

DECISION AND FINDINGS
IN THE
CONSISTENCY APPEAL OF
JORGE L. GUERRERO-CALDERON FROM
AN OBJECTION BY THE
PUERTO RICO PLANNING BOARD
MARCH 5, 1993

SYNOPSIS OF DECISION

Mr. Jorge L. Guerrero-Calderon (Appellant) is the owner of a parcel of property, on Culebra Island, Puerto Rico. This property comprises an unspecified length of shoreline adjacent to Tamarindo Bay. To facilitate convenient water access to his property, the Appellant proposes to construct a wooden pier with mooring pilings and buoys that would be 41 feet in length and 6 feet wide. In addition, the pier will be used by the Appellant for private recreational purposes.

On August 8, 1988, the Appellant applied to the U.S. Army Corps of Engineers (Corps) for a permit to construct the proposed pier. In conjunction with that Federal permit application the Appellant submitted to the Corps for review of the Puerto Rico Planning Board (PRPB), the Commonwealth of Puerto Rico's coastal management agency, under section 307(c)(3)(A) of the Coastal Zone Management Act of 1972, as amended (CZMA), 16 U.S.C. § 1456(c)(3)(A), a certification that the proposed activity was consistent with Puerto Rico's Federally-approved Coastal Management Program (CMP).

On February 9, 1989, the PRPB objected to the Appellant's consistency certification for the proposed project on the ground that it violates the CMP's policies that protect sea turtle habitat. The PRPB did not recommend any alternatives to the proposed pier.

Under CZMA § 307(c)(3)(A) and 15 C.F.R. § 930.131 (1988), the PRPB's consistency objection precludes the Corps from issuing a permit for the activity unless the Secretary of Commerce (Secretary) finds that the activity is either consistent with the objectives of the CZMA (Ground I) or necessary in the interest of national security (Ground II). If the requirements of either Ground I or Ground II are met, the Secretary must override the PRPB's objection.

On March 17, 1989, in accordance with CZMA § 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart H, the Appellant filed with the Department of Commerce (Department) a notice of appeal from the PRPB's objection to the Appellant's consistency certification for the proposed project. The Appellant based his appeal on Ground I. Upon consideration of the information submitted by the Appellant, the PRPB and several Federal agencies, the Secretary of Commerce made the following findings pursuant to 15 C.F.R. § 930.121(b):

Ground I

The proposed pier will cause adverse effects on the resources of the coastal zone, when performed separately or in conjunction with other activities, substantial enough to outweigh its contribution to the national interest. Because the second

element of Ground I was therefore not met, it was unnecessary to examine the other three elements. Accordingly, the proposed project is not consistent with the objectives or purposes of the CZMA. (Pp. 4 - 9)

Conclusion

Because the Appellant's proposed project has failed to satisfy the requirements of Ground I, and the Appellant has not pleaded Ground II, the Secretary did not override the Commonwealth's objection to the Appellant's consistency certification, and consequently, the proposed project may not be permitted by Federal agencies.

DECISION

I. Background

Mr. Jorge L. Guerrero-Calderon (Appellant) is the owner of a parcel of property, on Culebra Island, Puerto Rico. Letter from Jorge L. Guerrero-Calderon to William E. Evans, Under Secretary for Oceans and Atmosphere, June 9, 1989, (Appellant's Initial Brief), at 2. Appellant's property comprises an unspecified length of shoreline adjacent to Tamarindo Bay. Response of the Puerto Rico Planning Board to Jorge L. Guerrero-Calderon Supporting Information and Brief, July 18, 1989, (PRPB's Initial Brief), at 1. To facilitate convenient water access to his property, the Appellant proposes to construct a wooden pier with mooring pilings and buoys that would be 41 feet in length and 6 feet wide.¹ Appellant's Initial Brief at 1. The pier will be used by the Appellant for private recreational purposes. *Id.* Specifically, the Appellant intends to anchor and moor his sailboat at the pier when sailing from Puerto Rico to Culebra Island. Appellant's Initial Brief at 2.

On August 8, 1988, the Appellant applied to the U.S. Army Corps of Engineers (Corps) for a permit² to construct the pier. In conjunction with that Federal permit application the Appellant submitted to the Corps for review of the Puerto Rico Planning Board (PRPB), the Commonwealth of Puerto Rico's coastal management agency, under section 307(c)(3)(A) of the Coastal Zone Management Act of 1972, as amended (CZMA), 16 U.S.C. § 1456(c)(3)(A), a certification that the proposed activity was consistent with Puerto Rico's Federally-approved Coastal Management Program (CMP).

On February 9, 1989, the PRPB objected to the Appellant's consistency certification for the proposed project on the ground that it violates the CMP's policies that protect sea turtle habitat.³ Letter from Patria G. Custodio, Chairperson, PRPB, to Jorge L. Guerrero-Calderon, (PRPB Objection). Specifically, the pier would be located in Tamarindo Bay, an ecologically sensitive area which supports endangered and threatened sea turtles. *Id.* at 1, 2. In addition to explaining the basis of its objection, the PRPB also notified the Appellant of his right to appeal the PRPB's decision to the Department of Commerce (Department) as provided under CZMA § 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart H. PRPB Objection at 4.

¹ The Appellant acknowledges that he presently has access to his property via Ensenada Honda Bay which is a few miles from his property. Appellant's Initial Brief at 2. However, the Appellant contends that the "best" access would be anchoring in Tamarindo Bay at the proposed mooring. *Id.*

² The Corps permit is required by § 404 of the Federal Water Pollution Control Act, as amended, (Clean Water Act), 33 U.S.C. § 1344.

³ The Corps denied the Appellant's permit application without prejudice based on the PRPB's objection to the proposed project. Letter from LTC Charles S. Cox, Deputy District Engineer, U.S. Army Corps of Engineers, to Jorge L. Guerrero-Calderon, March 10, 1989.

Under CZMA § 307(c)(3)(A) and 15 C.F.R. § 930.131, the PRPB's consistency objection precludes the Corps from issuing a permit for the activity unless the Secretary of Commerce (Secretary) finds that the activity may be Federally-approved, notwithstanding the PRPB's objection, because the activity is either consistent with the objectives of the CZMA, or necessary in the interest of national security.

II. Appeal to the Secretary of Commerce

On March 17, 1989, in accordance with § 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart H, the Appellant filed with this Department a notice of appeal from the PRPB's objection to the Appellant's consistency certification for the proposed project. In that notice, the Appellant requested that he be permitted to submit supporting statements, data and other information. Letter from Jorge L. Guerrero-Calderon to the Secretary of Commerce, March 13, 1989. The parties to the appeal are Jorge L. Guerrero-Calderon and the Puerto Rico Planning Board.

When the Appellant perfected the appeal by filing supporting data and information pursuant to 15 C.F.R. § 930.125, comments on the issues germane to the decision in the appeal were solicited by way of public notices in the Federal Register, 54 Fed. Reg. 48,017 (November 20, 1989), and the San Juan Star, (December 2, 3, 4, 1989). The Department received one public comment opposing the proposed pier.

The Department solicited the views of five Federal agencies⁴ on the four regulatory criteria that the project must meet for the Secretary to find it consistent with the objectives or purposes of the CZMA. The criteria appear at 15 C.F.R. § 930.121, and are discussed below.⁵ All five Federal agencies responded.⁶

⁴ Comments were requested from the Coast Guard, the Department of the Interior, the Environmental Protection Agency and the National Marine Fisheries Service on February 25, 1989. In addition, comments were later requested from the Army Corps of Engineers.

⁵ See infra at 4.

⁶ See note 3, supra. The PRPB requested that the appeal be dismissed for good cause pursuant to 15 C.F.R. § 930.128(c), based on the Corps' denial without prejudice of the Appellant's permit application. Letter from Lina M. Dueno, Acting President, PRPB, to William E. Evans, Under Secretary for Oceans and Atmosphere, Department of Commerce, July 18, 1989. The Corps' denial, however, does not provide good cause sufficient to justify dismissal of this appeal because it was based solely on the PRPB's consistency objection. The PRPB's consistency objection gave rise to the appeal in the first place. See Decision and Findings in the Consistency Appeal of Jose R. Perez-Villamil (Villamil Decision) November 20, 1991, at 3.

On July 21, 1989, the PRPB filed a response to the appeal. After the comment period closed, the Department gave the parties an opportunity to file a final response to any submittal filed in the appeal. The Appellant did so on February 8, 1991 and the PRPB on or about February 6, 1991. All materials received by the Department during the course of this appeal are included in the administrative record. However, only those comments that are relevant to the statutory and the regulatory grounds for deciding an appeal are considered. See Decision and Findings in the Consistency Appeal of Amoco Production Company, July 20, 1990, at 4.

III. Grounds for Reviewing an Appeal

Once I determine that an objection has been properly lodged and that the Appellant has filed a perfected appeal, I then determine, based on all relevant information in the record of the appeal, whether the grounds for a Secretarial override have been satisfied. Since the PRPB's objection was timely made and described how the proposed activity was inconsistent with specific, enforceable elements of the CMP, I conclude that the PRPB's objection was properly lodged. See CZMA § 307(c)(3)(A); 15 C.F.R. §§ 930.64(a), (b).

Section 307(c)(3)(A) of the CZMA provides that Federal licenses or permits required for a proposed activity may be granted despite a valid consistency objection if the Secretary finds that the activity is (1) consistent with the objectives of the CZMA (Ground I) or (2) otherwise necessary in the interest of national security (Ground II). See also 15 C.F.R. § 930.130(a). The Appellant has pleaded only the first ground.

To find that the proposed activity satisfies Ground I, the Secretary must determine that the activity satisfies all four of the elements specified in 15 C.F.R. § 930.121. These elements are:

1. The proposed activity furthers one or more of the competing national objectives or purposes contained in §§ 302 or 303 of the CZMA. 15 C.F.R. § 930.121(a).
2. When performed separately or when its cumulative effects are considered, [the proposed activity] will not cause adverse effects on the natural resources of the coastal zone substantial enough to outweigh its contribution to the national interest. 15 C.F.R. § 930.121(b).
3. The proposed activity will not violate any of the requirements of the Clean Air Act, as amended, or the Federal Water Pollution Control Act, as amended. 15 C.F.R. § 930.121(c).

4. There is no reasonable alternative available (e.g., location[,] design, etc.) that would permit [proposed] activity to be conducted in a manner consistent with the [PRPB's coastal] management program. 15 C.F.R. § 930.121(d).

Because Element Two is dispositive of this case, I turn immediately to that issue.

V. Element Two

This element requires that the Secretary weigh the adverse effects of the objected-to activity on the natural resources of the coastal zone against its contribution to the national interest. To perform this weighing, the Secretary must first identify the proposed project's adverse effects and its contribution to the national interest.

A. Adverse Effects

The Appellant argues that the proposed pier will have no adverse effects, cumulative or otherwise, on the natural resources of the coastal zone. Appellant's Initial Brief at 3. However, the Appellant failed to submit any evidence to support this conclusory statement.

In response to the Appellant's claim of no adverse effects, the PRPB offers the following remarks on the environmental effects of the proposed pier:

Regarding to the adverse effects . . . Culebra has remarkable natural and wildlife resources which would be threatened by the uncontrolled development. Based on the information provided by the U.S. Department of Interior Fish and Wildlife Service (FWS) the action falls within the range of the following Federally and Commonwealth listed endangered (E) or threatened (T) species:

Green sea turtle (Chelonia mydas) (T)
Hawksbill sea turtle (Eretmochelys imbricata)

The Fish and Wildlife Service has been conducting sea turtle research on Culebra for over three years; one of their study areas is Tamarindo Bay. The bay is a feeding and resting area for juvenile sea turtles and is used extensively by them throughout the year. . . .

The relative solitude of Culebra's bays attracts sea turtles, these bays are some of the few areas in Puerto Rico where turtles can live unmolested. Increased boat traffic in the area would be disastrous in terms of sea turtles use of the area. Studies have shown that boats

entering the bays frighten sea turtles with their engine noise, causing turtles to leave the area. Once scared out of the bay, sea turtles avoid it for several days. Constant boat traffic would severely reduce the use of the bay by sea turtles. Turtles use and depend on areas such as Tamarindo because of the extensive seagrass beds and low human impacts.

Pristine seagrass beds and coral reefs can be found just off Bahia Tamarindo's shore. Grass beds extend close to the low water line. These ecologically important and sensitive natural resources are intact, and any type of structure would destroy their integrity.

PRPB's Initial Brief at 6-8.

In addition to the parties' submittals, the record contains relevant views of the three Federal agencies that commented on this appeal. The Fish and Wildlife Service (FWS) has commented that the seagrass of Tamarindo Bay is regularly grazed by green sea turtles, an endangered species, and that the cumulative effect of the proposed pier, and others planned for the area, would adversely affect the seagrass bed. In addition, the pier would eventually lead to more recreational boating activity which would frighten the turtles from the area. Letter from Richard N. Smith, Deputy Director, Fish and Wildlife Service, to Hugh C. Schratwieser, Attorney-Adviser, Office of the Assistant General Counsel for Ocean Services, NOAA, February 5, 1990. In noting the cumulative effects of this type of activity, the FWS stated:

Although Mr. Calderon's proposed pier, by itself, may not jeopardize the turtles, there are two other piers being proposed for the area by other applicants. Permitting any private pier in the bay would set a precedent that would make it difficult to prevent other piers from being built.

Id.

The National Marine Fisheries Service (NMFS) states: "[Tamarindo Bay] is heavily used by green turtles, because of the presence of dense seagrass beds. The introduction of mooring facilities in the bay would reduce or eliminate this use." Memorandum from William W. Fox, Jr., Assistant Administrator for Fisheries, NMFS, to Hugh C. Schratwieser, Attorney-Adviser, Office of the Assistant General Counsel for Ocean Services, NOAA, January 19, 1990.

The Environmental Protection Agency (EPA) also offered comments on the proposed pier's effects on the environment:

The available evidence indicates that the proposed project could cause adverse impacts on the natural and wildlife resources in the area, specifically to the green sea turtle (Chelonia mydas) and the hawksbill sea turtle (Eretmochelys imbricata).

Letter from James M. Strock, Assistant Administrator, Office of Enforcement and Compliance Monitoring, EPA, to Hon. Jennifer Joy Wilson, Assistant Secretary for Oceans and Atmosphere, Department of Commerce, February 14, 1990.

While the Appellant questions the impact of the proposed pier on turtle habitat, I find that the PRPB's comments are supported by the comments of Federal agencies. Moreover, absent scientific evidence to the contrary, I will accept the conclusions of the Federal agencies. Therefore, after reviewing the submissions to the record by the parties and the Federal agencies commenting on this appeal, I find that the proposed dock would lead to more boating activity in the Tamarindo Bay area and frighten endangered and threatened sea turtles from feeding on seagrass in the vicinity. See also Villamil Decision at 6.

B. Contribution to the National Interest

The national interests to be balanced in Element Two are limited to those recognized in or defined by the objectives or purposes of the CZMA. See Korea Drilling Decision at 16. The CZMA identifies two broad categories of national interest to be served by proposed projects. The first is the national interest in pre-serving and protecting natural resources of the coastal zone. The second is encouraging development of coastal resources. See CZMA §§ 302 and 303.

The Department sought the views of four Federal agencies concerning the national interest to be furthered by the Appellant's proposed project. However, none of the Federal agencies that commented on the appeal indicated that the Appellant's proposed project would contribute to the national interest.

The Appellant alleges that his proposed project serves the national interest of enhancing, preserving and protecting the natural resources of the coastal zone. Appellant's Initial Brief at 2; Appellant's Final Brief at 4. In addition, he alleges that the project, as proposed, will guard and take care of the natural resources in the area. Appellant's Initial Brief at 2. As indicated above, preserving and protecting the resources of the coastal zone is in the national interest. However, the Appellant fails to adequately explain in his submissions how the construction of the proposed dock contributes to this interest. Further, he has submitted no evidence, either direct or circumstantial, in support of his

assertions. Therefore, I find the Appellant's conclusory arguments that his proposed project furthers the national interest by enhancing, preserving and protecting the natural resources of the coastal zone to be speculative, at best.

The Appellant also indirectly argues that his proposed project furthers the national interest by providing access to his property on Culebra for recreational purposes. Appellant's Initial Brief at 2. Section 303(2) of the CZMA identifies providing public access to the coasts for recreational purpose as an objective or purpose of the CZMA which serves the national interest. The proposed dock would further this national interest by providing access to the Appellant's property for the purpose of increasing recreational boating opportunities. However, given that the Appellant has indicated that only the Appellant's sailboat will have access to the dock, I find that its contribution to this interest is minimal. Appellant's Initial Brief at 2.

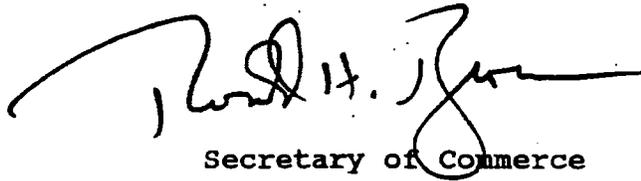
In conclusion, based on a review of the submissions to the record by the parties and Federal agencies commenting on this appeal, I find that the Appellant's proposed project contributes minimally to the national interest by providing public access to the coasts for recreation. See CZMA § 303(2)(D). This conclusion is consistent with this Department's findings in earlier appeal decisions. See Decision in the Consistency Appeal of Ford S. Worthy, May 9, 1984, at 10, (the addition of a single boating marina would contribute minimally to the national interest in increasing recreational boating opportunities in the coastal zone). In addition, given the Appellant's failure to submit any evidence in support of his claim that the proposed dock furthers the national interest of preserving and protecting the natural resources of the coastal zone, I find that the Appellant's project does not further that interest.

C. Balancing

At the heart of Element Two is a balancing of the various effects a proposed project will have on the resources and uses of the coastal zone subject to the CZMA. In this case, I found that the Appellant's proposed project would adversely affect the natural resources of the coastal zone by leading to more boating activity in the Tamarindo Bay area that would frighten endangered and threatened sea turtles from feeding on seagrass in the vicinity. I also found the proposed activity's contribution to the national interest to be minimal. In balancing these competing effects, I now find that the individual and cumulative adverse effects of the proposed activity will outweigh the activity's contribution to the national interest. See 15 C.F.R. § 930.121(b). Accordingly, the proposed activity has failed to satisfy Element Two.

VI. Conclusion

Because the Appellant must satisfy all four elements of the regulation in order for me to sustain his appeal, failure to satisfy any one element precludes my finding that the Appellant's project is "consistent with the objectives or purposes of the [CZMA]." Having found that the Appellant has failed to satisfy the second element of Ground I, it is unnecessary to examine the other three elements. Therefore, I will not override the PRPB's objection to the Appellant's consistency certification.



Secretary of Commerce