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

JUL 24 2006

VIA FACSIMILE & CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Bruce Kiely, Esq.
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Mr. Grover Fugate, Director
Coastal Resources Management Council
State of Rhode Island and Providence Plantations
4808 Tower Hill Rd., Suite 3
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Re: Consistency Appeal of Weaver's Cove Energy, LLC

Dear Messrs. Kiely and Fugate:

On June 22, 2006, Weaver's Cove Energy, LLC (Weaver) filed with the Secretary of Commerce (Secretary) a notice of appeal pursuant to section 307(c)(3)(A) of the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1456(c)(3)(A). This appeal concerns Weaver's application for a license from the Federal Energy Regulatory Commission (FERC) under the Natural Gas Act, 15 U.S.C. §§ 717-717z, authorizing the construction and operation of a proposed liquefied natural gas facility near Fall River, Massachusetts (Project). Weaver requests the Secretary find the Project consistent with the objectives of the CZMA or otherwise necessary in the interests of national security. For the reasons set forth below, this appeal is dismissed.

I. Introduction

This is the second appeal Weaver has filed with the Secretary concerning the Project. On October 11, 2005, Weaver filed an appeal of an alleged objection by the Rhode Island Coastal Resources Management Council (Rhode Island) to Weaver's CZMA consistency certification for the Project. On November 11, 2005, the National Oceanic and Atmospheric Administration (NOAA), on behalf of the Secretary, dismissed this first appeal for good cause. The appeal was dismissed because Rhode Island had not objected to Weaver's consistency certification, and there was therefore no basis for an appeal to the Secretary. *See* Letter from Lautenbacher to Kiely and Fugate (Nov. 11, 2005).[1]

[1] Subsequent to the denial of its first appeal, on December 16, 2005, Weaver wrote to NOAA's Office of Ocean and Coastal Resource Management (OCRM), asking that it "apply its regulations" and find that Rhode Island has presumptively concurred with Weaver's consistency certification, because Rhode Island failed to object within six months of receiving the certification. As Weaver indicates in its brief, OCRM

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In filing this appeal, Weaver acknowledges that Rhode Island still has not objected to the Project.[2] Weaver contends that no state objection is required before the Secretary may entertain its appeal under the statute. *See* Weaver's Brief at 3-4. Specifically, Weaver states:

> Weaver's Cove submits this appeal under 16 U.S.C. § 1456(c)(3)(A) of the Act, not under 15 C.F.R. § 930.131 of the regulations issued by the National Oceanic and Atmospheric Administration ("NOAA") of the Department of Commerce, because Weaver's Cove is not appealing a State's objection.

See Weaver's Brief at 4 n.1.

II. Discussion

Section 307(c)(3)(A) of the CZMA authorizes the Secretary of Commerce to hear appeals pertaining to federal consistency determinations. It provides in part:

> No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or *upon appeal by the applicant*, finds, after providing reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this title or is otherwise necessary in the interest of national security.

16 U.S.C. § 1456(c)(3)(A) (emphasis added).

The plain meaning of the term "appeal" requires a state objection as a necessary predicate for an appeal to the Secretary. The term "appeal" is generally understood to mean seeking review of an adverse decision. *See* Black's Law Dictionary (8th Ed. 2004) (appeal defined as a "proceeding undertaken to have a decision reconsidered by a higher authority"). In the context of the CZMA, absent a state objection, there would be nothing for an applicant to "appeal." *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("When the words of a statute are unambiguous, then, this first canon [of statutory construction] is also the last: 'judicial inquiry is complete'").

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has not issued a finding as requested. When appropriate, OCRM provides information on the content of State CZMA programs and guidance on compliance with CZMA requirements. In this instance, however, the issue of whether Rhode Island presumptively concurred with Weaver's consistency certification is an issue that may well come before the Secretary, should Rhode Island ultimately object to the consistency certification and Weaver appeal that objection.

[2] In its brief, Weaver indicates that "[Rhode Island] has had the Weaver's Cove Consistency Certification on file for nearly two years and has refused to object or concur." *See* Weaver's Brief at 2.

This plain meaning of the term "appeal" has long been reflected in NOAA's published regulations interpreting Section 307(c)(3)(A) and establishing rules of procedure for processing consistency appeals arising thereunder. *See* 15 C.F.R. Subpart H. These regulations provide for appeal only after a state has objected:

> [Subpart H] sets forth the procedures by which the Secretary may find that a federal license or permit activity, . . . *which a state has found to be inconsistent with the enforceable policies of the management program*, may be federally approved because the activity is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security.
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> To obtain Secretarial review of a *State agency objection*, the appellant shall file a notice of appeal with the Secretary within 30 days of receipt of a *State agency objection*.

See 15 C.F.R. §§ 930.120, 930.125(a) (emphasis added).

Even if there were any ambiguity in the meaning of the term "appeal," NOAA's interpretation of the CZMA is reasonable and entitled to deference. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984). Indeed, allowing an appeal to the Secretary in the absence of a state objection would result in absurd consequences. Weaver effectively suggests there are two alternate avenues for appeals: (1) an appeal under the statute itself, which may be pursued at any time in the absence of a state objection; and (2) an appeal under NOAA's consistency regulations, which may only be taken from a state objection. If this were true, however, a permit applicant could conceivably file an appeal under the statute before the state's six-month review period had elapsed. Moreover, no procedural regulations would exist for appeals based upon the statute. Such appeals would proceed without the benefit of regulations interpreting essential terms of the statute, *see* 15 C.F.R. § 930.121-122; establishing a procedural framework for processing the appeal, *see* 15 C.F.R. § 930.125-128; and providing guidance to the Secretary on issuing rulings during the course of the appeal, *see* 15 C.F.R. § 930.129. Implicitly acknowledging the limitations of its own argument, Weaver suggests that while not controlling, NOAA's consistency regulations offer a "useful framework" for reviewing its appeal. *See* Weaver's Brief at 4 n.1.

Notably, NOAA's interpretation of section 307(c)(3)(A) as limiting "appeals" to those arising from state objections has been endorsed by Congress. In a 1990 Conference Report discussing amendments to the CZMA, Congress explained that:

> The conference report does not alter the statutory requirements as currently enforced under sections 307(c)(3)(A) and (B), and (d) of the CZMA. *These requirements are outlined in the NOAA regulations (15 C.F.R. 930.50-930.66) and the conferees endorse this status quo.*

H.R. Conf. Rep. No. 101-964, at 971-72 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2374, 2676-2677 (emphasis added).

III. Conclusion

As noted in NOAA's response to Weaver's first appeal, absent an objection by Rhode Island, there is no basis for an appeal to the Secretary. To date, Rhode Island has not objected to Weaver's consistency certification. Accordingly, Weaver's appeal is dismissed for good cause pursuant to 15 C.F.R. § 930.129(a). Weaver's filing fee is returned to Weaver with this letter.

Sincerely,

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

cc: Ms. Magalie R. Salas, Secretary
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