



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

OFFICE OF THE GENERAL COUNSEL

May 24, 2007

VIA U.S. MAIL AND TELEFAX [(202) 739-3001]

Mr. Kenneth A. Rubin, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Re: The Consolidated Record for Consistency Appeals under the Coastal Zone Management Act (CZMA)

Dear Mr. Rubin:

This letter responds to your March 19, 2007, e-mail to David Kaiser, Senior Policy Analyst, National Oceanic and Atmospheric Administration (NOAA) Office of Ocean and Coastal Resource Management (OCRM), regarding the consolidated record for CZMA consistency appeals. You asked four questions regarding the consolidated record in the context of the U.S. Nuclear Regulatory Commission (NRC)'s consideration of a license renewal application submitted by AmerGen Energy Company. After reviewing pertinent statutory and regulatory language, I will respond to your four questions in turn.

I. Background

In August 2005, Congress enacted the Energy Policy Act of 2005. Pub. L. No. 109-58, 119 Stat. 594 (2005) (Energy Policy Act). The Energy Policy Act in part amended the CZMA by requiring the Secretary of Commerce (Secretary) to meet strict deadlines for processing CZMA consistency appeals. The Act also identifies the "consolidated record" as the initial record for consistency appeals involving energy projects. Energy Policy Act § 382, 16 U.S.C.A. § 1466 (2006). Section 382 stated:

For any Federal administrative agency proceeding that is an appeal or review under section 319 of the Coastal Zone Management Act of 1972 (16 U.S.C. 1465), as amended by this Act, related to any Federal authorization for the permitting, approval, or other authorization of an energy project, the lead Federal permitting agency for the project shall, with the cooperation of Federal and State administrative agencies, maintain a consolidated record of all decisions made or actions taken by the lead agency or by another Federal or State administrative agency or



officer. Such record shall be the initial record for appeals or reviews under that Act, provided that the record may be supplemented as expressly provided pursuant to section 319 of that Act.

Id. (emphasis added).

The Secretary took a number of steps to implement this language. First, he defined an “energy project” as one “related to the siting, construction, expansion, or operation of any facility designed to explore, develop, produce, transmit or transport energy or energy resources that are subject to review by a coastal State under subparts D, E, F or I of this part.” 15 C.F.R. § 930.123(c) (2006). Second, he defined “consolidated record” to mean “the record of all decisions made or actions taken by the lead Federal permitting agency or by another Federal or State administrative agency or officer, maintained by the lead Federal permitting agency, with the cooperation of Federal and State administrative agencies, related to any federal authorization for the permitting, approval or other authorization of an energy project.” *Id.* § 930.123(d).

Third, the Secretary issued a regulation regarding the consolidated record in energy project appeals, stating:

(i) Appeal Decision Record for Energy Projects. The provisions of this paragraph apply only to appeals for energy projects.

(1) The Secretary shall use the consolidated record maintained by the lead Federal permitting agency as the initial record for an appeal under this subpart for energy projects.

(2) The appellant's notice of appeal required by § 930.125(a) and (b) must be accompanied by two copies of the consolidated record maintained by the lead Federal permitting agency. One copy of the consolidated record must be in an electronic format compatible (to the extent practicable) with the website maintained by the Secretary to provide public information concerning appeals under the CZMA. Notwithstanding § 930.125(e), the Secretary may extend the time for filing a notice of appeal in connection with an energy project for good cause shown to allow appellant additional time to prepare the consolidated record for filing.

15 C.F.R. § 930.127(i).

I will consider your questions against this backdrop.

II. Submission of the Consolidated Record in Electronic Form

You first asked whether an appellant may submit both copies of the consolidated record in electronic form pursuant to 15 C.F.R. § 930.127(i)(2). The answer is no.

The Secretary and NOAA require appellants to submit one hard copy in addition to one electronic copy. One hard copy is necessary due to the strict deadlines the Energy Policy Act imposed for processing consistency appeals.

III. Submission of the Consolidated Record in Index Form

Your second question is whether an appellant may submit the consolidated record in index form. The regulation does not permit appellants to submit an index in lieu of the consolidated record. Rather, it states: "The appellant's notice of appeal required by § 930.125(a) and (b) must be accompanied by two copies of the consolidated record maintained by the lead Federal permitting agency." 15 C.F.R. § 920.127(i)(2). While indexing of the administrative record is encouraged to help increase the usability of the record, the submittal of an index alone, without the underlying record, is not acceptable. As referenced above, the CZMA now imposes strict processing deadlines, and the Department of Commerce needs to be able to begin review of the record soon after receiving the notice of appeal to meet these deadlines. Submitting an index without the record, and requiring the Secretary to later request hard copies from the parties, would create unnecessary delay and could undermine the ability of the Secretary to meet these deadlines.

IV. The Content of the Consolidated Record Maintained by the Lead Federal Agency Where the Lead Federal Agency is the NRC

Your letter also seeks clarification as to what the consolidated record contains. Specifically:

- Your third question seeks confirmation that for an NRC license renewal, the consolidated record consists of the authorizations specifically required in connection with issuance of a renewed license. You also would like to know if the record would include other documents that may relate to the facility license. In this regard, you noted an application for renewal of an NRC Operating License for a commercial nuclear power plant can be filed anywhere between twenty and thirty-five years after the initial licensing. Thus, you state the NRC record or docket for the facility normally covers hundreds of NRC decisions or actions and decisions or actions of other agencies – none of which are tied to renewal of an NRC Operating License. They are, in your view, unrelated to the coastal zone, and have no significance for a CZMA consistency review or an appeal of a denial of consistency.
- As part of your fourth question, you seek confirmation that if, at the time an appellant files its appeal, there are proceedings pending before agencies other than (a) the lead Federal permitting agency and (b) the State agency reviewing CZMA consistency determinations, the records of those pending proceedings are not included in the consolidated record.

In general, the contents of the consolidated record initially should be determined by the by the lead Federal permitting agency. This is because the CZMA vests with the lead Federal permitting agency responsibility for maintaining the applicable record. *See* 16 U.S.C.A. § 1466. However, because the Secretary must base his decision in part upon this consolidated record, the Secretary ultimately is responsible for determining the sufficiency of any consolidated record submitted and may seek to supplement the record submitted by the lead agency.

In April NOAA informally discussed this issue with Mr. Robert G. Schaaf of the NRC and in May with Ms. Mary Baty of the NRC. We understand that, preliminarily, NRC intends to include the following documents and information in the consolidated record for an NRC relicensing decision:

1. NRC's Safety Evaluation Report (NRC's decision document);
2. NRC's Environmental Impact Statement compiled under the National Environmental Policy Act, 42 U.S.C.A. §§ 4321-4370f, for the relicensing decision;
3. Publicly-available NRC documents referenced in the two above items; and
4. The application submitted to NRC for NRC's relicensing decision.

In addition, NOAA discussed with these individuals at NRC that the following state documents should also be included in the consolidated record, based on the requirement of 16 U.S.C. § 1466 that the lead Federal licensing agency maintain a record of applicable federal and state records:

1. The State CZMA agency's objection letter and any documents the State includes with that letter supporting its CZMA objection; and
2. Any communications between an applicant and the State CZMA agency regarding the State's CZMA decision.

This list may not be exhaustive. NOAA does not take a position at this time on whether these documents would constitute the entire record needed by the Secretary to make a decision in a CZMA appeal regarding an NRC relicensing decision. NOAA would, however, make several general observations. First, the consolidated record should include the entire record associated with relevant decision documents, not merely the decision documents themselves. Second, as to pending reviews by other State and Federal agencies, the consolidated record should include all documents generated by such agencies prior to filing of the notice of appeal, even though those reviews have yet to be completed, if those pending State and/or Federal reviews are relevant to NRC's relicensing decision. Finally, because the consolidated record is the record "related to any authorization," NRC should include in the record all documents pertaining to the relicensing of the facility, but may reasonably limit the record concerning actions taken prior to the licensing renewal application.

V. Incomplete Consolidated Record

Your fourth question was what actions an appellant might take if, at the time of a State objection, the consolidated record has not been compiled by the lead or other agency, and is therefore incomplete, or, at the time of a State's CZMA objection, the licensing Federal agency has not completed its review process. You wanted to know what, if any, additional actions must the appellant take to meet the consolidated record requirement under these circumstances.

The appellant has the obligation to submit the consolidated record with its notice of appeal. 15 C.F.R. § 930.127(i)(2). As NOAA has previously stated, "in order for the Secretary to have sufficient time within the 160-day decision record period [established pursuant to the EAct] to evaluate the decision record, the appellant must submit the lead Federal permitting agency's consolidated record along with appellant's notice of appeal." NOAA, Coastal Zone Management Act Federal Consistency Regulations, 71 Fed. Reg. 788, 800 (Jan. 5, 2006). Failure to submit the consolidated record with an appellant's notice of appeal is grounds for dismissal. 15 C.F.R. § 930.129.

NOAA recognizes, however, there may be situations where the lead or other agency has not compiled the consolidated record, and the appellant will have no control over this. For this reason, NOAA's regulations provide that "[n]otwithstanding § 930.125(e), the Secretary, for good cause shown, may extend the time required for filing a notice of appeal for an energy project to allow appellant time to prepare the consolidated record for filing." 15 C.F.R. § 930.127(i)(2). Appellants wishing to avail themselves of this exception are urged to provide a detailed explanation as to why the consolidated record is incomplete. Appellants should submit this request as soon as possible to allow ample time for the Secretary to consider the request.

In the other scenario you described (i.e., where the State has objected under the CZMA and the Federal agency has not completed its review of the project), the licensing Federal agency's record would be the record as it existed at the time of the State's objection.

Please feel free to contact Brett Grosko of my staff at brett.grosko@noaa.gov or (301) 713-7384, if you have any further questions.

Sincerely,



Joel La Bissonniere
Assistant General Counsel for
Ocean Services

cc: Robert G. Schaaf, NRC
Mary Baty, NRC
Ruth Ehinger, New Jersey Dept. of Environmental Protection