

one such request made which was withdrawn). Activities covered under a lease suspension could either have been already covered under the State's review of the lease sale, EP or DPP. Thus, while NOAA could not exempt lease suspensions from potential consistency review, NOAA does not currently anticipate approving any State's request to either list lease suspensions or to review lease suspensions on a case-by-case basis as an unlisted activity, except in some rare, limited circumstance.

Further, NOAA's view on lease suspensions as federal license or permit activities has been superceded by the Ninth Circuit, at least for the lease suspensions that were the subject of the California litigation. *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). On June 20, 2001, the U.S. District Court for Northern California ordered Interior to provide California with a consistency determination pursuant to CZMA section 307(c)(1) for the lease suspensions it issued for 36 leases located offshore California. The Court also ordered Interior to provide, pursuant to NEPA, a reasoned explanation for its reliance on a categorical exemption for the lease suspensions.

On appeal by the United States, the Ninth Circuit affirmed the District Court's finding that the lease suspensions, in the case of these 36 leases, whether granted or directed by Interior, were Federal agency activities under CZMA section 307(c)(1), and not "Federal license or permit activities" under CZMA section 307(c)(3)(A). The Ninth Circuit found that the suspensions allowed the leases to continue for lengthy additional terms and, more importantly, these leases had not been previously reviewed by California under the CZMA. The Court viewed the suspensions as an extension of the leases and thus any suspension of the lease was, in the Court's view, a Federal agency activity under CZMA section 307(c)(1). The Ninth Circuit further found that the lease suspensions at issue would have coastal effects since, among other things, the suspensions required lessees to engage in certain milestone activities which could affect coastal resources. The Ninth Circuit also determined that the effect of the 1990 amendments to the CZMA in overturning the decision of the Supreme Court in *Secretary of the Interior v. California*, 464 U.S. 312 (1984), is that lease suspensions are not subsidiary to exploration plans and development and production plans (and thus are not barred from consistency

review by CZMA section 307(c)(3)(B)), and that activities with coastal effects preceding exploration plans and development and production plans are subject to consistency review. In making this finding, the Ninth Circuit stated:

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

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

It is NOAA's view that the *California v. Norton* decision is limited to the 36 leases in that case and that in all foreseeable instances, lease suspensions would not be subject to Federal Consistency review since (1) as a general matter, they do not authorize activities with coastal effects, and (2) if they did contain activities with coastal effects, the activities and coastal effects should 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.

Comment 34. Section 930.85(c) should be amended to ensure that Interior first determines that an amended plan meets the requirements of the OCSLA, before it is sent to the State agency.

NOAA Response to Comment 34. NOAA agrees that Interior should decide first that an amended OCS plan meets OCSLA requirements before sending to the State agency. The same technical change should also be made to § 930.82. In this way, Interior ensures completeness with the OCSLA prior to sending an amended plan to the State agency, as is the case for initial OCS plan review under § 930.76(c).

Other Comments

Comment 35. Delete Conditional Concurrence Procedures or Narrow the Conditions that Can be Imposed. Conditional Concurrences create an unclear process, neither a concurrence nor objection, and could delay or terminate OCS projects. Conditions may usurp Federal permitting authority.

NOAA Response to Comment 35. The new conditional concurrences section, § 930.4, contains adequate standards to ensure State conditions are based on specific enforceable policies. If the requirements for a conditional concurrence are not met, then it is automatically treated as an objection pursuant to 15 CFR 930.4. Thus, if an applicant does not agree with a condition and does not amend its application to the Federal agency, then it is automatically an objection. Likewise, if a Federal agency finds a condition is contrary to its statutory mandate and refuses to accept the condition, then it is automatically an objection. The benefit of the conditional concurrence is that if the requirements are met, and the conditions are acceptable to the applicant and the Federal agency, then the Federal agency can approve the project. If conditional concurrences were not allowed, then the State would simply object. All of this happens within the State consistency review time frames established by the CZMA and NOAA's regulations. Thus, there is no delay and there is very clear direction regarding time frames, the substance of the conditions, and whether the State has objected or concurred.

NOAA, the States and the Federal agencies spent considerable time discussing the pros and cons of conditional concurrences as part of the 2000 rulemaking. NOAA does not anticipate proposed changes to this section until such time as a problem arises in implementing the section.

Comment 36. Clarify that the determination of whether a Federal agency activity has coastal effects is in the purview of the Federal agency conducting the activity. Commerce has insisted that pre-lease activities such as the 5-Year OCS lease plan are "development projects" under section 930.33 and are subject to consistency review.

NOAA Response to Comment 36. NOAA has not declared that Interior's pre-lease activities are "development projects" under 15 CFR 930.33. All that NOAA has said is that a Federal agency activity is subject to consistency if there are coastal effects. This is required by the CZMA. See 65 FR 77125, 77129–