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

OCT 29 2004

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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Re: Dismissal of the Consistency Appeal of Carlos Frontera Colley

Dear Messrs. González Román and Rodriguez:

This appeal involves a proposed project to reconstruct a stilt house and build a pier adjacent to the house in Lajas, Puerto Rico. In October 1998, Carlos Frontera Colley (Mr. Frontera) 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. Frontera 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). Because Mr. Frontera has since passed away, and because the proposed project has since been modified, the Corps has determined a permit application for the project is no longer pending before it. Consequently, Mr. Frontera's appeal is moot, and I dismiss the appeal for good cause pursuant to 15 C.F.R. § 930.128 (2000).

I. Statutory and Regulatory Background

The CZMA provides states 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 overrides the objection. The Secretary may override a state's objection upon appeal by the license or permit applicant. 16 U.S.C. § 1456(c)(3)(A) (1996).

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An appeal to the Secretary, however, may be dismissed for "good cause."[1] 15 C.F.R. § 930.128 (2000).[2] "Good cause" shall include, but is not limited to: "(c) Secretarial receipt of a detailed comment from the Federal agency stating that the agency has disapproved the Federal license, permit, or assistance application." 15 C.F.R. § 930.128(c) (2000). Under prior consistency appeal decisions, "good cause" has also included instances where an appeal became moot as a result of subsequent events,[3] or where the appellant failed to prosecute an appeal diligently (e.g., by failing to file its brief).[4]

II. Factual Background

In his appeal, Mr. Frontera sought to challenge Puerto Rico's objection to his proposal to reconstruct a stilt house and build an adjacent pier. Unfortunately, in both the initial and final briefs in this appeal, the National Oceanic and Atmospheric Administration (NOAA) Office of General Counsel[5] was notified of Mr. Frontera's death in early 2002. *See* Appellant's Initial Consolidated Brief at 11; *see also* Appellant's Final Brief at 2. Both briefs also stated Mr. Frontera's sons wished to assume the role of appellant in this appeal and to "maintain the existing platform and the dock for commercial and recreational fishing." Appellant's Initial Consolidated Brief at 11. The Appellant's Final Brief, however, describes the Frontera sons' plans as a modification of the project, including a proposal to build "an area to manage and clean fishes caught" and to use "the rest of the area as dock space." Appellant's Final Brief at 2.

III. Discussion

Under the CZMA, it is the "applicant" for a federal permit to conduct an activity affecting a state's coastal zone who must certify the activity will be conducted in a manner consistent with the state coastal program. 16 U.S.C. § 1456(c)(3)(A) (1996). *See also* 15 C.F.R. § 930.57 (2000). Subpart D of the federal consistency regulations define "applicant" as "any individual" who "files an application for a Federal license or permit to conduct an activity affecting the coastal zone." 15 C.F.R. § 930.52 (2000).

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[1] As the 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.

[2] Several aspects of the CZMA regulations were amended effective January 8, 2001. Because Mr. Frontera's appeal was filed in 1999, I will instead apply the CZMA regulatory provisions governing dismissal of appeals for good cause then in effect. My decision to dismiss this appeal for good cause, however, would be the same under both the old and new regulations.

[3] *See* Dismissal Letter in Consistency Appeal of John T. Keegan (Dec. 5, 2003) (death of federal permit applicant).

[4] *See* Dismissal Letter in Consistency Appeal of Joseph M. Mattone (June 19, 1997) (failure of appellant to file brief).

[5] 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.

In this case, it was Mr. Frontera who filed a permit application with the Corps to reconstruct a stilt house and build an adjacent pier. Mr. Frontera was listed as the sole applicant. Upon learning of Mr. Frontera's death, NOAA contacted the Corps to inquire as to the status of the permit application. In a letter dated March 13, 2003, the Corps advised NOAA "the deceased [Mr. Frontera] signed the permit application and appeal documents. Under general Commonwealth of Puerto Rico inheritance law, the rights that the deceased may have had are personal in nature and not inherited by the heirs. Thus any rights in the permit application pending with the Corps ceased to exist with the deceased." Corps Letter to NOAA at 1 (March 13, 2003). Consequently, Mr. Frontera's permit application was not viable after his death, and no permit application is being actively considered by the Corps.

There is a second problem with Mr. Frontera's permit application. Both briefs filed in this appeal describe a project different from the project described in the permit application. *See* Appellant's Initial Brief at 11; Appellant's Final Brief at 2. The Corps confirmed the discrepancy in its letter to NOAA stating, "the heirs have notified the agency that the original purpose has been modified sufficiently to consider the proposal under a new permit application. They now refer to a modification of the overall purpose, which would reduce the area and change the use to a commercial use, as opposed to a private use under the original application." Corps Letter to NOAA at 1 (March 13, 2003). The Corps advised the heirs "this matter must be reviewed under a new permit application, and not a modification." *Id.*

Given the Corps' determination that the permit application did not survive the death of Mr. Frontera, and proposed changes in the project require Mr. Frontera's sons to submit a new permit application in any event, there is no proposed activity to which Puerto Rico can object, and the appeal is moot. When an appeal is moot, the appeal can be dismissed for good cause pursuant to 15 C.F.R. § 930.128 (2000).[6] Dismissal Letter in Consistency Appeal of John T. Keegan at 2 (Dec. 5, 2003); *cf.* 15 C.F.R. § 930.128(c) (good cause dismissal includes instance where federal agency has disapproved permit application).[7]

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[6] The statutory authority to decide whether to override a state's objection upon appeal by a license or permit applicant of necessity includes the authority to dismiss the appeal because it has become moot. *See* Association of Businesses Advocating Tariff Equity v. Hanzlik, 779 F.2d 697, 700-01 (D.C. Cir. 1985) ("The precise question is, rather, whether the Administrator could, in the exercise of discretion, refrain from resolving issues in an administrative proceeding where the underlying project has been shelved, at least for the time being. We do not hesitate in concluding that he can do so, and that the exercise of discretion here was neither arbitrary nor capricious under section 10(e) of the Administrative Procedure Act.")

[7] The facts of this appeal are similar to those in the Consistency Appeal of John T. Keegan (Keegan). Mr. Keegan was the only applicant listed on a Corps permit application. Mr. Keegan, however, passed away while his appeal was pending. Attempts were made by two of Mr. Keegan's acquaintances to assume the role of appellant. Keegan Dismissal Letter at 3. In that appeal, NOAA determined there was no viable federal permit pending because the Corps would not allow the permit application to be assumed by a third party. NOAA determined the appeal was therefore moot. *Id.* at 4.

IV. Conclusion

For the foregoing reasons, I find this appeal is moot, and I hereby dismiss the appeal for good cause.

Sincerely,

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

cc: Edwin Muniz
Chief, Army Corps of Engineers Antilles Regulatory Section

Rose Ortiz
Representative, Puerto Rico Planning Board