

No. \_\_\_\_\_

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**UNITED STATES OF AMERICA  
BEFORE THE DEPARTMENT OF COMMERCE**

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**G. Walter Swain,  
Appellant,**

vs.

**Delaware Department of Natural  
Resources and Environmental Control,  
Respondent.**

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**REPLY BRIEF ON APPEAL OF G. WALTER SWAIN  
UNDER THE COASTAL ZONE MANAGEMENT ACT**

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## INTRODUCTION

DNREC's objection should be overridden for the following two reasons:

1. DNREC's objection was untimely under § 307(c)(3)(A) of the CZMA and must be overridden under 15 C.F.R. §930.129(b). During its review of Mr. Swain's application, DNREC gave the applicant two choices: 1) agree to an indefinite hold on the application; or 2) be denied for lack of information beyond Mr. Swain's control. DNREC admits that the agreement it drafted and imposed on Mr. Swain did not state a "specific date" upon which DNREC's hold on the application would end. Rather, DNREC tied its review deadline to some unknown date in which another agency's review would be completed. Although DNREC argues this deadline was somehow calculable, they do not—and cannot—state what the deadline was. DNREC does not have the authority to modify or ignore the express provisions of 15 C.F.R. §930.60(b). Therefore, DNREC's objection must be overruled as a threshold matter.

2. Mr. Swain's proposed marina is consistent with the objectives and purposes of the Act. DNREC does not provide a shred of evidence to the contrary. The only evidence DNREC provides—and the only arguments it makes—are that the red knot's population is in decline, and the Delaware Bay area is an important habitat for the red knot's migratory patterns. For purposes of this appeal, Mr. Swain does not dispute either of these facts. What DNREC fails to argue, let alone prove, is that Mr. Swain's proposed marina will have one iota of impact on either of these circumstances. Mr. Swain has demonstrated that his project is consistent with the purposes of the CZMA, regardless whether DNREC agrees with those purposes. In response, DNREC has failed to provide any scientific evidence (or even argument) that Mr. Swain's marina would have any adverse impact whatsoever on the red knot or any other migratory shorebird in the area.

## ARGUMENT

### 1. **DNREC's Unreasonable Delay and Indefinite "Hold" on the Project's Certification Review was Legally Improper Under the CZMA and its Regulations.**

It is undisputed that Mr. Swain provided DNREC with all of the information necessary for review of his consistency certification by November 16, 2006. DNREC's only basis for delaying its determination for over a year, until January 3, 2008, is its reliance on the terms of the agreement. DNREC relies on Paragraph 4 of the agreement, which states:

If the requested information is received within the time frame outlined above, the DCMF will defer a decision on the federal consistency certification until the DNREC Division of Water Resources issues or denies their permit for this project.<sup>1</sup>

DNREC argues that the end date of this hold was calculable, but then fails to state what that date is. In fact, it was not a specific or calculable date. If the date truly was calculable, DNREC should have simply stated the specific date in the agreement—but it did not. Any attempt to characterize DNREC's "hold" on its review of Mr. Swain's project as anything other than indefinite is simply wrong.

Section 930.60(b) of 15 C.F.R. requires that any stay of the six-month consistency review period must be "in writing and **state a specific date** on when the stay will end." (Emphasis added). DNREC's agreement did not state a specific date when it would end. DNREC then used that ambiguity to delay its review of Mr. Swain's project for over another year. The Federal regulations were promulgated to avoid precisely this situation. DNREC's agreement and its delay violated the CZMA and its regulations. DNREC's objection must therefore be overridden as a threshold matter.

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<sup>1</sup> Appellant's Exhibit I.

DNREC's argument that without the stay it would have been compelled to object to the consistency certification is meritless. Mr. Swain indisputably provided DNREC with all the information it needed to complete his application by November 16, 2006. At that point, the stay could have been lifted. DNREC's delay for over a year beyond that date was not attributable to the applicant, nor did it benefit the applicant in any way.

**2. The Application is Consistent With the Objectives of the CZMA and DNREC Does Not Provide any Evidence to the Contrary.**

A proposed project is consistent with the objectives or purposes of the CZMA if it satisfies the following three requirements:

(a) The activity furthers the national interest as articulated in §302 or §303 of the Act, in a significant or substantial manner.

(b) The national interest furthered by the activity outweighs the activity's adverse coastal effects, when those effects are considered separately or cumulatively.

(c) There is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program. The Secretary may consider but is not limited to considering previous appeal decisions, alternatives described in state objection letters and alternatives and other information submitted during the appeal.

**A. The proposed project furthers a national interest.**

The first requirement—furthering a national interest—has been broadly defined by Congress. CZMA appeals decisions uniformly recognize this mandate and have held that this requirement “will normally be satisfied on appeal.”<sup>2</sup>

Mr. Swain's marina will undoubtedly improve the commercial, recreational, and aesthetic use of the coastal zone satisfying the broadly defined § 302(a) of the Act. The Appellant also

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<sup>2</sup> *Decisions and Findings in the Consistency Appeal of Islander East Pipeline Company, LLC*, May 5, 2004, at pg. 3-4.

highlighted a number of provisions of § 303 of the Act that the marina is consistent with, including:

- § 303(1) which states that the national policy is “to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation’s coastal zone for this and succeeding generations.”
- § 303(2)(E) – to encourage and assist the needs for economic development programs including public access to the coasts for recreation purposes;
- § 303(2)(F) – to promote assistance in the redevelopment of deteriorating urban waterfronts and ports, and sensitive preservation and restoration of historic, cultural, and esthetic coastal features.

Faced with these indisputable national interests and purposes of the Act served by Mr. Swain’s project, DNREC points to the fact that the original marina on this site since the 1930’s was destroyed by a hurricane in 1992. It then makes the nonsensical argument that the Department of Commerce should apply “common sense” and uphold DNREC’s meritless objection because “we, as a society, learn from our mistakes and not allow for consecutive erroneous marina siting decisions.” This argument is not only inconsistent with DNREC’s previous willingness to issue Mr. Swain a permit to rebuild the marina in 1998, but also with rational thought. Based on DNREC’s cynical logic, New Orleans should never have been rebuilt, nor should have Florida and much of the eastern coastline (many times).

Under the DNREC philosophy, once a site is destroyed by a natural disaster, it should remain undeveloped for all time despite improvements in construction techniques and weather-proofing. It is difficult to see how such a policy (from a state agency nonetheless) is consistent with the CZMA. Such statements may provide some indication of the frustration Mr. Swain has had working with DNREC for the past three years.

**B. The national interest furthered by the proposed project outweighs any adverse coastal effects—of which DNREC has shown none.**

In its Answering Brief, DNREC’s counsel improperly tries to bolster DNREC’s consistency denial by citing information and articles that were not cited or relied on by the agency in its objection letter. In any event, the only thing that DNREC’s brief demonstrates—if accepted as true—is that the red knot population is dwindling and that the Delaware Bay area is important to the red knot’s migration. After spending two pages detailing the red knot’s migration journey, DNREC misstates the appellant’s argument. The appellant does not dispute that the Mispillion Harbor is important to the red knot or that its numbers are declining. What the appellant is arguing is that DNREC has provided absolutely no scientific evidence whatsoever that the *applicant’s proposed project* would have any effect on the red knot—or any other shorebird for that matter.

DNREC’s attempt to cast aspersions on Mr. Swain by characterizing his project as “commercial” and “for financial gain,” is entirely irrelevant. Similarly, DNREC’s statements that the proposed marina “would only serve a discrete and miniscule portion of the public,” is as unsubstantiated as its “scientific” arguments. The impact of the Swain’s Marina Project on Delaware’s Coastal Zone is overwhelmingly positive and beneficial to the public.

DNREC’s Answering Brief suffers from the same defects as its consistency objection letter. It is based on pure speculation and provides no reliable concrete evidence that Mr. Swain’s marina would harm any red knot or migratory bird. DNREC’s objection contains nothing more than conclusory allegations supported only by references to irrelevant sources entirely unrelated to the appellant’s project or even the site of the project.

The following examples of DNREC’s arguments demonstrate this point:

- On page 3 of its objection, DNREC argues that pollution from boats (not marinas) would harm the area. First, it is undisputed that there are already many boats that travel freely up and through this area. It is a public waterway. There is no argument—let alone evidence—that Swain’s marina would impact the number of boats in the area. Next DNREC says that “boat engines release up to 30 percent of their fuel directly into the water and as air pollution.” DNREC cites some unknown “Schmidt et. al.” article that it doesn’t even give the full cite for or list in its “References.” DNREC’s remaining references are entirely generic and there is no argument that the references apply to the type of structure or building materials for Swain’s marina whatsoever.
- On page 4, DNREC appears to make an entirely unsupported claim that the marina would somehow impair the “many Delawareans and visitors” ability to watch birds in the area. There is no evidence whatsoever that the marina would hinder bird-watchers. Ironically, bird-watchers might actually enjoy a place to launch a boat so they could float along the waterway to spot birds. Such an assertion is no less speculative or implausible than DNREC’s.
- On page 5, DNREC argues that the Mispillion Harbor supports many shorebirds and horseshoe crabs. While this may be true, the Mispillion Harbor is a very large area. Mr. Swain’s marina would be built and occupy an extremely small portion of the entire harbor that has already been commercialized by an adjacent marina and public boat slip. There is no evidence or argument whatsoever that the exact area where Mr. Swain’s marina would be built is an area of nesting or roosting for shorebirds or a spot where horseshoe crabs congregate. Instead, DNREC relies on general and outdated articles about the Mispillion Bay area as a whole.
- Finally, on page 6, DNREC makes a vague statement that human disturbance affects shorebird behavior, citing general articles. Based on this general statement, DNREC then makes the unsupported conclusion that Mr. Swain’s marina would negatively impact migratory shorebirds in the area. Even accepting as true DNREC’s entirely unsupported claim that the marina is located “within the premier shorebird foraging area,” there is no evidence that Mr. Swain’s marina would increase disturbance over what is already present in the area such that it would further affect the birds. Birds in that area are accustomed to human disturbances from the nearby marina and boat slips. It is just as likely that they have adapted to human disturbance as it is that they would be further disturbed.

These non-exclusive examples demonstrate that DNREC’s objection was not based on any objective scientific basis. DNREC simply did not want the marina in the area and was determined to deny Mr. Swain’s project regardless of his property rights or the purposes of the CZMA. Because Mr. Swain’s project is consistent with the purposes of the Act and there is no

evidence any adverse effects would outweigh the national interest served, DNREC's objection must be overruled.

**C. DNREC Expressly Rejected the Idea of Less Invasive Alternatives.**

DNREC's statement in its brief that "the DCMP's objection does not preclude appellant from seeking approval for a more modest project" is demonstrably false.<sup>3</sup> At the conclusion of DNREC's consistency objection, the Agency stated that "Based on the impacts to protected wildlife and habitats and public interest, *there is no viable commercial alternative to the project.*"<sup>4</sup> If the Agency's position has changed, the appellant is—and has been—willing to work with DNREC on a project that DNREC perceives as less invasive and "more modest."

**3. Conclusion**

For all of the foregoing reasons, and for all the reasons and evidence to be set forth in the Applicant's Opening Brief, the Applicant respectfully asks the Secretary to find and conclude that:

1. DNREC failed to comply with Section 307 and Subpart D of the NOAA regulations and, therefore, pursuant to 15 C.F.R. §930.129(b), all of DNREC's objections must be overridden.

2. The Swain's Marina Project is consistent with the objectives and purposes of the Act and, as such, all of DNREC's objections must be overridden.

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<sup>3</sup> Respondent's brief at 17.

<sup>4</sup> Appellants Exhibit R at 6.

Respectfully Submitted,

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Dated: April 15, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that on April 15, 2008, consistent with 15 C.F.R. §930.125 and DNREC's objection letter, copies of the foregoing REPLY BRIEF ON APPEAL have been sent to the following:

**VIA Federal Express**

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