

**DECISION AND FINDINGS BY THE U.S. UNDERSECRETARY OF
COMMERCE FOR OCEANS AND ATMOSPHERE IN THE
CONSISTENCY APPEAL OF NORWALK COVE MARINA, INC., FROM
AN OBJECTION BY THE NEW YORK STATE DEPARTMENT OF
STATE**

January 25, 2022

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I. INTRODUCTION

Norwalk Cove Marina, Inc. (“Norwalk Cove” or “NCM”) has appealed the New York State Department of State’s (“the State” or “NYSDOS”) (collectively, “the Parties”) objection to Norwalk Cove’s Coastal Zone Management Act (“CZMA”) consistency certification for a proposed U.S. Army Corps of Engineers (“the Corps”) permit that would allow Norwalk Cove to dredge and dispose of approximately 24,500 cubic yards of material at the Central Long Island Sound Dredged Material Disposal Site (“CLDS”). The State found that the disposal of dredged material at CLDS would not be consistent with its coastal management program established under the CZMA, 16 U.S.C. §§ 1451 *et seq.* Norwalk Cove appeals, requesting that the National Oceanic and Atmospheric Administration (“NOAA”) Administrator, as delegated, override the State’s objection.¹

The CZMA provides that a state with a federally-approved coastal management program may review any proposed activity requiring federal licenses or permits if the activity would affect any land or water use or natural resource of the state’s coastal zone.² A state’s timely objection to an applicant’s federal consistency certification precludes the federal agency from issuing licenses or permits for such activity unless, on appeal by the applicant, the NOAA Administrator finds that the activity is either consistent with the objectives and purposes of the CZMA or necessary in the interest of national security.³ These grounds are independent, and an affirmative finding on either is sufficient to override a state’s objection.⁴ If the NOAA Administrator overrides a state’s objection on appeal, the relevant federal agency is no longer barred from authorizing the activity in question.⁵

After considering the Parties’ briefs, past precedent, and the decision record, the NOAA Administrator finds that Norwalk Cove’s proposed activity is not consistent with the objectives or purposes of the CZMA, as defined by 15 C.F.R. § 930.121, because it does not further the national interest in a significant or substantial manner. Therefore, the NOAA Administrator sustains the State’s objection and the Corps is barred from authorizing the proposed activity.

¹ Under Departmental Organization Order 10-15 Section 3.01.u, the NOAA Administrator is delegated the authority to perform functions prescribed in the CZMA, 16 U.S.C. §§ 1451, *et seq.*, including administering and deciding consistency appeals.

² 16 U.S.C. § 1456(c)(3)(A).

³ *Id.*

⁴ *Id.*; 15 C.F.R. § 930.120; *see also Decision and Findings by the Deputy Under Secretary for Operations Performing the Duties of U.S. Under Secretary of Commerce for Oceans and Atmosphere in the Consistency Appeal of Jordan Cove Energy Project, L.P., and Pacific Connector Gas Pipeline, LP, from an Objection by the Oregon Department of Land Conservation and Development*, Feb. 8, 2021, at 2 (“*Jordan Cove*”). CZMA appeal decisions are available at <https://coast.noaa.gov/czm/consistency/appeals/fcappeldecisions/> (last visited Jan. 20, 2022).

⁵ 15 C.F.R. § 930.130(e)(1).

II. BACKGROUND

A. Statutory Background

Section 307 of the CZMA requires federal actions that have reasonably foreseeable effects on any land or water use or natural resource of the coastal zone to be consistent with the enforceable policies of the affected state's federally-approved coastal management program.⁶ This requirement extends to activities that require federal licenses or permits.⁷ States must develop and maintain "[a] list of Federal license and permit activities that will be subject to review" for consistency with their coastal management programs.⁸ Once NOAA approves this list, any federal license or permit activities contained therein and occurring either within the state's coastal zone or outside the coastal zone but within a NOAA-approved geographic location description,⁹ are subject to federal consistency review.¹⁰

The current appeal involves a case of interstate consistency. The CZMA and NOAA's regulations authorize interstate consistency review where "[a] federal activity may affect coastal uses or resources of a State other than the State in which the activity will occur."¹¹ The purpose of interstate consistency review is to "encourage cooperation among States in dealing with activities having interstate coastal effects, and to provide States, local governments, Federal agencies, and the public with a predictable framework for evaluating the consistency of these federal activities under the [CZMA]."¹² A state seeking to conduct a consistency review of federal activities in another state must "[l]ist those Federal agency activities, federal license or permit activities, and federal assistance activities that the State intends to routinely review for consistency" and "[g]enerally describe the geographic location for each type of listed activity."¹³ When describing the geographic location, the state must also "provide information to [NOAA's Office for Coastal Management ("OCM")] that coastal effects from listed activities occurring within the geographic area are reasonably foreseeable."¹⁴ Furthermore, the state must "notify and consult with the State in which the listed activity will occur, as well as with relevant Federal

⁶ 16 U.S.C. § 1456(c).

⁷ *Id.* § 1456(c)(3)(A).

⁸ 15 C.F.R. § 923.53(a)(2); *see also id.* § 930.53(a) (requiring states to "develop a list of federal license or permit activities which affect any coastal use or resource, . . . and which the [s]tate . . . wishes to review for consistency with the management program").

⁹ Under the CZMA implementing regulations, states may, by describing their geographic location, identify in their coastal management programs "areas outside of the coastal zone where coastal effects from federal license or permit activities are reasonably foreseeable." 15 C.F.R. § 930.53(a)(1).

¹⁰ 16 U.S.C. § 1456(c)(3)(A). The CZMA defines "enforceable policy" as a state's "policies which are legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions." *Id.* § 1453(6a).

¹¹ 15 C.F.R. § 930.150(a).

¹² *Id.* § 930.150(b).

¹³ *Id.* § 930.154(a)(1)–(2).

¹⁴ *Id.* § 930.154(c).

agencies” and “submit [its] lists and geographic location descriptions . . . to [OCM] for approval.”¹⁵

Once OCM has approved a state’s list of federal activities occurring within an interstate geographic location description, an applicant for a federal license or permit activity subject to interstate consistency review “shall notify each affected coastal State of the proposed activity,” by providing a consistency certification and associated necessary data and information.¹⁶ Within 30 days of receiving the consistency certification and necessary data and information from the applicant, each state intending to review an activity occurring in another state must notify the applicant, the federal agency, the state in which the activity will occur, and OCM of its intent to review the activity for consistency.¹⁷ Each reviewing state has six months from receipt of the consistency certification and necessary data and information to review the applicant’s proposed activity.¹⁸ If a reviewing state issues an objection, the federal agency may not issue the license or permit sought by the applicant unless the NOAA Administrator finds on appeal that the activity is consistent with the objectives of the CZMA or is otherwise necessary in the interest of national security.¹⁹

An applicant may file a notice of appeal within 30 days of receiving the state’s objection.²⁰ As noted above, the NOAA Administrator has been delegated the responsibility for deciding consistency appeals filed under the CZMA.²¹ NOAA’s Office of the General Counsel assists the NOAA Administrator in carrying out this responsibility and has been delegated certain functions associated with processing consistency appeals, including issuing procedural orders and establishing schedules.²²

B. Factual Background

1. Norwalk Cove’s Proposed Activity

Norwalk Cove owns a commercial marina located in Norwalk, Connecticut.²³ The marina is located along the east bank of the Norwalk Harbor and has direct access to the Norwalk Harbor Federal Navigation Channel.²⁴ The facility includes approximately four hundred boat slips of varying sizes and upland amenities including restrooms, restaurants, supplies, repair services,

¹⁵ *Id.* § 930.154(b), (d).

¹⁶ *Id.* § 930.155(b).

¹⁷ *Id.* § 930.155(c).

¹⁸ *Id.* § 930.60.

¹⁹ 16 U.S.C. § 1456(c)(3)(A).

²⁰ 15 C.F.R. § 930.125.

²¹ Departmental Organization Order 10-15 Section 3.01.u.

²² Redelegation of Authority from the Under Secretary of Oceans and Atmosphere Delegations of Authority, Transmittal #82 (2013).

²³ Norwalk Cove, Principal Brief, at 2 (June 29, 2021) (“NCM Principal Brief”), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0009>.

²⁴ *Id.*

and access to the surrounding area.²⁵ Norwalk Cove is proposing to undertake improvements to the southern portion of its facility to accommodate deep draft vessels by expanding and deepening the existing dredge footprint from a depth of 8 feet at mean low water to a depth of 13 feet at mean low water.²⁶ To achieve the desired depth, Norwalk Cove proposes to dredge and dispose of approximately 24,500 cubic yards of sediment.²⁷ The proposed activity may not proceed unless authorized by the Corps.²⁸

2. The Corps Permit

a. Permitting Framework

The Corps issues General Permits that categorically authorize certain kinds of activities in specific geographic regions.²⁹ The Corps has twenty-one General Permits for activities subject to Corps jurisdiction in waters of the United States, including navigable waters, within the boundaries of the State of Connecticut.³⁰ Of these, General Permit 7 authorizes certain dredging, transport, and disposal of dredged material under Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the CWA, and Section 103 of the Marine Protection, Research and Sanctuaries Act (“MPRSA”).³¹ Before beginning any dredging with open water disposal authorized under General Permit 7, a project proponent must first provide the Corps with a pre-construction notification (“PCN”).³² As part of the PCN, a project proponent is required to submit to the Corps a copy of the Connecticut Department of Energy and Environmental Protection (“CT DEEP”) Permit Consultation Form along with project plans.³³ If the Corps verifies that the proposed activity is authorized under General Permit 7, it will return a completed Permit Consultation Form to the project proponent for submission to CT DEEP.³⁴ In order for an authorization to be valid under General Permit 7, project proponents are responsible for applying for and obtaining concurrence under Section 307 of the CZMA from the appropriate states.³⁵

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Comment from U.S. Army Corps of Eng’rs (“Comment from Corps”), available at <https://www.regulations.gov/comment/NOAA-HQ-2021-0059-0017>.

²⁹ Comment from Corps at 2. All dredged material disposal activities in Long Island Sound, whether from federal or non-federal projects of any size, are subject to the requirements of section 404 of the CWA, 33 U.S.C. § 1344. “[T]he dumping of dredged material in Long Island Sound from any Federal project (or pursuant to Federal authorization) or from a dredging project by a non-Federal applicant exceeding 25,000 cubic yards shall comply with the requirements of [both the CWA and the MPRSA].” 33 U.S.C. § 1416(f).

³⁰ Comment from Corps at 3.

³¹ *Id.* General Permit 7 authorizes maintenance, new, and improvement dredging regardless of volume, with certain exceptions related to dredging impacts, purposes, and methods. *Id.* General Permit 7 also authorizes disposal of dredged material at designated open water or ocean water disposal sites, provided the Corps finds the dredged material to be suitable for such disposal. *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

b. The Permitting Process for the Norwalk Cove Project

Norwalk Cove's initiation of the permitting process for the proposed activity included the implementation of a Corps and Environmental Protection Agency ("EPA") approved sampling and analysis plan to evaluate the physical and chemical quality of the sediments to be dredged and determine the suitability of the material for open water disposal.³⁶ In July 2020, the Corps issued a determination in coordination with EPA Region 1 and CT DEEP, finding that "[a]ccording to the testing and evaluation requirements set forth in Section 404 of the CWA the sediments to be dredged from Norwalk Cove Marina are considered unsuitable for unconfined open water placement at CLDS without additional testing to further evaluate the potential risk to human health and the environment."³⁷ The Corps offered Norwalk Cove four alternatives: "(1) additional sampling and biological testing to more fully characterize the proposed dredged material for open water placement; (2) capping the proposed dredged material at CLDS with material suitable for open water placement; (3) upland disposal; or (4) another feasible alternative."³⁸

On September 23, 2020, the Corps received Norwalk Cove's PCN including the CT DEEP Permit Consultation Form and project plans.³⁹ Norwalk Cove described the proposed activity as dredging approximately 24,500 cubic yards of sediment and disposing of the material at CLDS with a suitable cap. The proposed activity is evaluated by the Corps under General Permit 7, since it consists of dredging with open water disposal of the dredged material, and no work may begin without written approval from the Corps.⁴⁰ The PCN submission included a Consistency Certification and the necessary data and information required by the CZMA implementing regulations.⁴¹ Following receipt of the PCN, the Corps initiated coordination with the State for review of Norwalk Cove's consistency certification.⁴²

³⁶ *Id.*

³⁷ Norwalk Cove, Appendix at 14 (June 29, 2021) ("NCM Appendix") (Final Suitability Determination for Norwalk Cove Marina), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0010>; see also Comment from U.S. Env'tl. Prot. Agency at 3-4 ("Comment from EPA") ("EPA also evaluated the sediment sampling results and reviewed the USACE's Suitability Determination."), available at <https://www.regulations.gov/comment/NOAA-HQ-2021-0059-0018>. EPA found that "[b]ased on the elevated sediment chemistry results, . . . the dredged material from this project is unsuitable for unconfined open-water disposal at the CLDS disposal site without additional testing to further assess potential risk to human health and the environment." Comment from EPA, Attachment A.

³⁸ Comment from Corps at 3-4. CT DEEP concurred with the Suitability Determination, finding that the material is suitable for disposal at CLDS provided that it is capped with suitable sediments. Comment from Conn. Dep't of Energy and Env'tl. Prot. at 3 ("Comment from CT DEEP"), available at <https://www.regulations.gov/comment/NOAA-HQ-2021-0059-0012>.

³⁹ Comment from Corps at 4.

⁴⁰ *Id.*

⁴¹ 15 C.F.R. § 930.58.

⁴² Notice of Appeal from Norwalk Cove to Gina M. Raimundo, Sec'y of Commerce, at 2 (Apr. 21, 2021) ("Notice of Appeal"), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0002>.

c. New York's Interstate Consistency Review

The State's CZMA consistency objection arises out of Norwalk Cove's PCN.⁴³ Norwalk Cove's proposed activity falls within the scope of federal license and permit activities occurring in Connecticut waters of Long Island Sound that the NYSDOS has been authorized to review for consistency with the enforceable policies of the Long Island Sound Coastal Management Program, which is a regional component of the New York State Coastal Management Program.⁴⁴ On March 24, 2021, the State timely objected to Norwalk Cove's CZMA consistency certification on the grounds that the proposed activity is not consistent with the enforceable policies of the Long Island Sound Coastal Management Program due to adverse impacts to water quality, marine resources, and ecology.⁴⁵ Specifically, the State objected on the basis that confined disposal of unsuitable dredged material at CLDS is not consistent with Long Island Sound Coastal Management Program policies 5, 6, 8, and 11.⁴⁶

C. Procedural Background

As required by the CZMA implementing regulations,⁴⁷ Norwalk Cove sent a Notice of Appeal by mail to the Secretary at the Herbert C. Hoover Building in Washington, D.C.⁴⁸ The Notice of Appeal was dated April 21, 2021, but was not stamped as received by the Secretary's office until May 19, 2021.⁴⁹ Due to this discrepancy, NOAA issued an order on May 26, 2021, requiring the Parties to submit preliminary briefing on the question of whether the Notice of Appeal was timely filed within 30 days of the State's March 24, 2021, objection.⁵⁰ After reviewing the

⁴³ *Id.*

⁴⁴ Pursuant to NOAA's interstate consistency review regulations at 15 C.F.R. Part 930, Subpart I, on February 6, 2006, the State requested OCM approval of a list of interstate activities, which included three activities that would require permits, licenses, or other forms of approval by the Corps. N.Y. State Dep't of State, Suppl. App'x A (Aug. 6, 2021) ("State SA-A"), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0020>. On March 28, 2006, NOAA approved the State's request, finding that the designation and use of open-water disposal sites in Connecticut waters in Long Island Sound would have reasonably foreseeable effects on New York's coastal resources and uses. *Id.*

⁴⁵ NCM Appendix at 230 (NYSDOS Objection Letter). CT DEEP also reviewed Norwalk Cove's proposed activity and stated in its public comment that "CT DEEP staff have concluded that . . . the project would be *consistent* with Connecticut's coastal management enforceable policies." Comment from CT DEEP at 5 (emphasis in original).

⁴⁶ NCM Appendix at 230, NYDOS Objection Letter.

⁴⁷ 15 C.F.R. § 930.125(d).

⁴⁸ Notice of Appeal, *see supra* note 42.

⁴⁹ *Id.*

⁵⁰ Consistency Appeal Acknowledgement and Order on Preliminary Briefing Schedule (May 26, 2021), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0003>.

briefing and supporting materials submitted by the Parties,⁵¹ NOAA issued an order on July 14, 2021, concluding that the Notice of Appeal was timely filed.⁵²

On June 7, 2021, NOAA issued an order that set a schedule for the principal briefing in this appeal.⁵³ Pursuant to the CZMA's implementing regulations,⁵⁴ NOAA published a notice of the appeal in the Federal Register on June 24, 2021, which invited the public and interested federal agencies to comment on the appeal.⁵⁵ By August 31, 2021, the Parties had completed the principal round of briefing and the window for public comment had closed.⁵⁶

NOAA received three public comments on the appeal. The New York State Department of Environmental Conservation submitted a comment requesting that the NOAA Administrator

⁵¹ Norwalk Cove submitted its response to NOAA's May 26, 2021, Order by email on June 2, 2021, and included two attachments. Email from Christopher Marchesi, Triton Coastal Consultants, LLC, to Bethany Henneman, Attorney-Advisor, NOAA (June 2, 2021), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0006>. The State submitted its brief and supporting materials on June 4, 2021. N.Y. State Dep't of State, Brief re: Timeliness of Notice of Appeal (June 4, 2021), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0005>.

⁵² Order on Timeliness of Notice of Appeal (July 14, 2021), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0011>.

⁵³ Order Re: Briefing Schedule (June 7, 2021), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0004>. The State requested that NOAA reconsider this order and postpone principal briefing for the appeal until NOAA had resolved the question of the Notice of Appeal's timeliness. Email from Linda M. Baldwin, Gen. Counsel, N.Y. State Dep't of State to Bethany Henneman, Attorney-Advisor, NOAA (June 8, 2021), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0007>. NOAA denied the State's request for reconsideration on June 14, 2021. Letter Denying Request for Reconsideration (June 14, 2021), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0008>.

⁵⁴ 15 C.F.R. § 930.128(a).

⁵⁵ 86 Fed. Reg. 33,235 (June 24, 2021), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0001>. As required by 15 C.F.R. § 930.128(a), NOAA also published notice of the appeal in two newspapers serving the Long Island Sound region, New York's *Newsday* and the Connecticut *Post*.

⁵⁶ Norwalk Cove submitted its principal brief and appendix on June 29, 2021. NCM Principal Brief, *see supra* note 23; NCM Appendix, *see supra* note 37. The State submitted its principal brief and six supplemental appendices on August 6, 2021. N.Y. State Dep't of State, Principal Brief (Aug. 6, 2021) ("State Principal Brief"), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0019>; State SA-A, *see supra* note 44; N.Y. State Dep't of State, Suppl. App'x B (Aug. 6, 2021), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0021>; N.Y. State Dep't of State, Suppl. App'x C (Aug. 6, 2021), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0022>; N.Y. State Dep't of State, Suppl. App'x D (Aug. 6, 2021), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0023>; N.Y. State Dep't of State, Suppl. App'x E (Aug. 6, 2021), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0024>; N.Y. State Dep't of State, Suppl. App'x F (Aug. 6, 2021), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0025>. After receiving a seven-day extension, *see* Order Granting Extension of Time (Aug. 18, 2021), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0030>, Norwalk Cove submitted its reply brief and two supplemental appendices on August 31, 2021. Norwalk Cove, Reply Brief (August 31, 2021) ("NCM Reply Brief"), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0031>; Norwalk Cove, Suppl. App'x A (Aug. 31, 2021), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0032>; Norwalk Cove, Suppl. App'x B (Aug. 31, 2021), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0033>. The public comment period for the appeal closed on July 26, 2021. *See* 86 Fed. Reg. 33,235 (June 24, 2021) ("Written comments and requests for a public hearing will be considered if received no later than July 26, 2021.").

sustain the State's objection,⁵⁷ and CT DEEP and the Connecticut Marine Trades Association each submitted a comment requesting that the NOAA Administrator override the State's objection.⁵⁸ NOAA also received substantive comments on the appeal from three federal agencies.⁵⁹ The EPA, the Corps, and NOAA's National Marine Fisheries Service each submitted a comment that provided background information relevant to the permitting process and regulatory framework for Norwalk Cove's proposed activity, but that did not take a position on the merits of Norwalk Cove's appeal.⁶⁰

During the principal briefing cycle, the State requested an opportunity to submit supplemental briefing to respond to the comments from federal agencies.⁶¹ On September 2, 2021, NOAA ordered the Parties to meet and confer regarding the necessity and scope of supplemental briefing.⁶² After reviewing the Parties' report from their meeting,⁶³ NOAA issued an order on September 14, 2021, that allowed each party to submit a supplemental brief and supplemental appendix to address the comments that had been submitted by federal agencies.⁶⁴ By October 1, 2021, the Parties had completed this supplemental round of briefing.⁶⁵

⁵⁷ Comment from N.Y. Dep't of Envtl. Conservation, available at <https://www.regulations.gov/comment/NOAA-HQ-2021-0059-0016>.

⁵⁸ Comment from CT DEEP, *see supra* note 38; Comment from Conn. Marine Trades Ass'n ("Comment from CMTA"), available at <https://www.regulations.gov/comment/NOAA-HQ-2021-0059-0015>.

⁵⁹ Consistent with its practice in prior consistency appeals, NOAA sent letters to potentially interested federal agencies inviting them to comment on this appeal. In addition to the three substantive comments described above, the U.S. Coast Guard and the U.S. Department of Homeland Security each responded to NOAA, stating that they had no comment on this appeal. Response from U.S. Coast Guard, available at <https://www.regulations.gov/comment/NOAA-HQ-2021-0059-0014>; Response from U.S. Dep't of Homeland Sec., available at <https://www.regulations.gov/comment/NOAA-HQ-2021-0059-0013>.

⁶⁰ Comment from EPA, *see supra* note 37; Comment from Corps, *see supra* note 28; Comment from Nat'l Marine Fisheries Serv., available at <https://www.regulations.gov/comment/NOAA-HQ-2021-0059-0026>.

⁶¹ *See* Order to Meet and Confer (Sept. 2, 2021) ("[O]n July 30, 2021, NYSDOS requested, by email, the opportunity to submit an additional brief to respond to comments on the appeal that had been submitted by interested Federal agencies."), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0034>.

⁶² *Id.*

⁶³ *See* Email from Carver Glezen, Triton Coastal Consultants, LLC, to Erik Federman, Attorney-Advisor, NOAA (Sept. 10, 2021) (reporting on meeting), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0035>.

⁶⁴ Order re: Supplemental Briefing Schedule (Sept. 14, 2021), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0036>.

⁶⁵ The State submitted its supplemental brief and appendix on September 24, 2021. N.Y. State Dep't of State, Suppl. Brief (Sept. 24, 2021), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0037>; N.Y. State Dep't of State, Suppl. App'x II (Sept. 24, 2021), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0038>. Norwalk Cove submitted its supplemental brief and appendix on October 1, 2021. Norwalk Cove, Suppl. Brief (Oct. 1, 2021), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0039>; Norwalk Cove, Suppl. App'x II (Oct. 1, 2021), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0039>. On October 6, 2021, the State requested that NOAA either exclude from the record a portion of Norwalk Cove's supplemental brief, which the State argued violated NOAA's September 14, 2021, Order, or that NOAA allow the State to submit a reply to Norwalk Cove's supplemental brief. Letter from Linda M. Baldwin, Gen. Counsel, N.Y. State Dep't of State, to Adam Dilts, Chief, Gen. Counsel Oceans and Coasts Section, NOAA (Oct. 6, 2021), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0042>. NOAA denied this request

On December 1, 2021, the decision record for this appeal closed pursuant to Section 319(b) of the CZMA.⁶⁶ On the same day, NOAA published a notice in the Federal Register announcing the closure of the decision record.⁶⁷

III. STANDARD OF REVIEW

The NOAA Administrator may override a state’s consistency objection upon finding that the proposed activity is either consistent with the objectives or purposes of the CZMA or necessary in the interest of national security.⁶⁸ An affirmative finding on either of these two independent grounds for decision is sufficient to override the state’s objection.⁶⁹ The NOAA Administrator reviews the proposed activity based on the national interest and coastal effects considerations specified in the CZMA and its implementing regulations; the NOAA Administrator does not review the substantive validity of the state’s consistency objection on appeal.⁷⁰

The NOAA Administrator considers the merits of a federal consistency appeal *de novo*.⁷¹ In the course of this review, the NOAA Administrator gives “deference to the views of interested Federal agencies when commenting in their areas of expertise.”⁷² However, the appellant bears the ultimate burden of persuasion, and must prove its case by a preponderance of the evidence.⁷³

IV. THRESHOLD ISSUES

The Parties put forth a number of arguments pertaining to threshold issues, which are separate from the merits arguments.

on October 14, 2021. Order Denying NYSDOS’ Requests Related to NCM’s Supplemental Brief (Oct. 14, 2021), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0044>.

⁶⁶ 16 U.S.C. § 1465(b).

⁶⁷ 86 Fed. Reg. 68,222 (Dec. 1, 2021), available at <https://www.regulations.gov/document/NOAA-HQ-2021-0059-0045>.

⁶⁸ 16 U.S.C. § 1456(c)(3)(A).

⁶⁹ *Jordan Cove* at 9; see also *Decision and Findings by the U.S. Under Secretary of Commerce for Oceans and Atmosphere in the Consistency Appeal of Electric Boat Corporation from an objection by the New York Department of State*, Nov. 16, 2020, at 13–14 (“*Electric Boat Corp.*”) (declining to reach appellant’s argument that proposed activity was consistent with objectives or purposes of CZMA after finding that it was necessary in the interest of national security).

⁷⁰ *Jordan Cove* at 9; see also *Decision and Findings by the U.S. Under Secretary of Commerce for Oceans and Atmosphere in the Consistency Appeal of WesternGeco from an Objection by the State of South Carolina*, June 15, 2020, at 8 (“*WesternGeco S.C.*”) (“NOAA presumes the substantive validity of a state’s objection on appeal.”).

⁷¹ *De novo* means “anew.” Black’s Law Dictionary (11th ed. 2019). Therefore, the NOAA Administrator does not apply any deference to determinations made by the state in its review process. See *Electric Boat Corp.* at 12 (“NOAA does not second-guess the local factors underlying a state’s objection; rather, NOAA applies a broader, national scope based on the factors described in the CZMA.”).

⁷² 15 C.F.R. § 930.127(e)(1).

⁷³ *Jordan Cove* at 9; see also *WesternGeco S.C.* at 8 (“The Appellant bears the burden of proof on the preponderance of the evidence.” (citing *Decision and Findings in the Consistency Appeal of Chevron U.S.A. Inc. from an Objection by the California Coastal Commission*, Oct. 29, 1990, at 5 (“*Chevron 1990*”); *Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S. Inc. from an Objection by the State of Florida*, Jan. 7, 1993, at 11)).

A. Challenge to the State's Federal Consistency Objection

Procedural challenges to a state's consistency objection are reviewed as a threshold matter. The NOAA Administrator must override a state's objection if the appellant demonstrates that the state failed to comply with the federal consistency provisions of the CZMA or its implementing regulations.⁷⁴ This threshold review does not provide an opportunity to challenge the merits of a state's objection, the substance of which is presumed to be valid on appeal.⁷⁵

In its principal brief, Norwalk Cove asserts as a basis for appeal that the proposed disposal of the dredged material at CLDS with capping is consistent with the State's coastal management program and is consistent with the applicable regulations implementing Section 404 of the CWA.⁷⁶ Norwalk Cove implies that the State's failure to consider capping as an available alternative to open water disposal at CLDS also implicates the adequacy of the State's consistency objection. This argument is in response to the State's consistency objection, which stated that the project should not move forward, in part because "[u]nsuitable material is prohibited for disposal at CLDS and the EPA has prohibited 'capping' of unsuitable materials in Long Island Sound since 1996."⁷⁷ Norwalk Cove asserts that the State's consistency objection "fails to acknowledge that the applicable regulations allow for the capping of such material with material which is suitable for open water placement after discharge."⁷⁸ In essence, Norwalk Cove argues that its proposed disposal is permissible under the CWA and must, therefore, be consistent with the enforceable policies of the State's coastal management program.

The Parties use a significant portion of their principal and supplemental briefs to argue over whether CLDS can accept the proposed dredged material from Norwalk Cove with a cap pursuant to MPRSA and CWA authorities and the management protocols at the disposal site. This dispute is outside the scope of the NOAA Administrator's review on appeal, which is limited to the two grounds for decision provided by CZMA.⁷⁹ The federal consistency appeal process does not empower the NOAA Administrator to adjudicate any and all possible disputes arising out of the environmental reviews and consultations related to the proposed federal permit or license activity.⁸⁰ The NOAA Administrator cannot use the consistency appeal process to resolve a dispute about the implementation of the MPRSA and CWA, statutes which are

⁷⁴ 15 C.F.R. § 930.129(b).

⁷⁵ See *Electric Boat Corp.* at 12.

⁷⁶ NCM Principal Brief at 5.

⁷⁷ NCM Appendix at 206 (NYSDOS Objection Letter).

⁷⁸ NCM Principal Brief at 5.

⁷⁹ See 16 U.S.C. § 1456(c)(3)(A) (providing that upon a state objection, "[n]o license or permit shall be granted by the Federal agency . . . unless the Secretary . . . finds . . . that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security").

⁸⁰ See *Jordan Cove* at 21 (finding that a federal consistency appeal is not the proper forum to determine the sufficiency of government-to-government consultations).

implemented by EPA and the Corps. Additional consideration will not be given to the details of these arguments, which are beyond the scope of the appeal.

Norwalk Cove has failed to identify a threshold procedural violation warranting a procedural override. This threshold review does not provide an avenue for an appellant to challenge the merits or substance of a state's objection, because NOAA presumes the substantive validity of a state's objection on appeal.⁸¹

B. Challenge to Norwalk Cove's Basis for Appeal

In its principal brief, the State argues that CLDS is not available for disposal of unsuitable material of any quantity, whether later covered by capping or not, and requests dismissal on that basis pursuant to 15 C.F.R. § 930.129(a)(5).⁸² Under 15 C.F.R. § 930.129(a)(5), the Administrator may dismiss an appeal for good cause when the appellant fails to base the appeal on grounds that the proposed activity is either consistent with the objectives or purposes of the CZMA, or necessary in the interest of national security. Section 930.129(a)(5) is not a catch-all provision for dismissing an appeal; rather, the purpose of the section is to dismiss an appeal for failure to address one or both of the two grounds for an appeal. Norwalk Cove has presented the basis for its appeal as the proposed activity's consistency with the objectives and purposes of the CZMA,⁸³ satisfying the requirement in 15 C.F.R. § 930.125 that "[t]he appellant's notice of appeal shall include a statement explaining the appellant's basis for appeal of the State agency's objection." The State's request for dismissal on this basis is denied.

C. Reconsideration of the Timeliness of Norwalk Cove's Notice of Appeal

In its principal brief, the State asked NOAA to reconsider its July 14, 2021, order concluding that the Notice of Appeal was timely filed.⁸⁴ The State noted that it "reaffirms and realleges all the issues addressed in its timeliness brief for NOAA's reconsideration."⁸⁵ In reply, Norwalk Cove argues that "[i]n the interest of fairness, there is no reason to revisit or reconsider NOAA's decision."⁸⁶ NOAA is not inclined to grant discretionary requests for reconsideration without a compelling basis. In this case, NOAA declines to reconsider this issue due to the State's failure to present an argument related to the availability of new evidence or the identification of an error in NOAA's application of fact or law.

⁸¹ *Chevron 1990* at 7.

⁸² State Principal Brief at 2–3.

⁸³ Notice of Appeal at 1.

⁸⁴ State Principal Brief at 2.

⁸⁵ *Id.*

⁸⁶ NCM Reply Brief at 1–2.

V. DISCUSSION

Of the two bases for decision established by the CZMA,⁸⁷ Norwalk Cove seeks override of the State's objection on the ground that its proposed activity is consistent with the objectives and purposes of the CZMA.⁸⁸ The CZMA implementing regulations provide a three-part test for determining whether a proposed activity is consistent with the objectives or purposes of the CZMA, such that overriding a state's objection is appropriate. First, the activity must further the national interest as articulated in the CZMA "in a significant or substantial manner" (Element 1); second, the national interest furthered by the activity must outweigh the activity's adverse coastal effects, "when those effects are considered separately or cumulatively" (Element 2); and third, there must be no reasonable alternative available that would allow the activity to be conducted "in a manner consistent with the enforceable policies of the [objecting state's coastal] management program." (Element 3).⁸⁹ The NOAA Administrator must find that the appellant has satisfied each of these three elements to override a state's consistency objection on the ground that the project is consistent with the objectives or purposes of the CZMA.⁹⁰

For the reasons discussed below, the NOAA Administrator finds that Norwalk Cove's proposed activity does not further the national interest as articulated in the CZMA in a significant or substantial manner. Because Norwalk Cove has failed to satisfy Element 1, the proposed activity is not consistent with the objectives or purposes of the CZMA, as defined by 15 C.F.R. § 930.121, and the State's objection is sustained.

A. The Analysis of Element 1 Considers the Activity as a Whole

At the outset, the Parties dispute whether the scope of analysis for Element 1 should be limited to Norwalk Cove's proposed disposal of dredged material or whether it should also extend to the dredging component of Norwalk Cove's marina improvement project. Norwalk Cove asserts that its proposed disposal of dredged material at CLDS "is inextricably linked to" the dredging of its marina, which Norwalk Cove characterizes as a "vital development activity" that will directly increase revenues and support employment at the marina while promoting the local economy by attracting recreational boaters to the area.⁹¹ Therefore, Norwalk Cove contends that its proposed disposal of dredged material, taken together with the dredging of the southern portion of its marina, furthers the national interest as articulated in the CZMA.⁹²

⁸⁷ As discussed above, the Parties' dispute over the regulatory framework governing disposal of dredged material at CLDS is outside the scope of review for this consistency appeal. *See supra* at 10–11.

⁸⁸ Notice of Appeal at 1; NCM Principal Brief at 7. Therefore, whether the proposed activity is necessary in the interest of national security is not at issue in this appeal and will not be discussed further in this decision.

⁸⁹ 15 C.F.R. § 930.121.

⁹⁰ *Id.*; *Jordan Cove* at 10.

⁹¹ NCM Principal Brief at 9.

⁹² *Id.* at 7–10; NCM Reply Brief at 5–6.

The State argues that the scope of the analysis under Element 1 in this case must be constrained to the specific activity that was the subject of its objection, which the State contends is the disposal of dredged material at CLDS.⁹³ The State argues that the disposal of dredged material does not further a national interest articulated in the CZMA, and that Norwalk Cove “attempts to shoehorn [such disposal] into the statutorily enumerated national interest set in [sic] 16 U.S.C. § 1452(2)(D), by seeking to incorporate the dredging component at their marina . . . as an inseparable component of the Activity under review.”⁹⁴

The State’s characterization of the inquiry under Element 1 is too narrow. Consistent with the text of the CZMA, the analysis of Element 1 considers the appellant’s proposed activity as a whole, rather than the discrete portion of that activity reviewed by the objecting state. Section 307(c)(3)(A) of the CZMA characterizes an “activity” by reference to the federal permit or license necessary for its authorization.⁹⁵ It is the federal license or permit that triggers the consistency process under the CZMA, and the effect of a state’s objection to a consistency certification is to preclude the issuance of the federal license or permit in question.⁹⁶ In this case, Norwalk Cove sought federal authorization for its proposed dredging and its proposed disposal of dredged material at CLDS through a single permit: the Corps’s General Permit 7.⁹⁷ Since they are subject to a single federal permit, it is appropriate to consider Norwalk Cove’s proposed dredging and disposal together as the “activity” for the purposes of the CZMA and the analysis under Element 1.

Considering Norwalk Cove’s proposed activity as a whole for the purposes of Element 1 is also consistent with prior consistency appeal decisions, even in cases such as this one, where only one portion of the activity—the disposal of dredged material—triggered the State’s consistency review. As explained in the *AES Sparrows Point* decision, “the inquiry into whether development of the coastal zone furthers the national interest in a significant or substantial manner takes into account the entire Project, not just a particular portion.”⁹⁸ In that appeal, the

⁹³ State Principal Brief at 3–4 (“Although [Norwalk Cove] has attempted to turn this appeal into an opportunity to discuss the importance and merits of dredging, . . . the Activity on appeal is [Norwalk Cove’s] proposal to dispose of dredged materials at CLDS, the only Activity that [NYS]DOS reviewed and objected to.”).

⁹⁴ *Id.* at 4.

⁹⁵ See 16 U.S.C. § 1456(c)(3)(A) (requiring “any applicant for a required Federal license or permit to conduct an activity . . . affecting . . . the coastal zone of [a] state” to submit a consistency certification to that state).

⁹⁶ *Id.*

⁹⁷ See NCM Appendix at 123 (pre-submission consultation form describing project to Corps as “[d]redg[ing] approximately 24,500 cubic yards of sediment . . . and dispos[ing] of the material at [CLDS] with suitable cap.”); see also Comment from Corps at 4 (“As a proposal for dredging with open water disposal of the dredged material, the work is being evaluated under GP 7 . . . [and] NCM must obtain written approval from the Corps before beginning any work.”).

⁹⁸ *Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of AES Sparrows Point LNG, LLC and Mid-Atlantic Express, L.L.C. from an Objection by the State of Maryland*, June 26, 2008, at 13 (“*AES Sparrows Point*”) (citing *Decision and Findings in the Consistency Appeal of Southern Pacific Transportation Company*, Sept. 24, 1985; *Decision and Findings in the Consistency Appeal of Mobil Exploration and Producing U.S. Inc.*, June 20, 1995; *Decision and Findings in the Consistency Appeal of Amoco Production Company*, July 20, 1990); cf. *Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal*

Secretary considered the national interest furthered by and the adverse coastal effects of an 88-mile pipeline, even though only 48 miles of it would occur in the objecting state’s coastal zone.⁹⁹

B. Norwalk Cove’s Proposed Activity Does not Further the National Interest in a Significant or Substantial Manner

Considering the activity as a whole, Norwalk Cove has not demonstrated by a preponderance of the evidence that its proposed activity—the dredging and disposal of dredged material at CLDS— furthers the national interest as articulated in Sections 302 or 303 of the CZMA in a significant or substantial manner. The requirement that an activity must further the national interest in a “significant or substantial manner” was added by a 2000 revision to the CZMA implementing regulations.¹⁰⁰ In the preamble to that rulemaking, the term “significant” is interpreted to encompass activities that provide a valuable or important contribution to a national interest, without necessarily being large in scale or having a large impact on the national economy.¹⁰¹ The term “substantial” is interpreted to encompass activities that contribute to a CZMA objective to a degree that has a value or impact on a national scale.¹⁰² Together, these terms encompass both the import and scale of a proposed activity.¹⁰³ To show that an activity furthers the national interest in a significant or substantial manner, an appellant must “demonstrate that the proposed activity is of such import to the national goals for coastal resource development that, despite the will of State and local government decisionmakers, the [NOAA Administrator] should independently review the proposed activity to determine its consistency with the CZMA.”¹⁰⁴

Norwalk Cove argues that its proposed activity will promote the national interest in the development of the coastal zone and in public access to the coasts for recreation purposes.¹⁰⁵

of the Foothill/Eastern Transportation Corridor Agency and the Board of Directors of the Foothill/Eastern Transportation Corridor Agency from an Objection by the California Coastal Commission, Dec. 18, 2008, at 10 (“*Foothill/Eastern*”) (expressing a “holistic approach” to a state’s consistency review and concluding that “once it is determined that part of an activity is subject to consistency review, the review extends to all physically connected portions of the same activity, even if the activity crosses the coastal zone boundary and continues outside of it.”).

⁹⁹ *AES Sparrows Point* at 11–14, 28.

¹⁰⁰ 65 Fed. Reg. 77123 (Dec. 8, 2000).

¹⁰¹ *Id.* at 77150.

¹⁰² *Id.*

¹⁰³ *WesternGeco S.C.* at 16–17 (citing *Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of Broadwater Energy LLC and Broadwater Pipeline LLC from an Objection by the State of New York*, April 13, 2009, at 10–11 (“*Broadwater*”); *AES Sparrows Point*, at 14; *Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of Weaver’s Cove Energy L.L.C. and Mill River Pipeline, L.L.C. from an Objection by the State of Massachusetts*, June 26, 2008, at 10–11).

¹⁰⁴ 65 Fed. Reg. 77123, 77150. The NOAA Administrator recognizes that the interstate consistency aspect of this appeal adds an additional level of complication in that two states may make conflicting decisions with respect to the same activity. When such conflict occurs, it does not increase the degree to which the activity furthers the national interest under the CZMA. Therefore, the interstate consistency aspect for this activity does not change the inquiry into whether the activity meets the national interest in a significant or substantial manner.

¹⁰⁵ NCM Principal Brief at 7–8 (citing 16 U.S.C. §§ 1451(a), 1452(2)(D)–(E)); NCM Reply Brief at 5–6.

Norwalk Cove frames its national interest argument in economic terms, contending that the Connecticut marina industry, as a whole, creates significant economic value in the region. Relying on a 2018 study of the economic impact of the U.S. marina industry, Norwalk Cove asserts that “Connecticut marinas, specifically, contribute more than \$560 million annually to the State’s economy, directly and indirectly employ 3,045 people and provide more than \$27 million in annual tax revenue.”¹⁰⁶ But, looking past the larger marina industry, Norwalk Cove has not demonstrated the significance of the economic impact associated with its facility, let alone the degree to which that impact will be increased by the specific improvement project at issue in this appeal—the deepening of the dredged footprint of the southern portion of Norwalk Cove’s marina in order to accommodate larger vessels. Norwalk Cove asserts, without quantification, that its facility is “a significant driver of economic activity to the surrounding area.”¹⁰⁷ Norwalk Cove also states that contracts to berth at its facility have been signed contingent on the improvement project’s completion, and that the cancellation of these contracts “will result in a loss of revenue for [Norwalk Cove], [and] could lead to a reduction in services for existing patrons and subsequent decreased economic activity due to fewer visitors to the local” businesses.¹⁰⁸ Finally, in support of Norwalk Cove, the Connecticut Marine Trades Association submitted a public comment maintaining that “[w]hen larger vessels are in port at Norwalk Cove Marina they result in at least 50 jobs on the dock per week . . . , per information . . . received from the marina personnel.”¹⁰⁹ In response, the State contends that “there would be very little, if any, national interest in allowing a small commercial marina to dispose of contaminated sediments . . . for the purpose of adding a larger boating dock.”¹¹⁰

The record shows that Norwalk Cove’s marina impacts the local economy. It produces local jobs and supports local businesses by attracting boaters to the area. And, together with the other marinas of Connecticut, Norwalk Cove’s facility contributes to an important sector of the state’s economy. But the local impacts of Norwalk Cove’s marina contrast sharply with the import and scale of activities that have been found to satisfy the significant or substantial threshold in prior appeals.¹¹¹ Further, Norwalk Cove has not convincingly shown the degree to which improving the southern portion of its facility to accommodate larger vessels will increase the local benefits already provided by its marina. As the preamble to the 2000 rulemaking notes, “a marina facility

¹⁰⁶ NCM Principal Brief at 9 (citing a 2018 U.S. Marina Economic Impact Study by the Association of Marina Industries, available in NCM Appendix at 232–240).

¹⁰⁷ *Id.* at 8.

¹⁰⁸ *Id.* at 9.

¹⁰⁹ Comment from CMTA at 2. The Connecticut Marine Trades Association explained that these jobs include “delivery truck drivers, mechanics, cleaners, dock hands, restaurant operators, as well as the marina employees.” *Id.*

¹¹⁰ State Principal Brief at 27.

¹¹¹ *See, e.g., Broadwater*, at 11–12 (finding national interest to be furthered in significant or substantial manner by natural gas pipeline capable of delivering 1.0 billion cubic feet per day that would address regional demand and “help serve a broader goal of stabilizing the price of natural gas on a national level”); *AES Sparrows Point* at 15 (finding national interest to be furthered in significant or substantial manner by natural gas pipeline capable of delivering “enough natural gas to heat about 3.5 million homes or to generate electricity for about 7.5 million homes”).

is coastal dependent, furthers the national goals of the CZMA in public access and recreation on our coasts, but its economic effects may be purely local.”¹¹² Norwalk Cove has not shown that the specific activity at issue in this appeal—deepening the dredged footprint of the southern portion of its marina and disposing of the dredged material at CLDS—is one of national importance or scale, such that it meets the “significant or substantial” threshold of Element 1.

In an attempt to amplify the significance of its proposed activity, Norwalk Cove contends that the “proposed disposal cannot be viewed in a vacuum,” and that “[m]arinas and other commercial facilities throughout Connecticut rely on the use of CLDS for disposal of their dredge material.”¹¹³ Sustaining the State’s objection, Norwalk Cove argues, would have the effect of “[p]reventing . . . other commercial marinas in Connecticut from disposing of their dredge material in a manner deemed acceptable by the responsible agencies” and “threaten[] the commercial viability of marinas throughout the state.”¹¹⁴ The Connecticut Marine Trades Association and CT DEEP made similar arguments in their public comments.¹¹⁵ The NOAA Administrator’s review of Element 1, however, is activity-specific. Consistent with the text of the CZMA and its implementing regulations, both of which allow override of a state objection only where “*the activity*” has been found to be consistent with the objectives of the CZMA,¹¹⁶ the activity under review must further the national interest in its own right, not when viewed together with future projects, the specifics of which are not in the record.¹¹⁷

Prior consistency appeal precedent also supports an activity-specific approach to Element 1. In the *Mark Smolisnksi* decision, the appellant sought override of a state’s objection to the installation of a solar-panel array on his property.¹¹⁸ The appellant argued that his proposed activity furthered the national interest in part because his “example . . . , if followed by others,

¹¹² 65 Fed. Reg. 77123, 77150 (Dec. 8, 2000).

¹¹³ NCM Principal Brief at 10.

¹¹⁴ *Id.*; see also NCM Reply Brief at 6 (“If NOAA were to agree with NYDOS’s [sic] objection, it would essentially create a moratorium for open water disposal of sediments (with capping) in Long Island Sound for projects involving less than 25,000 cubic yards of material.”).

¹¹⁵ See Comment from CMTA at 2 (“New York’s repeated objections against Connecticut dredging applications is effectively unilaterally curtailing dredging which is critical to the life blood of commerce in Connecticut via coastal waterways, ports, harbors, terminals, piers, marinas and boatyards.”); Comment from CT DEEP at 8 (“The dredging of Connecticut’s ports and harbors is vital to the achievement of the state’s federally approved CMP goals and policies, and a denial of consistency on this record directly threatens important Connecticut CZMA consistency goals.”).

¹¹⁶ See 16 U.S.C. § 1456(c)(3)(A) (providing for override of state objection where “the Secretary . . . finds . . . that *the activity* is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.” (emphasis added)); 15 C.F.R. § 930.121(a) (requiring “[*t*]he activity” to “further[] the national interest . . . in a significant or substantial manner (emphasis added)).

¹¹⁷ Moreover, while sustaining the NYSDOS objection may have implications for future disposal of dredged material in Long Island Sound, the NOAA Administrator does not have the authority through CZMA appeal decisions to address or resolve the larger policy issue of dredged material disposal in Long Island Sound. Instead, the scope of analysis in this appeal is restricted to determining whether Norwalk Cove’s specific activity satisfies the criteria for override of the State’s objection that are provided by the CZMA and its implementing regulations. See *supra* at 10–11.

¹¹⁸ *Decision in the Consistency Appeal of Mark Smolinski*, Apr. 14, 2014, at 1.

would profoundly affect air quality and energy independence.”¹¹⁹ The NOAA Administrator rejected this argument and sustained the state’s objection, concluding that the appellant had “not convincingly argued that a small solar-array that provides electricity to a single home satisfies the national interest requirement.”¹²⁰ Similar to the appellant in the *Mark Smolinski* decision, and notwithstanding arguments about the importance of dredged material disposal in Long Island Sound to the Connecticut marina industry as a whole, Norwalk Cove has not shown that dredging the southern portion of its marina and disposing of the dredged material at CLDS furthers the national interest in a significant or substantial manner.

In light of past precedent and the foregoing record, Norwalk Cove’s proposed disposal of dredged material does not meet the criteria in Element 1 because it does not further the national interest as articulated in Sections 302 or 303 of the CZMA in a significant or substantial manner. It is therefore unnecessary to determine whether the national interest furthered by the proposed activity outweighs the activity’s adverse coastal effects (Element 2) or whether a reasonable alternative to the proposed activity is available (Element 3).¹²¹

VI. CONCLUSION

The State’s objection to Norwalk Cove’s proposed activity is sustained. For the reasons set forth above, the record does not establish that Norwalk Cove’s proposed activity is consistent with the objectives or purposes of the CZMA, as it does not further the national interest in a significant or substantial manner. Therefore, the NOAA Administrator declines to override the State’s consistency objection.



Dr. Richard W. Spinrad
Under Secretary of Commerce
for Oceans and Atmosphere
and NOAA Administrator

¹¹⁹ *Id.* at 3–4.

¹²⁰ *Id.* at 4.

¹²¹ *Id.* at 4 (not addressing Elements 2 and 3 after dispositive finding with respect to Element 1); *Foothill/Eastern* at 24 (not addressing Elements 1 and 2 after dispositive finding with respect to Element 3).