April 25, 2019

VIA Federal eRulemaking Portal (www.regulations.gov)

Mr. Kerry Kehoe, Federal Consistency Specialist
Office for Coastal Management
National Oceanic and Atmospheric Administration
Attn: CZMA Federal Consistency ANPR Comments
1305 East-West Highway, 10th Floor, N/OCM6
Silver Spring, MD 20910

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

Dear Mr. Kehoe:

This letter provides the comments of the International Association of Geophysical Contractors ("IAGC"), the American Petroleum Institute ("API"), and the National Ocean Industries Association ("NOIA") (collectively, the "Associations") in response to the National Oceanic and Atmospheric Administration's ("NOAA") request for public comment concerning its advance notice of proposed rulemaking for procedural changes to the Coastal Zone Management Act ("CZMA") federal consistency process. *See* 84 Fed. Reg. 8628 (Mar. 11, 2019) ("ANPR"). As explained below, there are a number of regulatory changes that can and should be made to make the federal consistency process more efficient and effective. We appreciate NOAA's consideration of our comments.

I. THE ASSOCIATIONS

IAGC is the international trade association representing the industry that provides geophysical services (geophysical data acquisition, processing and interpretation, geophysical information ownership and licensing, and associated services and product providers) to the oil and natural gas industry. IAGC member companies play an integral role in the successful exploration and development of offshore hydrocarbon resources through the acquisition and processing of geophysical data.

API is a national trade association representing over 625 member companies involved in all aspects of the oil and natural gas industry. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers.

NOIA is the only national trade association representing all segments of the offshore industry with an interest in the exploration and production of both traditional and renewable energy resources on the United States' outer continental shelf ("OCS"). NOIA's membership comprises approximately 250 member companies engaged in a variety of business activities, including production, drilling, engineering, marine and air transport, offshore construction, equipment manufacture and supply, telecommunications, finance and insurance, and renewable energy.

II. COMMENTS

The ANPR specifically requests public input on the following issues:

A. "What changes could be made to NOAA's federal consistency regulations at 15 CFR part 930 that could streamline federal consistency reviews and provide industry with greater predictability when making large investments in offshore renewable and non-renewable energy development?" 84 Fed. Reg. at 8632.

B. "[W]hether and how NOAA could achieve greater efficiency to process an appeal in less time and increase predictability in the outcome of an appeal—while continuing to meet the requirements and purposes of the CZMA—by limiting the Secretary of Commerce's review of an appeal of a state's objection to an OCS oil and gas Development and Production Plan or Development Operations and Coordination Document, to information that the Secretary of Commerce had not previously considered in an appeal of an OCS oil and gas Exploration Plan for the same lease block." *Id*.

We address these topics in subsections A and B, below.

A. Streamlining and Improving Predictability of the Consistency Process.

Below, we present a number of suggested modifications to Subparts C, D, E, and H of the regulations implementing the CZMA consistency provisions. We intend for these proposed modifications to increase regulatory efficiency and improve predictability for the regulated community.

1. OCS activities should not be *presumed* to affect state coastal zone resources.

The touchstone for initiation of the CZMA consistency process—whether applicable to federal or private applicant activities—is that the proposed activity must *affect* "any land or water use or natural resource" of the state. *See* 16 U.S.C. § 1456(c)(1)(A), (c)(3)(A). The current consistency regulations establish a process in which a state either (i) unilaterally presumes, in practice, that certain "federal license or permit activities" affect state resources by its "listing" of such activities or (ii) requests review of "unlisted" activities on the basis that those activities have coastal effects that are "reasonably foreseeable." 15 C.F.R. §§ 930.53, 930.54.

The Associations recommend that NOAA modify the regulations to clarify that licenses and permits for activities that occur on the OCS (outside of the coastal zone) *cannot* be included as "listed activities" under 15 C.F.R. § 930.53. The Associations are concerned that the current regulations allow the states to *presume* that such OCS activities *will affect* a state's coastal uses

and resources by simply listing them and without expending the necessary effort to understand the scope and reasonably foreseeable effects of specific OCS activities. Whether or not an OCS activity will have reasonably foreseeable effects on a state's coastal uses and resources can only be determined on a case-by-case basis in light of the fact-based impact analysis of the proposed activity. This determination must involve the federal agency, the state, and the applicant—it should not be unilaterally presumed by the state in the first instance. Existing state lists typically describe effects generically (*i.e.*, "OCS plans and permits") and provide no meaningful information to applicants or to federal agencies about how the state has considered coastal effects associated with specific activities. Case-by-case review is part of the existing process for unlisted federal license or permit activities, which is the appropriate means of determining whether an activity proposed for the OCS is subject to consistency review.

Accordingly, we recommend that NOAA revise the regulations to specify that any OCS activities (whether covered by Subpart D or Subpart E of the regulations) are subject to the process set forth in 15 C.F.R. § 930.54, *not* § 930.53.[1] With this regulatory modification, federal agencies or applicants could choose to provide a consistency certification in the first instance at their own election or, alternatively, a state could request review pursuant to the process set forth in 15 C.F.R. § 930.54.

2. States must clearly identify enforceable policies applicable to unlisted activities early in the process.

When a state requests review of an unlisted activity under 15 C.F.R. § 930.54, the state should be required to specifically identify and justify the relevant and applicable enforceable policies of the state's coastal program as part of the "analysis" required by § 930.54(b). It can be difficult for applicants to ascertain which enforceable policies of a state's coastal program should apply to an activity on the OCS because many state program policies are written to expressly address activities in the coastal zone, and OCS activities are not, by definition, within a state's coastal zone. Requiring states to specify the policies that apply to an unlisted activity will create more efficiency in the process for determining whether the state's request for consistency review should be granted.

For instance, the Director will be able to evaluate whether unlisted activities will have reasonably foreseeable effects on coastal uses and resources in an *informed* way if the state is required to specifically identify and justify policies that form the basis for its request for review. Additionally, applicants will be better positioned to address state concerns if they know the specific and relevant enforceable policies that form the basis for the state's request for review early in the process. For example, if a state's request is granted and the applicant is required to provide a consistency certification, it will be far more efficient for the applicant to have already been informed about which state enforceable policies are relevant to the certification. Without that information, the applicant is required to "guess" when it prepares the certification, and if the applicant guesses wrong, the state may delay the six-month process under 15 C.F.R. § 930.60 by requesting more information. Early identification of applicable enforceable policies would allow

[1] This would also require modification to, or elimination of, 15 C.F.R. § 930.74.

an applicant to address such policies *before* submitting its consistency certification rather than in the middle of the review process, which would also help to avoid time-consuming appeals involving issues that could have been addressed earlier in the process.

3. NOAA should clarify the definition of "Federal agency activity."

The current regulations define "Federal agency activity" to include "any functions *performed* by or on behalf of a Federal agency." 15 C.F.R. § 930.31(a) (emphasis added); *see* 16 U.S.C. § 1456(c)(1)(C) (Federal agency activity is "carr[ied] out"). Notwithstanding this language, a federal district court recently held that a programmatic environmental assessment ("EA") that contemplated future offshore authorizations to use well simulation technologies was a "Federal agency activity" subject to consistency review under the CZMA.[2] In so doing, the court construed the programmatic EA as a "plan that is used to direct future agency actions."[3] This decision misinterprets the National Environmental Policy Act ("NEPA") and the CZMA.

Any EA (or environmental impact statement) prepared under NEPA is simply the agency's evaluation of the environmental impacts of a *separate* federal activity.[4] An EA is not a "plan" or any other type of federal action. When, in the case of a programmatic EA, the federal agency conducts a programmatic evaluation of the potential effects of future activities (as NEPA encourages), then the CZMA applies to those *future activities*, not to the environmental review document. In other words, the NEPA document is not a "function performed by" a federal agency; rather, it evaluates the effects of functions performed by, or actions authorized by, federal agencies.[5]

Accordingly, to prevent similar misinterpretations in the future, NOAA should modify 15 C.F.R. § 930.31(a) to clarify that NEPA documents are *not* "Federal agency activities" subject to consistency review. Additionally, NOAA should amend § 930.31(a) to expressly exclude from the definition of "federal agency action" any action that (i) has the effect of maintaining in place

---

[2] *See Envtl. Def. Ctr. v. Bureau of Ocean Energy Mgmt*., Case No. CV 16-8418 PSG, Dkt. 126, at 37 (C.D. Cal. Nov. 9, 2018).

[3] *Id*. (citing 15 C.F.R. § 930.31).

[4] *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756-57 (2004) ("NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions.").

[5] The court's opinion also wrongly results in duplicate consistency review of the effects of the activities that will ultimately be authorized—once when the EA is subjected to review under 16 U.S.C. § 1456(c)(1) and again when the actual activities are evaluated under 16 U.S.C. § 1456(c)(3). This directly contradicts established law. *See California v. Norton*, 311 F.3d 1162, 1170 (9th Cir. 2002) ("Sections (c)(1) and (c)(3) are mutually exclusive ….").

a lease that was the subject of consistency review and approval at the lease sale stage, and (ii) extends without expanding the rights conveyed in the lease.[6]

4. NOAA should amend the definition of "consistent to the maximum extent practicable."

Current regulations provide that "all Federal agency activities including development projects affecting any coastal use or resource will be undertaken in a manner *consistent to the maximum extent practicable* with the enforceable policies of approved management programs." 15 C.F.R. § 930.30 (emphasis added). This standard—"consistent to the maximum extent practicable"—is referenced throughout Subpart C of the consistency regulations. *See, e.g.*, *id*. §§ 930.34, 930.36, 930.39, 930.43, 930.45. The regulations define "consistent to the maximum extent practicable" as meaning "fully consistent with the enforceable policies of management programs unless full consistency is prohibited by existing law applicable to the Federal agency." *Id.* § 930.32(a)(1). However, this definition is incomplete and ignores the natural meaning of "practicable," which connotes something that can be reasonably performed. The current definition addresses only *legality* and does not speak to whether the enforceable policies at issue can reasonably be adhered to in a practical sense. This definition should be amended to say that "practicable" means *technologically, economically, and operationally feasible* (in addition to consistent with federal law).

5. The supplemental coordination provisions should be modified to provide necessary clarification and predictability.

Supplemental coordination is required if an activity will affect a coastal use or resource in a manner that is "substantially different" than described in the consistency certification. *See* 15 C.F.R. § 930.66. However, the regulations are unhelpfully ambiguous on key aspects of the supplemental coordination process. Modifications to § 930.66 are badly needed to provide clarity for the regulated community and to prevent the misuse of this provision, which can substantially delay and complicate the regulatory process. To assist the understanding of our proposed modifications, we provide the current language of § 930.66:

> (a) For federal license or permit proposed activities that were previously determined by the State agency to be consistent with the management program, but which have not yet begun, applicants shall further coordinate with the State agency and prepare a supplemental consistency certification if the proposed activity will affect any coastal use or resource substantially different than originally described. Substantially different coastal effects are reasonably foreseeable if:

[6] To eliminate any potential for ambiguity, NOAA should correspondingly clarify in 15 C.F.R. § 930.37 that NEPA documents are not "Federal agency activities" under § 930.31(a), and should eliminate the last sentence of § 930.37.

> (1) The applicant makes substantial changes in the proposed activity that are relevant to management program enforceable policies; or
>
> (2) There are significant new circumstances or information relevant to the proposed activity and the proposed activity's effect on any coastal use or resource.
>
> (3) Substantial changes were made to the activity during the period of the State agency's initial review and the State agency did not receive notice of the substantial changes during its review period, and these changes are relevant to management program enforceable policies and/or affect coastal uses or resources.
>
> (b) The State agency may notify the applicant, the Federal agency and the Director of proposed activities which the State agency believes should be subject to supplemental coordination. The State agency's notification shall include information supporting a finding of substantially different coastal effects than originally described and the relevant enforceable policies, and may recommend modifications to the proposed activity (if any) that would allow the applicant to implement the proposed activity consistent with the management program. State agency notification under subsection (b) does not remove the requirement under subsection (a) for applicants to notify State agencies.

15 C.F.R. § 930.66. We propose modifications to this regulatory language as follows.

First, § 930.66 is silent on the issue of *who* decides whether substantially different effects are reasonably foreseeable. The regulations should be amended and clarified to expressly state that the *federal agency* must specifically and timely make this determination in response to a state notification, just as is done for federal licenses and permits. *See, e.g.*, *id.* § 930.51(e).[7] Without this clarification, there is no guidance as to *what* happens or *who* acts in response to a state notification under § 930.66.

Second, § 930.66 should be amended to add a new subsection stating that if the federal agency determines that there is no basis for supplemental coordination, it can proceed to issue the requested licenses and permits. This clarification is necessary to prevent delays that would otherwise result from the existing regulatory ambiguity.

[7] In this light, 15 C.F.R. § 930.51(e) should also be amended to create a less ambiguous process by specifically eliminating the last two sentences of that subsection. The process should simply be that the federal agency makes the determination, after consulting as appropriate, with the purpose of *objectively* identifying activities or effects that have not been previously reviewed.

Third, there is a disconnect between the "will affect" language of the first sentence of § 930.66(a) and the "reasonably foreseeable" definition in the second sentence of that subsection. The regulatory language should clarify that the standard applicable in this subsection is either "will affect" or "reasonably foreseeable." We recommend that NOAA substitute "Substantially different coastal effects are reasonably foreseeable if:" with "This may occur if:".

Fourth, subsections (a)(1), (a)(2), and (a)(3) present unhelpful ambiguities. Subsections (a)(1) and (a)(2) describe alternative means of determining whether substantially different effects are reasonably foreseeable, as indicated by the use of the conjunctive "or" between those provisions. However, there is no conjunction between subsections (a)(2) and (a)(3). Moreover, the purpose of subsection (a)(3) is unclear, as that subsection appears to be subsumed by subsection (a)(1). Any perceived need for the content of subsection (a)(3) could be addressed by adding the phrase "not previously reviewed by the state" to subsection (a)(1) (and eliminating subsection (a)(3)).[8]

Finally, § 930.66 should be amended with a new subsection that clarifies that new studies and information that describe the same types of effects that were previously reviewed in the consistency process are *not* a basis for supplemental coordination. The touchstone for supplemental coordination is the demonstration of reasonably foreseeable *unanticipated effects*. The process could be indefinitely delayed if states were simply allowed to trigger § 930.66 on the sole basis of new information becoming available without any consideration of whether new effects are presented.[9]

6. Specific modifications to the appeal process will improve efficiency and predictability.

Lastly, we have identified a few opportunities for regulatory efficiency in the appeal process set forth in Subpart H of the regulations. Specifically, we encourage NOAA to consider the following modifications to improve the appeal process:

- There is no need for public notice and comment at the appeal stage. Public input is already provided under the consistency review process, and public input is also provided on specific issues involving OCS activities through other federal processes. *See* 15 C.F.R. § 930.42. To the extent the Secretary desires input from other federal agencies regarding the national interest or national security issues relevant to an appeal, it can request information from such agencies. Eliminating the unnecessary and duplicative public input process at § 930.42 would shorten the appeal timeframe and increase predictability.

[8] With the suggested revision, subsection (a)(1) would read: "The applicant makes substantial changes in the proposed activity not previously reviewed by the state that are relevant to management program enforceable policies; or".

[9] For example, the State of North Carolina attempted to reopen its consistency concurrence on a seismic survey planned for the Atlantic OCS under § 930.66 on the basis of new scientific studies that simply addressed effects that had already been fully considered. This resulted in unnecessary effort and delay on the part of the applicant and the involved federal agency.

- The regulations allow the Secretary to remand an appeal to the state in certain circumstances. *See* 15 C.F.R. § 930.129(d). To increase predictability for the applicant, a remand should be allowed *only* if the applicant consents to a remand.

- The regulations allow the Secretary to initiate review after a state completes its review, even if the applicant does not request review. *See* 15 C.F.R. § 930.131. We see no reason that the Secretary would need this authority if (i) the state has concurred with the applicant's consistency determination or (ii) neither the state nor the applicant has filed an appeal. Eliminating § 930.131 would improve efficiency and predictability.

B. Consistency Review Should Be Limited to Information and Issues Not Previously Considered.

In this section, we address the second issue identified in the ANPR. Specifically, we strongly believe that both efficiency and predictability would be improved "by limiting the Secretary of Commerce's review of an appeal of a state's objection to an OCS oil and gas Development and Production Plan ['DPP'] or Development Operations and Coordination Document ['DOCD'] to information that the Secretary of Commerce had not previously considered in an appeal of an OCS oil and gas Exploration Plan for the same lease block." 84 Fed. Reg. at 8632. We provide the following points in support of this approach.

First, the approach suggested in the ANPR presents a reasonable and substantively practical approach for ensuring that CZMA consistency review is meaningful and not redundant. With the change suggested by the ANPR, the consistency process would simply apply to each subsequent stage of the Outer Continental Shelf Lands Act ("OCSLA") process *only to the extent* that each subsequent stage contemplates activities with demonstrated significant coastal effects that were *not* addressed in the consistency process for an earlier stage.[10] For example, the coastal effects of any activities evaluated for consistency during a lease sale review need not be reconsidered during the exploration plan ("EP") or DPP review. Similarly, activities evaluated for consistency during an EP review should not be re-evaluated during a DPP review. To the extent the effects of any OCS activity have already been reviewed, additional review of the same activities and effects at a later stage has no substantive purpose and creates great opportunity for misuse. The regulations should be modified to encourage efficient and non-duplicative consistency review of OCS plans.

Moreover, much of the information that is required for EPs such as hazards reports, biological and cultural surveys, spill response plans, and vessel activity estimates (*see* 30 C.F.R. §§ 550.211-.228) is similar to that provided with DPPs and DOCDs (*see id.* §§ 550.241-.262). Also, because deepwater OCS operations are characterized by a very limited number of wells and

[10] Because any unaddressed effects associated with subsequent stage activities would be limited and narrow, NOAA should consider shortening the six-month review process under 15 C.F.R. § 930.62 for any such activities to three months or less. This would create further efficiencies in the process.

surface facilities, the magnitude of potential coastal impacts may not vary significantly between the exploration and development phases. In some cases, wells drilled under an EP are completed as production wells and tied back to an existing surface facility that has already been reviewed for consistency. The EP and DPP/DOCD are thus essentially the same from a coastal impact standpoint. The Associations therefore agree with the ANPR's suggestion that NOAA should limit the opportunity for state objections to consistency determinations on such DPPs or DOCDs. Additionally, NOAA should restrict the opportunity to object to EPs, DPPs, and DOCDs based on potential impacts that are not incrementally significant and are similar to those that have already been evaluated in the review of other projects.

Second, there is nothing novel about the approach suggested in the ANPR. Indeed, it would establish a framework that is similar to the "tiering" and "incorporation by reference" practices used in many forms of environmental review under other statutes, such as NEPA. NEPA review frequently occurs through a tiered framework in which previous NEPA documents can be relied upon for future actions or incorporated by reference into future NEPA documents as appropriate, including for activities being conducted pursuant to OCSLA. *See, e.g.*, 40 C.F.R. §§ 1502.20, 1502.21, 1508.28. By aligning with processes already used for NEPA review, limiting consistency review only to information and issues not previously considered would further streamline the regulatory process.

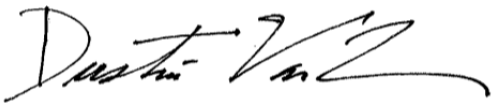
Third, the approach suggested in the ANPR could be further improved by amending 15 C.F.R. § 930.71. Specifically, the CZMA provides that the approval of an EP or DPP shall be deemed to constitute the approval of any license of permit (*e.g.*, an application for permit to drill ("APD")) that is "described in detail" in the EP or DPP. 16 U.S.C. § 1456(c)(3)(B). NOAA should expand the definition in § 930.71 by including an additional sentence providing that the approval of an OCS plan by the Secretary constitutes a binding determination that all licenses or permits with respect to activities pursuant to that plan have been adequately described in that plan. This would help to avoid inefficient and time-consuming disputes about whether an APD must go through its own consistency review whenever the lessee intends to engage in drilling techniques that were not explicitly discussed in an EP or DPP that went through consistency review and approval.

Finally, the ANPR's suggested regulatory modification should not be limited to activities subject to Subpart E of the consistency regulations. As noted in the ANPR, geological and geophysical ("G&G") surveys often occur as off-lease activities subject to review under Subpart D. Nonetheless, subsequent G&G surveys may be conducted on-lease, and those surveys may occur on the same lease blocks as previous off-lease surveys. In this event, there is no need to conduct a second consistency review for subsequent G&G activities under Subpart E if the enforceable policies or the effects on coastal uses and resources have not changed since the last consistency review.

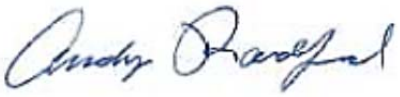
III. CONCLUSION

In sum, the Associations appreciate this opportunity to provide input on regulatory updates to streamline and improve the predictability and efficiency of the federal consistency review process under the CZMA. As set forth above, there are a number of simple modifications that can and should be made to greatly improve the consistency process for all parties involved. We look forward to providing further comments on a proposed rule in the near future.

Sincerely,



Dustin Van Liew
International Association of Geophysical Contractors
Vice President, Regulatory & Governmental Affairs



Andy Radford
American Petroleum Institute
Sr. Policy Advisor – Offshore

Jeff Vorberger
National Ocean Industries Association
Vice President Policy and Government Affairs