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

OFFICE OF THE GENERAL COUNSEL

SEP 24 2008

VIA CERTIFIED MAIL—RETURN RECEIPT REQUESTED

Mr. John W. Paradee, Esq.
Prickett, Jones, and Elliott
11 North State Street
Dover, Delaware 19901

Ms. Devera B. Scott, Esq.
Civil Kent County Environmental Unit
Department of Justice
State of Delaware
102 West Water Street
Dover, Delaware 19904

Re: Decision in the Consistency Appeal of Mr. G. Walter Swain

Dear Mr. Paradee and Ms. Scott:

On February 4, 2008, Mr. G. Walter Swain (Mr. Swain) filed notice of appeal with the Secretary of Commerce (Secretary), pursuant to section 307(c)(3)(A) of the Coastal Zone Management Act (CZMA). See 16 U.S.C. § 1456(c)(3)(A) (2000). Mr. Swain challenges an objection by the State of Delaware to the proposed construction of a marina at the confluence of Cedar Creek and Mispillon Rivers (Project). I find that Delaware's objection was untimely and override the objection on this basis. Accordingly, federal permits may issue.[1]

## 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 uses or resources of the state's coastal zone. See 16 U.S.C. § 1456(c)(3)(A) (2000). A state has six months to concur with, or object to, a consistency certification submitted by an applicant asserting the project is consistent with the state's coastal management program. See id. If a state agency does not respond to a certification within its six-month review period, the state's concurrence is conclusively presumed. See 15 C.F.R. § 930.62(a).

[1] As the General Counsel of the National Oceanic and Atmospheric Administration, I have been delegated the authority to perform certain procedural functions required to conduct consistency appeals, including the override of a State's objection based upon its failure to object within six months. See Delegations of Authority to the General Counsel, National Oceanic and Atmospheric Administration, *available at* http://www.corporateservices.noaa.gov/~ames/transmittals/pdfs/delTR72.pdf.

A timely objection raised by a state precludes federal agencies from issuing licenses or permits for the project, unless the Secretary overrides the objection. See id; 15 C.F.R. § 930.62(a), (c) (2008). When reviewing an objection on appeal, the Secretary shall override a state objection that is untimely. See 15 C.F.R. § 930.129(b) (2008).

## II. Factual Background

Mr. Swain owns property located at the confluence of Cedar Creek and Mispillon Rivers, Delaware. Historically used as a marina, the site was largely destroyed by a hurricane in 1992. Mr. Swain seeks to repair and rebuild the marina and associated structures. The Project requires federal authorization; specifically, a permit from the Army Corps of Engineers.

On April 25, 2005, pursuant to obligations under the CZMA, Mr. Swain filed a consistency certification with the Delaware Department of Natural Resources (Delaware or State) stating that the Project was consistent with Delaware's Coastal Management Program. Delaware subsequently notified Mr. Swain that it required additional information before commencing its review,[2] which the State received from Mr. Swain on January 17, 2006.[3] On January 31, 2006, Delaware notified Mr. Swain that the application was complete and that a decision would be issued by April 17, 2006. This decision deadline was later extended to July 17, 2006.

On June 30, 2006, Delaware informed Mr. Swain that it required additional information on the Project and that additional time was needed to complete its review, because the Project was being revised through a separate state-permitting process conducted by Delaware's Division of Water Resources. Because of this, Delaware gave Mr. Swain an ultimatum: either accept a stay of the State's review period or have Delaware object to the Project on the grounds of insufficient information. Accordingly, Delaware and Mr. Swain entered into an agreement that stayed the State's review period. Under the terms of this agreement, Mr. Swain was afforded an opportunity to submit additional information to the State. Delaware's decision on Mr. Swain's consistency certification would occur following the completion of the ongoing Water Resources permitting process.[4]

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[2] Letter from Sara Cooksey, Delaware Department of Natural Resources to David Hardin, Environmental Resources, Inc., May 25, 2005; Email from Bonnie Willis, Delaware Department of Natural Resources to David Hardin, Environmental Resources, Inc., Aug. 2, 2005.

[3] Letter from David Hardin, Restoration Ecological Services to Sara Cooksey, Delaware Department of Natural Resources, Jan. 12, 2006; Delaware's Br. at 2.

[4] Letter from Sarah Cooksey, Delaware Department of Natural Resources to David Hardin, Environmental Resources, Inc., June 30, 2006.

On July 5, 2006, and November 14, 2006,[5] Mr. Swain provided additional information to Delaware. On August 30, 2007, Delaware informed Mr. Swain that its review was again delayed due to the "complex nature of the situation." Finally, on January 3, 2008, Delaware objected to Mr. Swain's consistency certification. Mr. Swain filed a timely notice of an appeal of the State's objection with the Secretary.

## III. Discussion

A threshold issue in this appeal is whether Delaware's objection is timely. The CZMA provides that "[i]f 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." 16 U.S.C. § 1456(c)(3)(A) (2000). This period begins when a state has received the applicant's consistency certification and the necessary data and information about the project. See 15 C.F.R. § 930.60(a) (2008). NOAA's regulations, however, allow for a stay of this time period, where there is a written agreement between the parties, stating a "specific date" on which the stay will dissolve, with the permitting federal agency informed. See 15 C.F.R. § 930.60(b) (2008).

Given these requirements, Delaware's objection was untimely. By Delaware's own admission, it possessed all necessary data and information as of January 17, 2006, Delaware's Br. at 2, and its decision was therefore due no later than July 17, 2006. While Delaware attempted to further stay its review deadline, it did so through an agreement that failed to include a specific date upon which the stay would end, as required by regulation. Absent a valid stay agreement, Delaware's decision remained due on July 17, 2006. Because Delaware's ultimate objection on January 3, 2008, was untimely, federal consistency is conclusively presumed.

Delaware argues that the stay was not indefinite because the end date for the stay was implicitly calculable, based upon the Division of Water Resources' permit decision in a separate, state-permit proceeding. The CZMA regulations, however, specifically require that a stay agreement contain a date upon which the stay will dissolve. See 15 C.F.R. § 930.60(b) (2008). Linking of federal consistency review to an external event with an unspecified date contradicts the explicit requirement of a specific end date for the stay. Indeed, this very issue was addressed in the revisions to the federal regulations guiding the implementation of federal consistency provisions, which stated "[t]he written agreement for a stay must refer to a specific end date and should not be written to require a later event or condition to be satisfied to end the stay." 71 Fed. Reg. 789, 796 (Jan. 5, 2006).

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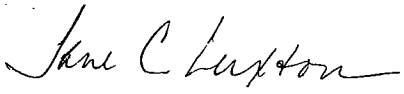
[5] On October 14, 2006, under the terms of the stay, Mr. Swain requested an extension (to November 16, 2006) of the deadline imposed by Delaware for submittal of additional information. Delaware accepted this extension.

Alternately, Delaware argues that it could link its review of Mr. Swain's consistency certification to this separate state permit decision, as the Project was under revision, and the State did not have the additional information requested to make a consistency decision, according to 15 C.F.R. § 930.58. See Delaware's Br. at 10. In this instance, however, Delaware already had determined it possessed all necessary information and data on the Project, triggering its six-month review period. While the State was free to press for additional information on the Project (or ultimately object to the Project for lack of sufficient information), it was not free to toll its deadline for rendering a decision until such information was received, absent a valid stay agreement pursuant to NOAA's regulations.[6]

## IV. Conclusion

For the foregoing reasons, I find that Delaware's objection to Mr. Swain's consistency certification for the Project was untimely. Accordingly, I hereby override Delaware's objection, and federal permits for the Project may issue.

Sincerely,



Jane C. Luxton
General Counsel

cc: LTC Thomas J. Tickner
District Commander, Philadelphia District
U.S. Army Corps of Engineers

[6] See Decision and Findings in the Consistency Appeal of Weaver's Cove Energy LLC and Mill River Pipeline, LLC, at 5-6 (June 26, 2008). During the six month review period, a state may request an applicant provide it with "other information necessary for the State agency to determine consistency" (such as applicable state licenses and permits) in accordance with the state's coastal management program. See 15 C.F.R. § 930.63(c). If an applicant fails to provide the additional requested information, the state can object for lack of information or seek a valid stay agreement to obtain the information.