



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

DEC 05 2003

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Angel David Rodrigues  
Chairperson  
Puerto Rico Planning Board  
Minillas Government Center, North Building  
De Diego Avenue, Stop 22  
P.O. Box 41119  
San Juan, Puerto Rico 00940-1119

Dear Mr. Rodrigues:

By letter dated October 26, 1999, John T. Keegan, under the address "Excalibur Mooring System" of Condado, Puerto Rico, filed a notice of appeal with the Secretary of Commerce pursuant to Section 307(c)(3)(A) of the Coastal Zone Management Act of 1972 (CZMA), as amended, 16 U.S.C. 1451 *et seq.*, and the Department of Commerce's implementing regulations, 15 C.F.R. Part 930, Subpart H. The appeal is taken from an objection by the Puerto Rico Planning Board (PRPB) to Mr. Keegan's consistency certification for a permit from the U.S. Army Corps of Engineers (USACE or Corps), pursuant to Section 10 of the Rivers and Harbors Act of 1899, to install a mooring project in Guanica Bay, Puerto Rico. On January 23, 2001, the Appellant filed supporting information and data with the Secretary of Commerce as "John T. Keegan President, Excalibur Mooring Company" in support of his appeal. Your office filed a reply brief on February 23, 2001. The Secretary published a *Federal Register* notice and request for public comments on March 20, 2001. The Secretary also requested comments of federal agencies by letter dated March 19, 2001. Due to several federal agency requests, the comment period was extended twice.

John T. Keegan died on May 30, 2001, at the Department of Veterans Affairs Hospital in San Juan, Puerto Rico, according to documentation supplied by the V.A. Hospital. Subsequently, the National Oceanic and Atmospheric Administration Office of General Counsel, Ocean Services (GCOS)<sup>1</sup> was contacted by Donald M. Allan and Olga Andreu Megwinoff. These individuals claimed to be business associates of Mr. Keegan and to represent Excalibur Mooring. In addition, Ms. Andreu Megwinoff stated she was the common law wife of Mr. Keegan. In these

<sup>1</sup>The Secretary has delegated to the NOAA Administrator the authority to perform certain functions prescribed in the CZMA, and to make any procedural rulings necessary for conducting appeals under Section 307 and to undertake all staff work necessary to make appeal findings. Some of these functions have been redelegated to the NOAA General Counsel. See Department of Commerce Organization Order 10-15, Section 3.01(u), and NOAA Administrative Order 201-104, Section 3.



capacities, they asserted they were successors in interest to Mr. Keegan's rights in the consistency appeal. GCOS requested Ms. Andreu Megwinoff and Mr. Allan to file briefs on the questions of whether Mr. Keegan's appeal continued under these circumstances and if so, whether they were eligible to pursue the appeal on his behalf. Specifically, Mr. Allan and Ms. Andreu Megwinoff were asked to address the issue of whether the Corps permit application, upon which the appeal is based, survived the death of the applicant. On October 23, 2001, Mr. Allan filed a brief, but indicated he was unable to obtain information on the continued viability of the permit application in light of the death of Mr. Keegan. Ms. Andreu Megwinoff filed a brief, also without addressing the viability of the permit. GCOS then requested the PRPB to file a brief on these matters. After several deadline extensions, the PRPB's brief was received on June 12, 2002. Final briefs on all issues, procedural and substantive, were received in December 2002.

On March 13, 2003, the USACE staff in Puerto Rico submitted a letter for the record indicating Mr. Keegan's rights, in his permit application pending with the Corps, ceased to exist upon his death. GCOS subsequently requested Mr. Allan's and Ms. Andreu Megwinoff's views on the USACE letter by April 18, 2003. After requesting and receiving an extension of time due to illness, Mr. Allan filed his comments on May 25, 2003. However, no comments were received from Ms. Andreu Megwinoff.<sup>2</sup>

A consistency appeal pursuant to Section 307 of the CZMA is taken in response to a state's objection. The state's objection is to the certification, accompanying a federal permit application, that the proposed activity will be conducted in a manner consistent with the State's approved coastal management program (CMP). The effect of the Secretary's decision in a consistency appeal is to determine whether the federal permit may be issued, notwithstanding the project's inconsistency with the state's CMP. If the permit application is withdrawn or otherwise ceases to exist, then there is no longer a proposed activity to which the state can object. Consequently, there is nothing to appeal, and any pending appeal becomes moot. In this case, the USACE indicated Mr. Keegan's federal permit application, upon which this appeal is based, did not survive his death. There being no surviving federal license or permit application, there is no certification before the Commonwealth of Puerto Rico. The lack of a viable application for a federal license or permit renders the appeal to the Secretary of Commerce moot. As the appeal is moot, it should be dismissed for good cause pursuant to the broad provisions of 15 C.F.R. 930.128 (2000). Likewise, the appeal can be dismissed for good cause pursuant to the specific provisions of 15 C.F.R. 930.128(c), as the USACE has contacted the Department of Commerce stating the Corps' determination that all rights under the Keegan permit application have ceased to exist.

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<sup>2</sup> GCOS recently discovered that Ms. Andreu Megwinoff died on March 22, 2003. A copy of this letter is being forwarded to her estate, at her most recent address.

## I. The Secretary of Commerce Has Authority to Determine Whether an Appeal is Properly Presented Pursuant to the Provisions of the CZMA and its Implementing Regulations

The analysis of threshold and procedural issues raised in a CZMA consistency appeal begins with the recognition that the Secretary has broad authority to resolve these issues. Absent law to the contrary, the formulation of administrative procedures is a matter left to the discretion of the administrative agency. The agency has considerable latitude in designing and administering these procedures as long as fundamental aspects of due process are followed. The Army Corps of Engineers has the same latitude as NOAA with respect to interpretation of its authorities and formulation of administrative procedures. *See* Dismissal Letter – Collier Resources Company Consistency Appeal at p. 3 (Apr. 17, 2002). *See also Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 523-24, 98 S.Ct. 1197, 1201-1202, 55 L.Ed.2d 460 (1978); *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539, 90 S.Ct. 1288, 1292, 25 L.Ed.2d 547 (1970); and *Titusville Cable TV, Inc. v. United States*, 404 F.2d 1187, 1192 (3d Cir 1968).

## II. A Consistency Appeal Under the CZMA Requires a Viable Federal Permit Application

Section 307 of the CZMA provides, in states with approved coastal management programs, an applicant for a federal license or permit that may affect resources in or uses of a state's coastal zone shall provide a certification that the activity complies with and will be conducted in a manner consistent with the enforceable policies of the state's coastal plan. 16 U.S.C. 1456 (c)(3)(A). *See also* 15 C.F.R. 930.57 (2000). An "applicant" is defined in the federal consistency regulations as "any individual, public or private corporation, partnership, association, or other entity organized or existing under the laws of any State, or any State, regional, or local government, who, following management program approval, files an application for a Federal license or permit to conduct an activity affecting the coastal zone." 15 C.F.R. 930.52 (2000). (Emphasis added.) An appeal to the Secretary of Commerce under the CZMA is triggered when the state (having a federally-approved Coastal Management Plan) objects to the certification within 6 months of the applicant's filing. *Ibid.* The decision for the Secretary, in processing a consistency appeal, is whether the federal license or permit should be issued. If no permit is pending, there is no issue for the Secretary to decide.

Here the USACE has declared, according to its policies and procedures, no permit application is now pending, following the death of Mr. Keegan. The decision of whether a Corps of Engineers permit application survives following the death of the applicant is clearly within the purview of the Corps of Engineers. We defer to the USACE with regard to whether rights associated with the Keegan permit application pending before the Corps of Engineers survive the death of Mr. Keegan. The USACE has indicated it considers the Keegan permit application as having been made by Mr. Keegan in his individual capacity, and that there is now no surviving federal permit application pending before the Corps. *See* USACE letter at p. 1 (March 13, 2003).

The position of the USACE does not appear to be arbitrary or capricious. The permit application for the activity was signed by Mr. John Keegan. (See federal permit application dated June 30, 1998, p. 1, attached.) In reviewing a copy of the permit application form, we note the signature of Mr. Keegan gives no indication of his role as representative of a company, such as "President" or "Chairman." In the form under "Applicant's Name," the name "John T. Keegan" appears, also without a title or indication of a position as trustee or officer of any organization or company. The space under "Applicant's Address" gives only a street address in Condado, PR, without a company name. The only other name appearing on the form is "Jesus J. Pinero, Environmental Consultant" under "Authorized Agent's Name and Title." Again, the agent's address is simply a street address and indicates no company affiliation.

The comments submitted by Mr. Allan do not offer any persuasive evidence that the Keegan permit application was filed as anything other than in an individual capacity, and Ms. Andreu Megwinoff sent no comments. Mr. Allan's comments focus on Mr. Keegan's activities in the years preceding the filing of the application, and in the time immediately after Mr. Keegan filed his appeal. However, Mr. Allan offers no evidence of the existence of a corporation named Excalibur Mooring at the time of the filing of the federal permit application. Mr. Allan notes; Mr. Keegan had worked in partnership with Mr. Allan and others on various projects; Mr. Keegan had been involved in a corporation named Outrigger Yacht Club; there was a "valid oral contract" between Mr. Keegan and Mr. Allan for shared ownership in the mooring project should it ever come to fruition; and Mr. Keegan used letterhead bearing the name "Excalibur Mooring System" in filing his appeal to the Secretary of Commerce. See Allan comment letter at p. 1-2, numbered pp. 21-22 (May 25, 2003). Mr. Allan comments "in neither case [application or appeal] did John Keegan act as an individual but instead as the CEO of a partnership and as a corporate subsidiary of Outrigger Yacht Club, Inc. . . ." *Ibid.* However, there is no indication, on Mr. Keegan's permit application or appeal documents, of his position as CEO of Outrigger or his partnership with Mr. Allan or anyone else. Also, it is clear from the record that no corporation named Excalibur existed until after Mr. Keegan's death. See Andreu Megwinoff procedural brief and attachment (December 28, 2001) at pp. 1-2, and PRPB procedural brief (June 12, 2002) at p.3.

Mr. Allan's comments indicate what he believed was John Keegan's possible intended use of the Corps permit, but they offer no evidence to indicate the USACE was arbitrary or capricious in its interpretation that Mr. Keegan acted in his personal capacity in filing for the Corps permit.<sup>3</sup> The

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<sup>3</sup>Indeed, the record contains evidence that Mr. Keegan continued to act as an individual long after filling out the Corps permit application. Although Mr. Keegan uses the words "Excalibur Mooring System" in the address of his letter giving notice of his appeal under the CZMA, he refers to himself individually in that notice and not as president of a corporation. Mr. Keegan on March 6, 2000, filed with the Secretary a form requesting a waiver of the required processing fee for the consistency appeal, in his individual capacity. On the fee waiver form, Mr. Keegan responded with information solely pertaining to his individual financial assets, not representing himself as acting as president of a corporation or listing assets of any corporation or

USACE determined that Mr. Keegan's signature was provided in his personal capacity and, under the policies of the Corps, such personal applications for a permit do not survive the death of the individual applicant. This is a question within the purview of the USACE. Therefore, according to the CZMA and supporting regulations, there is no issue left for the consistency appeal to resolve.

As noted previously, the CZMA gives the Secretary of Commerce the authority, in states with approval coastal management programs, to decide whether or not a federal permit may be issued, in circumstances in which an applicant certifies a project consistent with a state's approved CMP and the state objects within a 6-month time limit. 16 U.S.C. Section 1456(c)(3)(A). *See also* 15 C.F.R. 930.131 (2000). If no live, viable federal permit is pending, the consistency appeal is moot.

The issue involved in the Keegan appeal resembles that of the Torres-Martinez appeal. In that action (also located in Puerto Rico), the applicant applied for a Corps permit for construction of two piers. PRPB objected to his consistency certification, and the applicant appealed to the Department of Commerce. Before the appeal could be decided, the appellant proceeded with construction. The USACE in Puerto Rico informed him the Corps would proceed with an enforcement action and issued a Cease and Desist order. The Corps also informed the appellant (copied to GCOS) that, since the appellant had proceeded to construct the piers without a permit and since the Corps had initiated an enforcement action, it considered the permit application to be "deactivated," (which means the permit application could not be revived). We subsequently determined the lack of a pending federal permit application rendered the appeal moot and dismissed the appeal pursuant to the broad language of 15 C.F.R. 930.128. *See Dismissal Letter – Jorge Torres-Martinez Consistency Appeal (March 27, 2003).*

### III. Conclusion

The Secretary may dismiss an appeal for good cause. Subpart H of the federal consistency regulations states that "Good cause shall include, *but is not limited to*" four circumstances. 15 C.F.R. 930.128 (2000)<sup>4</sup> (emphasis added). The Secretary therefore has broad latitude to dismiss an appeal for good cause. In the situation of the Keegan appeal, there is no viable permit application following the death of Mr. Keegan. Consequently, there is no proposed activity to

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partners.

<sup>4</sup>Revisions to the consistency regulations, 15 C.F.R. Part 930, took effect on January 8, 2001. The consistency certification and appeal were filed before the date of revisions to the regulations, but Mr. Keegan's death occurred after the revised regulations went into effect. Both the old and new regulations would yield the same conclusion with regard to our ability to dismiss for good cause, based on lack of a viable federal permit application. *See* 15 C.F.R. 930.128(c) (2000) and 15 C.F.R. 930.129(a)(4) (2001).

which the Commonwealth can object, and the appeal is moot. Such a situation is within the broad authority for dismissal for good cause under the general language of Section 930.128 (2000).

While the decision in this appeal turns on the issue of mootness, the Corps' interpretation of the effect of Mr. Keegan's death on the viability of the permit application is analogous to a disapproval of the federal permit application. The specific language of Section 930.128 gives us the authority to dismiss for good cause in specific circumstances, one of which is "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). The USACE has advised the Keegan permit application cannot be revived following Mr. Keegan's death. Even if the Keegan appeal had not been rendered moot by his death, the Corps' treatment of his death, which has the effect of a dismissal with prejudice, would enable us to dismiss for good cause.

NOAA has been delegated the authority to undertake many aspects of the CZMA appeals process on behalf of the Secretary, including the authority to dismiss an appeal for good cause. This authority rests with the NOAA Administrator. *See* NOAA Administrative Order 201-104, Section 3.04. *See also* Department Organization Order 10-15, Section 3.01(u).

Having found the Secretary has sufficient discretion in the promulgation and implementation of rules governing procedures for the CZMA, including the authority to determine procedural and jurisdictional issues presented in Secretarial appeals, we conclude the Keegan appeal is no longer properly before us. Therefore, this appeal is dismissed for good cause pursuant to 15 C.F.R. 930.128 (2000). This dismissal constitutes final agency action for the purposes of judicial review.

Sincerely,



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

cc: U.S. Army Corps of Engineers, Puerto Rico  
Mr. Donald Allan  
Estate of Ms. Olga Andreu Megwinoff