



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

OCT 22 2004

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Mr. Ed Gudenas  
U.S. Erie Island Development Company  
24555 Lakeshore Blvd.  
Euclid, OH 44123

Mr. David Mackey, Chief  
Office of Coastal Management  
Ohio Department of Natural Resources  
105 W. Shoreline Dr.  
Sandusky, OH 44870

**Re: Dismissal of U.S. Erie Island Consistency Appeal**

Dear Messrs. Gudenas and Mackey:

This appeal involves a proposed project to construct a 10-acre recreational marina and condominium complex in Put-In-Bay Township, Ottawa County, Ohio. In July 2000, the U.S. Erie Island Development Company (Erie Island) filed an application for a permit with the U.S. Army Corps of Engineers (Corps) and certified that the project was consistent with the State of Ohio's (Ohio) coastal management program. In January 2001, Ohio disagreed and objected. In February 2001, Erie Island filed this appeal to the Secretary of Commerce under the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1456(c)(3)(A). Pursuant to requests by Erie Island (with Ohio's concurrence), numerous stays of this appeal were granted to allow the parties time to negotiate a resolution. After expiration of the last stay in December 2003, however, the parties failed to prosecute the appeal. Due to lack of prosecution of the appeal by either party, I dismiss this appeal for good cause.

The CZMA provides states with federally-approved coastal management programs the opportunity to review a proposed project requiring a federal license or permit 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).



An appeal to the Secretary, however, may be dismissed for “good cause.”<sup>1</sup> 15 C.F.R. § 930.129(a) (2003). Under prior consistency decisions, “good cause” has included instances where an appeal became moot as a result of subsequent events,<sup>2</sup> or where an appellant failed to prosecute an appeal diligently.<sup>3</sup>

In this appeal, Erie Island is challenging Ohio’s objection to a recreational marina and condominium project. *See* Erie Island’s Appeal Letter (Feb. 8, 2001). Shortly after the appeal was filed, the NOAA Office of the General Counsel set a briefing schedule. *See* NOAA General Counsel letter to Erie Island and Ohio (March 21, 2001).<sup>4</sup> By letter dated April 25, 2001, Erie Island requested a stay of this appeal. Pursuant to the federal consistency regulations at 15 C.F.R. § 930.129(c)(2) (2003), a stay was granted to allow the parties time to negotiate a resolution. *See* NOAA General Counsel letter to Mr. Dana Rinehart, counsel for Erie Island (May 8, 2001). The stay was extended numerous times at Erie Island’s request with Ohio’s concurrence; the last stay expired December 13, 2003.

In a letter dated September 25, 2003, the NOAA Office of the General Counsel asked the parties to provide a status of the Erie Island appeal, and further asked them whether there were any remaining issues to be resolved. That letter was sent to counsel for both parties, and to Mr. Ed Gudenas, Erie Island’s President. Mr. Dana Rinehart responded by letter, stating he no longer represented Erie Island and his office had forwarded a copy of NOAA’s letter to Mr. Gudenas. *See* Mr. Rinehart’s letter to NOAA General Counsel (Sept. 29, 2003). No other responses were received from either Erie Island or Ohio.

In the nine months since expiration of the last stay, neither Erie Island nor Ohio has acted to prosecute the appeal, despite a request from the NOAA Office of the General Counsel for the status of the appeal and whether any disputed issues remained. As noted above, a consistency

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<sup>1</sup>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); and NOAA Administrative Order 201-104, Section 3.04.

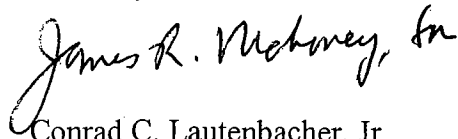
<sup>2</sup> *See* Dismissal Letter in Consistency Appeal of John T. Keegan (Dec. 5, 2003) (death of federal permit applicant).

<sup>3</sup> *See* Dismissal Letter in Consistency Appeal of Joseph M. Mattone (June 19, 1997) (failure of appellant to file brief).

<sup>4</sup> These communications were with the NOAA Office of the General Counsel because it has been delegated responsibility for undertaking all staff work necessary to make appeal findings. *See* Department of Commerce Organizational Order 10-15, Section 3.01(u), and NOAA Administrative Order 201-104, Section 3.

appeal may be dismissed for good cause, which has been interpreted in previous decisions to include circumstances in which a party failed to pursue the appeal diligently. Therefore, I dismiss this appeal for good cause, pursuant to the federal consistency regulations at 15 C.F.R. § 930.129(a) (2003).

Sincerely,

A handwritten signature in black ink that reads "James R. Mohney, Jr." with a stylized flourish at the end.

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

cc: Alan Sisselman, Chief  
Buffalo District, United States Army Corps of Engineers