UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

NOV 13 2006

VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED – AND TELEFAX

Mr. James S. Margolin, Esq.
Law Offices of Margolin and Margolin
52 Elm St., Suite 1
Huntington, NY 11743

Ms. Kathleen L. Martens, Esq.
New York State Department of State
Office of Counsel
41 State St.
Albany, NY 12231-0001

Re: Dismissal of the Consistency Appeal of Prescott Ammarell

Dear Mr. Margolin and Ms. Martens:

On July 28, 2006, Prescott Ammarell filed with the Secretary of Commerce a notice of appeal, pursuant to section 307(c)(3)(A) of the Coastal Zone Management Act (CZMA). This appeal concerns a proposal to construct a private dock in the Village of Lloyd Harbor (Lloyd Harbor), New York (the Project). In furtherance of the Project, Mr. Ammarell filed a permit application with the U.S. Army Corps of Engineers (Corps). Mr. Ammarell now appeals an objection by the New York Department of State (New York) to the consistency certification for the Project.

Pursuant to 15 C.F.R. § 930.129(a) (2005), *as amended*, 71 Fed. Reg. 787, 831 (Jan. 5, 2006), this appeal is dismissed for good cause. The appeal is dismissed because Mr. Ammarell has failed to: (a) timely submit a principal brief in support of the appeal; and (b) base his appeal on the grounds the Project is either consistent with the CZMA or necessary in the interest of national security.

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. A state may object to a proposed project if it is inconsistent with the enforceable policies of the state's approved coastal management program. 16 U.S.C. § 1456(c)(3)(A). A timely objection raised by a state precludes federal agencies from issuing licenses or permits for the project, unless the Secretary of Commerce finds the activity is "consistent with the objectives of [the CZMA]," or "necessary in the interest of national security." *Id.* A finding that either ground is satisfied will result in an override of a state's

objection. The Secretary may override a state's objection upon appeal by the license or permit applicant. *Id.*

The three criteria for determining whether a proposed activity is "consistent with the objectives of [the CZMA]" – each of which must be satisfied – are as follows:

> (a) The activity furthers the national interest as articulated in § 302 or § 303 of the [CZMA], 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 [, and]
>
> (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.

15 C.F.R. § 930.121 (2005), *as amended*, 71 Fed. Reg. 787, 829 (Jan. 5, 2006). As appellant, the license or permit applicant bears the burden of submitting evidence supporting the claim that the proposed activity is "consistent with the objectives of [the CZMA]" or "necessary in the interest of national security." Decision and Findings in Consistency Appeal of Chevron U.S.A., Inc. at 4-6 (Oct. 29, 1990); *see also* 15 C.F.R. § 930.127(f) (2005), *as amended*, 71 Fed. Reg. 787, 830 (Jan. 5, 2006).

The CZMA and implementing regulations also establish certain procedural requirements applicable to consistency appeals filed with the Secretary. Appellants must file a notice of appeal within 30 days of receiving a state objection. 15 C.F.R. § 930.125(a) (2005). Within 30 days of submitting a notice of appeal, an appellant must submit a principal brief and appendix of supporting documentation. 15 C.F.R. § 930.127(a) (2005), *as amended*, 71 Fed. Reg. 787, 830-31 (Jan. 5, 2006).

An appeal to the Secretary may be dismissed for "good cause."[1] 15 C.F.R. § 930.129(a) (2005). Good cause includes failure to "submit a brief or supporting materials within the required period." 15 C.F.R. § 930.129(a)(2) (2005). Good cause also includes "[f]ailure of the appellant to base the appeal on grounds that the proposed activity is either consistent with the objectives or purposes of the Act, or necessary in the interest of national security." 15 C.F.R. § 930.129(a)(5) (2005); *see also* Dismissal of the Consistency Appeal of Barnes Nursery, Inc. (Dec. 20, 2003); Decision and Findings in Consistency Appeal of Ricardo Ramirez (July 20, 2000); Decision and Findings in Consistency Appeal of Rick Bellew (Mar. 3, 1999).

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[1] As General Counsel for the National Oceanic and Atmospheric Administration (NOAA), I have been delegated authority to dismiss CZMA appeals for "good cause." *See* Department Organization Order 10-15, Section 3.01(u); Delegation of Authority from the Under Secretary to the General Counsel and Redelegation to the Assistant General Counsel regarding Section 307 of the CZMA (Aug. 30, 2006) (Transmittal # 62), *available at* http://www.corporateservices.noaa.gov/~ames/delegations.html (last visited Nov.8, 2006).

II. Factual Background

On June 29, 2006, New York objected to a consistency certification submitted by Mr. Ammarell in conjunction with an application to the Corps seeking approval to install a private dock in Lloyd Harbor. New York's objection asserts the Project does not comply with relevant dock length, water depth, and floating dock standards for Lloyd Harbor, which have been incorporated into the State's Coastal Management Program (Program).

On July 28, 2006, Mr. Ammarell filed a notice of appeal relative to this objection with the Secretary of Commerce.[2] The notice of appeal stated that the Lloyd Harbor Local Waterfront Revitalization Program precludes the construction of docks such as the one proposed. If the municipality's Board of Zoning Appeals (Board) grants a variance, however, an applicant can build such a dock. Given this scheme, Mr. Ammarell filed an application with the Board seeking a variance on July 14, 2004. He contends that at the time New York objected, his request for a variance was pending before the Board. By objecting when it did, New York improperly cut off a determination committed to the Board. Had New York not objected, the Board may have granted the variance, rendering the Project consistent with New York's Program.

To date, Mr. Ammarell has yet to file a principal brief and supporting appendix in support of this argument.

III. Discussion

As noted above, an appeal is deficient if the appellant fails to submit a principal brief and supporting appendix within 30 days of filing the notice of appeal. 15 C.F.R. § 930.127(a) (2005), *as amended*, 71 Fed. Reg. 787, 830 (Jan. 5, 2006). Mr. Ammarell failed to satisfy this threshold requirement. As the notice of appeal was filed on July 28, 2006, the brief and appendix were due on August 28, 2006. This failure constitutes a basis for dismissal. 15 C.F.R. § 930.129(a)(2) (2005).

Even if the notice of appeal is considered as a brief, the arguments advanced therein warrant dismissal. For the Secretary to override New York's objection, Mr. Ammarell must demonstrate his Project is either "consistent with the objectives of [the CZMA]" or "necessary in the interest of national security." 16 U.S.C. § 1456(c)(3)(A). Mr. Ammarell's notice of appeal, however, fails to meet this standard. The appeal notice does, by way of a single sentence, assert the Project is consistent with the objectives of the CZMA.[3] Read in its entirety, however, the notice makes clear that CZMA consistency is not the real basis of the appeal. Rather, the appeal simply challenges the propriety of the State's objection, asserting New York prematurely objected to a proposal, which might ultimately be found consistent with the State Program if the Board grants

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[2] NOAA received this Notice on or about September 21, 2006. This delay appears to be due to the fact that Mr. Ammarell filed the Notice with only the Secretary, and not also with NOAA's Assistant General Counsel for Ocean Services, as required by regulation. 15 C.F.R. § 930.125(d) (2005), *as amended*, 71 Fed. Reg. 787, 830 (Jan. 5, 2006).

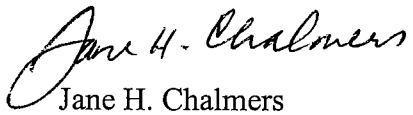
[3] In his Notice, Mr. Ammarell does not allege the Project is necessary in the interest of national security.

a variance, as has been requested. An appeal to the Secretary, however, is not a vehicle for challenging the state's determination that a project is inconsistent with that state's program.[4] Instead, the Secretary's role is to determine if the project is "consistent with the objectives or purposes of [the CZMA]," even where it might otherwise be inconsistent with a state's coastal management program. 15 C.F.R. § 930.121 (2005), *as amended*, 71 Fed. Reg. 787, 829 (Jan. 5, 2006).

IV. Conclusion

Mr. Ammarell has failed to timely file his principal brief and supporting appendix. Additionally, Mr. Ammarell failed to base his appeal on any recognized justification for overriding an objection by New York. Each of these deficiencies provides an independent basis for dismissal. This appeal is therefore dismissed for good cause pursuant to 15 C.F.R. § 930.129(a) (2005).

Sincerely,



Jane H. Chalmers
Acting General Counsel

cc: Mr. Richard L. Tomer, Chief, Regulatory Branch
U.S. Army Corps of Engineers

[4] *See* Dismissal of the Consistency Appeal of Edwin Irizarry Garcia at 4 (Jan. 26, 2006); Decision and Findings in Consistency Appeal of the Asociación de Propietarios de Los Indios, Inc. at 5 (Feb. 19, 1992); Decision and Findings in Consistency Appeal of Chevron U.S.A., Inc. at 6 (Oct. 29, 1990).