

described in the plans, and in one case the State objection was withdrawn as a result of a settlement agreement between the Federal government and the oil companies involved in the project.

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

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

IV. Explanation of Proposed Changes to the Federal Consistency Regulations

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

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

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

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

action is an essential element of the definition.

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

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

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

In the OCS oil and gas context, examples of interim or preliminary activities that are not Federal agency activities include the publication of OCS 5-Year programs, as discussed below; or rulemakings that establish administrative procedures for OCS-related activities that do not affect coastal uses or resources (e.g., rulemaking prescribing the completion and submission of forms). Consistent with the Ninth Circuit's decision in *California ex rel. Cal. Coastal Comm'n v. Norton*, 150 F. Supp.2d 1046 (N.D.

Cal. 2001), *aff'd*, 311 F.3d 1162 (9th Cir. 2002), granting or directing suspensions of OCS operations or production by MMS would be interim or preliminary activities and would not be Federal agency activities when a lease suspension would either not have coastal effects or, if the lease suspension set forth milestones that would have coastal effects, the State had previously reviewed the lease sale for Federal Consistency. (The Ninth Circuit emphasized that the leases at issue in *California v. Norton* had never been reviewed by California.) See NOAA's response to COMMENT 33 for further discussion on lease suspensions and *California v. Norton* and NOAA's conclusion that in all foreseeable instances, lease suspensions would not be subject to Federal Consistency review since (1) in general, they do not authorize activities with coastal effects, and (2) if they did contain activities with coastal effects, the activities and coastal effects would be covered in a State's review of a lease sale, an EP or a DPP. If a State believes that a particular lease suspension should be subject to Federal Consistency, the State could notify MMS. MMS could determine that the lease suspension is an interim activity that does not propose a new action with coastal effects and/or provide the State with a negative determination pursuant to 15 CFR § 930.35.

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

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