

NOAA has interpreted the term “maximum extent practicable” in a manner which requires strict adherence to the enforceable policies of state programs where a federal agency has discretion (15 CFR 930.32). *The Committee supports this long-standing interpretation.*

Cong. Rec. H 8073, 8076 September 26, 1990 (emphasis added). A recent Federal court decision has addressed NOAA’s definition of “consistent to the maximum extent practicable.” In *California Coastal Commission v. Dept. of the Navy*, 5 F. Supp. 2d. 1106 (S.D. Cal. 1998), the Navy argued that it complied to the “maximum extent practicable” with California’s dredging and disposal policies because it was obligated to follow a modified § 404 permit issued by the Corps. The court noted that the federal permit was “not existing Federal law” that would excuse compliance with the State policies and consistency requirements of the CZMA. *Id.* at 1111.

Congress partially waived the Federal Government’s supremacy over State law when it created the CZMA. As such, the only *objective* means to determine “consistent to the maximum extent practicable” is based on the legal requirements of Federal agencies and their administrative records. Otherwise, a Federal agency would be making arbitrary decisions, on an agency by agency basis, based on subjective criteria and outside the confines of Federal law applicable to the agency.

The 2000 rule provided clear guidance as to when a Federal agency can proceed over a State’s objection: due to an unforeseen circumstance or emergency, or when a Federal agency asserts, based on its own administrative decision record, it is fully consistent, or because of the requirements of other Federal law. NOAA added these provisions in 2000 at Federal agencies’ requests.

NOAA has provided, and will continue to provide, advice to Federal agencies on how to effectively use the consistent to the maximum extent practicable standard in connection with their statutes and case-by-case decision records.

Comment 42. The deference to be given a State’s determination of “substantially different coastal effects” under 15 CFR § 930.51(e), for purposes of determining if a renewal or major amendment of a federal license or permit is an unlawful transfer of Federal authority to the States and could delay OCS permit activities.

NOAA Response to Comment 42. The determination of substantially different coastal effects should be made by input from all the parties. While NOAA’s

language did not transfer Federal authority to the States, NOAA agrees the section should be revised to reflect NOAA’s original intent that the State’s view be accorded some weight.

VI. Miscellaneous Rulemaking Requirements

Executive Order 12372: Intergovernmental Review

This program is subject to Executive Order 12372.

Executive Order 13132: Federalism Assessment

NOAA has concluded that this regulatory action is consistent with federalism principles, criteria, and requirements stated in Executive Order 13132. The proposed changes in the Federal Consistency regulations are intended to facilitate Federal agency coordination with coastal States, and ensure that Federal actions affecting any coastal use or resource are consistent with the enforceable policies of approved State coastal management programs. The CZMA and these revised implementing regulations promote the principles of federalism articulated in Executive Order 13132 by granting the States a qualified right to review certain Federal actions that affect the land and water uses or natural resources of State coastal zones. Congress partially waived the Federal government’s supremacy over State law when it created the CZMA. Section 307 of the CZMA and NOAA’s implementing regulations effectively balance responsibilities between Federal agencies and State agencies whenever Federal agencies propose activities or applicants for required federal license or permit propose to undertake activities affecting State coastal uses or resources. Through the CZMA, Federal agencies are required to carry out their activities in a manner that is consistent to the maximum extent practicable with federally approved State management programs and licensees and permittees to be fully consistent with the State programs. The CZMA and these implementing regulations, rather than preempting a State provide a mechanism for it to object to Federal actions that are not consistent with the State’s management program. A State objection prevents the issuance of the Federal permit or license, unless the Secretary of Commerce overrides the objection. Because the CZMA and these regulations promote the principles of federalism and enhance State authorities, no federalism assessment need be prepared.

Executive Order 12866: Regulatory Planning and Review

This regulatory action is not significant for purposes of Executive Order 12866.

Regulatory Flexibility Act

The Chief Counsel for Regulation for the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that the proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. This proposed rule will make only minor changes to existing regulations. The existing regulations do not have a significant economic impact on a substantial number of small entities and, thus, these clarifying changes will not result in any additional economic impact on affected entities. To the extent the proposed rule impacts small entities, it is to diminish their regulatory burden and obligations. The proposed rule revises provisions of the Federal Consistency regulations to improve Federal-State coordination of actions affecting the coastal zone, and does not impose any new requirements on States, federal agencies, businesses, or the public.

The term “small entity” includes small businesses, small organizations, and small governmental jurisdictions. The Federal Consistency regulations, and the proposed rule, primarily affect States and federal agencies. Federal Consistency also applies to individual land owners proposing certain activities affecting the coastal zone that require federal authorizations. State and Federal agencies and individual landowners are not small entities under the Regulatory Flexibility Act (RFA). Federal Consistency does apply to some small businesses, small organizations and small governmental jurisdictions proposing activities that affect the coastal zone. The RFA defines a small jurisdiction as any government of a district with a population of less than 50,000.

The number of small entities affected by the consistency provisions of the CZMA generally, are insignificant when compared to the total number of small businesses and governmental jurisdictions in the 34 coastal States with approved coastal management programs. State coastal management programs concur with 95–97 percent of all federal license or permit activities, and over 99 percent of all applicable small organization and governmental jurisdiction federal assistance activities. For example, in the State of North Carolina, for the period January 1, 1998,