



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

OFFICE OF THE GENERAL COUNSEL

SEP 29 2004

VIA US MAIL

(return receipt requested)

Eugene A. Wimpee
6425 Cottage Hill Road
Mobile, AL 36696

Steve O. Jenkins
Chief, Field Operations Division
Alabama Department of
Environmental Management
P.O. Box 301463
Montgomery, AL 36130-1463

Re: Initial Briefing Schedule for the Consistency Appeal of Eugene Wimpee

Dear Messrs. Wimpee and Jenkins:

The purpose of this letter is two-fold: (1) to establish dates for the parties to file an initial brief in the Consistency Appeal of Eugene Wimpee; and (2) to identify the topics to be addressed by the initial briefs. By letter dated July 24, 2003, Mr. Wimpee (Appellant) submitted a notice of appeal to the Department of Commerce pursuant to section 307(c)(3)(A) of the Coastal Zone Management Act of 1972 (CZMA), as amended, 16 U.S.C. §§ 1451 et seq., and the Department of Commerce's (Department) implementing regulations, 15 C.F.R. Part 930, Subpart H. The appeal is taken from an objection by the Alabama Department of Environmental Management (Alabama or State) concerning an after-the-fact permit from the U.S. Army Corps of Engineers (Corps) to fill wetlands on Weeks Bay, Baldwin County, Alabama.

Alabama will have until **October 29, 2004**, to file its initial brief and supporting information. The due date for filing the Appellant's initial brief and any supporting information is **November 30, 2004**. Regarding the scope of the briefs, information received for the appeal ~~suggests the parties may have missed deadlines for completing certain actions during the CZMA~~ review and appeal process. Specifically at issue is whether the State raised its objection in a timely manner and whether there was a timely notice of appeal. A finding that either action occurred after the applicable deadline would affect the outcome of this appeal. Therefore, the



initial briefs are to be limited to addressing these threshold matters, further details of which are provided below.

The CZMA implementing regulations specify that a state's objection must be raised within six months of commencing its review of a proposed project, or the state's concurrence will be presumed and any subsequent objection will be overridden. *See* 15 C.F.R. §§ 930.62(a), 930.129(b); *see generally* 16 U.S.C. § 1456(c)(3)(A). Also, to obtain review of a state's CZMA objection, an appeal notice must be filed within 30 days from when the appellant received the state's decision. 15 C.F.R. § 930.125(a).

In this appeal, the record suggests that Alabama raised an objection more than six months after beginning its review of Mr. Wimpee's project. A dated but unsigned letter from the U.S. Army Corps of Engineers advises that in August 2002, Alabama was requested to determine whether the project was consistent with the State's coastal management program. *See* Letter from Ronald A. Krizman, Department of the Army, Corps of Engineers, to Eugene A. Wimpee, June 26, 2003. The objection by Alabama was issued approximately ten months later, on June 4, 2003.

With regard to the timing of the appeal, Mr. Wimpee filed an appeal notice July 25, 2003, more than 30 days after the State objected to the project on June 4, 2003. The record is unclear, however, concerning the date Mr. Wimpee received a copy of the State's objection, which is the event triggering the start of the 30-day period.

Three copies of each party's brief and supporting materials addressing these threshold issues should be submitted to Branden Blum, Senior Counselor, Office of the General Counsel for Ocean Services, U.S. Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), 1305 East-West Highway, Silver Spring, Maryland 20910. Briefs may not exceed 10 pages in length (double-spaced text, 8 ½ by 11 inch paper) if typed, or 15 handwritten pages.

The Department maintains a website (www.ogc.doc.gov/czma.htm) to facilitate access to nonconfidential documents submitted for the appeal's administrative record. Therefore, there is no need to serve briefs and supporting materials on the permitting federal agency (the U.S. Army Corps of Engineers). Additionally, we request the State to retain all nonconfidential documents sent or received in this appeal for public inspection during normal business hours. Copies of this information will also be available at NOAA's Office of the General Counsel for Ocean Services, at the above-listed address.

We expect to publish shortly a notice in the Federal Register and in a local newspaper distributed in the vicinity of Alabama's coastal zone likely to be affected by Mr. Wimpee's proposed project. The notice will invite public comment on issues raised in the appeal and provide background information concerning the appeal. The State and the Appellant should check the Department's website (referenced above) for comments and other materials received for this appeal. If the appeal is not decided on procedural grounds, the parties will be afforded an opportunity to submit

an additional brief addressing the substantive grounds considered by the Secretary of Commerce in reaching a decision.

On June 6, 2004, NOAA advised that its Office of Ocean and Coastal Resource Management would contact the State to inquire regarding the potential for the parties to reach a settlement of this matter. Our informal understanding is that the State is continuing to consider this option. Please note that the Office of Ocean and Coastal Resource Management is available to assist the parties with settlement negotiations.

Sincerely,



Karl D. Gleaves
Assistant General Counsel
for Ocean Services

cc: Ronald A. Krizman
Chief, Regulatory Branch, Operations Division, Mobile District, U.S. Army Corps of
Engineers
