

CALIFORNIA COASTAL COMMISSION

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original staff report

F7a

Correspondence

**Proposed Changes to the California Coastal Management Program
(CCMP) List of Federal Licenses and Permits Subject to Federal
Consistency Review**

Attached are federal agency and interested party comment letters



October 7, 2014

Charles Lester, Executive Director
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

Re: Comments on Proposed Changes to the California Coastal Management Program (CCMP) List of Federal Licenses and Permits Subject to Federal Consistency Review

Dear Mr. Lester and Members of the Commission:

Thank you for the opportunity to comment on the proposed changes to the CCMP List of Federal Licenses and Permits Subject to Federal Consistency Review, currently calendared for the October 2014 meeting of the California Coastal Commission (Agenda Item F7a). The Center supports the Commission's proposed amendments to its CCMP List that would provide for consistency review of certain federal actions that allow the killing and harming of imperiled marine life. However, the Center for Biological Diversity ("Center") believes that the CCMP List should be further amended to ensure the protection of marine protected species. Specifically, the List ought to include:

- exempted fishing permits, fishery plans, and plan amendments authorized by the National Marine Fisheries Service ("NMFS") under the Magnuson-Stevens Fishery Conservation and Management Act;
- federally permitted activities triggering consultation and resulting in incidental take authorization for species that occur in the coastal zone under section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2), (b); and
- incidental take authorizations issued by NMFS under the Marine Mammal Protection Act ("MMPA") section 101(a)(5)(E).

Background

Vulnerable marine mammals and endangered marine life in California's coastal zone deserve special consideration by the Coastal Commission even when the activities affecting the marine mammals and endangered species are outside the coastal zone. At a minimum, sections 30230, 30240, 30220 and 30234.5 of the Coastal Act speak to protecting these resources. Section 30230 of the Coastal Act provides:

Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall

be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

Similarly, section 30240 provides:

(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.

Numerous marine resources and “species of special biological or economic significance” and “environmentally sensitive habitat values” protected by the Coastal Act may be threatened by fishing permits and plans, ESA incidental take statements and MMPA incidental take authorizations for commercial fishing.

1. Fishing Permits, Plans and Plan Amendments

The Center requests that the Commission amend its list to add the following to the National Marine Fisheries Service category: c. exempted fishing permits, fishery plans, and plan amendments authorized under the Magnuson–Stevens Fishery Conservation and Management Act.

Endangered leatherback sea turtles, loggerhead sea turtles, and sperm whales are but a few of the most vulnerable species taken incidentally in commercial fisheries off of California. Fisheries that interact with species that occur in the coastal zone should seek consistency review.

Importantly, exempted fishing permits must receive scrutiny for consistency with the coastal management plan. Interactions between endangered species and the California drift gillnet fishery caused the Pacific Fisheries Management Council this year to solicit application for exempted fishing permits to help find more selective alternative fishing gear. Because of the potential for fisheries to interact with these species and others like the short-tailed albatross that depend on highly productive foraging waters off California, the Coastal Commission should add exempted fishing permits to the CCMP list.

2. Incidental Take Statements

The Center supports the Commission’s proposed amendment to its CCMP List that would add licenses and permits issued by the U.S. Fish and Wildlife Service (“FWS”) to authorize the take of threatened and endangered species under the Endangered Species Act (“ESA”), 16 U.S.C. § 1531, *et seq.* The Commission should make it clear that section 10 permits issued by National Marine Fisheries Service are also included on the list. Additionally, the Center further requests that the Commission also include actions that trigger take authorizations issued pursuant to Section 7 of the ESA, *id.* § 1536(a)(2), (b), not just those issued pursuant to Section 10, *id.* § 1539.

The Center requests that the Commission amend its list to add the following to Fish and Wildlife Service and National Marine Fisheries Service's list: b. federally permitted activities triggering consultation and resulting in incidental take authorization for species that occur in the coastal zone under section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2), (b).

The requirements of Section 7 of the ESA – under which biological opinions and the accompanying incidental take statements are issued – are triggered only where there is a federal action that may affect ESA-listed species. *See id.* § 1536(a)(2). However, where the triggering federal action is FWS and/or NMFS review and approval of non-federal activities, the take authorization provided by the incidental take statement often applies to the non-federal entities. In such situations, it is not necessary for the non-federal entity to also obtain a Section 10 permit. *See Ramsey v. Kantor*, 96 F.3d 434, 440-42 (9th Cir. 1996). Adding actions that result in incidental take statements issued under Section 7 of the ESA to the CCMP List would therefore ensure that the Commission evaluates the full extent of federal activities that affect the coastal zone, and ensure that federal actions that allow the killing, injuring, harming, or harassment of California's imperiled marine life receive proper scrutiny under the CZMA. *See* 16 U.S.C. § 1532(19) (defining take).

3. Incidental Take Authorizations Required for Commercial Fisheries

Finally, the Center requests that the Commission amend its list to add the following to the National Marine Fisheries Service category: d. incidental take authorizations under the Marine Mammal Protection Act ("MMPA") section 101(a)(5)(E)

The Coastal Commission should review NMFS's authorizations of incidental take of marine mammals in commercial fisheries. Currently NMFS is proposing to amend an authorization to entangle and kill endangered fin, humpback and sperm whales in the California drift gillnet fishery and the Washington/Oregon/California (WA/OR/CA) sablefish pot fishery.¹ These large whales depend on state and federal waters for habitat and interact with state and federal fisheries. Because of the impact to California coastal resources, specifically large, migratory endangered whales, we urge these authorizations to be added to the CCMP List.

Conclusion

Thank you for consideration of these comments. We look forward to the hearing.

Sincerely,



Catherine W. Kilduff, M.S., J.D.
Staff Attorney, ckilduff@biologicaldiversity.org

¹ 79 Fed. Reg. 50626 (Aug. 25, 2014).



In reply refer to:
FWS/R8/ES

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Pacific Southwest Region
2800 Cottage Way, Suite W-2606
Sacramento, CA 95825



SEP 26 2014

Charles Lester, Executive Director
California Coastal Commission
45 Fremont, Suite 2000
San Francisco, CA 94105

Re: Notice of Intent, Proposed Amendments to the Listed Federal Permits Subject to Federal consistency Review in the California Coastal Management Program

Dear Mr. Lester,

Thank you for the opportunity to provide input on your proposed amendment to the Federal Permits consistency review program. We welcome the opportunity to work with the California Coastal Commission (Commission), however; we have some questions and concerns with what is proposed.

Habitat Conservation Plans and Safe Harbor Agreements (Section 10 plans) are important tools that further the mission of the Fish and Wildlife Service (Service). The mission of the Service is: "working with others to conserve, protect and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people." The development of Section 10 plans is a negotiated process working with non-federal landowners to balance the conservation needs of sensitive fish and wildlife species (and their habitats) with developmental interests. Non-federal entities rely heavily on Section 10 plans to resolve conservation issues and allow their communities to grow and economic growth to occur.

If the Commission amends the Federal Permits consistency review program as is proposed, we request the Commission provide more clarity on when and how the consistency review would occur. The development of Section 10 plans can be a long and complicated process with many steps that must occur at specific times that are often driven by applicant deadlines. The addition of the proposed requirement with an undefined process to reach a consistency determination could adversely affect the timeline of which Section 10 plans are being developed and could serve as a disincentive to the development of these plans.

If the Commission amends the Federal Permits consistency review program as is proposed, we request the Commission restrict its review and regulatory oversight to only those areas that fall within the Coastal Management Zone, as opposed to an entire plan area. This should simplify review and we feel meets the intent of the Coastal Zone Management Act.

An agency with 'veto' power over Section 10 plan adequacy is of concern to the Service. We ask

that the Commission develop standards that are advertised to all affected parties to make clear ahead of time to determine adequacy. We also ask that the Commission identify a resolution process to bring a plan to adequacy of Commission standards.

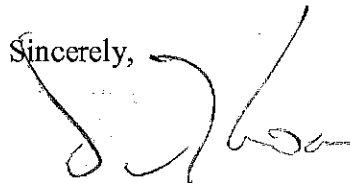
In looking at the list of approved California Coastal Management Program (CCMP) permits, the actions of those federal agencies issuing permits is significantly different than the actions of the Service associated with Section 10 plans. Section 10 plans are conservation plans, developed to achieve conservation of species and the habitat upon which they rely, which is consistent with the goals of the Commission. Additionally, the list of approved CCMP permits are primarily for federal landowners; Section 10 plans take place on non-federal lands for non-federal activities.

We urge the Commission to reconsider the proposed amendment to the Federal Permits consistency review program, and ask that the Commission consider alternative means to achieve the goals of collaboration in addressing Commission concerns in the development of Section 10 plans. We offer three alternatives for consideration to meet Commission needs.

1. The existing process to develop Section 10 plans has numerous opportunities for the Commission to engage and provide input, including two basic areas:
 - a. Involvement as a stakeholder during development of the plans to help shape them to achieve Commission needs. Medium to large sized plans engage stakeholders during their development to ensure stakeholder needs are met. Engagement of stakeholders is a crucial part of ensuring plans 'work' for the local community.
 - b. Provide public comments during official public comment periods. Public comments are a valuable part of Section 10 plan development and substantive comments and suggestions for change are incorporated into plans.
2. The Service works extensively with California Department of Fish and Wildlife (CDFW) throughout development of these plans; we recommend the Commission work with CDFW to use this agency as an 'agent' to represent Commission concerns during the HCP development process.
3. Can the Commission identify standards ahead of the development of any Section 10 plan that should be followed? For example: development of type x, needs to be set back ___ feet from sand dunes. Early understanding of Commission needs could be exceedingly useful in addressing them.

Thanks again for the opportunity to provide input on your proposed amendment to the Federal Permits consistency review program. If you have any questions or need more information, please contact Dan Cox, Section 10 Coordinator, at (916) 414-6539.

Sincerely,



Acting Assistant Regional Director



SURFACE TRANSPORTATION BOARD

Washington, DC 20423

Office of Environmental Analysis

July 14, 2014

Mark Delaplaine, Manager
Ocean Resources and Federal Consistency Division
California Coastal Commission
45 Fremont, Suite 2000
San Francisco, CA 94105-2219

RECEIVED

JUL 23 2014

CALIFORNIA
COASTAL COMMISSION

Re: Proposed Amendments to the List of Federal Permits Subject to Federal Consistency Review in the California Coastal Management Program

Dear Mr. Delaplaine:

Thank you for your June 17, 2014 letter informing me of your intent to amend the California Coastal Management Program's permit list (CCMP Permit List) to add authorizations for certain matters under the Surface Transportation Board's (Board) jurisdiction. As you know, the Board has significant responsibility to oversee rail restructuring transactions. This responsibility includes mergers and acquisitions, line sales, line constructions, and line abandonments. The Board's Office of Environmental Analysis (OEA) is responsible for conducting the environmental review process to ensure compliance with the National Environmental Policy Act (NEPA) and related environmental laws as part of the Board's licensing process.

OEA would be happy to work with your office in the future. We are assuming that when you refer to 49 U.S.C. §§ 10502, 10903 of our regulations in the list of Board authorizations in your letter, you mean constructions and abandonments. At this time, we have no additional comments on your notice of intent to amend the CCMP Permit List.

Again, thank you very much for your letter. If you have any questions or would like to discuss this matter further, please do not hesitate to call me at 202-245-0295 or Danielle Gosselin of my staff at 202-245-0300.

Sincerely,

Victoria Rutson
Director

Office of Environmental Analysis



United States Department of the Interior
BUREAU OF LAND MANAGEMENT

California State Office
2800 Cottage Way, Suite W1623
Sacramento, CA 95825
www.blm.gov/ca



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In Reply Refer To:
9105 (CA930)P

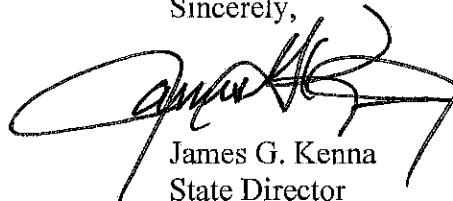
Mr. Charles Lester
Executive Director
State of California-Natural Resources Agency
California Coastal Commission
San Francisco CA 94105

Dear Mr. Lester:

The Bureau of Land Management, California, appreciates the opportunity to comment on the California Coastal Commission's proposed amendments to the list of federal permits subject to review by the Commission. Your proposal to add renewable energy projects to the list of projects requiring licenses or permits that you would review seems reasonable and is acceptable to the Bureau of Land Management.

In the event that the Bureau of Land Management receives applications for renewable energy projects in the coastal zone, we would look forward to working with the Commission to fully analyze and consider all important issues. Again, thank you for the opportunity to comment on your proposed amendments.

Sincerely,



James G. Kenna
State Director



United States Department of the Interior

BUREAU OF OCEAN ENERGY MANAGEMENT

Pacific OCS Region
770 Paseo Camarillo, 2nd Floor
Camarillo, CA 93010-6064

JUL 22 2014

Mr. Charles Lester
California Coastal Commission
45 Fremont, Suite 2000
San Francisco, CA 94105-2219

Re: Proposed Amendments to the California Coastal Management Plan

Dear Mr. Lester:

Thank you for the opportunity to review the proposed amendments to the List of Federal Permits Subject to Federal Consistency Review in the California Coastal Management Plan. The Bureau of Ocean Energy Management (BOEM) provided comments on draft changes at an earlier stage in the process and requested clarification on one section; the clarification was addressed by Mr. Mark Delaplaine on July 17, 2014. The amendments as proposed make the necessary adjustments due to federal agency changes over the years and incorporate renewable energy appropriately. We have no further comments.

If any questions arise regarding BOEM approval authorities, please call Ms. Joan Barminski at (805) 389-7509 or email her at joan.barminski@boem.gov.

Sincerely,

Ellen G. Aronson
Regional Director
Pacific OCS Region

cc: Jaron Ming, BSEE Pacific Regional Director
James Kenna, BLM State Director



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
West Coast Region
7600 Sand Point Way N.E.
Seattle, Washington 98115

September 18, 2014

Charles Lester
Executive Director
California Coastal Commission
45 Fremont, Suite 2000
San Francisco, CA 94105-2219

Dear Mr. Lester:

This letter provides the National Marine Fisheries Service's (NMFS) comments on the California Coastal Commission's (Commission's) intent, expressed in its July 7, 2014, letter, to propose that the following NMFS permits and authorizations be added to the California Coastal Management Program Permit List pursuant to 15 C.F.R. § 930.53:

- a. Incidental Harassment Authorizations and Letters of Authorization required under the Marine Mammal Protection Act (MMPA) of 1972, as amended, §§ 101(a)(5)(A) and (D) (16 U.S.C. § 1361 et seq.), and associated authorizations pursuant to the Endangered Species Act of 1973 (ESA), as amended, § 10(a)(1)(B) (16 U.S.C. § 1539(a)(1)(B) – incidental take permits).
- b. Exempted Fishing Permits required under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), as amended (Public Law 94-265 (550 C.F.R. § 600.745(b))).

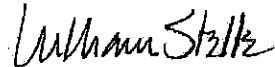
NMFS believes it is appropriate to add the MMPA permits and any associated ESA § 10 authorizations to the state of California's Permit List for Coastal Zone Management Act federal consistency for activities proposed within California's coastal zone.

With regard to adding the Exempted Fishing Permits to the Permit List, the MSA does not provide federal authority for NMFS to regulate fisheries in state waters. If the Commission believes there are Exempted Fishing Permits with reasonably foreseeable coastal effects outside of the coastal zone, 15 C.F.R. § 930.53(a)(1) provides that the Commission must generally describe the geographic location of such activities. Since no such description is provided at this time, NMFS recommends that the Commission not propose adding Exempted Fishing Permits to its Permit List at this time.



MMPA permits and authorizations are issued out of the NMFS headquarters Office of Protected Resources in Silver Spring, MD. Jolie Harrison, (301) 427-8401, is the branch chief and your point of contact for MMPA coordination. For matters regarding Exempted Fishing Permits, please contact Bob Turner, Assistant Regional Administrator for Sustainable Fisheries, NMFS West Coast Region, at (360) 753-5825. I look forward to our continued collaboration.

Sincerely,



William W. Stelle, Jr.
Regional Administrator

cc: NOAA/NOS/OCRM: David Kaiser, Kerry Kehoe
NOAA/NMFS/Office of Protected Resources: Donna Wieting
Administrative File: 10012WCR2014PR00162



U.S. Department
of Transportation
**Federal Highway
Administration**

Office of the Administrator

1200 New Jersey Ave., SE
Washington, D.C. 20590

August 29, 2014

In Reply Refer To:
HEPE

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SEP 08 2014
CALIFORNIA
COASTAL COMMISSION

Mr. Charles Lester
Executive Director
California Coastal Commission
45 Fremont
San Francisco, CA 94105-2219

Dear Mr. Lester:

Thank you for your letter regarding a Notice of Intent to add Federal Highway Administration (FHWA) Final Interstate Access Approvals to your California Coastal Management Program (CCMP) list.

This letter confirms that FHWA does not object to adding our final approval of an Interstate access change to the CCMP Permit List for projects located wholly or partially within the California coastal zone. The approval process after the listing will be consistent with our current practice. Typically, we approve Interstate access changes in two stages: (1) a *conditional* or *conceptual* approval of the proposed design of the new ramps from an engineering and traffic safety standpoint, contingent on (2) completion of the National Environmental Policy Act review. Only after both stages are complete can FHWA give *final* approval to the request. For projects in the California coastal zone covered by the CCMP, we will ensure final approvals are issued only after both stages are complete and a consistency determination is in place.

Our California Division Administrator, Mr. Vincent P. Mammano, and his staff will work with the California Department of Transportation and the California Coastal Commission to ensure compliance with the Notice of Intent. Please feel free to contact Mr. Mammano directly at 916-498-5015 to discuss the transition to compliance.

If I can provide further information or assistance, please feel free to call me.

Sincerely,

Gregory G. Nadeau
Acting Administrator



Via Hand Delivery and First Class Mail

October 8, 2014

California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219
Phone: (415) 904-5200
Fax: (415) 904-5400

Re: Proposed Changes to the California Coastal Management Program List of Federal Licenses and Permits Subject to Federal Consistency Review; Agenda Item 7(a) on October 10, 2014

Dear Commissioners:

I am writing on behalf of the Center for Biological Diversity (the "Center") to request that the California Coastal Commission (the "Commission") take additional action to ensure that hydraulic fracturing ("fracking") and other unconventional well stimulation techniques used in offshore oil and gas operations receive proper scrutiny under the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1451, *et seq.*

The Center applauds the Commission for asking the Bureau of Ocean Energy Management and the Bureau of Safety and Environmental Enforcement for information on instances in which the agency authorized fracking and other well stimulation techniques on the Outer Continental Shelf ("OCS"), and for urging the Bureaus to process applications to engage in such activities in a way that would ensure additional review under the CZMA and other relevant laws. But the Bureaus have not done so, and additional action on the part of the Commission is needed.

Specifically, the Center requests that the Commission amend the California Coastal Management Program Federal License and Permit List ("CMP List") to include applications for permits to drill and other applications for licenses or permits to engage in oil and gas extraction activities not described in detail in an exploration, drilling, or development plan, including fracking and other unconventional well stimulation techniques. Such action is necessary to safeguard California's beaches, air, water, and marine life from the myriad of threats posed by fracking, and ensure the continued health of our coastal ecosystem.

The Coastal Zone Management Act and Consistency Determinations

Enacted in 1972, the CZMA seeks "to protect and to give high priority to natural systems in the coastal zone" and thereby prevent "[i]mportant ecological, cultural, historic, and esthetic values in the coastal zone...[from] being irretrievably damaged or lost." 16 U.S.C. § 1451(e),

(h). To reach these goals, the CZMA enhances the ability of coastal states to assume planning and regulatory powers over their coastal zone. *Id.* § 1451(m); S. Rep. No. 92-753 (1972).

In particular, the CZMA authorizes states with federally approved coastal management programs to review federal license and permit activities in, or outside of, the coastal zone that affect land uses, water uses, or natural resources within the coastal zone to ensure the activity is fully consistent with the state's management plan. 16 U.S.C. § 1456(c)(3)(A); *see also* 15 C.F.R. § 930.53(a) (effects on coastal zone includes "reasonably foreseeable effects"). The Coastal Act – the Commission's enabling legislation – is part of California's federally approved coastal zone management program. Cal. Pub. Res. Code § 30008; *American Petroleum Institute v. Knecht*, 456 F.Supp. 889, 895 (C.D. Cal. 1978). Any qualifying federally permitted activity which affects the coastal zone must therefore be consistent with the goals of the Coastal Act. As such, if an activity does not "protect the ecological balance of the coastal zone and prevent[] its deterioration and destruction," Cal. Pub. Res. Code § 30001(c), the Commission must exercise its authority under the CZMA and deny consistency certification. 16 U.S.C. § 1456(c); *see also* Cal. Pub. Res. Code § 30230 ("[u]ses of the marine environment *shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms* adequate for long-term commercial, recreational, scientific, and educational purposes") (emphasis added).

In order to trigger the Commission's consistency review, however, the activity must typically be included on the CMP List. 15 C.F.R. § 930.53(a).¹ When a listed activity occurs outside the coastal zone, it can be subject to consistency review if it affects resources within the coastal zone and the Commission specifies the geographic location for such activities as part of its list. *Id.* The Commission can revise the listed activities that trigger consistency review following public notice and comment, and federal approval of the amendment. *Id.* § 930.53(c).

Typically, a federal agency cannot issue a permit for listed activities unless the applicant submits a consistency certification to the Commission and the Commission concurs with that certification. 16 U.S.C. § 1456(c)(1)(A), (3)(A); 15 C.F.R. § 930.53(d). If the Commission objects to the applicant's consistency certification, the federal government must deny the application, unless the applicant works with the Commission to develop conditions that will enable the activity to comply with the Coastal Act and otherwise satisfy the Commission's concerns, 15 C.F.R. § 930.4(a), or the U.S. Secretary of Commerce overrules the state's objection. 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.64.²

The CMP List thus serves an important function – it puts federal permit applicants on notice as to what particular applications will require a consistency determination, and ensures the Commission is involved in the permitting of such activity as early as possible in the planning process (potentially leading the applicant to revise the scope of its proposed activity at the

¹ The Commission can also review particular unlisted activities on a case-by-case basis if it requests, and receives, authorization from the National Oceanic and Atmospheric Administration to do so. 15 C.F.R. § 930.54.

² The Secretary of Commerce has previously sustained two Commission objections to exploratory oil and gas drilling in the Santa Barbara Channel, which the Commission had objected to due to adverse impacts on coastal resources and commercial fishing facilities, and cumulative air quality impacts. *See* Decisions and Findings in the Consistency Appeal of Exxon, 1984, *available at*: http://www.coastal.ca.gov/fedcd/soc/Exxon_Thresher_Shark.pdf; Decisions and Findings in the Consistency Appeal of Chevron, 1990, *available at*: http://www.coastal.ca.gov/fedcd/soc/Chevron_USA.pdf.

outset). The CMP List thus helps to “[a]ssure orderly, balanced utilization and conservation of coastal zone resources” and prevent the “deterioration and destruction” of the coastal environment as required by the Coastal Act. Cal. Pub. Res. Code §§ 30001.5; 30001(c). The CMP List also ensures that federal activities that affect the coastal zone will be subject to public notice and comment, 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.41(a), thereby giving citizens of the state a say as to whether a particular activity that affects its unique coastal resources should go forward.

Requested Amendment to the CMP Federal License and Permit List

The Center requests that the Commission seek to amend its CMP List to add the following: (f) Applications for permits to drill and other federal license or permit activities that involve hydraulic fracturing (“fracking”) and other unconventional well stimulation techniques not described in detail in an OCS plan.

The geographic area for this activity could be defined as follows:

The Santa Barbara Channel, and any other areas under OCS oil and gas leases in the Pacific Region.

The Commission’s Authority to Request the Amendment

The Commission would be well within its authority under the CZMA to request this specific amendment to its CMP List. Under the regulations implementing the CZMA, there are essentially three elements that need to be satisfied in order for an authorization from a federal agency to constitute a “federal license or permit” subject to the state’s consistency review. *See* 15 C.F.R. § 930.51(a). First, federal law requires that an applicant obtain a federal authorization in order to engage in a particular activity; second, the proposed activity has reasonably foreseeable effects on a state’s coastal zone; and third, the proposed activity was not previously reviewed for federal consistency by the state. *Id.*

A permit to drill using fracking easily satisfies this test. First, the Outer Continental Shelf Lands Act (“OSCLA”), 43 U.S.C. § 1331, *et seq.*, requires an applicant to obtain a permit from the Bureau of Ocean Energy Management (“BOEM”) in order to engage in oil and gas extraction activities on the OCS. 30 C.F.R. § 550.281.

Second, fracking has reasonably foreseeable effects on California’s coastal zone. Indeed, fracking is an inherently dangerous activity that can cause a host of detrimental impacts to California’s air, water, wildlife, and coastal communities. For example, exposure to ambient benzene – a known carcinogen – has been documented in people living within a ten-mile radius of fracked wells in Colorado,³ indicating that offshore fracking in federal waters can affect air quality and residents within the coastal zone. Fracking also has reasonably foreseeable impacts on a variety of species whose ranges span both inside and outside the coastal zone. The federal

³ Reutman, S.R. et al. 2002. Evidence of reproductive endocrine effects in women with occupational fuel and solvent exposures. *Environ Health Perspectives* 110:805-811; McKenzie, L. et al. 2014. Birth outcomes and maternal residential proximity to natural gas development in rural Colorado. *Environmental Health Perspectives*, doi:10.1289/ehp.1306722.

government currently allows offshore oil and gas facilities to dump more than nine billion gallons of wastewater directly into the ocean.⁴ Scientific research has indicated that 40 percent of the chemicals added to fracking fluids have been found to have ecological effects, indicating that they can harm aquatic animals and other wildlife.⁵ Some of the chemicals used in fracking operations can break down into nonylphenol, a very toxic substance with a wide range of harmful effects that include the development of intersex fish and altered sex ratios at the population level.⁶ Nonylphenol can also inhibit the development, growth, and survival of marine invertebrates, and has been shown to bioaccumulate in sea otters – a species listed as threatened under the federal Endangered Species Act.⁷ Water pollution associated with fracking could also significantly affect numerous species of endangered whales, including endangered blue, humpback, and gray whales, who feed in and migrate through the Santa Barbara Channel – the area where fracking in federal waters is known to have occurred.⁸

Finally, the Commission has not previously reviewed fracking for consistency with its coastal management program. Although the Coastal Commission currently reviews OCS exploration, development, and production plans for consistency, 15 C.F.R. § 930.73, the Center’s review of the development and production plans of projects that have engaged in fracking in federal waters reveals that *none* of these plans specifically mention fracking.⁹ In other words, fracking is not an activity contemplated under any of these plans. As such, the Commission has not previously reviewed this activity for consistency. The Commission should therefore seek to amend its CMP List to ensure that fracking and other unconventional well stimulation techniques used in offshore oil and gas operations receive proper scrutiny under the CZMA.¹⁰

⁴ Environmental Protection Agency, Reissuance of National Pollutant Discharge Elimination System (NPDES) General Permit for Offshore Oil and Gas Exploration, Development and Production Operations Off Southern California, 79 Fed. Reg. 1643 (Jan 23, 2014); Commission Consistency Determination, General NPDES Permit From Discharges of Offshore Oil and Gas Platforms, <http://documents.coastal.ca.gov/reports/2013/6/W13a-6-2013.pdf>.

⁵ California Council on Science and Technology. 2014. Advanced Well Stimulation Technologies in California: An Independent Review of Scientific and Technical Information. August 28, 2014, available at <http://ccst.us/publications/2014/2014wst.pdf> (“CCST”).

⁶ Diehl, J., et al. 2012. The distribution of 4-nonylphenol in marine organisms of North American Pacific Coast estuaries. *Chemosphere* 87:490-497.

⁷ *Id.*

⁸ See also Letter from the Center to the Commission, Re: The Coastal Commission’s Regulatory Authority and Mandates Relating to Fracking in Oil and Gas Wells Offshore California, Nov. 14, 2013 (detailing other detrimental impacts of offshore fracking).

⁹ BOEM’s regulations implementing OSCLA state that applications for permits to drill and other “permits to conduct activities under...approved [exploration and development plans]...are not subject to separate State CZMA consistency review.” 30 C.F.R. § 550.281(c). However, the regulation requires the activities proposed in such applications “to conform to the activities *described in detail*” in approved plans. *Id.* § 550.281(d) (emphasis added). Any activity that is *not* described in detail in an approved plan must therefore be subject to consistency review under the CZMA – the exemption for consistency review does not cover fracking because the practice is not described in detail in exploration or development plans. See 15 C.F.R. § 930.71 (defining “federal license or permit in context of OSCLA as “any activity requiring a federal license or permit...*described in detail within an OCS plan.*”) (emphasis added).

¹⁰ Although the Center believes that BOEM’s processing of applications for permits to drill that involve fracking and other unconventional well stimulation techniques as minor amendments is improper under the CZMA, OSCLA, and the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*, adding such permits to the CMP List will ensure that fracking and other dangerous enhanced recovery techniques receive CZMA review, regardless of BOEM’s classification.

Conclusion

Fracking is an inherently dangerous activity with a myriad of reasonably foreseeable detrimental impacts to California's coastal zone. Despite the fact that fracking has occurred numerous times in federal waters, the Commission has not reviewed the activity for consistency under the CZMA. The requested amendment would therefore implement the intent behind the CZMA that states review all federally permitted activities that can impact the coastal zone, and the intent of the Coastal Act that activities that will deteriorate or destroy California's unique coastal environment not be permitted.

Sincerely,



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**F7a**

September 23, 2014

TO: Coastal Commission and Interested Parties

FROM: Charles Lester, Executive Director
Alison Dettmer, Deputy Director
Mark Delaplaine, Manager, Energy, Ocean Resources and Federal
Consistency Division

SUBJECT: Proposed Changes to the California Coastal Management Program (CCMP) List of
Federal Licenses and Permits Subject to Federal Consistency Review

I. BACKGROUND**CZMA Listing Process**

The Federal Coastal Zone Management Act (CZMA) authorizes states with Federally approved coastal management programs to review for consistency with those programs federal license and permit activities that affect land or water uses in the coastal zone (16 U.S.C. § 1456 (c)(3)(A)). On November 7, 1977, the U.S. Secretary of Commerce, acting through the National Oceanic and Atmospheric Administration (NOAA), approved the California Coastal Management Program (CCMP), finding that the program met the requirements of the CZMA, as amended (16 USC §§ 1451-1464), and the CZMA regulations governing state program approvals (15 CFR Part 923).

The CZMA regulations governing the federal consistency review process (15 CFR Part 930) define "Federal license and permit activity" as "any authorization, certification, approval, or other form of permission which any Federal agency is empowered to issue to an applicant" (15 CFR § 930.51). Federal leases other than Outer Continental Shelf (OCS) leases are included within this definition (as will be described below, OCS leases are treated separately under the CZMA and its regulations). Under the regulations (15 CFR §§ 930.53-930.54), to review federal licenses and permits, a state must either include a list of such licenses/permits in its approved program, or, for other federal licenses and permits, must request and obtain permission from NOAA's Office of Ocean and Coastal Resources Management (OCRM) to review the activity (as described below).

The Commission's CCMP List of Federal Licenses and Permits was part of the originally approved CCMP, published in the State of California Coastal Management Program and Final Environmental Impact Statement (CCMP/FEIS) (Chapter 11, pages 91-92 (Appendix D below)). This list is also posted on the Commission's federal consistency page of its website (<http://www.coastal.ca.gov/fedcd/listlic.pdf>) and is included below in Appendix A.

For activities on this list, the Federal agency may not issue the license/permit until the applicant for the license/permit has submitted a consistency certification to the Commission and has received Commission concurrence with that certification. If the Commission objects, the Federal agency may not issue the license/permit unless the applicant appeals the objection to the Secretary of Commerce, and the Secretary overrides the Commission's objection (15 CFR Part 930, Subpart H). If the Commission has not acted within six months of receiving (and filing) the certification, the Commission's concurrence may be presumed (15 CFR § 930.62)).

Under 15 CFR § 930.53(c), a state may amend its list, after consultation with the federal agency and after holding public hearings on any proposed changes, by submitting the change to OCRM under the program change procedures (15 CFR Part 923, Subpart H).

Unlisted Permits

If a state wishes to review a federally licensed or permitted activity that is *not* on its approved list, within 30 days of receiving notice of the activity the state must notify OCRM, the applicant, and the federal permitting agency, of the state's intention to review the activity for consistency with the CCMP (15 CFR § 930.54). After reviewing written comments from the parties, OCRM will determine whether the activity "can be reasonably expected to affect the coastal zone of the state" and thus require consistency review (15 CFR § 930.54). If OCRM grants the state's request to review the "unlisted" activity, then the same stay on federal agency issuance of the license/permit applies (i.e., until the consistency review process is concluded, as described above in the first paragraph on this page).

Activities Outside the Coastal Zone and Geographic Location Descriptions (GLDs)

The same procedure for "unlisted" permits also applies to listed permits where the activity is located completely outside the coastal zone (15 CFR § 930.53(a)(2)), *unless* the state has included within its CMP (or amended it to include) a Geographic Location Description (GLD) describing activities and their locations outside its coastal zone that would cause "reasonably foreseeable effects" on the coastal zone (15 CFR § 930.53(a)(1)). The currently-approved CCMP does not contain any GLDs for its listed permits, as staff resources have not yet been available to complete this task. Staff resources permitting, the staff intends to develop GLDs for several of the licenses and permits on the CCMP List. Any such future changes to the CCMP List would follow the same process as discussed in this staff report for the currently-proposed changes.

Coastal Development Permits

Under the CCMP, receipt of a Commission-issued coastal development permit (CDP) replaces the need for a consistency certification for a "listed" federal permit.¹ If an applicant receives a locally-issued CDP, the applicant would be potentially subject to the requirements for a consistency certification for a listed permit; however, in practice, the Commission staff routinely

¹ The CCMP (Chapter 11, page 92) states: "The issuance of a Coastal Commission permit ... will be deemed to be a determination by the State that the proposed Federal license or permit activity is consistent with the management program, and no further certification will be required." Also, a project consistent with a Port Master Plan (in the Ports of Hueneme, Los Angeles, Long Beach, or San Diego) that needs a listed federal permit would also be "deemed consistent" for federal consistency purposes (PRC 20 § 30719).

waives such requirements. In terms of the volume of federal permits, the vast majority of CCMP-listed federal permits are U.S. Army Corps of Engineers “Section 404” (and some “Section 10”) permits, and these are predominantly for activities located in the Commission’s original or appeals jurisdiction, which provides the Commission with alternative review mechanisms under State law (i.e., CDPs and appeals reviews).

Federal Agency Activities

Under the consistency regulations, activities that are carried out by federal agencies are not reviewed under the “listed” federal permit procedures. The consistency regulations state: “The term ‘applicant’ does not include Federal agencies applying for federal licenses or permits. Federal agency activities requiring federal licenses or permits are subject to subpart C of this part” (15 CFR § 930.52). This means, among other things, that the Commission reviews them as consistency determinations (not certifications), and that they are not subject to the “listing” requirement for federally permitted activities (i.e., they are reviewed under Subpart C, not Subpart D, of the CZMA regulations).

Historic Consistency Workload

The majority (73%) of the Commission’s federal consistency reviews over the past 36 years have been of federal *agency* activities. Of the remaining 27% of the Commission’s federally consistency review, (i.e., those of federally *permitted* activities), the vast majority (over 90% of these reviews) have been either offshore energy projects on the OCS, U.S. Army Corps of Engineers permits (i.e., “Section 404” permits for fill of “Waters of the U.S.”, “Section 10” permits for structures affecting navigation, or “Section 103” permits for dredge disposal), and EPA NPDES permits for pollutant discharges.

Coordination and Consultation

The Commission staff initiated the process of updating and making changes to the CCMP List by providing written notice, on June 17, 2014, to each of the federal permitting agencies potentially affected, requesting their input and comments on proposed changes. The staff has made further refinements to the proposed changes in light of the federal agency responses and interagency discussions which ensued.

Preliminary Hearing

The purpose of this preliminary hearing on the proposed CCMP List changes is to seek public, other agency, or any interested party comments on tentatively proposed changes to the CCMP list. The staff has developed this list in light of the experience gained since the Commission commenced conducting federal consistency reviews. The Commission’s existing CCMP List is 36 years old, and during that period, a number of changes have taken place in the federal regulatory scheme. In addition, the Commission has gained experience in complying with the “unlisted permit” review process described above as to the types of federally-permitted activities likely to affect the coastal zone. Inclusion of activities on the CCMP List is intended to: (1) give notice to applicants of their consistency certification responsibilities under the CZMA and CCMP; (2) minimize the chance that an activity with significant coastal zone effects will avoid consistency review because it goes unnoticed during the brief (30-day) notice period provided by

federal regulation for unlisted activities; and (3) eliminate uncertainty and reduce time-consuming procedures which must be followed to obtain OCRM authorization on a case-by-case basis to review activities not on the CCMP List.

The staff intends to schedule a second hearing to respond to any comments received, and to provide a final list of changes recommended for adoption by the Commission. The staff intends to schedule this later hearing at a northern California location, which, depending on the number and length of comments received, would likely occur at either the Commission's November or December 2014 meeting. No changes to the CCMP List would take effect until they are submitted to and approved by OCRM as a Program Change.

II. PROPOSED CHANGES

The Commission's existing CCMP List is shown in Appendix A. Appendix B, which follows, is the staff's tentatively proposed CCMP List changes, shown in tracked changes mode (i.e., with proposed additions shown in **bold underlined text** and proposed deletions shown in ~~striketrough text~~). The proposed changes to the CCMP List would consist of: (1) adding a number of federal permits to the CCMP List; (2) correcting outdated citations and updating the names of the federal agencies issuing the permits; and (3) making several other minor modifications and clarifications to existing permits on the list.

The federal permits to be added to the list would be:

1. **Bureau of Land Management (BLM):** Approvals of renewable energy production on public lands.
2. **Bureau of Ocean Energy Management (BOEM):** Approvals of renewable energy activities on the OCS, and seismic/geophysical survey permits (not covered by existing OCS Plans).
3. **Surface Transportation Board (STB):** Approvals of construction or abandonment of railroad lines, track removal, and disposition of rights-of-ways.
4. **Federal Highway Administration (FHWA):** Approvals for interconnections with the interstate highway system.
5. **National Atmospheric and Oceanic Administration (NOAA):** Ocean thermal energy conversion facilities.
6. **U.S. Fish and Wildlife Service (USFWS):** Incidental take permits (ITP's) associated with Habitat Conservation Plans (HCPs) or Safe Harbor Agreements (SHAs).
7. **National Marine Fisheries Service (NMFS):** Incidental Harassment Authorizations (IHAs) and Letters of Authorization (LOAs).

Clarifications or minor changes to existing listed permits would consist of: (1) adding license terminations to nuclear power plant approvals by the Nuclear Regulatory Commission (NRC); and (2) adding/clarifying that “hydroelectric generating project” permits approved by the Federal Energy Regulatory Commission (FERC) would include both hydrokinetic and hydropower projects. The remaining changes would be limited to updating the federal permitting agency names and correcting several citations.

OCS Plans

Finally, the staff is proposing minor updates/“clean-up” language for the CCMP Chapter 11 section discussing OCS Plans. As noted above, OCS Plans are separate from the “§1456 (c)(3)(A)” CCMP Permit List discussed above. On the page following the existing CCMP List is a section describing permits issued under CZMA §1456 (c)(3)(B), which covers DOI approval of OCS Plans (CCMP Chapter 11, pages 93-94). To remain consistent with the current regulatory scheme, the staff proposes updating this section simply to reflect that BOEM is now the current federal agency that authorizes these plans. The changes to this section are shown in Appendix C.

Appendices

- Appendix A – Existing List
- Appendix B – Proposed Changes
- Appendix C – Proposed OCS Plan Update
- Appendix D – CCMP FEIS, pp. 91-94

Appendix A – Existing CCMP Federal License and Permit List

1. Department of Defense - U.S. Army Corps of Engineers:
 - a. Permits and licenses required under Section 9 and 10 of the Rivers and Harbors Act of 1899;
 - b. Permits and licenses required under Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972;
 - c. Permits and licenses required under Section 404 of the Federal Water Pollution Control Act of 1972 and amendments; and
 - d. Permits for artificial islands and fixed structures located on the Outer Continental Shelf (Rivers and Harbors Act of 1899 as extended by 43 U.S.C. 1333(f)).
2. Nuclear Regulatory Commission:
 - a. Permits and licenses required for siting and operation of nuclear power plants.
3. Department of the Interior - Bureau of Land Management - U.S. Geological Survey:
 - a. Permits and licenses required for drilling and mining on public lands (BLM).
 - b. Permits for pipeline rights-of-way on the Outer Continental Shelf.
 - c. Permits and licenses for rights-of-way on public lands.
4. Environmental Protection Agency:
 - a. Permits and licenses required under Sections 402 and 405 of the Federal Water Pollution Control Act of 1972 and amendments.
 - b. Permits and applications for reclassification of land areas under regulations for the prevention of significant deterioration (PSD) of air quality.
5. Department of Transportation - U.S. Coast Guard:
 - a. Permits for construction of bridges under 33 USC 401, 491-507 and 525-534.
 - b. Permits for deepwater ports under the Deepwater Port Act of 1974 (PL 93-627).

6. Department of Transportation - Federal Aviation Administration:
 - a. Certificates for the operation of new airports. (Federal Aviation Regulations, Part 139)

7. Federal Power Commission:
 - a. Licenses for construction and operation of hydroelectric generating projects including primary transmission lines.
 - b. Certifications required for interstate gas pipelines.
 - c. Permits and licenses for construction and operation of facilities needed to import, export, or transship natural gas or electrical energy.

Appendix B – Proposed Modifications to the CCMP Federal License and Permit List

1. Department of Defense - U.S. Army Corps of Engineers:
 - a. Permits and licenses required under Section 9 and 10 of the Rivers and Harbors Act of 1899, **as amended (33 USC §§ 401 and 403)**;
 - b. Permits and licenses required under Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, **as amended (33 USC § 1413)**;
 - c. Permits and licenses required under Section 404 of the Federal Water Pollution Control Act of 1972 ~~and amendments~~, **as amended (33 USC § 1344)**; and
 - d. Permits for artificial islands and fixed structures located on the Outer Continental Shelf (~~Rivers and Harbors Act of 1899 as extended by~~ 43 U.S.C. §1333~~(f)~~).
2. Nuclear Regulatory Commission (NRC):
 - a. Permits and licenses required for siting, ~~and~~ operation, **or license termination** of nuclear power plants.
3. Department of the Interior (DOI) - Bureau of Land Management (BLM), ~~–U.S. Geological Survey~~ Bureau of Safety and Environmental Enforcement (BSEE), and Bureau of Ocean Energy Management (BOEM):
 - a. Permits and licenses required for drilling and mining, **or renewable energy production (e.g., wind or solar energy facilities)**, on public lands (BLM).
 - b. Permits for pipeline rights-of-way on the Outer Continental Shelf **(BSEE)**.
 - c. Permits and licenses for rights-of-way on public lands **(BLM)**.
 - d. Leases, easements, and rights-of-way for renewable energy-related uses granted pursuant to subsection 8 of the Outer Continental Shelf Lands Act (OCSLA) (43 U.S.C. 1337), as amended by Section 388(a) of the Energy Policy Act of 2005 (EPAAct) (Pub. L. 109–58) (BOEM).**
 - e. Geophysical survey permits not authorized through existing OCS Plans issued under OCSLA (43 U.S.C. 1331 et seq.) (BOEM).**

4. Environmental Protection Agency:
 - a. Permits and licenses required under Sections 402 and 405 of the Federal Water Pollution Control Act of 1972 ~~and amendments~~, as amended (33 USC §§ 1342 and 1345).
 - b. Permits and applications for reclassification of land areas under regulations for the prevention of significant deterioration (PSD) of air quality.
5. Department of Transportation - U.S. Coast Guard:
 - a. Permits for construction of bridges under 33 USC §§ 401, 491-507 and 525-534 (42 USC §§ 7470-7492).
 - ~~b. Permits for deepwater ports under the Deepwater Port Act of 1974 (PL 93-627).~~
6. Department of Transportation - Maritime Administration (MARAD):
 - ~~a. Permits for deepwater ports under the Deepwater Port Act of 1974, as amended (33 USC §§ 1501-1524). (PL 93-627)~~
7. Department of Transportation - Federal Aviation Administration:
 - a. Certificates for the operation of new airports (49 USC § 44706). ~~Federal Aviation Regulations, Part 139)~~
8. Department of Transportation - Surface Transportation Board (STB):
 - a. Permits for railroad construction (49 U.S.C. § 10901).
 - b. Exemption from service requirements for rail transportation (49 USC. §§ 10502, 10903).
 - b. Removal of trackage and disposition of right-of-way (49 USC. § 10101 et seq.).
9. Department of Transportation - Federal Highway Administration (FHWA):
 - a. Final Interstate Access Approvals for access to the Interstate Highway System (23 U.S.C. §§ 109 and 111, 23 C.F.R. § 624.5, and 49 CFR § 1.48(b)(1)).

10. Federal ~~Power~~ Energy Regulatory Commission (FERC):
 - a. Licenses for construction and operation of hydroelectric and hydrokinetic generating projects including primary transmission lines.
 - b. Certifications required for interstate gas pipelines.
 - c. Permits and licenses for construction and operation of facilities needed to import, export, or transship natural gas or electrical energy.
11. National Atmospheric and Oceanic Administration (NOAA):
 - a. Authorization to construct or operate an ocean thermal energy conversion facility under the Ocean Thermal Energy Conversion Act of 1980 (42 USC § 9101 et seq.).
12. Department of the Interior/U.S. Fish and Wildlife Service (USFWS):
 - a. Incidental take permits (ITP's) associated with Habitat Conservation Plans (HCPs) or Safe Harbor Agreements (SHAs) issued pursuant to Section 10 of the federal Endangered Species Act of 1973 (ESA) (16 USC § 1539(a)(1)).
13. National Atmospheric and Oceanic Administration (NOAA)/National Marine Fisheries Service (NMFS):
 - a. Incidental Harassment Authorizations and Letters of Authorization required under the Marine Mammal Protection Act (MMPA) of 1972, as amended (Sections 101(a)(5)(A) and (D) (16 U.S.C. 1361 et seq.), and the Endangered Species Act of 1973 (ESA), as amended (Section 10 (16 U.S.C. 1531 et seq.)).

Appendix C – Proposed Modifications to the CCMP OCS Plan Discussion

Federal Licenses and Permits Described in Detail in OCS Plans

The following Federal agency licenses and permits will be subject to the certification process for consistency with the management program under Section 307(c)(3)(B) of the CZMA if the activity being licensed or permitted is described in detail in an OCS exploration or development plan and affects land or water uses in the coastal zone:

Department of the Interior (DOI) – ~~U.S. Geological Survey~~ **Bureau of Ocean Energy Management (BOEM)**:

Approval of offshore drilling operations.

Approval of design plans for the installation of platforms to permitted platforms.

Approval of gathering and flow lines.

Any other OCS-related Federal license or permit activities described in paragraph (b) (i)² (for example, ~~BLM~~ pipeline rights-of-way on the OCS) which ~~U.S.G.S.~~ **BOEM** determines should be described in detail in OCS plans.

² Note: the reference to “paragraph (b) (i)” in this sentence refers back to the CCMP Permit List described above (i.e., Appendices A and B).

If a Federal agency does not choose to participate in the voluntary memorandum of understanding process, the Federal agency must utilize some other procedure (OMB A-95 project notifications, Environmental Impact Statements, etc.) supplemented as necessary pursuant to the requirements of the CZMA. Regardless of the alternative notification process used by a Federal agency, it must assure that the Coastal Commission is notified of all Federal activities including development projects in the coastal zone at the earliest practicable time in the planning process. The process must also provide adequate opportunity for the Coastal Commission to hold a public hearing and to determine the consistency of the proposed action with the CCMP. The notification must include a description of the activity, a discussion relating the coastal zone effects of the action to the relevant requirements of the management program, and sufficient supporting information for the Coastal Commission to review the Federal agency's consistency determination.

(ii) Consistency of Federal Activities Not Requiring Coastal Permits.

Memoranda of understanding will not be requested with regard to Federal activities including development projects which would not otherwise require coastal agency permits. However, such actions conducted by any Federal agency which will directly affect coastal zone resources will be expected to be undertaken in a manner consistent, to the maximum extent practicable, with California's coastal program as required by the CZMA. The Coastal Commission, with the assistance of local government representatives, will review Federal agency decisions to determine whether Federal actions directly affect the coastal zone, and if there is such an impact, whether the Federal action is consistent to the maximum extent practicable with the coastal program. This review process will include a timely notice and public hearing, with the Federal agency and local governments having jurisdiction over the affected area being invited to participate in the public hearing. Local government representatives will be afforded the opportunity to assist the Coastal Commission in its consideration of the Federal agency's consistency determination by presenting a determination of the consistency of the Federal activity or project with the certified local coastal programs for the affected jurisdictions. If the Coastal Commission finds that the Federal activity or development project directly affects the coastal zone and is not consistent with the management program, and the Federal agency disagrees and decides to go forward with the action, it will be expected to (a) advise the Coastal Commission in writing that the action is consistent, to the maximum extent practicable, with the coastal management program, and (b) set forth in detail the reasons for its decision. In the event the Coastal Commission seriously disagrees with the Federal agency's consistency determination, it may request that the Secretary of Commerce seek to mediate the serious disagreement as provided by Section 307(h) of the CZMA, or it may seek judicial review of the dispute.

(iii) State Monitoring and Review of Federal Activities Including Development Projects.

To assist in implementing the procedures set forth in paragraphs (i) and (ii) above, the Coastal Commission will monitor all Federal activities including development projects that may directly affect the coastal zone. This monitoring effort will rely upon existing inter-governmental coordination procedures - the A-95 notification and review process, review of environmental impact statements, and review of Corps of Engineers public notices - supplemented as necessary with special coordination with individual Federal agencies. The Coastal Commission will make every effort to notify Federal agencies of potential inconsistent Federal activities as early as possible in the Federal agencies' planning process. At the same time, it is expected that each Federal agency proposing to conduct Federal activities including development projects which may directly affect the coastal zone will notify the Coastal Commission at the earliest practicable time. These reciprocal efforts can assist the parties in identifying potential conflicts with the State's management program and, once identified, the Federal agency and the Coastal Commission can work towards early resolution of the problem.

(b) Federal Licenses and Permits Subject to Certification for Consistency.

(i) Federal License and Permit List.

The following Federal agency licenses and permits will be subject to the certification process for consistency with the management program, under Section 307(c)(3) of the CZMA, if the activity being licensed or permitted affects land or water uses in the coastal zone:

Department of Defense - U.S. Army Corps of Engineers:

- o Permits and licenses required under Sections 9 and 10 of the Rivers and Harbors Act of 1899;
- o Permits and licenses required under Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972;
- o Permits and licenses required under Section 404 of the Federal Water Pollution Control Act of 1972 and amendments; and
- o Permits for artificial islands and fixed structures located on the Outer Continental Shelf (Rivers and Harbors Act of 1899 as extended by 43 U.S.C. 1333(f)).

Nuclear Regulatory Commission:

- o Permits and licenses required for siting and operation of nuclear power plants.

Department of the Interior - Bureau of Land Management - U.S. Geological Survey:

- o Permits and licenses required for drilling and mining on public lands (BLM).
- o Permits for pipeline rights-of-way on the Outer Continental Shelf.
- o Permits and licenses for rights-of-way on public lands.

Environmental Protection Agency:

- o Permits and licenses required under Sections 402 and 405 of the Federal Water Pollution Control Act of 1972 and amendments.
- o Permits and applications for reclassification of land areas under regulations for the prevention of significant deterioration (PSD) of air quality.

Department of Transportation - U.S. Coast Guard:

- o Permits for construction of bridges under 33 USC 401, 491-507 and 525-534.
- o Permits for deepwater ports under the Deepwater Port Act of 1974 (PL 93-627).

Department of Transportation - Federal Aviation Administration:

- o Certificates for the operation of new airports. (Federal Aviation Regulations, Part 139)

Federal Power Commission:

- o Licenses for construction and operation of hydroelectric generating projects including primary transmission lines.
- o Certifications required for interstate gas pipelines.
- o Permits and licenses for construction and operation of facilities needed to import, export, or transship natural gas or electrical energy.

This listing is intentionally limited to those Federal licenses and permits that may significantly affect coastal land and water uses. This is desirable to minimize the administrative burdens on the governmental entities as well as on the applicant. If it is found that the issuance of other Federal permits and licenses causes significant effects on coastal land and water uses, the consistency requirements will be applied to those permits or licenses through administrative addition to the list above.

(ii) License and Permit Activities Within the Coastal Zone.

Within the coastal zone, a Coastal Commission permit will be required from non-Federal applicants for the above activities. A memorandum of understanding will be requested from Federal agency applicants for the above activities. The issuance of a Coastal Commission permit* or agreement on a memorandum of understanding will be deemed to be a determination by the State that the proposed Federal license or permit activity is consistent with the management program, and no further certification will be required. In cases where no Coastal Commission permit has been applied for but where one is required, the Coastal Commission will process a certification of consistency concurrent with the permit application. The Coastal Commission will not review whether a Federal license or permit activity in the coastal zone is consistent with the management program except in connection with a Coastal Commission permit application if a permit is required.

To ensure that the national interest is adequately protected, where the State's primary management authority over the above activities has been delegated to a local government upon the certification of a local coastal program, the local decision will be automatically reviewed by the Coastal Commission. The Coastal Commission's decision on the appeal, or on the review of a local permit that was not or could not be appealed, will be deemed to be the State's determination of the consistency of the proposed activity with the California Coastal Management Program. Consequently, the Coastal Commission will have the lead role and during its deliberations it will consider the views of local governments with certified local coastal programs for the affected areas.

*The issuance of a permit for an electric transmission line or a thermal power plant by the State Energy Resources Conservation and Development Commission pursuant to Section 30413 of the Coastal Act is considered a Coastal Commission permit for purposes of this section.

(iii) License and Permit Activities Outside of the Coastal Zone.

Outside of the coastal zone (for example, on excluded Federal lands or on uplands beyond the coastal zone boundary), consistency certifications for the above licenses and permits will be required only in cases where the Coastal Commission determines that the activity being licensed or permitted could have a substantial effect on land and water uses in the coastal zone. This determination will be made on a case-by-case basis in the course of the monitoring program described in paragraph (a)(iii). It is not anticipated that many licenses and permits outside of the coastal zone will require certification. At the same time, those that do will probably be of considerable interest to the public because of the potential for substantial impact on the coast. Consequently, consistency certifications for Federal license or permit activities outside of the coastal zone will be processed as much as possible as if they were applications for Coastal Commission permits under the Coastal Act and its implementing regulations to allow for timely public notice and hearings. The local governments having jurisdiction over the area that would be affected by the proposed activity will be invited to participate in the public hearing. Local government representatives will be afforded the opportunity to participate in the Commission's deliberations and to present a determination of the consistency of the proposed activity with the certified local coastal programs for the affected jurisdictions.

(iv) Coastal Commission Objections to Federal License and Permit Activities.

If, in connection with the review of proposed Federal license or permit activities under paragraphs (ii) or (iii), the Coastal Commission determines that a non-Federal applicant's proposed license or permit activity is not consistent with the State's management program as required by Section 307(c)(3)(A) of the CZMA, the Federal agency may not issue the license or permit unless the Secretary of Commerce, on her own initiative or upon appeal by the applicant, finds, after providing an opportunity for comments from the Federal agency involved and from the Coastal Commission, that the activity is consistent with the objectives of the CZMA or is otherwise necessary in the interest of national security. If the Coastal Commission objects to the consistency of a Federal applicant's proposed license or permit activity, and the Federal agency decides to go forward with the activity, the Coastal Commission may use the mediation or judicial review dispute resolution procedures described in paragraph (a)(i). In its draft Section 307 regulations, NOAA has proposed to exclude Federal agencies from the license and permit certification requirements and the appeal provisions of the CZMA. While the Coastal Commission does not fully agree with this position, it will abide by NOAA's decision in the administration of the CCMP for purposes of the CZMP. The Coastal Commission, however, reserves the right to subject Federal agencies to the certification requirement in the event administrative, judicial, or legislative modification should occur.

(c) Federal Licenses and Permits Described in Detail in OCS Plans.

The following Federal agency licenses and permits will be subject to the certification process for consistency with the management program under Section 307(c)(3)(B) of the CZMA if the activity being licensed or permitted is described in detail in an OCS exploration or development plan and affects land or water uses in the coastal zone:

Department of the Interior - U.S. Geological Survey

Approval of offshore drilling operations.

Approval of design plans for the installation of platforms.

Approval of gathering and flow lines.

Any other OCS-related Federal license or permit activities described in paragraph (b)(i) (for example, BLM pipeline rights-of-way on the OCS) which U.S.G.S. determines should be described in detail in OCS plans.

In accordance with the CZMA, Federal license and permit activities described in detail within exploration or development plans for OCS areas adjacent to California waters that have been leased under the Outer Continental Shelf Lands Act, will be subject to certification and State review. This process will assure that Federal license and permit activities described in detail in such plans, and affecting land or water uses in the coastal zone, are consistent with the State's management program. Consistency certifications for OCS plans will be processed as much as possible as if they were applications for coastal permits under the Coastal Act and its implementing regulations to allow for timely public notice and hearings. Local governments having jurisdiction over areas affected by OCS activity will be invited to participate in the public hearing. Local government representatives will be afforded the opportunity to participate in the Coastal Commission's deliberations and to present determinations of the consistency of the proposed OCS activity with the certified local coastal programs for the affected jurisdictions.

If the Coastal Commission determines that one or more of the Federal license or permit activities described in detail in an OCS plan are not consistent with the coastal management program as required by Section 307(c)(3)(B) of the CZMA, Federal agencies may not issue the licenses or permits described in detail in the OCS plan unless the Secretary of Commerce, on her own initiative or upon appeal by the lessee, finds, after providing an opportunity for comments from the Federal agencies involved and the Coastal Commission, that the Federal license or permit activities are consistent with the objectives of the CZMA or are otherwise necessary in the interest of national security.

(d) Federal Assistance Subject to Consistency with the Management Program.

To review State and local government applications for Federal assistance under Federal programs affecting the coastal zone, the Coastal Commission will use the Project Notification and Review System of OMB Circular A-95 authorized under Title IV of the Intergovernmental Coordination Act of 1968 and administered by Regional Clearinghouses and statewide by the Office of Planning and Research.

The scope of Coastal Commission review will be limited to ensuring that the proposed project is consistent with the coastal management program. In the event the Coastal Commission determines that the proposed project is not consistent with the management program, the Coastal Commission will attempt to resolve the inconsistency through negotiation with the applicant. If no resolution is possible, the Commission will forward its determination to the appropriate Federal agency and, as required by Section 307(d) of the CZMA, the Federal agency will not approve the proposed project unless the Secretary of Commerce finds that the project is consistent with the purposes of the CZMA or is in the interest of national security.

C. Incorporation of Federal Air and Water Quality Standards

Although the Coastal Plan recommended that California institute air or water quality standards more restrictive than Federal requirements in certain areas in order to address unique problems, the Coastal Act did not go as far. The Coastal Act does uphold Federal standards as enforced by existing State agencies. Local coastal programs must also incorporate as necessary the air and water quality standards prior to certification. Section 30522 of the Coastal Act states, "Nothing in this chapter shall permit the commission to certify a local coastal program which provides for a lesser degree of environmental protection than that provided by the plans and policies of any state regulatory agency." While the Coastal Commission cannot require local governments to incorporate more stringent standards, nothing prohibits the local governments from incorporating more stringent standards into their LCPs; however, these standards will not be applicable until they have been officially approved by the State regulatory agencies pursuant to the provisions of the Federal air and water quality laws. Section 30253(3) requires new development to be consistent with requirements imposed by an air-pollution control district or the State Air Resources Control Board.

The State Water Resources Control Board is recognized as having primary responsibility for the coordination and control of water quality and the administration of water rights pursuant to applicable law. The Coastal Commission is responsible for seeing that proposed development and local coastal programs do not frustrate the State Water Resources Control Board's programs. However, Section 15 of the Coastal Act amended the State Water Code to ensure that water agencies support the Coastal Commission's management program to protect the coastal marine environment. Treatment works within the coastal zone and those outside the coastal zone that serve the coastal zone require a coastal permit determined on siting and visual appearance, geographic limits, and development projections. The Coastal Commission must make the final determination on a permit prior to the time of final approval of the project by the State Water Resources Control Board. (30412).

The State Air Resources Board and local air pollution control districts, having been established pursuant to State law and consistent with Federal law, are the principal public agencies responsible for air quality, emission standards, and air pollution control programs. The Coastal Commission is not to modify air pollution standards set by the Air Resources Board, which, it is expected, will recommend ways that the Coastal Commission can assist in air quality programs. (30414)