

description of the activity, its associated facilities and the coastal effects.

NOAA proposes to remove the clause in § 930.58(a)(1) that says “and comprehensive data and information sufficient to support the applicant’s consistency certification.” This clause is not needed since the rest of the section, especially as changed, describes the information NOAA determined necessary and § 930.58(a)(2) allows the State to describe in its CMP necessary information in addition to that required by NOAA regulations. The language proposed to be removed is ambiguous as it could refer to the other paragraphs in this section or to other undefined information, and could create uncertainty in the determination of when the six-month review period starts.

These changes would not affect a State’s ability to specifically describe “necessary data and information” in the State’s federally approved management program (§ 930.58(a)(2)), or to request additional information during the six-month review period (§ 930.60(b)), or to object for lack of information (§ 930.63(c)).

Rule Change 11: § 930.58(a)(2) Necessary data and information (State permits). In the 2000 rule, NOAA allowed States to describe State permits as necessary data and information. Unfortunately, implementation of this provision had the potential to require applicants to obtain State permit approval before the six-month consistency review period could begin. NOAA does not believe the statutorily defined six-month review process anticipated such a conundrum. While it may be appropriate or necessary for a State to include complete State permit *applications* as necessary data and information, it is not appropriate to require an approved permit. Thus, NOAA proposes to remove “State permits” as eligible necessary data and information, but has retained State permit applications.

Rule Change 12: § 930.60 Commencement of State agency review. This change would clarify when the State’s consistency review period begins for federal license or permit activities. The changes would provide additional clarification to States that the State’s determination of whether the information provided by the applicant pursuant to 15 CFR 930.58 is complete, is not a substantive review. Instead it is a “checklist” review to see if the application, description of the activity, the coastal effects, the evaluation of the State’s enforceable policies, and specific information described in the State’s federally approved program are

included in the submission to the State agency. If the items required by § 930.58 are included, then the six-month review starts. This review does not determine or evaluate the *substantive adequacy* of the information. The adequacy of the information is a component of the State’s substantive review which occurs during the six-month review period. The change would also further clarify that a State may not stop, stay or otherwise alter the consistency timeclock once it begins, unless the applicant agrees in writing to stay the time period for a specific or defined amount of time. NOAA proposes to delete the word “extend” because the six-month period is set by statute and cannot be extended by rule. Thus, the State agency and applicant can stay or “toll” the running of the six-month period for an agreed upon time, after which the remainder of six-month statutory period would continue.

NOAA reiterates that if a State wants to require certain information prior to starting the six-month review period, the only way it can do so is to amend the State’s management program to identify specific “necessary data and information” pursuant to § 930.58(a)(2).

NOAA also proposes to change the section to remove a State’s option of starting the six-month review period when a consistency certification has not been submitted. *See* below under *Collier Decision* for further information.

The proposed re-write of paragraph (a)(2) is not a substantive change, but is merely a more clear restatement of the existing paragraph.

The Collier Decision. Under the 2000 rule, § 930.60(a)(1)(ii) allowed a State to start the six-month consistency review period even if the applicant had not provided a consistency certification or the necessary data and information. However, now, as described in *Collier*, NOAA has determined that a State could not start the six-month review without the applicant’s consistency certification. *See* NOAA’s Dismissal Letter in the Consistency Appeal of Collier Resources Company (April 17, 2002). In *Collier*, NOAA determined that:

An applicant’s failure to provide a state with a consistency certification cannot divest a state of its authority pursuant to CZMA section 307(c)(3)(A). However, filing a state objection without an underlying consistency certification provided by the applicant is neither a remedy for the applicant’s failure to comply with the CZMA, nor a valid exercise of [the State’s] own CZMA authorities.

The statutory language and scheme of the CZMA presumes that the applicant has the first opportunity to demonstrate that its activity is consistent with the enforceable policies of the state CMP. Section

307(c)(3)(A) provides in pertinent part: “[a]t the earliest practicable time, the state or its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant’s certification.” The NOAA regulations also require a state objection be made in response to the applicant’s consistency certification. 15 CFR 930.64. Likewise, consistency cannot be presumed without the receipt of a consistency certification. 16 U.S.C. 1456(c)(3)(A) and 15 CFR 930.63. Finally, NOAA’s regulations anticipate that the applicant will have the first opportunity to provide the state with the necessary information and data to demonstrate consistency with the state CMP and that only after the receipt of that information can the state consistency review process begin. *See* 15 CFR 930.58.

Given the language and structure of the statute and NOAA’s implementing regulations, it is clear that an applicant’s consistency certification is essential to a state’s Federal consistency review. Therefore, I conclude that a State may not “object” within the meaning of the CZMA, to an application for a Federal license or permit when no consistency certification has been submitted. Florida’s objection in this case has no effect or is not valid.

A coastal state is not without remedy, however, when a recalcitrant applicant declines to provide the necessary consistency certification. First, both the statute and the regulations make it clear that a Federal agency cannot issue a license or permit until “the state or its designated agency has concurred with the applicant’s consistency certification or until by the state’s failure to act, the concurrence is conclusively presumed.” 16 U.S.C. 1456(c)(3)(A). In addition, a state may seek enforcement of the CZMA in Federal court. Unlike the Secretary of Commerce, the Federal courts have the authority to require compliance with Federal law through the issuance of mandamus, injunction and other relief.

Optimally, in matters such as this, where an applicant disagrees that its permit or license activity is subject to the provisions of a state CMP can be resolved through the availability of mediation services of NOAA’s Office of Ocean and Coastal Resource Management (OCRM), 15 CFR 930.55, or an advisory letter issued by OCRM pursuant to 15 CFR 930.142 (15 CFR 930.3(2001)). While these informal procedures do not carry the weight of a federal court order, they represent the views of the expert agency charged with the implementation of the CZMA. These informal remedies are also more expedient and less costly than the Secretarial appeals process or federal litigation.

While not central to the decision made in *Collier*, NOAA opined in *Collier* that the six-month review period could also only start after receipt of the necessary data and information. *Id.* However, NOAA has determined that a State could, if it wished to, start the six-month review upon receipt of a consistency certification, but without the necessary data and information (but could not then later stop the six-month