



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

AUG 1 2005

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Aram V. Terchunian  
President, First Coastal Corporation  
P.O. Box 1212  
4 Arthur Street  
Westhampton Beach, NY 11978

George R. Stafford  
Director, Division of Coastal Resources  
New York Department of State  
41 State Street, 8<sup>th</sup> Floor  
Albany, NY 12231-0001

Re: Decision in the Consistency Appeal of Peter and Nancy Fenner

Dear Messrs. Terchunian and Stafford:

This appeal involves a proposed project to construct a private dock on Moriches Bay, in the Town of Southampton, New York. In December 2000, Peter and Nancy Fenner (Fenners) filed a permit application with the U.S. Army Corps of Engineers (Corps) and included a certification that the project was consistent with New York's Coastal Management Program. New York received the certification in January 2001.

In August 2001 – more than seven months later – New York objected to the Fenners' consistency certification. Under the Coastal Zone Management Act (CZMA), however, states must either concur or object within six months after receiving the certification. 16 U.S.C. § 1456(c)(3)(A). Because New York failed to object to the Fenners' certification before expiration of the six-month period, New York's concurrence with the Fenners' project is presumed, and New York's late objection is overridden.<sup>1</sup>

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<sup>1</sup> As the Under Secretary of Commerce for Oceans and Atmosphere, I have been delegated authority to make procedural rulings for the conduct of CZMA appeals. See Department Organization Order 10-15, Section 3.01(u).

THE ADMINISTRATOR



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## **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. Under the CZMA, a state has six months to concur with, or object to, a certification submitted by an applicant asserting the project is consistent with the state's program. This six-month period, however, does not begin unless the consistency certification is accompanied by the "necessary data and information" as defined by the CZMA implementing regulations. 15 C.F.R. §§ 930.58, 930.60 (2000).<sup>2</sup>

A timely objection raised by a state precludes federal agencies from issuing licenses or permits for the project, unless the Secretary of Commerce overrides the objection. If the state's objection is untimely, however, concurrence with the project is presumed. 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.63 (2000).

## **II. Factual Background**

On December 22, 2000, Peter and Nancy Fenner applied to the Corps for a permit<sup>3</sup> to construct a private dock on Moriches Bay in the Town of Southampton, New York, and simultaneously filed a consistency certification on New York's Federal Consistency Assessment Form (Assessment Form). The consistency certification included the Corps permit application, a property survey, a site plan, a project narrative, and photographs.<sup>4</sup> New York received the consistency certification on January 5, 2001. New York Brief at 5.

On January 17, 2001, New York requested the Fenners provide what it referred to as additional "necessary data and information." After noting the proposed dock length would exceed certain local standards set by the Town of Southampton, New York wrote:

Please indicate as soon as possible whether or not you plan to modify the project to meet the Town's standards. If you do not plan to modify the proposal, please provide justification *for the dock length based on the Town's dock standards* and possible effects on navigation related to the State Coastal Policies. Pursuant to 15 CFR 930.60(a), the Department of State's review of this proposal and the consistency certification provided for it will begin after we receive the necessary data and information and determine whether it is adequate to assess the effects of the proposal on the coastal area.<sup>5</sup>

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<sup>2</sup> Several aspects of the CZMA regulations were amended effective January 8, 2001. Because the Fenners certified their project as being consistent before that date, the regulations governing completeness of such certifications then in effect apply.

<sup>3</sup> The permit is required under the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (2000).

<sup>4</sup> See Letter from Thackoor George Mootoo, First Coastal Corp., to Diana Boos, New York Department of State, Dec. 22, 2000, and attachments.

<sup>5</sup> See Letter from Christine Nelson, New York Department of State, to Thackoor George Mootoo, First Coastal Corp., Jan. 17, 2001 (emphasis added).

On February 16, 2001, the Fenners sent a letter to New York, noting they had amended the project, shortening the dock length and adding stairs.<sup>6</sup> New York acknowledged in writing its receipt of Fenners' amended project proposal, stating "the submitted documentation is adequate to commence our review of your proposed project," but noting "[t]he project still appears to exceed the Southampton Town Trustees dock standards."<sup>7</sup>

New York continued to request additional information concerning the project over the course of the next several months.<sup>8</sup> Ultimately, however, New York sent a letter to the Fenners on August 8, 2001, objecting to their consistency certification based on insufficient information.<sup>9</sup> The Fenners then appealed New York's objection, claiming New York had sufficient information, its objection was "without merit," and "the six-month time period for review [had] lapsed and thus the project is conclusively presumed to be consistent with the [New York State] approved Coastal Management Program."<sup>10</sup>

The National Oceanic and Atmospheric Administration (NOAA) Office of the General Counsel<sup>11</sup> sent the parties a letter establishing a briefing schedule for the appeal. The letter asked the parties to address both substantive issues and the timeliness of New York's objection.<sup>12</sup> Both parties submitted Initial Briefs. NOAA then requested public and agency comments regarding the appeal, but received no comments. The Fenners submitted a Final Brief; New York declined to do so. With briefing completed, this matter is ready for disposition.

### **III. Discussion**

The parties disagree regarding the timeliness of New York's objection. The timing question concerns when the Fenners met the CZMA requirement to submit all necessary

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<sup>6</sup> Letter from Thackoor George Mootoo, First Coastal Corp., to Christine Nelson, New York Department of State, Feb. 16, 2001.

<sup>7</sup> Letter from Christine Nelson, New York Department of State, to Thackoor George Mootoo, First Coastal Corp., Mar. 6, 2001.

<sup>8</sup> See Letters from Christine Nelson, New York Department of State, to Thackoor George Mootoo, First Coastal Corp., May 14, 2001, and July 17, 2001.

<sup>9</sup> See Letter from George R. Stafford, New York Department of State, to Thackoor George Mootoo, First Coastal Corp., Aug. 8, 2001.

<sup>10</sup> See Letter from Aram V. Terchunian, First Coastal Corporation, to Donald L. Evans, Secretary of Commerce, Sept. 6, 2001, with a copy to the New York Department of State, NOAA General Counsel, the Corps, and the Fenners.

<sup>11</sup> The NOAA Office of the General Counsel has been delegated responsibility for undertaking all staff work necessary to make appeal findings. See Department order 10-15, Section 3.01(u), and NOAA Administrative Order 201-104, Section 3.

<sup>12</sup> See Letter from Karl Gleaves, NOAA Office of the General Counsel, to Aram Terchunian, First Coastal Corp., and to George R. Stafford, New York Department of State, Mar. 21, 2002.

data and information with their consistency certification, thus triggering the beginning of the six-month review period. 15 C.F.R. § 930.60(a) (2000). Having received the Fenners' consistency certification on January 5, 2001, it appears New York's six-month review period ended on July 5, 2001, and its August 2001 objection was untimely. New York, however, contends the information it requested in its January 17, 2001, letter constituted necessary data and information, and that New York's review period began when it received information from the Fenners one month later. New York Brief at 5-16. New York's contention is without merit.

As described earlier, the state's six-month review period for a consistency certification does not begin unless the certification is accompanied by the "necessary data and information." 15 C.F.R. §§ 930.58, 930.60 (2000). The CZMA implementing regulations specify a list of items constituting necessary data and information. *See* 15 C.F.R. § 930.58(a) (2000). A state may add to this list by describing additional "requirements regarding the data and information necessary to assess the consistency of Federal license and permit activities." 15 C.F.R. §§ 930.56(b), 930.58(a)(2) (2000). Such additional requirements, however, must be part of the state's approved coastal management program. *Id.* The six-month time period for review is not extended by a request for information that is in addition to necessary data and information. 15 C.F.R. § 930.60(b) (2000).

Pursuant to 15 C.F.R. § 930.58(a)(2), New York requires an applicant to complete the Assessment Form, including identification of New York coastal policies in its Coastal Management Program affected by the proposed activity, a brief assessment of the activity's effects on such policies, and a statement indicating how the activity is consistent with each policy. New York Brief at 5-6. The materials submitted by the Fenners included a completed Assessment Form, with a description of the project and its location; a Supplement indicating which New York coastal policies the Fenners considered relevant to the project; a survey of the property on which the project would be located; a diagram of the project; a location map; and a copy of the Corps permit application. Fenner Initial Brief, Attachments.

New York argues the Fenners nevertheless needed to submit additional information pursuant to 15 C.F.R. § 930.58(a)(2) regarding the project's compliance with the Town of Southampton's dock standards before its review period could begin.<sup>13</sup> Such information would be "necessary data and information" if the Town of Southampton's limits on

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<sup>13</sup> New York also contends the Fenners submitted "a factually incorrect and improper certification," including an unofficial version of the Assessment Form, an inaccurate description of Moriches Bay, and misleading information regarding the project's coastal effects. *See* New York Brief at 5-7, 12-14. New York, however, did not raise these issues in its January 17, 2001, letter; any of its subsequent letters; or any documented telephone conversations. *See* n.8 *supra*; *compare* New York Brief at 6. Instead, its January 17, 2001, letter requested additional "necessary data and information" solely with respect to the Town of Southampton's dock standards, and then advised the Fenners upon receipt of that information that the certification was complete. *See* n.7 *supra*. Consistent with the view taken by New York at the time, and based on my review of the record, I find the additional information New York now claims was missing was not "necessary data and information." Moreover, even if it were, New York cannot retroactively extend the six-month time period by noting deficiencies on appeal it did not raise at the time the Fenners submitted their certification.

construction and dimensions of docks in its geographical area were a New York coastal policy and part of its Coastal Management Program. The New York Coastal Management Program, however, provides:

The basis for all consistency reviews are the enforceable policies in Part II, Section 6 of this document, and all the guidelines developed to assist in this review, and all approved management programs for Special Management Areas, particularly *local waterfront revitalization programs which have been formally incorporated into the State's Coastal Management Program.*

New York Coastal Management Program at II-9-12 (emphasis added).

While Southampton's standards may be legally enforceable, neither those standards nor any broader Southampton waterfront revitalization program has ever been incorporated into New York's Coastal Management Program as a New York coastal policy. See State Coastal Management Program LWRP Status Sheet, March 1, 2005; Fenner Initial Brief at 3, 5; Fenner Final Brief at 3; 15 C.F.R. part 923, subparts G and H (process by which states receive federal approval of coastal management plans and amendments thereto).

Accordingly, the Fenners were not required to provide "necessary data and information" related to Southampton dock standards in their consistency certification, and New York's six-month review period commenced upon receipt of that certification on January 5, 2001. New York's objection sent August 8, 2001 – some seven months later – was thus untimely.

#### **IV. Conclusion**

For the foregoing reasons, New York failed to object within the six-month time period allowed for under the CZMA. New York's concurrence in the Fenners' project is therefore presumed, and New York's late objection is overridden.<sup>14</sup> Accordingly, the project may receive licenses and permits from federal agencies.

Sincerely,



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

cc: William Sharp, Office Counsel  
New York Department of State  
Mike Vissichelli, Chief  
U.S. Army Corps of Engineers  
New York District, Eastern Permits Section

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<sup>14</sup> Because New York's objection was untimely and concurrence in the project is presumed, I do not address the substantive issues raised in the Fenners' or New York's briefs.