



**DEPARTMENT OF COMMERCE**

**National Oceanic Atmospheric Administration**

**15 CFR Part 923**

**Docket No. 080416573-8999-03**

**RIN 0648-AW74**

**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:** Final rule.

**SUMMARY:** The National Oceanic and Atmospheric Administration (NOAA) is providing states and NOAA with a more efficient process for making changes to state coastal management programs (“management programs”). The final rule revises the Coastal Zone Management Act (CZMA) program change regulations and alleviates the need for previous associated guidance (Program Change Guidance (July 1996) and Addendum (November 2013)); the 1996 Guidance and 2013 Addendum no longer apply. 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

the regulations. 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. The final rule addresses the objectives raised in NOAA's May 2008 Advance Notice of Proposed Rulemaking (ANPR) and November 2016 Proposed Rule. These objectives include: 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 final rule also addresses comments submitted on the proposed rule.

**DATES:** *Effective:* [INSERT 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**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 former 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. These national interest objectives are contained in CZMA §§ 302 and 303 (16 U.S.C. 1451 and 1452). NOAA must also evaluate whether a state program change would meet these national interest objectives. As part of NOAA’s national interest evaluation, by statute and regulations NOAA also determines whether a state’s management program if changed would continue to give “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). Further, states, in developing and implementing their management programs, must provide for adequate 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. In the case of energy facilities, the Secretary shall find that the State has given consideration to any applicable national or interstate energy plan or program. (16 U.S.C. 1455(d)(8), *see* 15 CFR 923.52 (Consideration of the national interest in facilities)). These CZMA national interest requirements for the development and implementation of state management programs are further described in NOAA's CZMA regulations. *See* 15 CFR 923.52.

Some of the important issues NOAA must consider when evaluating program changes include whether the change would: (1) conflict with 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), or Magnuson Stevens Fisheries Conservation and Management Act (MSFCMA).

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 section 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 previous program change regulations, 15 CFR part 923, subpart H, were 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. The final rule addresses these points of confusion by revising the regulations at 15 CFR part 923, subpart H, and alleviating the need for the 1996 program change guidance and the 2013 addendum; the 1996 guidance and 2013 addendum no longer apply. The final rule addresses the objectives raised in NOAA’s May 2008 Advance Notice of Proposed Rulemaking, 73 FR 29093 (May 20, 2008) (ANPR) and November 2016 Proposed Rule, 81 FR 78514 (Nov. 8, 2016).

### **III. Objectives of the Final 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 removes the program change analysis currently done by states to determine if a change is substantial, and therefore an amendment, and instead requires 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 were 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 must 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 the NOAA "Program Change Website" through which NOAA will electronically post program changes and public comments received, and notify Federal agencies and the public of the status of program changes, <http://coast.noaa.gov/czmprogramchange>; and
9. Require states to post program change public notices on the state's management program website.

In addition, the previous regulations at 15 CFR part 923, subpart H, included "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 final rule no longer includes termination of approved management programs under subpart H.

### **Changes between the Proposed Rule and Final Rule**

In general, the final rule has the same overall provisions, requirements, and structure as the proposed rule. The final rule does not introduce major new requirements. There are various minor changes and clarifications in the final rule preamble and regulatory text in response to comments and to ensure that NOAA's new Program Change Website is consistent with the final rule. This final rule also provides further explanation and clarification of CZMA national interest considerations, public notice for state program change submissions to NOAA, and how NOAA applies the Federal preemption doctrine to its review of state CZMA program change submissions.

NOAA describes the changes from the proposed rule for each of the five regulation sections (923.80, 923.81, 923.82, 923.83, 923.84, and 923.85) in the preamble below under section IV. Explanation of Changes to the CZMA Program Change Regulations.

### **Comments on the Proposed Rule**

NOAA received comments on the proposed rule from the state coastal management programs from California (from both the California Coastal Commission and San Francisco Bay Conservation and Development Commission), Hawaii, Maine, New York, Oregon, and Virginia. The Coastal States Organization and the National Ocean Policy Coalition also submitted comments. In addition, NOAA discussed some of the proposed changes with the U.S. Navy. NOAA addresses general comments below. NOAA addresses comments on specific sections in section IV. Explanation of Changes to the CZMA Program Change Regulations. The comments on the proposed rule can be viewed in their entirety and downloaded at

<https://www.regulations.gov/docket?D=NOAA-NOS-2016-0137>

**General Comments on the Proposed Rule.**

**Comment 1** (Hawaii, Maine, California, Oregon, Coastal States Organization): We support the purposes of the rulemaking to provide a more effective and efficient process for states and NOAA to make changes to state coastal management programs.

**Response:** NOAA appreciates the comment.

**Comment 2** (Oregon): We support doing away with the concepts of “routine” changes or “amendments” and removing the need to provide an analysis of whether a change is “substantial.”

**Response:** NOAA appreciates the comment.

**Comment 3** (Virginia): We have no comments or concerns with the proposed rule.

**Response:** NOAA appreciates the comment.

**Comment 4** (National Ocean Policy Coalition): The proposed rule refers to proposed revisions to the associated guidance and Addendum within NOAA regulations, such revisions were not included in the proposed rule and the Coalition requests that the proposed guidance and Addendum revisions be provided for public comment before being finalized.

**Response:** NOAA was not proposing any changes to the 1996 program change guidance and addendum to the guidance. Rather NOAA is removing the guidance and addendum and replacing them with the final rulemaking; the program change guidance and addendum are no longer effective.

**IV. Explanation of 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 § 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 former 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.

*Comments on Proposed § 923.80.*

**Comment 5** (New York): Under § 923.80(e), how will NOAA identify which program changes are “necessary actions” under section 312 of the Act and part 923, subpart L (Review of Performance) that will trigger the process for suspending NOAA funding allocations to states or impose new program changes to previously-approved Federal program elements?

**Response:** NOAA does not have authority to require a state to make a change to state law or its coastal management program, except in limited circumstances if a state is not adhering to its NOAA-approved coastal management program. *See California Coastal Com'n v. Mack*, 693 F.Supp. 821 (N.D. Cal. 1988). However, if a state makes a change to any part of its NOAA-approved management program that was needed to obtain NOAA approval or that a state uses for Federal consistency purposes, then section 306(e)(1) of the Act requires the state to submit those changes to NOAA for approval. NOAA can find the failure to do so as part of a periodic evaluation of a state’s management program pursuant to section 312 of the Act and require submission of the changes to those management program provisions as a necessary action. Failure to meet the section 312 necessary action for the program change could form the basis for enforcement action under 15 CFR 923.135.

**Changes from Proposed Rule.** NOAA did not make any material changes between the proposed rule and final rule.

*§ 923.81 Program change procedures, deadlines, public notice and comment, and application of*

*approved changes.*

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 will no longer require states to mail hard copies of program changes. Rather, states must submit all program changes through the new Program Change Website or through an alternative method, agreed to by the state and NOAA, if an electronic submission through the website is not possible.

All deadlines and timeframes will start on the first full business day after NOAA receives a program change (Day 1). For example, if NOAA receives a submission on a Thursday, Day 1 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, except for the last day (e.g., Day 30 or Day 120). The day that NOAA's decision is due must also end on a full business day. For example, if Day 30 is a Saturday, then NOAA's decision would be due the next Monday, or if Monday is a Federal holiday, on Tuesday. 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 can extend its review period beyond 120 days for NEPA compliance; NOAA must 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). Given the reliance on electronic means of communication and the demise of hard copy notices in newspapers and other formats, all states must post a public notice of its program change on the state management program's website and directly email or mail the notice 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 will also post the state notice on its Program Change

Website and directly notify via email Federal agency headquarter contacts and any other individual or group requesting direct notice. The state's public notice will describe the program change, any new or modified enforceable policies, and indicate that any comments on the incorporation of the program change into the state's management program shall be submitted to NOAA through NOAA's Program Change Website. NOAA will post the program change and all NOAA decisions on its website and notify Federal agency headquarter contacts and other individuals or groups requesting notification. NOAA may extend the public comment period.

State program change approval requests will be submitted electronically by the state through the Program Change Website. The timing of the state's public notice will occur in the following manner. States will draft a public notice of a submission, which shall be included as part of the contents of the program change submission form. When NOAA posts the program change submission on its Program Change Website, NOAA will notify the state management program via email. The state will then post its public notice on the state webpage providing a link to the submission on NOAA's Program Change Website. The state shall send the public notice and link to the state and local agencies, Federal agency contacts, and others who have requested the state's public notice. Day 1 for NOAA review purposes will be the first business day after the state submits to NOAA the program change request. However, the 21-day comment period will not start until the state posts its public notice on the state webpage. If a state fails to post its public notice, then NOAA would either determine the program change submission is not complete and the review period has not started or deny the program change request.

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 Website. This section codifies 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 retroactive requirements on applicants and Federal agencies.

*Comments on Proposed § 923.81.*

**Comment 6** (Hawaii, Coastal States Organization): We support § 923.81(a) that program changes may be submitted on a cyclical basis or as changes occur giving states flexibility.

**Response:** NOAA appreciates the comment.

**Comment 7** (Hawaii): The proposed rules should change “§ 923.81 Program change procedures, deadlines, public notice and comment and application of Federal consistency” to “§ 923.81 Program change procedures, deadlines, public notice and comment and application of approved changes.”

**Response:** NOAA agrees that the phrase “application of approved changes” would be more appropriate to match the title of Subpart H – Changes to Approved Management Programs, and maintain the title consistency from § 923.81 to § 923.84.

**Comment 8** (Hawaii): The proposed rule should include a deadline under § 923.81(b) for NOAA to determine and notify the state whether its submission is complete.

**Response:** NOAA agrees with the comment and has added to § 923.81(b) five- and ten-day timeframes, respectively, for responding to the receipt of a program change and notifying the state if a program change submission is incomplete. This timeframe does not preclude NOAA from requesting additional information from the state on the submission.

**Comment 9** (Hawaii): A state's public notice is required by § 923.81(e)(2)(iii) to 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. However, as required by § 923.81(e)(1), when the state posts its public notice prior to, or on the same date as, the date the state submits the electronic program change to NOAA, the state does not know the date when NOAA's review period will start. Therefore, when a state posts its public notice on the state's management program Web site, the deadline for comment submitted to NOAA has to be left as "to be determined," which shall be updated when the day one of NOAA's review period is available from NOAA.

**Response:** NOAA agrees that this could be confusing and has modified § 923.81(e)(2)(iii) to state that comments shall be submitted within 21 days of the date of the state's notice.

**Comment 10** (National Ocean Policy Coalition): NOAA must publish notice and provide public comment opportunities in the Federal Register for any changes that are not editorial, non-substantive, and/or minor in scope, including but not limited to any proposed changes or additions to state Federal consistency lists or geographic location descriptions, any major changes requiring analysis for their justification, and any changes that may require analysis

under NEPA, rather than rely solely on website notices and communications to individuals who opt-in to receive such announcements.

**Response:** The CZMA establishes a 30-day timeframe for reviewing program changes that are further detailing of state programs. Preparation and publication of a public notice in the Federal Register while providing a meaningful opportunity for public comment cannot be accomplished within a 30-day timeframe. Nonetheless, public notice and an opportunity for public comment is provided through state management program websites and email list serves as well as NOAA's Program Change Website and list serve. Furthermore, additional public notice and an enhanced opportunity to submit comments will be provided through the NOAA's new Program Change Website with direct notifications sent to interested parties. Where changes are so substantial as to bring into question the continued approvability of a state program and when NOAA needs additional time for NEPA compliance, NOAA's practice has been to extend its review timeframe in order to provide for notice and comment in the Federal Register. NOAA will continue to follow that practice.

**Comment 11** (National Ocean Policy Coalition): NOAA should provide for at least 45 days of public comment on proposed changes to management programs that are not editorial, non-substantive, and/or minor in scope, including but not limited to any proposed changes or additions to state Federal consistency lists or geographic location descriptions, any major changes requiring analysis for their justification, and any changes that may require analysis under NEPA.

**Response:** NOAA disagrees. NOAA is required by statute to respond to the state within 30 days of receipt of a program change. Therefore, NOAA retains the 21-day comment period.

However, both the proposed rule and final rule, in § 923.81(e)(4), allow NOAA to extend a public notice period at NOAA's discretion. *See* 16 U.S.C. 1455(e)(2).

**Comment 12** (New York, Oregon): Please clarify how this rule will relate to the new NOAA Revised National Environmental Policy Act Implementing Procedures in its draft Companion Manual for NOAA Administrative Order 216-6A containing policy and procedures for implementing NEPA. What standards will OCM use to determine “on a case by case basis” the appropriate level of NEPA analysis to be applied?

**Response:** All program changes are now subject to NOAA's Companion Manual for NOAA Administrative Order 216-6A, Appendix E, Categorical Exclusion A6, effective January 13, 2017. *See* <http://www.nepa.noaa.gov/>. NOAA will evaluate each program change submitted by a coastal state on a case-by-case basis pursuant to the Administrative Record for Categorical Exclusion A6 to determine if the magnitude of the difference between the current NOAA approved management program and the management program as changed would no longer be covered under this Categorical Exclusion (CE) and would require an environmental assessment or environmental impact statement. Factors NOAA will consider when determining if the CE applies include, but are not limited to, the following. The presence of any of these factors in a program change does not necessarily mean the change is not covered by the CE; rather, NOAA will consider the magnitude of the change to the management program for these factors. Factors considered prior to applying the CE:

- Whether the program change is further detailing of existing: uses subject to the management program; enforceable policies; organizational structure; coastal zone

boundaries; special area management plans; national interest objectives; geographic location descriptions; or Federal consistency lists.

- Whether the program change contains new: uses subject to the management program; enforceable policies; organizational structure; coastal zone boundaries; special area management plans; national interest objectives; geographic location descriptions; or Federal consistency lists.
- Whether the approval of a program change may be controversial.
- Whether the program change may have a potentially significant effect on tribal resources or sovereignty, threatened or endangered species, historic properties, essential fish habitat, or marine mammals.
- Whether the program change may trigger any informal or formal consultations for tribal or other Federal law purposes. Not all tribal or other Federal law consultations would necessarily trigger the need for an environmental assessment; rather, NOAA would determine the magnitude of the issues and whether the CE would still apply.

**Comment 13** (Oregon): We support the use of the language in the statute for establishing NOAA's review periods and extensions.

**Response:** NOAA appreciates the comment.

**Comment 14** (New York, Maine): Please clarify the time limits NOAA will have to review and approve program changes and for extensions and public hearings. It is unclear how long of an extension "beyond 120 days" NOAA can make based on the language under § 923.81(c) (see Page 78523 column 1). Can the extension be indefinite?

**Response:** The CZMA requires NOAA to respond within 30 days of receipt of a program change request. Determining the 30 days is described in this preamble and in § 923.81(a), (b), and (c). The Act authorizes NOAA to extend the 30-day response period to 120 days. 16 U.S.C. 1455(e)(2). Whether NOAA extends the 30-day time period will depend on the complexity or issues raised by a program change, including whether NOAA will hold a public hearing. NOAA can extend beyond 120 days if NOAA needs that time to comply with NEPA and the length of time NOAA extends beyond 120 days will depend on the time needed to produce additional NEPA documents.

**Comment 15** (New York): Will the public be able to comment on every program change submitted to the NOAA Program Change Website, and what will be the process for states responding to those comments? What type of comments will be accepted during the public comment period under this new rule?

**Response:** The public and Federal agencies will be able to respond to any program change that NOAA determines is complete and is under NOAA review. This applies to all program changes that states submit to NOAA through the Program Change Website and that NOAA has made publicly available on the Program Change Website. NOAA has modified § 923.81(e)(3) to state that NOAA will not accept and will not consider any comments received after NOAA issues its decision. If a state responds to a public comment before NOAA issues its decision, then NOAA will consider the state's response and may post the state's response on the Program Change Website. A state's response to a comment would be sent directly to NOAA via email or mail and not through the Program Change Website. NOAA has modified §

923.81(e)(2)(iii) to state that any public comments on a state's request to incorporate the program changes into the state's management program may be submitted to NOAA.

**Comment 16** (New York): Please clarify the time requirements or limits for submitting program changes “as the changes occur” or “on a cyclical basis.” Will the states get to choose the option they prefer (“as the changes occur” or “on a cyclical basis”)?

**Response:** There is no requirement for a state to submit program changes within a specified time period, unless the submission of program changes is a necessary action in a CZMA section 312 finding and that 312 finding has a specified time frame that would have been discussed between NOAA and the state. Section 923.81(a) gives states choices on submitting program changes as they occur or on some cyclical basis. When a state submits a program change may also depend on whether the state wants NOAA to approve a program change so the state can use the change for Federal consistency reviews.

**Comment 17** (New York): Under § 923.81(e)(4) how will NOAA determine if a proposed program change is elevated to a “controversial” status that would necessitate a public hearing? How would NOAA weigh the information gathered during a public hearing in its decision making regarding whether or not to approve the proposed program change?

**Response.** NOAA will evaluate the magnitude of the proposed change to the management program and the totality of any issues raised on any particular program change submission to determine if any controversy over a request for approval of a program change warrants a public hearing. If NOAA conducts a public hearing, public comments become part of NOAA's decision record and NOAA will evaluate the usefulness of the comments submitted when applying NOAA's decision criteria.

**Comment 18** (New York). When will the new proposed regulations take effect, and how will program changes happen while the Program Change Form and website are being developed, tested, and finalized?

**Response:** The final regulations will take effect 30 days after publication in the Federal Register. The Program Change Website described in § 923.81(a)(1) has been developed, tested, and finalized concurrently with development of this rulemaking. Any program change submitted after the effective date identified in the Federal Register notice for the final rule must apply these regulations and use the Program Change Website.

**Comment 19** (Maine, Coastal States Organization): Under § 923.81(e)(1), allowing a coastal state to provide public notice and opportunity for comment on proposed program changes by publishing a notice on its website seems like a sensible change that, in today's world, provides notice in a forum likely to reach interested parties and reduces administrative costs related to publication of newspaper notices.

**Response:** NOAA appreciates the comment.

**Comment 20** (Maine, Coastal States Organization): Under § 923.81(e)(3), NOAA would notify and solicit comments from Federal agencies regarding all proposed program changes and provide access to information on such changes on its website. Section 923.81(e)(1) appears to require coastal states to provide the same notice to the same Federal agencies. NOAA should revise these provisions to avoid duplicative notice and consider clarifying that it will assume sole responsibility for notifying Federal agencies via its website as outlined in proposed § 923.81(e)(3).

**Response:** NOAA disagrees with the comment. States have a wider set of local, regional, and sometimes headquarter Federal agency contacts. In addition, Federal agencies should have the full 21 days to provide comments, which starts from when the state provides notice. It is the state's notice that solicits comments; NOAA's notice via the Program Change Website alerts Federal agency headquarter contacts and anyone else asking for direct notification that the program change is available for viewing on the Program Change Website.

**Comment 21** (Maine, Coastal States Organization): Section 923.81(f) clarifies that enforceable policies become effective on the date of NOAA's letter to a coastal state providing its decision on proposed program changes. This seems helpful and well-aligned with rules regarding web-based notice of approved program changes.

**Response:** NOAA appreciates the comment.

**Changes from the Proposed Rule.** NOAA modified the title of the section by replacing "Federal consistency" with "approved changes." NOAA added to § 923.81(b) five- and ten-day timeframes, respectively, for responding to the receipt of a program change and notifying the state if a program change submission is incomplete. NOAA modified § 923.81(e)(2)(iii) to state that comments shall be submitted within 21 days of the date of the state's notice. NOAA modified § 923.81(e)(3) to state that NOAA will not accept and will not consider any comments received after NOAA issues its decision. If a state responds to a public comment before NOAA issues its decision, then NOAA will consider the state's response and may post the state's response on the Program Change Website. NOAA modified § 923.81(e)(2)(iii) to state that any public comments on a state's request to incorporate the program changes into the state's management program may be submitted to NOAA.

*§ 923.82 Program change submissions.*

Section 923.82 identifies the type of changes that a state would submit to NOAA. Paragraph (a) reflects the statutory requirement that states may not implement changes to their management programs unless the changes are approved by NOAA. Paragraph (b) identifies the five CZMA management program approval areas; all changes to a state management program would fall under one or more of these five areas. The changes described in § 923.82(c) are editorial, non-substantive, or are minor in scope, both procedurally and substantively. The distinction between paragraph (c) (editorial, non-substantive, or minor in scope) and paragraph (d) (substantive changes) does not re-introduce “routine” changes and “substantial” changes from the previous regulations. Rather, paragraph (c) changes that are editorial, non-substantive, or minor in scope are not controversial and pose little or no impact on Federal agencies or the public. Therefore, NOAA’s review of changes under § 923.82(c) would be expedited.

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

Most program changes, even those that result in some substantive change to enforceable policies, have historically been minor and non-controversial, and have not posed any approval issues or resulted in any comments from Federal agencies or the public. Under paragraph (c)(4), 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(d) are self-explanatory and include: any changes that are not covered under § 923.82(c) 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 (d)(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 states, 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 removes the substantial administrative burden for states and NOAA to submit and review local coastal programs.

Paragraph (e) addresses changes to state Clean Air Act (CAA) and Clean Water Act (CWA) Pollution Control Requirements. CZMA section 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. NOAA notes, however, that changes to state CWA or CAA pollution control requirements must be consistent with the Acts and not seek to circumvent or supersede exemptions provided for specified military activities. For example, state CWA and CAA requirements must not attempt to regulate or prohibit discharges from vessels of the armed forces that are permissible as a matter of law under the CWA.

*Comments on Proposed § 923.82.*

**Comment 22** (Hawaii): We support § 923.82(c)(4) [now (d)(4)] that the 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.

**Response:** NOAA appreciates the comment.

**Comment 23** (Hawaii, Maine, Coastal States Organization): We support § 923.82(d) [now (e)] that the states are not required to submit as program changes, any changes to state Clean Air Act (CAA) and Clean Water Act (CWA) provisions. The CZMA itself expressly makes such requirements applicable under NOAA-approved state coastal management programs.

**Response:** NOAA appreciates the comment.

**Comment 24** (Oregon, Coastal States Organization): Section 923.82(c)(3) [now (d)(3)]

concerns changes to provisions that are not enforceable policies but that help determine whether an enforceable policy applies. Please clarify which provisions would fall under this category.

**Response:** In their program, some states include guidance documents and explanatory text for enforceable policies to help interpret and apply the policies. While such guidance or explanatory text may explain how a Federal agency or license or permit applicant may demonstrate consistency with the policies, the actual guidance or explanatory text cannot be treated as enforceable policies and cannot serve as the basis for a state's finding of inconsistency or objection.

**Changes from the Proposed Rule.** NOAA made minor wording changes to clarify program change submission types. In the preamble, NOAA further explained the incorporation of Clean Air Act and Clean Water Act provisions into management programs and that state CWA and CAA provisions cannot circumvent or supersede exemptions provided for specified military activities.

*§ 923.83 Program change materials.*

Section 923.83 describes all the program change information a state must submit to NOAA. NOAA has transformed these paragraphs into a form that will, to the greatest extent practicable, use check-boxes or "radio-buttons," and require minimal text input. While the same form will be used for all program changes, there will be less information needed for those changes that fall under § 923.82(b).

Paragraph (a)(1) is a brief general overview of the entire program change submission. Paragraph (a)(2) is a more detailed overview requiring states to briefly describe each authority or policy included in a program change. For example, if a program change submission contains

changes to two state statutes and three different state regulatory programs, then the state would briefly describe the changes in each of the two statutes and three regulations. The brief description would also describe the effect of the change on the management program, that is, the “delta” – how the management program as changed is different than the previously approved management program.

Paragraph (a)(3) requires states to indicate which of the five program approval areas the program change applies to.

Paragraph (a)(4) is the table states will fill out for each change within a state statute, regulation, or other program change authority. This is similar to the table format states previously used to fill out, but NOAA has eliminated some of the columns.

Paragraph (a)(4)(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.

Paragraph (a)(5) applies to changes to state Federal consistency lists or geographic location descriptions under 15 CFR 930.53.

Paragraph (a)(6) applies to necessary data and information under 15 CFR 930.58.

Paragraph (a)(7) requires states to indicate whether they believe that NOAA's decision criteria are met.

Paragraph (a)(8) requires states to describe any impacts related to other Federal laws. This does not require states to develop new information or to consult with Federal agencies or tribes. Rather, NOAA needs any information a state may have regarding requirements of other Federal laws.

Paragraph (a)(9) requires states to identify their websites where the public notices and program change submissions are located.

Paragraph (a)(10) requires states to provide any correspondence they have with Federal agencies regarding the program change.

Paragraph (a)(11) requires states to specify whether a program change is responding to a CZMA § 312 evaluation necessary action.

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.

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

*Comments on Proposed § 923.83.*

**Comment 25** (Hawaii, New York): NOAA should provide the states an opportunity to review and comment on the Program Change Form and website before it is finalized for use.

**Response:** The Program Change Website and web-based form that states will have to use to submit program changes once these regulations are final and will not be available for public review and comment. The website and form are directly tied to these regulations and do not contain any requirements that are in addition to these regulations. The website and form were developed by NOAA's in-house web designers and NOAA did conduct testing of the web-based form with three states (Maine, North Carolina, Oregon).

**Comment 26** (National Ocean Policy Coalition, Oregon, Coastal States Organization): We oppose, are concerned with, or have questions on proposed § 923.83(a)(3)(iii), which would have allowed use of a Regional Planning Body (RPB) process to replace the program change requirements in the regulations for notifications to Federal agencies and the public for the development of 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 an RPB's regional ocean plan, and agreed to by NOAA through the RPB process.

**Response:** NOAA has deleted § 923.83(a)(3)(iii) from the final rule, regarding

establishment of geographic location descriptions and changes to state Federal consistency lists by states as part of a regional ocean plan by an RPB. NOAA's intent was that the public process used by an RPB when developing a regional ocean plan would suffice for meeting public notice and comment for changes to state CZMA programs. However, neither the Northeast RPB nor the Mid-Atlantic RPB proposed geographic locations descriptions or changes to state Federal consistency lists and, while there was public discussion at the RPBs of the concept, there was no discussion of any proposed geographic location description. NOAA agrees that now that these two regional ocean plans are final, any further RPB or other regional process should not suffice for the CZMA's and NOAA's public participation requirements. In addition, Executive Order 13840 (Ocean Policy to Advance the Economic, Security, and Environmental Interests of the United States) revokes and replaces the 2010 ocean policy Executive Order 13547 and disbands the RPBs. States could discuss and coordinate on geographic location descriptions and other changes to a state's management program through regional discussions, but any changes to a state's management program would need to follow all requirements of 15 CFR part 923, subpart H, including public notice requirements.

**Comment 27** (New York): One of NOAA's objectives in revising the program change regulations is for the states to "indicate whether the state believes the program change would impact CZMA program approvability areas." (82 FR at 78515). Would this new analysis require a state to defend the entirety of NOAA's prior program approval(s) when just one program component is being updated?

**Response:** This is not a new requirement. The comment refers to §§ 923.83(a)(3) and 923.82(b), which is the requirement for the state to identify which of, and assess the impact to,

the five program approvability areas the program change applies to: 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). Neither the state nor NOAA assess the approvability of a state's entire program when submitting and reviewing program changes. If a program change raises an approvability issue, NOAA addresses that particular issue and not the entire management program.

**Comment 28** (New York): What standards will OCM use to determine that “enforceable mechanisms” are inadequate for making enforceable policies legally binding?

**Response:** As described in § 923.83(a)(2)(v) and in this preamble for subpart H, NOAA relies on a state's identification of the state statutes, regulations, or other state legal requirements that can be shown to compel compliance with the policy. In reviewing state program change submissions NOAA, in consultation with the state, may identify policies that are no longer supported by an enforceable mechanism, e.g., the enforceable mechanism was repealed by the state or changed in such a manner that it no longer supports the enforceable policy.

**Comment 29** (New York): Please clarify and describe how the “Coastal Effects Analysis” will be applied. Will states be able to create their own “Coastal Effects Analysis” tools, and what standards will be acceptable? For the “causal connection,” will probabilistic (Bayesian) statistics methods and tools be allowable?

**Response:** For the coastal effects analyses described in § 923.83(a)(5) and § 923.84(d), NOAA will determine whether the state has demonstrated that there will be reasonably foreseeable effects to uses or resources of a state's coastal zone for a new item on a state's

Federal consistency list or from listed activities in a proposed geographic location description. NOAA has provided the steps for states to use in making a coastal effects analysis in § 923.84(d) and states may use a variety of tools that help them address these steps. For example, there are new ocean-related data portals for the Northeast and Mid-Atlantic Regional Ocean Plans, as well as the Federal Marine Cadastre that can provide substantial information on resources, uses, and economic information, related to coastal effects analyses. At this time, NOAA is not speculating on what tools may or may not be persuasive in making a coastal effects analysis.

**Comment 30** (New York): Related to § 923.83(a)(4)(vi), after this proposed rule is adopted, how will NOAA carry out its review process for state coastal programs to identify which, if any, state coastal policies are no longer enforceable for lack of standards?

**Response:** In reviewing state program change submissions that include previously approved enforceable policies, NOAA, in consultation with the state, may identify policies submitted in a program change request that were approved many years ago, but do not contain a sufficient standard for Federal consistency. NOAA will work with the state to revise the policy or to determine that it is no longer enforceable.

**Comment 31** (Maine, Coastal States Organization): Section 923.83(a)(4)(i) raises a technical issue. Use of the citation to the pertinent public law section(s) is an accurate way to reference a proposed program change. Use of the popular name or citation to the codified law may prove confusing. The same section of codified law may be amended multiple times over the years. In Maine, not all public laws are codified. This section may be improved by asking that states not provide just public law citations but reference to the codified law as well, to the extent practicable.

**Response:**NOAA agrees with the comment and has modified § 923.83(a)(4)(i) to include state code, public law number, state regulation, and other official state formats.

**Comment 32** (Maine): Section 923.83(a)(4) requires coastal states to submit to NOAA information that it presumably already has. Accordingly, for efficiency's sake, it should be deleted.

**Response:**NOAA has determined that the only date needed for program change submissions is the date the state policy became effective in the state. NOAA has deleted the other dates, including date last approved by NOAA.

**Comment 33** (Oregon): We support creating a program change form that states would submit to ease state and NOAA paperwork burdens and promote consistent submissions and NOAA analyses.

**Response:**NOAA appreciates the comment.

**Comment 34** (Oregon): We believe providing underline/strikeout documents showing changes to previously approved policies is an unnecessary and overly burdensome requirement. There may be instances where such a technique is employed to clearly explain a program change, but this should be an available tool, not a strict requirement.

**Response:**The regulation does not contain a requirement for states to submit underline/strikeout documents. However, the preamble to the final rule does encourage states to submit underline/strikeout documents as these documents can be very useful in reviewing the changes to management programs and help expedite NOAA's review and approval.

**Changes from the Proposed Rule.** NOAA made minor wording and organization changes to § 923.83. NOAA removed from the final rule a provision, included in the proposed rule as §

923.83(a)(3)(iii), that would have allowed use of the Regional Planning Body process to replace some of the program change requirements for the development of geographic location descriptions and changes to state Federal consistency lists that describe general concurrences for minor Federal license or permit activities. NOAA made this change after considering the public comments, the current status of the Northeast and Mid-Atlantic regional ocean plans, and Executive Order 13840 (June 19, 2018 - Ocean Policy to Advance the Economic, Security, and Environmental Interests of the United States), which revokes and replaces the 2010 ocean policy Executive Order 13547 and disbands the Regional Planning Bodies. NOAA modified § 923.83(a)(4)(i) to include state code, public law number, state regulation, and other official state formats. NOAA modified § 923.83(a)(4) so that the only date a state needs to include for program change submissions is the date the state policy became effective in the state. NOAA deleted the other dates that were in the proposed rule, including date last approved by NOAA.

*§ 923.84 Program change decision criteria.*

The decision criteria in this section are taken from the previous 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 will use NOAA's program change form 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 designate a statute or regulation as an enforceable policy; however, this designation only applies to the substantive standards within the statute or regulation. Procedural requirements are not considered to be enforceable policies for CZMA review purposes.

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 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.

State review under the CZMA is contingent upon a Federal action having coastal effects. State enforceable policies must relate to the particular effects of a Federal action. NOAA will not approve proposed enforceable policies that arbitrarily discriminate against a particular type of Federal action. There must be a sufficient justification for discriminatory policies. NOAA would determine if a discriminatory policy is reasonable and also whether a prohibition of an activity would violate the national interest objectives of the CZMA.

State enforceable policies must apply equally to private and public entities, and for Federal consistency purposes states cannot apply enforceable policies differently to Federal

agencies. This is derived from requirements in the CZMA for states to “exert control over private and public land and water uses and natural resources in the coastal zone” (16 U.S.C. 1453(6a), definition of enforceable policy), and for management programs to contain “standards to guide public and private uses. . . .” (16 U.S.C. 1453(12), definition of management program).

NOAA evaluates whether a program change would adversely affect the national interests in the CZMA because states are required to consider the national interest in numerous activities and activities that have a regional or national benefit. The primary national interest requirements for program change considerations are set forth in 16 U.S.C. 1452(2)(D) and 1455(d)(8), and 15 CFR 923.52. *See above* discussion of national interest requirements under Background. If a state policy adversely affects these national interests, then NOAA will not approve the state policy as part of a state's management program.

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 and discriminate against 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. These examples have both discrimination and national interest issues. Not only is energy one of the national interests in the CZMA, but states also have to give priority consideration to energy siting and must have energy facility siting processes as part of their

management program.

In addition, NOAA will not approve a proposed enforceable policy if Federal law expressly preempts the state policy. For example, NOAA could not approve a state proposed policy that regulates the siting of onshore liquefied natural gas (LNG) terminals regulated by the Federal Energy Regulatory Commission (FERC) under the Natural Gas Act, since FERC has exclusive jurisdiction over the siting of onshore LNG terminals and states are federally preempted from regulating the siting of LNG terminals. Such a policy could not be legally binding under state law, as required by the CZMA definition of enforceable policy in CZMA section 304(6a). States can still apply enforceable policies of general applicability to address coastal effects from the siting of an LNG terminal.

Paragraph (c) codifies long-standing NOAA practice and guidance when enforceable policies previously approved by NOAA 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 that an enforceable policy is no longer legally enforceable under state law, then that policy can no longer be used for Federal consistency purposes. The same applies if a policy previously approved by NOAA is subsequently preempted by Federal law.

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. A persuasive coastal effects analysis should identify, to the extent practicable, each of the following:

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. A reasonable showing of a 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 required mitigation may be inadequate. While there may be mitigation considerations while reviewing Federal consistency list additions or geographic location descriptions, NOAA expects that the mitigation analysis would mostly be used case-by-case for state requests to review an unlisted activity under the Federal consistency regulations (15 CFR 930.54), and not for program change requests for state-Federal

consistency lists or state geographic location descriptions.

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.

*Comments on Proposed § 923.84.*

**Comment 35** (New York): Please further clarify, define and provide examples of “standards” to be used in policies. How does this new requirement comport with the definition of an “enforceable policy?” Will standards allow probabilistic (Bayesian) statistics methods and tools in cases of future uncertainties?

**Response:** NOAA is not adding a new requirement for the content of enforceable policies and will use the definition of an enforceable policy under 15 CFR 930.11(h). NOAA is not providing further specificity to the regulatory requirement that enforceable policies must be some form of a directive or other standard for compliance, but “need not establish detailed criteria such that a proponent of an activity could determine the consistency of an activity without interaction with the State agency.” 15 CFR 930.11(h). A state may propose any manner of criteria for an enforceable policy and NOAA would determine whether in the specific context a probabilistic statistic method for an enforceable policy is a sufficient standard for compliance.

**Comment 36** (Maine, Oregon, Coastal States Organization): Section 923.83(a)(8) calls on coastal states to “describe whether and how the program change will impact” the interests of federally-recognized tribes and natural and cultural resources managed under a host of Federal laws. This provision, which appears related to coastal states’ consideration of the national interest, imposes a new and potentially significant and burdensome requirement on coastal states.

We suggest that NOAA should continue to bear the burden of conducting the assessments called for by this provision if such assessments are needed. Federally-recognized tribes are the best ones to articulate whether and how a given proposed change may affect their interests. The trust responsibility for consideration of tribal interests and for compliance with consultation requirements of other Federal laws is NOAA's responsibility. Federal agencies responsible for administration of the laws referenced in this section are best positioned to provide comments to NOAA on how a proposed change may relate to those laws.

**Response:** NOAA recognizes that it has responsibility for conducting potential government-to-government consultation with tribes as well as compliance for various consultations that may be needed under other Federal statutes. Section 923.85 describes NOAA's responsibilities. However, when submitting a program change, NOAA needs the state's assessment of whether it believes any tribal or other Federal law interests are impacted given a state's local knowledge. NOAA is not asking the state to gather additional information or to reach out to tribes or to initiate and consult under other Federal statutes. Rather, NOAA is merely asking for information that a state may have for these consultation processes.

**Comment 37** (California, Coastal States Organization, Maine): The commenters assert that, under § 923.84(b)(5), Federal preemption should not apply to state CZMA enforceable policies, because the state policies are implemented through a Federal statute, the CZMA. Further, they comment that NOAA should not make a determination of whether an enforceable policy is federally preempted and, therefore, not approvable. Rather, the determination should be made by state attorneys general or the courts. In making these comments, the commenters assert that NOAA's application of the Federal preemption doctrine to the definition of enforceable

policy in CZMA section 304(6a) is incorrect.

**Response:** Federal preemption of state law arises from the Supreme Court's interpretation of the Supremacy Clause which states that the “Constitution, and the Laws of the United States . . . shall be the supreme Law of the land.” U.S. Const., Art. VI, cl. 2. There are two main types of Federal preemption, both of which result in the invalidation of state law: express preemption and implied preemption. Express preemption occurs when a Federal law explicitly conveys Congress’ intent to preempt state law or regulation. Implied preemption occurs when a state law conflicts with a Federal law, or Congress intends to “occupy the field” in a particular area of law. If a Federal law preempts a state policy, the policy is not legally binding under state law and shall not be an enforceable policy under 16 U.S.C. 1453(6a). NOAA will not approve for incorporation into a state’s management program a state policy that is expressly preempted by Federal law. NOAA also recognizes that situations may arise in which an approved enforceable policy is not expressly preempted by Federal law, but could be impliedly preempted by Federal law. In such situations, NOAA encourages states to coordinate with the applicable Federal agency to determine whether Federal law preempts application of the state’s enforceable policy.

Even though states review Federal actions under the CZMA Federal consistency authority (a Federal law requirement), the states apply their CZMA enforceable policies, which are based on state law, to review Federal actions. NOAA does not believe that the CZMA Federal consistency authority or NOAA’s approval of state enforceable policies for incorporation into state management programs, removes the application of Federal preemption to the state enforceable policies. The application of the Federal preemption doctrine to the CZMA and state enforceable policies as described in the proposed rule and in this final rule is NOAA’s long-

standing position and does not represent a change in NOAA's view or how NOAA would review state CZMA program changes under the revised regulations. NOAA believes that its application of Federal preemption to state CZMA enforceable policies is required by the definition of "enforceable policy" in CZMA section 304(6a) (must be legally binding under state law).

The Federal preemption doctrine results in the invalidation of state law, not Federal law. Therefore, even if a Federal law preempts a state's enforceable policy, CZMA Federal consistency review still applies to Federal actions. For example, under the CZMA Federal consistency authority, states have routinely reviewed Federal actions that are regulated by a Federal law that preempts certain state law, such as: onshore liquefied natural gas terminals or oil and gas pipelines regulated by the Federal Energy Regulatory Commission (FERC) under the Natural Gas Act; hydroelectric facilities regulated by FERC under the Federal Power Act; abandonment of railway lines regulated by the Surface Transportation Board under the Revised Interstate Commerce Act; and impacts to marine mammals regulated by NOAA's National Marine Fisheries Service under the Marine Mammal Protection Act. In such instances, states conduct CZMA Federal consistency reviews by applying their enforceable policies of general applicability to address coastal effects of the proposed Federal actions.

NOAA has removed the phrase "on its face," from § 923.84(b)(5) as this term could be misinterpreted and is not needed when discussing Federal preemption.

**Comment 38** (Maine, Coastal States Organization): Section 923.84(d)(6) is problematic and raises concerns about how it may be interpreted and applied to frustrate coastal states' efforts to address the potential effects of ocean-based activities on coastal resources. In order to secure jurisdiction to review an extra-territorial or unlisted activity or establish a "geographic location

description” (GLD) under NOAA’s rules, a coastal state need only show that a coastal effect is “reasonably foreseeable.” As this term is typically used that refers to a level of knowledge or information that an average person may have based on experience. The basic problem with this provision is that, as applied, it may put the cart well before the horse by asking coastal states to prove too much, too soon. This provision appears to require a coastal state to make a significant factual showing establishing a direct causal link between such activities and foreseeable effect(s) simply in order to secure jurisdiction to review such activities for consistency with its enforceable policies. As a consequence, it has the potential to inappropriately shift the burden of coming forward with information regarding coastal effects to coastal states as opposed to Federal agencies or Federal applicants. Whereas subparts (1)-(4) call for factual information that may be reasonably available to a coastal state, subparts (5) and (6) in effect state core issues which a coastal state may want to examine in detail in light of the factual information called for by subparts (1-4).

**Response:** NOAA disagrees with the comment. Paragraphs 5 (impacts from the activity) and 6 (causal connection to coastal effects) have always been essential to NOAA’s analysis when reviewing a change to a state’s list of Federal license or permit activities for Federal consistency review and state requests to add a geographic location description outside a state’s coastal zone for Federal consistency purposes. (In addition, while not related to this rulemaking these have also been essential to NOAA review of state requests to review unlisted activities under the Federal consistency regulations at 15 CFR 930.54.) Paragraphs 5 and 6 explain how a state makes the “reasonably foreseeable effects” argument. Paragraphs 1-4 and 8 have been developed to assist states in better understanding how to show effects under paragraphs 5 and 6, especially

by using new geospatial tools such as the data portals for the Northeast and Mid-Atlantic Regional Ocean Plans and the Marine Cadastre developed by the Bureau of Ocean Energy Management (BOEM) and NOAA. In addition, while states should address all of the paragraphs 1-8 to make the most persuasive effects argument, the precursor language to paragraphs 1-8 includes the phrase “to the extent practicable,” and NOAA has added to paragraph 6 the phrase “A reasonable showing of a causal connection . . . .”

**Comment 39** (Maine, Coastal States Organization): Section 923.84(d)(7) would authorize NOAA to reject a coastal state’s attempt to assert Federal consistency review authority through establishment of a geographic location description or a change in its list of Federal license and permit actions subject to consistency review based on NOAA’s assessment of whether mitigation that may be proposed in the future would effectively eliminate the “coastal effect” necessary for such extensions of state review authority. This provision is problematic. Mitigation proposed to ameliorate adverse effects of a development or other activity cannot reliably be known or presumed until an actual proposal, such as a Federal permit application, has been filed. Accordingly, it is not clear how NOAA could conclude that mitigation which has not actually been proposed may eliminate a coastal effect. The question of whether and how the proposed mitigation may ameliorate the effect is best examined following detailed review of the proposed action and based on the understanding of project-specific effects that must be mitigated.

**Response:** NOAA believes that mitigation information may be relevant to determining reasonably foreseeable coastal effects. When mitigation is included as part of the programmatic requirements for a Federal activity a state is requesting to add to its Federal consistency list or a

geographic location description, the mitigation measures may be relevant in determining effects. NOAA understands that additional mitigation measures may ultimately be required for a project beyond those proposed and that these cannot be considered in determining effects if they are unknown at the time of NOAA's review.

NOAA agrees with the comment, in part, related to changes to state Federal consistency lists and state geographic location description proposals. NOAA has added language to the preamble description of paragraph 7 explaining that NOAA expects that the mitigation analysis would be used mostly for state case-by-case requests to review an unlisted activity, but still may be relevant for additions to state Federal consistency lists or state geographic location descriptions.

**Comment 40** (Oregon): We are concerned with the last sentence of section 923.84(c) (Effect of Prior Program Change Approvals) regarding a previously approved enforceable policy that may become unenforceable if subsequent Federal law preempts state regulation of a particular activity. We are concerned with situations where a state has regulated an activity based on similar coastal effects. It is not clear how that would interplay with the "particular activity" preemption.

**Response:** This sentence has been revised to clarify that a previously approved enforceable policy will no longer be legally enforceable under state law if subsequent Federal law preempts the state policy. For example, if a state policy that NOAA previously approved as part of the state's management program has text that determines where someone can "site liquefied natural gas (LNG) terminals," that requirement would no longer be enforceable for CZMA purposes as states are federally preempted from siting LNG terminals, because the

Energy Policy Act of 2005 amended the Natural Gas Act to give FERC exclusive authority for the siting of LNG terminals. States would still review applications to FERC for LNG terminals under the CZMA Federal consistency provision and apply its relevant enforceable policies that address coastal effects.

**Comment 41** (Oregon): It would be helpful if NOAA identified what criteria were not met when they do not approve a portion of a plan or statute as enforceable.

**Response:** The criteria NOAA uses to approve or not to approve an enforceable policy are discussed in this preamble and are contained in 15 CFR 930.11(h) and 15 CFR 923.84(b) and (c).

**Comment 42** (Oregon): Regarding NOAA's decision criteria, we believe that the only applicable criteria are first, the program continues to meet the standards set forth in CZMA § 306(d), and second, the revised program does not place an unacceptable burden on a Federal agency operating in the coastal zone. Absent either of those circumstances, NOAA should approve any change to a coastal program.

**Response:** NOAA decision criteria must include the program approval standards in 16 U.S.C. 1455(d) and in corresponding program approval regulations in 15 CFR part 923, the program change requirements in 16 U.S.C. 1455(e), and criteria established for determining enforceable policies under 16 U.S.C. 1453(6a), 15 CFR 930.11(h), and as further described in 15 CFR part 923, subpart H. These criteria have been part of NOAA regulations and guidance for decades. NOAA is not making substantial changes to program change decision criteria in this final rule.

**Changes from the Proposed Rule.** NOAA modified the preamble language to further clarify

how the Federal preemption doctrine applies to the CZMA. NOAA removed the phrase “on its face,” from § 923.84(b)(5) as this term could be misinterpreted and is not needed when discussing Federal preemption. NOAA revised § 923.84(c) to clarify that a previously approved enforceable policy will no longer be legally enforceable under state law if subsequent Federal law preempts the state policy. NOAA added to § 923.84(d)(6) the phrase “A reasonable showing of a causal connection to the proposed activity . . . .” This further emphasizes that the information described in § 923.84(d) does not require states to provide absolute proof of coastal effects, but to provide information to the “extent practicable” that supports a reasonable causal connection of coastal effects to the proposed activity.

*§ 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 and also coordination with federally-recognized Indian Tribes. A “federally-recognized Indian Tribe” is an Indian or Alaska Native Tribe, Band, Nation, Pueblo, Village, or Community that the Secretary of the Interior acknowledges to exist as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act. *See* 82 FR 4915 (Jan. 17, 2017).

NOAA’s action in approving a program change may require NOAA to coordinate with tribes or with other Federal agencies to determine if NOAA needs to consult under other Federal statutes. In some circumstances NOAA may need to conduct government-to-government consultation with tribes pursuant to applicable executive orders and Federal case law.

However, 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. 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.

The CZMA is a voluntary program and if a state chooses to participate it develops a management program unique to its state, based on state laws and policies pursuant to general program requirements in the CZMA and NOAA's regulations. As such, the national coastal zone management program is not a federally delegated program and if a state chooses not to participate NOAA does not implement a coastal management program in the state. 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 section 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.

**Changes from the Proposed Rule.** NOAA made minor wording changes to § 923.85.

## **V. 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 section 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 provide a mechanism for states 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 final rule is not significant for purposes of Executive Order 12866.

#### Regulatory Flexibility Act

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received that would change the certification that this action will not have a significant economic impact on a substantial number of small entities regarding this certification. As a result, a final regulatory flexibility analysis and not required and none was prepared. Paperwork Reduction Act

This 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 action does not have the potential to pose significant impacts on the quality of the human environment. Further, NOAA has concluded that this final rule would not result in any changes to the human environment and that no extraordinary circumstances exist. Therefore, NOAA has concluded that this rulemaking does not have a significant impact on the human environment and is categorically excluded from the need to prepare an environmental impact statement pursuant to the requirements of NEPA in accordance with NAO 216-6A, Categorical Exclusion G7: Preparation of policy directives, rules, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature, or for which the environmental effects are too broad, speculative or conjectural to lend themselves to meaningful analysis and will be subject later to the NEPA process, either collectively or on a case-by-case basis. *See also* the description above on NEPA compliance for program changes.

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

Administrative practice and procedure, Coastal zone, Reporting and record keeping requirements.

Nicole R. LeBoeuf

Acting Assistant Administrator

for Ocean Services and Coastal Zone Management

National Oceanic and Atmospheric Administration

For the reasons stated in the preamble, 15 CFR part 923 is amended 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 approved changes.
923.82	Program change submissions.
923.83	Program change materials.
923.84	Program change decision criteria.
923.85	Procedural requirements of other Federal law.

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

#### **§ 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) Pursuant to section 306(e)(1) of the Act and § 923.135, 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.

**§ 923.81 Program change procedures, deadlines, public notice and comment, and application of approved changes.**

(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 Website, <http://coast.noaa.gov/czmprogramchange>.

(i) If a state is not able to electronically send all or part of a program change to NOAA through NOAA's Program Change Website, the state and NOAA shall agree to an alternative

method (e.g., email, electronic CD, or a state website). In such instances, NOAA will, to the extent practicable, post the program change to NOAA's Program Change Website.

(ii) [Reserved]

(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, except for the last day (e.g., Day 30 or Day 120). The day that NOAA's decision is due shall also end on a full business day. For example, if Day 30 is a Saturday, then NOAA's decision will be due the next Monday, or if Monday is a Federal holiday, on Tuesday. A state may request that NOAA's review period begin on a specified date following receipt by NOAA.

(b) Within 5 days of receipt of a program change submission, 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 within 10 days of receipt of a program change submission 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's program change review period shall start on Day 1 pursuant to paragraph (a)(2) of this section, unless NOAA determines the submission is incomplete pursuant to

paragraph (b) of this section. NOAA shall respond to the state (via email or letter) within 30 calendar days after the date NOAA receives a program change. NOAA's approval is presumed if NOAA does not respond or extend its review period within the 30-day period. 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) 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)(1) A state shall post a public notice of its program change on the state's management program website 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 website, affected local governments and state agencies, and to individuals requesting direct notice. 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 website and notifying the

parties described above, states may, but are not required to, publish the notice in any state bulletin or newspaper. The timing of the state's public notice. States will draft a public notice of a submission, which shall be included as part of the contents of the program change submission form. When NOAA posts the program change submission on its Program Change Website, NOAA will notify the state management program via email. The state will then post its public notice on the state webpage providing a link to the submission on NOAA's Program Change Website. The state shall send the public notice and link to the state and local agencies, Federal agency contacts, and others who have requested the state's public notice. Day 1 for NOAA review purposes will be the first business day after the state submits to NOAA the program change request. However, the 21-day comment period shall not start until the state posts its public notice on the state webpage. If a state fails to post its public notice, then NOAA may either determine the program change submission is not complete and the review period has not started or deny the program change request.

(2) A state's public notice shall:

- (i) Describe the changes to the management program;
- (ii) If applicable, identify any new, modified or deleted enforceable policies of the management program;
- (iii) Indicate that any comments on the incorporation of the program change into the state's management program shall be submitted to NOAA through NOAA's Program Change Website within 21 calendar days of the date of the state's public notice; and

(3) NOAA shall post all program changes on its Program Change Website where any interested party may review or download materials. NOAA shall also post on its Program

Change Website deadlines, extensions and any comments received. For each program change posted on NOAA's website, NOAA shall notify the Federal agency CZMA headquarter contacts (identified on NOAA's Federal consistency website) via email. In addition, any party may request through the Program Change Website 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, through NOAA's Program Change Website, submit comments to NOAA on a state's request to incorporate a program change into the state's management program within 21 calendar days from the date of the state's public notice. NOAA shall only consider public and Federal agency comments for program change requests that are pending for a NOAA decision; no comments shall be accepted or considered for program changes once NOAA issues its decision. If a state, during or after the public comment period, submits directly to NOAA a response to a comment before NOAA issues a decision, NOAA shall consider the state's response and post the state's response on the Program Change Website.

(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 Website 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 website.

(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. 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 Website. Changes to a state's management program and enforceable policies shall apply for Federal consistency purposes to Federal actions proposed on or after the date NOAA approves the changes. Approved program changes shall not apply retroactively to state Federal consistency reviews under 15 CFR part 930 initiated prior to the date NOAA approved the changes, except as allowed by part 930 (e.g., a 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 section 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 Website.

(b) All state program changes shall identify the program approval area(s) that apply to the program change. The five program approval areas are: 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).

(c) Program changes that are editorial, non-substantive, or minor in scope. The types of program changes in paragraphs (c)(1) through (4) of this section shall be approved by NOAA and need less review 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, special area management plans, and other authorities;

(2) Changes that do not change a state's coastal zone boundary or geographic location description(s), 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 under paragraph (d) of this section to ensure they satisfy the decision criteria.

(d) Any program change that is not described in paragraph (c) 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;

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

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

(e) 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. States shall use the Program Change Website Form and Table to provide the following.

(1) A brief general overview 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). The general overview description shall identify the law, regulation, policy, or other type of program provision contained in the program change submission.

(2) A brief summary of the changes of each authority or policy identified in paragraph (a)(1) of this section, and how the management program as changed is different than the previously approved management program.

(3) Indicate which of one or more of the five management program approval areas under this part apply to the program change:

- (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).

(4) States shall use the Program Change Table provided by NOAA through the Program Change Website to provide:

- (i) The State legal citation for the policy (state code, public law number, state regulation, other official state format);
- (ii) The title of the policy, section, or other descriptor;
- (iii) Whether the change or policy is new, revised, or deleted;
- (iv) The date the change was effective in the state;
- (v) Identification of each enforceable policy submitted as part of the program change; and
- (vi) The state enforceable mechanism citation 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.

(5) 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)).

(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 (§ 923.84(d)).

(6) 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.

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

(8) The state shall describe whether and how the program change will impact the following:

- (i) Resources or interests of any federally-recognized Indian Tribe.
- (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); and
- (v) Marine mammals managed under the Marine Mammal Protection Act (MMPA).

(9) The state shall identify the state's website 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.

(10) 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.

(11) 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.

(b) [Reserved]

**§ 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 section 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 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, 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 shall still need to apply only the substantive standards within the statute or regulation as enforceable policies for CZMA Federal consistency reviews. Procedural requirements are not considered to be enforceable policies for CZMA review purposes.

(ii) [Reserved]

(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 be preempted by Federal law. If a state policy 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 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; and

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

(c) If enforceable policies previously approved by NOAA become obsolete or unenforceable 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 substantially 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 will no longer be legally enforceable under state law if subsequent Federal law preempts the state policy.

(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. States should be specific in showing the 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) A reasonable showing of a 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 required 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.**

NOAA shall determine on a case-by-case basis whether each program change requires NOAA to take additional actions under any other Federal requirements.

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

(b) 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.

(c) 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:

(1) 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

(2) 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.