



APR 14 2014

VIA CERTIFIED MAIL — RETURN RECEIPT REQUESTED

Mark Smolinski
14537 Fancher Avenue
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State of New York
Department of State
Attn: Linda M. Baldwin
One Commerce Plaza
99 Washington Avenue
Albany, NY 12231-0001

Re: Decision in the Consistency Appeal of Mark Smolinski

Dear Mr. Smolinski and Ms. Baldwin:

The Secretary of Commerce (Secretary) has received a “Notice of Appeal” filed by Mr. Mark Smolinski (Appellant) pursuant to the Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451 *et seq.*, and regulations found at 15 C.F.R. Part 930, Subpart H. Appellant challenges an objection by the State of New York (State) to the consistency certification for a federal permit to install a solar-panel array onto an existing dock located over Little Sodus Bay, Sterling, New York (Project). The stated purpose of the Project is to “collect renewable solar energy for production of electricity for consumption in [the Appellant’s] home, with any excess to be utilized by [the] public via grid tied connection.”¹

I have been delegated authority from the Secretary to decide appeals filed under the CZMA. For the reasons set forth below, the State’s objection is sustained.

I. FACTUAL BACKGROUND

Appellant owns lakefront residential property in Sterling, New York. Since 2007, he has made considerable improvements to the property to increase its energy efficiency. The next phase of the project involves installation of a solar-panel array to supply all of the electric energy needs of Appellant’s home.² It is this solar-panel installation (Project) that is the focus of the current appeal.

¹ New York State Department of State Coastal Management Program, Federal Consistency Assessment Form submitted by Mark Smolinski (Received Apr. 17, 2013).

² Joint Application Form submitted by Mark Smolinski (Feb. 3, 2013), at 2.

THE ADMINISTRATOR



According to Appellant, the home itself is not an ideal site for installation of the solar-panel array because a large oak tree located on his property provides complete shade coverage. On the other hand, a private dock extending from his property is in full sunlight. The dock is located over New York state-owned underwater lands in Little Sodus Bay, a tributary that provides riparian access to Lake Ontario.

The Project is designed to meet Appellant's annual home-energy demands of 6 kilowatts. It would be comprised of twenty-four 240-watt photovoltaic panels arranged in a landscape fashion and affixed to the existing pilings of the dock. The lower edge of the solar-panel array would hang down approximately 4.4 feet over the waters of Little Sodus Bay and the upper edge of the solar-panel array would rise over the dock creating a shadow of approximately 141 square feet.

In February 2013, Appellant submitted a joint application for state and federal permits needed to install the solar-panel array onto the dock. The joint application included Appellant's certification that the Project would be conducted in a manner consistent with New York's federally approved Coastal Management Program.³ The consistency certification was reviewed by the State of New York, Department of State (State) pursuant to the CZMA.⁴ The State objected to the Project finding it to be inconsistent with the New York Coastal Management Program's enforceable policies related to "facilitat[ing] the siting of water-dependent uses and facilities on or adjacent to coastal waters." Specifically, the State found that affixing solar panels to a dock is not a water-dependent use and Appellant did not have authority from the State to use underwater lands.⁵

The State's objection precludes the issuance of the federal permit needed for the Project unless, on appeal, the Department overrides the State's objection.

I. PROCEDURAL BACKGROUND

In August, 2013, Appellant filed a timely Notice of Appeal with the Department, requesting an override of the State's objection.

The appeal was noticed in the Federal Register for a 30-day public comment period. No public comments were received. The Federal permitting authority – here, the Corps – was contacted directly for its views on the matter, and the Corps chose to provide no comments.

The parties were permitted the opportunity to submit briefs on the merits of the appeal. The appeal record closed on February 28, 2014.

II. LEGAL FRAMEWORK

The CZMA provides a state with a federally-approved coastal management program the opportunity to review proposed activities requiring a federal license or permit if the activity would affect any land or

³ Joint Application Form, at 2 (including attached plans); Federal Consistency Assessment Form, at 3; Letter to Secretary of Commerce from Mark Smolinski, dated Aug. 13, 2013 (Notice of Appeal).

⁴ 16 U.S.C. § 1456(c). This CZMA review was triggered by the Project's need for a federal permit from the U.S. Army Corps of Engineers (Corps) pursuant to section 10 of the Rivers and Harbors Appropriations Act of 1899. 33 U.S.C. § 401 *et seq.*

⁵ Objection to Consistency Certification, dated July 11, 2013.

water use or natural resource of the state’s coastal zone.⁶ A properly raised objection by the state precludes a federal agency from issuing the license or permit for the proposed activity, unless on appeal the Department of Commerce overrides the state’s objection.⁷ A state’s objection is subject to an override if the proposed activity is consistent with the objectives of the CZMA or is otherwise necessary in the interest of national security.⁸ These grounds are independent and an affirmative finding on either ground is sufficient to override a state’s objection.⁹

A. Ground 1 (Consistent with the objectives of the CZMA)

A project is “consistent with the objectives of the CZMA” if it satisfies three regulatory elements:

1. The project furthers the national interest as set forth in the CZMA in a significant or substantial manner;
2. The national interest furthered by the project outweighs the activity’s adverse coastal effects, when those effects are considered separately or cumulatively; and
3. There is no reasonable alternative available that would permit the activity to be conducted in a manner consistent with the enforceable policies of the state’s coastal management program.¹⁰

The appellant must meet all three of these elements to demonstrate that his or her project is consistent with the objectives of the CZMA.

B. Ground 2 (Necessary in the interest of national security)

A project is “necessary in the interest of national security” if a national defense or other national security interest would be significantly impaired were the activity not permitted to go forward as proposed.¹¹

III. PARTIES’ ARGUMENTS AND ANALYSIS

The parties addressed both grounds for override in their briefs.

A. Parties’ Arguments on Ground 1

With respect to Ground 1 (consistent with the objectives of the CZMA), Appellant argues that his strong commitment to renewable energy, as demonstrated by the Project, is intended to reduce the harmful effect of fossil fuels and to reduce the United States’ reliance on foreign sources of energy. While the

⁶ 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. pt. 930, subpart D.

⁷ 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.64.

⁸ 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.120.

⁹ Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal 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, at 12 (Dec. 18, 2008).

¹⁰ 15 C.F.R. § 930.121.

¹¹ 15 C.F.R. § 930.122.

Project is intended simply to power one homestead, Appellant asserts that the example he is setting, if followed by others, would profoundly affect air quality and energy independence, and therefore is in the national interest. Appellant denies there are any adverse coastal effects, and asserts the State's proffered alternative (*i.e.*, for the solar-array to be placed upland on Appellant's property instead of on the dock) is not reasonable because it would require him to cut down an ancient oak tree that shades his entire property.

The State responds that the project is too small in scale to be considered in the national interest, and notes that the CZMA policies only support siting "major [energy] facilities" of "more than local interest" in the coastal zone.¹² Were the Project to move forward, the State argues it could promote similar non-water-dependent uses on docks, adversely displacing other water-dependent coastal uses which are more properly placed there. As an alternative, the State argues the Project could be built upland, and disputes Appellant's allegation that such upland placement is impossible due to shading.

B. Analysis of Ground 1

Overall, the record suggests that the Project is not consistent with the objectives of the CZMA, because it does not further the national interest in a significant or substantial matter. The phrase "significant or substantial" is included in the standard to make clear that the Department's review function is "not intended to upend the State management structure by replacing the State agency's decision . . . for projects which are essentially local government land use decisions."¹³ Accordingly, 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 [Department] should independently review the proposed activity."¹⁴

Energy projects that have been found to significantly or substantially further the national interest include major, coastal-dependent facilities, such as a liquefied national gas import terminal.¹⁵ On the other hand, small projects related to the development of "a house, a restaurant, or a food store, may contribute to the economy of the coastal municipality or state, but are not coastal dependent and may not provide significant or substantial economic contributions to the national interest."¹⁶ Appellant has not convincingly argued that a small solar-array that provides electricity to a single home satisfies the national interest requirement of Ground 1.

C. Parties' Arguments on Ground 2

With respect to Ground 2 (necessary in the interest of national security), Appellant argues that the Project – if it sets a precedent for renewable energy use adopted by many other homeowners – helps to increase national security by decreasing dependence on foreign energy sources. The State disputes Appellant has shown any national security interest stemming from the Project.

¹² 16 U.S.C. §§ 1451(i), 1452(2)(D).

¹³ 65 Fed. Reg. 77124, 77150 (Dec. 8, 2000).

¹⁴ *Id.*

¹⁵ Decisions and Findings of the Secretary of Commerce in the Consistency Appeal of AES Sparrows Point LNG, LLC and Mid-Atlantic Express, LLC from an Objection by the State of Maryland (June 26, 2008), at 10-16.

¹⁶ 65 Fed. Reg. 77124, 77150 (Dec. 8, 2000).

D. Analysis of Ground 2

The Department has previously faced allegations that coastal energy projects increase national security by improving the Nation's energy infrastructure and diversifying its energy sources; however, such generalized assertions have not resulted in a finding that a project is "necessary in the interest of national security," even for energy projects much larger in magnitude than the Project in this case.¹⁷ Appellant has not demonstrated that a national defense or other national security interest would be significantly impaired were the Project not to go forward and therefore is not entitled to an override on Ground 2.

IV. CONCLUSION

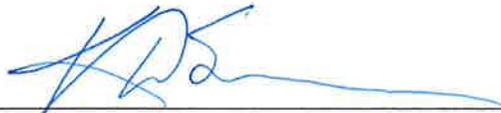
For the reasons set forth above, I find the Project is not consistent with the objectives of the CZMA nor is it otherwise necessary in the interest of national security. While Appellant's goals in pursuing renewable energy improvements for his property are laudable, the Project is simply too small in scale and import to the national goals of the CZMA to be found to further the national interest in a significant or substantial manner or to be necessary in the interest of national security.

Given this finding, the State's objection operates as a bar to the issuance of the federal permit requested for the Project. However, this finding does not prevent Appellant from adopting the alternative identified by the State (i.e., locating the solar array upland), nor does it prevent the parties from agreeing to any other mutually acceptable alternative not yet identified.

The appeal is dismissed.

14 April 2014

Dated



Kathryn D. Sullivan, Ph.D.
NOAA Administrator and Under Secretary of Commerce
for Oceans and Atmosphere

¹⁷ Decision and Findings by the 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 35-36.