



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

JUL 15 2004

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Angel D. Rodriguez
Chairman, Puerto Rico Planning Board
Minillas Government Center
De Diego Ave., Stop 22, Santurce
P.O. Box 41119
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Re: Consistency Appeal of Villa Marina Yacht Harbour, Inc.

Dear Messrs. Ferrer and Rodriguez:

Villa Marina Yacht Harbour, Inc. (Villa Marina) is proposing to expand its existing marina located in Sardinera Bay, Fajardo, Puerto Rico, and has filed an administrative appeal, pursuant to the Coastal Zone Management Act, with the Department of Commerce (Department). The appeal asks the Department to override the objection of the Puerto Rico Planning Board (Puerto Rico) to the proposed expansion. The parties have filed initial briefs addressing issues raised by the appeal.

On May 21, 2004, Villa Marina filed a motion requesting that Puerto Rico's initial brief be deemed untimely. Villa Marina's motion also requested inclusion of an additional document in the appeal record. Puerto Rico did not submit comments on the motion. For the reasons noted below, Villa Marina's request concerning Puerto Rico's brief is denied; the request to supplement the record is granted.

In its motion, Villa Marina argues Puerto Rico's brief should be deemed untimely because Villa Marina's copy was postmarked May 4, 2004, the day after the deadline for filing the brief with the Department. On May 3, 2004, however, Ms. Rose Ortiz, on behalf of Puerto Rico, telephoned Molly Holt, the Department staff attorney assigned to assist in processing this appeal, to inquire whether the brief could be filed by facsimile. Consistent with past practice, Ms. Holt confirmed a brief submitted by facsimile would be timely if the Department received it by the due date, and if the original were sent by overnight mail on or before the date of the facsimile transmission. Puerto Rico met both conditions: the Department received a facsimile of Puerto Rico's brief on May 3, 2004; the original was delivered by overnight mail and received on May 4, 2004. Therefore, Puerto Rico's brief was timely filed.



A party's deadline for filing its brief with the Department is considered to apply to service of a copy on the opposing party because delaying delivery of the brief may unfairly reduce the opposing party's time for preparing its response. In this case, Villa Marina received Puerto Rico's brief four days after it was filed with the Department. While objecting to this short delay, Villa Marina has not identified any prejudice it suffered as a result. Of note, the date for Villa Marina's reply to arguments contained in Puerto Rico's brief has not yet been set, further demonstrating that the delayed receipt has not adversely affected Villa Marina's interests. Consequently, Villa Marina's motion requesting Puerto Rico's brief be deemed untimely is denied.

Villa Marina also requested a letter from the U.S. Coast Guard dated October 10, 2003, be considered part of Villa Marina's initial brief and be included in the appeal record. Puerto Rico's interests would not be prejudiced if this request were granted, given Villa Marina may submit the letter with its reply brief. In addition, Puerto Rico is listed as an original recipient of the Coast Guard letter as sent, and is presumed to have received it in October 2003, and to be familiar with its contents. Indeed, it appears on May 11, 2004, Puerto Rico supplied a copy of the letter to Villa Marina. At the time of Villa Marina's motion, new materials could still be added to the record (e.g., the public comment period did not close until July 8, 2004). Consequently, Puerto Rico should not be surprised if the appeal record were to be supplemented, regardless of whether reply briefs have been filed. Therefore, this aspect of Villa Marina's motion is granted, and the Coast Guard letter will be included in the appeal record.

Sincerely,



Jane Chalmers
Acting General Counsel

cc: Vivian Gerena
Acting Chief, Antilles Regulatory Section
U.S. Army Corps of Engineers