

DECISION AND FINDINGS
IN THE
CONSISTENCY APPEAL OF
SUCESION ALBERTO BACHMAN FROM
AN OBJECTION BY THE
PUERTO RICO PLANNING BOARD
OCTOBER 10, 1991

SYNOPSIS OF DECISION

In 1987, Sucesión Alberto Bachman (Appellant) applied to the U.S. Army Corps of Engineers (Corps) for a permit to replace a swimmers' protection barrier in the waters adjacent to the only beach on Isla de Palominos (Palominos Island). Specifically, the Appellant proposed to replace existing steel drum buoys that were authorized under an earlier Corps permit with styrofoam buoys. 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.

Also in 1987 the PRPB held a public hearing with the Appellant's knowledge which led to the adoption in January of 1988 of an alternative to the Appellant's proposed project, a smaller swimmers' protection barrier. On February 16, 1988, the PRPB objected to the Appellant's consistency certification for the proposed project on the ground that the proposed protected swimming area is not in accordance with Puerto Rico's coastal management public policies and objectives of encouraging public access to beaches. Specifically, the proposed project would eliminate a boating access to the beach. In the objection letter, however, the PRPB did not discuss whether there were alternatives to the Appellant's proposed project.

Under CZMA § 307(c)(3)(A) and 15 C.F.R. § 930.131 (1988), the PRPB's consistency objection precludes Federal agencies from issuing a permit for the activity unless the Secretary of Commerce determines 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 PRPB's objection.

On March 18, 1988, in accordance with CZMA § 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 PRPB's objection to the Appellant's consistency certification for the proposed project. The Appellant based his appeal on Ground I. Although the PRPB did not indicate in its objection the availability of a reasonable alternative, during the pendency of the appeal the Puerto Rico Department of Natural Resources installed a swimmers' protection barrier. Upon consideration of the information submitted by the Appellant, the Commonwealth and several Federal agencies, the Secretary of Commerce made the following findings pursuant to 15 C.F.R. § 930.121(d):

Ground I

In order to find the fourth element of Ground I satisfied, the Secretary must find that there is no reasonable alternative to the Appellant's proposed project available that would permit the activity to be conducted in a manner consistent with the Commonwealth's Coastal Management Program. The Secretary found the alternative implemented by the Puerto Rico Department of Natural Resources to be a reasonable, available alternative that would be consistent with the Commonwealth's Coastal Management Program. Because the fourth 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 - 7)

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 Commonwealth's objection to the Appellant's consistency certification, and consequently, the proposed project may not be permitted by Federal agencies.

DECISION

I. Background

In 1987, Sucesión Alberto Bachman¹ (Appellant) applied to the U.S. Army Corps of Engineers (Corps) for a permit² to replace a swimmers' protection barrier in the waters adjacent to the only beach on Isla de Palominos (Palominos Island). Specifically, the Appellant proposed to replace existing steel drum buoys that were authorized under an earlier Corps permit with styrofoam buoys. The beach provides the only suitable landing for boats, as the remainder of the island is surrounded by coral reefs and exposed vertical rocky shores. Letter from Patria Custodio, Chairperson, PRPB, to William Evans, Under Secretary, NOAA, September 14, 1988, at 1 (PRPB Brief). The beach has been used by both bathers and local fishermen in the past. Id.

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.

On November 20, 1987, the PRPB held a public hearing to discuss zoning of a protected area for swimmers on Palominos Island. Letter from Patria Custodio, Chairperson, PRPB, to William Evans, Under Secretary, Dept. of Commerce, April 14, 1989, at 2. (PRPB Reply Brief). At that hearing, Sucesión Bachman was represented by its attorney, Héctor Oliveras. Local fishermen present at the hearing requested the installation of a system of buoys that would allow them access to the beach. On January 13, 1988, the PRPB adopted new sheets to the zoning map for Palominos Island.

On February 16, 1988, the PRPB objected to the Appellant's consistency certification for the proposed project on the ground that the proposed protected swimming area is not in accordance with Puerto Rico's coastal management public policies and objectives of encouraging public access to beaches, as expressed

Estate of Alberto Bachman.

² 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.

in Act 48,³ by eliminating boating access. Letter from Patria Custodio, Chairperson, PRPB, to Héctor Oliveras-Delgado, Attorney for Sucesión Alberto Bachman. In the objection letter the PRPB did not discuss whether there were alternatives to the Appellant's proposed project. Id. In addition to explaining the basis of its objection, the PRPB also notified the Appellant of its right to appeal the PRPB's objection to the Department of Commerce (Department) as provided under CZMA § 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart H. Id.

In May of 1988, the Puerto Rico Department of Natural Resources (DNR) installed its own buoys in conformance with the zoning map. The protected area encompassed by the DNR buoys is smaller than the area that would be protected by the Appellant's proposed project. This alternative swimmers' protection barrier installed by the DNR also allows for freedom of access for local fishermen. See Letter from Jesús Gálvez Ortiz, Navigation Commissioner, Dept. of Natural Resources, to Eng. José Rodríguez Mercado, Director, Land Use Planning Bureau, PRPB, September 7, 1988.

Under CZMA § 307(c)(3)(A) and 15 C.F.R. § 930.131 (1988), the PRPB's consistency objection precludes Federal agencies from issuing a permit for the activity unless the Secretary of Commerce (Secretary) determines 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 18, 1988, in accordance with CZMA § 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 PRPB's objection to the Appellant's consistency certification for the proposed project. Letter from Héctor F. Oliveras, Legal Counsel for Sucesión Alberto Bachman to William C. Verity, Secretary of Commerce. The parties to the appeal are the Sucesión Alberto Bachman and the Puerto Rico Planning Board.

The Department set a briefing schedule and solicited comments from the public and from interested agencies. Public notice of the filing of the appeal was published in the Federal Register, 53 Fed. Reg. 27,062 (July 18, 1988). On September 14, 1988, the PRPB filed a response to the appeal, after the Appellant

³ While Act 48 was not approved as a Routine Program Implementation to the Coastal Management Program until January 3, 1990, the policies underlying the act as to beach access were a part of the approved program. See Puerto Rico Coastal Management Program and Final Environmental Impact Statement at 70-89.

perfected the appeal by filing supporting data and information pursuant to 15 C.F.R. § 930.125. On November 15, 1988, 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 agencies responded. Public comments on the issues germane to the decision in the appeal were solicited by way of notices in the Federal Register, 53 Fed. Reg. 48,571 (December 1, 1988) (request for comments), and the San Juan Star (December 12-14, 1988). No comments were received.

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 April 7, 1989; the PRPB did so on April 14, 1989. 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 (Amoco Decision), July 20, 1990, at 4.

Consistent with prior consistency appeals, I have not considered whether the PRPB was correct in its determination that the proposed activity was inconsistent with the Commonwealth's Coastal Management Program. See Decision and Findings in the Consistency Appeal of Korea Drilling Company (Korea Drilling Decision), January 19, 1989, at 3. Rather, I have examined the PRPB's objection only for the purpose of determining whether it was properly lodged, *i.e.*, whether it complied with the requirements of the CZMA and its implementing regulations. *Id.* I conclude that the PRPB's objection was properly lodged.

III. 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 PRPB 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 (Ground I) or (2) otherwise necessary in the interest of national security (Ground

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

⁵ See *infra* at 3-4.

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, 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 [Puerto Rico's coastal] management program. 15 C.F.R. § 930.121(d).

Because Element Four is dispositive of this case, I turn immediately to that issue. See Decision and Findings in the Consistency Appeal of John Bianchi, January 25, 1989, at 10.

IV. Element Four: Lack of a Reasonable Alternative

The fourth element of Ground I is usually decided by evaluating the alternative(s) proposed by a state in the consistency objection. See Decision and Findings in the Consistency Appeal of Chevron U.S.A. (Chevron Decision), October 29, 1990, at 58; Decision and Findings in the Consistency Appeal of Long Island Lighting Company, February 26, 1988, at 16. The Department's regulations at 15 C.F.R. § 930.64(b) provide in part that "state agency objections must describe ... alternative measures (if they exist) which, if adopted by the applicant, would permit the proposed activity to be conducted in a manner consistent with the management program." As discussed in the Korea Drilling Decision, requiring a state to identify alternatives serve two purposes:

First, it gives the applicant a choice: adopt the alternative (or, if more than one is identified, adopt one of the alternatives) or, if the applicant believes

all alternatives not to be reasonable or available, either abandon the proposed activity or appeal to the Secretary and demonstrate the unreasonableness or unavailability of the alternatives. Second, it establishes that an alternative is consistent with a State's program because the State body charged by the act with determining consistency makes the identification of the alternative.

Korea Drilling Decision at 23.

In this case, however, the PRPB has not proposed any alternatives in its objection letter.⁶ Rather, as previously mentioned, the record of this case has disclosed that there is an alternative to the Appellant's proposed project that was approved by the PRPB prior to the appeal and implemented by the DNR during the pendency of this appeal, the alternative of a smaller swimmers' protection barrier.⁷ See Letter from Jesús Gálvez Ortiz,

⁶ The initial burden of describing any alternative is on the PRPB. See Korea Drilling Decision at 23.

⁷ In the exercise of his discretion, the Secretary may identify an alternative that has been disclosed in the administrative record of the appeal. See Korea Drilling Decision at 24. In this case, the Appellant already knows of the alternative and, in fact, addressed the issue in its notice of appeal. See Appellant's Notice of Appeal at 2. The Appellant first had notice of the alternative at a public hearing held on the activity in 1987. At that hearing, Sucesión Bachman was represented by its attorney, Héctor Oliveras. Local fishermen present at the hearing requested the installation of a system of buoys that would allow them access to the beach. On January 13, 1988, prior to commencement of this appeal, the PRPB adopted new sheets to the zoning map for Palominos Island. The Appellant referred to this resolution of the PRPB in its notice of appeal:

We understand that our project is totally consistent with the Puerto Rico coastal management Program as it has expressed in the Resolution Number REP-2-0-86 of January 13, 1988 of the Puerto Rico Planning board, copy of which we included. This Resolution authorized the Department of Natural Resources of Puerto Rico the installation of swimmer protection bouys [sic] at the Isla of Palominos. The basic difference between the Resolution of the Puerto Rico Planning board and the project which Sucesión Alberto Bachman is applying for, is the area or distance of protection with the swimmer protection buoys.

Notice of Appeal at 2. The alternative was then implemented by

Navigation Commissioner, Dept. of Natural Resources, to Eng. José Rodríguez Mercado, Director, Land Use Planning Bureau, PRPB, September 7, 1988. In this regard, this appeal differs from past consistency appeals in that, rather than the coastal management agency suggesting an alternative to the Appellant, another agency of the Commonwealth implemented an alternative. From the actions of the PRPB with respect to the alternative implemented by the DNR, I find the alternative to be consistent with the Commonwealth's approved Coastal Management Program.⁸ See Amoco Decision at 50.

As discussed above, the alternative must be both reasonable and available. Since the alternative has been implemented, I find that it is available. The reasonableness of this alternative depends upon its feasibility and the balancing of advantages of the alternative against its costs. See Chevron Decision at 58; Decision and Findings in the Consistency Appeal of Gulf Oil Corp., December 23, 1985, at 22; Decision and Findings in the Consistency Appeal of Exxon Company, November 14, 1984, at 14. In this case, the alternative's feasibility and specificity are not at issue since it has been implemented. See Decision and Findings in the Consistency Appeal of Texaco, Inc., May 19, 1989, at 36; Korea Drilling Decision at 24. The advantage of the alternative is that it permits both a protected swimming and boating access to the island, whereas the Appellant's proposed project would have only permitted swimming. In addition, the alternative was implemented at no cost to the Appellant. The Secretary must also consider whether the alternative would have "measurably less adverse effects on land and water resources of the coastal zone." Decision and Findings in the Consistency Appeal of Southern Pacific Transp. Co., September 24, 1985, at 19. In this case, the alternative permits a boat launching area that could increase, rather than decrease, the adverse effects on land and water resources of the coastal zone.⁹ In comparing the

the DNR in May of 1988, one month after the Appellant appealed to the Secretary of Commerce.

⁸ As stated in the Decision and Findings in the Consistency Appeal of Long Island Lighting Company (LILCO Decision), February 26, 1988, at 16, "[a] state is normally in the best position to propose an alternative which it considers to be consistent with its CMP."

⁹ In seeking to create a protected swimming area the Appellant makes the following remarks on impacts to natural resources:

By the installation at our cost of these swimmers protections [sic] devices or barriers it will be simultaneously protecting the swimmers, the reef and habitat

size of the protected area proposed by the Appellant with the size of the protected area implemented by the DNR, I find that difference in environmental impacts would be minimal.

I now find that the advantages of the alternative implemented by the DNR outweigh its disadvantages because the established swimmers' protection barrier permits both swimming and boating access to the island. In accordance with the foregoing analysis, I find that there is a reasonable alternative available that would permit the Appellant's proposed project to be conducted in a manner consistent with Puerto Rico's Coastal Management Program. 15 C.F.R. § 930.121(d).

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 fourth 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

of multiple and fascinating marine wildlife since it will be preventing their destruction by man's alteration with their boats, yachts, anchors, etc.

Appellant's Brief at 2. However, there is no evidence in the record to compare the environmental effects of the alternative to the Appellant's proposed project, and the comments by Federal agencies did not discuss the alternative.