

Federal agency. This is done through the listing and geographical location description requirements in NOAA's regulations at 15 CFR 930.53. States are required to list the federal license or permit activities that the State believes will have coastal effects in their management programs. The State either develops this list as part of management program development or after management program approval through NOAA's program change procedures. See 15 CFR 930.53(c), and 15 CFR part 923, subpart H. When listing Federal license or permit activities, States determine whether it is reasonably foreseeable that the activity, when conducted inside the coastal zone, will affect coastal resources. Once listed in the State's federally approved program, all applications for the listed Federal authorization in the coastal zone are automatically subject to the consistency process.

To review activities located outside the coastal zone, NOAA must approve or deny a State's request to describe a geographic location outside its coastal zone where activities will be presumed to have coastal effects. A State must describe with specificity the geographic areas from which it is reasonably foreseeable that activities will affect coastal uses or resources. Federal agencies and other interested parties may comment to NOAA. NOAA's approval is based on whether effects on the coastal zone are reasonably foreseeable.

A State can also review a listed activity located outside the coastal zone that is not in a described geographic location as an "unlisted" activity on a case-by-case basis, pursuant to 15 CFR 930.54. NOAA approval is required in such circumstances and NOAA's approval is also based on whether coastal effects are reasonably foreseeable.

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

However, the geographic location description requirement for Federal license or permit activities has not applied to Federal authorizations described in detail in OCS plans because these activities are specifically described in the CZMA, 16 U.S.C. 1456(c)(3)(B), if coastal effects are reasonably foreseeable. In the past, most

OCS oil and gas plans were for projects located near shore and coastal effects were readily identified. Now, however, technology allows industry to drill for oil and gas far offshore and the connection between a project and effects to a particular coastal State is not as clear. In these cases a person could assert that its project will not have coastal effects on a particular State. If MMS agreed with the person's assertion and factual basis but a coastal State still believed the OCS activity will have coastal effects, then the factual matter may be resolved through the mediation provisions of the CZMA, OCSLA provisions and/or litigation.

*Comment 22.* The 1990 amendments to the CZMA did not give *carte blanche* to the States to assert consistency review over all OCS leasing activities no matter how far beyond a State's coastal zone they take place. Rather, "effects" must still be demonstrated. Moreover, this legislative history does not apply to the entirely separate provisions regarding consistency review for federal permits in section 307(c)(3)(A), or OCS plans in section 307(c)(B). Congress made it very clear that technical amendments to the provision calling for State review of private permits were made solely to conform this provision to changes made to the Federal agency activity provision, and did not expand a State's scope of consistency review. Despite the clear legislative history, Commerce's preamble blurs the distinction between "Federal agency activities" and "Federal activities," in general, *e.g.*, approval of private permits/licenses, and OCS plans, and incorrectly emphasizes the 1990 amendments' expansion of consistency review for "Federal activities." (65 FR 77125 middle column, December 8, 2000). Such statements should be corrected.

*NOAA Response to Comment 22.* The 1990 CZMA amendments apply to all the consistency requirements. The "technical amendments" were to conform all of CZMA section 307 with the changes made to CZMA § 307(c)(1). Moreover, "direct" effects were not a limiting factor to the pre-1990 CZMA application of Federal Consistency for Federal license or permit activities. As noted by the comment, the effects test is the controlling factor. Thus, the preamble to the 2000 final rule at 65 FR 77125, 2d col, needs no correction.

The effects test, discussed in the Conference Report and other legislative history, speak to a cause and effect analysis, or the so-called series or chain of events analysis. If a Federal agency activity will have reasonably foreseeable effects, then consistency applies. Thus,

as discussed in the preamble to the 2000 rule, the type of Federal agency activity is not the determinative factor. *Id.*

*Comment 23.* The term "foreseeable coastal effects" is ambiguous, recommend that guidance be developed to assist in making this determination.

*NOAA Response to Comment 23.* NOAA need not further define reasonably foreseeable coastal effects. The varied State programs, the analysis of effects, and the case-by-case nature of Federal Consistency precludes rigid definitions of effects and what is reasonably foreseeable. 65 FR 77130, 2d col. (Dec. 8, 2000). Further, as described above under the general comments and in detail in the preamble to the 2000 rule, the definitions of coastal effects and coastal uses and resources have not been expanded beyond what was already required by the statute, particularly the 1990 amendments to the CZMA.

*Comment 24.* NOAA should monitor the States' interpretations of the "effects test," and the implementation of the "listing and geographic location" regulations found at 930.53, to ensure that States assert a right of consistency review in a reasonable manner. This is particularly applicable for projects at increasing distance from a State's coastal zone.

*NOAA Response to Comment 24.* NOAA monitor's the States' use of Federal Consistency through (1) day-to-day interactions with States, Federal agencies, industry and others; (2) periodic evaluations of the States' programs, pursuant to CZMA § 312; and (3) the Secretary of Commerce's review of consistency appeals.

*Comment 25.* NOAA should revise the definition of "Coastal Use or Resource" at § 930.11. By adding terms such as "scenic and aesthetic enjoyment" and "air", this definition goes far beyond the statutory definition of coastal use or resource, and inappropriately extends the "reach of reasonably foreseeable effects."

*NOAA Response to Comment 25.* NOAA need not revise the definition of "coastal use or resource" at § 930.11. The definition in the 2000 rule did not create new thresholds, but is based on the effects test as described in the statute and the Conference Report to the CZMA 1990 amendments, as discussed in the preamble to the 2000 rule.

*Comment 26.* Commerce regulations should delete the provision that an action with minimal or no environmental effects may affect coastal use. Requiring consistency review without regard to significance of environmental impact is not good public policy.