

April 25, 2019

Mr. Kerry Kehoe
Federal Consistency Specialist
Office of Coastal Management
National Oceanic and Atmospheric Administration (NOAA)

Re: NOAA-NOS-2018-0107, Advanced Notice of Proposed Rulemaking Regarding Procedural Changes to the Coastal Zone Management Act Consistency Process

Dear Mr. Kehoe,

On behalf of the Natural Resources Defense Council (NRDC), American Littoral Society, Azul, California Coastal Protection Network, Center for Biological Diversity, Conservation Law Foundation, Nassau Hiking & Outdoor Club, Inc., NY4WHALES, Ocean Conservancy, Surfrider Foundation, and our millions of members, we submit the following comments on NOAA's Advanced Notice of Proposed Rulemaking (ANPR) regarding Procedural Changes to the Coastal Zone Management Act (CZMA) Federal Consistency Process. See 84 Fed. Reg. 8628 (March 11th, 2019). We urge NOAA not to revise the federal consistency regulations at this time for at least two principal reasons. First, there is no demonstrated need for streamlining the federal consistency process to make it more "efficient." Second, coastal states must be able to fully utilize their consistency review authority under the CZMA in order to effectively protect their coasts, coastal communities, and coastal economies in the face of proposals to speed up and greatly expand Outer Continental Shelf (OCS) offshore oil and gas activities. To attempt to diminish that state authority, as the ANPR invites, would undermine a foundational requirement of the CZMA, namely that in exchange for coastal states' developing and implementing federally approved state CZM programs, federal actions having reasonably foreseeable coastal impacts must be consistent with those programs.

Our comments will first address the historical need for the consistency process. We will then examine the efficiency of the current CZMA consistency review process. Finally, we will respond to the questions posed by NOAA's ANPR, specifically: 1) the potential to streamline federal consistency reviews for the sake of predictability and efficiency, 2) the potential impact of limiting the scope of information reviewed by the Secretary of Commerce on appeal, and 3) the potential need to amend the Secretary's process of collecting fees for appeals.

Important Role of Federal Consistency in the CZMA

Our nation's coastlines are a vital resource that merit protection. As of 2010, people living in the counties directly on the shoreline accounted for 39 percent of the total U.S. population. By 2020, the population of these counties is projected to increase by an additional 10 million people, or 8%.¹ These coastlines are home to valuable beaches, estuaries and wetlands that support an incredible range of biodiversity. We rely

¹ NOAA. What percentage of the American population lives near the coast, National Ocean Service website, <https://oceanservice.noaa.gov/facts/population.html>, accessed April 23, 2019.

on these areas also to support fisheries, recreation and tourism, transportation, and more. These activities contribute trillions of dollars to the total gross US GDP each year.²

Yet, our use of coastal resources can upset the balance of the entire ecosystem if we are not careful.³ In the context of both climate change and coastal population growth, our coasts are becoming increasingly vulnerable. The environmental consequences of offshore oil and gas operations also can negatively impact ecosystems like beaches, wetlands and estuaries. For example, a major oil spill has the potential to devastate coastal communities and coastal economies. Each state has the duty and privilege of protecting its coastlines for environmental, health, economic, and aesthetic purposes from such threats. Each state also has the right to participate in decisions affecting their shores.

The need for protection of our coastlines was realized in 1972 when Congress enacted the Coastal Zone Management Act (CZMA; P.L. 92-583, 16 U.S.C. 1451-1466). The act, which has since been amended 11 times, was spurred by the realization that our coastlines were threatened by degradation due to human activities. The CZMA establishes a framework for states to address environmental issues and manage their coastal resources. States that opt into the program receive two key benefits, namely: 1) eligibility for federal grants and 2) the right to review federal actions for consistency with enforceable state coastal policies. These provisions have been mainstays of the CZMA since its development and enactment.⁴

As the ANPR states, federal consistency is the CZMA provision that requires federal actions (inside or outside a state's coastal zone) that have reasonably foreseeable effects on any land or water use or natural resource of the affected states' coastal zone must be consistent with the enforceable policies of the affected state's federally approved CZMA program (84 Fed. Reg. at 8629). While consistency reviews do not serve as a veto on federal agency activities such as oil and gas lease sales, they do require the *maximum extent practicable* compliance with enforceable state policies that are part of the state's federally approved CZM program.⁵ For other forms of federal action, such as decisions on Outer Continental Shelf exploration plans and development and production plans, and federal licensing or permitting, full consistency is the standard absent an appeal to and reversal by the Secretary of Commerce.⁶ Consistency review thus serves as an important tool for states to exercise their right to preserve their coastlines.

Weakening the states' ability to ensure the consistency of federal decisions by "streamlining" the consistency appeals system diminishes the incentive for states to participate in the program and undermines the statutory scheme carefully laid out by Congress.

² The National Ocean Economics Program (NOEP), at <http://www.oceaneconomics.org/>, accessed April 19, 2019.

³ NOAA, Coastal Ecosystem Science, National Ocean Service website, <https://oceanservice.noaa.gov/ecosystems/coastalecosci/>, accessed April 23, 2019.

⁴ Eva Lipiec, Coastal Zone Management Act (CZMA): Overview and Issues for Congress, Cong. Research Service, p. 4 (2019), at <https://crsreports.congress.gov/>, R45460.

⁵ Coastal Zone Management Act § 307(c)(1),(2).

⁶ Coastal Zone Management Act § 307(c)(3)(A),(B).

Current Efficiency of the CZMA Consistency Review Process including the Appeals Process

According to NOAA, coastal states review thousands of federal consistency determinations each year, with more than half of the reviews being for federal license or permit activities. Remaining reviews are, in descending order, federal agency activities and development projects, federal financial assistance activities, and outer continental shelf plans. *Over time, state participants have concurred in 93% to 95% of the federal consistency determinations they have reviewed.*⁷(emphasis supplied).

The CZMA consistency review process differs procedurally for federal and private applicants, and action types. For federal agency activities (for example, OCS oil and gas lease sales), there is no appeal to the Secretary of Commerce. As noted in the ANPR, a state may challenge a federal agency's decision to proceed over state objection in federal court or through mediation under the Secretary of Commerce or NOAA (307(c)(1),(2)).

For other kinds of actions, such as Outer Continental Shelf Plans and federal licensing and permitting, the appeals process can come into play. In these cases, when a state receives a consistency certification from the applicant, the state has the ability to reject the certification if it finds that it is not consistent with the state's enforceable coastal policies. Applicants then have the choice to either amend their consistency certification in accordance with the state's recommendations or appeal the state's objection to the Secretary of Commerce (307(c)(3)(A),(B)). Upon review, the Secretary has the power to override the State's rejection of the applicant's consistency determination if he finds the activity consistent with the objectives of the CZMA or otherwise necessary in the interest of national security.

Since the first state coastal program was approved in 1978, only 45 consistency decisions have been subject to secretarial appeals. Of the 45 appeals, the Secretary overrode state objections in 14 cases and agreed with the state in the other 31 cases.⁸

With respect to offshore oil and gas issues specifically, it was noted by NOAA in its 2006 amendment of the consistency regulations that:

In the 30-year history of the CZMA, there have been only 18 instances where the offshore oil and gas industry appealed a State's federal consistency objection to the Secretary of Commerce. The Secretary issued a decision in 14 of those cases. The Secretary did not issue a decision for the other 4 OCS appeals because the appeals were withdrawn due to settlement negotiations between the State and applicant or a settlement agreement between the Federal Government and the oil companies involved in the projects. Of the 14 decisions (1[Development and Production Plan] and 13 [Exploration Plans]), there were 7 decisions to override the State's objection and 7 decisions not to override the State.⁹

⁷ Lipiec, *supra* note 4, p. 10.

⁸ *Id.*; see also, NOAA, Office for Coastal Management, Appeals to the Secretary of Commerce Under the Coastal Zone Management Act (CZMA)—April 26, 2018, at <https://www.coast.noaa.gov/czm/consistency/media/appealslist.pdf>, accessed on April 12, 2019.

⁹ 71 Fed. Reg. 787,791 (Jan.5, 2006).

According to the current Federal Register notice: “*These numbers are still valid. The most recent Secretarial appeal of an OCS Oil and gas plan was in 1999.*”¹⁰ (emphasis supplied)

Finally, changes have already been made to the federal consistency requirements for the sake of “efficiency.” According to the amended regulations, the Secretary has 30 days to publish a notice of appeal, then 160 days to develop a decision record, may stay the 160-day period for 60 days, and has a 60-75 day period to issue a decision after the record is closed.¹¹ These regulations have even eliminated the opportunity for public comment or a public hearing from any appeals involving energy projects (like OCS oil and gas projects) in the name of “efficiency.”

Given the above-referenced track records for consistency reviews and of appeals and the “streamlining” that has already abbreviated the appeals process, there should be no further “streamlining.”

Questions Raised by the ANPR

1. Streamlining and Predictability

NOAA’s ANPR seeks input on changes that can streamline the federal consistency review process and provide the industry with greater predictability. However, as it stands, the process of federal consistency review is already governed by strict timelines. For example, states have only 60-75 days to review a consistency determination submitted by a federal agency, or 6 months to review activities by non-federal applicants. Additionally, as discussed above, the timeframe for consistency appeals of energy projects, including OCS oil and gas projects, is already exceedingly tight. The regulations even foreclose the opportunity for public comment or a public hearing. Attempting to further cut corners for the sake of expediting review of OCS oil and gas projects would come at a potentially significant environmental and social cost.

As discussed in detail above, in a system where states have concurred with 93-95% of consistency determinations and where the last secretarial appeal involving an oil and gas plan occurred twenty years ago, it can hardly be argued that there is a demonstrated need for change and further streamlining. Responsible federal agencies and companies that do their due diligence and put in a good faith effort to comply with the enforceable policies of state CZM programs have little to no grounds to complain.

2. Limiting the Scope of Information Reviewed on Appeal

The risks of limiting the scope of information reviewed on appeal far outweigh any potential benefits. States need the ability to review and register their concurrence or objection to a consistency determination by an applicant based on the potential effects of an oil and gas project at each phase of project implementation. This is because each phase poses distinct risks and issues. Similarly, the Secretary needs to be able to review and factor in all information relevant to the different phases of a project on appeal in order to properly evaluate a state’s objection to a consistency determination.

¹⁰ 84 Fed. Reg. 8632 (March 11, 2019).

¹¹ 15 C.F.R. Section 930.128-130 (2006).

An OCS exploration plan (EP) looks significantly different than an OCS development and production plan. Here, companies set out a plan for when and how they will survey the leased area for oil and gas. The activities reviewed during the exploration phase are the temporary operations around exploring potential oil and gas deposits, which will differ in nature and in scope from the operation of long-term development and production stage. The EP involves drilling in areas where the geographic characteristics may not be well known or understood. The varying pressure with which oil is released from different drill sites makes careful surveying, planning, and drilling critical in order to avoid a well blowout and a consequent massive oil spill like the 2010 *Deepwater Horizon* oil disaster or the 1969 Santa Barbara oil spill. Issues that arise during this stage revolve largely around uncertainty. At this stage, it is not even clear to the driller whether commercial quantities of oil and/or natural gas will be discovered.

When it comes to a development and production plan, the level of drilling increases dramatically once a promising source is identified, which carries new environmental risks. Concerns shift to how to create a permanent fixture at the site and how to safely pipe or ship the product from the source.

Given the limited overlap of operational processes between the different OCS stages as well as the potential for new and fuller environmental information at later stages, it is essential that the Secretary of Commerce give an appeal at each stage of the OCS process a full review and not be bound by prior decisions. The regulations already give the Secretary the ability to “consider” previous appeal decisions, if he so chooses.¹² To require that the Secretary be bound by an earlier decision, in whole or in part, is unjustified.

3. Appeals Fees

The current regulations require that the Secretary waive any or all fees if the Secretary concludes upon review of the appellant’s fee waiver request that such fees impose an economic hardship on the appellant.¹³ Absent evidence that waivers have not been forthcoming when justified, there does not appear to be a need to revise the regulations.

Conclusion

The federal consistency determination process, although far from perfect, has operated as an *efficient* tool over the course of many years. It is an essential requirement of the CZMA and a key incentive for state participation in the program. Weakening the ability of states to meaningful exercise their consistency review authority or constraining the appeals process even further than what has already been done would undermine the federal statutory scheme.

With the pending rollout of the Department of the Interior’s proposed Five-Year Offshore Leasing Program, it is more important now than ever to ensure that a fair regulatory process remains in place. The consistency review process should be left as is, if not strengthened, rather than further streamlined.

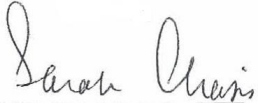
For all of the reasons stated above, the federal consistency regulations should not be revised at this time.

¹² 15 C.F.R. Section 930.121(c).

¹³ 15 C.F.R. Section 930.125(f).

We appreciate your consideration of our views.

Sincerely,

A handwritten signature in black ink that reads "Sarah Chasis". The signature is written in a cursive style with a large initial 'S'.

Sarah Chasis
Senior Director, Oceans
NRDC

Destiny N. Kanu
Legal Intern
NRDC