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15 CFR Part 930

Coastal Zone Management Act Federal Consistency Regulations; Proposed Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 930

[Docket No. 990723202–9202–01]

RIN 0648–AM88

Coastal Zone Management Act Federal Consistency Regulations

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

ACTION: Proposed rule.

SUMMARY: The National Oceanic and Atmospheric Administration (NOAA) is proposing to revise the federal consistency regulations under the Coastal Zone Management Act of 1972 (CZMA). The Coastal Zone Act Reauthorization Amendments of 1990, enacted November 5, 1990, as well as the Coastal Zone Protection Act of 1996, enacted June 3, 1996, amended and reauthorized the CZMA. Among the amendments were revisions to the federal consistency requirement contained in section 307 of the CZMA. Current federal consistency regulations were promulgated in 1979 and are in need of revision after 18 years of implementation. The purpose of this proposed rule is to make these revisions and to codify the 1990 and 1996 statutory changes to section 307.

DATES: Comments on the proposed rule are invited and will be considered if submitted on or before May 30, 2000.

ADDRESSES: All comments concerning these proposed regulations should be mailed to: Joseph A. Uravitch, Chief, Coastal Programs Division, Office of Ocean and Coastal Resource Management (N/ORM3), 1305 East-West Highway, 11th Floor, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: David W. Kaiser, Federal Consistency Coordinator, Office of Ocean and Coastal Resource Management (N/ORM3), 1305 East-West Highway, 11th Floor, Silver Spring, MD 20910. Telephone: 301–713–3098, extension 144.

SUPPLEMENTARY INFORMATION:

I. Authority

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

II. Background

The CZMA was enacted to develop a national coastal management program that comprehensively manages and balances competing uses of and impacts to any coastal use or resource. The national coastal management program is implemented by individual state coastal management programs in partnership with the Federal Government. The CZMA federal consistency requirement, 16 USC 1456, requires that Federal agency activities be consistent to the maximum extent practicable with the enforceable policies of a state's coastal management program. The federal consistency requirement also requires that indirect federal activities (i.e., non-federal activities requiring federal permits, licenses or financial assistance activities) be fully consistent with a state's federally approved coastal management program. The federal consistency requirement is an important mechanism to address coastal effects, to ensure adequate federal consideration of state coastal management programs, and to avoid conflicts between states and Federal agencies by fostering early consultation and coordination.

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

III. Coastal Zone Act Reauthorization Amendments of 1990

This proposed rule codifies changes made to section 307 of the CZMA in 1990. The Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) (Pub. L. 101–508) amended the CZMA to clarify that the federal consistency requirement applies when any federal activity, regardless of location, affects any land or water use or natural resource of the coastal zone. This new ''effects'' language was added by the CZARA to replace previous language that referred to activities ''directly affecting the coastal zone,'' establishing:

> a generally applicable rule of law that any federal agency activity (regardless of its location) is subject to [the consistency requirement] if it will affect any natural resources, land uses, or water uses in the coastal zone. No federal agency activities are categorically exempt from this requirement.

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

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

Id. at 970–71. These changes reflect an unambiguous Congressional intent that all Federal agency activities meeting the ''effects'' test are subject to the CZMA consistency requirement; that there are no exceptions or exclusions from the requirement as a matter of law; and that the ''uniform threshold standard'' requires a factual determination, based on the effects of such activities on the coastal zone, to be applied on a case-by-case basis. *Id.* at 970–71; 136 Cong. Rec. H 8076 (Sep. 26, 1990).

Other changes made to the CZMA by the CZARA include the addition of section 307(c)(1)(B) which, under certain circumstances, authorizes the President to exempt a specific Federal agency activity if the President determines that the activity is in the paramount interest of the United States.

This section does not require implementing regulations. The CZARA also makes clear the requirement that Federal agency activities and federal license or permit and federal assistance activities must be consistent with the enforceable policies of state coastal management programs. Finally, the CZARA made technical and conforming changes to the other existing federal consistency requirements of CZMA sections 307(c)(3) (A) and (B), and 307(d) for the purpose of conforming these existing sections with changes made to section 307(c)(1).

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

In 1984, the Supreme Court held that outer continental shelf (OCS) oil and gas lease sales by the Department of the Interior's Minerals Management Service were not activities subject to the CZMA consistency requirement as the lease sales did not directly affect the coastal zone. *Secretary of the Interior* v. *California,* 464 U.S. 312 (1984). In amending the CZMA federal consistency section in 1990, Congress overturned the effect of the decision in *Secretary of the Interior* and made it clear that OCS oil and gas lease sales are subject to the consistency requirement. Conference Report at 970. Congress also intended this change to clarify that other federal activities (in or outside the coastal zone) in addition to OCS oil and gas lease sales are subject to the federal consistency requirement. The remainder of the consistency discussion in the Conference Report makes this clear as does similar discussion in the Congressional Record, 136 Cong. Rec. H8068 (Sep. 26, 1990) [hereinafter Congressional Record] (incorporated into the Conference Report, *see* Conference Report at 975).

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

The Congressional Record sheds further light on the intent and the scope of Congress' rejection of *Secretary of the Interior.* Congress not only rejected *Secretary of the Interior,* but eliminated the "'shadow effect" of the Court's decision (i.e., its potentially erosive effect on the application of the federal consistency requirements to other federal agency activities) * * * and also to dispel any doubt as to the applicability of this requirement to all federal agency activities that meet the standard [i.e., the effects test] for review." Congressional Record at H8076.

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

V. Coastal Zone Protection Act of 1996

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

VI. Purpose of This Proposed Rulemaking

The purpose of this proposed rule is to codify the 1990 and 1996 statutory changes to section 307 of the CZMA, and to update the federal consistency regulations after 18 years of implementation by NOAA, states and Federal agencies. This proposed rule is also the result of a two year informal effort by NOAA to work with Federal agencies, state coastal management programs and other interested parties to identify issues and obtain comments on draft proposed revisions to the regulations. Thus, this proposed rule has already undergone substantial review by Federal agencies, states and other interested parties.

VII. Section-by-Section Discussion of Proposed Changes

Throughout part 930 NOAA proposes to make a number of minor revisions, as well as a number of revisions that will implement the CZARA and the CZPA. The minor revisions include changes that will update the regulations and make them easier to use. The following is a section-specific discussion of some of these proposed changes, as well as proposed changes that will implement the CZARA and the CZPA. Because of the number of changes to the consistency regulations, the federal consistency regulations are being issued in this **Federal Register** notice in its entirety.

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

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

The "State agency" is the designated federal consistency agency for a particular state management program.

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

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

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

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

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

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

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

Subpart A—General Information

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

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

Section 930.2 would codify the requirement for public participation for all types of consistency reviews which was added by CZARA, 16 U.S.C. 1455(d)(14) (CZMA § 306(d)(14)).

Section 930.3 was formerly located at section 930.145.

Section 930.4 would clarify the use by State agencies of conditional concurrences. The Act's consistency requirements impose a definite time by which a Federal agency or an applicant for a federal approval or financial assistance (and the approving Federal agency) know if the State agency has concurred with a proposed activity, and whether the federal approval or funding may be issued. Conditions of concurrence should not replace state objections and the identification of alternatives for activities that the State agency finds are inconsistent with its management program. Since conditional concurrences could seriously weaken the state leverage granted by the CZMA consistency requirement, the proposed rules would only allow conditional concurrences pursuant to the following criteria: (1) Conditions must be based on specific enforceable policies, (2) the applicant must amend its federal application, and (3) the Federal agency approves the application as amended with the state conditions. If all of these requirements are not met, then the conditional concurrence is an objection.

Section 930.5 would be added to clarify that the mediation and negotiation sections of the regulations do not preclude other state enforcement actions where the state has jurisdiction or believes it is necessary to take enforcement or judicial action.

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

Section 930.6(b) would be revised to simplify consistency terminology. At present, different terms are used to describe state responses for Federal agency activities (''agreement or disagreement'') and federal license or permit activities (''objection or concurrence''). As proposed, a state would either object to or concur with a consistency determination or a consistency certification.

Section 930.6(c) would be added to clarify the role of the single State agency for coordinating federal actions and the State agency's responsibility to apply all relevant enforceable policies when conducting consistency reviews. The requirement that a single State agency ensure that all relevant enforceable policies are considered under state federal consistency reviews is derived from CZMA section 307 and various sections of NOAA's regulations. The CZMA requires compliance with all relevant enforceable policies of a ''management program'' and not a subset thereof. *See, e.g.,* CZMA §§ 307(c)(3)(A), 304(12). A major criterion for coastal management program approval is a determination that state agencies responsible for implementing the coastal management program do so in conformance with the policies of the management program. 15 CFR 923.40(b). *See* also 15 CFR 923.41(b)(2). Networked state coastal management programs must also demonstrate that coastal management program authorities implement the full range of policies. 15 CFR 923.43(c). The federal consistency regulations mirror the requirement for the application of enforceable policies in a comprehensive manner.

Subpart B—General Definitions

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

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

Sections 930.11(b) and (g) would define ''any coastal use or resource'' and ''effect on any coastal use or resource,'' respectively. These proposed terms are not intended to alter the statutory requirement which refers to any land or water use or natural resource of the coastal zone. These terms are merely a simpler description of the statutory requirement. The definition for coastal uses and resources is derived primarily from CZMA Section 304 (coastal resources of national significance are defined in CZMA Section 304(2)). Not all coastal uses or resources can be added. The list is not exclusive, but is meant to highlight the more common uses or resources. The term ''minerals'' has been added to include both surface and subsurface mineral resources. Aesthetics and scenic qualities are not natural resources, but are enjoyment or use of natural resources. These concepts have been added to the definition of coastal use. Land has been added to natural resource. A sentence has also been added to include coastal uses and resources detailed in a state's management program. Resource creation or restoration projects has been added as a coastal use. This will include tidal and nontidal restoration and creation projects. Air and invertebrates have

been added as natural resources. Since historic and cultural resources are important coastal resources under the CZMA (*see* sections 302(e), 303(2) and 303(2)(F)), the protection of historic and cultural resources of the coastal zone is included in the examples of coastal uses. Coastal effects are to be construed broadly and include reasonably foreseeable and cumulative and secondary effects. *See* Conference Report at 970–71. Whether consistency applies is not dependent on the type of federal activity, but on reasonably foreseeable coastal effects. For example, a planning document or regulation prepared by a Federal agency would be subject to the federal consistency requirement if coastal effects from those activities are reasonably foreseeable.

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

Section 930.11(h) would be added to define enforceable policy by reference to CZMA § 304(6a), and to clarify that an enforceable policy must be sufficiently comprehensive and specific to control coastal uses while not necessarily inflexibly committing the state to a particular path. *See American Petroleum Institute* v. *Knecht,* 456 F. Supp. 889, 919 (C.D. Cal. 1978), *aff'd,* 609 F.2d 1306 (9th Cir. 1979); 15 CFR 923.40(a); Conference Report at 972.

Subpart C—Consistency for Federal Agency Activities

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

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

NOAA proposes to amend section 930.31(a) to further describe the scope of the federal consistency effects test by clarifying the term ''functions.'' This language is derived from the CZMA's legislative history.

Section 930.31(d) would be added to clarify that CZMA section 307(c)(1) is a residual category. Federal actions that do not fall into subparts D, E, or F are Federal agency activities. CZMA section 307(c)(1)(A); *see* 44 FR 37146.

Section 930.31(e) would address the hybrid nature of general permit programs developed by Federal agencies. This occurs when a Federal agency proposes to replace the need for an applicant to obtain an individual permit with a general set of requirements which, if met by the applicant, would allow the applicant to proceed with the activity without a case-by-case approval by the Federal agency. Two examples are the Corps' Nation-wide Permit (NWP) program under the Clean Water Act section 404 and the Environmental Protection Agency's (EPA's) general National Pollutant Discharge Elimination System (NPDES) permits for discharges from OCS oil and gas facilities. The development of the general permit program is best thought of as a Federal agency activity. Even though a general permit will authorize license or permit activities, the development of the federal requirements is an action by a Federal agency, not an applicant. Moreover, there is not a discreet federal or license permit activity to review and there is not an applicant. Neither the statute nor the regulations contemplated the hybrid nature of general permits. CZMA section 307(c)(1)(A) does provide that a Federal agency is subject to section 307(c)(1) unless it is subject to paragraph (2) or (3) (license or permit activities). However, this does not resolve the matter since § 307(c)(3) does not imply or anticipate a situation where a Federal agency is an applicant for its own approval and for general permits, the Federal agency is not actually undertaking the license or permit activity covered by the general permit. Federal agencies may of course choose to subject their general permit programs to CZMA section 307(c)(3)(A).

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

Section 930.32(a)(3) would clarify the effect of federal appropriations law on the consistent to the maximum extent practicable standard. A general lack of funding cannot be a reason to conduct a federal activity that is not consistent with state management program enforceable policies. In order for federal law to prohibit Federal agencies from being consistent there must be specific limitations in federal acts. Problems arise if Federal agencies were to use dollar amounts specified in appropriations acts as part of the consistent to the maximum extent practicable equation. These problems are: (1) The CZMA Presidential exemption includes the only express exemption due to lack of appropriations; (2) appropriations acts often provide little guidance as to how funds are to be used; and (3) state enforceable policies are substantive requirements to be adhered to. State coastal management program enforceable policies are, in most cases, in place long before the planning of many federal projects and in advance of budgeting for annual appropriations. A Federal agency cannot avoid any state

requirement that it finds burdensome simply by not funding the required action. Advance planning and early coordination can help alleviate these concerns. If Federal agencies know what the state's enforceable policies are then costs can be factored into an agency's planning. Also, just as Federal agencies cannot avoid other federal and state law requirements (e.g., under the Clean Water or Air Acts, NEPA) due to funding constraints, they cannot avoid state enforceable policies. State enforceable policies are developed pursuant to the CZMA, approved by the federal government, and applicable to Federal agencies through the CZMA federal consistency requirement.

Section 930.32(b) would be revised to clarify that in unforeseen cases, such as an emergency, the Federal agency must still adhere to the consistency requirements, to the extent that exigent circumstances allow. For example, a Federal agency, responding to an emergency, must still provide a consistency determination to the State agency, if time allows. If the time frame for responding to an emergency is too short for a consistency determination, the Federal agency should coordinate with the State agency to the extent possible. To avoid uncertainty in these instances, the Federal agency and State agency may mutually agree to emergency response planning prior to an actual emergency, or develop expedited procedures or a general review for reasonably foreseeable emergency situations and activities. The phrase ''exigent circumstances'' is used for emergency actions since many agencies respond to emergencies, but they may not be mandated by law to respond within a certain time frame. Thus, their rapid response is determined by the emergency, not their discretionary authority.

Section 930.32(c) would address national security activities that are ''classified.'' The 1990 changes to the CZMA make it clear that all federal activities are subject to the consistency requirement. Thus, a classified activity that will affect coastal uses or resources is subject to the consistency requirement unless exempted by the President under CZMA section 307(c)(1)(B)). However, under the consistent to the maximum extent practicable standard, the Federal agency need only provide project information that it is legally permitted to release. Despite the fact that a Federal agency may not be able to disclose certain project information, the Federal agency must still conduct the classified activity consistent to the maximum extent practicable with the state management program. Concerned state management programs may want to consider developing general consistency agreements with relevant Federal agencies for classified activities. The definition of ''classified'' is adopted from the Freedom of Information Act. Classified information should protect from disclosure national security information concerning the national defense or foreign policy, provided that it has been properly classified in accordance with the substantive and procedural requirements of an executive order. As of October 14, 1995, the executive order in effect is E.O. 12,958, 3 CFR 333, reprinted in 50 U.S.C. 435 note (1994). Generally, it is preferable, however, not to identify the particular executive order in the regulations, because it may be supplanted by a new order under a new administration and courts have held that agencies should always apply the executive order in effect at the time the classified determination is made—i.e., an agency does not have to go back through all of its old secrets and reclassify them pursuant to the latest executive order.

Section 930.33(a)(1) would clarify that effects on any coastal use or resource are not limited to environmental effects and that a review of relevant state coastal management program enforceable policies is necessary to determine whether the activity will affect any coastal use or resource.

Section 930.33(a)(2) would clarify when federal consistency does not apply to a Federal agency activity. If there are no effects on any coastal use or resource and a negative determination is not required, then the Federal agency need not provide anything to the state.

Section 930.33(a)(3) would provide a process whereby State agencies and Federal agencies can more efficiently address ''de minimis'' activities. *De minimis* activities cannot be unilaterally excluded from the federal consistency requirement. As the court noted in *Envtl. Defense Fund* v. *Envtl. Protection Agency,* 82 F.3d 451 (D.C. Cir. 1996), *modified* by 92 F.3d 1209 (D.C. Cir. 1996), ''[t]he ability to create a de minimis exemption is not an ability to depart from the statute, but rather a tool to be used in implementing the legislative design. * * * Of course, * * * a de minimis exemption cannot stand if it is contrary to the express terms of the statute.'' The express terms of the CZMA are that consistency applies to ''each'' federal activity ''affecting'' ''any'' coastal use or resource. Neither the CZMA nor the Conference Report specifically authorize a unilateral de minimis exception. Further, Congress amended the CZMA in 1990 to specifically guard against Federal agencies exempting their activities. Thus, any attempt to address de minimis activities must be done cautiously. Also, many states are concerned with the cumulative effect of seemingly de minimis activities. NOAA believes, however, that the CZMA allows states and Federal agencies to mutually agree to address de minimis activities in a flexible manner. The proposed revisions do not provide detailed definitions of de minimis activities. Rather, NOAA proposes some general guidelines and then leaves it to the Federal agency and states to agree as to what is de minimis. NOAA is not requiring a State agency to provide for public participation for agreements between a State agency and a Federal agency regarding de minimis activities. An agreement between a State agency and a Federal agency to exclude de minimis activities is not a consistency determination. (If a State agency and Federal agency agree to address de minimis activities through a general determination public participation would be required.) Individual states may of course provide for public participation.

Section 930.33(a)(4) would allow State agencies and federal agencies to mutually agree to exclude environmentally beneficial activities from further State agency review.

Section 930.33(c)(2) would be removed. Outer continental shelf (OCS) oil and gas lease sales are Federal agency activities and are subject to the CZMA consistency requirement. *See* Sections III and IV of this proposed rule. Likewise, pre-lease sale activities are also subject to the consistency requirement if coastal effects are reasonably foreseeable. *See* 44 FR 37154 (comment to § 930.71); Letter from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Dept. of Justice, to C.L. Haslam, General Counsel, U.S. Dept. of Commerce and Leo M. Krulitz, Solicitor, U.S. Dept. of the Interior (Apr. 20, 1979).

Section 930.33(d) would further clarify the CZMA federal consistency ''effects test.'' Early federal-state coordination is emphasized to reduce conflict, build public support, provide a smooth and expeditious federal consistency review, and to help Federal agencies avoid costly last minute changes to projects in order to comply with state coastal management program enforceable policies. The earlier the coordination, the less likely it is that conflict will arise. Early coordination also enables a Federal agency to address coastal management concerns while the

agency still has the discretion to alter the activity and before substantial resources have been expended.

Section 930.34 would be removed and its contents moved to new section 930.34 and to section 930.36 on consistency determinations.

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

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

Sections 930.34(b)(2) and (c) would be deleted, with parts of these sections moved to new section 930.34(c). These sections are confusing and are not needed, since the listing provision for Federal agency activities is a recommendation and not a requirement and Federal agencies must provide a consistency determination to applicable states for activities with coastal effects regardless as to whether the state has listed the activity.

Section 930.34(d) would encourage Federal agencies to seek assistance from the State agency in its determination of effects and consistency. At a minimum, State agencies must be able to provide Federal agencies with the applicable enforceable policies. Identifying a state's enforceable policies can be difficult. Also, providing the Federal agency with the applicable policies will help focus the Federal agency's efforts on the state's coastal management concerns.

Section 930.35 would apply to negative determinations and clarify existing requirements for negative determinations. Section 930.35(d)(3) is proposed to be deleted since the subsection is not used very often, the meaning is not clear, it is redundant with subsection (a)(1), and may discourage Federal agencies from taking a hard look at borderline cases.

Section 930.35(b) would clarify the information requirements for a negative determination. A negative determination, by definition, is a finding of no effects. Thus, the information provided for a negative determination may not be as substantial as that provided for a consistency determination.

Section 930.35(c) would clarify that if a state disagrees with a Federal agency's negative determination, it must do so within 60 days or its concurrence is presumed. Public notice under CZMA § 306(d)(14) is not required for State agency review of negative determinations since negative determinations are not consistency determinations as contemplated by the Act. This section also clarifies that, if a Federal agency were to agree that coastal effects are reasonably foreseeable and that its negative determination was not correct, then the State agency and Federal agency may agree to an alternative schedule to promote administrative efficiency.

Section 930.36 would be moved to section 930.35(d). Section 930.36 would incorporate existing sections 930.37 and 930.34(b) and elaborate on consistency determinations for proposed activities.

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

Section 930.36(e) would describe a method to efficiently address consistency requirements for a federal activity that is national or regional in scope. For example, a federal activity, such as a rulemaking or planning activity, may apply to more than one coastal state where coastal effects are reasonably foreseeable. Providing each state with a separate consistency determination may be difficult, inefficient and not cost effective, even with early coordination. The proposed regulation provides states and Federal agencies with the means to effectively coordinate, ensure adequate consideration of state coastal management programs, and provide an efficient, cost effective and timely method for meeting the consistency requirement.

Section 930.37(c) would be moved to 930.36(d) and amended to clarify that phased consistency determinations refers to development projects and activities. Section 930.37 would clarify coordination of consistency with the use of NEPA documents to address consistency requirements. Federal agencies are not required to address consistency requirements in NEPA documents, but may use NEPA documents, at the Federal agency's discretion, as an efficient and effective mechanism to address the consistency requirements. The use of NEPA documents for consistency purposes does not, however, mean that a NEPA document necessarily satisfies all consistency requirements. The Federal agency must still comply with the applicable sections in 15 C.F.R. part 930, subpart C. Section 930.37 would provide flexibility for states and Federal agencies to agree to different NEPA/consistency review procedures. Coordination between states and federal agencies on federal consistency requirements should occur at an early stage, usually at the draft environmental impact statement (EIS) stage, and before the Federal agency reaches a significant point in its decision making and while the Federal agency still has discretion to modify the activity. A final EIS is a significant point in an agency's decision making and further modifications are much harder to do and require more resources. It is more efficient and in keeping with the intent of consistency for states and federal agencies to coordinate at the draft EIS stage. Arrangements should be made to do supplemental consistency reviews in case the project substantially changes in the final EIS or Record of Decision.

Section 930.39(a) would be amended to clarify that the Federal agency's evaluation of the management program

is included in the consistency determination. The last sentence in subsection (a) is derived from the last sentence of former § 930.34(a).

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

The last sentence of section 930.39(c) would be deleted since it is redundant with the rest of section 930.39(c).

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

Section 930.39(e) would clarify the relationship between state permit requirements and the federal consistency requirements. Federal agencies must obtain state permits (including state coastal management program permits) when required by Federal law (other than the CZMA). For example, the Clean Water Act (CWA) requires Federal agencies to obtain state permits and certifications that regulate and control dredging and water pollution within the navigable waters of the state. *See* 33 U.S.C. 1323, 1341, 1344(t); *Friends of the Earth* v. *United States Navy,* 841 F.2d 927 (9th Cir. 1988). However, in some instances, there may be an issue as to the scope of a state or local permit that a Federal agency is required to obtain by another federal law. To insure that such a requirement is ''not enlarged beyond what the language [of the federal law] requires,'' *United States Department of Energy* v. *Ohio*, 112 S. Ct. 1627 (1992), and to minimize conflicts in situations where the scope of the state permit requirement is an issue, the U.S. Department of Justice should be consulted. When a Federal agency is not required to obtain a state permit, the Federal agency must, pursuant to the CZMA, still be consistent to the maximum extent practicable with state enforceable policies, including the standards that underlie a state's permit program.

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

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

The time period for a state's response to a consistency determination would be increased from 45 days to 60 days to allow states to provide adequate public participation as required by CZMA section 306(d)(14)(added in 1990 by CZARA). Federal agencies must provide consistency determinations to coastal states at least 90 days prior to federal action. 16 U.S.C. 1456(c)(1)(C). Currently, NOAA regulations require states to respond within 45 days of receiving the determination. 15 CFR 930.41(a). If a state needs more time, a Federal agency must allow one 15 day extension. 15 CFR 930.41(b). These regulatory requirements were promulgated prior to the addition of CZMA section 306(d)(14). OCRM's Final Guidance implementing CZMA section 306(d)(14) did not change these requirements. 59 FR 30339. It will be difficult for many states to meet the public participation requirement under state law and still respond within 45 days. The likely result of this new requirement is that for most reviews of consistency determinations, states will need at least one 15 day extension, resulting in at least a 60-day review. Thus, in order for states to develop meaningful public participation procedures, and to provide greater predictability for Federal agencies as to when a state's consistency review will be completed, NOAA proposes to provide states with a 60-day review period (extension provision remain the same). This should alleviate the inconsistency between current regulations and the CZMA section 306(d)(14) requirement. The total time allowed before a federal action may commence (90 days) would not change.

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

Section 930.41(d) would be added to clarify that states cannot unilaterally place time limits on concurrences. States must decide if they can concur with a consistency determination absent an agreement on time limits. Otherwise a state has the option of objecting for lack of information, if appropriate, or relying on § 930.45(b) (previously § 930.45(b)). There are several reasons why time limits are not acceptable. The CZMA requires a Federal agency to provide a consistency determination 90 days before final Federal agency approval. CZMA section 307(c)(2). The CZMA does not allow states to re-review the same activity. State consistency decisions and objections also must be based on the enforceable policies of a state's management program. A time limit on a state's concurrence would be based on the possibility that the activity or the state's program would change and not on enforceable policies, as required by the CZMA. Further, State agencies and Federal agencies may agree to a time limit for a state's concurrence, including concurrences for de minimis activities and general determinations. The CZMA does, however, require Federal agencies to carry out each activity in a manner that is consistent to the maximum extent practicable with a state's enforceable policies. Thus, if a project substantially changes between the time that the state reviews the activity and when the activity begins, the Federal agency must provide a new or supplemental consistency determination since the state would not have had the opportunity to review the ''new'' activity. This is precisely what the proposed § 930.46 is for. Section 930.46 only applies to previously reviewed activities that have not yet begun and the coastal effects are substantially different then as originally reviewed by the State agency.

Section 930.41(e) would clarify that a State agency may not assess the federal agency with a fee for the state's review of the Federal agency's consistency determination, unless such a fee is required under federal law applicable to that agency. The CZMA does not require

Federal agencies to pay processing fees. NOAA cannot require such fees by regulation. Thus, states cannot hold up their consistency reviews or object based on a failure by a Federal agency to pay a fee.

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

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

Section 930.43(d) would clarify that, in the event of a state objection, the remainder of the 90-day period should be used to resolve differences and that federal agencies should postpone agency action after the 90 day period, if differences have not been resolved. It also clarifies that, notwithstanding unresolved issues, after the 90 days a Federal agency may only proceed with the activity over a state's objection if the Federal agency clearly describes, in writing, the federal legal requirements that prohibit the Federal agency from full consistency.

Section 930.46 would address the situation where a proposed activity previously reviewed, but not yet begun, will have coastal effects substantially different than originally described. If a proposed project has substantially changed, and the state has not reviewed the changes, then it is a new project, and a new consistency determination is required. Since the consistency test depends on whether coastal effects are reasonably foreseeable, and not on the nature of the activity, substantial new coastal effects would also trigger the consistency requirement. Thus, where an activity has not started, substantial new effects have been discovered, and the state has not had the opportunity to review the activity for consistency in light of these effects, section 930.46 would require a supplemental consistency determination. This is an affirmative duty on the part of Federal agencies. States may seek compliance either through negotiation, mediation or litigation. This proposed section is similar to NEPA requirements for supplemental statements. *See* 40 CFR § 1502.9(c)(1). NOAA expects that this section will be little used, but where it is used will eliminate confusion as to the consistency process and conform the regulations to the changes made by CZARA.

A similar section is repeated at the end of subparts D and F. See proposed sections 930.66 and 930.101.

Subpart D—Consistency for Federal License or Permit Activities

Sections 930.50 and 930.51(a) would be amended to be consistent with the statutory language referring to ''required'' federal license or permit activities. A required federal approval means that the activity could not be performed without the approval or permission of the Federal agency. The approval does not have to be mandated by federal law, it only has to be a requirement to perform the activity.

Section 930.51(a) would clarify that a federal lease to a non-federal applicant, e.g., to use federal land for a private or commercial purpose, is a form of authorization or permission under the definition of federal license or permit, with the exception of lease sales issued under the Outer Continental Shelf Lands Act, which are Federal agency activities under 15 CFR part 930, subpart C.

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

Section 930.51(c) would clarify that a major amendment is not a minor change to a previously reviewed activity, but a change that affects any coastal use or resource substantially different than effects previously reviewed by the State agency.

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

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

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

Section 930.52 would be amended to add to the definition of ''applicant'' applicants for a United States required approval from other nations, and applicants filing a consistency certification under the proposed general permit consistency process under § 930.31(e). Regarding other nations, the CZMA requires any applicant for a

required federal license or permit to certify consistency with state management programs. There may be instances where a foreign company or individual must obtain a United States approval.

Section 930.53(a) would be removed. Most state programs have either been developed or are in the process of doing so. Thus, this section is no longer necessary. Also, federal involvement in the identification of federal activities is addressed in the program development regulations. *See* 15 CFR § 923.53.

Section 930.53(b) would be moved to 930.53(a).

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

Sections 930.53(c), (d) and (e) would be moved to 930.53(b), (c) and (d), respectively. The addition of proposed sections 930.53(c)(1) and (2) clarify the procedures for consultation with Federal agencies and approval by the Director.

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

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

Section 930.54(c) would be amended to clarify that the Director's decision deadline may be extended by the Director for complex issues or to address the needs of one or more of the parties. This would codify existing practice which has been useful in resolving issues often leading to the State agency's withdrawal of its request.

Section 930.54(f) would provide applicants and State agencies with the flexibility to agree to forego the unlisted activity procedure, have the applicant subject itself to consistency, and to expedite the consistency process. This would help to resolve any coastal management issues informally and to avoid delays due to disagreement over whether the application should be subject to State agency consistency review.

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

Section 930.58 would be modified to clarify information requirements and to consolidate language from other sections. Subsection 930.58(a)(1) (formerly § 930.56(b)) would clarify that the necessary data and information which applicants must provide to the State agency may include state permits or permit applications.

Sections 930.60(a)(1), (2) and (3) would clarify when the consistency time clock may begin; the consequences of an incomplete certification; and State agency notice requirements to the applicant and the Federal agency. Where the applicant has submitted an incomplete certification and the state begins the consistency time clock, the State agency cannot later stop the time clock unless the applicant agrees. Section 930.60(a)(2) would require State agencies to notify the applicant and the Federal agency of the date when necessary certification or information deficiencies have been corrected, and the State agency's review has begun. Subsection (a)(3) would allow states and applicants to mutually agree to alter the review time period.

Section 930.62 would be deleted and part of it moved to section 930.61(a). The following section numbers in this subpart would be renumbered.

Section 930.63(a) (to be redesignated as section 930.62(a)) would be amended to clarify that a State agency's objection must be postmarked by the end of the six month review period.

Section 930.62(d) would be moved from § 930.64(c).

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

Section 930.64(e) (to be redesignated as section 930.63(e)) would be amended to clarify the notification of availability of the Secretarial override process. Since a concurrence with conditions may also become an objection, a conditional concurrence must also include similar appeal language.

Section 930.66 (to be redesignated as § 930.65) would be amended to provide states with a more meaningful opportunity to address instances where the State agency claims that an activity once found consistent or not affecting any coastal use or resource, is not being conducted as originally proposed and which will cause effects on a coastal use or resource substantially different than originally proposed. Previously, states could only request that the Federal agency take remedial action. If a Federal agency does not take remedial action the State agency can request that the Director find that the effects of the activity have substantially changed and require the applicant to submit an amended or new consistency certification and supporting information, or comply with the originally approved certification. This change mirrors the existing remedial action section of subpart E (*see* § 930.86)

and, like section 930.86, is not expected to be used frequently. However, the procedure exists, if necessary, to ensure that federal license or permit activities continue to be conducted consistent with a state's management program.

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

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

Section 930.75(b) would be deleted as redundant with the proposed changes to § 930.76(b) and with § 930.58.

Section 930.77 would be deleted since this information is redundant with § 930.58, which is referenced in § 930.76(b). The rest of the sections in this subpart are renumbered accordingly (with additional minor changes, mostly conforming with changes made in subpart D).

Section 930.79(a) would be amended to clarify that if, after State agency concurrence, the activity, or effects from the activity, which the State agency reviewed, has substantially changed, then a new consistency certification shall be included in the person's application for the federal license or permit. This is consistent with the statutory requirement that all federal actions affecting any coastal use or resource are subject to the consistency requirement. If the activity or effects have changed, then the state did not have the opportunity to review the activity.

Sections 930.83(b)–(e) (currently § 930.84(b)–(e)) would be deleted since they are unnecessary and are replaced by the new reference in revised § 930.83.

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

Section 930.94 would be amended to clarify that all federal assistance activities that affect any coastal use or resource are subject to the consistency requirement. While the intergovernmental review process is the preferred method for notifying the State agency and for State agency review, the intergovernmental review process may not provide notification for all federal assistance activities subject to the consistency requirement. Proposed §§ 930.94(b) and 930.95 provide methods to ensure adequate notification and review, by specifying a listed and unlisted procedure.

Section 930.94(c) would be added to conform to the statutory requirement that the applicant agency provide an evaluation of consistency. *See* CZMA section 307(d).

Sections 930.96(c)–(e) would be deleted since the reference to § 930.63 in § 930.63(b) eliminates the need for these subsections.

The unlisted activity procedure in section 930.98 follows the unlisted activity procedures found at § 930.54, except that Director approval is not required, because the State agency, through its monitoring and review of federal assistance activities, determines if coastal effects are reasonably foreseeable.

Section 930.100 would be amended to provide states with more meaningful opportunity to address remedial action for previously reviewed activities. See discussion of § 930.65.

Section 930.101 would contain a supplemental coordination for proposed activities provision. *See* discussion of section 930.46.

Subpart G—Secretarial Mediation

Only minor changes were made to subpart G. Subpart G provides a process for Federal agencies and coastal states to request that the Secretary of Commerce mediate serious disputes regarding the federal consistency requirements. Subpart G also provides for informal negotiation by OCRM. Both Secretarial mediation and informal negotiations require the participation of both agencies and are non-binding.

Subpart H—Secretarial Review Related to the Objectives or Purposes of the Act and National Security Interests

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

The Secretary's review is an independent assessment of the activity (the Secretary's review of the State agency's decision is limited to ensuring that the state's objection to an applicant's consistency certification was based on enforceable policies that are incorporated into the state's management program and that other consistency process requirements were met). If the Secretary overrides a State agency's objection, then the Federal agency may permit or fund the activity.

Changes were made to § 930.121(a) and (b) to ensure that the Secretary overrides a state's objection only where there is a national interest in the activity and that interest outweighs the adverse coastal effects of the activity. These changes will allow the Secretary to address issues of national concern and not minor local land use decisions that have only a de minimis connection to coastal uses and the national interest defined in the CZMA's objectives.

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

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

Section 930.126 would codify and explain the statutory requirement for the Secretary to collect fees from appellants to recover the costs of administering and processing appeals. These fees are in addition to the filing fees. *See* 16 USC 1456(i).

Section 930.127 would clarify when an appellant must submit supporting data and information. This requirement is necessary so that the Secretary can meet new time limits placed on the Secretary by the 1996 amendments to the CZMA.

Section 930.132 would be amended to clarify the procedures applicable to reviews initiated by the secretary on his/her own initiative. Section 930.132(b) is superseded by section 8 of the Coastal Zone Protection Act of 1996, Public Law 104–150. Section 8 created

a new section 319 of the CZMA concerning the timing of appeals.

Sections 930.133 and 134 would be replaced with a cross reference in § 930.134(b) to the provisions in subpart H for processing and administering appeals.

Subpart I—Assistant Administrator Reporting and Review

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

In addition, section 930.145 would be revised and moved to section 930.3.

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

The CZARA clarified that the federal consistency trigger is coastal effects, regardless as to the geographic location of the federal activity. *See* 16 U.S.C. 1456; H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess., 970–972. Thus, federal consistency applies to all relevant federal actions, even when they occur outside the state's coastal zone and in another state. For example, State A may review a federal permit application for an activity occurring wholly within State B if State A has a federally approved coastal management program and the activity will have coastal effects. An example of this type of activity is the placement of a sewage outfall pipe in State B's waters that results in impacts to shellfish harvesting waters in State A.

In 1994, the Secretary of Commerce found, in the Lake Gaston decision, that federal consistency applied to a federal activity occurring in one state and having coastal effects in another state (hereinafter referred to as ''interstate consistency''). This decision was based on a 1989 NOAA General Counsel opinion, the plain language of the CZMA and the Conference Report. *See also* 136 Cong. Rec. H8077 (Sep. 26, 1990).

Interstate consistency does not expand a coastal state's jurisdiction or affect the sovereignty of other states. Federal consistency applies only to federal actions, not state actions. If State A determines that an activity in State B would affect its coastal resources, but no federal permit or other federal action is required to undertake the activity, State A does not have any authority under the CZMA to review that activity. The CZMA also, even when there is a federal connection, does not give coastal states the authority to review the application of the laws, regulations, or policies of any other state. The CZMA only allows a state coastal management program to review the federal approval of an activity. NOAA proposes to add a new subpart I to provide clearer guidance as to how interstate consistency should be applied.

NOAA believes that regulations are needed so that the application of interstate consistency is carried out in a predictable, reasonable, and efficient manner. NOAA is specifically addressing interstate consistency to encourage neighboring states to cooperate in dealing with common resource management issues, and to provide states, permitting agencies, and the public with a more predictable application of the consistency requirement to these activities. Interstate resource management issues are best resolved on a cooperative, proactive basis.

VIII. Miscellaneous Rulemaking Requirements

Executive Order 12372: Intergovernmental Review

This program is subject to Executive Order 12372.

Executive Order 13132: Federalism Assessment

NOAA has concluded that this regulatory action is consistent with federalism principles, criteria, and requirements stated in Executive Order 13132. The proposed changes in the federal consistency regulations are intended to facilitate Federal agency coordination with coastal states, and ensure that federal actions affecting any coastal use or resource are consistent with the enforceable policies of approved state coastal management programs. The Coastal Zone Management Act (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 activities that affect the land and water uses or natural resources of state coastal zones. Section 307 of the CZMA and these implementing regulations effectively transfer power from federal agencies to state agencies whenever federal agencies propose activities or applicants for required federal license or permit propose to undertake activities affecting state coastal 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 programs and licensees and permitees 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 activities that are not consistent with the State's management program. A state objection prevents the issuance of the federal permit or license, unless the Secretary of Commerce overrides the objection. Because the CZMA and these regulations promote the principles of federalism and enhance state authorities, no federalism assessment need be prepared.

Executive Order 12866: Regulatory Planning and Review

This regulatory action is not significant for purposes of Executive Order 12866.

Regulatory Flexibility Act

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that the proposed rule, if adopted, would not have a significant impact on a substantial number of small entities. This proposed rule will only make minor changes to existing law, under both the CZMA and the existing regulations. The existing regulations do not have a significant impact on a substantial number of small entities and, thus, codifying in the regulations the requirements of the CZMA, as amended in 1990, and other minor changes, will not result in any additional economic impact on affected entities. The proposed rule: (1) Addresses coastal management programs of coastal states and territories, (2) removes outdated or unnecessary provisions for federal consistency purposes, (3) revises the remaining provisions to improve federal-state coordination of actions affecting the coastal zone, and (4) do not impose any significant new requirements on states, federal agencies, businesses, or the public. The basic substantive requirements in the existing regulations and the proposed rule would remain in effect whether or not the proposed rule is adopted. Accordingly, an initial Regulatory Flexibility Analysis was not prepared.

The term ''small entity'' includes small businesses, small organizations, and small governmental jurisdictions. The federal consistency regulations, and the proposed rule, primarily affect states and federal agencies. Federal consistency also applies to private land owners proposing certain activities

affecting the coastal zone that require federal approvals. State and federal agencies and private landowners are not small entities under the Regulatory Flexibility Act (RFA). Federal consistency does apply to some small businesses, small organizations and small governmental jurisdictions proposing activities that affect the coastal zone. (NOAA's National Marine Fisheries Service defines a small jurisdiction under the RFA as any government of a district with a population of less than 50,000.) However, these numbers are insignificant when compared to the number of small businesses and governmental jurisdictions in coastal states. The Federal consistency appeal process affects very few entities of any kind. Since the CZMA was enacted in 1972, only 39 consistency appeals have been filed with the Secretary of Commerce. Of those 39 consistency appeals, only 5 appeals have involved small entities. In 27 years of implementation, only five small entities have been affected by these regulations governing consistency appeals to the Secretary of Commerce.

In addition, the number of small entities affected by the consistency provisions of the CZMA generally, are insignificant when compared to the total number of small businesses and governmental jurisdictions in the 33 coastal states with approved coastal management programs. For example, in the State of North Carolina, for the period January 1, 1998, to December 31, 1998, the state reviewed 26 applications for federal licenses or permits under 15 CFR part 930, subpart D (the existing regulations), for activities that did not require a state permit. Of these 26 applications, no small entities were subject to the state's CZMA federal consistency review authority and the existing regulations. During the same period the state also reviewed 90 applications by state agencies and local governments for federal financial assistance. Of these 90 applications, 28 small entities were subject to the state's CZMA federal consistency review authority and the existing regulations. The State did not object to any of these financial assistance applications. Moreover, all of these financial assistance activities involved allowing federal funds to improve local infrastructure. North Carolina is a representative state in the use and application of the federal consistency requirement and the existing regulations. This is evidenced by the fact that all State coastal management programs concur with 95–97 percent of all federal license or permit activities, and over 99 percent of all applicable small organization and governmental jurisdiction federal assistance activities.

Thus, the existing regulations do not, and the proposed rule will not, have a significant impact on a substantial number of small entities.

Paperwork Reduction Act

This proposed rule contains a collection-of-information requirement subject to review and approval by OMB under the Paperwork Reduction Act (PRA). Many of these are existing requirements and are being submitted to OMB for approval. This Notice also refers to federally approved coastal management plans which have previously been approved by OMB under 0648–0119. Public reporting burden for the collection of information related to this proposed rule is estimated to average as follows: (A) State objection and concurrence to consistency certifications or determinations approximately 18,800 hours; (B) State requests to review unlisted activities approximately 12 hours; (C) public notice requirements approximately 1300 hours; (D) remedial action and supplemental review approximately 12 hours; (E) listing notices approximately 1 hour; (F) mediation requests approximately 6 hours; and (G) appeals to the Secretary of Commerce approximately 200 hours.

Public comment is sought regarding: whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of the information, including through the use of automated collection techniques or other forms of information technology. Send comments on any of these or any other aspects of the collection of information to David Kaiser, Federal Consistency Coordinator at the **ADDRESSES** above, and to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503 (Attention: NOAA Desk Officer).

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

National Environmental Policy Act

NOAA has concluded that this regulatory action does not constitute a major federal action significantly affecting the quality of the human environment. Therefore, an environmental impact statement is not required.

List of Subjects in 15 CFR Part 930

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

Dated: April 6, 2000.

Ted Lillestolen,

Deputy Assistant Administrator for Ocean Services and Coastal Zone Management.

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

PART 930—FEDERAL CONSISTENCY WITH APPROVED COASTAL MANAGEMENT PROGRAMS

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Sec.

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Authority: 16 U.S.C. 141 *et seq.*

Subpart A—General Information

§ 930.1 Overall objectives.

The objectives of this part are:

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

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

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

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

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

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

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

§ 930.2 Public participation.

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

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

As part of the responsibility to conduct a continuing review of approved management programs, the Director of the Office of Ocean and Coastal Resource Management (Director) shall review the performance of each state's implementation of the federal consistency requirement. The Director shall evaluate instances where a State agency is believed to have either failed to object to inconsistent federal actions, or improperly objected to consistent federal actions. This evaluation shall be incorporated within the Director's general efforts to ascertain instances where a state has not adhered to its approved management program and such lack of adherence is not justified.

§ 930.4 Conditional concurrences.

(a) Federal agencies, applicants, persons and applicant agencies should

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

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

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

(3) The Federal agency (for subparts D, E, F and I) shall approve the amended application (with the State agency's conditions). The Federal agency shall immediately notify the State agency and applicant or applicant agency if the Federal agency will not approve the application as amended by the State agency's conditions. Federal agencies shall enforce, to the extent allowed by law, the state conditions contained in the federal permit or license as approved with the state's conditions.

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

§ 930.5 State enforcement action.

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

§ 930.6 State agency responsibility.

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

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

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

Subpart B—General Definitions

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

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§ 930.11 Definitions.

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

(b) *Any coastal use or resource.* The phrase ''any coastal use or resource'' means any land or water use or natural resource of the coastal zone. Land and water uses, or coastal uses, are defined in sections 304(10) and (18) of the Act, respectively, and include, but are not limited to, public access, recreation, fishing, historic or cultural preservation, development, hazards management, marinas and floodplain management, scenic and aesthetic enjoyment, and resource creation or restoration projects. Natural resources include biological or physical resources that are found within a state's coastal zone on a regular or cyclical basis. Biological and physical resources include, but are not limited to,

air, tidal and nontidal wetlands, ocean waters, estuaries, rivers, streams, lakes, aquifers, submerged aquatic vegetation, land, plants, trees, minerals, fish, shellfish, invertebrates, amphibians, birds, mammals, reptiles, and coastal resources of national significance. Coastal uses and resources also includes uses and resources appropriately described in a state's management program.

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

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

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

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

(g) *Effect on any coastal use or resource (coastal effect).* The term ''effect on any coastal use or resource'' means any reasonably foreseeable effect on any coastal use or resource resulting from a federal action. (The term ''federal action'' includes all types of activities subject to the federal consistency requirement under subparts C, D, E, F and I of this part.) Effects are not just environmental effects, but include effects on coastal uses. Effects include both direct effects which result from the activity and occur at the same time and place as the activity, and indirect (cumulative and secondary) effects which result from the activity and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects are effects resulting from the incremental impact of the federal action when added to other past, present, and reasonably foreseeable actions, regardless of what person(s) undertake(s) such actions.

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

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

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

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

(l) *OCRM.* The term ''OCRM'' means the Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration (''NOAA''), U.S. Department of Commerce.

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

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

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

Subpart C—Consistency for Federal Agency Activities

§ 930.30 Objectives.

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

§ 930.31 Federal agency activity.

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

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

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

(d) A general permit program proposed by a Federal agency is subject to this subpart, unless a Federal agency chooses to subject its general permit program to consistency review under subpart D of this part. When proposing a general permit program, a Federal agency shall provide a consistency determination to the relevant state management programs and request that the State agency(ies) provide the Federal agency with conditions that would permit the State agency to concur with

the Federal agency's consistency determination. State concurrence should remove the need for the State agency to review future case-by-case uses of the general permit. Federal agencies shall, to the maximum extent practicable, incorporate the state conditions into the general permit. If the state conditions are not incorporated into the general permit or a State agency objects to the general permit, then the Federal agency shall notify potential users of the general permit that the general permit is not authorized for that state. Accordingly, the applicants in those states shall provide the State agency with a consistency certification under subpart D of this part.

§ 930.32 Consistent to the maximum extent practicable.

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

(2) Section 307(e) of the Act does not relieve Federal agencies of the consistency requirements under the Act. The Act was intended to cause substantive changes in Federal agency decisionmaking within the context of the discretionary powers residing within such agencies. Accordingly, whenever legally permissible, Federal agencies shall consider the enforceable policies of state management programs as requirements to be adhered to in addition to existing Federal agency statutory mandates. If a Federal agency asserts that full consistency with the management program is prohibited, it shall clearly describe, in writing, to the State agency the statutory provisions, legislative history, or other legal authority which limits the Federal agency's discretion to be consistent with the enforceable policies of the management program.

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

(b) A Federal agency may deviate from full consistency with an approved management program when such deviation is justified because of some unforeseen circumstances, *e.g.,* an emergency, arising after the approval of the management program which present the Federal agency with a substantial obstacle that prevents complete adherence to the approved program. Such deviation shall be the minimum necessary to address the exigent circumstances. Federal agencies shall carry out their activities consistent to the maximum extent practicable with the enforceable policies of a state's management program, to the extent that the exigent circumstances allow. Federal agencies shall consult with State agencies to the extent that an unforeseen circumstance allows and shall attempt to seek State agency concurrence within the time allowed. This invariably involves a case-by-case evaluation conducted by the Federal agency. Once the exigent circumstances have passed Federal agencies shall ensure that their activities are consistent to the maximum extent practicable with the enforceable policies of state management programs.

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

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

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

(1) Effects are determined by looking at reasonably foreseeable direct and indirect effects on any coastal use or resource. An action which has minimal environmental effects may still have effects on a coastal use (*e.g.,* effects on public access and recreational opportunities, protection of historic property) or a coastal resource. Therefore, Federal agencies shall, in making a determination of effects, review relevant state coastal management program policies as part of determining effects on any coastal use or resource.

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

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

available to facilitate a Federal agency's proposal.

(4) Environmentally beneficial activities. The State agency and Federal agencies may mutually agree to exclude environmentally beneficial Federal agency activities (either on a case-by-case basis or for a category of activities) from further State agency review.

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

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

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

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

§ 930.34 Federal and State agency coordination.

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

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

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

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

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

§ 930.35 Negative determinations for proposed activities.

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

(1) Identified by a State agency on its list or through case-by-case monitoring of unlisted activities; or

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

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

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

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

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

§ 930.36 Consistency determinations for proposed activities.

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

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

(2) Federal and State agencies may mutually agree upon procedures for extending the notification requirement beyond 90 days for activities requiring a substantial review period, and for shortening the notification period for activities requiring a less extensive review period, provided that public participation requirements are met.

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

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

(e) *National or regional consistency determinations.* (1) A Federal agency may provide states with consistency determinations for Federal agency activities that are national or regional in scope (*e.g.,* rulemaking, national plans), and that affect any coastal use or resource of more than one state. Many states share common coastal management issues and have similar enforceable policies, *e.g.,* protection of a particular coastal resource. The Federal agency's national or regional consistency determination should, at a minimum, address the common denominator of these policies, i.e., the common coastal effects and management issues, and thereby address different states' policies with one discussion and determination. If a Federal agency decides not to use this section, it must issue consistency determinations to each coastal state pursuant to § 930.39.

(2) Federal agencies shall be consistent to the maximum extent practicable with the enforceable policies of each state's management program. Thus, the Federal agency's national or regional consistency determination shall contain, if necessary, sections that would apply to individual states to address coastal effects and enforceable policies unique to particular states. Early coordination with coastal states will enable the Federal agency to identify particular coastal management concerns and policies. In addition, the Federal agency could address the concerns of each affected state by providing for state conditions for the proposed activity. Further, the consistency determination could identify the coordination efforts and describe how the Federal agency responded to State agency concerns.

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

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

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

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

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

§ 930.39 Content of a consistency determination.

(a) The consistency determination shall include a brief statement indicating whether the proposed activity will be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of the management program. The statement must be based upon an evaluation of the relevant enforceable policies of the management program. A description of this evaluation shall be included in the consistency determination. The consistency determination shall also include a detailed description of the activity, its associated facilities, and their coastal effects, and comprehensive data and information sufficient to support the Federal agency's consistency statement. The amount of detail in the evaluation of the enforceable policies, activity description and supporting information shall be commensurate with the expected coastal effects of the activity. The Federal agency may submit the necessary information in any manner it chooses so long as the requirements of this subpart are satisfied.

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

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

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

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

§ 930.40 Multiple Federal agency participation.

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

§ 930.41 State agency response.

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

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

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

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

(e) *State processing fees.* The Act does not require Federal agencies to pay state processing fees. State agencies shall not

assess a Federal agency with a fee to process the Federal agency's consistency determination unless payment of such fees is required by other federal law or otherwise agreed to by the Federal agency and allowed by the Comptroller General of the United States. In no case may a State agency stay the consistency timeclock or base its objection on the failure of a Federal agency to pay a fee.

§ 930.42 Public participation.

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

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

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

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

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

(3) Specify a source for additional information; and

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

(d) Procedural options that may be used by the State agency for issuance of public notice include, but are not limited to, public notice through an official state gazette, a local newspaper serving areas of coastal zone likely to be affected by the activity, individual state mailings, and public notice through a state coastal management newsletter. States shall not require that the Federal agency provide public notice.

§ 930.43 State agency objection.

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

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

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

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

(b) If the State agency's objection is based upon a finding that the Federal agency has failed to supply sufficient information the State agency's response must describe the nature of the information requested and the necessity of having such information to determine the consistency of the Federal agency activity with the enforceable policies of the management program.

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

(d) In the event of an objection, Federal and State agencies should use the remaining portion of the 90-day notice period (*see* § 930.36(b)) to attempt to resolve their differences. If resolution has not been reached at the end of the 90-day period Federal agencies should use the dispute resolution mechanisms of this part and postpone final federal action until the problems have been resolved. At the end of the 90-day period the Federal agency shall not proceed with the activity over a State agency's objection unless consistency with the enforceable policies of the management program cannot be achieved under the ''consistent to the maximum extent practicable'' standard described in § 930.32, and the Federal agency clearly describes, in writing, to the State agency the legal impediments to full consistency (*see* § 930.32(a)). In cases where the Federal agency asserts that it is fully consistent with the enforceable policies of the management program, but the State agency asserts that the Federal agency is not fully consistent, the Federal agency shall be consistent to the maximum extent practicable with the State agency's interpretation, pursuant to §§ 930.11(h) and 930.32. If a Federal agency decides to proceed with a Federal agency activity that is consistent to the maximum extent practicable, but is objected to by a State agency or follow an alternative suggested by the State agency, the Federal agency shall notify the State agency of its decision to proceed before the project commences.

§ 930.44 Availability of mediation for disputes concerning proposed activities.

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

§ 930.45 Availability of mediation for previously reviewed activities.

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

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

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

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

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

§ 930.46 Supplemental coordination for proposed activities.

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

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

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

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

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

§ 930.50 Objectives.

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

§ 930.51 Federal license or permit.

(a) The term ''federal license or permit'' means any required authorization, certification, approval, lease, or other form of permission which any Federal agency is empowered to issue to an applicant. The term ''lease,'' means a lease issued by a Federal agency to a non-federal entity that authorizes or approves the use of federal property for a non-federal activity and where no other federal license, permit, authorization or other form of approval, is required. The term lease does not include lease sales conducted by a Federal agency (*e.g.,* outer continental shelf (OCS) oil and gas lease sales conducted by the Minerals Management Service or oil and gas lease sales conducted by the Bureau of Land Management). Lease sales conducted by a Federal agency are Federal agency activities under subpart C of this part if coastal effects are reasonably foreseeable (subpart E of this part addresses activities described in detail in OCS plans).

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

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

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

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

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

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

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

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

§ 930.52 Applicant.

The term ''applicant'' means any individual, public or private corporation, partnership, association, or other entity organized or existing under the laws of any nation, state, or any state, regional, or local government, who, following management program approval, either files an application for a required individual federal license or permit, or who files a consistency certification for a required general federal license or permit under § 930.31(e) to conduct an activity affecting any coastal use or resource. The term ''applicant'' does not include Federal agencies applying for federal licenses or permits. Federal agency activities requiring federal licenses or permits are subject to subpart C of this part.

§ 930.53 Listed federal license or permit activities.

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

(1) The geographic location description should encompass areas outside of the coastal zone where coastal effects from federal license or permit activities are reasonably foreseeable. The State agency should exclude geographic areas outside of the

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

(2) For listed activities occurring outside of the coastal zone for which a state has not generally described the geographic location of review, states must follow the conditions for review of unlisted activities under § 930.54 of this subpart.

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

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

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

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

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

§ 930.54 Unlisted federal license or permit activities.

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

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

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

(c) The Federal agency and the applicant have 15 days from receipt of the State agency notice to provide comments to the Director regarding the State agency's request to review the activity. The sole basis for the Director's approval or disapproval of the State agency's request will relate to whether the proposed activity's coastal effects are reasonably foreseeable. The Director shall issue a decision, with supporting comments, to the State agency, Federal agency and applicant within 30 days from receipt of the State agency notice. The Director may extend the decision deadline beyond 30 days due to the complexity of the issues or to address the needs of the State agency, the Federal agency, or the applicant. The Director shall notify the relevant parties of the expected length of an extension.

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

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

(f) The unlisted activity procedures in this section are provided to ensure that State agencies are afforded an opportunity to review federal license or permit activities with reasonably foreseeable coastal effects. Prior to bringing the issue before the Director, the concerned parties should discuss coastal effects and consistency. The

applicant can avoid delay by simply seeking the State agency's expeditious concurrence rather than waiting for the Director's decision. If an applicant, of its own accord or after negotiations with the State agency, provides a consistency certification and necessary data and information to the State agency, the review shall be deemed to have received the Director's approval, and all of the provisions of this subpart shall apply and the State agency need not request the Director's approval. If an applicant for an unlisted activity has not subjected itself to the consistency process within the 30 day notification period contained in paragraph (a) of this section, the State agency must adhere to the unlisted activity review requirements of this section to preserve its right to review the activity.

§ 930.55 Availability of mediation for license or permit disputes.

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

§ 930.56 State agency guidance and assistance to applicants.

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

§ 930.57 Consistency certifications.

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

(b) The applicant's consistency certification shall be in the following form: ''The proposed activity complies with the enforceable policies of (name of state) approved coastal management program and will be conducted in a manner consistent with such program.''

§ 930.58 Necessary data and information.

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

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

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

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

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

(c) When satisfied that adequate protection against public disclosure exists, applicants should provide the State agency with confidential and proprietary information which the State agency maintains is necessary to make a reasoned decision on the consistency of the proposal. State agency requests for such information must be related to the necessity of having such information to assess adequately the coastal effects of the proposal.

§ 930.59 Multiple permit review.

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

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

§ 930.60 Commencement of State agency review.

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

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

(i) The State agency's review has not yet begun, and that its review will

commence once the necessary certification or information deficiencies have been corrected; or

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

(2) Under paragraph (a)(1) of this section, State agencies shall notify the applicant and the Federal agency, within 30 days of receipt of the completed certification and information, of the date when necessary certification or information deficiencies have been corrected, and that the State agency's consistency review commenced on the date that the complete certification and necessary data and information were received by the State agency.

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

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

§ 930.61 Public participation.

(a) Following receipt of the material described in § 930.60 the State agency shall ensure timely public notice of the proposed activity. Public notice shall be provided in the area(s) of the coastal zone likely to be affected by the proposed activity, as determined by the State agency. At the discretion of the State agency, public participation may include one or more public hearings. State agencies should restrict the period of public notice, receipt of comments, hearing proceedings and final decision-making to the minimum time necessary to inform the public, obtain sufficient comment, and develop a reasonable decision on the matter.

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

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

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

(3) Specify a source for additional information; and

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

(c) Procedural options that may be used by the State agency for issuance of public notice include, but are not limited to, public notice through an official state gazette, a local newspaper serving areas of the coastal zone likely to be affected by the activity, individual state mailings, and public notice through a state coastal management newsletter. The State agency may require the applicant to provide the public notice. State agencies shall not require that the Federal agency provide public notice. The State agency may rely upon the public notice provided by the Federal agency reviewing the application for the federal license or permit (*e.g.,* notice of availability of NEPA documents) if such notice satisfies the minimum requirements set forth in paragraphs (a) and (b) of this section.

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

§ 930.62 State agency concurrence with a consistency certification.

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

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

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

(d) During the period when the State agency is reviewing the consistency certification, the applicant and the State agency should attempt, if necessary, to agree upon conditions, which, if met by the applicant, would permit State agency concurrence. The parties shall also consult with the Federal agency responsible for approving the federal license or permit to ensure that proposed conditions satisfy federal as well as state management program requirements (see also § 930.4).

§ 930.63 State agency objection to a consistency certification.

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

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

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

(d) *Alternatives.* If a State agency proposes an alternative(s) in its objection letter, the alternative(s) shall be described with sufficient specificity to allow the applicant to determine whether to, in consultation with the State agency: adopt an alternative; abandon the project; or file an appeal

under subpart H. Application of the specificity requirement demands a case specific approach. More complicated activities or alternatives generally need more information than less-complicated activities or alternatives. *See* § 930.121(d) for further details regarding alternatives for appeals under subpart H of this part.

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

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

§ 930.64 Federal permitting agency responsibility.

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

§ 930.65 Remedial action for previously reviewed activities.

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

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

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

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

(c) The State agency notification shall include:

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

(2) Supporting information; and

(3) A request for appropriate remedial action. A copy of the request shall be sent to the applicant and the Director. Remedial actions shall be linked to coastal effects substantially different than originally described.

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

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

§ 930.66 Supplemental coordination for proposed activities.

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

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

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

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

§ 930.70 Objectives.

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

§ 930.71 Federal license or permit activity described in detail.

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

§ 930.72 Person.

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

§ 930.73 OCS plan.

(a) The term ''OCS plan'' means any plan for the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act (43 U.S.C. 1331 *et seq.*), and the regulations under that Act, which is submitted to the

Secretary of the Interior or designee following management program approval and which describes in detail federal license or permit activities.

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

§ 930.74 OCS activities subject to State agency review.

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

§ 930.75 State agency assistance to persons.

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

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

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

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

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

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

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

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

§ 930.77 Commencement of State agency review and public notice.

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

(2) To assess consistency, the State agency shall use the information submitted pursuant to the Department of the Interior's OCS operating regulations (*see* 30 CFR 250.33 and 250.34) and OCS information program (*see* 30 CFR part 252) regulations and necessary data and information (*see* 15 CFR 930.58).

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

§ 930.78 State agency concurrence or objection.

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

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

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

§ 930.79 Effect of State agency concurrence.

(a) If the State agency issues a concurrence or is conclusively presumed to concur with the person's consistency certification, the person will not be required to submit additional consistency certifications and supporting information for State agency review at the time federal applications are actually filed for the federal licenses or permits to which such concurrence applies, unless the activities, or effects from the activities on any coastal use or resource, have substantially changed. If the person's request for a federal license or permit proposes activities which have substantially changed from the activities described in detail in the OCS plan, the person shall submit an amended plan. The amended plan shall be submitted to the Secretary of the Interior or designee along with a consistency certification and necessary data and information pursuant to § 930.58. The determination of whether an activity or the coastal effects of an activity have substantially changed is made on a case-by-case basis by the State agency, MMS and the person. The opinion of the State agency shall be accorded deference and ''substantially changed'' shall be construed broadly to ensure that the State agency has the opportunity to review substantially different coastal effects not previously reviewed.

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

§ 930.80 Federal permitting agency responsibility.

Following receipt of a State agency objection to a consistency certification related to federal license or permit activities described in detail in an OCS plan, the Federal agency shall not issue

any of such licenses or permits except as provided in subpart H of this part.

§ 930.81 Multiple permit review.

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

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

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

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

§ 930.82 Amended OCS plans.

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

§ 930.83 Review of amended OCS plans; public notice.

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

§ 930.84 Continuing State agency objections.

If the State agency objects to the consistency certification for an amended OCS plan, the prohibition in § 930.80 against Federal agency approval of licenses or permits for activities described in detail in such a plan applies, further Secretarial review pursuant to subpart H of this part may take place, and the development of an additional amended OCS plan and consistency certification may be required pursuant to §§ 930.82 through 930.83.

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

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

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

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

(d) A person shall be found to have failed substantially to comply with an approved OCS plan if the State agency claims and the Director finds that one or more of the activities described in detail in the OCS plan which affects any coastal use or resource are being conducted or are having an effect on any coastal use or resource substantially different than originally described by the person in the plan or accompanying information and, as a result, the activities are no longer being conducted in a manner consistent with the state's management program. The Director may make a finding that a person has failed substantially to comply with an approved OCS plan only after providing a reasonable opportunity for the person and the Secretary of the Interior to review the State agency's objection and to submit comments for the Director's consideration.

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

§ 930.90 Objectives.

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

§ 930.91 Federal assistance.

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

§ 930.92 Applicant agency.

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

§ 930.93 Intergovernmental review process.

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

§ 930.94 State review process for consistency.

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

(b) The applicant agency shall submit an application for federal assistance to the State agency for consistency review, through the intergovernmental review process or by direct submission to the State agency, for any proposed federal assistance activity that:

(1) Is listed in the management program and occurring within the coastal zone (*see* § 930.95(a)) or within a described geographic area outside of the coastal zone (*see* § 930.95(b)), or

(2) Will have reasonably foreseeable effects on any coastal use or resource.

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

§ 930.95 Guidance provided by the State agency.

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

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

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

(d) For review of unlisted federal assistance activities, the State agency shall follow the same procedures as it would follow for review of listed federal assistance activities outside of the coastal zone or the described geographic area (*see* § 930.98.)

§ 930.96 Consistency review.

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

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

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

§ 930.97 Federal assisting agency responsibility.

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

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

(a) State agencies should monitor proposed federal assistance activities outside of the coastal zone or the described geographic area (e.g., by use of the intergovernmental review process, review of NEPA documents **Federal Register**) and shall immediately notify applicant agencies, Federal agencies, and any other agency or office which may be identified by the state in its intergovernmental review process pursuant to E.O. 12372 of proposed activities which will have reasonably foreseeable coastal effects and which the State agency is reviewing for consistency with the management program. Notification shall also be sent by the State agency to the Director. The Director, in his/her discretion, may review the State agency's decision to review the activity. The Director may disapprove the State agency's decision to review the activity only if the Director finds that the activity will not affect any coastal use or resource. The Director shall be guided by the provisions in § 930.54(c). For purposes of this subpart, State agencies must inform the parties of objections within the time period permitted under the intergovernmental review process, otherwise the State agency waives its right to object to the proposed activity.

(b) If within the permitted time period the State agency notifies the Federal agency of its objection to a proposed Federal assistance activity, the Federal agency shall not provide assistance to the applicant agency except as provided in subpart H of this part.

§ 930.99 Availability of mediation for federal assistance disputes.

In the event of a serious disagreement between a Federal agency and the State agency regarding whether a federal assistance activity is subject to the consistency requirement either party may request the informal negotiation or

Secretarial mediation services provided for in subpart G of this part. The existence of a serious disagreement will not relieve the Federal agency from the responsibility for withholding federal assistance for the activity pending satisfaction of the requirements of this subpart, except in cases where the Director has disapproved a State agency decision to review an activity.

§ 930.100 Remedial action for previously reviewed activities.

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

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

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

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

(c) The State agency notification shall include:

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

(2) Supporting information; and

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

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

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

§ 930.101 Supplemental coordination for proposed activities.

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

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

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

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

Subpart G—Secretarial Mediation

§ 930.110 Objectives.

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

§ 930.111 Informal negotiations.

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

§ 930.112 Request for mediation.

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

(b) Within 15 days following receipt of a request for mediation the disagreeing agency shall transmit a written response to the Secretary, and to the agency requesting mediation, indicating whether it wishes to participate in the mediation process. If the disagreeing agency declines the offer to enter into mediation efforts, it must indicate the basis for its refusal in its response. Upon receipt of a refusal to participate in mediation efforts, the Secretary shall seek to persuade the disagreeing agency to reconsider its decision and enter into mediation efforts. If the disagreeing agencies do not all agree to participate, the Secretary will cease efforts to provide mediation assistance.

§ 930.113 Public hearings.

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

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

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

§ 930.114 Secretarial mediation efforts.

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

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

§ 930.115 Termination of mediation.

Mediation shall terminate:

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

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

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

(d) For other good cause.

§ 930.116 Judicial review.

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

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

§ 930.120 Objectives.

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

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

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

(a) The activity furthers, in more than a de minimis way, one or more of the competing national objectives or purposes contained in section 302 or section 303 of the Act,

(b) When performed separately or when its cumulative effects are considered, the national interest furthered by the activity outweighs the activity's adverse coastal effects,

(c) The activity will not violate any requirements of the Clean Air Act, as amended, or the Federal Water Pollution Control Act, as amended, and

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

§ 930.122 Necessary in the interest of national security.

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

§ 930.123 Appellant and Federal agency.

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

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

§ 930.124 Computation of time.

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

(b) Whenever a party is required to act within a prescribed time period after receipt of a document or notice and the notice or document is provided to the party by mail, 3 days shall be added to the prescribed period of time.

§ 930.125 Notice of appeal to the Secretary.

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

(b) The appellant's notice of appeal shall be accompanied by payment of an application fee or a request for a waiver of such fees. An appeal involving a project with a value of $1 million dollars or more shall be considered a major appeal and the application fee is $500.00. The application fee for all other projects is $200.00. Upon review of the notice of appeal, the Secretary may determine that a project valued at less than $1 million is likely to involve significant administrative costs to the agency and assess the $500.00 application fee which shall be due upon receipt of notice thereof.

(c) The appellant shall send a copy of the notice of appeal to the objecting State agency and the Assistant General Counsel for Ocean Services (GCOS), 1305 East West Highway, Room 6111 SSMC 4, Silver Spring, Maryland 20910.

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

(e) The Secretary may waive the application fee and processing fee if the appellant demonstrates that such fees impose an economic hardship. The request for a waiver and demonstration of economic hardship shall accompany the notice of appeal. If the Secretary denies a request for a waiver and the appellant wishes to continue with the appeal, the appellant shall submit to the Secretary the fees within 20 days of receipt of the Secretary's denial. If the fee is not received on the 20th day, then the Secretary shall dismiss the appeal.

§ 930.126 Consistency appeal processing fees.

The Secretary shall collect as a processing fee such other fees from the appellant as are necessary to recover the full costs of administering and processing such appeals under section 307(c) of the Act. All processing fees shall be assessed and collected no later than 60 days after publication of the **Federal Register** Notice closing the decision record. Failure to submit processing fees shall be grounds for extending the time for issuance of a decision pursuant to section 319(a)(2) (16 U.S.C. 1465(a)(2)) and 930.131 of this subpart.

§ 930.127 Briefs and supporting data and information.

(a) The Secretary shall establish a schedule of dates and times for submission of the briefs, supporting data and information by the appellant and the State agency. The schedule shall include a time for the submission of a response and any relevant supporting information from the State agency.

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

(c) The Secretary may approve a request for an extension of time for submission of briefs and supporting information so long as the request is filed within the time period prescribed in the briefing schedule established under paragraph (a) of this section. A copy of the request for an extension of time shall be sent to the Assistant General Counsel for Ocean Services.

§ 930.128 Public notice and comment period.

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

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

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

(d) Requests for extensions of time to provide comments may be made pursuant to § 930.127(c).

§ 930.129 Dismissal, remand, and stay of appeals.

(a) The Secretary may dismiss an appeal for good cause. Good cause shall include, but is not limited to:

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

(2) Failure of the appellant to submit the supporting information within the required period or approved extension period;

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

(4) The Federal agency denies the federal license, permit or assistance application;

(5) Failure of the appellant to base the appeal on grounds that the proposed activity either is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security.

(6) Failure of the State agency to properly lodge its consistency objection in compliance with section 307 of the Act and the regulations contained in subparts D, E, F, or I of this part. The Secretary shall make this determination as a threshold matter if raised by the appellant, and after providing an opportunity to the State agency to respond to the appellant's allegations.

(b) The Secretary may stay his review and 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's objection, that was not provided to the State agency as part of its review, is submitted to the Secretary by the appellant, the public or a federal agency.

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

(1) To allow additional information to be developed relevant to compliance with the Clean Air Act, as amended, and/or the Federal Water Pollution Control Act, as amended,

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

(3) To allow for remand pursuant to paragraph (b) of this section;

(4) A stay shall not be granted for more than one year.

§ 930.130 Public hearings.

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

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

(a)(1)At such time as the Secretary shall deem appropriate, but no sooner than 30 days after the close of the public comment period, the Secretary shall publish in the **Federal Register** a notice stating that the decision record is closed and that no further information, briefs or comments will be considered in deciding the appeal.

(2) 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).

(b) No later than 90 days after the closure of the decision record the Secretary shall issue a decision or publish a notice in the **Federal Register** explaining why a decision cannot be issued at that time. The Secretary shall issue a decision within 45 days of the publication of such notice.

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

(d) The appellant bears the burden of submitting evidence in support of its appeal and the burden of persuasion. In reviewing an appeal, the Secretary shall find that a proposed federal license or permit activity, or a federal assistance activity, is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security, when the information submitted supports this conclusion.

(e)(1) If the Secretary finds that the proposed activity is consistent with the

objectives or purposes of the Act, or is necessary in the interest of national security, the Federal agency may approve the activity.

(2) If the Secretary does not make either of these findings, the Federal agency shall not approve the activity.

§ 930.132 Review initiated by the Secretary.

(a) The Secretary may, on her own initiative, choose to consider whether a federal license or permit activity, or a federal assistance activity, is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security. Secretarial review shall only be initiated after the completion of State agency review pursuant to the relevant subpart. The Secretary's decision to review the activity may result from an independent concern regarding the activity or a request from interested parties. If the Secretary decides to initiate review, notification shall be sent to the applicant, person or applicant agency, and to the Federal and State agencies. The notice shall include a statement describing the reasons for the review.

(b) With the exception of application and processing fees, all other provisions under this subpart governing the processing and administering of appeals will apply to Secretarial reviews initiated under this section.

Subpart I—Consistency of Federal Activities Having Interstate Coastal Effects

§ 930.150 Objectives.

(a) A federal activity may affect coastal uses or resources of a state other than the state in which the activity will occur. Effective coastal management is fostered by ensuring that activities having such reasonably foreseeable interstate coastal effects are conducted consistent with the enforceable policies of the coastal management program of each affected state.

(b) The application of the federal consistency requirement to activities having interstate coastal effects is addressed by this subpart in order to encourage cooperation among states in dealing with activities having interstate coastal effects, and to provide states, local governments, Federal agencies, and the public with a predictable framework for evaluating the consistency of these federal activities under the Act.

§ 930.151 Interstate coastal effect.

The term ''interstate coastal effect'' means any reasonably foreseeable effect resulting from a federal action occurring in one state of the United States on any coastal use or resource of another state that has a federally approved management program. Effects are not just environmental effects, but include effects on coastal uses. Effects include both direct effects which result from the activity and occur at the same time and place as the activity, and indirect (cumulative and secondary) effects which result from the activity and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects are effects resulting from the incremental impact of the federal action when added to other past, present, and reasonably foreseeable actions, regardless of what person(s) undertake(s) such actions. The term ''affects'' means have an effect on. Effects on any coastal use or resource may also be referred to as ''coastal effects.''

§ 930.152 Application.

(a) This subpart applies to federal actions having interstate coastal effects, and supplements the relevant requirements contained in 15 CFR part 930, subparts C (Consistency for Federal Agency Activities), D (Consistency for Activities Requiring a Federal License or Permit), E (Consistency for OCS Exploration, Development and Production Activities) and F (Consistency for Federal Assistance to State and Local Governments). Except as otherwise provided by this subpart, the requirements of other relevant subparts of part 930 apply to activities having interstate coastal effects.

(b) Federal consistency is a requirement on federal actions affecting any coastal use or resource of a state with a federally-approved coastal management program, regardless of the activities' locations (including states without a federally approved coastal management program). The federal consistency requirement does not alter a coastal state's jurisdiction. The federal consistency requirement does not give states the authority to review the application of laws, regulations, or policies of any other state. Rather, the Act allows a state coastal management program to review federal actions and may preclude federal action as a result of a state objection, even if the objecting state is not the state in which the activity will occur. Such objections to interstate activities under subparts D, E and F may be overridden by the Secretary pursuant to subpart H of this part.

§ 930.153 Coordination between states in developing coastal management policies.

Coastal states are encouraged to give high priority to:

(a) Coordinating state coastal management planning, policies, and programs with respect to contiguous areas of such states;

(b) Studying, planning, and implementing unified coastal management policies with respect to such areas; and

(c) Establishing an effective mechanism, and adopting a federal-state consultation procedure, for the identification, examination, and cooperative resolution of mutual problems with respect to activities having interstate coastal effects.

§ 930.154 Listing activities subject to routine interstate consistency review.

(a) *Geographic location of listed activities.* Each coastal state intending to conduct a consistency review of federal activities occurring in another state shall:

(1) List those Federal agency activities, federal license or permit activities, and federal assistance activities that the state intends to routinely review for consistency; and

(2) Generally describe the geographic location for each type of listed activity.

(b) In establishing the geographic location of interstate consistency review, each state must notify and consult with the state in which the listed activity will occur, as well as with relevant Federal agencies.

(c) *Demonstrate effects.* In describing the geographic location for interstate consistency reviews, the State agency shall provide information to the Director that coastal effects from listed activities occurring within the geographic area are reasonably foreseeable. Listed activities may have different geographic location descriptions, depending on the nature of the activity and its effects on any coastal use or resource. For example, the geographic location for activities affecting water resources or uses could be described by shared water bodies, river basins, boundaries under the state's coastal nonpoint pollution control program, or other ecologically identifiable areas.

(d) *Director approval.* Coastal states shall submit their lists and geographic location descriptions developed under this section to the Director for approval as a routine program change under subpart H of 15 CFR part 923. Each state submitting this program change shall include evidence of consultation with states in which the activity will occur, evidence of consultation with relevant Federal agencies, and any agreements with other states and Federal agencies regarding coordination of activities.

(e) *State failure to list interstate activities.* A coastal state that fails to list

federal activities subject to interstate review, or to describe the geographic location for these activities, under paragraphs (a) through (d) of this section, may not exercise its right to review activities occurring in other states, until the state meets the listing requirements. The listing of activities subject to interstate consistency review, and the description of the geographic location for those listed activities, should ensure that coastal states have the opportunity to review relevant activities occurring in other states. States may amend their lists and geographic location descriptions pursuant to the requirements of this subpart and subpart H of 15 CFR part 923. States which have complied with paragraphs (a) through (d) of this section may also use the procedure at § 930.54 to review unlisted activities. States will have a transition period of 18 months from the date this rule takes effect. In that time a state may review an interstate activity pursuant to § 930.54 of this part. After the transition period states must comply with this subpart in order to review interstate activities.

§ 930.155 Federal and State agency coordination.

(a) *Identifying activities subject to the consistency requirement.* The provisions of this subpart are neither a substitute for nor eliminate the statutory requirement of federal consistency with the enforceable policies of state management programs for all activities affecting any coastal use or resource. Federal agencies shall submit consistency determinations to relevant State agencies for activities having coastal effects, regardless of location, and regardless of whether the activity is listed.

(b) *Notifying affected states.* Federal agencies, applicants or applicant agencies proposing activities listed for interstate consistency review, or determined by the Federal agency, applicant or applicant agency to have an effect on any coastal use or resource, shall notify each affected coastal state of the proposed activity. State agencies may also notify Federal agencies and applicants of listed and unlisted activities subject to State agency review and the requirements of this subpart.

(c) *Federal and State agency coordination.* Following notification of the proposed activity, the Federal agency or applicant or applicant agency shall coordinate with all affected states with approved coastal management programs in evaluating the consistency of the activity with the enforceable policies of each such program.

(d) *Notice of intent to review.* Within 30 days from receipt of the consistency determination or certification and necessary data and information, or within 30 days from receipt of notice of a listed federal assistance activity, each state intending to review an activity occurring in another state must notify the applicant or applicant agency (if any), the Federal agency, the state in which the activity will occur (either the state's coastal management program, or if the state does not have a coastal management program, the Governor's office), and the Director, of its intent to review the activity for consistency. The state's notice to the parties must be postmarked by the 30th day after receipt of the consistency determination or certification. If a state fails, within the 30 days, to notify the applicant or applicant agency (if any), the Federal agency, the state in which the activity will occur, and the Director, of its intent to review the activity, then the state waives its right to review the activity for consistency. The waiver does not apply where the state intending to review the activity does not receive notice of the activity.

§ 930.156 Content of a consistency determination or certification and State agency response.

(a) In addition to the applicable requirements for consistency determinations and certifications contained in subparts C, D and E of this part, the determination or certification shall include a statement that the Federal agency or applicant has coordinated with affected states with approved management programs in developing the proposed activity.

(b) The Federal agency or applicant is encouraged to prepare one determination or certification that will satisfy the requirements of all affected states with approved management programs.

(c) State agency responses shall follow the applicable requirements contained in subparts C, D, E and F of this part.

§ 930.157 Mediation and informal negotiations.

The relevant provisions contained in subpart G of this part are available for resolution of disputes between affected states, relevant Federal agencies, and applicants or applicant agencies. The parties to the dispute are also encouraged to use alternative means for resolving their disagreement. OCRM shall be available to assist the parties in these efforts.

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