The Under Secretary for
Oceans and Atmosphere
Washington, D.C. 20230

JAN 24 1992

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Mr. Jeffrey R. Benoit
Director
Coastal Zone Management
Executive Office of Environmental Affairs
100 Cambridge Street
Boston, Massachusetts 02202

Dear Mr. Benoit:

I have considered the threshold legal issue of whether the Commonwealth of Massachusetts' (State) objection to Mr. Eugene J. Dean's (Appellant) consistency certification for a U.S. Army Corps of Engineers (Corps) permit to fill approximately 36,000 square feet of wetlands for the purpose of creating an area for amusement ride testing was timely. Based on my review of the submissions by the parties on this issue, I have concluded that, because more than 16 months passed between the date the State commenced its consistency review (October 12, 1988) and the date of the State's consistency objection (February 20, 1990), a timely consistency objection was not made.

The Coastal Zone Management Act of 1972 (CZMA), as amended, 16 U.S.C. § 1451 et seq., provides that if the State or its designated agency fails to notify an applicant that it concurs or objects to an applicant's certification within six months of receipt of a copy of the applicant's certification, the State's concurrence with the certification shall be conclusively presumed. See 16 U.S.C. § 1456 (c)(3)(A). The regulations implementing this section of the CZMA provide that concurrence shall be conclusively presumed in the absence of an objection by the State agency within six months following commencement of review. 15 C.F.R. § 930.63(a). The State agency review of a consistency certification commences when the agency receives a copy of the certification and the necessary data and information to support it. 15 C.F.R. § 930.60(a). The data and information required to be submitted with a consistency certification may include the State or local permits which are required in addition to the Federal license or permit as well as other data and information described in a State's management program necessary to assess the consistency of Federal license and permit activities. 15 C.F.R. § 930.56, 15 C.F.R. § 930.58.

The State's Federally-approved Coastal Zone Management Program (CZMP) requires that, for projects subject to Massachusetts Environmental Protection Act (MEPA) jurisdiction, a consistency

THE ADMINISTRATOR

applicant must submit a final decision in the MEPA process as part of his consistency certification. 301 C.M.R. 21.10(3). In the instant matter, because the Appellant's proposed project would alter over 5000 square feet of wetlands and thus require a variance under the State's Wetlands Protection Act, the Appellant's proposed activity was apparently subject to MEPA jurisdiction and thus a final decision was required to be submitted by the Appellant as part of his consistency certification. 310 C.M.R. 10.55, 301 C.M.R. 11.26.

On October 12, 1988, the Appellant submitted his consistency certification and supporting information for his proposed project. However, because the Appellant did not believe his proposed project was subject to the requirements of MEPA, the Appellant, despite requests by the State, failed to submit it to the MEPA review process and thereafter submit a final decision to the State. The State, rather than objecting pursuant to 15 C.F.R. § 930.64(d) within six months of receipt of the Appellant's consistency certification and supporting information on the basis of lack of information to assess consistency, reviewed the Appellant's consistency certification and supporting information and found that the Appellant's proposed project was inconsistent with its CZMP. The State found the Appellant's project inconsistent because it would require the filling of 36,000 square feet of wetlands and thus violate the State's Wetlands Protection Act. Letter from Jeffrey R. Benoit, Director, Coastal Zone Management, to Mr. Eugene J. Dean, February 20, 1990. The State's objection was made over 16 months after the Appellant had submitted his consistency certification and supporting information to the State.

The record establishes that despite the lack of MEPA review the State was able to assess the consistency of the Appellant's proposed project. The State objected based solely on the Appellant's consistency certification and supporting information filed therewith on October 12, 1988. Therefore, I must conclude that as of October 12, 1988, the State had in its possession all the necessary information to assess the consistency of the Appellant's proposed project and, pursuant to the regulations, its review commenced on that date. 15 C.F.R. § 930.60(a). Accordingly, I find that the State's consistency objection of February 20, 1990, occurring over 16 months after commencement of its review, was not timely and concurrence by the State is

conclusively presumed as provided by 16 U.S.C. § 1456(c)(3)(A). Of course, my decision in this matter in no way affects the requirement that the Appellant apply for and obtain all required State, local and Federal permits for his proposed project. To avoid, in the future, the situation presented in the instant matter which has precluded me from addressing the merits of the State's objection to the Appellant's consistency certification, states should be particularly sensitive to the six month statutory time limit for review and the provisions of 15 C.F.R. § 930.64(d) which make available an objection based on lack of information.

Sincerely,

John A. Knauss

cc: Eugene J. Dean
Karen Kirk Adams