Attorneys General of New York, California, Maryland, Massachusetts, New Jersey, North Carolina, Oregon, Rhode Island and Washington

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April 25, 2019

Kerry Kehoe
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Attn: CZMA Federal Consistency ANPR Comments

Re: ANPR Procedural Changes to the Coastal Zone Management Act Federal Consistency Process

Dear Mr. Kehoe:

The Attorneys General for nine states[1] write to express concerns regarding the March 11, 2019 Advance Notice of Proposed Rulemaking for Procedural Changes to the Coastal Zone Management Act Federal Consistency Process. 84 Fed. Reg. 8628 (March 11, 2019) (Advance Notice or ANPR).[2] In the Advance Notice, the National Oceanic and Atmospheric Administration (NOAA) seeks input on potential changes to the Federal Consistency process intended to promote efficiency "across all stages of [Outer Continental Shelf (OCS)] … oil and gas projects from leasing to development, as well as renewable energy projects." *Id.* Additionally, NOAA invites comments regarding the timeliness of its appeals process and ways to promote "predictability in the outcome of an appeal." *Id.*

First, we question the need for the rulemaking proposed by the Advance Notice. NOAA identifies no problems with the current Coastal Zone Management Act (CZMA) consistency review procedures that need to be corrected, nor regulatory changes to existing processes that need to be made in order for NOAA to function more effectively under the CZMA. Indeed, in 2000 and 2006, NOAA successfully amended the CZMA regulations to address the very goals identified in the Advance Notice. Thus, the undersigned question the factual basis for any additional, unwarranted changes to the regulations.

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[1] These comments are submitted jointly by the Attorneys General for New York, California, Maryland, Massachusetts, New Jersey, North Carolina, Oregon, Rhode Island and Washington.
[2] 16 U.S.C. § 1451, *et seq.;* 15 CFR Part 930.

More broadly, the undersigned Attorneys General object to any proposals in the Advance Notice that are detrimental to State authority and contrary to the CZMA. Congress intended the CZMA to serve as a substantive planning tool for managing the important natural resources and habitat in the Nation's coastal zones. The key to effective protection of those resources:

> is to *encourage the states to exercise their full authority over the lands and waters in the coastal zone* by assisting the states, in cooperation with Federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance.

16 U.S.C. § 1451(i)(emphasis added).

Any regulatory changes must be consistent with Congress' intent to promote cooperative federalism under the CZMA. Therefore, to the extent that NOAA intends to proceed, what would benefit the State programs and potential applicants is clarity regarding timing and required documents for review. This is especially important in the context of State review of offshore projects with "reasonably foreseeable" coastal impacts, to facilitate informed regulatory consideration of energy projects, including those that do not "fit" within project review under Subpart E as it exists today, such as offshore wind projects.

I. Part 930 Provides Predictable Review for OCS Energy Projects

The existing CZMA regulations in Part 930 establish a process governing State and federal coordination on oil and gas OCS plans. This process seeks to recognize States' interests in such development on the OCS. Oil and gas project review is already coordinated among and between the States, NOAA, and the Department of the Interior's Bureau of Ocean Energy Management (BOEM). The framework of established processes provides consistency review for OCS oil and gas activities, lease sales, exploration plans, and development and production plans. Further, its collaborative framework provides opportunities for resolving controversy and avoiding costly litigation that would result in project delays and increased costs to a developer.

Indeed, CZMA implementing regulations were updated in 2000 and again in 2006 in response to the Energy Policy Act of 2005,[3] expressly to address the very issues the Advance Notice now raises anew. 71 Fed. Reg. 788, 791 (January 5, 2006); 65 Fed. Reg. 77124 (December 8, 2000). As the ANPR acknowledges, the "2006 final rule removed uncertainties in various time frames in the regulations, provided an expedited and date-certain period for processing CZMA consistency appeals, and provided industry with greater transparency and predictability in the CZMA process." 84 Fed. Reg. at 8632.

[3] Energy Policy Act of 2005, Pub. L. No. 109-58 § 381, 119 Stat. 593, 737-38 (2005).

Additionally, the ANPR notes that since 1978, over 10,600 exploration plans and over 6,000 development and production plans have been approved, yet there have been only 18 instances where industry appealed a State's federal consistency objection to the Secretary. *Id.* The Secretary overrode the State in only 7 of those instances and upheld the State in 7 more; 4 were resolved without a Secretarial decision. *Id.*

As conceded in the ANPR and confirmed on NOAA's regulatory website, there have been *no new* appeals to federal consistency decisions regarding renewable or nonrenewable OCS development or Outer Continental Shelf Lands Act plans since the 2006 regulatory changes.[4] This absence of appeals under 15 CFR Part 930 Subpart H strongly supports the conclusion that State and federal coordination for oil and gas OCS plans is working and no further changes are warranted to the current CZMA regulations.

If NOAA believes that the current regulations do not provide industry with sufficient "predictability,"[5] NOAA should specifically indicate what about the current process is not adequately predictable and explain the basis for its conclusion. Only with that information can commenters begin to address the issues that NOAA perceives to exist. NOAA should not, under the guise of enhancing predictability and without any demonstrated justification, simply shift the balance of authority away from the States.

II. Limiting the Scope of Secretary Review is Not Warranted

Given the rarity of appeals to the Secretary[6] and the importance of the decisions at issue, NOAA's proposal to limit the scope of review of State objections to energy development projects to information "not previously considered in an appeal" of an OCS exploration plan in the same lease block is not warranted. *See* 84 Fed. Reg 8628, 8632. Again, NOAA's Advance Notice offers no explanation for why such a limitation is needed. In the States' experience, where potential coastal impacts can come to light later in the project phases, limiting the scope of the Secretary's review would likely omit proper consideration of subsequently identified or cumulative impacts, in contravention of the intent of the Coastal Zone Management Act. Moreover, exploration impacts are often very different in cause and effect from development and production impacts.

For example, the analysis of an exploration plan may include the "information" that a critical life stage of a certain species occurs in the area. Development and production in that area would also affect that critical life stage, but may have significantly greater or different effects. Under the suggestion in the ANPR, in a subsequent appeal to the Secretary, the Secretary would not be permitted to assess any of this information when determining "the activity's adverse coastal effects," 15 CFR 930.121(b), because the "information" that the species' critical life stage occurred in that area would have

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[4] *See,* 84 Fed. Reg. at 8632; *see also* Off. of Coastal Mgmt., NOAA, Appeals to the Sec'y of Commerce Under the CZMA at 6 (April 26, 2018) (https://coast.noaa.gov/czm/consistency/media/appealslist.pdf).

[5] 84 Fed. Reg. at 8632.

[6] "The most recent Secretarial appeal of an OCS oil and gas plan was in 1999." 84 Fed. Reg. at 8632 (citing Appeals to the Sec'y of Commerce Under the CZMA, *supra* note 3).

already been considered. That is, although some of the "information" may be the same, the import of that information may be quite different. The ANPR states no cogent reason why the process should be artificially constrained in this way.

Further, the ANPR assumes that the objection to the exploration plan and the objection to the development and production plan were from the same State. Large projects can affect many States and result in various objections. It would make no sense for an appeal by one State to be limited by what another State submitted in a separate proceeding.[7]

III. Efficient State Project Review is Dependent Upon State Programs Receiving Timely, Meaningful, and Complete Project Information

To the extent NOAA, through this ANPR, seeks to streamline State consistency review of energy projects, it should focus on ensuring the States have meaningful and complete project information as early in the regulatory process as possible. This information would include but not be limited to review documents prepared pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.* In addition, State CZMA administrators would benefit from NOAA articulating in its regulations a list of the routine materials required in an application that is subject to State review. This is particularly important where States rely on federal environmental reviews to inform that review.[8]

Incomplete information for proposed projects, including offshore renewable energy projects, can result in delays and review conflicts, especially when project information fails to adequately identify and assess its coastal effects in the first instance. This problem is exacerbated by the present inadequacy of the rules to require complete information at the outset. Section 930.58 prescribes the data and information that is "necessary" for the State to review the project. However, under NOAA's interpretation of section 930.60(c), the rule does not require the applicant to submit this information before the State's review period begins. Under section 930.60(c), the applicant merely has to submit only the most minimal of information for each required element, regardless of whether that information is substantively complete or adequate.

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[7] NOAA may be able to address any issues more effectively by not seeking to "reinvent the wheel." Courts have developed the doctrine of collateral estoppel under which, generally speaking, a "judgment in [a] prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979). This doctrine has been applied to give preclusive effect to issues litigated before administrative agencies. *B&B Hardware, Inc. v. Hargis Indus.*, 135 S. Ct. 1293, 1303 (2015). Relying on this judicial doctrine, along with its developed case law, instead of rewriting NOAA's regulations would better foster predictability and efficiency. *See, e.g., Richmond v. United States*, 422 U.S. 358, 373 n.6 (1975) (addressing the issue of whether collateral estoppel may be invoked to bar litigation of an issue that was resolved in a previous case in which a party did not participate).

[8] *See, e.g.,* 15 U.S.C. § 717n(b) (Natural Gas Act designates FERC as lead agency for environmental review).

Consequently, States have been forced to initiate their review of consistency certifications even without information from the applicant that NOAA itself deems "necessary." In order to avoid having the regulatory clock run out and certification conclusively presumed, the State may be left with a choice: either negotiate with the applicant for a voluntary extension of the deadline – which would be entirely within the applicant's discretion – or object to the certification for lack of information.

Neither of these outcomes is efficient or productive for either side. If the State proceeds to review the certification based on inadequate information, it must conduct a public review process in which the public lacks the very information on which comment is desired. In the alternative, the parties can spend time negotiating an extension instead of using that time to work on substantive issues. All of this is exacerbated by the three-month timeline that frequently applies to OCS activities when the activities are unlisted.

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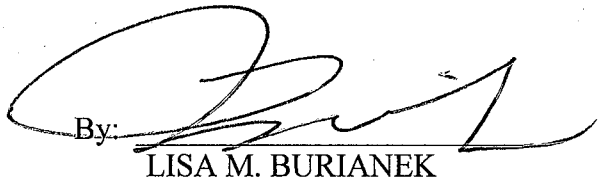
In sum, NOAA has not demonstrated that further streamlining of the CZMA regulations is either warranted or necessary. There is no basis to conclude that streamlining the federal consistency process will even achieve NOAA's apparent policy goal of promoting more energy exploration and production on the OCS. The regulations have already and recently been revised to address industry concerns, and there have been very few instances of appeals to the Secretary. Additional changes could adversely affect the ability of the State and interested persons to fully participate in the consistency process. Should NOAA proceed with rulemaking, we encourage consideration of the suggested changes discussed above in connection with information provided to States, which will promote—not impede—State and public engagement.

Sincerely,

FOR THE STATE OF NEW YORK

LETITIA JAMES
Attorney General



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