UNITED STATES DEPARTMENT OF COMMERCE
The Under Secretary of Commerce
for Oceans and Atmosphere
Washington, D.C. 20230

MAY 16 2005

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Gary J. Cuevas
EnviroSouth
6017 Vista Circle
Gulfport, Mississippi 39507-4636

Glen H. Carpenter
Executive Director
Mississippi Department of Marine Resources
1141 Bayview Avenue, Suite 101
Biloxi, Mississippi 39530

Re: Decision in the Consistency Appeal of Singleton Development Corporation

Dear Messrs. Cuevas and Carpenter:

This appeal involves a request by the Singleton Development Corporation (Singleton) to alter approximately four acres of wetlands for expansion of a residential subdivision. In March 1999, Singleton filed an application with the Army Corps of Engineers (Corps) and Mississippi Department of Marine Resources (Mississippi) seeking approval to alter these wetlands and certifying the project was consistent with Mississippi's Coastal Program.

In September 2000 – almost eighteen months later – Mississippi objected to Singleton's consistency certification. Under the Coastal Zone Management Act (CZMA), however, states must either concur or object within six months after receiving the certification. 16 U.S.C. § 1456(c)(3)(A). Because Mississippi failed to object to Singleton's certification before expiration of the six-month period, Mississippi's concurrence with Singleton's project is presumed, and Mississippi's late objection is overridden.[1]

[1] As the Under Secretary of Commerce for Oceans and Atmosphere, I have been delegated authority to make procedural rulings for CZMA appeals. *See* Department Organization Order 10-15, Section 3.01(u).

THE ADMINISTRATOR

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I. Statutory and Regulatory Background

The CZMA provides states with federally-approved coastal management programs the opportunity to review proposed projects requiring federal licenses or permits if the project will affect the state's coastal zone. Under the CZMA, a state has six months to concur with, or object to, a certification submitted by an applicant asserting the project is consistent with the state's program. 16 U.S.C. § 1456(c)(3)(A). This six-month period, however, does not begin unless the consistency certification includes all "necessary data and information" as defined by the CZMA implementing regulations. *Id.*; 15 C.F.R. §§ 930.58, 930.60 (2000).[2]

A timely objection raised by a state precludes federal agencies from issuing licenses or permits for the project, unless the Secretary of Commerce overrides the objection. If the state's objection is untimely, however, concurrence with the project is presumed. 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.63 (2000).

II. Factual background

On March 31, 1999, Singleton submitted an application to Mississippi and the Corps seeking approval to alter four acres of wetlands for expansion of a residential subdivision in Jackson County, Mississippi. The application package included (1) a cover letter, (2) the application form, (3) five maps, (4) an Environmental Assessment dated March 25, 1999, and (5) a letter from the Corps regarding its completed wetland delineation for the property.[3] The application included the required CZMA consistency certification, stating the project complied with the approved Mississippi Coastal Program and would be conducted in a manner consistent with the Program. According to Mississippi, it received the application on April 2, 1999.[4]

On September 29, 2000, Mississippi sent a letter to the Corps objecting to Singleton's consistency certification.[5] Singleton responded to Mississippi on October 25, 2000, contending Mississippi's concurrence with the consistency certification was presumed, as Mississippi had not responded within the prescribed six-month period. Nonetheless, Singleton copied the Secretary of Commerce on its letter, lodging this appeal.[6]

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[2] Several aspects of the CZMA regulations were amended effective January 8, 2001. Because Singleton's appeal was filed in October 2000, the regulations governing appeals then in effect apply.

[3] *See* Letter from Gary J. Cuevas, EnviroSouth, to Mr. Howard Ladner, Mississippi Department of Marine Resources, Mar. 31, 1999, and attachments.

[4] *See* Letter from William W. Walker, Mississippi Department of Marine Resources, to Martin M. Freeman, NOAA Office of the General Counsel, Oct. 30, 2002, attachment 1.

[5] *See* Letter from E.G. Woods, Mississippi Department of Marine Resources, to Larry Godwin, U.S. Army Corps of Engineers, Sept. 29, 2000.

[6] *See* Letter from Gary J. Cuevas, EnviroSouth, to E.G. Woods, Mississippi Department of Marine Resources, Oct. 25, 2000.

After requesting and reviewing additional information submitted by the parties, the National Oceanic and Atmospheric Administration (NOAA) Office of the General Counsel[7] requested Singleton and Mississippi each submit a single brief addressing the timeliness of Mississippi's objection.[8] With briefing completed, this matter is ready for disposition.

III. Discussion

The parties disagree on when Mississippi's six-month review period began. The disagreement concerns when Singleton met the CZMA requirement to submit all necessary data and information with its consistency certification, thus triggering the beginning of the six-month review period. 15 C.F.R. § 930.60(a) (2000). Singleton asserts the six-month review period began on April 2, 1999, when Mississippi received the application package including the consistency certification. Singleton Brief, June 27, 2003, at 1. If Singleton is correct, the six-month review period ended on October 2, 1999.

Mississippi, however, contends the six-month review period began on August 20, 2000, when it received information concerning what it believed to be the last change in the project, and that its objection was therefore timely. Mississippi Brief, June 26, 2003, at 1. Mississippi makes two separate arguments in support of this contention: (1) Singleton's March 1999 application failed to include an initial alternatives analysis and mitigation plan, both of which are necessary data and information, and therefore failed to submit a complete certification triggering the start of the six-month review period; and (2) there were ongoing changes to the project, and each change restarted the six-month review period.[9] If Mississippi is correct on either score, then its objection was not late and consistency cannot be presumed. As set forth below, each of Mississippi's arguments is without merit.

A. Alternatives and Mitigation

As described earlier, the state's six-month review period for a consistency certification does not begin unless the certification includes all "necessary data and information." 15 C.F.R. §§ 930.58, 930.60 (2000). The CZMA implementing regulations specify a list of items constituting necessary data and information. *See* 15 C.F.R. § 930.58(a) (2000). A

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[7] The NOAA Office of the General Counsel has been delegated responsibility for undertaking all staff work necessary to make appeal findings. *See* Department Order 10-15, Section 3.01(u), and NOAA Administrative Order 201-104, Section 3.

[8] *See* Letter from Karl D. Gleaves, NOAA Office of the General Counsel, to Glen H. Carpenter, Mississippi Department of Marine Resources, and Gary J. Cuevas, EnviroSouth, May 15, 2003.

[9] In addition, Mississippi contends Singleton's project would fill a wetland that was to be preserved as mitigation for wetlands filled during an earlier phase of the development. *See* Mississippi Brief at 3-4. Whatever the merits of this contention, it is not a basis for excusing Mississippi from missing the deadline to object to Singleton's consistency certification.

state may add to this list by describing additional "requirements regarding the data and information necessary to assess the consistency of Federal license and permit activities." 15 C.F.R. §§ 930.56(b), 930.58(a)(2) (2000). Such additional requirements, however, must be part of the state's approved coastal management program. *Id.*

Mississippi claims, "Due to the complete lack of alternatives analysis and a mitigation plan acceptable to [the Mississippi Department of Environmental Quality (DEQ)], [Mississippi] viewed the [March 1999] project application as lacking necessary data and information."[10] Mississippi concedes the CZMA regulations do not identify an alternatives analysis or mitigation plan as "necessary data and information" for purposes of a consistency certification. Mississippi nevertheless contends its Coastal Program does. To support this contention, Mississippi cites to Section 4, Part II.B, of its Coastal Program, which references state laws and regulations implementing the federal Clean Water Act, 33 U.S.C. §§ 1251-1387. Under those state laws and regulations, an application for a Clean Water Act state water quality certification must address, in part, "feasible alternatives to the activity" and "mitigation." *See* Mississippi DEQ Regulation WPC-1, Chapter 3, Section IV.

Part II.B, however, does not pertain to what constitutes "necessary data and information" for purposes of a consistency certification. It addresses "Coastal Program Agency Responsibilities," i.e., Mississippi's responsibilities, and directs that, when reviewing proposed actions and their potential impacts on water quality, Mississippi's Bureau of Pollution Control must consider the Clean Water Act and the state's implementing regulations. *See* Mississippi Coastal Program, Section 4, Part II.B.

The relevant part is instead Part III.C, titled "Federal Consistency Certification." The provisions relevant to federal licenses and permits simply state that a consistency "certification must be accompanied by supporting information in accordance with [NOAA's regulations]" and thus do not specify any additional data and information necessary to trigger the start of the consistency timeclock. *See* Mississippi Coastal Program, Section 4, Part III.C. Accordingly, Mississippi's contention that Singleton failed to submit necessary data and information in March 1999 is rejected.

B. <u>Changing Project</u>

Mississippi alternatively argues Singleton and the Corps continued to modify the project after submission of the March 1999 application, triggering a new six-month review period with each change. *See, e.g.*, Mississippi Brief at 1-3. Singleton does not deny the project continued to undergo modest changes, but argues these changes did not affect the six-month review period. Singleton Brief at 1-3. Singleton is correct.

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[10] *See* Letter from William Walker, Mississippi Department of Marine Resources, to Martin M. Freeman, NOAA Office of the General Counsel, Oct. 30, 2002, at 3.

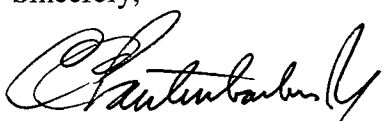
The CZMA identifies applications made to a federal agency (here the Corps) as the triggering event for imposition of CZMA consistency requirements. *See* 16 U.S.C. § 1456(c)(3)(A). The application triggers the requirement for an applicant to submit its certification and the necessary data and information to the state. *Id.* The state's receipt of the certification starts the six-month review period. *Id.* The CZMA contains no provision for the six-month period to be restarted. Likewise, NOAA's regulations make no provision for the six-month period to be restarted. *See* 15 C.F.R. §§ 930.50-930.66 (2000).

Several considerations argue in favor of one six-month review period for each application. First, Congress intended to limit the amount of time available for state review, thereby providing certainty and finality to the consistency process. It did so by enacting language that a state's concurrence is conclusively presumed if the state does not concur or object within six months. *See* 16 U.S.C. § 1456(c)(3)(A). Second, as a practical matter, states and applicants frequently work together to modify projects during the six-month time period. Mississippi's proposed interpretation could greatly reduce the incentive for applicants to work with the federal permitting agency and the state. Applicants would likely hesitate to consider making changes at the state's behest if each change effectively pushed the deadline for the state's decision further away. Finally, restarting the six-month review is unnecessary. If a state and applicant are unable to come to agreement within the six-month period, the state may object.

IV. Conclusion

For the foregoing reasons, Mississippi failed to object within the six-month time period allowed for under the CZMA. Mississippi's concurrence in Singleton's project is therefore presumed, and Mississippi's late objection is overridden. Accordingly, the project may receive licenses and permits from federal agencies.

Sincerely,



Conrad C. Lautenbacher, Jr.
Vice Admiral, U.S. Navy (Ret.)
Under Secretary of Commerce for
Oceans and Atmosphere

cc: Larry Godwin, Project Manager, Permitting Section
Mobile District, Corps of Engineers