

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

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

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

There are several reasons why a general permit cannot be a Federal

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

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

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

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

Rule Change 6: § 930.35(d) General Negative Determination. Section 930.35(d) would be changed to (e) and a new section 930.35(d) would be added. The General Negative Determination (General ND) would be an administrative convenience for

Federal agencies to use when they undertake repetitive activities that, either on an individual, case-by-case basis or cumulatively, do not have coastal effects. The General ND would not diminish the factual basis required for Federal Consistency reviews. The Federal agency must still make a factual effects analysis for the repetitive activities. It is proposed as an analogue to the existing General Consistency Determinations (15 CFR 930.36(c)), for repetitive activities which do have cumulative effects.

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

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

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

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