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

JAN 26 2006

VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Mr. Edwin Irizarry Garcia
P.O. Box 101
Lajas, Puerto Rico 00667

VIA FAX AND U.S. MAIL

Mr. Angel D. Rodríguez
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 Edwin Irizarry Garcia

Dear Messrs. Irizarry and Rodriguez:

This appeal involves a proposed project to reconstruct a stilt house and dock in Lajas, Puerto Rico (the Project). Edwin Irizarry Garcia (Mr. Irizarry) 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 (Program). In May 2004, the Puerto Rico Planning Board (Puerto Rico) disagreed and objected. Mr. Irizarry then filed this appeal in June 2004 with the Secretary of Commerce under the Coastal Zone Management Act (CZMA or the Act), 16 U.S.C. § 1456(c)(3)(A) (2004).

Because Mr. Irizarry failed to base his appeal on the grounds the Project is consistent with the CZMA or is necessary in the interest of national security, this appeal is dismissed for good cause pursuant to 15 C.F.R. § 930.129(a)(5) (2004).

THE ADMINISTRATOR

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I. Statutory and Regulatory Background

The CZMA provides states[1] 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 state may object to a proposed project if it is inconsistent with the enforceable policies of the state's approved coastal management program. 16 U.S.C. § 1456(c)(3)(A). 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." *Id.* A finding that 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 three 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 the national interest as articulated in sections 302 or 303 of the Act in a significant or substantial manner;
>
> (b) When performed separately or when its cumulative effects are considered, the national interest furthered by the activity outweighs the activity's adverse coastal effects; and
>
> (c) There is no reasonable alternative available (e.g., location, design, etc.) that would permit the activity to be conducted in a manner consistent with the state's program.

15 C.F.R. § 930.121. 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. § 930.130(d).

An appeal to the Secretary may be dismissed for "good cause."[2] 15 C.F.R. § 930.129. Good cause includes "[f]ailure of the appellant to base the appeal on grounds that the proposed activity is either consistent with the objectives or purposes of the Act, or necessary in the interest of national security." 15 C.F.R. § 930.129(a)(5); *see also* Dismissal of the Consistency Appeal of

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

[2] 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.

Barnes Nursery, Inc. (Dec. 20, 2003); Decision and Findings in Consistency Appeal of Ricardo Ramirez (July 20, 2000); Decision and Findings in Consistency Appeal of Rick Bellew (Mar. 3, 1999).

II. Factual Background

In November 2003, Puerto Rico deemed Mr. Irizarry's consistency certification for the Project complete for purposes of its review. In May 2004, Puerto Rico objected to Mr. Irizarry's consistency certification, in part asserting the Project would affect mangroves and sea grass areas included within the La Parguera Natural Reserve and Southwest Special Planning Area. Mr. Irizarry appealed this objection to the Secretary of Commerce in June 2004.

After the appeal was filed, the National Oceanic and Atmospheric Administration Office of the General Counsel (NOAA General Counsel)[3] set a briefing schedule, and advised Mr. Irizarry as Appellant of the specific issues his brief must address to satisfy the standards for overriding Puerto Rico's objection.[4] Mr. Irizarry timely submitted his brief postmarked October 28, 2005 (Irizarry Brief). The essence of Mr. Irizarry's argument is that "the proposed project is consistent with the objectives" of Puerto Rico's "Land Use Plan." Puerto Rico failed to file a response by its deadline, which pursuant to the established briefing schedule was no later than December 5, 2005.[5] On January 11, 2006, NOAA General Counsel notified Puerto Rico it had waived its right to file a response brief and no further filings would be accepted.[6] This matter is therefore ready for disposition.

III. Discussion

For the Secretary to override Puerto Rico's objection, Mr. Irizarry must demonstrate his Project 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). As Appellant, Mr. Irizarry bears the burden of making this showing. In his brief, Mr. Irizarry declined to argue the Project was necessary in the interest of national security. *See* Irizarry Brief at 1-3. Accordingly, the only relevant question is whether Mr. Irizarry has established the Project is "consistent with the objectives of [the CZMA]."

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

[4] *See* Letter from NOAA General Counsel to Messrs. Irizarry and Rodríguez (Sept. 16, 2005) (citing 15 C.F.R. § 930.121).

[5] Puerto Rico's response brief was due no later than thirty days after receipt of Mr. Irizarry's initial brief. Letter from NOAA General Counsel to Mssrs. Rodríguez and Irizarry (Sept. 16, 2005).

[6] *See* Letter from NOAA General Counsel to Mr. Rodríguez (Jan. 11, 2006).

In his brief, Mr. Irizarry advances the following arguments:

> (a) the Project "must be built at the shoreline for medical reasons" related to Mr. Irizarry's health condition, and "it would be costly to build the [Project] . . . in another area of Puerto Rico" because it would require Mr. Irizarry to travel long distances;
>
> (b) the Project is "well-planned" and "will not damage the special natural and scenic characteristics" of the Project's location;
>
> (c) the Project "will not cause adverse effects on the natural resources of the coastal zone;"
>
> (d) the Project "will not emit pollutants [into] the air" and "untreated sewage will be disposed [of] through the pipelines of the Puerto Rico Aqueduct and Sewage Authority for appropriate treatment and disposal;" and
>
> (e) the Project "is not new," but rather has existed in some form since 1979, and is not unlike other projects for which Puerto Rico has granted permits.

See Irizarry Brief at 1-3. Mr. Irizarry concludes by claiming "the proposed project is consistent with the objectives" of Puerto Rico's "Land Use Plan." *Id.* at 3.

Mr. Irizarry's arguments fail to address the first two of the three required criteria (specified on page 2 above) for determining whether a project is consistent with the objectives of the CZMA. Indeed, the majority of Mr. Irizarry's arguments merely refute Puerto Rico's findings regarding purportedly adverse environmental effects of the Project, which formed the basis of Puerto Rico's objection. *Id.* at 2.

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 coastal management program.[7] Instead, the Secretary's role is to determine if the project is "consistent with the objectives or purposes of [the CZMA]," even where it might otherwise be inconsistent with a state's coastal management program. 15 C.F.R. § 930.121. Mr. Irizarry has simply failed to address this standard.

[7] *See* Decision and Findings in Consistency Appeal of the Asociación de Propietarios de Los Indios, Inc. at 5 (Feb. 19, 1992); Decision and Findings in Consistency Appeal of Chevron U.S.A., Inc. at 6 (Oct. 29, 1990).

IV. Conclusion

Mr. Irizarry has failed to base his appeal on any recognized justification for overriding an objection by Puerto Rico. I therefore dismiss this appeal for good cause pursuant to 15 C.F.R. § 930.129(a)(5).

Sincerely,

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

cc: Mr. Sindulso Castillo, Chief, Antilles Regulatory Division
U.S. Army Corps of Engineers