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VIA CERTIFIED MAIL — RETURN RECEIPT REQUESTED

Thomas C. Jensen, Esq.  
Sonnenschein Nath & Rosenthal, LLP  
1301 K Street, N.W.  
Suite 600 East Tower  
Washington, DC 20005

Luis O. Cintron  
Cintron & Carrillo  
712 Ponce de Leon Ave.  
San, Juan Puerto Rico 00918

Re: Decision in the Consistency Appeal of Pan American Grain Company

Dear Messrs. Jensen and Cintron:

On January 27, 2010, Pan American Grain Company (Pan American) filed a consistency appeal with the Secretary of Commerce (Secretary), pursuant to section 307(c)(3)(A) of the Coastal Zone Management Act (CZMA). See 16 U.S.C. § 1456(c)(3)(A) (2000). Pan American challenges an objection by the Puerto Rico Planning Board (Puerto Rico) to proposed amendments to an ongoing and federally-permitted port improvement project at Pan American's facilities along San Juan Bay, Puerto Rico. For reasons set forth below, I override the objection because Puerto Rico was not entitled to review the proposed amendments to the project.<sup>1</sup> Accordingly, necessary federal permits may issue.

I. Statutory and Regulatory Background

The CZMA provides states with federally-approved coastal management programs the opportunity to review proposed activities requiring federal licenses or permits if the activity would affect any land or water use or natural resource of the state's coastal zone. 16 U.S.C. § 1456(c)(3)(A).<sup>2</sup> A properly raised objection by a state precludes federal agencies from issuing licenses or permits for the activity, unless the Secretary overrides the state's objection. 16 U.S.C. § 1456(c)(3)(A). A state's objection is subject to an override for procedural reasons, as a threshold matter, if the state failed to comply with the CZMA and its procedural regulations. 15 C.F.R. § 930.129(b).

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<sup>1</sup> Authority to make this determination as a threshold matter pursuant to 15 C.F.R. § 930.129(b) has been delegated to NOAA. *See* Department Organization Order 10-15 at 3.01(i)(u) (May 28, 2004), available at [http://www.osec.doc.gov/omo/dmp/does/doo10\\_15.html](http://www.osec.doc.gov/omo/dmp/does/doo10_15.html) (last visited Oct. 14, 2010).

<sup>2</sup> Under the CZMA, the term "state" includes the Commonwealth of Puerto Rico. *See* 16 U.S.C. § 1453(5).

THE ADMINISTRATOR



## II. Factual Background

Pan American is a privately-held company, engaged in importing, exporting, and processing grain, grain by-products, and fertilizer. The company owns and maintains port and milling facilities in an industrial section of San Juan Bay. Since 2002, Pan American has been making substantial improvements to its facilities: expanding an existing warehouse; constructing additional grain silos, a mill, and two warehouses; repairing an existing pier damaged by a 1998 hurricane (Hurricane Georges); and constructing a new marine leg and platform.<sup>3</sup> Except for construction of the marine leg and platform, the project is substantially complete.

Prior to the objection that is the subject of this appeal, Puerto Rico twice reviewed the project for consistency with the Commonwealth's coastal management program. In February 2002, Puerto Rico concurred with Pan American's original permit application,<sup>4</sup> thereby allowing the Corps to issue a permit necessary for construction of the project.<sup>5</sup> In 2008, Puerto Rico concurred with a Pan American request to extend its original permit.<sup>6</sup> In both instances, the project reviewed by Puerto Rico included a marine leg and platform. Following Puerto Rico's second concurrence, the Corps issued Pan American an extension to its permit, which remains in force until 2013.<sup>7</sup>

In 2009, Pan American sought to amend its existing Corps permit to authorize minor design improvements to its proposed marine leg and platform. Specifically, Pan American proposes to: (a) modify the dimensions of the platform, slightly enlarging its overall size; (b) construct a service walkway that would provide access to the platform; and (c) alter the piles supporting the platform, using twenty-four smaller piles instead of the six larger support piles conceived in the original design.<sup>8</sup> In the view of the Corps, the design changes proposed by Pan American would result in no coastal effects beyond those previously identified and reviewed. Given its permitting

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<sup>3</sup> A "marine leg" is a conveyer belt affixed to the pier and is designed to unload grain from a cargo ship. The marine leg at issue is comprised of two concrete platforms oriented in an "L" shape measuring, respectively, 90' x 30' and 33' x 30,' and a breasting dolphin against which vessels may be moored.

<sup>4</sup> Letter from Wanda I. Capó Rivera, Acting Chairperson, Common Wealth of Puerto Rico, Office of the Governor, Planning Board, to Mr. Jordi Bofil, CMA Architects and Engineers LLP, re: Federal Consistency Determination CZ-2002-0927-041, Sol. Cong. 0246, Pan American Grain Company, Feb. 21, 2002 (Puerto Rico Federal Consistency Determination CZ-2002-0927-041).

<sup>5</sup> Corps Permit Number 200105368(IP-CGR), issued Mar. 2002.

<sup>6</sup> Puerto Rico Planning Board Resolution CZ-2008-0213-047, Jun. 2, 2008.

<sup>7</sup> Pan American Principal Brief, at 6-9; Letter from Sindulfo Castillo, Chief, Antilles Regulatory Section, Department of the Army, Jacksonville District Corps of Engineers to NOAA Office of General Counsel, Apr. 12, 2010 (Corps Comments).

<sup>8</sup> Letter from Sindulfo Castillo, Chief, Antilles Regulatory Section, Department of the Army, Jacksonville District Corps of Engineers to NOAA Office of General Counsel, August 17, 2010 (Corps Supplemental Comments). Though not identified by either the parties or the Corps, Pan American's 2009 application also includes the construction of a service walkway that would be located alongside the platform and used to provide access to the platform. Joint Permit Application, June 2009, at 4. As such, I will consider it a part of Pan American's proposal for purposes of this review.

requirements, however, the Corps required Pan American to submit a new application. The Corps permit application form includes a CZMA consistency certification section the applicant must sign, potentially initiating a new CZMA consistency review process.

Following its third review of the project, Puerto Rico objected. Puerto Rico did not object to changes to the marine leg and platform, but rather objected to Pan American's continued use of a dead-end public road providing access to the facility, the lack of certain permits for an already constructed warehouse, and the lack of certain permits for an access control booth to Pan American's facility.<sup>9</sup> The dead-end road has been used by Pan American and its predecessor since 1957, and provides access to the Pan American facility and other industrial tenants. In support of its objection, Puerto Rico states that this public road is an integral part of the Guaynabo Municipal Government's local redevelopment and revitalization plan, and that the proposed project would violate two enforceable policies of the Commonwealth's federally approved coastal management program that relate principally to beach access.<sup>10</sup>

### **DISCUSSION**

A threshold issue in this appeal is whether Puerto Rico was entitled to review Pan American's project a third time, based upon proposed changes to the marine leg and platform. As noted above, the CZMA provides states with federally-approved coastal management programs the opportunity to review proposed activities requiring federal licenses or permits if the activity would affect any land or water use or natural resource of the state's coastal zone. 16 U.S.C. § 1456(c)(3)(A).

State review under the CZMA of federal license and permit activities, however, is not without limit. Under NOAA regulations implementing section 1456(c)(3)(A), once a proposed license or permit activity has been reviewed and approved by a state as consistent with its coastal program, and assuming no intervening changes to the coastal program, further state review under the CZMA is limited to major amendments of the federal license or permit activity that "will cause

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<sup>9</sup> Letter from Héctor O'Neill Garcia, Mayor, Commonwealth of Puerto Rico, Autonomous Municipal Government of Guaynabo, to Héctor Morales Vargas, President, Puerto Rico Planning Board, re: Federal Certificate of Compatibility CZ 2010-0703-001, Joint Application: 983, Nov. 2, 2009; Letter from Héctor O'Neill Garcia, Mayor, Commonwealth of Puerto Rico, Autonomous Municipal Government of Guaynabo, to Héctor Morales Vargas, President, Puerto Rico Planning Board, re: Federal Certificate of Compatibility CZ 2010-0703-001, Joint Application: 983, Dec. 28, 2009.

<sup>10</sup> Puerto Rico cited the following two enforceable policies as the basis for its objection:

- The Objectives and Public Policies of the Land Use Plan of Puerto Rico establishing the following: Avoid building structures in beach areas, discourage activities in adjacent areas where they may impede or hinder free access to beaches and encourage free enjoyment of panoramic views, free access to the sun and enjoyment of these areas by all people.
- Planning Regulation Number 17: "Zoning Regulation for the Coastal Zones and the Access to Beaches and Coasts of Puerto Rico."

an effect on any coastal use or resource substantially different than those originally reviewed by the State agency.” 15 C.F.R. § 930.51(b)(3).<sup>11</sup>

At this juncture, Pan American seeks approval from the Corps to modify its proposed marine leg and platform – a proposal that was twice reviewed and approved by Puerto Rico as consistent with its coastal management program. The design changes proposed by Pan American, however, would not result in coastal effects substantially different from those previously reviewed by Puerto Rico. This is evident from the nature of the proposed changes – a slightly larger marine platform, a modest walkway servicing the platform, and a reconfiguration of the pilings supporting the platform. It is reinforced by the views of the Corps, which confirms that the coastal effects of the amendment are not substantially different from those previously reviewed.<sup>12</sup> Finally, while Puerto Rico alleges new adverse effects, it has failed to identify a single change in coastal effects associated with the proposed modification. Because Pan American’s proposed changes do not result in coastal effects substantially different from what Puerto Rico previously reviewed and approved, Puerto Rico was not entitled to a third federal consistency review.<sup>13</sup>

Given the above, I override Puerto Rico’s objection pursuant to 15 C.F.R. § 930.129(b), because Puerto Rico did not have the right to review Pan American’s proposed amendments to the project. Accordingly, necessary federal permits may issue.

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<sup>11</sup> This limitation on subsequent review is reinforced in 15 C.F.R. § 930.51(c), which defines the term “major amendment” as follows:

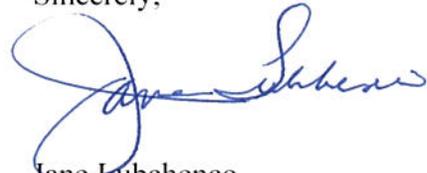
The term “major amendment” of a federal license or permit activity means any subsequent federal approval that the applicant is required to obtain for modification to the previously reviewed and approved activity and where the activity permitted by issuance of the subsequent approval will , , , in the case of a major amendment subject to § 930.51(b)(3), affect any coastal use or resource in a way that is substantially different than the description or understanding of effects at the time of the original activity.

<sup>12</sup> Corps Supplemental Comments, at 2.

<sup>13</sup> I note that the permit application at issue in this appeal differs from how new permit applications are typically treated under NOAA’s federal consistency regulations. As a general rule, new permit applications that seek authorization to conduct a federally-approved license or permit activity trigger state review for federal consistency. That said, where a state has previously reviewed and approved an activity, state reexamination of a project is guided by the whether the proposal constitutes a “major amendment” with coastal affects substantially different from what had been previously reviewed, as set forth in NOAA’s regulation at 15 C.F.R. § 930.51(b)(3), not the procedural requirements of the licensing federal agency, which may require a new license application for reasons unique to the licensing statute and completely unrelated to the CZMA and to any change in anticipated coastal effects.

In this instance, the Corps’ regulations required a new permit application, even though the Corps has stated that consideration of coastal effects was “not applicable” to the decision to require a new permit application. *See* Corps Supplemental Response, at 2. Because Pan American’s proposal is really a request to make minor changes to an ongoing activity that has already been reviewed by Puerto Rico and licensed by the Corps, Pan American’s proposal – for purposes of CZMA review – is considered as an amendment rather than a new license or permit activity.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Jane Lubchenco', with a large, stylized initial 'J'.

Jane Lubchenco  
Under Secretary of Commerce  
for Oceans and Atmosphere

cc: Puerto Rico Planning Board, P.O. Box 41119, San Juan, Puerto Rico 00940-1119, E-mail  
address: [ortiz\\_R@jp.gobierno.pr](mailto:ortiz_R@jp.gobierno.pr)