

77133 (Dec. 8, 2000). NOAA defers to Interior regarding the determination of effects for any specific Interior activity.

*Comment 37.* Delete the Interstate Consistency regulations. A logical implementation of the new consistency review for activities "outside of the coastal zone" contained in the 1990 amendments does not lead to interstate review. These regulations also raise constitutional issues as to whether one State's policies can be legally enforceable against Federal activities taking place entirely in a different State.

*NOAA Response to Comment 37.* Interstate consistency review is authorized by the CZMA effects test. See 65 FR 77125, 77129–77133, 77152–77153 (Dec. 8, 2000) (discussion of the effects test and application to interstate review).

*Comment 38.* Commerce regulations at section 930.121 require that an activity must "significantly or substantially" further the national interest before the Secretary can override an objection based on the statutory "national interest" criteria. This change can potentially be very problematic. While the preamble to the 2000 regulations state that "an example of an activity that significantly or substantially furthers the national interest is the siting of energy facilities or OCS oil and gas development," there is no such statement of intent with regard to oil and gas exploration. The preamble should be revised to make it clear that exploration meets the new override criteria otherwise the term "significantly or substantially" should be deleted from the regulations.

*NOAA Response to Comment 38.* The use of the phrase "oil and gas development" in the preamble to the 2000 rule when discussing the phrase "significantly or substantially" in 15 CFR 930.121, was intended as an example and not meant to apply only to DPP's. The term "development" was used as a general descriptor for OCS oil and gas activities. At this time, NOAA cannot foresee a case where OCS oil and gas activities do not further the national interest in a significant or substantial manner, inclusive of the exploration, development and production phases.

*Comment 39.* Section 930.3 imposes a requirement on OCRM to conduct a continuing review of approved management programs. This is a critical part of the Federal Consistency program and one that should receive sufficient resources and funding within OCRM to fully effectuate. OCRM should carefully monitor the States' application of their management programs to evaluate whether a State is inappropriately singling out a particular proposed

federal activity in or outside its coastal zone, and objecting to such an activity on its face, without any demonstration that such activity may impact a State's coastal zone. We recommend that Commerce amend section 930.3 as follows: (1) To require that OCRM conduct a continuing review of the States' application of their enforceable programs on at least a semiannual basis, (2) the goal of such review would be, among others, to ensure that the States have supporting documentation and justification for an objection to a proposed federal activity, and that the States are not using their CZM programs to prevent a certain category of activity from taking place in or outside their coastal zone, and (3) the definition of "enforceable policy" in section 930.11 be changed to delete the statement that "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."

*NOAA Response to Comment 39.* NOAA conducts a statutorily mandated continuing review of State programs under CZMA § 312. As part of these section 312 evaluations, NOAA looks closely at the State's implementation of Federal Consistency. These reviews occur every three years. NOAA also scrutinizes State use of consistency on a case-by-case basis when called for and, as a threshold matter, on appeal of a State's objection to the Secretary. Conducting a more formalized review semi-annually or annually, would require substantial additional resources, with little foreseeable benefit.

NOAA also ensures that State programs continue to adequately address the national interest in, among other priority areas, energy facility siting. This is accomplished through the section 312 reviews and when reviewing proposed changes to a State's federally approved management program. For example, NOAA has denied State requests to include in their management programs State policies that ban all offshore oil and gas activities as inconsistent with the CZMA's national interest requirements.

The definition of enforceable policy in NOAA's regulations is based on the statutory definition and on *American Petroleum Institute v. Knecht*, 456 F. Supp. 889 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979). See 65 FR 77130, 2d col., (Dec. 8, 2000) (discussion of "enforceable policy").

*Comment 40.* A State can delay the start of the consistency review period for Federal agency activities by claiming the Federal agency's submission is incomplete or otherwise insufficient.

*NOAA Response to Comment 40.* If the Federal agency has provided the consistency determination and information required by 15 CFR 930.39, then the 60-day State review period begins on the date of the State's receipt of the information. The State cannot stay, stop or alter the commencement of the 60-day period once it starts, unless the Federal agency and State agency agree to an alternative time period. The State is not the arbiter of completeness; the Federal agency is. If a consistency determination and the information required by § 930.39 are provided, even though the State may believe it needs clarification or additional information, the 60-day period begins when the State received the Federal agency's information. The State has no authority to delay the start of the 60-day period. If the Federal agency provided the information required by § 930.39, then the Federal agency may presume State concurrence if the State has not objected (or requested an extension as allowed under the regulations) within 60 days from the State's receipt of the information. However, NOAA proposes a modification to § 930.41(a) that would ensure that States notify Federal agencies if the State believes the consistency determination is not complete.

*Comment 41.* Modify the definition of consistent to the maximum extent practicable under § 930.32 to allow the Federal agency to determine that full consistency is not practical due, but not limited to, such factors as logistical impediments, lack of adequate technology, illegality, time and space considerations, conflicts with other statutory law, cost effectiveness, availability of equipment, etc., etc.

*NOAA Response to Comment 41.* The definition of "consistent to the maximum extent practicable" was not significantly changed in 2000. NOAA's definition is long-standing (since 1979) and clearly reflects the language and intent of the CZMA. NOAA's language was specifically endorsed by Congress in the conference report to the 1990 CZMA reauthorization and has been upheld by Courts since then.

The suggested changes would provide Federal agencies with complete discretion as to whether or not they would be consistent with a State's enforceable policies. Such a change would violate the statute and Congressional intent. The change would also cause untold and unwarranted ambiguity in the application of consistency and in legal precedent, particularly court decisions. Congress declared: