

DECISION AND FINDINGS
IN THE
CONSISTENCY APPEAL OF
SHICKREY ANTON FROM
AN OBJECTION BY THE
SOUTH CAROLINA COASTAL COUNCIL
MAY 21, 1991

SYNOPSIS OF DECISION

Mr. Shickrey Anton (Appellant) is the owner of a ten acre parcel of land located in the city of Hilton Head, Beaufort County, South Carolina. That parcel contains approximately 6.5 acres of wetlands. The Appellant proposes to construct a commercial business on the property. Construction of the site would necessitate the filling of approximately 0.76 of an acre (33,106 square feet) of wetlands on the lot. As mitigation, the Appellant has proposed to preserve the remaining wetlands and to create 0.56 of an acre (24,394 square feet) of wetlands elsewhere on the property.

In 1989, the Appellant applied to the U.S. Army Corps of Engineers (Corps) for a permit to fill the wetlands. In conjunction with that Federal permit application the Appellant submitted to the Corps for the State of South Carolina's (State) review under § 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 is consistent with the State's Federally-approved Coastal Management Program.

On August 25, 1989, the State objected to the Appellant's consistency certification for the proposed project on the ground that it violates the State Coastal Management Program's prohibition of the filling of wetlands. As an alternative that would be consistent with the State's Coastal Management Program, the State recommended the deletion of almost all fill and the construction of a bridge in order to connect the two high-ground portions of the property.

Under CZMA § 307(c)(3)(A) and 15 C.F.R. § 930.131 (1988), the State'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 or purposes 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 State's objection.

On October 4, 1989, in accordance with § 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart H, counsel for the Appellant filed with the Department of Commerce (Department) a notice of appeal from the State'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 State and several Federal agencies, the Secretary of Commerce made the following findings pursuant to 15 C.F.R. § 930.121:

Ground I

The proposed project, in particular the proposed filling of wetlands for commercial development, 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. As such the proposed project is not consistent with the objectives or purposes of the CZMA. (Pp. 5 - 10)

Conclusion

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

DECISION

I. Background

Mr. Shickrey Anton (Appellant) is the owner of a ten acre parcel of land located in the city of Hilton Head, Beaufort County, South Carolina. Appellant's Statement in Support of Request for an Override, February 28, 1990, at 2 (Appellant's Brief). That parcel contains approximately 6.5 acres of wetlands. *Id.* The Appellant proposes to construct a commercial business on the property.¹ *Id.* at 6. Commercial development of the property would necessitate the filling of approximately 0.76 of an acre (33,106 square feet) of wetlands on the lot. As mitigation, the Appellant has proposed to the South Carolina Coastal Council² (State) to preserve the remaining wetlands and to create 0.56 of an acre (24,394 square feet) of wetlands elsewhere on the property. *Id.* at 2-3.

In 1989, the Appellant applied to the U.S. Army Corps of Engineers (Corps) for a permit³ to fill the wetlands. In conjunction with that Federal permit application the Appellant submitted to the Corps for the State of South Carolina's review under § 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 the State's Federally approved Coastal Management Program.

On August 25, 1989, the State objected to the Appellant's consistency certification for the proposed project on the ground that it violates the State Coastal Management Program's prohibition of the filling of wetlands. Letter from H. Stephen Snyder, Director of Planning and Certification, South Carolina Coastal Council, to LTC James T. Scott, District Engineer, U.S. Army Corps of Engineers. As an alternative, that would be consistent with the State of South Carolina's Federally approved Coastal Management Program, the State recommended the deletion of almost all fill and the construction of a bridge in order to

¹ There is no indication in the administrative record of this consistency appeal of the type of commercial business proposed by the Appellant.

² The South Carolina Coastal Council is South Carolina's Federally approved coastal management agency under sections 306 and 307 of the Coastal Zone Management Act of 1972, as amended (CZMA), 16 U.S.C. §§ 1455 and 1456, and 15 C.F.R. Parts 923 and 930 of the Department of Commerce's implementing regulations.

³ The Corps permit is required by section 404 of the Federal Water Pollution Control Act, as amended, (Clean Water Act), 33 U.S.C. § 1344.

connect the two high-ground portions of the property. Id. In addition to explaining the basis of its objection, the State also notified the Appellant of his right to appeal the State's objection to the Department of Commerce (Department) as provided under section 307(c)(3)(A) of the CZMA and 15 C.F.R. Part 930, Subpart H. Id.

Under section 307(c)(3)(A) of the CZMA and 15 C.F.R. § 930.131, the State'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 State'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 October 4, 1989, in accordance with § 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart H, counsel for the Appellant filed with the Department of Commerce a notice of appeal from the State's objection to the Appellant's consistency certification for the proposed project. In that notice, the Appellant requested an extension of time to submit his supporting statements, data and other information. Letter from Christopher McG. Holmes, Esquire to the Hon. Robert Mosbacher, U.S. Secretary of Commerce, October 2, 1989. The parties to the appeal are Shickrey Anton and the State of South Carolina.

Public notice of the filing of the appeal was published in the Federal Register, 55 Fed. Reg. 48 (January 2, 1990). When the Appellant perfected the appeal by filing supporting data and information pursuant to 15 C.F.R. § 930.125, public comments on the issues germane to the decision in the appeal were solicited by way of notices in the Federal Register, 55 Fed. Reg. 11,427-28 (March 28, 1990) (request for comments), and the Charleston News and Courier (March 19-21, 1990). The Department received two public comments -- both opposing the proposed project.

On April 3, 1990, the Department solicited the views of four 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 agencies except the Department of the Interior responded. On April 6, 1990, the State filed a response to the appeal.

⁴ Comments were requested from the Army Corps of Engineers, the Department of the Interior, the Environmental Protection Agency and the National Marine Fisheries Service.

See infra at 5-6.

After the comment periods 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 July 6, 1990; the State did not. 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. Threshold Issues

During the course of this appeal the Appellant raised two threshold issues. Those issues are A) the scope and standard of review and B) burden of proof. I address each issue below.

A. Scope and Standard of Review

The Appellant has indirectly raised an issue as to the scope and standard of review by arguing that the State did not follow the correct procedure in objecting to his consistency certification. Appellant's Brief at 3-4. As stated, however, in the Decision and Findings in the Consistency Appeal of Chevron U.S.A., October 29, 1990 (Chevron Decision):

[T]he appeals process is a de novo determination based on the statutory standards of the CZMA and its implementing regulations. Therefore, the decisionmaker [sic] in CZMA consistency appeals shall independently determine, based on all the information submitted during the procedure, whether the proposed activity is consistent with the objectives or purposes of the CZMA or otherwise necessary in the interest of national security.

Id. at 5. In addition to a de novo inquiry, based on the information submitted for the record, of whether the grounds for a Secretarial override have been met, the Secretary will consider whether a State has complied with the procedural requirements for making an objection as established by the CZMA and its implementing regulations. See Chevron Decision at 6. The Secretary, as a matter of policy, has declined to review the substantive validity of the State objection in the appeals process. See Chevron Decision at 6. Accord Exxon v. Fischer, 807 F.2d 842 (9th Cir. 1987). As previously indicated, only those comments that are relevant to the statutory and the regulatory grounds for deciding an appeal are considered.

B. Burden of Proof

In discussing one of the grounds for the appeal,⁶ the Appellant has raised an issue as to burden of proof:

Were the land located in other than one of the eight coastal counties of South Carolina the project could go forward without notification being required to any federal or state agency. Given these prior approvals, appellant submits the burden should be upon the [State] to establish that the proposal is contrary in any manner to the national interest.

Appellant's Brief at 6. Burden of proof encompasses the burden of producing evidence and the burden of persuasion. "Except as otherwise provided by statute, the moving party before an administrative tribunal generally bears both burdens." Decision and Findings in the Consistency Appeal of the Korea Drilling Company, Ltd., January 19, 1989, at 22. (Korea Drilling Decision).

The regulations governing consistency appeals indicate that once the State has objected to a consistency certification and described alternatives (if they exist) that would be consistent with the State's Coastal Management Program,⁷ the Appellant then bears both the burden of proof and the burden of persuasion. The regulations provide that the Secretary shall find that a proposed activity satisfies either of the two statutory grounds "when the information submitted supports this conclusion." 15 C.F.R. § 930.130(a) (emphasis added). Thus, without sufficient evidence the Secretary will decide in favor of the State. In addition, the regulations under 15 C.F.R. § 930, Subpart H, provide procedures by which the Secretary may find that an appropriate activity "which is inconsistent with a [state] management program, may be federally approved because the activity is consistent with the objectives or purposes of the [CZMA]." 15 C.F.R. § 930.120. While the regulations do not name the party that bears the burden of proof at this stage, it would logically fall to the Appellant, not the State, to demonstrate that a proposed activity is consistent with the objectives or purposes

⁶ See infra at 5.

⁷ See Decision and Findings in the Consistency Appeal of Korea Drilling Company, Ltd., January 19, 1989, at 22-23 (once the State has satisfied its burden with regard to alternatives, the Appellant must prove Element Four).

of the CZMA.⁸

Accordingly, I conclude that the Appellant bears both the burden of proof and the burden of persuasion in consistency appeals. See also Chevron Decision at 4-5.

IV. Grounds for Reviewing an Appeal

Section 307(c)(3)(A) of the CZMA provides that Federal licenses or permits required for the Appellant's proposed activity may not be granted until either the State concurs in the consistency of such activity with its Federally-approved coastal zone management program, or the Secretary finds that the activities are (1) consistent with the objectives of the CZMA or (2) otherwise necessary in the interest of national security. See also 15 C.F.R. § 930.130(a). The Appellant has pleaded only the first ground.

To make a finding on this ground the Secretary must determine that the activity satisfies all four of the elements specified in 15 C.F.R. § 930.121. These requirements 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, it 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 the activity to be conducted in a manner consistent with the [State's coastal zone] management program.

⁸ More specifically, the Appellant raised the burden of proof issue with respect to Element Two of Ground I. Appellant's Brief at 6. Element Two requires evidence showing that the proposed activity "will not cause adverse effects on the natural resources of the coastal zone substantial enough to outweigh [the proposed activity's] contribution to the national interest." 15 C.F.R. § 930.121(b) (emphasis added). Element Two is also phrased in terms of evidence that would naturally originate in the Appellant's arguments.

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 proposes to fill 0.76 of an acre (33,106 square feet) of wetlands for commercial purposes. However, he has submitted no evidence concerning the proposed project's effects on the environment. Instead, the Appellant has offered to mitigate the effects of the proposed project.

First, the Appellant proposes to mitigate by preserving the remaining wetlands on the property "in perpetuity through either covenants on the land or through a gift to a land conservation organization." Appellant's Brief at 2. This proposal may offer more protection to those wetlands than that presently available under the CZMA. See Appellant's Reply at 4. However, as the wetlands are within the protection of the State's Coastal Management Program, it is unclear how much more protection this mitigation would offer. See State's Response at 4.

Second, the Appellant has offered to mitigate by creating 0.56 of an acre (24,394 square feet) of wetlands, thus resulting in a net wetland loss of 0.2 of an acre (8,712 square feet) of wetlands. Appellant's Brief at 3. The quantity of wetland loss, however, is not the only factor the Department will consider in evaluating the adverse effects on the environment. Other factors may include, but are not limited to, the nature of the wetland loss and the effects of the wetland loss on the remaining ecosystem. As to the Appellant's proposal to create 0.56 of an acre of wetlands, the Appellant presents no evidence comparing the productivity of the lost wetlands to the productivity of the wetlands the Appellant has offered to create. Without proof of the effectiveness of this mitigation, I cannot equate the value of a replacement to that of the original. I therefore find that the proposed loss of wetland will be 0.76 of an acre. Moreover, if the Appellant were to prove the effectiveness of the proposed mitigation, even a loss of 0.2 of an acre (8,712 square feet) of wetlands could produce adverse effects. C.f. Consistency Appeal of Exxon Company, U.S.A., June 14, 1989 (the Appellant was barred from filling in 5,660 square feet of wetlands).

In response, in addition to opposing the Appellant's offers of mitigation,⁹ the State offers the following remarks on the environmental effects of the proposed development:

The .76 acre wetland area proposed for development is part of approximately four acres of palustrine forested seasonally flooded wetlands at the site. The Department of the Interior's Fish and Wildlife Service objected to the certification request on the basis that the wetland area presently provides some of the only wildlife habitat remaining in an area surrounded by dense development, and that the stated purpose of the filling of the wetlands was for nonwater-dependent purposes.

State's Response to Appeal at 1. One of the State's Coastal Management Program policies identified in the State's objection provides that "wetlands are valuable habitat for wildlife and plant species and serve as hydrologic buffers, providing for storm water runoff and aquifer recharge." Letter from H. Stephen Snyder, Director of Planning and Certification, South Carolina Coastal Council, to LTC James T. Scott, District Engineer, U.S. Army Corps of Engineers, dated August 25, 1989.

In addition to the parties' submittals, the record contains relevant views of the three Federal agencies that commented on this appeal.¹⁰ The National Marine Fisheries Service (NMFS) states:

The area to be filled initially included four acres of scrub shrub wetlands. Subsequently reduced to seven-tenths acre, the fill would accommodate the corners of two buildings and a parking lot on Hilton Head Island, South Carolina. The area is intermittently connected to estuarine waters which contain highly productive marsh habitat. These wetlands contribute to water quality maintenance in the adjoining estuary.

Should an individual permit for filling more than one-tenth acre be contemplated, we would object to its issuance.

⁹ The State will allow mitigation "only to address the residual impact of a project. When there is no overriding public interest or feasible alternatives do exist, mitigation will not be considered by the Coastal Council." State's Brief at 3.

¹⁰ See supra note 4 and accompanying text.

Memorandum from William W. Fox, Jr., Assistant Administrator for Fisheries, NMFS, to Kirsten Erickson, Attorney-Adviser, Office of General Counsel for Ocean Services, NOAA, May 3, 1990.

EPA remained neutral in its opinion on Element Two in this case: "On the basis of the information available to us, we cannot weigh any possible adverse effects on the coastal zone against any contribution of this activity to the national interest." Letter from James M. Strock, Assistant Administrator, Office of Enforcement And Compliance Monitoring, EPA, to Gray Castle, Deputy Under Secretary for Oceans and Atmosphere, Department of Commerce, May 23, 1990. However, the comments of EPA generally affirm the points made by the NMFS about wetlands' beneficial impact on water quality:

It is general EPA policy to recommend that where any activity will adversely affect the natural functions of a wetland, that activity should be avoided to the maximum extent practicable. Wetlands serve a variety of functions including shoreline erosion control, habitat for commercial and recreational fin and shellfish species and wildlife habitat.

Id. Additionally, as explained by EPA in the Decision and Findings in the Consistency Appeal of Exxon Company, U.S.A., June 14, 1989, (Exxon Decision):

Over half of our nation's wetland[s] have been eliminated during the past 200 years. Cumulative impacts of wetlands' destruction are a major policy concern to EPA and we have focused multi-year research efforts to more clearly delineate cumulative impacts of wetlands losses. In addition, EPA believes a close synergism exists between wetlands in coastal areas and water quality in nearby estuarine waters. Part of EPA's Near-Coastal Waters strategy calls for increased protection of wetlands in these fragile and overstressed [sic] coastal areas. Some 70% of our population lives within 100 miles of our coasts and the Great Lakes. The dwindling coastal wetlands are becoming more vulnerable as population pressures increase.

Exxon Decision at 10.

In sum, a review of the submissions to the record by the parties and the Federal agencies commenting on this appeal reveals that, in addition to diminishing the size of the wetland habitat, the Appellant's proposed project could adversely affect the water quality of a nearby, highly productive estuary. Beyond offering to mitigate the adverse effects, the Appellant has not provided

any evidence to contradict the foregoing conclusions. See Appellant's Reply Brief at 4-5. I find, therefore, that the proposed project will affect adversely the environment by reducing the size of the wetlands and by contributing to the reduction of water quality.

B. Contribution to the National Interest

With respect to the proposed project's contribution to the national interest, the Appellant contends:

Evidence that Anton's proposal conforms with the national interest is reflected in the fact that approval has already been granted by the Corps, pursuant to Sec. 404 of the [Clean Water Act], and by the South Carolina DHEC, pursuant to sec. 401 of the [Clean Water Act] for this activity.

Appellant's Brief at 6. Otherwise, the Appellant has not identified the national interests promoted by the project. As decided in a previous consistency appeal:

The national interests to be balanced in Element Two are limited to those recognized in or defined by the objectives or purposes of the Act. In other words, while a proposed activity may further (or impede) a national interest beyond the scope of the national interests recognized in or defined by the objectives or purposes of the Act, such a national interest may not be considered in the balancing.

Korea Drilling Decision at 16.

The State maintains that the national interest is served by protecting wildlife habitat. State's Brief at 5. The comments of NMFS discussed above with respect to adverse environmental effects suggest that NMFS concludes that wetlands contribute positively to the national interest. I therefore conclude that the Appellant's offer to create wetlands would serve the national interest.¹¹ However, as previously discussed, I have already balanced those offers of mitigation against the adverse environmental effects of the proposed project.¹²

I turn now to the proposed commercial development. While the Appellant's proposed commercial development is small in size, it still satisfies two of the CZMA's objectives: (1) "needs for economic development," § 303(2), and (2) "the location, to the

¹¹ Appellant's Brief at 6.

¹² See supra at 6-7.

maximum extent practicable, of new commercial ... developments in or adjacent to areas where such development already exists," § 303(2)(C). I am persuaded, however, that the project would contribute minimally to these national interests. This conclusion is consistent with this Department's finding in an earlier appeal decision. See Decision of the Secretary of Commerce 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).

C. Balancing

Above, I found that the Appellant's proposed project would adversely affect the natural resources of the coastal zone by eliminating wetlands and reducing water quality of adjacent wetlands. In addition, I found that the proposed activity's contribution to the national interest would be minimal. Having taken into consideration the Appellant's offers of mitigation, I now find that the Appellant has failed to prove that "[w]hen performed separately or when its cumulative effects are considered, [the activity] will not cause adverse effects on the natural resources of the coastal zone substantial enough to outweigh [the activity's] contribution to the national interest." 15 C.F.R. § 930.121(b). Accordingly, the proposed project has failed to satisfy Element Two.

Conclusion

Because the Appellant must satisfy all four elements of the regulation in order for me to sustain its 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 State's objection to Mr. Anton's consistency certification.



Secretary of Commerce