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

FEB - 3 2006

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Mr. Eduardo J. Ferrer Ramirez de Arellano
Villa Marina Yacht Harbour, Inc.
P.O. Box 9020485
San Juan, Puerto Rico 00902-0485

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

Re: Decision in the Consistency Appeal of Villa Marina Yacht Harbour, Inc.

Dear Messrs. Ferrer and Rodriguez:

This appeal involves a proposed project to expand an existing marina in Fajardo, Puerto Rico. In April 2001, Villa Marina Yacht Harbour, Inc. (Villa Marina) filed a permit application with the U.S. Army Corps of Engineers (Corps). This application included a certification the project was consistent with Puerto Rico's Coastal Management Program.

In September 2003, the Puerto Rico Planning Board (Puerto Rico) objected to Villa Marina's consistency certification. Under the Coastal Zone Management Act (CZMA), however, states must either concur or object within 6 months of receiving the certification and all necessary data and information. 16 U.S.C. § 1456(c)(3)(A). Because Puerto Rico failed to object to Villa Marina's certification before the 6-month review period expired, Puerto Rico's concurrence with Villa Marina's project is conclusively presumed, and Puerto Rico's late objection is overridden.[1]

[1] As the Under Secretary of Commerce for Oceans and Atmosphere, I have been delegated authority to make procedural rulings for CZMA appeals. *See* Department of Commerce Organizational Order 10-15, Section 3.01(u).

THE ADMINISTRATOR

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I. Statutory and Regulatory Background

The CZMA provides states[2] 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. 16 U.S.C. § 1456(c)(3)(A). Under the CZMA, a state has 6 months to concur with, or object to, a consistency certification submitted by an applicant asserting the project is consistent with the state's program. *Id.*

A timely objection raised by a state precludes federal agencies from issuing licenses or permits for the project, unless the Secretary of Commerce overrides the objection. 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.64. If a state fails to object within the 6-month review period, the state's concurrence is conclusively presumed and the federal agency may approve the federal license or permit. 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.62(a), (c). When reviewing an objection on appeal, the Secretary shall override a state objection that is untimely. 15 C.F.R. § 930.129(b).

II. Factual Background

On April 3, 2001, Villa Marina applied to the Corps for a permit to expand an existing marina in Fajardo, Puerto Rico. Villa Marina's application included a certification that the project was consistent with Puerto Rico's Coastal Management Program. Puerto Rico states it received Villa Marina's consistency certification on May 29, 2001.

On June 11, 2001, Puerto Rico requested that Villa Marina provide additional information. Puerto Rico specifically requested the following four items: (a) the Puerto Rico Environmental Quality Board's (Board) endorsement of Villa Marina's environmental impact declaration; (b) endorsements or comments on the environmental impact declaration from relevant federal and state agencies; (c) an engineering study of the proposed breakwater; and (d) a survey diagram showing the dimensions and location of the proposed expansion in relation to a neighboring marina. Over the course of the next 18 months, Villa Marina provided three separate responses to this request.[3] Collectively, Villa Marina: (a) refused to provide the Board's endorsement, arguing it was not necessary data and information; (b) provided some information relating to the endorsements or comments of relevant federal and state agencies, although it is unclear whether its response was complete; and (c) provided both a breakwater study and a diagram of the proposed expansion on September 27, 2001.

In addition to its June 11, 2001, request, Puerto Rico provided Villa Marina with two subsequent information requests. On January 30, 2003, it sought information regarding existing and proposed parking facilities for the marina, as well as responses to comments submitted by the neighboring marina's owner. Villa Marina provided this information on March 5, 2003. On July 9, 2003, Puerto Rico sought additional comments and concerns submitted by various federal and state agencies, the local fishermen's association, and private parties. Villa Marina provided this information on July 29, 2003.

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[2] Under the CZMA, the term "state" includes Puerto Rico. 16 U.S.C. § 1453(4).

[3] *See* Letters from Eduardo Ferrer-Ramirez, Esq., to Rose Ortiz, Puerto Rico Planning Board, dated September 27, 2001, April 5, 2002, and December 17, 2002.

During the course of Puerto Rico's review, the parties discussed briefly extending the review period afforded Puerto Rico. In a letter dated August 22, 2003, Villa Marina stated:

> According to our discussion [on August 22, 2003] and Puerto Rico Rico Planning Board request, Villa Marina Yacht Harbour, Inc. decides to extend the evaluation period of the application for consistency with the coastal zone (Puerto Rico Coastal Zone Management Program) of the project at reference, for a period of no more than 30 days that will be due on September 27, 2003.

See Letter from Eduardo Ferrer Ramirez de Arellano, to Norma Alvira Ruiz, Puerto Rico Planning Board, August 22, 2003. The letter itself is silent on the circumstances giving rise to this extension. Subsequent correspondence suggests the extension was to allow the Puerto Rico Department of Natural and Environmental Resources and the U.S. Coast Guard to comment on the project.[4]

On September 26, 2003, Puerto Rico objected to Villa Marina's consistency certification, based on its contention that the information submitted by Villa Marina was insufficient. In response, Villa Marina filed this appeal, claiming that Puerto Rico's objection was untimely, and the proposed activity is consistent with the objectives of the CZMA. Upon receipt of the appeal, the National Oceanic and Atmospheric Administration (NOAA) Office of the General Counsel[5] established a briefing schedule. Both parties have now submitted their initial and reply briefs. NOAA also requested public and agency comments regarding the appeal, but received no comments. With briefing completed, this matter is ready for disposition.

III. Discussion

Under the CZMA, a state has 6 months to concur with, or object to, a consistency certification submitted by an applicant asserting that a project is consistent with the state's program. 16 U.S.C. § 1456(c)(3)(A). A state's 6-month review period begins once it receives the consistency certification together with all "necessary data and information." 15 C.F.R. § 930.60(a). If an applicant fails to submit necessary data and information as required, the state shall notify the applicant of any missing information within 30 days of receipt of the consistency certification. 15 C.F.R. § 930.60(a)(1). Timely identification of missing data or information can operate to extend a state's 6-month review period until the necessary data or information is submitted. *Id.*

Regulations implementing the CZMA set forth what constitutes necessary data and information. 15 C.F.R. § 930.58(a). Such information shall include the following:

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[4] *See* Letter from Angel D. Rodriguez Quinones, Puerto Rico Planning Board, to Edwin E. Muniz, U.S. Army Corps of Engineers, August 27, 2003; *see also* Villa Marina Brief at 9.

[5] The NOAA Office of the General Counsel has been delegated responsibility for undertaking all staff work necessary to make appeal findings. *See* Department of Commerce Organizational Order 10-15, Section 3.01(u); NOAA Administrative Order 201-104, Section 3.

> A detailed description of the proposed activity, its associated facilities, the coastal effects, and comprehensive data and information sufficient to support the applicant's consistency certification. Maps, diagrams, technical data and other relevant material shall be submitted when a written description alone will not adequately describe the proposal . . . .

Id. A state may establish additional categories of data and information that it deems "necessary" for purposes of consistency review, provided such data and information are specifically identified in the state's approved coastal management program. *Id.* When reviewing a consistency certification, a state may request information that is not considered necessary data and information. A state's request, however, does not extend the date on which state review commences. 15 C.F.R. § 930.60(b).

Based on Puerto Rico's assertion that it received Villa Marina's certification on May 29, 2001, its first request for information dated June 11, 2001, appears to have been timely. Assuming it was timely, and to the extent the request sought "necessary data and information," it thus operated to extend Puerto Rico's 6-month review period until the necessary data and information was submitted.[6]

On September 27, 2001, Villa Marina provided both a breakwater study and a diagram of the proposed expansion, which was "necessary data and information." Puerto Rico does not contest the adequacy of this response. Villa Marina also provided some information as to endorsements or comments on the environmental impact declaration from relevant federal and state agencies. It refused, however, to provide the Board's endorsement.

Neither the Board's endorsement nor endorsements and comments from other agencies, however, constitute necessary data and information for purposes of Puerto Rico's review of the project. Neither category of information is included as "necessary" data and information under 15 C.F.R. § 930.58(a). Moreover, Puerto Rico has not amended its coastal management program to include these categories of information as necessary for purposes of reviewing projects. While Puerto Rico was entitled to request such information, Villa Marina's purported failure to provide it did not operate to toll the 6-month period for state review.

Given this, Puerto Rico's 6-month review period began no later than September 27, 2001, when Villa Marina provided Puerto Rico with both a breakwater study and a diagram of the proposed expansion. Upon providing this information, Villa Marina provided all outstanding necessary data and information that Puerto Rico requested on June 11, 2001. Because Puerto Rico's 6-month review period began no later than September 27, 2001, it had at most until March 27, 2002, to object to Villa Marina's consistency certification. Puerto Rico's objection was filed on September 26, 2003 – almost 18 months later. As such, Puerto Rico's objection was untimely and concurrence conclusively presumed.

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[6] Villa Marina argues that Puerto Rico's initial request for additional information was untimely. Villa Marina does not state when it believes Puerto Rico received its consistency certification, hindering my ability to address this issue. Given my ruling, it is unnecessary to further address or resolve this issue.

Nor did Puerto Rico's subsequent information requests operate to extend its deadline for objecting to Villa Marina's consistency certification. As noted above, in order to extend the state's 6-month review period, a state agency must, within 30 days of receipt of a consistency certification, notify an applicant of any missing data or information. 15 C.F.R. § 930.60(a)(1). Puerto Rico's subsequent requests for additional information, however, were not sent to Villa Marina until January 30, 2003, and July 9, 2003 – long after its receipt of Villa Marina's consistency certification on May 29, 2001.

Villa Marina's letter dated August 22, 2003, similarly did not operate to revive Puerto Rico's time-barred opportunity to review the project. Villa Marina's letter extends Puerto Rico's review "for a period of no more than 30 days that will be due on September 27, 2003." By this point in time, however, the review period afforded to Puerto Rico had expired. Notwithstanding the possible intentions of the parties, the agreement reflected in this letter failed to revive Puerto Rico's time-barred opportunity to review the project. *Cf.* Bachman v. Bear Stearns & Co., 57 F. Supp. 2d 556, 561 (N.D. Ill. 1999) (tolling agreement signed after expiration of statute of limitations failed to revive time-barred claim).

IV. Conclusion

For the foregoing reasons, Puerto Rico failed to object within the 6-month review period allowed under the CZMA. Accordingly, Puerto Rico's concurrence in Villa Marina's project is conclusively presumed, and Puerto Rico's late objection is overridden.

Sincerely,

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

cc: Mr. Sindulfo Castillo
Chief, Antilles Regulatory Section
United States Army Corps of Engineers