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VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED

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Re: Decision in the Consistency Appeal of Cangrejos Yacht Club (No. CZ-2013-0131-060)

Dear Mr. Torres-Fernández, Mr. Ramos and Ms. Roman:

Cangrejos Yacht Club filed a notice of appeal with the Secretary of Commerce pursuant to the Coastal Zone Management Act (“CZMA”), 16 U.S.C. §§ 1451 *et seq.*, and CZMA regulations found at 15 C.F.R. Part 930, Subpart H. Cangrejos Yacht Club challenges an objection by the Puerto Rico Planning Board (“Planning Board”) to a CZMA consistency certification related to the issuance of a federal permit by the U.S. Army Corps of Engineers (“Army Corps”) to perform maintenance dredging of a navigational waterway located in Carolina, Puerto Rico.

I have been delegated authority to address appeals filed under the CZMA that are decided on procedural grounds. Reviewing the notice of appeal, written briefs, and various exhibits submitted by Cangrejos Yacht Club and the Planning Board, I find that the Planning Board failed to meet the mandatory time deadlines for proper submission of its objection to the certification. Accordingly, I override the Planning Board’s objection as untimely, and the Planning Board’s concurrence with the issuance of the subject permit is conclusively presumed under the CZMA.

I. Legal Framework

This appeal arises out of the CZMA’s “federal consistency” provisions.¹ Federal consistency requires federal actions with reasonably foreseeable effects on the uses or resources of a state’s

¹ 16 U.S.C. §1456(c) and 15 C.F.R. Part 930.



coastal zone to be consistent with the enforceable policies of a state's federally approved coastal management program.² Applicants for federal authorizations or funding submit "consistency certifications" to states with a coastal management program for proposed activities that are listed in a state's coastal management program. The applicant must certify that the proposed action is fully consistent with the enforceable policies of the state's program and provide all "necessary data and information."³ Upon receipt of the consistency certification from the applicant, the state is provided a six-month period to review the submission.⁴ If the applicant's submission is incomplete (in either the certification or necessary data and information), the state can toll the commencement of the six-month review period by informing the applicant of the deficiency within thirty days of receipt of the incomplete submission.⁵ If the state fails to notify the applicant within thirty days, the state waives the ability to toll the review period despite any deficiencies in the submission.⁶

Following review, the state may object to or concur with the certification. If the state objects, the federal authorizing or funding agency cannot authorize the applicant to undertake any activities unless the state's objection is appealed to the Secretary of Commerce and the Secretary (or her designee) overrides the state's objection. The regulations require that objections be in the proper form and contain specific language related to the procedures for lodging an appeal to the Secretary of Commerce.⁷ If the applicant fails to receive a decision (either an objection or a concurrence) from the state within six months following commencement of the state's review period, the state's concurrence with the consistency certification is "conclusively presumed" under the CZMA and its implementing regulations.⁸

II. Factual Background

Cangrejos Yacht Club is a privately-owned yacht club located in Carolina, Puerto Rico, with facilities situated alongside the Boca de Cangrejos Channel, a navigational waterway that allows entry into the Torrecillas Lagoon from the ocean. The Planning Board is the primary

² The CZMA includes Puerto Rico, a U.S. incorporated territory, in the statutory definition of the term "state." See 16 U.S.C. § 1453(4).

³ 15 C.F.R. § 930.57 (consistency certifications); 15 C.F.R. § 930.58 (necessary data and information).

⁴ 15 C.F.R. § 930.60.

⁵ 15 C.F.R. § 930.60(a)(1)-(2).

⁶ *Id.* Even if the state waives its opportunity to toll the six-month review period, the state is not left without recourse. The state may still object to the certification within six months based on lack of sufficient information. 15 C.F.R. § 930.60(a)(2).

⁷ 15 C.F.R. § 930.63(e).

⁸ 16 U.S.C. §1456(c)(3)(A) ("If the state or its designated agency fails to furnish the required notification [of its decision] within six months after the receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed."); 15 C.F.R. § 930.62(a) ("Concurrence by the State agency shall be conclusively presumed if the State agency's response is not received within six months following commencement of the State agency review.").

governmental agency responsible for managing coastal development in the Commonwealth of Puerto Rico.

Since 1991, Cangrejos Yacht Club has performed periodic maintenance dredging of the Boca de Cangrejos Channel, with the last dredging activities occurring in 2008. In 2013, Cangrejos Yacht Club sought approval to dredge the channel once again. As part of this process, Cangrejos Yacht Club applied for a permit from the Army Corps in compliance with the requirements of section 10 of the Rivers and Harbors Act. The permit application was submitted to the Army Corps on January 23, 2013.

In conjunction with the permit application submitted to the Army Corps, Cangrejos Yacht Club filed a CZMA consistency certification with the Planning Board stating that the proposed maintenance dredging of the Boca de Cangrejos Channel was consistent with the Puerto Rico Coastal Zone Management Program. The consistency certification also attached various documents providing data and other information regarding the project.

The Planning Board received the consistency certification package on January 25, 2013.⁹ Forty-eight days later, on March 14, 2013, the Planning Board sent Cangrejos Yacht Club an initial response. This initial response acknowledged receipt of the consistency certification and requested additional information regarding the project and the status of the Environmental Compliance Certificate required under Puerto Rico's Environmental Public Policy Act.¹⁰ Cangrejos Yacht Club replied a few days later and provided information in response to both requests. The parties engaged in a follow up round of information exchange on April 1 (request) and April 5 (response).

On April 18, 2013, the Planning Board sent Cangrejos Yacht Club a letter stating that the six-month period prescribed under the CZMA regulations for review of the consistency certification had commenced on April 16, 2013.¹¹ In the letter, the Planning Board also requested evidence of Cangrejos Yacht Club's compliance with the requirements of the Environmental Public Policy Act and noted that compliance with the Act was a required condition for the Planning Board's approval of the consistency certification.¹² In response, on May 24, 2013, Cangrejos Yacht Club presented the Planning Board with a copy of a "Determination of Environmental Compliance via Categorical Exclusion" issued by the Puerto Rico Permits Management Office ("Determination").¹³

⁹ Planning Board's Initial Brief, Exhibit 1 and Principal Brief at p. 2.

¹⁰ See Article 4(B)(3) of the Environmental Public Policy Act, Law 416 of September 22, 2004 (12 L.P.R.A. § 8001a).

¹¹ Cangrejos Yacht Club's Opening Brief, Exhibit 7.

¹² Id.

¹³ Cangrejos Yacht Club's Opening Brief, Exhibit 11. The parties spend considerable time in their briefs discussing their difference in opinion on whether Cangrejos Yacht Club's Determination was sufficient to meet the requirements of the Environmental Public Policy Act. Nevertheless, the substance of these arguments is not relevant to the decision in this appeal, and will not be discussed further herein.

On October 11, 2013, the Planning Board signed and adopted a one-page “agreement” objecting to the consistency certification, but waited until December 2, 2013 to inform Cangrejos Yacht Club of the decision by sending a more detailed “resolution” via U.S. Mail.¹⁴ Cangrejos Yacht Club timely filed this appeal to the Planning Board’s objection.

III. Discussion

The threshold issue in this appeal is whether the Planning Board’s objection to the consistency certification was timely. An objection is untimely if it is not received by an applicant within the six-month review period prescribed under the CZMA regulations.¹⁵ The Planning Board argues that the review period commenced on April 16, 2013 (i.e., the date identified by the Planning Board in its April 18, 2013 correspondence to Cangrejos Yacht Club) and that its objection was made before the six-month deadline through the Planning Board’s adoption of the October 11, 2013 agreement document.¹⁶ The Planning Board is incorrect on both points.

The review period commenced on January 25, 2013

It is undisputed that Cangrejos Yacht Club’s consistency certification application was received by the Planning Board on January 25, 2013.¹⁷ Under the CZMA regulations, the six-month review period begins on the date the state agency receives the consistency certification and supporting documentation from the applicant.¹⁸ The Planning Board had an opportunity to toll the start of the review period by providing Cangrejos Yacht Club notice within thirty days of any deficiencies in the application materials.¹⁹ However, the Planning Board’s initial response to the application and first request for additional information missed the thirty-day deadline by over two weeks. The Planning Board, therefore, waived its ability to toll commencement of the review period.²⁰

Despite the commencement of the review period on January 25, the Planning Board still had the option of formally objecting to Cangrejos Yacht Club’s consistency certification due to any

¹⁴ Planning Board’s Initial Brief, Exhibits 5 and 6. The December 2, 2013 resolution sent to Cangrejos Yacht Club contained the statement required by 15 C.F.R. § 930.64(e). The October 11, 2013 agreement does not contain the required statement.

¹⁵ 15 C.F.R. § 930.62(a).

¹⁶ Planning Board’s Principal Brief at 15 (“The six (6) months period review began on April 16, 2013, [the Planning Board] had at most until October 16, 2013 to object to [Cangrejos Yacht Club’s] consistency certification. The Puerto Rico Planning Board objection was made on October 11, 2013 during the six (6) months period granted.”).

¹⁷ Cangrejos Yacht Club Brief at 3; Planning Board’s Principal Brief at 1.

¹⁸ 15 C.F.R. § 930.60(a).

¹⁹ 15 C.F.R. § 930.60(a)(1)-(2).

²⁰ *Id.*; see also *Decision in the Consistency Appeal of Villa Marina Yacht Harbour, Inc.*, (Feb. 3, 2006) (available at <http://coastalmanagement.noaa.gov/consistency/mediadecisions/villamarinadismisal.pdf>).

information deficiencies that it perceived within the application. But this objection needed to be made – and received by Cangrejos Yacht Club – by July 25, 2013. By its own admission, the Planning Board did not make even an internal decision on the application until October 11, 2013.²¹ Because the Planning Board failed to object by the July 25 deadline, its concurrence with the consistency certification is conclusively presumed.²²

The objection was not made until on or after December 2, 2013

Notably, even if the Planning Board had been correct in its conclusion that the review commencement date was April 16, 2013, the objection was still untimely. The Planning Board argues that its objection was accomplished on October 11, 2013, when it made the internal decision to issue an objection, making it irrelevant when Cangrejos Yacht Club received notice of the decision. However, this argument runs counter to the plain language of the CZMA and its implementing regulations, both of which require the state to provide notice of its decision to both the applicant and the relevant federal agency in order to perfect its objection.²³

The Planning Board's rationale would undermine the fair and efficient operation of the consistency certification review process. Taking the Planning Board's view, a state could decide to object during the review period, but wait until some indeterminate time in the future to provide notice of the decision, leaving the applicant in the untenable position of not being able to proceed with the project (having not received the state's decision) and unable to exercise its right to appeal.²⁴

Under the CZMA regulations, a state's concurrence with an applicant's certification is conclusively presumed if the applicant fails to receive a decision from the state agency within six months of commencement of the review period.²⁵ In this case, the Planning Board concedes that it waited until December 2, 2013, to mail a notifying resolution to Cangrejos Yacht Club.²⁶ That is more than seven months after the date the Planning Board contends the review period started

²¹ Planning Board's Initial Brief at 3.

²² 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.62(a).

²³ 15 C.F.R. § 930.62(a) ("Concurrence by the State agency shall be conclusively presumed if the State agency's response is not received within six months following commencement of the State agency review.") (emphasis supplied). Notably, the October 11, 2013 agreement, provided by the Planning Board as the documentary recording of its objection, does not meet the form requirements for an objection set forth in the CZMA regulations. Specifically, the agreement fails to include the statement required by 15 C.F.R. § 930.64(e). This statement provides notice of the availability of appeal rights upon the applicant's receipt of the objection. The state's December 2 notice did include the statement required by § 930.64(e).

²⁴ 15 C.F.R. § 930.125(a) ("To obtain Secretarial review of a State agency objection, the appellant shall file a notice of appeal with the Secretary within 30 days of receipt of a State agency objection.") (emphasis supplied).

²⁵ 15 C.F.R. § 930.62(a).

²⁶ Planning Board's Initial Brief at 3 ("The resolution notifying the decision was sent on December 2, 2013."). The Planning Board presented no evidence of any other attempt to provide notice of the objection decision.

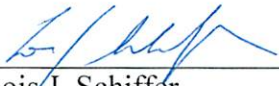
(and more than 11 months after the actual commencement date). Under either calculus, the state's objection was untimely.

IV. Conclusion

Based on the analysis above, I override the Planning Board's objection pursuant to 15 C.F.R. § 930.129(b) because I find that it was untimely made, and that the Planning Board's concurrence is conclusively presumed.

Sept. 16, 2014

Dated



Lois J. Schiffer
General Counsel