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October 31, 2012

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Re: Comparison of Oregon and Texas Federal Consistency Rules (NSGLC-12-04-08)

This product was prepared by the National Sea Grant Law Center under award number NA09NOS4190165 from the National Oceanic and Atmospheric Administration, U.S. Department of Commerce through a subgrant to the Texas General Lands Office and Texas A&M Corpus Christi. The statements, findings, conclusions, and recommendations are those of the author and do not necessarily reflect the views of NOAA or the U.S. Department of Commerce.

Dear Sheri:

Below is the summary of research of the National Sea Grant Law Center regarding the newly amended Oregon federal consistency rules and our comparison of these rules with the existing Texas rules. Also attached as Appendix A is a summary of the requirements for listing federal activities, federal licenses and permits, Outer Continental Shelf plans and federal assistance to state and local governments under the federal consistency regulations. The following information is intended as advisory research only and does not constitute legal representation of the Texas General Lands Office or its constituents by the National Sea Grant Law Center. It represents our interpretation of the relevant laws and cases.

Oregon recently amended and updated their federal consistency rules in order to address the concerns of the Office of Ocean and Coastal Resource Management (OCRM) of the National Oceanic and Atmospheric Administration (NOAA) with the Oregon rules and

ensure that the revised rules conform with the federal regulations, 15 C.F.R. Part 930. Kerry Kehoe of OCRM has suggested that Texas use Oregon as a model in adopting its own rules.

Oregon streamlined its rules in a couple of ways. First, the definition section now simply applies the definitions found in Section 304 of the Coastal Zone Management Act (CZMA), 15 C.F.R. Part 930 (the federal consistency regulations), and the applicable provisions of the Oregon code. The provision, as amended, only contains definitions for “Coastal Zone” and “OCMP” (Oregon Coastal Management Program). Second, Oregon revised its prior rules for its review of federal activities and development projects, federal licenses or permits, outer continental shelf activities, and federal assistance to state and local governments. The rules now basically state that Oregon will follow the requirements and procedures of the applicable subpart of 15 C.F.R. Part 930. Oregon hopes that by directing applicants to the applicable part of the federal regulations, its rules will alleviate any confusion and uncertainty that applicants might face in having very similar, but not identical, state and federal provisions.

Provisions of the Amended Oregon Rules

660-035-0000 - Purpose

- This purpose statement of the rules states that the section establishes Oregon’s procedures for implementing the requirements of the CZMA.

660-035-0005 – Conformance with Federal Consistency Review Rules

- This is a new rule that Oregon adopted- it clarifies that Oregon will follow the procedures in 15 C.F.R. Part 930.
- The rule also designates the Department of Land Conservation and Development (Department) as Oregon’s coastal zone management agency.
- The rule also clarifies that all references to 15 C.F.R. Part 930 are to the version that existed when the Oregon rules were adopted, which was May 11, 2012.

660-035-0010 - Definitions

- As discussed above, the new streamlined definition rule simply applies the definitions in CZMA Section 304, 15 C.F.R. Part 930, and the applicable provisions of the Oregon code.
- The rule only contains the following two definitions:
 - Coastal Zone; and
 - OCMP (Oregon Coastal Management Program).

660-035-0015 - Activities Subject to Review

- This new rule clearly lists what activities the Department will review under 15 C.F.R. Part 930. These include:
 - Proposed federal agency activities, including proposed federal development projects, which affect any coastal use or resource;
 - Activities that affect any coastal use or resource and that require one or more federal licenses or permits identified on the approved OCMP license

- and permit list, or unlisted licenses or permits that the Department identifies through an alternative process set forth in 15 C.F.R. § 930.54;
- Outer continental shelf exploration, development, and production activities that affect any coastal use or resource; and
- Federal assistance to state and local governments for activities that affect any coastal use or resource.

660-035-0020 - Federal Consistency in the OCMP

- Oregon amended this rule.
- Section (1) clarifies how an applicant initiates federal consistency review.
- Section (2) states that the Department will review the activities for consistency with the federally approved enforceable policies of the OCMP. The section states that these policies can generally be found in:
 - (1) The statewide planning goals;
 - (2) Acknowledged comprehensive plans and implementing regulations; and
 - (3) Selected state agency statutory and regulatory authorities governing coastal uses or resources.
- Section (3) states that a person can contact the Department for a list of the federally approved enforceable policies.

660-035-0030 - Consistency for Federal Agency Activities

- Oregon amended and clarified this rule.
- Section (1) states that in its consistency review, the Department will conform to the requirements and procedures provided in 15 C.F.R. Part 930, Subpart C.
- Section (2) states that the federal agency must give the Department the information listed in 15 C.F.R. § 930.39(a).
 - This section also clarifies the use of documents prepared under the National Environmental Policy Act (NEPA) in the review process.
- Section (3) addresses public participation- the Department will be consistent with 15 C.F.R. § 930.42 and will maintain a list of interested parties, notify those parties when the Department is doing a consistency review for a federal activity or development project, and solicit comments.
- OCRM worked with Oregon on the language in Section (4), which addresses federal agencies obtaining state and local permits.

REPEALED - 660-035-0040 - DLCD Review of Federal Activities and Development Projects

- This repealed rule gave more details on the Department's review of federal activities and development projects. Now Oregon Rule 660-035-0030 is the only section addressing Oregon's review of federal activities and development projects.

660-035-0050 - Consistency for Activities Requiring a Federal License or Permit

- Oregon amended this rule to state that the Department will conform to the requirements and procedures in 15 C.F.R. Part 930, Subpart D.

- Section (2) lists the items that an applicant must submit to the Department for a consistency review, including a consistency certification and the necessary data and information in 15 C.F.R. § 930.58(a).
- Section (3) states that the Department will comply with the public participation requirements of 15 C.F.R. § 930.61, and will:
 - Maintain a list of interested parties, notify those parties when the Department is doing a federal consistency review, and solicit comments on this review.
- Section (4) clarifies the Department's requirements regarding state and local permits.

660-035-0060 - Consistency for Outer Continental Shelf (OCS) Activities

- Oregon amended this rule to streamline it and clarify that the Department will follow 15 C.F.R. Part 930, Subpart E when reviewing these activities.
- Section (2) states that the applicant must submit to the Secretary of Interior a consistency certification that complies with 15 C.F.R. § 930.76.
- Section (3) states that the Department will comply with 15 C.F.R. § 930.77 when it provides for public participation in its consistency review.

660-035-0070 - Consistency for Federal Assistance to State and Local Governments

- Oregon amended this rule to streamline it and clarify that it will follow 15 C.F.R. Part 930, Subpart F when reviewing these activities.
- Section (2) states that the applicant agency must submit to the Department the materials described in 15 C.F.R. § 930.94.
- Section (3) states that its review period for these activities will be 60 days.

REPEALED - 660-035-0080 - Commission Review

- This repealed rule allowed for Oregon's Land Conservation and Development Commission (Commission) to review activities if a party filed a petition or the Director referred an action to the Commission.
- Under the previous procedure, the Commission could affirm, reverse, or modify the action of the Director.
- Since Oregon repealed this procedure, it will now rely on 15 C.F.R. Part 930, Subpart H, which provides the procedures and standards that govern the appeal of federal consistency decisions to the U.S. Secretary of the Interior.

Comparison with the Current Texas Rules (Texas Administrative Code Chapter 506)

The Texas consistency rules are found in Chapter 506 of the Texas Administrative Code (TAC.) Obviously, the new Oregon rules are much shorter and streamlined than the current Texas rules, as even the previous version of the Oregon rules were much shorter than the current Texas rules. As discussed above, Oregon streamlined its rules by referring to the definitions in the CZMA, 15 C.F.R. Part 930, and applicable Oregon statutes. In addition, it simplified the rules by referring to the procedures in 15 C.F.R. Part 930 when describing its consistency review of federal activities and development

projects, federal licenses and permits, OCS activities, and federal assistance to state and local governments.

Definitions

As stated above, Oregon streamlined this section of the rules by referring to definitions elsewhere. In comparison, Rule 506.11, the current TAC definition section, is three pages long.

List of Reviewable Activities

Currently, TAC Rule 506.12 provides a detailed list of the activities Texas will review. Oregon, however, provides a very general list in its amended rules (see description of Oregon 660-035-0015). When updating its rules, Texas may want to check with OCRM to see if Oregon has a more detailed list of activities listed somewhere outside of its rules. Appendix A provides a summary of the federal requirements for listing activities.

Conditional Concurrence

TAC Rule 506.13 addresses conditional concurrences under 15 C.F.R. § 930.4 (see mark-up of TAC 506). Oregon does not include a similar provision.

Review of Federal Agency Activities and Development Projects

TAC Rules 506.20-29 detail the review of federal agency activities and development projects, with rules on:

- Consistency Determinations (506.20);
- Notification of Negative Determinations (506.21);
- General Consistency Determinations (506.22);
- Consistency Determinations for Development Projects (506.23);
- Consistency Determinations for Federal Agency Activities Initiated Prior to Federal Approval of the Coastal Management Program (506.24);
- Public Notice and Comment (506.25);
- Referral to the Council of Federal Agency Activities (506.26);
- Council Hearings (506.27);
- General Consistency Agreements for Federal Activities and Interagency Coordination Teams (506.28); and
- Supplemental Interagency Coordination for Federal Agency Activities (506.29).

In comparison, Oregon 660-035-0030 (see description above) has a streamlined rule concerning the review of these activities. For instance, the Oregon rule states that the federal agency's consistency determination must comply with 15 C.F.R. § 930.39, with some additional details on NEPA documents under 15 C.F.R. § 930.37. The Oregon Rule also does not discuss negative determinations, relying instead on the state to follow the procedures in the federal rules, and refers to 15 C.F.R. § 930.42 for the public participation requirements.

The council (soon to be committee) procedures in the TAC also lengthen Texas's rules. TAC Rule 506.26 (Referral of Federal Agency Activities) and TAC Rule 506.27 (Council Hearing to Review Federal Agency Activities and Availability of Mediation) deal with

the council's review of federal activities and development projects. Under Section 33.206(e) of the amended Texas statute, the committee will still be able to refer actions to the commissioner for review if 3 committee members agree that any federal action, activity, or OCS plan presents a significant unresolved issue regarding consistency with the goals and policies of the Coastal Management Program (CMP).

In comparison, under Oregon 660-035-0005, the Department of Land Conservation and Development (Department) conducts its federal consistency reviews. As discussed above, Oregon repealed its procedures to have the Land Conservation and Development Commission (Commission) also perform consistency reviews; therefore, Oregon now only has one entity doing consistency reviews. Texas may be interested in following a similar model, but it also needs to address the procedures in its statute that allows the committee to refer actions to the commissioner for review if 3 committee members agree. This may be another area where OCRM could provide some guidance when Texas revises its rules.

Review of Federal Licenses/Permits ("Federal Agency Action" under TAC Rule 506.11)

TAC Rules 506.30- 506.37 address the review of federal agency actions, with rules on:

- Consistency Certifications (506.30);
- Council Assistance (available at the request of the applicant) (506.31);
- Public Notice and Comment (506.32);
- Referral to the Council of Federal Agency Action (506.33);
- Council Hearing to Review a Federal Agency Action (506.34);
- General Concurrence (506.35);
- Supplemental Coordination for Proposed Federal Agency Actions (506.36); and
- Remedial Actions for Previously Reviewed Federal Agency Actions (506.37).

As discussed above, in Oregon 660-035-0050, Oregon amended and streamlined its rule for its review of these activities. The rule now states that the Department will conform to the requirements and procedures in 15 C.F.R. Part 930, Subpart D, and specifies that the consistency certifications and public comment will comply with 15 C.F.R. § 930.39(a) and 15 C.F.R. § 930.42, respectively. Again, Texas may want to take a similar approach and might want to work with OCRM to see how its rules can be amended. In addition, as stated above, Texas will have to think about how the committee review under Section 33.206 of the amended Texas statute will fit into this review process.

Review of Outer Continental Shelf (OCS) Plans

TAC Rules 506.40-45 address Texas's consistency review of OCS plans, with rules on:

- Consistency Certifications (506.40);
- Public Notice and Comment (506.41);
- Referral to Council for Review of OCS Plans (506.42);
- Council Hearing to Review OCS Plan (506.43);
- Effect of Council Concurrence (506.44); and
- Failure to Comply Substantially with an Approved OCS Plan (506.45).

Again, like the new rules for federal activities and federal permits and licenses, Oregon amended Rule 660-035-0060 to make it very short and to clarify that the Department will follow 15 C.F.R. Part 930, Subpart E when reviewing these activities. The Oregon rule also states that an applicant must submit to the Secretary of Interior a consistency certification that complies with 15 C.F.R. § 930.76 and that public participation will comply with 15 C.F.R. § 930.77. Again, Texas may want to take a similar approach and may want to work with OCRM to see how its rules can be amended. In addition, as stated above, Texas will have to think about how the committee review under the amended Texas statute will fit into this review process.

Federal Assistance to State and Local Governments

TAC Rules 506.50-54 address Texas's consistency review for federal assistance activities, with rules on:

- Notice to the Council of Applications for Federal Assistance (506.50);
- Referral of Applications for Federal Assistance (506.51);
- Hearing to Review Applications for Federal Assistance (506.52);
- Supplemental Coordination for Federal Assistance Activities Rule (506.53); and
- Remedial Action for Previously Reviewed Federal Assistance Activities (506.54).

Oregon 660-035-0070, like the other Oregon rules, states that the Department will follow 15 C.F.R. Part 930, Subpart F when it is reviewing these activities. The rule also states that the applicant agency must submit to the department the materials described in 15 CFR § 930.94 and that the Department's review period for these activities will be 60 days. Under the federal regulations, a state's review period is based on the state's clearinghouse procedure. In addition, Section 33.206(e) of the revised Texas statute does not give the committee power to refer federal assistance activities to the commissioner, as the provision only applies to federal actions, activities, and OCS plans.

I hope you have found this information helpful. If you have follow-up questions or concerns, please let me know.

Sincerely,

Catherine M. Janasie

Catherine M. Janasie
Ocean and Coastal Law Fellow

Appendix A

Reviewable Activities

Under Section 33.053(10) of the Texas statute, the Coastal Management Program (CMP) lists each federal agency action or activity and each OCS plan that may have a direct and significant detrimental impact on natural resource areas. A summary of the federal requirements for listing federal agency activities, federal licenses and permits, OCS plans, and federal assistance activities to state and local governments are described below.

Federal Agency Activity

15 C.F.R. § 930.32 requires that a federal agency activity be consistent to the “maximum extent practicable” with the enforceable policies of a state’s CMP, and 15 C.F.R. § 930.33 requires federal agencies to determine whether their activities affect any coastal use or resources of the CMP. Federal development projects in the coastal zone should always be covered.

15 C.F.R. § 930.34 governs federal and state agency coordination in determining what activities need to be reviewed. Under this provision, it is ultimately the federal agency’s responsibility to determine whether an activity is subject to consistency review, as federal agencies need to provide the state agency with a consistency determination for all federal agency activities affecting any coastal use or resource. The federal regulations encourage states to list in the CMP federal agency activities that, in the state agency’s opinion, will have reasonably foreseeable coastal effects and may require a consistency determination. Further, under the regulations, states should monitor unlisted federal activities, but the federal agency still has to determine if consistency review is needed, regardless of whether the activity is listed or not. Finally, in determining if an activity should be reviewed, the federal agency should obtain the views and assistance of the state agency, and the state should make available for public inspection copies of the management program document.

Federal License or Permit

Under 15 C.F.R. § 930.53, states shall develop a list of the specific federal licenses and permits that affect any coastal use or resource that the state wants to review for consistency. The state’s listing must describe the applicable geographic area for activities outside the coastal zone with foreseeable coastal effects, and if the area is on federal land outside the coastal zone, states must describe this geographic location in their plans. If the state does not describe the geographic location and wants to review the action, the state must follow the unlisted activity procedures. If the state wants to amend the list, it has to let the affected federal agency know 60 days before submitting the program change to OCRM, and the state must include any comments from the federal agency in its program change request to OCRM. Finally, the state can give general concurrence for minor activities, but it must develop conditions for allowing concurrence

and then provide public notice and general concurrence on similar minor work in the same area.

Under 15 C.F.R. § 930.54, states, with help from the federal agencies, should review unlisted activities. If a state wants to review an unlisted activity, it has to notify the federal agency within 30 days of receiving notice of the license or permit activity. Otherwise, the state waives review. However, if the state doesn't receive notice from the federal agency pursuant to the requirements of this section, this waiver doesn't apply. The state and federal agency will then work with the Director on whether the state can review the activity. The procedures that the state and federal agency must follow can be found in 15 C.F.R. § 930.54.

OCS Plans

Under 15 C.F.R. § 930.74, unless a state doesn't anticipate that OCS activities will have coastal effects, the state shall list OCS plans that describe in detail federal license or permit activities that affect any coastal use or resource.

Federal Assistance

Under 15 C.F.R. § 930.95, a state agency should develop a list of federal assistance programs subject to consistency review. If the state agency wants to review federal assistance activities outside of the coastal zone that have foreseeable coastal effects, it needs to describe the geographic area for the activities that will be covered, and each listing can have its own location. The state needs to consult with the federal agency and receive the approval of the Director for both the listings and geographic areas, as well as for any amendments under 15 C.F.R. § 930.95(a) and (b). The state needs to give these listings to the federal agencies and units of applicant agencies. Finally, the state agency can review unlisted activities under 15 C.F.R. § 930.98, under which state agencies should monitor federal assistance activities outside the coastal zone or described geographic areas (e.g., by use of the intergovernmental review process, reviewing NEPA documents, or reviewing the Federal Register).