal activity could do a cursory ''bare-bones'' evaluation and propose an alternative that is clearly unacceptable to the State so that the alternatives analysis burden would fall to the State. The responsibility to conduct a reasonable alternatives analysis rightly belongs to the applicant, who has the original burden of proof and persuasion respecting its chosen proposal.

NOAA Response to Comment 93. This is an adoption of current practice, as noted in the explanation to this rule

change. Anyone can offer an alternative on appeal. However, this change clarifies that for an alternative to be considered available, the State would have to declare whether it is consistent. The point of the Secretary's decision is to determine whether to allow a Federal agency to authorize the proposed project, which has already undergone substantial State review. Thus, if an alternative meets the purpose of the project and the State finds the alternative consistent, then the applicant could adopt the alternative and proceed with that alternative without further State CZMA review. The purpose of the appeal decisions is not to begin a new round of State reviews for the same project, but to bring finality to the CZMA process for that project. If a State cannot make a finding of consistency for an alternative on appeal, then the State would not prevail on that element of ground I.

Section 930.127—Briefs and Supporting Materials

Comment 94. Thirty days is not an adequate time period for the State to respond to the new issues raised at the appeals level. As NOAA points out, the Secretary is not imposing his or her judgment on the consistency of an activity with a State's program, but rather is reviewing new questions of balancing competing national interests and looking at national security needs. By their very nature, these issues do not involve questions of consistency with the State's coastal program. Rather, these are new issues that the State does not (nor is required to) consider in its consistency review. The consideration of these issues will require additional data gathering and, possibly, public input, and thus 30 days is insufficient time for the States to consider these issues.

Comment 95. As a general matter, it would be preferable for both States and the appellants to permit the Secretary to establish a briefing schedule in consultation with the parties as provided in the current regulation. This would enable a schedule to be established to meet the case-by-case needs of both parties. To the extent the final rule sets out a specific briefing schedule, it is in the best interest of both parties to have an adequate opportunity to submit information to assure a complete record. Allowing for a less rigid briefing schedule would not extend the time set for completion of the record and issuance of a final decision. CSO supports the following specific technical changes: Subsection (a)—Provide at least 45 and preferably 60 days for States to submit a reply brief; Subsections (a), (b) & (c)—Clarify the relation between the initial brief and reply and additional procedural or other briefs required by the Secretary. For example, would separate time periods be set out for those briefs? Would the need for these additional briefs extend the briefing schedule? Subsection (c)(3)—There seems to be an error in subsection (c)(3) that refers to sections 930.127(a) and (c)(1). The significance of these cross-references is not clear. Subsection (e) provides for extensions of briefing schedules ''only in the event of exigent or unforeseen circumstances.'' This provision is overly restrictive.

Comment 96. The State generally supports these changes, but we have particular concerns. First, we suggest that allowing the appellant 30 days to file the notice of appeal, and an additional 30 days to file its brief, whereas the State is permitted only 30 days in which to respond is unfair to the State. We recommend that the State be given 60 days, which equals the total time afforded the appellant. Second, we ask that subsection (b)(1) of the final rule clarify whether supporting materials must be submitted in electronic format or whether just the briefs must be so submitted. Third, we suggest that the Secretary's authority to determine the scope of the record is not unbridled and is limited by settled principles of administrative and procedural law. Subsection (c)(1) should state that, at a minimum, the record shall be comprised of all properly filed and served briefs and supporting materials and all timely submitted public and agency comments. Fourth, as the rule allows for the Secretary to order additional briefs, subsection (e) should clarify that the Secretary may establish the filing periods for such briefs beyond the limits specified in subsection (a).

Comment 97. It would be both practical and helpful to allow the parties to submit additional response briefs within 20 days after the filing of the State's opening brief. This would allow the parties the opportunity not only for important rebuttal arguments, but also for the parties' responses to any public, or Federal agency comments that had been received into the decision record.

NOAA Response to Comments 94, 95, 96 and 97. To meet the more restricted time period for closing the decision record, limitations are needed to the briefing schedules and time spent developing the decision record. These limitations to the briefing schedules are even more imperative now that the Energy Policy Act has imposed a shorter, 160-day, period to develop the decision record and a shorter period to issue a decision, from 135 days to 75 days. The appeal decision record only needs to provide the Secretary with a reasonable basis to issue a decision. The record is ''complete'' when the Secretary determines there is sufficient information to make a reasonable decision. Public input is provided for in the public comment period in § 930.128. Likewise, to issue a more timely decision and as described in the description of this rule change, there will be only one reply brief by the appellant. Additional briefs will occur only as needed by the Secretary. Time periods to submit any additional briefs required by the Secretary would be established by the Secretary based on the complexity of the information requested and the amount of time left in the period to complete the decision record under § 930.130. Thus, States should ensure that (1) they fully participate in the application process during the authorizing Federal agency's proceedings and raise all State concerns and requirements, to the extent possible, to the authorizing Federal agency; and (2) the States should address issues in their objection letters to the fullest extent possible, and then, again, in their brief on appeal. The cross-references to paragraphs (a) and (e) in paragraph (e)(3) are correct, as those sections describe the briefs to be filed. In order to meet the 160-day period in § 930.130, the Secretary will need to adhere to a strict briefing schedule and, thus, extensions are only for good cause shown. All materials should be provided in electronic format, as required by the existing rule. When some materials, e.g., large maps, do not lend themselves to electronic format, NOAA does not require that these materials be provided electronically. Paragraph (e), formerly (c), already allows the Secretary to extend the time for submission of briefs.

NOAA is maintaining the deadlines described in the proposed rule for when the appellant's and State's briefs are due. These deadlines are needed to address the deadlines established by the Energy Policy Act. The appellant's brief is due 30 days after submitting the notice of appeal and the State's brief will be due 60 days after appellant submits its notice of appeal.

Comment 98. While API sees potential utility in the provisions in proposed section 930.127(c)(2) for the Secretary to have the option of requesting an initial round of briefs to address only procedural or jurisdictional issues, followed by briefs on the merits as appropriate, the proposed rule needs to be changed to clarify that exercise of this option by the

Secretary would constitute an exception to the otherwise uniform provision in proposed section 930.127(a) that requires the appellant's opening brief to be filed within 30 days of the appeal notice, and the State's brief to be filed 30 days thereafter.

NOAA Response to Comment 98. No change is needed to note the ''exception'' since the uniform provision in § 127(a) is not that only one brief is allowed, but that the parties' one brief is due at a certain time. The provisions in paragraph (e) provide for other briefs that may be required and paragraph (e)(4) clearly provides the ''exception'' language requested by the comment.

Comment 99. Section § 930.127(b)(2) states that ''[a]t the same time that materials are submitted to the Secretary, the appellant and the State agency shall serve at least one copy of their briefs, supporting materials and all requests and communications *to the Secretary and on each other.*'' (Emphasis added.) API believes that the highlighted language could be misread as requiring an additional obligation of service on the Secretary beyond the procedures already outlined in § 930.127(a) and (b)(2). Thus, API requests that NOAA consider changing the language of proposed § 930.127(b)(2) to read as follows: ''At the same time that materials are submitted to the Secretary, the appellant and State agency shall serve on each other at least one copy of their briefs, supporting materials, and all requests and communications submitted to the Secretary.''

NOAA Response to Comment 99. NOAA agrees with this comment and has made this change.

Section 930.128—Public Notice, Comment Period, and Public Hearing

Comment 100. The proposed change would require the Secretary of Commerce to give greater weight to Federal agencies in administrative appeals where they provide comments within their area of expertise. NOAA's proposal ignores the expertise of the State in coastal planning and permitting issues. This change, along with the other changes noted above, reduce the deference accorded to the State under the current regulations and elevate the input of Federal agencies. Congress intended the States to play an equal role in determining the fate of their coastal zones except in the most unusual circumstance: when either, after a judicial decision finding a federal activity to be inconsistent with a State's management program, the President determines that inconsistent activity is in the paramount interests of the United States or, with regard to OCS plans, the Secretary of Commerce determines that the plan's activity is necessary in the interest of national security. (16 U.S.C. 1456(c)(1)(B) and (c)(3)(B)(iii).) NOAA should not thwart Congress's intent by adopting narrow interpretations of laws intended to have a broad reach.

NOAA Response to Comment 100. This section deals only with Federal agency comments on appeals to the Secretary in 15 CFR part 930, subpart H. This section has no impact on the implementation of other subparts and has no impact on the weight given to State agency views on appeal. This change only means that NOAA shall give greater weight to the views of Federal agencies commenting in their areas of technical expertise over the views of other Federal agencies who are not commenting in their area of technical expertise. This section does not pit Federal agency views against State views. For example, an authorizing Federal agency has developed an EIS under NEPA for its proposed action to issue a federal authorization. The authorizing Federal agency certainly has some knowledge of environmental impacts, but suppose there is possible harm to an endangered species or a marine mammal. In those cases, the expert Federal agencies would not be the authorizing Federal agency, but would be the Endangered Species Act agencies (the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (NMFS)). 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.

Comment 101. The proposed change would allow the Secretary to reopen the period for Federal agency comments. All interested or affected parties, not just Federal agencies, should be able to submit comments if the Secretary reopens the period for comments. The change appears to accommodate the time extension request of a Federal agency while excluding other parties from submitting comments.

NOAA Response to Comment 101. In order to meet the more restricted time period for closing the decision record, the public comment period will not be re-opened, except as described in the regulation if the Secretary holds a public hearing. Parties submit their views according to the briefing schedule. In most cases this will also apply to Federal agencies. However, there may be instances when the Secretary will need further input from the authorizing Federal agency or an expert Federal agency. In these cases, the Secretary may reopen the period for Federal agency comments, when there is good cause shown, but before the record closes.

Comment 102. Section 930.128(b) suggests that the public could be required to comment prior to the availability of NEPA documents and other important information that clarify the nature of the proposed action and the potential for impacts on the State's coastal zone.

NOAA Response to Comment 102. As explained above in response to comments on § 930.127, the Secretary needs sufficient information to make a decision. The Secretary does not necessarily need to obtain all conceivable views on every item submitted for the record. Further, the shorter deadlines imposed by the proposed rule and the Energy Policy Act dictate a more streamlined appeals process that requires NOAA to establish a revised process for input by the parties, the public and Federal agencies.

Section 930.129—Dismissal, Remand, Stay, and Procedural Override

Comment 103. If the Secretary remands the case back to the State, because new information relevant to the State's objection arises, NOAA proposes to reduce the period for State comments from three months to 20 days. It would be virtually impossible for States to comply with this change and it is likely that information on the alternative would not be complete. As a new alternative, there would not be a complete design or adequate environmental evaluation. Rather, the States will be considering a conceptual plan. In addition, the change would eliminate public participation in the process, which is one of the cornerstones of federal consistency. In California's case, the CCC and the BCDC meet only once every 30 days. Under this proposal, insufficient time would be available for us to conduct a public hearing and determine consistency with our program.

NOAA Response to Comment 103. This change is needed to address the new time frame for closing the decision record. The remand to the State is not a new review of the entire project and does not require public comment at the State level. The remand is for the State to reconsider its previous objection in light of the new information. Public comment on appeals is provided by the Secretary under § 930.128. However, in response to the comment, NOAA believes that a maximum time for remand is not needed and that the Secretary can choose a period longer than 20 days or might choose a period

less than 20 days, depending on the time remaining in the 160-day period to develop the record. Therefore, the ''exceed 20 days'' language has been removed.

Comment 104. The change to paragraph (c) would remove the Secretary's ability to remand the appeal for reasons other than those allowed under section 930.130 governing the stay of closing of the decision record. This would have the effect of discouraging applicant-State agency resolution of issues through negotiation, since it would no longer allow settlement or negotiation as a basis for remanding an appeal. Issues would remain unresolved, until the Secretary decides them in favor of one side or the other.

NOAA Response to Comment 104. Open-ended remands are no longer possible under a definitive date in which to close the decision record.

Comment 105. Section 930.129(b) should be modified by inserting the words ''including the enforceable policies of the State,'' after the word Act.

NOAA Response to Comment 105. This change would be, in part, redundant with the remainder of this paragraph. While the Secretary may decide whether the State has complied with CZMA requirements by basing its objection on enforceable policies and objecting in a timely manner, the Secretary does *not* review the substantive basis for the State's decision. The Secretary will not substitute his decision for that of the States. Such an action would be contrary to a basic principle of the CZMA that, CZMA coastal management decisions are made by the States pursuant to State law incorporated into federally approved CMPs. Hence, the Secretary's balancing of the coastal effects with the national interest and applying the CZMA objectives is a *de novo* review.

Section 930.130—Closure of the Decision Record and Issuance of Decision

Comment 106. We have serious concerns that the consistency appeals process has caused undue delays in energy projects. Furthermore, NOAA's proposed rule, while providing clarity to some definitions, fails to ensure that consistency appeal decisions are made in a timely fashion. NOAA's proposal establishes an unnecessarily long 270-day window for record closure. Since the federal permit agency's decision must have fully considered the expertise of all relevant federal and State agencies, as well as project need, alternatives, and coastal impact mitigation to satisfy court review, NOAA should close its record immediately upon receiving final party briefs (API asks for a 120–180 day period to develop the decision record). At that point the Secretary has all record evidence necessary to decide any appeal. Further, NOAA's proposed deadline exceptions for *additional* environmental or biological opinions are not needed for any appellate review and would simply delay the appeal. We request that NOAA change its proposal to comply with congressional intent that the Secretary decide these appeals expeditiously.

Comment 107. While appeals to the Secretary are relatively rare, they do have the potential to significantly impact proposed projects in which the mere fact of delay can sometimes be fatal to the ability to continue with the project. In such cases, we feel that it would be beneficial to process appeals to the Secretary of Commerce on a fast-track basis. We suggest a process in which the record on appeal consists of documentation compiled by the State and the relevant Federal agencies from which approvals for the projects must be obtained and that NOAA shall give conclusive weight to and be bound by any prior determination by a Federal agency having authority to authorize the activity determining the national or public interest or the reasonableness of alternatives. After a short briefing period and opportunity for public comment, it is important that a decision be issued as soon as possible and preferably within 90 days.

NOAA Response to Comments 106 and 107. NOAA proposed a 270-day period as a reasonable time in which to close the decision record. NOAA felt that the 270-day time period was needed because the authorizing Federal agency's decision record often lacks information needed to address CZMA issues. The Secretary's review is not a review of the State objection, rather it is a *de novo* determination of whether the project is consistent with the objectives of the CZMA or in the interest of national security. The Secretary's judgement is not substituted for that of the authorizing Federal agency regarding the merits of the project, nor does the Secretary determine whether a proposed project complies with other Federal law. However, because of the multiple national interest requirements of the CZMA, the Secretary must evaluate the project in light of the competing CZMA objectives. Varying levels of information and detail are required to make these determinations which are dictated by many factors such as the nature of the project, scale and scope of effects on coastal uses and resources, alternatives to the proposal, etc. NOAA has amended § 930.127(c)(3) to note the importance of the authorizing Federal agency's administrative decision and record in the Secretary's decision, when that information is submitted to the appeal decision record.

The appeal process is an important component of the CZMA formula to balance State-Federal-private interests. The Secretary's consideration of the national interest in the CZMA objectives is a ''check'' on the State's authority to block projects affecting State coastal uses or resources. If a State objects to the issuance of a federal authorization, then the project cannot go forward unless the Secretary overrides the State's objection.

An unreasonably short period for developing the decision record and relying solely on the authorizing Federal agency's record could substantially weaken the Secretary's decision to override the State's objection, thus, significantly diminishing this important CZMA safeguard. Moreover, the burden of establishing that the Secretary should override a State's objection generally rests with the permit applicant. NOAA is concerned that the time period proposed by the comment could limit the ability of the applicant/appellant to develop national interest information related to CZMA objectives, by (1) not allowing sufficient time, and (2) forcing all parties to use the authorizing Federal agency's record which is developed for purposes very different than those of the CZMA. To meet the deadlines established by the Energy Policy Act, NOAA has had to further alter some of the appeals procedures to accommodate the new deadlines, provide the parties with a reasonable opportunity to argue their positions, and allow the Secretary sufficient time to evaluate the decision record, draft a decision document and issue a decision.

As described above for rule change 25, § 930.130, the Energy Policy Act replaces NOAA's proposed stay provision with a new stay provision. The Secretary may still use the new stay provisions to obtain NEPA and ESA documents. Again, NOAA emphasizes that doing so allows the Secretary to obtain environmental documents from the authorizing Federal agency and are not *additional* environmental documents developed by the Secretary, but are the environmental NEPA and/or ESA documents required by operation of other Federal law without which the authorizing agency cannot complete its permitting action. The Secretary's

request for these documents does *not* delay issuance of the federal authorization. If the NEPA and/or ESA documents are completed prior to the appeal or during the 160-day decision record period, then the exception need not be used. The use of the exception is most likely to be used in the OCS oil and gas context where timelines of the OCSLA require the CZMA six-month consistency review period to start before MMS completes NEPA or ESA compliance. Nevertheless, OCS oil and gas projects are *not* delayed by use of this exception, because MMS cannot issue any license or permit until NEPA or ESA compliance is complete.

Comment 108. The Natural Gas Act (NGA), which predates the CZMA by decades, confers on FERC plenary authority to issue certificates of public convenience and necessity to authorize the siting, construction and operation of interstate natural gas pipelines. Numerous Supreme Court decisions validate the preemptive effect of FERC's authority under the NGA. The Congress in 1972 made clear that enactment of the CZMA did not diminish, modify or supercede this preexisting federal authority. CZMA section 307(e). Now, however, the pending appeals from State objections to consistency certifications for proposed interstate pipelines that have received FERC certificates calls into question whether this clear statement by the Congress will be followed. NOAA's final rule should state clearly that it will give due weight to FERC's findings in view of the statutory scheme in the NGA that confers on FERC sole responsibility for determining whether, and under what conditions, a proposed interstate pipeline is required by the public convenience and necessity. The NGA and NEPA require FERC to assess all reasonable alternatives to a pipeline's construction proposal as a key factor in its evaluation and determination. Yet NOAA asserts that it must review alternatives that the protesting coastal State, in that State's judgment, deems consistent with its State coastal management plan. This subverts the comprehensive federal scheme Congress intended for interstate pipeline analysis. State consideration of issues not already covered in the FERC's Environmental Impact Statement (EIS) should, at the very least, be done within the FERC-imposed deadline for State agency comments. This would continue to allow for full State participation, while protecting federal authority to authorize interstate natural gas pipeline construction pursuant to the NGA. Thus, the federal consistency regulations should be revised to require, as a condition for approval of a State's CZMA program, that the State participate in the FERC's certificate/NEPA environmental review process to ensure that FERC has the opportunity to address the State's concerns. To the extent that the CZMA or regulations thereunder require NOAA to make a determination in its own name (as distinguished from resolving CZMA matters within the FERC certificate process) NOAA should accept the record developed at FERC as being dispositive of the issues reviewed and resolved by the FERC certificate process.

NOAA asserts that it has *de novo* review authority pursuant to the CZMA, without citation to the statute. Absent an express statutory grant of authority for *de novo* review, however, NOAA's authority under CZMA is appellate only. It is black letter law that an ''appeal'' is an examination by the appropriate review body of a decision record to determine if there are material errors of fact or application of law contained in that record. Therefore, NOAA lacks the authority to engage in a *de novo* review of the interstate pipeline routing alternatives considered by the FERC in the NGA certificate process. NOAA's review fails to address the fact that in considering alternative routes for an interstate pipeline that has been certificated by the FERC, NOAA is engaging in what amounts to the very form of *de novo* review of the Federal agency's decision that NOAA disclaims.

NOAA also asserts that ''through the CZMA Congress gave the States the ability to review federal actions, independent of the Federal agencies' reviews.'' This statement, however, is inconsistent with the fact that the CZMA limits NOAA's consistency review of a federal permit activity to an examination of whether the proposed activity is *consistent to the maximum extent practicable* with the *enforceable policies* of a State's coastal zone management plan. A State policy in its coastal zone management plan that has the effect of blocking the siting of an interstate pipeline could not be enforceable against a federally pre-emptive NGA. For instance, in the case of an interstate pipeline project that is to be situated within the coastal zone of a State and has been or is to be issued a certificate of public convenience and necessity under NGA section 7(c), 15 U.S.C 717f(c), conditioned on compliance with 16 U.S.C. 1456(c)(3)(A), a State may validly object to a pipeline company's consistency certification only if that objection is based on State policies that satisfy pre-existing substantive federal constitutional standards and statutory limitations, including those arising under the commerce clause and the supremacy clause.

NOAA Response to Comment 108. The NGA may preempt State regulation of interstate natural gas pipeline permitting. However, it does not preempt CZMA requirements. The CZMA is part of a Federal scheme allowing State review of federal authorizations for private activities that have effects on State coastal uses or resources. Thus, both the NGA and CZMA can and must be given the full effect of Federal law.

Consistency with State enforceable policies does not violate any preemptive effect of the NGA because the State review, pursuant to federally approved State enforceable policies, is part of the federal CZMA scheme and is not an intrusion upon FERC's authority under the NGA. No federal license or permit activities are exempt from federal consistency: consistency applies if the activity will have reasonably foreseeable coastal effects. 16 U.S.C. 1456(c)(3)(A), Conference Report at 970–972. The NGA does not explicitly repeal any part of the CZMA. Congress affirmed the no exemption component of the CZMA federal consistency requirement when it reauthorized the CZMA in 1996, with no mention of the NGA. *See* Pub. L. 104–150. There is also no ''affirmative showing of an intention to repeal'' the CZMA federal consistency provision in whole or in part. *See Southern Pacific Transportation Co.*, v. *California Coastal Commission*, 520 F. Supp. 800, 805 (N.D. CA 1981). As repeal by implication is not favored, the CZMA must be given effect so long as the CZMA and NGA are not irreconcilable and the CZMA does not stand as an obstacle to the objectives of the NGA. *Id.* Moreover, the Energy Policy Act clearly states that State CZMA review is not affected even though FERC has been given preemptive authority over State regulation under the Natural Gas Act.

As for the State policies, NOAA must approve State enforceable policies. NOAA will not approve State policies that on their face contain requirements that are preempted by Federal law. For example, the State of North Carolina sought to regulate low level aircraft in flight by adopting policies that described specific standards preempted by Federal law administered by the Federal Aviation Administration. The State sought to impose minimum altitude and decibel levels, and other overflight restrictions. NOAA denied the State's request to incorporate the policies into the North Carolina CMP because the policies were, on their face,

preempted. Thus, North Carolina could not use the policies for CZMA federal consistency purposes.

So long as a State's enforceable policies do not specifically describe preempted restrictions the State may apply them through the federal consistency process to interstate pipeline projects. For example, a State may implement enforceable wetland protection policies, but not impermissible regulations for interstate pipeline safety. If a pipeline were to impact State wetlands, then the applicant must be consistent with the State wetland policies. Thus, mitigation may be required or, if mitigation is not available, then the siting of a pipeline may need to be altered, not because the State is attempting to regulate the pipeline, but to address coastal effects through the federal CZMA scheme.

In another case before the Surface Transportation Board (STB) for the abandonment of a railroad line in Massachusetts, NOAA found, and the STB concurred, that the CZMA process and the applicant's compliance with the State's enforceable policies was not preempted by the Interstate Commerce Commission Termination Act of 1995 (ICCTA) (49 U.S.C. 701, 10501). Pursuant to the ICCTA, the STB has exclusive, preemptive, jurisdiction over the construction, acquisition, operation, abandonment or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State. *See City of Auburn* v. *The Surface Transportation Board*, 154 F.3d 1025, 1030–1032 (9th Cir. 1998). Nevertheless, the STB has consistently determined that the exercise of State and local government traditional police power functions to protect the health and safety of their citizens may not be preempted if there is minimal impact on interstate commerce and the regulatory action is taken in a non-discriminatory manner. Thus, NOAA and the STB determined that Massachusetts could exercise its CZMA consistency authority in a manner compatible with the ICCTA if the application of the State CMP enforceable policies would not impermissibly burden interstate commerce, restrict the railroad from conducting its necessary operations or otherwise discriminate against railroad activities.

Likewise, under the Federal Power Act, FERC has preemptive jurisdiction over the licensing of hydro-electric facilities. However, applicants for FERC hydroelectric licenses must be consistent with the affected coastal State's federally approved enforceable policies. *See e.g., Mountain Rhythm Resources* v. *FERC*, 302 F.3d 958 (9th Cir. Aug. 23, 2002); FERC, Standard Branch Procedure SBP–4–16 (March 1992). In *Mountain Rhythm*, the Court found that there are ''federal and state law concerns for protecting and managing coastline that Congress has declared to be limitations on FERC's power. Specifically, the [CZMA] provides that if a hydropower project is located in a state's coastal zone, then FERC cannot issue the license unless the state's applicable agency concurs that the proposed project is consistent with the state's Coastal Zone Management Program * * *.'' *Mountain Rhythm* at 960. The Court also found that implementation of the State's permit program, through the CZMA federal consistency process, does not ''strip[] the federal government of its exclusive grant of authority to issue licenses for hydropower projects. But the [State] permit is not a power permit; it is merely part of the consistency evaluation process invoked by the responsible state agency, DOE, in exercising its authority to assess consistency with state coastal zone management that Congress has granted to the states in the CZMA.'' *Mountain Rhythm* at 967. The Court further elaborated that the State's ''permit does not in any way supplant FERC's authority, but is a confirmation that a proposed project complies with state waterway zoning regulations. FERC remains the only authority that can issue power licenses. And with the deliberate concurrence of the Secretary of Commerce about consistency with the CZMA, FERC may do this even over state objection. There has been in this case no improper interference by state or local government with federal authority.'' *Id.*

The Ninth Circuit's statements are consistent with CZMA section 307(e), which provides that the CZMA does not diminish either Federal or State jurisdiction, responsibility, or rights and does not supersede, modify, or repeal existing Federal law. However, Congress clearly envisioned that Federal agencies and applicants for federal authorizations might have to modify their activities to be consistent with State enforceable policies. For Federal agency activities, Congress requires Federal agencies to be consistent to the maximum extent practicable. For federal license or permit activities, applicants must be fully consistent with the State's federally approved enforceable policies. Congress initially intended and has subsequently affirmed that State consistency reviews based on State laws approved by NOAA would be applied to license or permit activities to be authorized by other Federal agencies with objectives different from those in the CZMA. It would be incongruous for Congress to provide a mechanism for State review of Federal agency activities and federally authorized activities in one section and then remove that requirement in another section. Section 307(e) is merely a standard savings clause ensuring that laws administered by Federal and State agencies are not altered by the CZMA. S. Rep. No. 753, 92nd Cong., 2d Sess. 20 (1972). Moreover, Congress, in discussing sections 307(f) and 307(e), stated that these sections are provided so that Federal agencies are not shielded from compliance with more stringent environmental requirements of other Federal or State laws by a finding that it is consistent to the maximum extent practicable with the CZMA. 136 Cong. Rec. 8077 (Sep. 26, 1990).

So long as State policies do not include specific preempted restrictions and a State's policies are implemented in a manner contemplated by the CZMA, then the State is acting properly. *See Norfolk Southern Corp.* v. *Oberly*, 822 F.2d 388, 394–395 (1987) (''While the CZMA states a national policy in favor of coastal zone management, it does not on its face expand state authority to regulate in ways that would otherwise be invalid under the Commerce Clause'').

The CZMA mandates that the Secretary conduct an ''appeal,'' to establish ''that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security,'' but says nothing about reviewing the substantive basis of the State's decision. This statutory standard for the Secretary's review demands a *de novo* review, a new review, of the activity, even though the State found it objectionable. If, for purposes of interstate pipelines, an alternative route considered by FERC, or not considered by FERC (*e.g.*, an alternative route is explored after the FERC process, but before completion of the CZMA process), is found to meet CZMA objectives and is reasonable and available (including a State determination that the alternative is consistent with the State's program), and the Secretary then overrides the State's objection, then the Secretary is fulfilling the duties prescribed by Congress in the CZMA to balance the State-Federal-private interests within the objectives of the CZMA.

Comment 109. The regulations should maintain the Secretary's discretion as to the length of time needed for issuing a judicious decision. Any effort to force

that period into a shorter time period may encourage additional litigation (thereby lengthening the process), if an appellant or a State believes its interests were not adequately considered.

NOAA Response to Comment 109. As described in the explanation, NOAA believes that the appeals can be processed in a more efficient manner and now has 160 days in which to develop the decision record.

Comment 110. The State respects the need for certainty in the override process and believes that these proposals reasonably accommodate the needs of the parties. The State does not oppose these changes.

NOAA Response to Comment 110. NOAA notes this comment.

Comment 111. Section 930.130(a)(2)(ii), purporting to expedite other environmental analyses conducted pursuant to NEPA or the Endangered Species Act, in connection with any extension of the proposed 270-day period for the decision record in a coastal consistency appeal is unnecessary, may infringe upon other coordinated agency processes, and worse, gives the impression that review pursuant to these two environmental statutes can and should be hurried along as interfering with the consistency review process. NOAA should delete the phrase ''on an expedited basis.''

NOAA Response to Comment 111. One of the oft-stated goals of CZMA review is ''coordination and simplification of procedures to ensure expedited governmental decisionmaking for the management of coastal resources.'' CZMA section 303(2)(G). This applies to State CZMA decisions and the Secretary's appeal decisions. To that end, to the extent a NEPA or ESA document being prepared by the authorizing Federal agency for its permit decision is not complete and the Secretary determines the document is needed, then the Federal agencies should endeavor to complete the document in as timely a manner as possible.

Comment 112. Section 930.130(a)(2)(ii) limits the Secretary's ability to consider important information that may not be included in NEPA documents or Biological Opinions. The Secretary's ability to make a fully informed decision could be compromised by limiting the Secretary's options in this way. The Secretary should be allowed to extend closure of the record to include any and all relevant information.

NOAA Response to Comment 112. The Secretary needs only that information he determines is relevant to the CZMA appeal standard. That information will be obtained during the period to develop the decision record. The changes to § 930.130 and the rest of subpart H provide sufficient time to develop a decision record and to issue timely decisions.

Subpart I—Interstate Consistency

Comment 113. We question the legal authority for NOAA to establish interstate consistency review requirements. The proposal response to comments that States that the procedure finds support in the ''effects tests'' is not consistent with the legislative history as we view it, and does not address the fundamental constitutional infirmities concerning a State's ability to review activities taking place wholly within the boundaries of another State.

NOAA Response to Comment 113. NOAA continues to rely on the statute and its legislative history for the addition of the Interstate consistency regulations in 2000. NOAA's view is summarized in the preamble to the 2000 rule at 65 FR 77125, 77129–77133, 77152–77153 (Dec. 8, 2000).

VI. Miscellaneous Rulemaking Requirements

Executive Order 12372: Intergovernmental Review

This program is subject to Executive Order 12372.

Executive Order 13132: Federalism Assessment

NOAA concluded that this regulatory action is consistent with federalism principles, criteria, and requirements stated in Executive Order 13132. The changes in the federal consistency regulations will facilitate Federal agency coordination with coastal States, and ensure that federal actions affecting any coastal use or resource are consistent with the enforceable policies of approved State coastal management programs. The CZMA and these revised implementing regulations promote the principles of federalism articulated in Executive Order 13132 by granting the States a qualified right to review certain federal actions that affect the land and water uses or natural resources of State coastal zones. Congress partially waived the Federal Government's supremacy over State law when it created the CZMA. Section 307 of the CZMA and NOAA's implementing regulations effectively balance responsibilities between Federal agencies and State agencies whenever Federal agencies propose activities or applicants for a required federal license or permit propose to undertake activities affecting State coastal uses or resources. Through the CZMA, Federal agencies are required to carry out their activities in a manner that is consistent to the maximum extent practicable with federally approved State management programs, and licensees and permittees are required to be fully consistent with the State programs. The CZMA and these implementing regulations, rather than preempting a State, provide a mechanism for it to object to federal actions that are not consistent with the State's management program. A State objection prevents the issuance of the federal permit or license, unless the Secretary of Commerce overrides the objection. Because the CZMA and these regulations promote the principles of federalism and enhance State authorities, no federalism assessment need be prepared.

Executive Order 12866: Regulatory Planning and Review

This regulatory action is significant for purposes of Executive Order 12866.

Executive Order 13211

Executive Order 13211 requires that agencies prepare and submit a ''Statement of Energy Effects'' to the Office of Management and Budget for certain actions. These actions include regulations which have been designated as ''significant'' under Executive Order 12866 and are likely to have a ''significant adverse effect'' on the supply, distribution, or use of energy. This action will not result in any adverse effect upon the supply, distribution, or use of energy. Rather, this regulation implements recommendations contained in the Energy Report, and serves to improve Federal-State coordination of actions affecting the coastal zone. The rule makes only minor, clarifying changes to existing regulations. To the extent these changes impact energy supply, distribution, or use, they should result in positive effects, by improving the clarity, transparency and predictability of NOAA's CZMA regulations.

Administrative Procedure Act

Pursuant to authority at 5 U.S.C. 553(b)(B), NOAA waives for good cause the requirement to provide prior notice and an opportunity for public comment on the provisions of this final rule that implement, verbatim, specific provisions of the Energy Policy Act of 2005. Such procedures are unnecessary as NOAA must comply with the law as enacted. Additional provisions of this final rule not explicitly contained in the Energy Policy Act, though necessary for NOAA's compliance with that Act, concern matters addressed in the

proposed rule and by public comment in response to that rule. As such, these provisions are within the scope of the notice previously provided and additional notice and comment are not required.

Regulatory Flexibility Act

The Chief Counsel for Regulation for the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration, when this rule was proposed, that the rule, if adopted, would not have a significant economic impact on a substantial number of small entities. This rule only makes minor changes to existing regulations. The existing regulations do not have a significant economic impact on a substantial number of small entities and, thus, these clarifying changes will not result in any additional economic impact on affected entities. No comments were received regarding the certification. Accordingly, the basis for the certification has not changed and neither an initial nor final Regulatory Flexibility Analysis was not prepared.

Paperwork Reduction Act

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

National Environmental Policy Act

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

List of Subjects in 15 CFR Part 930

Administrative practice and procedure, Coastal zone, Reporting and recordkeeping requirements.

Dated: December 21, 2005.

Craig McLean,

Acting Deputy Assistant Administrator for Ocean Services and Coastal Zone Management.

■ For the reasons stated in the preamble, NOAA amends 15 CFR part 930 as follows:

PART 930—FEDERAL CONSISTENCY WITH APPROVED COASTAL MANAGEMENT PROGRAMS

■ 1. The authority citation continues to read as follows:

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

■ 2. Section 930.1 is amended by revising paragraphs (b) and (c) to read as follows:

§ 930.1 Overall objectives.

* * * * *

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

(c) To provide flexible procedures which foster intergovernmental cooperation and minimize duplicative effort and unnecessary delay, while making certain that the objectives of the federal consistency requirement of the Act are satisfied. Federal agencies, State agencies, and applicants should coordinate as early as possible in developing a proposed federal action, and may mutually agree to intergovernmental coordination efforts to meet the requirements of these regulations, provided that public participation requirements are met and applicable State management program enforceable policies are considered. State agencies should participate in the administrative processes of federal agencies concerning federal actions that may be subject to state review under subparts C, D, E, F and I of this part.

* * * * *

■ 3. Section 930.10 is amended by revising the following entry in the table to read as follows:

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

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

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

§ 930.11 Definitions.

* * * * *

(g) *Effect on any coastal use or resource (coastal effect).* The term ''effect on any coastal use or resource'' means any reasonably foreseeable effect on any coastal use or resource resulting from a Federal agency activity or federal license or permit activity (including all types of activities subject to the federal consistency requirement under subparts C, D, E, F and I of this part.) * * *

* * * * *

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

§ 930.31 Federal agency activity.

(a) The term ''Federal agency activity'' means any functions performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities. The term ''Federal agency activity'' includes a range of activities where a Federal agency makes a proposal for action initiating an activity or series of activities when coastal effects are reasonably foreseeable, *e.g.*, a Federal agency's proposal to physically alter coastal resources, a plan that is used to direct future agency actions, a proposed rulemaking that alters uses of the coastal zone. ''Federal agency activity'' does not include the issuance of a federal license or permit to an applicant or person (see subparts D and E of this part) or the granting of federal assistance to an applicant agency (see subpart F of this part).

* * * * *

(d) A general permit proposed by a Federal agency is subject to this subpart if the general permit does not involve case-by-case or individual issuance of a license or permit by a Federal agency. When proposing a general permit, a Federal agency shall provide a consistency determination to the relevant management programs and request that the State agency(ies) provide the Federal agency with review, and if necessary, conditions, based on specific enforceable policies, that would permit the State agency to concur with the Federal agency's consistency determination. State agency concurrence shall remove the need for the State agency to review individual uses of the general permit for consistency with the enforceable policies of management programs. Federal agencies shall, pursuant to the consistent to the maximum extent practicable standard in § 930.32, incorporate State conditions into the general permit. If the State agency's conditions are not incorporated into the general permit or a State agency objects to the general permit, then the Federal agency shall notify potential users of the

general permit that the general permit is not available for use in that State unless an applicant under subpart D of this part or a person under subpart E of this part, who wants to use the general permit in that State provides the State agency with a consistency certification under subpart D of this part and the State agency concurs. When subpart D or E of this part applies, all provisions of the relevant subpart apply.

* * * * *

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

§ 930.35 Negative determinations for proposed activities.

* * * * *

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

* * * * *

■ 7. Section 930.37 is amended by adding a new third sentence to read as follows:

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

* * * State agencies shall not require Federal agencies to submit NEPA documents as information required pursuant to § 930.39. * * *

■ 8. Section 930.41 is amended by revising paragraph (a) to read as follows:

§ 930.41 State agency response.

(a) A State agency shall inform the Federal agency of its concurrence with or objection to the Federal agency's consistency determination at the earliest practicable time, after providing for public participation in the State agency's review of the consistency determination. The Federal agency may presume State agency concurrence if the State agency's response is not received within 60 days from receipt of the Federal agency's consistency determination and supporting information required by § 930.39(a). The 60-day review period begins when the State agency receives the consistency determination and supporting information required by § 930.39(a). If the information required by § 930.39(a) is not included with the determination, the State agency shall notify the Federal agency in writing within 14 days of receiving the determination and supporting information that the 60-day review period has not begun, identify missing information required by § 930.39(a), and that the 60-day review period will begin when the missing information is received by the State agency. If the State agency has not notified the Federal agency that information required by § 930.39(a) is missing within the 14 day notification period, then the 60-day review period shall begin on the date the State agency received the consistency determination and accompanying information. The State agency's determination of whether the information required by § 930.39(a) is complete is not a substantive review of the adequacy of the information provided. Thus, if a Federal agency has submitted a consistency determination and information required by § 930.39(a), then the State agency shall not assert that the 60-day review period has not begun because the information contained in the items required by § 930.39(a) is substantively deficient. The failure to submit information not required by 930.39(a) shall not be a basis for asserting that the 60-day review period has not begun.

* * * * *

■ 9. Section 930.51 is amended by revising paragraph (a) and paragraph (e) to read as follows:

§ 930.51 Federal license or permit.

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

* * * * *

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

* * * * *

■ 10. Section 930.58 is amended by revising paragraph (a)(1) and the third sentence of paragraph (a)(2) and adding a new fourth sentence and a new fifth sentence in paragraph (a)(2) to read as follows:

§ 930.58 Necessary data and information.

(a) * * *

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

(i) All material relevant to a State's management program provided to the Federal agency in support of the application; and

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

(2) * * * Necessary data and information may include completed State or local government permit applications which are required for the proposed activity, but shall not include the issued State or local permits. NEPA documents shall not be considered necessary data and information when a Federal statute requires a Federal agency to initiate the CZMA federal consistency review prior to its completion of NEPA compliance. States shall not require that the consistency certification and/or the necessary data and information be included in NEPA documents. * * *

* * * * *

■ 11. Section 930.60 is revised to read as follows:

§ 930.60 Commencement of State agency review.

(a) The State agency's six-month review period (*see* § 930.62(a)) of an applicant's consistency certification begins on the date the State agency receives the consistency certification required by § 930.57 and all the necessary data and information required by § 930.58(a).

(1) If an applicant fails to submit a consistency certification, the State agency shall notify the applicant and the Federal agency, within 30 days of receipt of the incomplete submission, that a consistency certification satisfying § 930.57 was not received and that the State agency's six-month review period will commence on the date of receipt of the missing certification, subject to paragraph (a)(2) of this section.

(2) If an applicant fails to submit all necessary data and information required by § 930.58(a), the State agency shall notify the applicant and the Federal agency, within 30 days of receipt of the incomplete submission, that necessary data and information described in § 930.58(a) was not received and that the State agency's six-month review period will commence on the date of receipt of the missing necessary data and information, subject to the requirement in paragraph (a) of this section that the applicant has also submitted a consistency certification. The State agency may waive the requirement in paragraph (a) of this section that all necessary data and information described in § 930.58(a) be submitted before commencement of the State agency's six-month consistency review. In the event of such a waiver, the requirements of § 930.58(a) must be satisfied prior to the end of the six-month consistency review period or the State agency may object to the consistency certification for insufficient information.

(3) Within 30 days of receipt of the consistency certification and/or necessary data and information that was deemed missing, pursuant to paragraphs (a)(1) or (2) of this section, the State agency shall notify the applicant and Federal agency that the certification and necessary data and information required pursuant to § 930.58 is complete, the date the certification and/or necessary data and information deemed missing was received, and, that the State agency's consistency review commenced on the date of receipt. In the event of a State waiver under paragraph (a)(2) of this section, receipt of the necessary data and information deemed missing shall not alter the date the consistency review period commenced.

(b) State agencies and applicants (and persons under subpart E of this part) may mutually agree in writing to stay the six-month consistency review period. Such an agreement shall be in writing and state a specific date on when the stay will end. The State agency shall provide a copy of the written agreement to the Federal agency and the Federal agency shall not presume State agency concurrence with an applicant's consistency certification when such a written agreement to stay the six-month consistency review period is in effect. The State agency shall not stop, stay, or otherwise alter the consistency review period without such a written agreement with the applicant.

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

■ 11a. Section 930.46 is amended by adding a new paragraph (a)(3) to read as follows:

§ 930.46 Supplemental coordination for proposed activities.

(a) * * *

(3) Substantial changes were made to the activity during the period of the State agency's initial review and the State agency did not receive notice of the substantial changes during its review period, and these changes are relevant to management program enforceable policies and/or affect coastal uses or resources.

* * * * *

■ 12. Section 930.63 is amended by revising the fourth sentence in paragraph (d) to read as follows:

§ 930.63 State agency objection to a consistency certification.

* * * * *

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

* * * * *

■ 12a. Section 930.66 is amended by adding a new paragraph (a)(3) to read as follows:

§ 930.66 Supplemental coordination for proposed activities.

(a) * * *

(3) Substantial changes were made to the activity during the period of the State agency's initial review and the State agency did not receive notice of the substantial changes during its review period, and these changes are relevant to management program enforceable policies and/or affect coastal uses or resources.

* * * * *

■ 13. Section 930.76 is amended by removing paragraph (c), redesignating paragraph (d) as paragraph (c), and revising paragraphs (a) and (b) as follows:

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

(a) Any person submitting any OCS plan to the Secretary of the Interior or designee shall submit to the Secretary of the Interior or designee:

(1) A copy of the OCS plan;

(2) The consistency certification;

(3) The necessary data and information required pursuant to § 930.58; and

(4) The information submitted pursuant to the Department of the Interior's OCS operating regulations (*see* 30 CFR 250.203 and 250.204) and OCS information program regulations (*see* 30 CFR part 252).

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

* * * * *

■ 14. Section 930.77 is amended by revising paragraph (a) to read as follows:

§ 930.77 Commencement of State agency review and public notice.

(a)(1) Except as provided in § 930.60(a), State agency review of the person's consistency certification begins at the time the State agency receives the certification and information required pursuant to § 930.76(a) and (b). If a person has submitted the documents required by § 930.76(a) and (b), then a State agency's assertion that the information contained in the submitted documents is substantively deficient, or a State agency's request for clarification of the information provided, or information and data in addition to that required by § 930.76 shall not delay or otherwise change the date on which State agency review begins.

(2) To assess consistency, the State agency shall use the information submitted pursuant to § 930.76. If a State agency wants to augment the necessary data and information required by § 930.76 to start the six-month review period for OCS plans, then the State can only do so if it amends its management program to include the information under § 930.58(a)(2).

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

* * * * *

■ 15. Section 930.82 is revised to read as follows:

§ 930.82 Amended OCS plans.

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

■ 16. Section 930.85 is amended by revising the section heading and removing paragraph (d) and revising paragraph (b) and paragraph (c) to read as follows:

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

* * * * *

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

(c) If a person fails to substantially comply with an approved OCS plan, as determined by Minerals Management Service, pursuant to the Outer Continental Shelf Lands Act and applicable regulations, the person shall come into compliance with the approved plan or shall submit an amendment to such plan or a new plan to Minerals Management Service. When satisfied that the person has met the requirements of the OCSLA and this subpart, and the Secretary of the Interior or designee has made the determination required under 30 CFR 250.203(n)(2) or § 250.204(q)(2), as applicable, the Secretary of the Interior or designee shall furnish the State agency with a copy of the amended OCS plan (excluding proprietary information), necessary data and information and consistency certification. Sections 930.82 through 930.84 shall apply to further State agency review of the consistency certification for the amended or new plan.

■ 16a. Section 930.101 is amended by adding a new paragraph (a)(3) to read as follows:

§ 930.101 Supplemental coordination for proposed activities.

(a) * * *

(3) Substantial changes were made to the activity during the period of the State agency's initial review and the State agency did not receive notice of the substantial changes during its review period, and these changes are relevant to management program enforceable policies and/or affect coastal uses or resources.

* * * * *

■ 17. Section 930.121 is amended by revising paragraph (c) to read as follows:

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

* * * * *

(c) There is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program. The Secretary may consider but is not limited to considering previous appeal decisions, alternatives described in state objection letters and alternatives and other information submitted during the appeal. The Secretary shall not consider an alternative unless the State agency submits a statement, in a brief or other supporting material, to the Secretary that the alternative would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program.

■ 18. Section 930.123 is amended by revising the section heading and adding new paragraphs (c), (d) and (e) as follows:

§ 930.123 Definitions.

* * * * *

(c) The term ''energy project'' means 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.

(d) The term ''consolidated record'' means the record of all decisions made or actions taken by the lead Federal permitting agency or by another Federal or State administrative agency or officer, maintained by the lead Federal permitting agency, with the cooperation of Federal and State administrative agencies, related to any federal authorization for the permitting, approval or other authorization of an energy project.

(e) The term ''lead Federal permitting agency'' means the Federal agency required to: issue a federal license or permit under subparts D or I of this part; approve an OCS plan under subpart E

of this part; or provide federal financial assistance under subparts F or I of this part for an energy project.

■ 19. Section 930.125 is amended by redesignating paragraphs (b) through (e) as paragraphs (c) through (f), by adding a new paragraph (b) and by revising the third and fourth sentences in redesignated paragraph (f) as follows:

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

* * * * *

(b) The appellant's notice of appeal shall include a statement explaining the appellant's basis for appeal of the State agency's objection under § 923.121 of this title, including any procedural arguments pursuant to § 930.129(b). Bases for appeal (including procedural arguments) not identified in the appellant's notice of appeal shall not be considered by the Secretary.

* * * * *

(f) * * * If the Secretary denies a request for a waiver and the appellant wishes to continue with the appeal, the appellant shall submit the appropriate fees to the Secretary within 10 days of receipt of the Secretary's denial. If the fees are not received by the 10th day, then the Secretary shall dismiss the appeal.

■ 20. Section 930.127 is revised to read as follows:

§ 930.127 Briefs and supporting materials.

(a) Within 30 days of submitting the notice of appeal, as specified in § 930.125, the appellant shall submit to the Secretary its principal brief accompanied by the appendix described in paragraph (c) of this section. Within 60 days of the appellant's filing of the notice of appeal, the State agency shall submit to the Secretary its principal brief accompanied by a supplemental appendix, if any, described in paragraph (c) of this section. Not later than 20 days after appellant's receipt of the State agency's brief, appellant may submit to the Secretary a reply brief accompanied by a supplemental appendix, if any, described in paragraph (c) of this section.

(b) A principal brief shall not exceed 30 double-spaced pages; appellant's reply brief shall not exceed 15 double-spaced pages. Any table of contents, table of citations, or certifications of mailing and/or service do not count toward the page limitations.

(c) The appellant must prepare and file an appendix with its brief containing:

(1) Its consistency certification;

(2) The State agency's objection; and

(3) All such supporting documentation and material as the appellant deems necessary for consideration by the Secretary. The State agency (or appellant on reply) shall cite to appellant's appendix or may file a supplemental appendix to include additional documentation and material as the State agency (or appellant on reply) deems necessary for consideration by the Secretary that was not included in appellant's appendix (or the State agency's supplemental appendix). The parties are encouraged to discuss the contents of appellant's appendix in order to include in the appendix as much of the supporting documentation and material as any party deems necessary for consideration by the Secretary. In an appeal for an energy project, supporting documentation and material shall be limited to the parts of the consolidated record described in paragraph (i)(1) of this section to which the appellant or the State agency wishes to direct the Secretary's attention.

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

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

(3) Each submission to the Secretary shall be accompanied by a certification of mailing and/or service on the other party. Service may be done by mail or hand delivery. Materials or briefs submitted to the Secretary not in compliance with this subpart may be disregarded and not entered into the Secretary's decision record of the appeal.

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

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

(3) The Secretary may require the appellant and the State agency to submit briefs in addition to those described in paragraphs (a) and (e) of this section as necessary.

(4) Any briefs not requested or required by the Secretary may be disregarded and not entered into the Secretary's decision record of the appeal.

(f) The appellant bears the burden of submitting evidence in support of its appeal and the burden of persuasion.

(g) The Secretary may extend the time for submission, and length, of briefs and supporting materials for good cause.

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

(i) Appeal Decision Record for Energy Projects. The provisions of this paragraph apply only to appeals for energy projects.

(1) The Secretary shall use the consolidated record maintained by the lead Federal permitting agency as the initial record for an appeal under this subpart for energy projects.

(2) The appellant's notice of appeal required by § 930.125(a) and (b) must be accompanied by four copies of the consolidated record maintained by the lead Federal permitting agency. One copy of the consolidated record must be in an electronic format compatible (to the extent practicable) with the website

maintained by the Secretary to provide public information concerning appeals under the CZMA. Notwithstanding § 930.125(e), the Secretary may extend the time for filing a notice of appeal in connection with an energy project for good cause shown to allow appellant additional time to prepare the consolidated record for filing.

(3) The appellant and the State agency shall submit briefs as required by paragraphs (a), (b) and (c) of this section.

(4) Supplemental information may be accepted and included in the decision record by the Secretary only as allowed by § 930.130(a)(2).

■ 21. Section 930.128 is revised to read as follows:

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

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

(b) Except in the case of appeals involving energy projects, the Secretary shall provide a 30-day period for the public and interested Federal agencies to comment on the appeal. Notice of the public and Federal agency comment period shall be provided in the Notice required in paragraph (a) of this section.

(c)(1) The Secretary shall accord greater weight to those Federal agencies whose comments are within the subject areas of their technical expertise.

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

(d) Except in the case of appeals involving energy projects, the Secretary may hold a public hearing in response to a request or on the Secretary's own initiative. A request for a public hearing must be filed with the Secretary within 30 days of the publication of the Notice in the **Federal Register** required in paragraph (a) of this section. If a hearing is held by the Secretary, it shall be noticed in the **Federal Register** and guided by the procedures described within § 930.113. If a hearing is held by the Secretary, the **Federal Register** notice for the hearing shall reopen the public and Federal agency comment period and shall close such comment period 10 days after the hearing.

■ 22. Section 930.129 is amended by revising paragraph (c) and paragraph (d) to read as follows:

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

* * * * *

(c) The Secretary may stay the processing of an appeal in accordance with § 930.130.

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

■ 23. Section 930.130 is amended by revising paragraphs (a), (b), (c) and (d) to read as follows:

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

(a)(1) With the exception of paragraph (a)(2) of this section, the Secretary shall close the decision record not later than 160 days after the date that the Secretary's Notice of Appeal is published in the **Federal Register** under § 930.128(a). After closing the decision record, the Secretary shall immediately publish a notice in the **Federal Register** stating that the decision record has been closed. The notice shall also state that the Secretary shall not consider additional information, briefs or comments.

(2) The Secretary may stay the closing of the decision record during the 160-day period described in paragraph (a)(1) of this section:

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

(ii) As the Secretary determines necessary to receive, on an expedited basis:

(A) Any supplemental information specifically requested by the Secretary to complete a consistency review under the Act; or

(B) Any clarifying information submitted by a party to the proceeding related to information in the consolidated record compiled by the lead Federal permitting agency.

(3) The Secretary may only stay the 160-day period described in paragraph (a)(1) of this section for a period not to exceed 60 days.

(b) Not later than 60 days after the date of publication of a **Federal Register** notice stating when the decision record for an appeal has been closed, the Secretary shall issue a decision or publish a notice in the **Federal Register** explaining why a decision cannot be issued at that time. The Secretary shall issue a decision not later than 15 days after the date of publication of a **Federal Register** notice explaining why a decision cannot be issued within the 60-day period.

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

(d) In reviewing an appeal, the Secretary shall find that a proposed federal license or permit activity, or a federal assistance activity, is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security, when the information in the decision record supports this conclusion.

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