

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF COMMERCE

### National Oceanic Atmospheric Administration

#### 15 CFR Part 923

[Docket No. 080416573–6895–02]

RIN 0648–AW74

#### Changes to the Coastal Zone Management Act Program Change Procedures

**AGENCY:** Office for Coastal Management, National Ocean Service, National Oceanic Atmospheric Administration (NOAA), Department of Commerce (Commerce).

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** The National Oceanic and Atmospheric Administration (NOAA) wants to provide states and NOAA with a more efficient process for making changes to state coastal management programs (“management programs”). NOAA proposes to revise the Coastal Zone Management Act (CZMA) program change regulations and associated guidance (Program Change Guidance (July 1996) and Addendum (November 2013)) within our regulations. Under the CZMA, a coastal state may not implement any amendment, modification, or other change as part of its approved management program unless the amendment, modification, or other change is approved by the Secretary of Commerce under this subsection. Once NOAA approves the incorporation of a change into a management program, any new or amended management program enforceable policies are applied to federal actions through the CZMA federal consistency provision. This proposed rule addresses the issues raised in NOAA’s Advanced Notice of Proposed Rulemaking, 73 FR 29093 (May 20, 2008) (ANPR) to: Provide a more efficient process for states and NOAA to make changes to state management programs; remove

unnecessary requirements in the current regulations; establish program change documentation that all states would adhere to; continue to ensure that federal agencies and the public have an opportunity to comment to NOAA on a state’s proposed change to its management program; and comply with the requirements of the CZMA and other applicable federal law. The proposed rule also addresses comments submitted on the ANPR.

**DATES:** Comments on this notice must be received by January 9, 2017.

**ADDRESSES:** You may submit comments on this proposed rule, identified by NOAA–NOS–2016–0137, by either of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal [www.regulations.gov](http://www.regulations.gov). To submit comments via the e-Rulemaking Portal, first click the “Submit a Comment” icon, then enter NOAA–NOS–2016–0137 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the “Submit a comment” icon on the right of that line.

- *Mail:* Submit written comments to Mr. Kerry Kehoe, Federal Consistency Specialist, Office for Coastal Management, NOAA, 1305 East-West Highway, 10th Floor, N/OCM6, Silver Spring, MD 20910. Attention: CZMA Program Change Comments.

*Instructions:* Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NOS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on [www.regulations.gov](http://www.regulations.gov) without change. All personal identifying information (e.g., name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NOS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

**FOR FURTHER INFORMATION CONTACT:** Mr. Kerry Kehoe, Federal Consistency Specialist, Office for Coastal Management, NOAA, at 240–533–0782 or [kerry.kehoe@noaa.gov](mailto:kerry.kehoe@noaa.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Unless otherwise specified, the term “NOAA” refers to the Office for Coastal Management, within NOAA’s National Ocean Service. The Office for Coastal Management formed in 2014 through the merger of the Office of Ocean and Coastal Resource Management and the Coastal Services Center.

The CZMA (16 U.S.C. 1451–1466) was enacted on October 27, 1972, to encourage coastal states, Great Lake states, and United States territories and commonwealths (collectively referred to as “coastal states” or “states”) to be proactive in managing the uses and resources of the coastal zone for their benefit and the benefit of the Nation. The CZMA recognizes a national interest in the uses and resources of the coastal zone and in the importance of balancing the competing uses of coastal resources. The CZMA established the National Coastal Zone Management Program, a voluntary program for states. If a state decides to participate in the program it must develop and implement a comprehensive management program pursuant to federal requirements. See CZMA § 306(d) (16 U.S.C. 1455(d)); 15 CFR part 923. Of the thirty-five coastal states that are eligible to participate in the National Coastal Zone Management Program, thirty-four have federally-approved management programs. Alaska is currently not participating in the program.

An important component of the National Coastal Zone Management Program is that state management programs are developed with the full participation of state and local agencies, industry, the public, other interested groups and federal agencies. See e.g., 16 U.S.C. 1451(i) and (m), 1452(2)(H) and (I), 1452(4) and (5), 1455(d)(1) and (3)(B), and 1456. The comprehensive state management programs must address the following areas pursuant to 15 CFR part 923:

1. Uses Subject to Management (Subpart B);
2. Special Management Areas (Subpart C);
3. Boundaries (Subpart D);

4. Authorities and Organization (Subpart E); and

5. Coordination, Public Involvement and National Interest (Subpart F).

NOAA approval is required for the establishment of a state management program. Once approved, changes to one or more of the program management areas listed above, including new or revised enforceable policies, must be submitted to NOAA for approval through the program change process.

Program changes are important for several reasons: The CZMA requires states to submit changes to their programs to NOAA for review and approval (16 U.S.C. 1455(e)); state programs are not static—laws and issues change, requiring continual operation of the CZMA state-federal partnership; and the CZMA “federal consistency” provisions require that federal actions that have reasonably foreseeable coastal effects be consistent with the enforceable policies of federally-approved management programs. The state-federal partnership is a cornerstone of the CZMA. The primacy of state decisions under the CZMA and compliance with the CZMA federal consistency provision is balanced with adequate consideration of the national interest in CZMA objectives; the opportunity for federal agency input into the content of state management programs; NOAA evaluation of management programs and NOAA review and approval of changes to management programs.

In establishing and maintaining their federally-approved management programs, states must consider national interest objectives of the CZMA in addition to state and local interests. The national interest objectives of the CZMA include:

- Effective management, beneficial use, protection and development of the coastal zone (16 U.S.C. 1451(a));
- important ecological, cultural, historic and esthetic values of the coastal zone are essential to the well-being of all citizens (16 U.S.C. 1451(d));
- anticipating and planning for the effects of climate change (16 U.S.C. 1451(l));
- managing coastal development to minimize the loss of life and property caused by improper development and coastal storms (16 U.S.C. 1452(2)(B)); and
- giving priority consideration to coastal-dependent uses and orderly processes for siting major facilities related to national defense, energy, fisheries, recreation, and ports and transportation (16 U.S.C. 1452(2)(D)).

Some of the important issues NOAA must consider when evaluating program

changes include whether the change would: (1) Affect CZMA national interest objectives; (2) attempt to regulate federal agencies, lands or waters, or areas outside state jurisdiction; (3) be preempted by federal law; (4) discriminate against particular coastal users or federal agencies; (5) include policies that are enforceable under state law; and (6) raise issues under the National Environmental Policy Act (NEPA), Endangered Species Act (ESA), Marine Mammal Protection Act (MMPA), National Historic Preservation Act (NHPA), Magnuson Stevens Fisheries Conservation and Management Act (MSFCMA) or other federal laws.

NOAA review and approval of program changes is also important because the CZMA provides for federal agency and public participation in the content of a state’s management program. NOAA can only approve management programs and changes to management programs after federal agencies and the public have an opportunity to comment on the content of the program change. Within the context of the CZMA federal consistency provisions, an enforceable policy is a state policy that has been incorporated into a state’s federally-approved management program, is legally binding under state law (*e.g.*, through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions), and by which a state exerts control over private and public coastal uses and resources. *See* 16 U.S.C. 1453(6a) and 15 CFR 930.11(h) (enforceable policy). This means that enforceable policies must be given legal effect by state law and cannot apply to federal lands, federal waters, federal agencies or other areas or entities outside a state’s jurisdiction, unless authorized by federal law. Also, the CZMA § 307 federal consistency provision requires that state enforceable policies are the standards that apply to federal agency activities, federal license or permit activities, outer continental shelf plans and federal financial assistance activities. 16 U.S.C. 1456; *see also* 15 CFR 930.11(h). Therefore, federal agencies and the public must have an opportunity to review proposed substantive changes to a state’s enforceable policies.

Program changes are also important because the CZMA federal consistency provision applies only if the federal action has reasonably foreseeable coastal effects and a state has applicable policies approved by NOAA that are legally enforceable under state law. It is therefore important for states to submit to NOAA for approval timely updates to

state management program enforceable policies.

## II. Need for Revised Program Change Regulations

The current program change regulations, 15 CFR part 923, subpart H, have been in place since the late 1970s. The CZMA was revised in 1990, in part, to place greater emphasis on state management program enforceable policies. This has led to an increase in the number of program changes submitted to NOAA and the workload for state and federal staff. States and NOAA have, therefore, recognized the need to clarify the program change procedures and to provide a more administratively efficient submission and review process. In 1996, NOAA made minor revisions to the regulations and also issued program change guidance that further described program change requirements. In 2013, NOAA issued an addendum to the 1996 program change guidance for added clarification. Over the years, states and NOAA have, at times, found the regulations difficult to interpret. For example, there has been confusion about determining: When a program change is “routine” versus an “amendment;” when a program change is “substantial;” what level of state analysis is required; what level of detail is needed for a policy to be enforceable; and what can be approved as an enforceable policy.

## III. Objectives of the Proposed Rule

NOAA’s objectives in revising the program change regulations are to:

1. Establish a clear, efficient and transparent process for program change review;
2. Describe approval criteria and how these apply;
3. Use terminology from the CZMA, including time lines and extensions;
4. Eliminate the distinction between “routine program changes (RPCs)” and “amendments.” This would remove the program change analysis currently done by states to determine if a change is substantial, and therefore an amendment, and instead require states to describe the nature of the program change and indicate whether the state believes the program change would impact CZMA program approvability areas, national interest objectives, or compliance with other federal laws. The distinction between RPCs and amendments, and the substantiality analyses by states are administrative and paperwork burdens with little or no benefit;
5. Continue to determine on a case-by-case basis the appropriate level of NEPA

analysis warranted. With over 35 years of reviewing program changes, NOAA has determined that the vast majority of program changes do not, for purposes of NEPA, significantly affect the human environment;

6. Encourage states to use underline/strikeout documents for program change submissions to show changes to previously approved policies;

7. Create a program change form that all states would use to submit changes to NOAA, easing state and NOAA paperwork burdens, promoting more consistent submissions and NOAA analyses, and expediting NOAA's review;

8. Use a NOAA "Program Change Web site" through which NOAA would electronically post program changes and public comments received, and notify federal agencies and the public of the status of program changes; and

9. Require states to post program change public notices on the state's management program Web site.

In addition, the current regulations at 15 CFR part 923, subpart H, include "termination of approved management programs." However, sanctions to and termination of management programs are described in detail in Subpart L—Review of Performance. Therefore, the proposed changes to subpart H would no longer include termination of approved management programs.

#### *Comments on Advanced Notice of Proposed Rulemaking*

Comments were submitted on the ANPR by the Coastal States Organization (CSO), the U.S. Navy, the San Francisco Bay Conservation and Development Commission (BCDC) and the states of Delaware and Oregon. Most of the comments received on the ANPR supported NOAA's objectives and some comments offered suggestions for how some of these objectives might be achieved. NOAA presented eight points in the ANPR to help focus comments. These eight points and the comments submitted to NOAA are discussed below.

1. Establishing a clearer and more efficient and transparent process for program change review.

*Comments:* All commenters support this objective.

For minor changes to enforceable policies, local plans, etc., a simplified approach could be an annual report to NOAA using a NOAA form/checklist that would describe the change, scope of the change and impacts to enforceable policies (Oregon).

For changes to local enforceable policies such as comprehensive plan

provisions, land use regulations and maps, Oregon suggests two alternatives:

Alternative A—NOAA would allow a state to determine that a change in local enforceable policies is consistent with the underlying enforceable policies of state statute or rule that were previously approved by NOAA. A state would submit an annual summary of local amendments that are consistent with underlying state enforceable policies, along with the dates of approval by the state management program of the changes; or,

Alternative B—NOAA and each state would enter into a Memorandum of Understanding that specifies the conditions under which a state would submit changes to local statutes and administrative rules and regulations, and local enforceable policies.

The Navy made various recommendations:

1. Develop specific and reasonable timelines that allow sufficient time for review, and set timelines for related issues such as extensions, preliminary approvals, and requesting mediation;

2. The public should be provided immediate notice of proposed and final program changes;

3. Impose a new requirement for states to assist with notification of the public and federal agencies that may wish to review proposed changes; and

4. Use modern information technology by providing that posting the proposed changes on the Internet, when combined with an email notification roster (listserv), serves as official notification. Create Web sites that include the state's proposed text, NOAA decisions and NEPA documents and links to state management programs.

*NOAA Response:* NOAA believes that the proposed program change regulations meet the proposal by Oregon for minor changes to state management programs. A state could submit program changes as they occur or on a cyclical basis (twice a year, once a year, etc.) and NOAA has included this in the proposed rule at § 923.81(a). NOAA believes that Oregon's proposal for local plans and policies: (1) Is not compatible with the CZMA requirement that states submit program changes to NOAA for review and approval (16 U.S.C. 1455(e)); (2) would not provide adequate opportunity for NOAA to determine if the local policies are consistent with the decision criteria described in § 923.84; and (3) would not provide adequate opportunity for federal agency or public comment. NOAA believes that the program change submission process in proposed § 923.82 provides an alternative for Oregon's proposal and

still satisfies CZMA and NOAA approval requirements.

In response to the Navy, NOAA believes that all of the Navy's recommendations have been met in the proposed rule regarding use of both state and NOAA Web sites and listservs to provide notice of and access to program changes and NOAA's decisions as well as relevant timeframes and decision dates that are dictated primarily by statute.

2. Describing clearer approval/disapproval criteria and how these apply.

*Comments:* All commenters support this objective. NOAA's decision criteria need to be clearly defined (BCDC).

The only applicable criteria should be that (1) the program continues to meet the standards set forth in section 306 of the CZMA, and (2) that the revised program does not place an unacceptable burden on a federal agency operating in the coastal zone (CSO, Oregon).

Allow state policies to refer to state and allowable federal codes and regulations without including the full text of those authorities (Delaware).

*NOAA Response:* NOAA has described its program change decision criteria in proposed § 923.84 and believes that the proposed criteria, as well as the program change documentation and form, will clearly define the NOAA decision process. NOAA disagrees that its only approval criteria should be a finding that the program continues to meet the program approval criteria and does not place an unacceptable burden on federal agencies. NOAA believes that in order to meet its obligations under the CZMA, the proposed decision criteria, which NOAA has been using as a matter of policy and practice for many years, are needed to comply with the CZMA and Congressional intent for NOAA oversight. In addition, determining what would be an "unacceptable burden" on federal agencies would be subjective at best; rather, NOAA's decision criteria provide a more objective and legally sound basis on which to evaluate state program changes.

NOAA also disagrees that states should be able to impose standards "by reference" when those referenced standards have not been subjected to the program change process, NOAA review and opportunity for federal agency and public comment.

3. Using the simpler statutory language, including time lines, extensions, and preliminary approval.

*Comments:* All commenters support this objective.

*NOAA Response:* No response needed.

4. Keeping the “routine” concept to streamline the process for truly routine changes, but do away with “routine program changes (RPCs)” and “amendments” and replace with just “program changes.”

*Comments:* The commenters support keeping the routine concept and eliminating amendments. The level of analysis should be tailored to fit the complexity of the change to the state’s program; assigning labels or categories to changes does not add to the process (BCDC, CSO, Delaware, Oregon).

The Navy welcomes NOAA’s initiative towards improving the transparency and ease of the coastal zone management program change review and approval process. The Navy supports NOAA’s suggestion that truly routine program changes be identified and their handling streamlined. However, the Navy supports a separate process for amendments (substantial changes) so that affected federal agencies can comment on the proposals. The Navy stated that NOAA should review the types of changes that have been approved over recent years and develop a list of examples deemed to be routine, and NOAA should use the list to prepare descriptive criteria for routine changes.

*NOAA Response:* Consistent with the comments from BCDC, CSO, Delaware and Oregon, the program change regulations will eliminate the distinction between “routine program changes” and “amendments.” States will be required to use a program change form to identify the changes being submitted for approval. The level of effort needed by NOAA to review changes will correspond to the type of changes proposed. All program changes will be submitted using the same process, which will eliminate the need for states to make the former distinction between amendments and routine program changes. Using the same process, in addition to a program change form, should make program change submissions and review more efficient for state and NOAA staff. Program changes identified in proposed § 923.82(b) will be reviewed by NOAA in a more expedited manner.

NOAA believes it has met the Navy’s objectives without needing to use the current distinction between routine program changes and amendments. As explained elsewhere in the proposed rule, this distinction is unnecessary and the history of program changes shows that most changes are routine. Moreover, under the proposed program change regulations, NOAA will provide access to program change materials, send notices to federal agencies, and

provide an opportunity for federal agencies to comment on all program changes. At the same time, administrative burdens on states and NOAA will be lessened.

NOAA’s proposed removal of the distinction between routine changes and amendments is based on NOAA’s review of almost one thousand changes to management programs over the past thirty-five years. The vast majority of these changes were modifications to existing parts of NOAA approved management programs. In only a few instances did NOAA prepare an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) and even rarer an Environmental Impact Statement (EIS). The determining factors in the few instances when NOAA prepared an EA or EIS, were the magnitude of the change proposed by a state, usually involving a major new component to the management program or a major change in focus to the existing management program. Most of these also involved controversial positions by the state.

From 1977 to March 2016, there have been approximately 862 changes to management programs approved by NOAA. Less than 2.5 percent, about twenty, were amendments; approximately 842 were RPCs. Seventy-five percent of the amendments (about fifteen) were before 1990 and many of these were for the addition of energy facility siting plans required by an amendment to the CZMA. For five of the amendments NOAA prepared an EIS (1998, 1991, 1997, 2004 and 2004) and two of these included informal ESA consultation. For fourteen of the amendments NOAA prepared an EA and FONSI. Of the approximately 842 RPCs, NOAA prepared an EA and FONSI for two of them.

State CZMA management programs are comprehensive programs that, when they are being developed, undergo extensive review by states, NOAA, federal agencies and the public, including environmental review and an EIS under NEPA. In most instances changes to management programs have added further details to the previously approved management program and have not presented issues not considered during initial program approval and subsequent program changes. Under NOAA’s current program change regulations and guidance these would be routine program changes (RPCs) and not substantial changes, or amendments. NOAA intends to eliminate the distinction between RPCs and amendments and just have “program changes.”

5. Removing the “substantial” evaluations currently done by states and replacing such evaluations with a description of what the change is to the program. Further evaluations (by states or NOAA) would be for specific CZMA, NEPA, ESA, NHPA, etc., purposes, e.g., is an EA or EIS, or ESA consultation needed.

*Comments:* BCDC, CSO, Delaware, Oregon support removing the “substantial” evaluations.

Much of the difficulty in the current procedure for compiling and submitting program changes stems from the requirement for a detailed comparison of old and new versions of state laws, state rules and regulations, and local comprehensive plans and ordinances. While this side-by-side comparison may have some utility, it turns out to have little or no practical value to either NOAA or the state, and has become a barrier to making federal consistency determinations that reflect current conditions (Oregon).

For substantial changes, NOAA should also provide a **Federal Register** Notice to ensure that the public understands what changes are proposed. This provides agency personnel who may not be included on an email list or listserv with the opportunity to comment and express their concerns (Navy).

*NOAA Response:* NOAA does not believe that **Federal Register** notices, in general, are needed, especially since NOAA will be making program changes and related notices publicly available on its new “Program Change Web site.” Through the Web site, federal agencies and the public will be able to sign up to receive program change notices from NOAA. However, where there is a major change in a state’s management program that may require a separate EA or EIS, NOAA may decide to publish notices in the **Federal Register**.

6. Establishing use of NEPA categorical exclusions.

*Comments:* CSO and the state of Oregon support this goal, but note that it requires further explanation.

The Navy recommended that NOAA consider, pursuant to 15 CFR 930.33(a)(3), developing a list of universal de minimis activities based on NEPA categorical exclusions and on existing federal activity de minimis lists that have been approved by state agencies, retaining the ability of states and federal agencies to mutually agree on additional de minimis activities. States could modify the universal de minimis lists by adding mitigating or compliance conditions. Such additions should be subject to the change review procedures.

*NOAA Response:* NOAA will determine on a case-by-case basis the appropriate level of NEPA analysis warranted for the action. NOAA has determined that, when applicable, a more appropriate process for NEPA compliance may be use of a categorical exclusion.

In response to the Navy's novel approach to using the de minimis provision of NOAA's federal consistency regulations, NOAA does not believe it could impose such a list of de minimis activities. NOAA does, however, encourage federal agencies to propose de minimis activities and submit these to the coastal states for their concurrence under the federal consistency provision. See 15 CFR 930.33.

7. Submitting underline/strikeout documents showing changes to previously approved policies.

*Comments:* BCDC supported the use of underline/strikeout documents, but stated that NOAA should provide flexibility to account for multiple and large-scale changes to a policy over time, large documents, etc.

CSO found this to be an unnecessary and overly burdensome requirement. CSO stated that there may be instances where such a technique is employed to clearly explain a program change, but this is more appropriately an available tool, rather than a strict requirement.

The Navy suggested that NOAA require submission of underline/strikeout documents showing changes to previously approved documents.

*NOAA Response:* NOAA encourages states to use underline/strikeout documents but recognizes that such documents are not always practicable.

8. Creating a program change checklist that states would submit to ease state and NOAA paperwork burdens and promote consistent submissions and NOAA analyses.

*Comments:* All commenters support this objective. One item on this checklist would be formal notification of federal agencies about program changes. In addition, CSO and Oregon suggested that a list of federal agencies and points of contact for notice of program changes updated and maintained by NOAA would greatly improve this step in the process. *NOAA Response:* Through the federal consistency Web site and the developing program change Web site there are and will be federal agency contacts maintained by NOAA. See <http://www.coast.noaa.gov/czm/consistency/>. In addition, federal agencies and the public will be able to view program changes posted to

NOAA's new "Program Change Web site."

#### IV. Explanation of Proposed Changes to the CZMA Program Change Regulations

##### § 923.80 General

This section describes the general requirements for program changes. Paragraph (a) states that the term "program changes" includes all terms used in the statute, CZMA § 306(e), and identifies the Office for Coastal Management as the NOAA office that administers these regulations. Paragraph (b), derived from CZMA § 306(e), states that a coastal state may not implement a change as part of its management program until NOAA approves the program change. Similarly, a coastal state may not use a state or local government policy or requirement as an "enforceable policy" for purposes of federal consistency unless NOAA has approved the state or local policy or requirement as an "enforceable policy." State or local government law not approved by NOAA as part of a state's management program remain legal requirements for state and local government purposes, but will not be part of a state's management program and, therefore, cannot be used for CZMA federal consistency purposes.

Paragraph (d) states that the term "enforceable policies" has the same definition as that included in NOAA's CZMA federal consistency regulations at 15 CFR 930.11(h). NOAA has added enforceable policy decision criteria in proposed § 923.84. These criteria have been included in NOAA guidance and information documents and have been part of long-standing NOAA implementation of program changes and enforceable policies. See, e.g., NOAA's Program Change Guidance (July 1996) (<http://coast.noaa.gov/czm/consistency/media/guidanceappendices.pdf>) and NOAA's Federal Consistency Overview document ([http://www.coast.noaa.gov/czm/consistency/media/FC\\_overview\\_022009.pdf](http://www.coast.noaa.gov/czm/consistency/media/FC_overview_022009.pdf)).

Paragraph (e) notes that the submission of program changes may be required as a necessary action under NOAA's evaluation of management programs under CZMA § 312 and 15 CFR part 923, subpart L. Failure to comply with a necessary action to submit a program change can result in a suspension of CZMA grants pursuant to CZMA § 312 and the subpart L regulations.

##### § 923.81 Program Change Procedures, Deadlines, Public Notice and Comment and Application of Federal Consistency

This section sets forth various procedures for submitting program changes.

Paragraph (a). Program changes must be submitted by the Governor of a coastal state, the head of the single state agency designated under the management program to be the lead state agency for administering the CZMA, or the head of an office within the designated single state agency if the state has authorized that person to submit program changes.

NOAA would no longer require states to mail hard copies of program changes. Rather, all program changes would be submitted through the new Program Change Web site or through an alternative method, agreed to by the state and NOAA, if an electronic submission through the Web site is not possible.

All deadlines and timeframes would start on the first full business day after NOAA receives a program change (Day 1). For example, if a submission is received on a Thursday, Day one for timeline purposes would be Friday; if the day of receipt is Friday and Monday is a federal holiday, Day 1 would be Tuesday. All days, starting with Day 1, are included in the calculation of total time for a deadline, including weekends and federal holidays. States may request that the official start date occur at a later time; this is an administrative convenience NOAA has allowed states to use in the past to account for various state administrative purposes.

Paragraph (b). NOAA shall confirm receipt of all program changes and future deadlines. During NOAA's review of a program change, NOAA may request additional information that it needs to make its decision.

Paragraph (c). This paragraph sets forth the deadlines NOAA must follow in responding to state program change requests. The deadlines in paragraph (c) are the same as NOAA's current practice and clarify a discrepancy that exists in the current program change regulations and the CZMA. NOAA is required by the Act to respond within 30 calendar days of receipt of a program change request. The 30-day period starts on Day 1 (the first full business day after receipt of a program change request). If NOAA does not respond within the 30-day period, then NOAA's approval is presumed. NOAA may extend its review period up to 120 days after receipt of a program change request, if NOAA so notifies the state during the 30-day period. NOAA may continue to extend

its review period up to 120 days and can extend beyond 120 days for NEPA compliance; NOAA would have to notify the state of the NEPA extension during the 120-day review period.

Paragraph (d). This paragraph codifies the current practice of pre-submission consultation with NOAA to identify any potential approval issues prior to submitting a program change submission. States are encouraged to submit draft program changes to NOAA for informal review and to consult with NOAA, to the extent practicable, prior to state adoption of new or revised laws, policies and other provisions that the state intends to submit as a program change.

Paragraph (e). NOAA is simplifying the public notice and comment procedures for program changes. Given the reliance on electronic means of communication and the demise of hard copy notices in newspapers and other formats, all states would be required to post public notices on state management program's Web site and directly email or mail notices to applicable local and regional offices of relevant federal agencies, federal agency headquarter contacts, affected local governments and state agencies, and any individuals or groups requesting direct notice. NOAA's program change review period would not begin until such notice is provided. NOAA will also post the state notices on its Program Change Web site and directly notify via email federal agency headquarter contacts and any other individual or group requesting direct notice. The state's public notice would describe the program change, any new or modified enforceable policies, and indicate that any comments on the program change shall be submitted to NOAA. NOAA will post the program change and all NOAA decisions on its Web site and notify federal agency headquarter contacts and other individuals or groups requesting notification. NOAA may extend the public comment period.

Paragraph (f). This paragraph states that program changes to enforceable policies can only be applied for CZMA federal consistency review purposes on or after the date NOAA approves the changes. The effective date for the approved changes will be the date on NOAA's approval letter. NOAA will post its program change decision letters on its Program Change Web site. This section would also codify in regulation NOAA's long-standing position that a state enforceable policy cannot apply retroactively to previously proposed federal actions; proposed federal actions are only subject to the management program enforceable policies approved

at the time the federal action is proposed under the various subparts of 15 CFR part 930. Applying newly approved program changes retroactively to proposed federal actions would be contrary to Congressional intent that federal consistency apply in an expeditious and timely manner, and could impose unfair requirements on applicants and federal agencies.

#### *§ 923.82 Program Change Submissions*

The changes described in § 923.82(b) are editorial or are minor in scope, both procedurally and substantively. These changes are not controversial and pose little or no impact on federal agencies or the public. Therefore, NOAA's review of changes under § 923.82(b) would be expedited.

Paragraphs (b)(1) through (4) describe program changes that are either editorial in nature or are minor in scope, both procedurally and substantively.

Paragraph (b)(1) addresses editorial or non-substantive changes to state laws, regulations, enforceable policies, local government coastal programs or plans that contain enforceable policies, and other authorities. Paragraph (b)(2) covers changes to special area management plans that do not change a state's coastal zone boundary, enforceable policies or geographic location descriptions, and are not otherwise used by the state for federal consistency review. Paragraph (b)(3) covers most organizational changes where the primary structure and responsibilities of the management remain intact. NOAA will closely monitor organizational changes to ensure that major overhauls of a state's management program structure would not weaken a coastal program.

Paragraph (b)(4). Most program changes, even those that result in some substantive change to a management program, have historically been routine and non-controversial, and have not posed any approval issues or resulted in any comments from federal agencies or the public. NOAA's review of these types of program changes should be expedited so long as these minor substantive changes would only apply to revised enforceable policies, not wholly new enforceable policies, and the changes are consistent with the scope and application of the previously approved enforceable policy.

The types of program changes under § 923.82(c) are self-explanatory and include: any changes that are not covered under § 923.82(b) and would be used for federal consistency purposes (new or revised enforceable policies, changes to state lists of federal actions subject to federal consistency review,

geographic location descriptions outside the coastal zone, necessary data and information); new or revised coastal uses; changes in the coastal zone boundary; program approval authorities; and special area management plans.

Paragraph (c)(4), recognizes that for some states with local coastal programs or plans, the state can respond to federal consistency reviews without having to refer to the local programs or plans. In such cases, while the local programs and plans are important implementing mechanisms for coastal management in the state, states do not need to submit updates to the local programs or plans if they do not contain enforceable policies for federal consistency purposes. This would remove the substantial administrative burden for states and NOAA to submit and review local coastal programs.

Paragraph (d) addresses changes to state Clean Air Act (CAA) and Clean Water Act (CWA) Pollution Control Requirements. CZMA § 307(f) states that CAA and CWA requirements established by the Federal Government or by any state or local government pursuant to the CWA and CAA shall be incorporated in state management programs and shall be the water pollution control and air pollution control requirements applicable to such management program. NOAA's long-standing interpretation of 307(f) has been that these CWA and CAA pollution control requirements are automatically enforceable policies of the state management programs and, therefore, states are not required to submit as program changes any changes to state CAA and CWA provisions.

#### *§ 923.83 Program Change Materials*

Section 923.83 describes all the program change information a state would submit to NOAA. These requirements are self-explanatory. NOAA intends to transform each of these paragraphs into a form that would, to the greatest extent practicable, use check-boxes or "radio-buttons," and require minimal text input. While the same form would be used for all program changes, there would be less information needed for those changes that fall under § 923.82(b).

Paragraph (a)(2)(vi) codifies NOAA interpretation and long-standing practice of the term "enforceable mechanism." An enforceable mechanism is the state legal authority that makes a state policy enforceable under state law. In order to be an "enforceable policy," CZMA § 304(6a) requires that the policies be legally binding under state law. NOAA has interpreted this to mean that the

enforceable policy must be incorporated into the state's NOAA-approved management program, but the underlying enforceable mechanism does not necessarily have to be incorporated into a state's management program or submitted for NOAA approval. Some enforceable mechanisms are integral parts of the management program or are needed for NOAA approval of a state's management program and changes to these enforceable mechanisms would be submitted to NOAA as program changes (e.g., core management program statutes, regulatory permit programs that implement a part of a management program). States need to identify the enforceable mechanism for each enforceable policy. This is needed not only so NOAA can concur that a state policy is legally binding under state law, but an enforceable mechanism may be changed in such a way that makes an enforceable policy no longer legally binding under state law. In such cases, that policy, while previously approved by NOAA as part of the state's management program, would no longer be an enforceable policy that could be used for federal consistency purposes.

States are encouraged to show the changes, additions and deletions to enforceable policies using an underline/strikeout format or other similar format. If a state uses an underline/strikeout format, the state should only show the changes from the version of the policy last approved by NOAA and the most current version that is being submitted to NOAA; a state does not need to show any changes to the policy that might have been made in between NOAA's last approval and the current version.

States are also encouraged to post comprehensive lists of the enforceable policies to the state's coastal management program Web site.

#### *§ 923.84 Program Change Decision Criteria*

The decision criteria in this section are taken from the current Program Change Guidance (1996) and NOAA's Federal Consistency Overview document. NOAA has applied these criteria since at least 1996 when reviewing program change requests. These criteria are generally self-explanatory and states would use a program change form to be developed by NOAA to assess whether these criteria are satisfied. For enforceable policies under paragraph (b) of this section, a policy must contain a standard; if a provision of a state law or regulation merely directs a state agency to develop standards, then that provision would not be an enforceable policy as it does not contain a standard.

An enforceable policy should contain terms such as "shall," "must," or other terms interpreted under state law that mandate some action or compliance. Paragraph (b) also clarifies that it does not always make sense to parse out the enforceable policies within a statute or regulation that also contain parts that are necessary details for applying enforceable policies even though not enforceable themselves. This includes definitions, procedures, and information requirements that are essential elements of interpreting the substantive standards and determining consistency with the standards. Therefore, in some cases NOAA may find that a statute or regulation in its entirety is enforceable.

Paragraph (b) also clarifies that enforceable policies must: Apply to areas and entities within state jurisdiction; not assert regulatory authority over federal agencies, lands or waters unless federal law authorizes such jurisdiction; not be preempted on their face by federal law; not attempt to incorporate by reference other state or local mandatory requirements not submitted to, reviewed, and approved by NOAA; not discriminate against a particular activity or entity; and not adversely affect the national interest in the CZMA objectives.

For example, if a state is concerned about having policies that would apply to offshore oil and gas activities, the state would need to develop policies that would apply to any activity or industry that would have similar coastal effects; the state could not single out offshore oil and gas unless there are specific activities or coastal effects that only apply to the offshore oil and gas industry. Likewise, if a state wants to promote marine renewable energy in its enforceable policies, it may do so, but could not at the same time prohibit other forms of energy development without sufficient justification. Blanket prohibitions are generally not approved by NOAA as part of a state's management program unless a state provides sufficient justification. NOAA will not approve proposed enforceable policies which can be applied in an arbitrary or in a discriminatory manner. An enforceable policy cannot prohibit an activity due to the nature of its effects, e.g., potential marine mammal ship strikes, if other activities pose the same kind and degree of risk and are not prohibited. There must be a sufficient justification for discriminatory policies. NOAA would evaluate such proposed program changes to determine if such discrimination is warranted and also whether a prohibition of an activity would violate the national interest objectives of the CZMA.

Paragraph (c) codifies long-standing NOAA practice and guidance when previously NOAA-approved enforceable policies are no longer enforceable for purposes of federal consistency review. If an underlying enforceable mechanism, e.g., a state law, is repealed or changed in such a way so that an enforceable policy is no longer supported by the law, or a court determines a policy is not enforceable, then the policy is no longer legally binding under state law and could no longer be used for federal consistency purposes. The same applies if a policy previously approved by NOAA is subsequently preempted by federal law or impacted by a court decision.

Paragraph (d) describes NOAA criteria for states to amend their lists of federal actions subject to federal consistency review and to propose geographic location descriptions (GLDs) to review federal actions outside the coastal zone, either landward or seaward. This paragraph focuses on the need for a state to make an adequate justification based on reasonably foreseeable effects to the state's coastal uses or resources. For NOAA to find that an activity in a proposed GLD outside the coastal zone may have coastal effects, a state must show that the impact from an activity will have a reasonably foreseeable effect to coastal uses or resources of the state. A state's burden to demonstrate coastal effects means that a mere assertion that an activity in federal waters will have an impact is insufficient to make a finding of reasonably foreseeable coastal effects. Moreover, a state's effects analysis must provide more than general assertions of impacts or that resources or uses are "important," or should be reviewed because of the proximity of an activity to state coastal uses or resources. A persuasive coastal effects analysis should identify:

1. The affected uses (e.g., commercial and recreational fishing, boating, tourism, shipping, energy facilities) and resources (e.g., fish, marine mammals, reptiles, birds, landmarks).
2. Where and in what densities the uses and resources are found.
3. How the state has a specific interest in the resource or use. Be specific in showing their connection to the coastal zone of the state (e.g., economic values, harvest amounts, vulnerabilities, seasonal information relevant to the proposed activity).
4. Where the proposed activity overlaps with these resources, uses and values.
5. Impacts to the resources or uses from the proposed activity.
6. The causal connection to the proposed activity, including how any

impacts from the activity results in reasonably foreseeable effects on the state's coastal uses or resources.

7. Why any proposed mitigation may be inadequate.

8. Empirical data and information that supports the effects analysis and can be shown to be reliable; visualizes the affected area, resources and uses with maps; and shows values, trends and vulnerabilities.

#### *§ 923.85 Procedural Requirements of Other Federal Law*

This section describes compliance and consultations under other federal law such as ESA, NHPA, MSFCMA or MMPA. This has to do with the nature of NOAA's action in approving a program change, in that NOAA can approve or deny a program change, but cannot affect the state's ability to enact a law and implement it at the state level. NOAA's approval of any state or local provisions as enforceable policies of the state's management program means those provisions can be used during a state's CZMA federal consistency review.

In addition, it is important to understand the nature of NOAA's discretion for the review and approval of program changes when informally or formally consulting on Endangered Species Act, other federal consultations and addressing tribal concerns.

The CZMA is not a delegated program; there are not federal CZMA standards, there is not a federal coastal zone, and NOAA does not implement management programs. The CZMA is a voluntary program and if a state chooses to participate it develops a management program unique to each state, based on state laws and policies pursuant to general program requirements in the CZMA and NOAA's regulations.

Once NOAA approves a state's management program, NOAA cannot require a state to change its program. NOAA can, through periodic evaluations of a state's management program under CZMA § 312, establish necessary actions if NOAA finds a state is not adhering to its NOAA-approved program, but NOAA can only *recommend* that a state change its program to create a different state standard or to address emerging issues. If NOAA finds that a state is not adhering to its management program and the state does not remedy the issue, NOAA's only recourse is to impose financial sanctions by withholding a part of a state's annual CZMA implementation grant until the state remedies the issue or ultimately NOAA could decertify a state's management program.

If a state submits a program change, NOAA can approve or disapprove that program change. When NOAA reviews a program change, NOAA has a limited ability to require a state to make changes to state policies. If NOAA disapproves, this does not require a state to change state law. Therefore, there is no effect from NOAA's denial on the implementation of state law at the state (or local government) level. NOAA's denial means the disapproved state policy is not part of the state's NOAA approved management program and cannot be used for CZMA federal consistency purposes. NOAA cannot use a program change to require changes to other parts of a state's management program.

#### **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 program change regulations are intended to facilitate federal agency coordination with coastal states, and ensure compliance with CZMA requirements. 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 amend their federally-approved management programs to address activities that affect the land and water uses or natural resources of state coastal zones and to apply these amended management programs to federal actions through the CZMA federal consistency provision. CZMA § 307 and NOAA's implementing regulations (15 CFR part 930) balance responsibilities between federal agencies and state agencies whenever federal agencies propose activities, or applicants for a 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 while licensees and permittees are 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. The term "small entity" includes small businesses, small organizations, and small governmental jurisdictions. The Regulatory Flexibility Act (RFA) defines a small jurisdiction as any government of a district with a population of less than 50,000.

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. The proposed rule revises provisions of the program change regulations to provide for a more effective and efficient process for states to amend their management programs, NOAA to review the proposed changes, and for federal agencies and the public to comment. The program change regulations, and the proposed rule, primarily affect states; the proposed changes do not impose any requirements on small entities.

The existing regulations do not, and the proposed rule will not, if adopted, have a significant economic impact on a substantial number of small entities. Accordingly, an Initial Regulatory Flexibility Analysis was not prepared.

##### *Paperwork Reduction Act*

This proposed rule contains no additional collection-of-information requirement subject to review and approval by the Office of Management and Budget under the Paperwork Reduction Act; rather it changes the manner in which states provide information to NOAA and, in some

cases, eliminates or reduces information currently required.

#### *National Environmental Policy Act*

NOAA has concluded that this proposed regulatory action does not have the potential to pose significant impacts on the quality of the human environment. Further, NOAA has concluded that this proposed rule, if adopted, would not result in any changes to the human environment. Therefore, NOAA has concluded that, pursuant to sections 5.05 and 6.03c.3(i) of NAO 216–6, this proposed rulemaking does not have a significant impact on the human environment and is categorically excluded from the need to prepare an environmental assessment or environmental impact statement pursuant to the requirements of NEPA in accordance with NAO 216–6. See also the description above on NEPA compliance for program changes.

Dated: October 24, 2016.

#### **W. Russell Callender,**

*Assistant Administrator for Ocean Services,  
National Oceanic and Atmospheric  
Administration.*

#### **List of Subjects in 15 CFR Part 923**

Administrative practice and procedure, Coastal zone, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, NOAA proposes to revise 15 CFR part 923 as follows:

#### **PART 923—COASTAL ZONE MANAGEMENT PROGRAM REGULATIONS**

- 1. The authority citation continues to read as follows:

**Authority:** 16 U.S.C. 1451 *et seq.*; 31 U.S.C. 6506; 42 U.S.C. 3334; Sections 923.92 and 923.94 are also issued under E.O. 12372, July 14, 1982, 3 CFR 1982 Comp. p. 197, as amended by E.O. 12416, April 8, 1983, 3 CFR 1983 Comp. p. 186.

- 2. Revise subpart H to read as follows:

#### **Subpart H—Changes to Approved Management Programs**

Sec.

923.80 General.

923.81 Program change procedures, deadlines, public notice and comment and application of federal consistency.

923.82 Program change submissions.

923.83 Program change materials.

923.84 Program change decision criteria.

923.85 Procedural requirements of other Federal law.

#### **§ 923.80 General.**

(a) This subpart establishes the criteria and procedures by which any proposed change to approved

management programs shall be made. The term “program change” includes all terms used in section 306(e) of the Act, including amendment, modification or other program change. Draft program changes submitted to NOAA for informal review and comment are not subject to these requirements. Unless otherwise specified, the term “NOAA” refers to the Office for Coastal Management, within NOAA’s National Ocean Service. (The Office for Coastal Management was formerly known as the Office of Ocean and Coastal Resource Management and the Coastal Services Center.)

(b) Pursuant to section 306(e) of the Act, a coastal state may not implement any change to a management program as part of its management program unless the state submits, and NOAA approves, the change for incorporation into the state’s federally-approved management program. A state shall not use a state or local government policy or requirement as an “enforceable policy” under 16 U.S.C. 1453(6a) and § 930.11(h) of this subchapter for purposes of federal consistency under 16 U.S.C. 1456 and part 930 of this subchapter, unless NOAA has approved the incorporation of, and subsequent changes to, the state or local policy into the state’s management program under this subpart. State or local government law not approved by NOAA as part of a state’s management program remain legal requirements for state and local government purposes, but not for CZMA federal consistency purposes.

(c) For purposes of this subpart, program changes include changes to enforceable policies as well as changes to one or more of the following management program areas under part 923: Uses Subject to Management (Subpart B); Special Management Areas (Subpart C); Boundaries (Subpart D); Authorities and Organization (Subpart E); and Coordination, Public Involvement and National Interest (Subpart F).

(d) The phrase “enforceable policies” used in this subpart is described in 16 U.S.C. 1453(6a) and § 930.11(h) of this subchapter. Enforceable policies are the only policies states can use to determine whether a federal action is consistent with its management program under section 307, the Federal Consistency provision, of the Act (16 U.S.C. 1456 and part 930 of this subchapter).

(e) Suspension of grants. Pursuant to section 306(e)(1) of the Act and § 923.135 of this subchapter, NOAA may suspend all or part of any grant or cooperative agreement made under section 306 of the Act if the state has failed to submit a program change

identified as a necessary action under section 312 of the Act and part 923, subpart L (Review of Performance) and pursuant to the requirements for NOAA to notify the Governor of a state under the enforcement provisions of § 923.135 of this subchapter.

#### **§ 923.81 Program change procedures, deadlines, public notice and comment and application of federal consistency.**

(a) Pursuant to section 306(d)(6) of the Act and § 930.11(o) of this subchapter, all program changes shall be submitted to NOAA by: The Governor of a coastal state with an approved management program; the head of the single state agency designated under the management program to be the lead state agency for administering the CZMA; or the head of an office within the designated single state agency if the state has authorized that person to submit program changes. Program changes may be submitted to NOAA on a cyclical basis (*e.g.*, quarterly, twice a year, annually) or as the changes occur.

(1) One (1) copy shall be submitted electronically using the Program Change Form on NOAA’s Program Change Web site and addressed to: Chief, Stewardship Division, Office for Coastal Management, NOAA, 1305 East-West Hwy., 10th Floor, Silver Spring, MD 20910.

(i) If a state is not able to electronically send all or part of a program change to NOAA through NOAA’s Program Change Web site, the state and NOAA shall agree to an alternative method (*e.g.*, email, electronic CD, or a state Web site). In such instances, NOAA will, to the extent practicable, post the program change to NOAA’s Program Change Web site.

(2) All deadlines and timeframes under this subpart shall start on the first full business day after the day NOAA receives a program change (Day 1). For example, if a submission is received on a Thursday, day one of NOAA’s review period would be Friday; if the day of receipt is Friday and Monday is a federal holiday, Day 1 would be Tuesday. All days, starting with Day 1, are included in the calculation of total time for a deadline, including weekends and federal holidays. A state may request that NOAA’s review period begin on a specified date following receipt by NOAA.

(b) When NOAA receives a program change, NOAA shall notify the state (via email or letter) of the date the program change was received and NOAA’s expected decision deadline. NOAA will also notify the state if NOAA determines the submission is incomplete. If NOAA

determines a submission is incomplete, NOAA shall inform the state that the program change review timeline shall not start until the missing information is submitted. During NOAA's review of a program change request, NOAA may request additional information that NOAA needs to make its decision.

(c) NOAA shall respond to the state (via email or letter) within 30 calendar days after the date NOAA receives a program change. The 30 days starts on Day 1. If NOAA does not respond within the 30-day period, then NOAA's approval is presumed. NOAA may extend its review period up to 120 days after receipt of a program change request, if NOAA so notifies the state during the 30-day period. NOAA can extend beyond 120 days only as necessary to meet the requirements of the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*). NOAA shall inform the state via email or letter whether NOAA approves, approves in part, approves with qualifications or denies the incorporation of the program change into the state's management program.

(d) Pre-submission consultation. States shall, to the extent practicable, consult with NOAA prior to state adoption of new or revised state laws, policies, regulations, and other changes the state intends to submit to NOAA as a program change. States are encouraged to submit draft program changes to NOAA for informal review and comment prior to submitting a program change. If consulted, NOAA shall review draft submissions to identify issues that would need to be addressed in the formal submission.

(e) Public Notice and Comment.

(1) A state shall post a public notice of its program change on the state's management program Web site in a conspicuous manner, and email or mail the public notice to local and regional offices of relevant federal agencies, federal agency CZMA headquarter contacts identified on NOAA's federal consistency Web site, affected local governments and state agencies, and to individuals requesting direct notice. The state shall post its public notice prior to, or on the same date as, the date the state submits the electronic program change to NOAA. NOAA's program change review period shall not start until NOAA informs the state that it has received the program change. To meet the requirement for direct public notice (via email or mail), states are encouraged to maintain a coastal management listserv or mailing list. In addition to posting the public notice on the state's Web site and notifying the parties described above, states may, but

are not required to, publish the notice in any state bulletin or newspaper.

(2) A state's public notice shall:

(i) Describe the nature of the program change;

(ii) If applicable, identify any new, modified or deleted enforceable policies of the management program;

(iii) Indicate that any comments on the content of the program change shall be submitted to NOAA through NOAA's Program Change Web site within 21 calendar days of the date NOAA's review period starts; and

(3) NOAA shall post all program changes on its Program Change Web site where any interested party may review or download materials. NOAA shall also post on its Program Change Web site deadlines, extensions and any comments received. For each program change posted on NOAA's Web site, NOAA shall notify the federal agency CZMA headquarter contacts (identified on NOAA's federal consistency Web site) via email. In addition, any party may request through the Program Change Web site that NOAA notify them via email when program changes are submitted by one or more state(s). NOAA's email shall also state that any party may submit comments to NOAA on a program change request within 21 calendar days from the date NOAA's review period starts.

(4) NOAA may, at its discretion, extend the public comment period or hold a public hearing. NOAA shall only consider holding a public hearing for a program change that would substantially change a management program and/or be controversial.

(5) NOAA shall post its program change decisions on its CZMA Program Change Web site and shall notify, by email, federal agency CZMA headquarter contacts and individuals requesting such notice. A state shall post NOAA's decision regarding a state's program change on the state agency's Web site.

(f) Application of approved program changes for federal consistency purposes under section 307 of the Act (16 U.S.C. 1456) and part 930 of this subchapter. Changes to a state's management program and enforceable policies shall be applicable for federal consistency purposes on the date NOAA approves the changes. The effective date for the approved changes will be the date on NOAA's approval letter. NOAA will post its program change decision letters on its Program Change Web site. Approved program changes shall not apply retroactively to state federal consistency reviews under part 930 of this subchapter, subparts C, D, E or F, for proposed federal actions where a

federal agency (subpart C), applicant (subpart D), person (subpart E), or applicant agency (subpart F) had submitted to the management program a consistency determination or consistency certification prior to NOAA's approval, except as allowed by part 930 of this subchapter, unless the proposed federal action was finalized or authorized and there is a substantial change, amendment or renewal proposed for the federal action on or after the date of NOAA's approval of a program change, pursuant to the applicable subpart of part 930.

#### § 923.82 Program change submissions.

(a) As required by CZMA § 306(e)(3)(A), coastal states may not implement a change as part of its approved management program unless the change is approved by NOAA. In accordance with § 923.81 and § 923.83, states shall submit program changes to NOAA for approval using the Program Change Form on NOAA's Program Change Web site.

(b) The following types of program changes shall be approved by NOAA as long as they satisfy the decision criteria in § 923.84 and do not raise issues under any federal laws, as described in § 923.85:

(1) Editorial or non-substantive changes (*e.g.*, citation changes, minor technical changes, or changes to state agency name) to state laws, regulations, enforceable policies, local government coastal management programs or plans that contain enforceable policies, and other authorities;

(2) Changes to special area management plans that do not change a state's coastal zone boundary, enforceable policies or geographic location descriptions, and are not otherwise used by the state for federal consistency review;

(3) Changes to the organization of a state's management program if the management program's structure and responsibilities will remain intact; and

(4) Changes to enforceable policies previously approved by NOAA that make minor substantive revisions consistent with the scope and application of the previously approved enforceable policy. If the proposed changes are not consistent with the scope and application of the previously approved enforceable policy, then NOAA shall more closely review the changes to ensure they satisfy the decision criteria.

(c) Any program change that is not described in paragraph (b) of this section shall be reviewed by NOAA to ensure the state's management program will remain approvable if the proposed

program change is approved. These changes include:

(1) *Changes to the five program approval areas, including:* Uses Subject to Management (subpart B of this part); Special Management Areas (subpart C of this part); Boundaries (subpart D of this part); Authorities and Organization (subpart E of this part); and Coordination, Public Involvement and National Interest (subpart F of this part);

(2) Changes to enforceable policies, including modifications, additions and deletions;

(3) Changes to provisions that are not enforceable policies, but which a state may use to evaluate the scope or applicability of an enforceable policy (e.g., definitions, advisory statements);

(4) Changes to local government coastal management programs or plans if those local programs or plans contain enforceable policies that the state uses for federal consistency review. States are not required to submit program changes for local government coastal management programs or plans that do not contain enforceable policies for federal consistency review; and

(5) Changes or additions to the state's federal consistency list or geographic location descriptions (part 930 of this subchapter);

(6) Changes or additions to Necessary Data and Information (930.58 of this subchapter).

(d) Changes to state Clean Air Act (CAA) and Clean Water Act (CWA) Pollution Control Requirements. Pursuant to section 307(f) of the Act, requirements established by the CWA (33 U.S.C. 1251–1387) and the CAA (42 U.S.C. 7401–7671), or established by the Federal Government or by any state or local government pursuant to the CWA and CAA shall be incorporated in state management programs and shall be the water pollution control and air pollution control requirements applicable to such management program. Therefore, states are not required to submit as program changes any changes to state CAA and CWA provisions.

### **§ 923.83 Program change materials.**

(a) All program changes submitted to NOAA shall be submitted in accordance with § 923.81. Using the Program Change Form, a state shall provide a brief description of the proposed program change(s) and a current version of the document(s) containing the program change (e.g., text of the revised statute, regulation, policy, map, etc.). States shall use the Program Change Form to provide information for:

(1) Changes to the five program approval areas. States shall indicate if

the proposed program change(s) affect any of the five management program approval areas under this part:

(i) Uses Subject to Management (subpart B);

(ii) Special Management Areas (subpart C);

(iii) Boundaries (subpart D);

(iv) Authorities and Organization

(subpart E); or

(v) Coordination, Public Involvement and National Interest (subpart F).

The state shall refer to its program approval findings and any other relevant documents and make a statement that, to the best of the state's knowledge, its management program would continue to satisfy these five areas if the proposed changes are approved by NOAA.

(2) Changes or additions to enforceable policies. States shall identify new, revised or deleted enforceable policies and describe the:

(i) Title of the policy or statutory section, if applicable;

(ii) If previously approved by NOAA, whether the proposed policy revisions are consistent with the scope and application of the previously approved version;

(iii) State legal citation for the policy (do not use public law numbers);

(iv) Date the policy was last updated by the state;

(v) Date the policy was last approved by NOAA; and

(vi) State enforceable mechanism that makes the policy enforceable under state law. The phrase "enforceable mechanism" means a state authority that makes an enforceable policy legally binding under state law, as described in this subpart and § 930.11(h) of this subchapter. Examples of an enforceable mechanism include state statutes, regulations, permitting programs, local government ordinances or court decisions. If an enforceable mechanism is changed so that an enforceable policy is no longer legally binding under state law, then the enforceable policy shall be submitted as a program change with a new underlying state enforceable mechanism; otherwise the policy is no longer enforceable for purposes of state CZMA federal consistency reviews under part 930 of this subchapter.

(3) Changes or additions to the state's federal consistency list or geographic location descriptions.

(i) For each new or revised listed federal action, states shall describe the:

(A) type of federal action;

(B) specific federal statutory authority;

(C) responsible federal agency; and

(D) reasonably foreseeable effects to the uses and resources of the state's coastal zone (§ 923.84(d) of this part).

(ii) For each new or revised geographic location description, states shall describe the:

(A) geographic location description, using specific geographic boundaries;

(B) listed federal actions to be included within a geographic location description; and

(C) reasonably foreseeable effects to the uses and resources of the state's coastal zone.

(iii) Exception for state and federal agreements made as part of a regional ocean plan prepared by a Regional Planning Body under the National Ocean Policy Executive Order 13547 (75 FR 43022 (July 22, 2010)). Geographic location descriptions and changes to state lists of federal license or permit activities that describe general concurrences for minor federal license or permit activities resulting from state and federal agency agreements as part of a Regional Planning Body's regional ocean plan, and agreed to by NOAA through the Regional Planning Body process, shall be part of a state's management program once the Regional Planning Body's regional ocean plan is approved by the Regional Planning Body and certified by the National Ocean Council. No further submission to NOAA shall be required; the requirements of § 930.53 of this subchapter and this part for notification to federal agencies and the public shall be met by the Regional Planning Body process.

(4) Changes to Necessary Data and Information. States shall describe any changes or additions to Necessary Data and Information approved by NOAA in accordance with § 930.58 of this subchapter and explain why such information is necessary in order for the state to commence its federal consistency review period.

(5) NOAA's decision criteria. The state shall indicate that the program change meets each of NOAA's decision criteria in § 923.84.

(6) Impacts relating to other federal laws. The state shall describe whether and how the program change will impact the following:

(i) Resources or interests of any federally-recognized American Indian or Alaska Native tribal government.

(ii) Threatened or endangered species listed under the federal Endangered Species Act (ESA);

(iii) Historic properties designated under the National Historic Preservation Act (NHPA);

(iv) Essential fish habitat designated under the Magnuson Stevens Fishery Conservation and Management Act (MSFCMA);

(v) Marine mammals managed under the Marine Mammal Protection Act (MMPA); and

(vi) Other resources managed under other federal statutes.

(7) The state shall identify the state's Web site where the public notices for the notification and submission requests are, or will be, located and where, if applicable, state documents related to the request may be viewed.

(8) The state shall submit to NOAA any substantive correspondence between the state and federal agencies (not including NOAA's Office for Coastal Management) concerning the development of the changes that are the subject of the program change request.

(9) The state shall indicate if the program change was developed pursuant to section 309 of the Act (16 U.S.C. 1456b—Coastal zone enhancement grants) and, if so, shall state the strategy title and years the strategy was carried out.

(10) The state shall indicate if the program change was developed as a necessary action pursuant to section 312 of the Act (16 U.S.C. 1458—Review of performance) and, if so, shall briefly describe the necessary action.

#### **§ 923.84 Program change decision criteria.**

(a) NOAA shall review all program changes on a case-by-case basis. NOAA shall determine whether a management program, if changed, would continue to satisfy the applicable program approval criteria of CZMA § 306(d) and subparts B through F of this part and the requirements of this subpart (subpart H).

(b) Enforceable policies. In order for NOAA to approve the incorporation of a new or revised enforceable policy into a state's management program, the policy shall:

(1) Be legally binding under state law;

(2) Contain standards of sufficient specificity to guide public and private uses. A policy is not enforceable if it merely directs a state agency to develop regulations or standards.

(i) Definitions, procedures and information requirements are essential elements of determining compliance with regulatory and permit standards. As such, a state law or regulation that contains numerous standards, definitions, procedures, and information requirements may be considered enforceable in its entirety after consultation with NOAA. If NOAA determines that a law or regulation may be considered enforceable in its entirety, a state does not have to identify non-enforceable parts of the law or regulation.

(3) Apply only to areas and/or entities under state jurisdiction;

(4) Not refer to or otherwise purport to apply to federal agencies, federal lands or federal waters. The Act does not authorize states to establish regulatory standards for federal agencies or for federal lands or waters. A state policy that would regulate or otherwise establish standards for federal agencies or federal lands or waters shall not meet the Act's definition of "enforceable policy" (*i.e.*, legally binding under state law) under 16 U.S.C. 1453(6a). States apply their NOAA-approved enforceable policies to federal actions, regardless of location, through CZMA federal consistency reviews under 16 U.S.C. 1456 and part 930 of this subchapter;

(5) Not, on its face, be preempted by federal law. If a state policy seeks to regulate an activity where state regulation is preempted by federal law, the policy is not legally binding under state law and shall not be an enforceable policy under 16 U.S.C. 1453(6a). Policies previously approved by NOAA as enforceable policies shall no longer be enforceable if federal law enacted after NOAA's approval subsequently preempts the state policy;

(6) Not incorporate by reference other state or local requirements that are not identified, described and evaluated as part of the program change request. Any state or local requirements incorporated by reference shall not be applicable for federal consistency review purposes unless separately approved by NOAA as enforceable policies;

(7) Not discriminate against a particular type of activity or entity. Enforceable policies shall be applied to all relevant public and private entities that would have similar coastal effects. Enforceable policies may be specific to a particular type of activity or entity if NOAA agrees that a state has demonstrated that the activity or entity present unique circumstances; or

(8) Not adversely affect the national interest in the CZMA objectives described in 16 U.S.C. 1451 and 1452.

(c) Effect of Prior Program Change Approvals. If enforceable policies previously approved by NOAA become obsolete or non-enforceable through application of subsequently enacted state or federal law, such policies will no longer be enforceable for purposes of CZMA federal consistency review. For example, a state law change may repeal a previous policy or may change the policy in a manner that changes the scope and application of the policy. In such cases, the previously approved enforceable policy is no longer applicable under state law and the new or revised policy is not applicable for federal consistency purposes until that policy has been submitted by the state

as a program change and approved by NOAA. A previously approved enforceable policy may also become non-enforceable and no longer legally binding under state law if subsequent federal law preempts state regulation of a particular activity.

(d) Changes to a management program's federal consistency list or a new or revised geographic location description under part 930 of this subchapter, subparts C, D, E, F or I. For changes to a management program's list of federal actions or a new or revised geographic location description, the state's effects analysis shall be based on information that would allow NOAA to find that the listed activity, either within the state's coastal zone or within a geographic location described outside the state's coastal zone, would have reasonably foreseeable effects on the uses or resources of the state's coastal zone. A state's analysis asserting impacts to uses or resources outside of the coastal zone shall not, by itself, demonstrate a coastal effect; rather, the state shall describe a causal connection of how an impact outside the coastal zone could result in a coastal effect. A state's effects analysis shall not be based on unsupported conclusions, speculation or the mere existence of coastal uses or resources within a geographic location. A state's coastal effects analysis shall, to the extent practicable, identify:

(1) The affected uses (*e.g.*, commercial and recreational fishing, boating, tourism, shipping, energy facilities) and resources (*e.g.*, fish, marine mammals, reptiles, birds, landmarks).

(2) Where and in what densities the uses and resources are found.

(3) How the state has a specific interest in the resource or use. Be specific in showing their connection to the coastal zone of the state (*e.g.*, economic values, harvest amounts, vulnerabilities, seasonal information relevant to the proposed activity).

(4) Where the proposed activity overlaps with these resources, uses and values.

(5) Impacts to the resources or uses from the proposed activity.

(6) The causal connection to the proposed activity, including how the impacts from the activity results in reasonably foreseeable effects on the state's coastal uses or resources.

(7) Why any proposed mitigation may be inadequate.

(8) Empirical data and information that supports the effects analysis and: can be shown to be reliable; visualizes the affected area, resources and uses with maps; and shows values, trends and vulnerabilities.

**§ 923.85 Procedural requirements of other Federal law.**

(a) NOAA shall determine on a case-by-case basis whether each program change requires NOAA to take additional actions under any other federal requirement described below.

(1) If a state's program change will affect the resources or interests of any federally-recognized American Indian or Alaska Native tribal government (tribe), NOAA shall contact the affected tribe(s) and determine if Government-to-Government consultation is desired under Executive Order 13175 (Nov. 6, 2000).

(2) If, for the purposes of ESA, NHPA, MSFCMA or MMPA compliance, NOAA determines that a state's program change will have effects on listed threatened or endangered species, historic properties, essential fish habitat or marine mammals, then NOAA shall determine if consultation is needed with the applicable federal agency under the ESA, NHPA, MSFCMA and MMPA.

(3) When NOAA determines whether to consult under other federal statutes or tribal executive orders, NOAA's ability to require changes to a state's proposed program change are limited by the following:

(i) Once NOAA approves a state's management program, NOAA cannot require a state to change its program. NOAA can, through periodic evaluations of a state's management program under section 312 of the Act, establish necessary actions if NOAA finds a state is not adhering to its NOAA-approved program, but NOAA can only recommend that a state change its program to create a different state standard or to address emerging issues; and

(ii) NOAA can approve or disapprove a program change request. When NOAA reviews a program change, NOAA has a limited ability to require a state to make changes to state policies. If NOAA disapproves a program change request, this does not require a state to change state law. Therefore, there is no effect from NOAA's denial on the implementation of state law at the state (or local government) level. NOAA's denial means the disapproved state policy is not part of the state's NOAA-approved management program and cannot be used for CZMA federal consistency purposes. NOAA cannot use a program change to require changes to other parts of a state's management program.

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**DEPARTMENT OF HEALTH AND HUMAN SERVICES****Food and Drug Administration****21 CFR Part 1**

[Docket No. FDA-2012-D-1002]

**Questions and Answers Regarding Food Facility Registration (Seventh Edition); Draft Guidance for Industry; Availability**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notification of availability.

**SUMMARY:** The Food and Drug Administration (FDA or we) is announcing the availability of a draft guidance for industry entitled "Questions and Answers Regarding Food Facility Registration (Seventh Edition): Guidance for Industry." This draft guidance contains 15 sections of a multisection guidance intended to provide updated information relating to the food facility registration requirements in the Federal Food, Drug, and Cosmetic Act (the FD&C Act).

**DATES:** Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that we consider your comment on the draft guidance before we begin work on the final version of the guidance, submit either electronic or written comments on the draft guidance by February 6, 2017.

**ADDRESSES:** You may submit comments as follows:

**Electronic Submissions**

Submit electronic comments in the following way:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <http://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <http://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a

written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

**Written/Paper Submissions**

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

*Instructions:* All submissions received must include the Docket No. FDA-2012-D-1002 for the draft guidance for industry entitled "Questions and Answers Regarding Food Facility Registration (Seventh Edition)." Received comments will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <http://www.regulations.gov> or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <http://www.regulations.gov>. Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <http://www.fda.gov/>