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

FEB 3 2005

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Gerardo González Román, Esquire
Caribe Environmental Services
Ramirez Silva #60
Ensanche Martinez
Mayaguez, Puerto Rico 00680

Angel D. Rodriguez
Chairman, Puerto Rico Planning Board
Minillas Government Center
De Diego Ave., Stop 22, Santurce
P.O. Box 41119
San Juan, Puerto Rico 00940-1119

Re: Dismissal of the Consistency Appeal of Fernando Otero Rodriguez, CZ-1999-1020-22

Dear Messrs. González Román and Rodriguez:

This appeal involves a proposed project to reconstruct a stilt house in Lajas, Puerto Rico. Fernando Otero Rodriguez (Mr. Rodriguez) filed a permit application with the U.S. Army Corps of Engineers (Corps) and certified the project was consistent with Puerto Rico's coastal management program. In March 1999, the Puerto Rico Planning Board (Puerto Rico) disagreed and objected. Mr. Rodriguez then filed this appeal in April 1999 with the Secretary of Commerce under the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1456(c)(3)(A) (1996).

This appeal is factually similar to three other appeals filed with the Secretary concerning objections by Puerto Rico to consistency certifications for the reconstruction of stilt houses.[1] Hence, those appeals were consolidated, and one initial brief was submitted on behalf of all appellants. While final briefs were filed separately, Mr. Rodriguez's final brief is identical to the final brief submitted on behalf of another appellant, Pedro Vidal (Vidal). The Vidal appeal was recently dismissed for good cause because it was not based on grounds specified in the CZMA.[2] Because Mr. Rodriguez also failed to base his appeal on grounds the proposed activity is consistent with the CZMA or is necessary in the interest of national security, this appeal is similarly dismissed for good cause pursuant to 15 C.F.R. § 930.128(d) (2000).

[1] *See* Notice of Federal Consistency Appeal by Luz Torres DeRosa, Pedro Vidal, Frontera Colley and Fernando E. Otero Rodriguez From Objections by the Puerto Rico Planning Board, 68 Fed. Reg. 23,284 (May 2, 2003).

[2] *See* Dismissal of the Consistency Appeal of Pedro Vidal (Dec. 29, 2004).

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I. Statutory and Regulatory Background

The CZMA provides states[3] 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. A timely objection raised by a state precludes federal agencies from issuing licenses or permits for the project, unless the Secretary of Commerce finds the activity is:

- "consistent with the objectives of [the CZMA]" or
- "necessary in the interest of national security."

16 U.S.C. § 1456(c)(3)(A) (1996). A finding either ground is satisfied will result in an override of a state's objection. The Secretary may override a state's objection upon appeal by the license or permit applicant. Id.

The four criteria for determining whether a proposed activity is "consistent with the objectives of [the CZMA]" – each of which must be satisfied – are as follows:

> (a) The activity furthers one or more of the competing national objectives or purposes contained in section 302 or 303 of the Act;
>
> (b) When performed separately or when its cumulative effects are considered, it will not cause adverse effects on the natural resources of the coastal zone substantial enough to outweigh its contribution to the national interest;
>
> (c) The activity will not violate any requirements of the Clean Air Act, as amended, or the Federal Water Pollution Control Act, as amended; and
>
> (d) There is no reasonable alternative available (e.g., location, design, etc.) which would permit the activity to be conducted in a manner consistent with the management program.

15 C.F.R. § 930.121 (2000).[4] As appellant, the license or permit applicant bears the burden of submitting evidence supporting the claim that the proposed activity is "consistent with the objectives of [the CZMA]" or "necessary in the interest of national security." Decision and Findings in Consistency Appeal of Chevron U.S.A., Inc., at 4-6 (Oct. 29, 1990); *see also* 15 C.F.R. § 930.125 (2000) (appellant's notice of appeal shall include statement in support of appellant's position along with "supporting data and information").

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[3] The CZMA defines "state" to include Puerto Rico. 16 U.S.C. § 1453(4).

[4] Several aspects of the CZMA regulations were amended effective January 8, 2001. Because the appeal was filed in April 1999, I will instead apply the regulations governing appeals then in effect.

An appeal to the Secretary, however, may be dismissed for "good cause."[5] 15 C.F.R. § 930.128 (2000). "Good cause" explicitly includes "[f]ailure of the appellant to base the appeal on grounds that the proposed activity is either (1) consistent with the objectives or purposes of the [CZMA] or (2) is necessary in the interest of national security." 15 C.F.R. § 930.128(d) (2000); Decision and Findings in Consistency Appeal of Rick Bellow (Mar. 3, 1999); Decision and Findings in Consistency Appeal of Ricardo Ramirez (Jul. 20, 2000).

II. Factual Background

In this appeal, Mr. Rodriguez seeks to challenge Puerto Rico's objection to his proposal to reconstruct a stilt house. Shortly after the appeal was filed, the National Oceanic and Atmospheric Administration (NOAA) Office of the General Counsel[6] set a briefing schedule, and advised Mr. Rodriguez as Appellant of the specific issues his brief must address to satisfy the standards for overriding Puerto Rico's objection. *See* NOAA General Counsel letters to Messrs. González Román and Caballero-Mercado (Aug. 17, 1999) (citing 15 C.F.R. § 930.121). Rather than brief the merits of the appeal, the parties requested a stay, and a stay was granted, to allow them time to negotiate a resolution. *See* NOAA General Counsel letters to Messrs. González Román and Caballero-Mercado (Sept. 21, 1999).

After several extensions of the stay, however, the parties ultimately failed to reach a settlement; an order was then issued in November 2002 directing Mr. Rodriguez to file his initial brief within 30 days, and Puerto Rico to file its initial brief 30 days thereafter. *See* NOAA General Counsel letters to Messrs. González Román and Oritz Quinones (Nov. 27, 2002). Mr. Rodriguez was again reminded of the specific issues his brief must address to satisfy the standards for overriding Puerto Rico's objection. Id. at 2 (citing 15 C.F.R. § 930.121(2000)). After being granted an additional 30-day extension, Mr. Rodriguez filed his initial brief. Puerto Rico declined the opportunity to respond.

Following notice to the public and a request for comments, the parties were given an opportunity to file final briefs. *See* NOAA General Counsel letters to Messrs. González Román and Oritz Quinones (Jul. 18, 2003). Both parties were given 30 days to do so, and Mr. Rodriguez was again instructed to address the standards for overriding Puerto Rico's objection. Id. at 1 (citing 15 C.F.R. § 930.121 (2000) and enclosing copy of regulations). After being granted a further extension to September 24, 2003, Mr. Rodriguez filed his final brief. Puerto Rico chose not to file a final brief. With briefing completed, this matter is ready for disposition.

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[5] As Under Secretary of Commerce for Oceans and Atmosphere, I have been delegated authority to dismiss CZMA appeals for "good cause." *See* Department Organization Order 10-15, Section 3.01(u); NOAA Administrative Order 201-104, Section 3.04.

[6] These communications were with the NOAA General Counsel's Office, which 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.

III. Discussion

The CZMA consistency appeal process is intended to allow a federal license or permit applicant the opportunity to demonstrate his proposed activity is either "consistent with the objectives of [the CZMA]" or "necessary in the interest of national security." 16 U.S.C. § 1456(c)(3)(A) (1996). As Appellant, Mr. Rodriguez bears the burden of making this showing.

Nowhere, however, do Mr. Rodriguez' briefs suggest the proposed project is "necessary in the interest of national security." While the final brief does state the "proposed activity is consistent with the objectives of the CZMA," Appellant's Final Brief at 3, neither the initial nor final brief specifies how the proposed project meets the first criterion of this test, that reconstruction of a privately-owned stilt house "furthers one or more of the competing *national* objectives or purposes" of the CZMA. 15 C.F.R. § 930.121(a) (2000) (emphasis added). Specifically, Mr. Rodriguez has offered no supporting data or information to allow the Secretary to override Puerto Rico's objection on the basis this private residence would somehow provide, for example, for the effective management, beneficial use, protection or development of Puerto Rico's coastal zone, or otherwise enhance important ecological, cultural, historic and esthetic values essential to the well-being of all citizens. *Compare* 16 U.S.C. §§ 1451, 1452 (sections 302 and 303 setting forth the CZMA's national objectives and purposes).

In a sentence of his final brief, Mr. Rodriguez claims this one stilt house was "part of the famous cultural environment characteristic" of the area. Appellant's Final Brief at 7. That statement, however, is unsupported, and even if true, irrelevant to the test's first criterion: that rebuilding this stilt house will further a national objective or purpose, such as enhancing important cultural values essential to the well-being of all citizens. 16 U.S.C. § 1451(e). Nor does such an assertion, that area homeowners are members of an organization with a claimed purpose of protecting the marine environment, demonstrate rebuilding this stilt house will somehow further the CZMA's "*national* objectives or purposes." 15 C.F.R. § 930.121(a) (emphasis added); *see* Appellant's Final Brief at 7.

Mr. Rodriguez' briefs also attempt to refute Puerto Rico's findings regarding adverse environmental effects, which formed the basis of its objection. Appellant's Initial Brief at 10; Appellant's Final Brief at 3-8. An appeal to the Secretary, however, is not a vehicle for challenging the state's determination that a project is inconsistent with the state's program.[7] Instead, the Secretary's role is to determine if the project is "consistent with the objectives of [the CZMA]," even where it might otherwise be inconsistent with a state's program. 15 C.F.R. § 930.121. Mr. Rodriguez, however, failed to address that standard here.[8]

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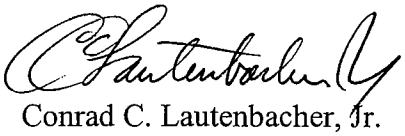
[7] *See* Decision and Findings in Consistency Appeal of the Asociacion de Propietarios de Los Indios, Inc. (Feb. 19, 1992); Decisions and Findings in Consistency Appeal of Chevron U.S.A., Inc. (Oct. 29, 1990).

[8] Mr. Rodriguez also requested a public hearing to "demonstrate that the environment will not be affected by the proposed action and also provide information in order to comply with the standards require [sic] for appellation." Appellant's Initial Brief at 11; Appellant's Final Brief at 11. Mr. Rodriguez has already been given that opportunity in two briefs and failed to do so. I am therefore exercising my discretion pursuant to 15 C.F.R. § 930.129 and denying the request for a public hearing. *See* NOAA Administrative Order 201-104, Section 3.04.

IV. Conclusion

Because his briefs failed to address an essential criterion established by regulation for determining whether a project is "consistent with the objectives of [the CZMA]," Mr. Rodriguez has failed "to base the appeal on grounds that the proposed activity . . . is consistent with the objectives and purposes of the CZMA]." I therefore dismiss this appeal for good cause pursuant to 15 C.F.R. § 930.128(d). Because Puerto Rico's objection to Mr. Rodriguez' consistency certification remains in place, the project may not receive licenses or permits from federal agencies.

Sincerely,



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

cc: Edwin Muniz, Chief, Antilles Regulatory Division
U.S. Army Corps of Engineers

Mr. Rodriguez' briefs also raise other issues, such as the constitutionality of actions taken by Puerto Rico and the validity of a Corps permit (referred to as Nationwide Permit 3). *See* Appellant's Initial Brief at 2-3; Appellant's Final Brief at 2-3. These contentions, however, are not bases for the Secretary's overriding a state's objection. This dismissal therefore does not address them. I also find no merit in the unsupported allegation that deciding the appeal while the matter is "pending" before Puerto Rico could infringe on his constitutional rights. *See* Appellant's Initial Brief at 5-7.