MEMORANDUM FOR: State and Territory Coastal Management Program Managers

FROM: Jeffrey R. Benoit
Director

SUBJECT: Final Program Change Guidance

Attached is the Office of Ocean and Coastal Resource Management's ("OCRM") Final Program Change Guidance. Over the years OCRM has provided guidance on requirements and submission procedures for changes made to federally approved state and territory coastal management programs ("CMPs"). The program change guidance attached to this memorandum consolidates and replaces all previous program change guidance. A draft of this guidance was sent to state and territory coastal management program managers on March 6, 1996. Seven states submitted comments, most of which supported the draft guidance. All issues raised by the commenters were discussed with the relevant states and resolved or addressed through changes in the final guidance.

The Program Change Guidance clarifies information and procedural requirements for program change requests. The focus of the guidance is to explain the difference between procedures for the two types of program changes: routine program changes and program amendments. The guidance also explains a recent update of the program change regulations. See 61 Fed. Reg. 33801-33819 (1996) (to be codified at 15 C.F.R. part 923). In that update, OCRM replaced the four criteria by which program change requests are evaluated with a reference to the five program approvability areas addressed in the program development regulations: (1) uses subject to management, (2) special management areas, (3) boundaries, (4) authorities and organization, and (5) coordination, public involvement and national interest.

Please contact David Kaiser, Federal Consistency Coordinator, OCRM, at (301) 713-3098, x 144, if you have any questions on the program change guidance.

Attachment

Program Change Guidance

The Coastal Zone Management Act and Changes to State and Territory Coastal Management Programs

July 1996

Office of Ocean and Coastal Resource Management

National Oceanic and Atmospheric Administration

Program Change Guidance:

The Coastal Zone Management Act and Changes to State and Territory Coastal Management Programs

July 1996

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I. Introduction

This guidance clarifies information and procedural requirements for program change requests by state and territory coastal management programs ("CMP") pursuant to the Coastal Zone Management Act of 1972 ("CZMA") and its implementing regulations. This guidance augments the program change requirements found at CZMA section 306(e)(16 U.S.C. § 1455(e)) and 15 C.F.R. Part 923, Subpart H [redesignated].[1] The focus of the guidance is to explain the difference between procedures for the two types of program changes: routine program changes and program amendments.

The guidance also explains a recent update of the program change regulations. See 61 Fed. Reg. 33801-33819 (1996) (to be codified at 15 C.F.R. part 923); Appendix A (for subpart H). In that update, the Office of Ocean and Coastal Resource Management ("OCRM") replaced the four criteria by which program change requests are evaluated with a reference to the five program approvability areas addressed in the program development regulations: (1) uses subject to management, (2) special management areas, (3) boundaries, (4) authorities and organization, and (5) coordination, public involvement and national interest. The preamble to the final rule issued on June 28, 1996, contains additional explanation of the program change regulations. See Appendix C of this guidance.

This guidance is, for the most part, not new. The intent of the changes to the regulations and this guidance is to reduce information and paperwork burdens on states and OCRM and to clarify that most changes to state CMPs are not substantial and are routine program changes. This guidance does not apply retroactively to any program change previously approved by OCRM. See also Appendix C of this guidance.

Please contact your OCRM Coastal Programs Division ("CPD") program specialist for further assistance.

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[1] While OCRM moved the program change regulations within 15 C.F.R. Part 923 from Subpart I to Subpart H, the citations to individual program change regulatory sections remain the same.

II. General Information on Program Change Submissions

This section of the guidance provides general information on program changes, definitions, and general procedural points. Sections III and IV provide detailed guidance for routine program changes ("RPCs")(formerly called routine program implementations or RPIs) and amendments, respectively.

A. Definition of Program Change

A program change is any amendment, modification, or other change to a federally approved CMP. 16 U.S.C. § 1455(e). Changes in the manner in which states manage coastal uses and resources, that affect approved CMPs, must be reviewed by OCRM with respect to the original approval of the state CMP. Changes that do not affect the CMP should not be submitted as a program change. Changes that must be submitted are those that (1) affect the CMP as approved by OCRM, (2) the state CMP wishes to spend CZMA funds on, and (3) the state CMP wishes to use for federal consistency. For example, if a state makes a minor substantive change to an enforceable policy, then the state must submit the change to OCRM for approval in order to use the policy for federal consistency purposes. See also Appendix C of this guidance.

The program development and approval regulations establish five program areas. See 15 C.F.R. Part 923, Subparts B, C, D, E and F. Thus, program changes are changes to one or more of these five areas. The program areas are:

1. Uses Subject to Management (15 C.F.R. Part 923, Subpart B)

2. Special Management Areas (15 C.F.R. Part 923, Subpart C)

3. Boundaries (15 C.F.R. Part 923, Subpart D)

4. Authorities and Organization (15 C.F.R. Part 923, Subpart E)

5. Coordination, Public Involvement and National Interest (15 C.F.R. Part 923, Subpart F)

Subparts B through F of Part 923 provide a detailed explanation of each of these headings. States may refer to these subparts for assistance in their analysis of a program change. These subparts and detailed explanations, and statutory citations, are also listed in Appendix B of this program change guidance. State CMPs need only discuss the subparts (or detailed explanation of those subparts) that apply to a particular program change.

Examples of program changes include, but are not limited to:

- Changes to boundaries or organization of approved CMPs.

- Changes to new or revised enforceable policies that may be contained in statutes, executive orders, implementing regulations and memoranda of agreement, which comprise a CMP.

- Additions of or revisions to enforceable local coastal programs (“LCPs”) incorporated into a CMP (if the change to an LCP affects the approved CMP, or the state CMP wants to use CZMA funds to implement the change, or the state intends to use the change for federal consistency purposes).

- New or revised Special Area Management Plans or other plans for specific areas that are not LCPs such as Areas of Particular Concern.

- Changes to policies and procedures affecting state or federal consistency review or federal agency, local government, and public participation.

- Changes to guidelines, policy documents, manuals, which provide additional information to public and private entities concerning how CMP requirements can be met or which provide specific interpretations of the general standards in the CMP.

- Additions or deletions to listed permits for federal consistency.

B. Types of Program Changes

The CZMA regulations define two types of program changes: amendments and RPCs. OCRM anticipates that most program changes will continue to be routine.

1. Amendment

Amendments are defined in 15 C.F.R. § 923.80(d), as substantial changes in one or more of the five program areas identified in subparts B through F of Part 923. These areas are listed above in section II.A. and Appendix B of this guidance. Appendix C of this guidance contains additional discussion of section 923.80(d).

2. Routine Program Changes

RPCs are the further detailing of a state CMP that does not result in a substantial change to one or more of the five program areas identified in subparts B through F of Part 923. See 15 C.F.R. § 923.84(a). State CMPs should, prior to submitting a program change, obtain CPD's preliminary view as to whether the change is an RPC or an amendment. Such prior consultations will facilitate the process by giving OCRM a better understanding of the proposed change and should reduce the overall work effort of both the state CMP and OCRM. The scope of a change may be such that OCRM can (1) determine, prior to receiving an RPC submission, that the change is an amendment, or (2) identify information and analysis requirements necessary to support the RPC.

3. Amendment or RPC: When is a program change "substantial?"

The key in determining whether a program change is an amendment or an RPC is whether a change in one or more of the five program areas is "substantial." The indicators and examples below illustrate that most program changes will continue to be RPCs, and not substantial changes to CMPs; that a substantial change is a high threshold. (The closer a program change is to this threshold, the more information and analysis will be required.) Whether a program change is substantial is based on a case-by-case determination. Indicators of a substantial change include:

1. New or revised enforceable policies that address coastal uses or resources not previously managed (or major changes in the way a state CMP manages coastal uses or resources) may be substantial. It will often depend on the scope of the change. (New or revised enforceable policies that make minor revisions to existing CMP components are generally not substantial changes.)

2. The extent to which the proposed change impacts the national interest reflected in the CZMA such as, OCS oil and gas development, energy facility siting, water and air quality.

3. The extent to which the proposed change is similar to past program change requests (by any state) that were treated as amendments.

One example of how “substantial” is applied is when a coastal county adopted a revision to its LCP that would prohibit all offshore oil and gas related development within its waters and on its land. OCRM preliminarily considered this change to be an amendment. In addition, its approvability was questioned due to inadequate consideration of the national interest in energy facility siting and uses of regional benefit. Eventually OCRM approved the change as being routine, but only because the change was limited in scope geographically, there were sound economic and environmental reasons, and the state CMP had the authority to override any local decisions that substantially affected the national interest. OCRM also conditioned the approval on the fact that the oil and gas industry was not shut out of the state’s entire coastal zone. OCRM noted that if other coastal counties adopted similar policies, those changes would likely be reviewed as amendments because of the cumulative impact on the national interest in energy facility siting in the state.

Whether a change is substantial is further illustrated by the development of local government components by three different states. (1) The first state proposed a routine change to its program by incorporating a new statute and regulations requiring the development of local government plans and ordinances. The local plans and ordinances themselves were not included in the program change. The state felt that the statute and regulations

contained sufficient enforceable policies for federal consistency purposes. OCRM concurred that the change was routine after determining that the statute and regulations were based on or contained existing enforceable policies that addressed coastal uses and resources currently included in the CMP. The new statute and regulations applied these existing policies to new areas of the state (but did not expand the coastal zone).

(2) The routine nature of local government change in the first example is distinguished from an earlier instance where another state's statute and regulations requiring local governments to develop coastal management plans and ordinances was substantial. In the second state, the statute and regulations mandated a program that managed coastal uses and resources in an entirely new way and with new enforceable policies. Even though the local plans and ordinances were not incorporated, the new policies and program included in the statute and regulations was a substantial change and, therefore, an amendment.

(3) The third state proposes a similar local government component. The state also intends to incorporate the LCPs into the CMP. Incorporation of the LCPs is needed as the statute and the regulations merely specify the types of activities that must be included in the LCPs and do not contain many new enforceable policies. OCRM has preliminarily determined that this would be a substantial change to the CMP and should be submitted as an amendment.

C. General Procedural Guidance

1. Early consultation with OCRM

When possible, states should consult with CPD staff to discuss possible changes during program change development and prior to state adoption. States should informally submit proposed statutory or regulatory language to CPD staff so that (1) potential conflicts can be identified prior to incorporation into state authorities, (2) CPD staff can help clarify whether the program change is an amendment or RPC, and (3) CPD can ensure that the program change submission will satisfy all procedural, information, and public notice requirements.

Lack of early consultation with OCRM can lead to problems. State CMPs often submit program changes to OCRM only after they have been adopted into state law or regulation. In some cases, OCRM was unaware that such changes were being considered. This has two possible negative effects. The change may cause a state CMP to fall below the requirements of CZMA section 306(d) and 15 C.F.R. Part 923. Also, state implementation of changes not approved by OCRM could lead to adverse evaluation findings.

We also recommend that you consult early with federal agencies that could be affected by the changes you are considering. OCRM has received complaints from federal agencies that they are not involved early at the state level in program change deliberations. (States are required to provide an opportunity for federal agency involvement in the development of an amendment. See 15 C.F.R. § 923.81(b)(5).) Federal agencies may raise problems during OCRM processing and may cause delay in approval of the state's program change request. If a state believes that a federal agency consistently does not participate during state review process, the state may ask OCRM's assistance in encouraging federal agency participation.

2. Submitting program changes in a timely manner

The CZMA requires that state CMPs promptly notify OCRM of any proposed change to its approved CMP. 16 U.S.C. § 1455(e)(1). OCRM may suspend all or part of a CZMA section 306 award pending the submission of proposed changes to a CMP. Id. Program changes should be submitted on a regular basis, both to avoid processing delays caused by large volume submissions and to assure that a CMP is up to date. NOAA regulations allow the submission of changes either "on a case-by-case basis, periodically throughout the year, or annually." 15 C.F.R. § 923.84(b)(1)(i). Each CMP should develop and maintain a submission schedule with its CPD contact.

The regular and timely submission of program changes is also important to keep a program up to date. Except as provided under 16 U.S.C. § 1455(e)(3)(B), until program changes are approved by OCRM and a public notice of OCRM's approval is published by the state CMP, the state CMP may not use the program changes for CZMA section 307 federal consistency purposes and CZMA section 306 funds may not be used to implement the proposed change.

3. Submitting complete information with the program change request

State CMPs should ensure that all required information is included in the program change request. Incomplete requests result in a delay of OCRM's review pending receipt of additional information from the state. The necessary substantive and procedural information requirements are included in sections III and IV of this guidance.

D. OCRM Review and Approval Criteria

OCRM reviews all program change requests, whether an amendment or an RPC, on a case-by-case basis to determine if the program change is approvable. OCRM determines whether the CMP, if amended, would continue to satisfy the applicable program approval criteria of CZMA section 306(d) and 15 C.F.R. Part 923, Subparts B through F. See 15 C.F.R. § 923.82(a), section II.A. and, for more detailed criteria, Appendix B of this guidance. For routine changes, OCRM determines whether it concurs with the state's assessment that the action is an RPC. 15 C.F.R. § 923.84(b)(3). OCRM will also evaluate whether any policies to be added are preempted by federal law. The proposed change, in conjunction with the CMP, must be applied to all relevant public and private activities, and not discriminate against a federal agency or activity.

E. Endangered Species Act Consultation

If the program change may affect federally listed endangered species or their critical habitat, OCRM will consult with the U.S. Fish and Wildlife Service ("FWS") or the National Marine Fisheries Service ("NMFS") pursuant to our obligations under the Endangered Species Act. We encourage state CMPs to consult informally with the FWS or NMFS on any such changes prior to its adoption as a matter of state law. Any comments the state CMP receives from FWS or NMFS should be included in the program change package.

III. Routine Program Changes

A. Information Requirements

RPCs must be submitted to the Chief of CPD by the designated CMP agency. The requirements for RPC requests are found at 15 C.F.R. § 923.84. The level of detail in the state CMP's analysis and information depends on the scope of the change. The state CMP's analysis should be more detailed for more substantive changes. Minor RPCs require minimal information and analysis. The amount of information and analysis should be discussed with OCRM prior to submittal. The information requirements contained in 15 C.F.R. § 923.84 are:

1. A complete copy of the text of the program change.

2. An identification of any new or changed policies, both enforceable and advisory. At a minimum identification of the policies should list the sections of the statute, regulation, ordinance, etc. The state CMP's analysis should include the mechanism (e.g., zoning, permit) by which the state ensures that any new or changed enforceable policies are legally binding under state law.

3. A description of the nature of the program change, including specific pages of the management program proposed to be changed. The description must include an analysis that explains why the program change is an RPC and not an amendment. In other words, the explanation should describe what elements of the approved program are affected, and explain why the proposed change will not result in a substantial change to one or more of the five program approvability areas identified in Part 923, subparts B through F.

4. A copy of the state CMP's public notice of the submittal to OCRM. This notice must be distributed to the general public and affected parties, including local governments, other state agencies, and regional offices of relevant federal agencies (or the agency's headquarters if it does not maintain a regional office), as well as a listing of individuals notified

of the RPC. The public notice must be published at the same time or before (but not after) the state submits the program change package to OCRM. Electronic notification may be used, but may not be the exclusive method of notification (many people and organizations do not yet have access to the Internet or other means of electronic transfer).

The public notice must:

a. Describe the nature of the program change and identify any enforceable policies to be added to the CMP.

b. Indicate that the state considers the change to be an RPC and has requested OCRM's concurrence in that determination; and

c. Indicate that any comments on whether or not the action does or does not constitute an RPC may be submitted to OCRM within three weeks of the date of issuance of the notice.

5. In addition, the state CMP may submit any comments from state and federal agencies or the public or other information received during the development and review process which could aid OCRM's review.

B. The RPC Process

The state CMP submits the RPC request to the Chief of CPD. OCRM has four weeks from the date of receipt of the request to complete its review and make a final determination. 15 C.F.R. § 923.84(b)(3). OCRM's final determination will be in writing (either mailed, faxed, or electronically transmitted).

Submitted RPC packages will be distributed to appropriate OCRM and NOAA Office of General Counsel for Ocean Services staff for substantive review. If no additional information is needed by OCRM and OCRM concurs with the state CMP's determination, then the Director of OCRM will provide written concurrence (either mailed, faxed, or electronically transmitted) to the state CMP. If OCRM does not concur, the state CMP will be advised to either

submit the change as an amendment or resubmit the RPC with additional information requested by OCRM concerning how the program will be changed as a result of the action.

If the RPC package is incomplete, two actions may occur: (1) OCRM may deny the RPC request and the denial letter will identify deficiencies in the RPC package, or (2) rather than deny the request, the state CMP may request a suspension of the four week deadline in order to resolve any differences between the state and OCRM on the content of an RPC request. Upon resolution, the review period would resume.

When OCRM concurs with the state CMP's RPC request, the state CMP must then provide notice to the general public and affected parties, including local governments, other state agencies, and relevant federal agencies. This notice shall:

1. Indicate the date on which the state CMP received concurrence from OCRM and that the action constitutes an RPC;

2. Reference the earlier public notice for a description of the content of the RPC action; and

3. Indicate if federal consistency applies as of the date of the new notice.

Until the state CMP publishes this notice the provisions of this change cannot be used for federal consistency purposes.

IV. Amendments

A. Information Requirements

The amendment submittal and review process addresses both CZMA and NEPA requirements. Relevant CZMA requirements are found at section 306(e) and 15 C.F.R. §§ 923.80 - 923.83. See also Appendix C of this guidance for information contained in the preamble to the final rule issued on June 28, 1996.

Program amendment requests must be submitted to OCRM by the Governor of a coastal state or by the head of the designated state 306 agency, if the governor has delegated this

responsibility and the delegation is part of the approved CMP. 15 C.F.R. § 923.81(a). Information requirements for amendment requests are set forth at 15 C.F.R. § 923.81. In brief, the request must include the following:

1. A description of the proposed change, including specific pages and text of the management program that are proposed for amendment. This description shall also identify any enforceable policies to be added to the management program. The state CMP's analysis should include the mechanism (e.g., zoning, permit) by which the state ensures that the policies are legally binding under state law.

2. An explanation of why the program change is necessary and appropriate, including a detailed analysis of the effects of the change on the approvability of the program.

3. A copy of the public notice(s) announcing the public hearing(s) on the proposed amendment. The state must hold at least one public hearing on the proposed amendment, pursuant to CZMA section 306(d)(4). The notice must precede the hearing by at least 30 days. The state's public hearing may be concurrent with OCRM's review.

4. A summary of the hearing(s).

5. Documentation of opportunities provided relevant federal (including appropriate federal regional offices), state, regional, and local agencies, port authorities, and other public and private parties to participate in the development and approval of the amendment at the state level (prior to submission to OCRM as an amendment).

B. The Amendment Process

OCRM reviews amendment requests according to the procedures described at 15 C.F.R. § 923.82. As a first step, OCRM undertakes a preliminary review to determine whether a CMP, if amended as proposed, would still constitute an approvable program. See section II.D. of this guidance for OCRM's approval criteria.

OCRM will prepare and disseminate internally a set of preliminary findings of approval or disapproval. If the Director of OCRM determines that the program, if amended, would no longer be approvable, or that the procedural requirements of the CZMA have not been met, the state CMP will be advised in writing of the reasons the amendment request may not be approved. The state CMP may, of course, modify its amendment request and resubmit it for approval by the Director.

If the Director determines, as a preliminary matter, that the program as amended remains approvable, the Director must decide whether an Environmental Impact Statement ("EIS") is required as part of the approval process. If an EIS is necessary, OCRM, with state CMP assistance, will prepare and distribute a draft EIS and final EIS according to Council on Environmental Quality guidelines and NOAA procedures.

If an EIS may not be necessary, OCRM will prepare an Environmental Assessment ("EA"), with state CMP assistance as requested. The EA either leads to a Finding of No Significant Impact ("FONSI") or a determination that the effects of the proposed amendment are such that an EIS must be prepared.

Following completion of the NEPA review process and consultation as appropriate with FWS or NMFS, OCRM will take final action to approve or disapprove the amendment request. Notice of the proposed decision on the amendment, as well as the statement that federal consistency applies as of the date the amendment is approved, will be published by OCRM in the Federal Register.

If a state implements an amendment despite notification from the Director of OCRM that the amendment would render the management program unapprovable, that state may be subject to withdrawal of program approval and withdrawal of administrative funding. See

15 C.F.R. § 928.5(a)(3)(G)[to be redesignated at 15 C.F.R. § 923.135(a)(3)(G)].

The time frame for review and approval of amendment requests is established by CZMA section 306(e)(2). Within 30 days of receiving an amendment request, OCRM must notify the state CMP whether it approves or disapproves the amendment, or whether it is necessary to extend the review for a period not to exceed 120 days. OCRM may extend the review period further, if necessary to meet NEPA requirements.

If a serious disagreement occurs between a state CMP proposing an amendment and federal agencies objecting to the amendment, the Governor, or the head of the state CMP agency, or the head of the relevant federal agency may request mediation by the Secretary of Commerce under CZMA section 307(h). 15 C.F.R. § 923.54.

V. Clean Air and Water Act Requirements

Requirements established by the Clean Water Act, the Clean Air Act, or established by the Federal Government or by any state or local government pursuant to such Acts shall be incorporated in CMPs and shall be the water pollution control and air pollution control requirements applicable to such program. Section 307(f) of the CZMA provides:

> Notwithstanding any other provision of [the CZMA], nothing in [the CZMA] shall in any way affect any requirement (1) established by the Federal Water Pollution Control Act, as amended, or the Clean Air Act, as amended, or (2) established by the Federal Government or by any state or local government pursuant to such Acts. Such requirements shall be incorporated in any program developed pursuant to [the CZMA] and shall be the water pollution control and air pollution control requirements applicable to such program.

State CMPs do not have to submit these requirements as program changes. However, state CMPs must notify OCRM, federal, state, and local agencies, and other interested parties, of the incorporation of the requirements into the state CMP. The lead coastal management agency may provide the required notice at various points in the rule-making process, e.g., (1) when the

requirements are distributed for public comment, the state CMP may choose to add a provision stating that the rules, when adopted, will be incorporated into the CMP, or (2) after the rules have been adopted, the state CMP may send a notice to the state CMP's program change mailing list indicating that the requirements are now incorporated into the coastal management program and indicating the applicability of federal consistency.

OMB Control # 0648-0119, expires June 2001. OCRM requires this information in order to adequately assess the eligibility of proposed changes to state and territory coastal management programs. Public reporting burden for this collection of information is estimated to average 8 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Joseph A. Uravitch, AICP, Chief, Coastal Programs Division, OCRM, 1305 East-West Hwy., 11th Floor, Silver Spring, Maryland 20910. This reporting is required under and is authorized under 16 U.S.C. § 1455 and 15 C.F.R. part 923, subpart H. Information submitted will be treated as public records. Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection displays a currently valid OMB Control Number.

Appendix A

Program Change Regulations

61 Fed. Reg. 33815-33816 (1996)
(to be codified at 15 C.F.R. part 923)

development, at least one of which will be on the total scope of the coastal management program. Hearings on the total management program do not have to be held on the actual document submitted to the Assistant Administrator for section 306 approval. However, such hearing(s) must cover the substance and content of the proposed management program in such a manner that the general public, and particularly affected parties, have a reasonable opportunity to understand the impacts of the management program. If the hearing(s) are not on the management document per se, all requests for such document must be honored and comments on the document received prior to submission of the document to the Assistant Administrator must be considered;

(b) Provide a minimum of 30 days public notice of hearing dates and locations;

(c) Make available for public review, at the time of public notice, all agency materials pertinent to the hearings; and

(d) Include a transcript or summary of the public hearing(s) with the State's program document or submit same within thirty (30) days following submittal of the program to the Assistant Administrator. At the same time this transcript or summary is submitted to the Assistant Administrator, it must be made available, upon request, to the public.

Subpart G—Review/Approval Procedures

§ 923.60 Review/approval procedures.

(a) All state management program submissions must contain an environmental assessment at the time of submission of the management program to OCRM for threshold review. In accordance with regulations implementing the National Environmental Policy Act of 1969, as amended, OCRM will assist the State by outlining the types of information required. (See 40 CFR § 1506.5 (a) and (b).)

(b) Upon submission by a State of its draft management program, OCRM will determine if it adequately meets the requirements of the Act and this part. Assuming positive findings are made and major revisions to the State's draft management program are not required, OCRM will prepare draft and final environmental impact statements, in accordance with National Environmental Policy Act requirements. Because the review process involves preparation and dissemination of draft and final environmental impact statements and lengthy Federal agency review; states should anticipate that it will take at least 7 months between the time a state first submits a draft management program to OCRM for threshold review and the point at which the Assistant Administrator makes a final decision on whether to approve the management program. Certain factors will contribute to lengthening or shortening this time table; these factors are discussed in OCRM guidance on the review/approval process. The OCRM guidance also recommends a format for the program document submitted to the Assistant Administrator for review and approval.

Subpart H—Amendments to and Termination of Approved Management Programs

§ 923.80 General.

(a) This subpart establishes the criteria and procedures by which amendments, modifications or other changes to approved management programs may be made. This subpart also establishes the conditions and procedures by which administrative funding may be terminated for programmatic reasons.

(b) Any coastal state may amend or modify a management program which it has submitted and which has been approved by the Assistant Administrator under this subsection, subject to the conditions provided for subsection 306(e) of the Act.

(c) As required by subsection 312(d) of the Act, the Assistant Administrator shall withdraw approval of the management program of any coastal state and shall withdraw financial assistance available to that state under this title as well as any unexpended portion of such assistance, it the Assistant Administrator determines that the coastal state has failed to take the actions referred to in subsection 312(c)(2)(A) of the Act.

(d) For purposes of this subpart, amendments are defined as substantial changes in one or more of the following coastal management program areas:

(1) Uses subject to management;

(2) Special management areas;

(3) Boundaries;

(4) Authorities and organization; and

(5) Coordination, public involvement and the national interest.

(e) OCRM will provide guidance on program changes. The five program management areas identified in § 923.80(d) are also discussed in subpart B through F of this part.

§ 923.81 Requests for amendments.

(a) Requests for amendments shall be submitted to the Assistant Administrator by the Governor of a coastal state with an approved management program or by the head of the state agency (designated pursuant to subsection 306(d)(6) of the Act) if the Governor had delegated this responsibility and such delegation is part of the approved management program. Whenever possible, requests should be submitted prior to final State action to implement the amendment. At least one public hearing must be held on the proposed amendment, pursuant to subsection 306(d)(4) of the Act. Pursuant to section 311 of the Act, notice of such public hearing(s) must be announced at least 30 days prior to the hearing date. At the time of the announcement, relevant agency materials pertinent to the hearing must be made available to the public.

(b) Amendment requests must contain the following:

(1) A description of the proposed change, including specific pages and text of the management program that will be changed if the amendment is approved by the Assistant Administrator. This description shall also identify any enforceable policies to be added to the management program;

(2) An explanation of why the change is necessary and appropriate, including a discussion of the following factors, as relevant; changes in coastal zone needs, problems, issues, or priorities. This discussion also shall identify which findings, if any made by the Assistant Administrator in approving the management program may need to be modified if the amendment is approved;

(3) A copy of public notice(s) announcing the public hearing(s) on the proposed amendments;

(4) A summary of the hearing(s) comments:

(i) Where OCRM is providing Federal agency review concurrent with the notice period for the State's public hearing, this summary of hearing(s) comments may be submitted to the Assistant Administrator within 60 days after the hearing;

(ii) Where hearing(s) summaries are submitted as a supplement to the amendment request (as in the case described in paragraph (b)(1) of this section), the Assistant Administrator will not take final action to approve or disapprove an amendment request until the hearing(s) summaries have been received and reviewed; and

(5) Documentation of opportunities provided relevant Federal, State, regional and local agencies, port authorities and other interested public and private parties to participate in the development and approval at the State level of the proposed amendment.

§ 923.82 Amendment review/approval procedures.

(a) Upon submission by a State of its amendment request, OCRM will review the request to determine preliminarily if the management program, if changed according to the amendment request, still will constitute an approvable program. In making this determination, OCRM will determine whether the state has satisfied the applicable program approvability criteria of subsection 306(d) of the Act.

(b) If the Assistant Administrator, as a preliminary matter, determines that the management program, if changed, would no longer constitute an approvable program, or if any of the procedural requirements of section 306(d) of the Act have not been met, the Assistant Administrator shall advise the state in writing of the reasons why the amendment request cannot be considered.

(c) If the Assistant Administrator, as a preliminary matter, determines that the management program, if changed, would still constitute an approvable program and that the procedural requirements of section 306(d) of the Act have been met, the Assistant Administrator will then determine, pursuant to the National Environmental Policy Act of 1969, as amended, whether an environmental impact statement (EIS) is required.

§ 923.83 Mediation of amendments.

(a) Section 307(h)(2) of the Act provides for mediation of "serious disagreements" between a Federal agency and a coastal State during administration of an approved management program. Accordingly mediation is available to states or federal agencies when a serious disagreement regarding a proposed amendment arises.

(b) Mediation may be requested by a Governor or head of a state agency designated pursuant to subsection 306(d)(6) or by the head of a relevant federal agency. Mediation is a voluntary process in which the Secretary of Commerce attempts to mediate between disagreeing parties over major problems. (See § 923.54).

§ 923.84 Routine program changes.

(a) Further detailing of a State's program that is the result of implementing provisions approved as part of a State's approved management program, that does not result in the type of action described in § 923.80(d), will be considered a routine program change. While a routine change is not subject to the amendment procedures contained in §§ 923.81 through 923.82, it is subject to mediation provisions of § 923.83.

(b) (1) States must notify OCRM of routine program change actions in order that OCRM may review the action to ensure it does not constitute an amendment. The state notification shall identify any enforceable policies to be added to the management program, and explain why the program change will not result in the type of action described in § 923.80(d).

(i) States have the option of notifying OCRM of routine changes on a case-by-case basis, periodically throughout the year, or annually.

(ii) In determining when and how often to notify OCRM of such actions, States should be aware that Federal consistency will apply only after the notice required by paragraph (b)(4) of this section has been provided.

(2) Concurrent with notifying OCRM, States must provide notice to the general public and affected parties, including local governments, other State agencies and regional offices of relevant federal agencies of the notification given OCRM.

(i) This notice must:

(A) Describe the nature of the routine program change and identify any enforceable policies to be added to the management program if the State's request is approved;

(B) Indicate that the State considers it to be a routine program change and has requested OCRM's concurrence in that determination; and

(C) Indicate that any comments on whether or not the action does or does not constitute a routine program change may be submitted to OCRM within 3 weeks of the date of issuance of the notice.

(ii) Where relevant Federal agencies do not maintain regional offices, notice must be provided to the headquarters office.

(3) Within 4 weeks of receipt of notice from a State, OCRM will inform the State whether it concurs that the action constitutes a routine program change. Failure to notify a State in writing within 4 weeks of receipt of notice shall be considered concurrence.

(4) Where OCRM concurs, a State then must provide notice of this fact to the general public and affected parties, including local governments, other State agencies and relevant Federal agencies.

(i) This notice must:

(A) Indicate the date on which the State received concurrence from OCRM that the action constitutes a routine program change;

(B) Reference the earlier notice (required in paragraph (b)(2) of this section) for a description of the content of the action; and

(C) Indicate if Federal consistency applies as of the date of the notice called for in this paragraph.

(ii) Federal consistency shall not be required until this notice has been provided.

(5) Where OCRM does not concur, a State will be advised to:

(i) (1) submit the action as an amendment, subject to the provisions of §§ 923.81 through 923.82; or

(ii) resubmit the routine program change with additional information requested by OCRM concerning how the program will be changed as a result of the action.

Subpart I—Applications for Program Development or Implementation Grants

§ 923.90 General.

(a) The primary purpose of development grants made pursuant to section 305 of the Act is to assist coastal States in the development of comprehensive coastal management programs that can be approved by the Assistant Administrator. The primary purpose of implementation grants made pursuant to section 306 of the Act is to assist coastal States in implementing coastal management programs following their approval, including especially administrative actions to implement enforceable program policies, authorities and other management techniques. The purpose of the guidelines in this subpart is to define the procedures by which grantees apply for and administer grants under the Act. These guidelines shall be used and interpreted in conjunction with applicable Federal laws and policies, Department of Commerce grants management regulations, policies and procedures, and any other applicable directives from the NOAA Grants Management Division and OCRM program offices.

(b) Grants awarded to a State must be expended for the development or administration, as appropriate, of a management program that meets the requirements of the Act, and in accordance with the terms of the award.

(c) All applications for funding under section 305 or 306 of the Act, including proposed work programs, funding priorities and allocations are subject to the discretion of the Assistant Administrator.

(d) For purposes of this subpart, the term "development grant" means a grant awarded pursuant to subsection 305(a) of the Act. "Administrative grant" and "implementation grant" are

Appendix B - Five Program Approval Areas and Detailed Explanations

A proposed change in one or more of the areas listed below, and the detailed explanations of the areas, or in the way a state CMP manages these areas, would be a program change. OCRM also uses this list to evaluate whether a state's CMP would continue to satisfy these criteria if a proposed change is approved.

1. Uses Subject to Management (15 C.F.R. Part 923, Subpart B)

- Permissible land uses and water uses within the coastal zone which have a direct and significant impact on coastal waters and how these uses will be managed. CZMA § 306(d)(2)(B).

- The planning process and the enforceable policies for energy facilities likely to be located in, or which may significantly affect, the coastal zone. CZMA § 306(d)(2)(H).

- The CMP's method of assuring that local land use and water use regulations within the coastal zone do not unreasonably restrict or exclude land uses and water uses of regional benefit. CZMA § 306(d)(12).

- The inventory and designation of areas that contain one or more coastal resources of national significance; and the enforceable policies to protect such resources. CZMA § 306(d)(13).

2. Special Management Areas (15 C.F.R. Part 923, Subpart C)

- Designation of areas of particular concern within the coastal zone. CZMA § 306(d)(2)(C).

- Guidelines on priorities of uses in particular areas, including specifically those uses of lowest priority. CZMA § 306(d)(2)(E).

- The term "beach" and the planning process and enforceable policies for the protection of, and access to, public beaches and other public coastal areas. CZMA § 306(d)(2)(G).

- The planning process for assessing the effects of, and studying and evaluating ways to control, or lessen the impact of, shoreline erosion, and to restore areas adversely affected by such erosion. CZMA § 306(d)(2)(I).

- The CMP's procedures for specifying areas that may be designated for the purpose of preserving or restoring them for their conservation, recreational, ecological, historical, or esthetic values. CZMA § 306(d)(9).

3. Boundaries (15 C.F.R. Part 923, Subpart D)

- Boundaries of the coastal zone. CZMA § 306(d)(2)(a).

4. Authorities and Organization (15 C.F.R. Part 923, Subpart E)

- CMP enforceable polices. CZMA § 306(d)(2)(D).

- The organizational structure approved to implement the management program. CZMA § 306(d)(2)(F).

- The designated single State agency to receive and administer grants for implementing the CMP. CZMA § 306(d)(6).

- The State organization to implement the management program. CZMA § 306(d)(7).

- The State's authority for the management of the coastal zone in accordance with the management program, including the authority to administer land use and water use regulations to control development to ensure compliance with the management program, and to resolve conflicts among competing uses; and to acquire fee simple and less than fee simple interests in land, waters, and other property through condemnation or other means when necessary to achieve conformance with the management program. CZMA § 306(d)(10).

- The state CMPs general techniques for control of land uses and water uses within the coastal zone. CZMA § 306(d)(11).

- The State’s mechanism to ensure that all State agencies will adhere to the program. CZMA § 306(d)(15).

- The enforceable policies and mechanisms to implement the Coastal Nonpoint Pollution Control Program of the State required by section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990. CZMA § 306(d)(16).

5. Coordination, Public Involvement and National Interest (15 C.F.R. Part 923, Subpart F)

- The mechanism for continuing consultation and coordination between the lead CMP agency and with local governments, interstate agencies, regional agencies, and area wide agencies within the coastal zone. CZMA § 306(d)(3)(B).

- The CMP’s consideration of the national interest involved in planning for, and managing the coastal zone, including the siting of facilities such as energy facilities which are of greater than local significance. CZMA § 306(d)(8).

- The CMP’s procedures for public participation in permitting processes, consistency determinations, and other similar decisions. CZMA § 306(d)(14).

- The CMPs federal consistency procedures.

Appendix C

Preamble to the Final Rule Issued on June 28, 1996.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Parts 923, 926, 927, 928, 932, and 933

[Docket No. 960126015–6165–02]

RIN 0648–AI43

Coastal Zone Management Program Regulations

AGENCY: Office of Ocean and Coastal Resource Management (OCRM), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Final rule.

SUMMARY: The National Oceanic and Atmospheric Administration (NOAA) is revising and consolidating its regulations concerning coastal zone management (CZM) program development, approval, grants and evaluation, and removing obsolete rules concerning research and technical assistance. These regulations implement, in part, the Coastal Zone Management Act, as amended (CZMA). The purpose of this rule is to remove outdated provisions and to revise and consolidate remaining provisions. The intended effect of this rule is to make the CZM program regulations more concise and easier to use.

EFFECTIVE DATE: July 29, 1996.

FOR FURTHER INFORMATION CONTACT: Roger Eckert, NOAA Office of General Counsel for Ocean Services, at 301–713–2967 (ext. 213), fax: 301–713–4408, e-mail: RBEckert@RDC.noaa.gov.

SUPPLEMENTARY INFORMATION:

I. Authority

This rule is issued under the authority of the CZMA, 16 U.S.C. 1451 *et seq.*

II. Background

The CZMA was enacted to encourage and assist the 35 eligible coastal states and territories to develop and implement CZM programs to preserve, protect, develop and, where possible, restore or enhance the resources of the Nation's coasts. In all, 29 coastal states and territories have chosen to participate in this program, and their programs have received federal approval. Five states are currently developing programs for federal approval. Many of the regulations promulgated when the program began are no longer needed, now that the program has matured.

In March 1995, President Clinton issued a directive to federal agencies regarding their responsibilities under his Regulatory Reform Initiative. This initiative is part of the National Performance Review and calls for immediate, comprehensive regulatory reform. The President directed all agencies to review all of their regulations, with an emphasis on eliminating or modifying those that are obsolete or otherwise in need of reform. This rule is intended to carry out the President's directive with respect to the regulations implementing the Coastal Zone Management program.

On March 11, 1996 (61 FR 9745–9762), the Office of Ocean and Coastal Resource Management (OCRM) proposed to revise and consolidate these CZM regulations. Concurrent with the issuance of the proposed regulations, OCRM mailed draft guidance to coastal states concerning the program change regulations. OCRM received comments on the proposed revision of the regulations and/or draft program change guidance from the states of: Connecticut, Massachusetts, Michigan, New Hampshire, Oregon, Pennsylvania and Texas. These state comments focused on the proposed revision of 15 CFR 923.80(d) (the definition of a program amendment). OCRM will evaluate the comments directed at the draft guidance, and revise the guidance as appropriate. The comments directed at the proposed revision of the regulations are addressed below. In addition, OCRM will continue to consider these comments in its implementation of the CZMA and these regulations.

OCRM also received comments from the Federal Emergency Management Agency (FEMA) directed at coastal hazard mitigation efforts. Sections 303(2)(K) and 303(3) of the CZMA identify the need to address the adverse effects of coastal hazards, including erosion, land subsidence and flooding. While the regulations already identify hazardous areas as areas of particular concern (15 CFR 923.21(b)(7)), some additional emphasis on coastal hazards has been placed in § 923.25(a) and § 923.50(a)(5) to reflect the CZMA's policies. Coastal states may rely on these interpretive statements when submitting program changes concerning coastal hazard mitigation efforts. In addition, the regulation concerning plan coordination (§ 923.56(b)(2)) has been updated, consistent with FEMA's current planning authorities.

Accordingly, this final rule revises and consolidates the CZM regulations as follows:

A. Consolidates Regulations

The rule consolidates CZM program regulations found in present 15 CFR parts 923, 927, 928 and 932 into a revised part 923. This consolidation is expected to make the regulations easier for coastal states, territories and the public to use.

B. Removes Regulations Restating Statutory Language

The rule removes those regulations in 15 CFR part 923 that simply restate provisions contained in the Coastal Zone Management Act. These provisions are replaced, where appropriate, with references to the applicable sections of the CZMA. Removal of these provisions is in accordance with the rules of the Office of the Federal Register which discourage agencies from restating the language of a law in a document intended for publication in the **Federal Register.**

C. Removes Outdated Provisions and Simplifies Remaining Provisions

The rule removes those regulations in 15 CFR part 923 that are no longer necessary because the CZM program has reached its maturity, and simplifies the remaining provisions. Many of the more detailed regulatory requirements are removed. Since part 923 largely addresses requirements for the development and approval of coastal management programs, many of these changes do not apply to those states that already have federally approved CZM programs. For the eligible coastal states that do not yet have approved programs, OCRM will continue to provide necessary guidance, and actual and timely notice of appropriate application procedures. In particular, OCRM will continue to work with the 5 coastal states currently developing programs in order to ensure that those programs meet the criteria for federal approval. Finally, the rule removes 15 CFR part 933 because it implements a portion of the CZMA that was repealed in 1986. OCRM will provide guidance on a corresponding technical assistance provision that was added to the CZMA in the Coastal Zone Act Reauthorization Amendments of 1990.

D. Updates Program Change Regulations

The rule updates the program change regulations so that they more precisely reflect the structure of coastal management programs. In particular, the four criteria identified at 15 CFR 923.80(d)(1)–(4), by which program changes are assessed by OCRM, are replaced with a reference to the five program approvability areas identified in part 923: (1) uses subject to

management, (2) special management areas, (3) boundaries, (4) authorities and organization, and (5) coordination, public involvement and national interest. These criteria will apply when states submit their proposed program changes to OCRM for review and approval; they are intended to assist in OCRM's evaluation of a program change.

The revised definition of a program amendment located at 15 CFR 923.80(d) is intended to ease rather than increase the administrative burden of states. While the four criteria were an effort to group the program approvability areas, not all program changes fit squarely within the four groups. The rule repeats the headings of subparts B through F of part 923, and so, tracks the program approvability areas. In addition, states may refer to these subparts for assistance in their analysis of a program change. Furthermore, states are no longer required to address those program areas that do not apply to their proposed changes. Rather, the rule allows states to discuss one or more of the program areas that would be affected by a change. Thus, the rule allows states greater flexibility to provide a more focused analysis. OCRM anticipates that the great majority of program change requests will continue to be routine program changes, i.e., OCRM does not anticipate that the revision will increase the number of program changes that are determined to be substantial in nature.

The element of 15 CFR 923.80(d) relating to special management areas has been simplified from "criteria or procedures for designating or managing areas [of] particular concern or areas for preservation or restoration," to the heading for subpart C of part 923: "special management areas." OCRM does not anticipate that this revision will increase the number of program changes relating to special management areas that will be determined to be amendments. Specifically, the elimination of the phrase "criteria or procedures for designating or managing" is not intended to broaden the scope of this element. Conversely, OCRM declines to reinsert this phrase into 15 CFR 923.80(d) because, in practice, this phrase has proven to be of little utility to coastal states submitting program changes in this category. Rather, the test for an amendment to the special management area portion of a coastal management program remains unchanged: the program change must be substantial. In other words, under both the old and the new language, whether a change in this area of a state's program constitutes an amendment requires an evaluation of whether the program change is substantial.

The addition of "authorities" as a partial fifth category in 15 CFR 923.80(d) is merely a restructuring of the definition of program amendment. Previously, the term "authorities" was used at the outset of the definition of program amendment, and proved to be a source of confusion. Again, the test of whether a change is substantial, and therefore an amendment, remains unchanged. Minor program changes, including minor changes in authorities, remain approvable through the routine program change process.

The addition of an "organization" element to 15 CFR 923.80(d) clarifies that federal approval of coastal programs is indeed predicated, in part, on whether the state is organized to manage its coastal zone in an effective manner. The prior four criteria contained in § 923.80(d) did not assist states in analyzing the impacts of organizational changes, whereas the revision explicitly addresses this area of program approvability. Again, minor program changes, including minor organizational changes, remain approvable through the routine program change process.

The rule also adds explanatory statements concerning the addition of any enforceable policies to management programs. These statements reflect Congress' increased focus on enforceable policies in the Coastal Zone Act Reauthorization Amendments of 1990. OCRM, federal agencies, applicants for federal licenses or permits, and often the state coastal programs themselves, cannot always identify the enforceable policies in a program. OCRM recognizes that events beyond a coastal management program's control can change the enforceability of a policy. However, OCRM needs to know just what is being changed at the time of a program change, and federal agencies and applicants should be allowed to comment on the enforceable policies submitted for incorporation.

To be sure, coastal management programs allow for flexibility in state coastal management efforts. Certain changes in coastal management efforts may not need OCRM approval because they do not affect the federally-approved program. In other words, states structured their coastal management programs with varying levels of detail sufficient to "guide public and private uses of lands and waters in the coastal zone." CZMA section 304(12). Depending on the nature of the particular state coastal management program and the nature of the management change, a state may make minor adjustments in how it manages the coastal zone without necessarily changing its approved coastal management program.

Alternatively, a state may determine that a necessary change in its federally-approved coastal management program is so insignificant that it need not be submitted to OCRM for review. However, the expenditure of CZMA funds is limited to those approved parts of a state's program (with an exception identified in CZMA section 306(e)(3)(B)), as is the requirement of federal consistency. In addition, this regulatory revision does not change the possibility that failure to submit program changes for OCRM approval may lead to adverse evaluation findings (15 CFR 928.5(a)(3)(i)(G) has been redesignated as 15 CFR 923.135(a)(3)(i)(G)). The routine program change procedure is intended to be an administratively efficient means by which states may submit, on a routine or periodic basis, insubstantial program changes for OCRM review and approval. OCRM shares the desire of coastal states to minimize administrative burdens and will work cooperatively to achieve this goal.

Finally, the term "routine program implementation" is changed to the more descriptive term "routine program change," and existing agency practice that allows for the resubmittal of routine program change requests is codified.

III. Miscellaneous Rulemaking Requirements

Executive Order 12372: Intergovernmental Review

This program is subject to Executive Order 12372.

Executive Order 12612: Federalism Assessment

NOAA has concluded that this regulatory action does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment under Executive Order 12612.

Executive Order 12866: Regulatory Planning and Review

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

Regulatory Flexibility Act

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that the rule will not have a significant impact on a substantial number of small entities because (1) the rule addresses CZM