

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

OFFICE OF THE CHAIRMAN

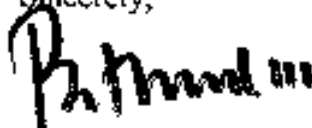
August 27, 2003

David Kaiser
Federal Consistency Coordinator
Coastal Programs Division
Office of Ocean and Coastal Resources Management, NOAA
1305 East-West Highway, 11th Floor
Silver Spring, MD 20910

Dear Mr. Kaiser:

The comments of the Federal Energy Regulatory Commission Staff on NOAA's proposed rulemaking to revise the Federal Consistency regulations under the Coastal Zone Management Act of 1972 are attached. Please let me know if I may be of any further assistance.

Sincerely,



Pat Wood, III
Chairman

Enclosure

COMMENTS
OF THE FEDERAL ENERGY REGULATORY STAFF
ON NOAA'S PROPOSED RULEMAKING

On June 11, 2003, the National Oceanic and Atmospheric Administration (NOAA) issued a proposed rule to revise its Federal Consistency regulations at 15 C.F.R. Part 930 to clarify some sections and provide greater transparency and predictability. NOAA is proposing its rule in response to the recommendations of the National Energy Policy Development Group. The comments of the Federal Energy Regulatory Commission (FERC) staff on the proposed rule are set forth below.

Comments

Rule changes 10 and 11 propose to modify section 930.58(a)(1) and (a)(2) to provide greater specificity in identifying the information an applicant must provide a State agency to start the State's six-month consistency review period. As modified, section 930.58(a)(1) would require that the information and data to be provided must include "(1) A copy of the application for the Federal license or permit and (i) all material provided to the Federal agency in support of the application"

We support the proposed revisions to section 930.58 as adding specificity to what an applicant is required to provide to obtain a consistency determination in a timely, responsible fashion. We wish to take this opportunity, however, to highlight problems with this requirement that applicants for FERC certificates have recently experienced in trying to obtain consistency determinations for proposed projects, and to propose a further revision to section 930.58.

In one particular case, prior to beginning its consistency review, the designated State agency required the applicant to submit: 1) a Federal Consistency Assessment Form; 2) a copy of the application(s) along with any supporting documentation filed with FERC; and 3) a copy of FERC's Draft Environmental Impact Statement (DEIS).

Subsequently, the State agency informed the applicant that FERC's DEIS should include a narrative assessment of the effects of the entire project on, and its consistency with, all of the applicable State Coastal Policies related to land and water uses, natural resources, energy development and cultural resources. The State agency further stated that its review of the consistency certification would not begin until after this information was received and it determined whether it and all other necessary data and information were adequate to address the effects of the proposal on the coastal zone.

At a later date, the State agency informed the applicant and FERC that it would not begin its consistency review of the project until the Final Environmental Impact

Statement (FEIS) had been issued. In fact, the State agency did not commence its consistency review until after FERC issued its FEIS.

The tying of a State's commencement of its consistency review process to the completion by a Federal agency of its environmental review under the National Environmental Policy Act (NEPA) subverts the statutory scheme set forth in the Coastal Zone Management Act (CZMA) and in NOAA's Part 930, Subpart D regulations implementing the CZMA, and harms applicants and Federal agencies in their efforts to review and approve proposed projects in a timely fashion.¹

Section 307 of the CZMA sets forth the responsibilities of applicants and State agencies. As to applicants, section 307(c)(3)(A) provides that:

[A]ny applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of a state's approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data.

As to the responsibilities of States, section 307(c)(3)(A) provides that:

At 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. If the state or its designated agency fails to furnish the required notification within six months after receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed.

¹FERC staff's comment is limited to NOAA's Subpart D regulatory program. We do not address this issue in the context of NOAA's other programs, such as its Subpart C program governing consistency for Federal agency activities, or its Subpart E program setting forth the consistency requirements for Outer Continental Shelf exploration, development and production activities.

NOAA's regulations in Part 930, Subpart D, flesh out the statutory scheme set forth in section 307 of the CZMA. For example, section 930.58 specifies the data and information that an applicant must submit to a State with its consistency certification. Section 930.62 states that the State agency shall notify the Federal agency and the applicant at the earliest practicable time whether the State agency concurs with or objects to a consistency determination. These requirements, and others contained in Subpart D, clearly contemplate submission to the State of an applicant's consistency determination at the time the applicant submits its application to a Federal agency. It also requires action as soon thereafter as possible by the State agency. A State agency requirement that it not begin its consistency review until completion of the Federal agency's NEPA review, a process which sometimes takes years, is not sanctioned by either the statute or by NOAA's regulations implementing the statute.

This conclusion is verified by section 930.37, which is found in Subpart C of NOAA's regulations. Subpart C sets forth consistency requirements for projects in which the Federal agency itself, and not a private applicant, is the project sponsor. In such cases, it is the Federal agency that is responsible for providing a consistency determination to the State or its designated agency. Section 930.37 provides that:

A Federal agency may use its NEPA documents as a vehicle for its consistency determination or negative determination under this subpart. However, a Federal agency's federal consistency obligations under the Act are independent of those required under NEPA and are not necessarily fulfilled by the submission of a NEPA document. If a Federal agency includes its consistency determination or negative determination in a NEPA document, the Federal agency shall ensure that the NEPA document includes the information and adheres to the timeframes required by this subpart. Federal agencies and State agencies should mutually agree on how to best coordinate the requirements of NEPA and the [CZMA]. (Emphasis added).

This language further confirms that the CZMA and NEPA processes are separate and distinct, and that the unilateral action of the State agency in this case refusing to consider the consistency determination until after the Federal agency issued an FEIS was inappropriate.² Accordingly, we urge NOAA to further amend section 930.58 to clarify

²There is a practical basis for regarding the CZMA and NEPA processes as separate in the context of Subpart D activities. As NOAA acknowledged in previously revising its Federal consistency regulations: "NEPA and the CZMA have different

that a Federal agency's NEPA process is separate and distinct from the state's CZMA process unless the Federal agency, State, and applicant agree to address consistency requirements in NEPA documentation, and that a State or its designated agency may not delay processing an applicant's consistency determination pending completion of the Federal agency's NEPA or other environmental processes.

With regard to States and others who wish to participate in the Commission's environmental process, we would like to note that, in conjunction with the White House Task Force on Energy Project Streamlining, the Commission has made substantial efforts to involve all stakeholders in the Commission's environmental review of projects. The "Interagency Agreement on Early Coordination of Required Environmental and Historic Preservation Reviews Conducted in Conjunction With the Issuance of Authorizations to Construct and Operate Interstate Natural Gas Pipelines Certified by the Federal Energy Regulatory Commission" (Interagency Agreement), signed in August 2002, emphasizes the goal of having permits for interstate natural gas pipelines issued concurrently rather than consecutively. While the Interagency Agreement applies to the nine signatory Federal agencies, including the Department of Commerce, its objectives and goals are being applied by the Commission in working with all stakeholders. This includes agencies administering the CZMA.

In such cases, we encourage state agencies to participate in the Commission's environmental process, not only as commenters or cooperating agencies, but also at the pre-filing stage before projects are formally filed with the Commission. Under the Interagency Agreement, signatory agencies will continue to work directly with applicants

'effects tests.' Thus, it may be that a NEPA document may not contain needed CZMA information or that a conclusion regarding effects for NEPA purposes will not satisfy the CZMA effects test." 65 Fed. Reg. 77124 at 77139 (December 8, 2000). Similarly, in the instant rulemaking, NOAA noted in connection with a proposed revision to Subpart E of its regulations pertaining to consistency for Outer Continental Shelf exploration, development and production activities, that:

While the status of the completion of NEPA documents is an issue raised by coastal states when performing consistency reviews, NOAA is not adding language requiring that NEPA documents be included as information necessary to start the six-month review period. A requirement that NEPA documents (draft or final) be completed prior to the start of the six-month review period would be incompatible with the statutory requirements in the OCSLA.

68 Fed. Reg. 34851 at 34858 (June 11, 2003).

to address issues, including issues that may relate to a State's coastal zone. However, agencies can and should bring any significant unresolved issues to the attention of the Commission as the lead Federal agency where they can receive attention in the context of the licensing proceeding.

Finally, we would like to take this opportunity to highlight two additional problems that we feel warrant NOAA's attention. The first concerns appeals to the Secretary of Commerce from a State's determination that a proposed activity is inconsistent with its Coastal Management Plan. While such appeals are relatively rare, they do have the potential to significantly impact proposed projects. This is particularly true of projects sponsored by private, non-governmental entities in which the mere fact of delay can sometimes be fatal to the ability to continue with the project. In such cases, we feel that it would be beneficial to process appeals to the Secretary of Commerce on a fast-track basis.

While we recognize that there may be restraints on NOAA's ability to address this problem, we would nonetheless like to recommend that as to such projects development of an alternative appeals process be considered. In such instances, we would suggest a process in which the record on appeal consists of documentation compiled by the State or its designated agency and the relevant Federal agencies from which approvals for the projects must be obtained. After a short briefing period and opportunity for public comment, it is important that a decision be issued as soon as possible and preferably within 90 days. In this manner, projects would be less likely to fail from the regulatory uncertainty that is created by a lengthy appeals process.

A similar problem is State delay in commencing, or completing, consistency review of a project pending an applicant obtaining permits from a county or other local government agency with a role in the consistency process. We recognize that the necessity of obtaining local permits is embodied in at least some State CMPs, but we note that this process has the potential to unduly delay the approval of projects involving coastal issues. We would suggest that, to the extent they are necessary, all such reviews run concurrently and not as a condition precedent to the six month review period for a State agency to concur with or object to a consistency determination. In this manner, the State interest can be served while completing consistency reviews within the time-frames contemplated by the Act and NOAA's implementing regulations, and projects would not be needlessly delayed.

Conclusion

FERC staff recommends that NOAA amend section 930.58 to clarify that a Federal agency's NEPA process is separate and distinct from the state's CZMA process unless the Federal agency, State, and applicant agree to address consistency requirements

in NEPA documentation, and that a State or its designated agency may not delay processing an applicant's consistency determination pending completion of the Federal agency's NEPA or other environmental processes. We also urge NOAA to consider establishing an alternative appeals process for certain types of projects and require all consistency reviews be conducted concurrently within the six month review period as specified above.