

DECISION AND FINDINGS
OF THE SECRETARY OF COMMERCE
IN THE
CONSISTENCY APPEAL OF
JOHN BIANCHI
FROM AN
OBJECTION BY THE NEW YORK STATE DEPARTMENT OF STATE
January 25, 1989

SYNOPSIS OF DECISION

John Bianchi (Appellant) owns a restaurant on the Reynolds Channel in Hempstead, New York. On March 10, 1986, Appellant applied to the U.S. Army Corps of Engineers (COE) for a permit to construct a pier behind the restaurant. The design he submitted was an open-pile timber deck measuring twenty-eight feet by forty-four feet to be attached to an existing bulkhead. A two-foot by fourteen-foot ramp was to link the deck and a five-foot by forty-four-foot float. The proposed facility would serve as both a temporary dock for the boats of restaurant patrons and an "alternate" waiting area for the patrons. At about this time Appellant began construction of the facility, although he had not yet obtained the required permit. Appellant completed construction about June 1986.

Appellant certified in his application to COE that his project complied with and would be conducted in a manner consistent with the Federally approved New York Coastal Management Program (NYCMP). Pursuant to section 307(c)(3)(A) of the Coastal Zone Management Act of 1972, as amended (Act), 16 U.S.C. § 1456(c)(3)(A), the State of New York (State) reviewed Appellant's consistency certification. On August 4, 1986, the State objected to the certification on the ground that the project was inconsistent with Coastal Policy No. 2 of the NYCMP: to "[f]acilitate the siting of water dependent uses and facilities on or adjacent to coastal waters." The State determined that "[t]he purposed [sic] use of the deck as an alternate waiting area was not water dependent and preempted the use of this area for water dependent uses. In addition there is no valid justification for the need of such an extensive deck for boat docking." As an alternative, the State recommended an open-pile dock in a "T"- or "L"-shape.

Under section 307(c)(3)(A) of the Act and 15 C.F.R. § 930.131, the State's objection precludes COE from issuing any permit required for Appellant's project to proceed unless the Secretary of Commerce finds that the activity objected to may be Federally approved because it is consistent with the objectives of the Act (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 sustain the appeal.

On September 5, 1986, Appellant's attorney sent a letter via express mail to the Director of the Office of Coastal Resource Management, National Oceanic and Atmospheric Administration, Department of Commerce, stating that his client wished to appeal the State's consistency objection and seeking advice on the appeal procedure.

On September 18, 1986, a new attorney for Appellant notified the Secretary and the State of the appeal and provided a supporting statement. On October 30, 1986, Appellant's attorney provided the Secretary with additional information in support of the appeal, pleading Ground I. Both parties have raised the issue of the timeliness of the appeal.

The Secretary, upon consideration of the information submitted by the parties and interested Federal agencies, as well as other information in the administrative record of the appeal, made the following findings pursuant to 15 C.F.R. § 930.121.

Timeliness

Appellant's letter of September 5, 1986, constituted an informal notice of appeal. By his submissions received September 18, 1986, and October 30, 1986, Appellant perfected the appeal. Therefore the appeal was timely filed (pp. 3-5).

Ground I

In order to find the fourth element of Ground I satisfied, the Secretary must find that there is no reasonable alternative to Appellant's project available that would permit the activity to be conducted in a manner consistent with the NYCMP. In its letter of objection, the State identified an alternative to the project that would be consistent with the NYCMP. The Secretary found that alternative to be reasonable and available. Because the fourth element of Ground I was therefore not met, it was unnecessary to examine the other three elements (pp. 6-10).

Conclusion

The State's objection to Appellant's consistency certification is not overridden (p. 10).

DECISION

Factual Background

On March 10, 1986, John Bianchi (Appellant) applied to the New York District Office of the U.S. Army Corps of Engineers (COE) for a permit under Section 10 of the River and Harbor Act of 1899, 33 U.S.C. § 403, to construct a pier behind his restaurant on the Reynolds Channel in Hempstead, New York. Application for Department of the Army Permit, reproduced at Enclosure 16 of Appellant's Supporting Documentation (Consultant's Survey), dated October 18, 1986, submitted with Letter to Secretary Baldrige dated October 29, 1986. The design he submitted was an open-pile timber deck measuring twenty-eight feet by forty-four feet to be attached to an existing bulkhead. A two-foot by fourteen-foot ramp was to link the deck and a five-foot by forty-four-foot float. The proposed facility would serve as both a temporary dock for the boats of restaurant patrons and an "alternate" waiting area for the patrons. COE Public Notice 12573-86-352-L5. Appellant certified in his application that the proposed activity complied with and would be conducted in a manner consistent with the Federally approved New York Coastal Management Program (NYCMP). Id. At about this time Appellant also began construction of the facility, although he had not yet obtained the required permit. Appellant's Supporting Documentation (Consultant's Survey), dated October 18, 1986, at 5. Appellant completed construction about June 1986. Id.

On August 4, 1986, the New York Department of State (State) wrote to Appellant that it found the project to be inconsistent with Coastal Policy No. 2 of the NYCMP: to "[f]acilitate the siting of water dependent uses and facilities on or adjacent to coastal waters." The State determined that "[t]he purposed [sic] use of the deck as an alternate waiting area is not water dependent and preempts the use of this area for water dependent uses. In addition there is no valid justification for the need of such an extensive deck for boat docking." State's Consistency Objection Letter, dated August 4, 1986.

As an alternative providing a stable docking facility and permitting the proposed activity to be conducted in a manner consistent with the NYCMP, the State identified an open-pile dock in a "T"- or "L"-shape. Id. It gave as an acceptable dock configuration that "described by both USEPA [U.S. Environmental Protection Agency (EPA)] and USF&WS [U.S. Fish and Wildlife Service (FWS)] in their letter to [Appellant] of April 16, 1986." Id. That letter, describing the consensus regarding Appellant's project reached by EPA, FWS and the National Marine Fisheries Service (NMFS) at a meeting held April 7, 1986, was apparently actually written by COE. The letter stated that those agencies recommended that the proposed dock be built in a "T"-shape; it included a sketch, meeting the agencies' recommendation, of a "T"-

shaped open-pile dock with a float placed along the top of the "T", upon which sketch was written a note to Appellant stating that the agencies wanted the dock no wider than six feet and that many variations of the float placement were available. Letter from State to Secretary Baldrige, dated October 21, 1986, Exhibit D.

On August 27, 1986, COE ordered Appellant to cease and desist any further work on the project. Letter from State to Secretary Baldrige, dated October 21, 1986, Exhibit A.

Under section 307(c)(3)(A) of the Coastal Zone Management Act of 1972, as amended (Act), 16 U.S.C. § 1456(c)(3)(A), and 15 C.F.R. § 930.131 of the Department of Commerce's (Department's) implementing regulations, the State's objection to Appellant's project on the ground that it is inconsistent with the NYCMP precludes COE from issuing any permit required for the project to proceed unless the Secretary of Commerce (Secretary) determines that the project is "consistent with the objectives of [the Act] or is otherwise necessary in the interest of national security." 16 U.S.C. § 1456(c)(3)(A).

Appeal to the Secretary of Commerce

It appears that Appellant received the State's letter of objection on or about August 8, 1986. See Letter from Appellant to Secretary Baldrige, dated September 17, 1986. (The State asserts that Appellant received the letter on or about August 6, 1986, but provides no support for the assertion. Letter from State to Secretary Baldrige, dated October 21, 1986, at 3.) On September 5, 1986, Appellant's attorney sent a letter via express mail to Peter Tweedt, Director of the Office of Coastal Resource Management in the Department's National Oceanic and Atmospheric Administration (NOAA), stating, in pertinent part, "Pursuant to 15 CFR § 930.125, my client wishes to appeal the New York Department of State's consistency decision. Please advise on the appeal procedure so this matter may be expeditiously reviewed." Letter from Appellant to Peter Tweedt, dated September 5, 1986. On September 18 a new attorney for Appellant notified Secretary Baldrige and the State of the appeal and provided a supporting statement. Letter from Appellant to Secretary Baldrige, dated September 17, 1986. On October 30 Appellant's attorney provided additional information in support of the appeal and for the first time explicitly communicated the ground for the appeal: that the project was "consistent with the objectives and purposes of the Act." Letter from Appellant to Secretary Baldrige, dated October 29, 1986. The Department published a notice of this appeal in the Federal Register on December 1, 1986 (51 Fed. Reg. 43232) and in the local newspaper for the Hempstead area, Newsday (Nassau edition), on December 26 through 28, 1986. The notice stated that interested parties could submit comments on the issues raised by the appeal within thirty days of the date of publication of the

notice. Two comments were received. The Department also solicited and received comments on the project from COE, EPA, NMFS, FWS, and the U.S. Coast Guard.

Appellant and the State were asked to file briefs addressing the issue of timeliness of the appeal and the four elements identified in 15 C.F.R. § 930.121 as necessary for a finding that the proposed activity is consistent with the objectives or purposes of the Act. The Department received those briefs on December 29, 1986. The State had previously submitted a brief on October 22, 1986, responding to Appellant's submission dated September 17, 1986. A final reply brief was received from Appellant on February 18, 1987, and the State on February 19, 1987. Appellant also submitted a brief on January 14, 1987.

All documents submitted by the parties and comments submitted by non-parties during the course of this appeal are included in the administrative record of this decision. Materials are considered, however, only if they are relevant to the statutory and regulatory grounds for deciding consistency appeals.

Timeliness

The first issue to be addressed in this matter is whether Appellant timely filed his appeal, an issue that both parties have raised. The conclusion depends on whether Appellant's letter dated September 5, 1986, to Mr. Tweedt was adequate to meet the filing time limitations of the implementing regulations to the Act.

The implementing regulations provide:

1. Appellant may file¹ a notice of appeal with the Secretary within thirty days of Appellant's receipt of a state agency objection (15 C.F.R. § 930.125(a));
2. The notice of appeal shall be accompanied by a statement in support of Appellant's position, along with supporting data and information (15 C.F.R. § 930.125(a));
3. Appellant shall send a copy of the notice of appeal and accompanying documents to the Federal and state agencies involved (15 C.F.R. § 930.125(a));
4. No extension of time will be permitted for filing a notice of appeal (15 C.F.R. § 930.125(b)); and
5. The Secretary may approve a reasonable request for an extension of time to submit supporting information as long

¹ The regulations do not define the term "file".

as the request is filed with the Secretary within the thirty-day period. Normally, the Secretary shall limit an extension period to fifteen days (15 C.F.R. § 930.125(c)).

I have concluded that Appellant's letter dated September 5, 1986, was sufficient to meet the regulatory time limit for filing an appeal. As I have so concluded, there is no need to address the State's argument that the time limit is a substantive rule rather than a procedural one and therefore may not be waived.

I accept the letter as an informal notice of appeal, which appeal Appellant perfected by his submissions received September 18 and October 30. The September 5 letter specifically stated that Appellant wished to appeal the State's objection. Appellant sent the letter via express mail just as the deadline was about to expire, leaving no doubt about his intention. Although the letter was not addressed to the Secretary, it did constitute initial notice to the Department that Appellant wished to appeal.²

The State's argument that the letter merely requested advice is not a fair reading of the letter. Further, Appellant's request in the letter for information on the appropriate procedure to follow, implicitly including a request for instructions on how to cure any deficiency, should be treated as a request for an extension of time to submit supporting data and information. It is the Department's normal practice to grant such requests. The September 18 submission contained the statement of support required by 15 C.F.R. § 930.125(a). The October 30 submission contained the requisite supporting data and information and explicitly stated the ground for the appeal. Copies of both the September 18 and October 30 submissions were sent to the State and COE. Viewing Appellant's actions as a whole, I find that this appeal was timely filed. I accordingly find that this appeal is properly before me for consideration.³

My ruling is supported by case law interpreting certain Internal Revenue Service (IRS) provisions. In United States v. Kales,

- 2 Appellant has explained that the letter was addressed to Mr. Tweedt rather than the Secretary because Mr. Tweedt was the Department official courtesy-copied on the State's objection letter, leading Appellant to assume that Mr. Tweedt was the Department's "representative in this matter." Letter from Appellant to Secretary Baldrige, dated September 17, 1986.
- 3 My decision presumes the validity of the State's consistency review and objection. Although there is some authority for a broad review of the State's objection, the Secretary has generally limited consistency appeal decisions to the statutory and regulatory grounds for deciding them. See Exxon v. Fischer, 807 F.2d 842 (9th Cir. 1987).

314 U.S. 186 (1941), the Supreme Court held that timely notice fairly advising the Tax Commissioner of the nature of a taxpayer's claim but not complying with formal requirements would be treated as a claim filed within the proper time where the formal defects were cured by an amendment filed after the lapse of the statutory time period. Accord, Sicanoff Vegetable Oil Corp v. United States, 181 F. Supp. 265 (Ct. Cl. 1960); American Radiator & Standard Sanitary Corp. v. United States, 318 F.2d 925 (Ct. Cl. 1963).

Grounds for Sustaining an Appeal

Section 307(c)(3)(A) of the Act provides that Federal licenses or permits for activities affecting land or water uses in the coastal zone may not be granted until either the State concurs in the determination that such activities are consistent with its Federally approved coastal zone management plan (its concurrence may be conclusively presumed in certain circumstances) or the Secretary finds, "after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of [the Act] or is otherwise necessary in the interest of national security." Appellant has pleaded only that his activity is "consistent with the objectives and purposes of the Act." Letter from Appellant to Secretary Baldrige, dated October 29, 1986. I have therefore confined my review to the first statutory ground.

The regulation interpreting the statutory ground "consistent with the objectives of" the Act is found at 15 C.F.R. § 930.121 and states:

The term "consistent with the objectives or purposes of the Act" describes a Federal license or permit activity, or a Federal assistance activity which, although inconsistent with a State's management program, is found by the Secretary to be permissible because it satisfies the following four requirements:

- (a) The activity furthers one or more of the competing national objectives or purposes contained in sections 302 or 303 of the Act,
- (b) 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,
- (c) The activity will not violate any requirements of the Clean Air Act, as amended, or the Federal Water Pollution Control Act, as amended, and

(d) There is no reasonable alternative available (e.g., location[,] design, etc.) which would permit the activity to be conducted in a manner consistent with the management program.

In order to sustain Appellant's appeal, I must find that the project satisfies all four elements of 15 C.F.R. § 930.121. Failure to satisfy any one element precludes me from finding that the project is consistent with the objectives of the Act.

Fourth Element: Lack of Reasonable Alternative

Because the State in its letter of objection asserts that an alternative exists permitting the activity to be conducted in a manner consistent with the NYCMP, I turn first to consideration of the fourth element.

As mentioned previously, the State recommended an open-pile dock in a "T"- or "L"-shape, stating that such a configuration would provide a stable docking facility. State's Consistency Objection Letter, dated August 4, 1986. Although the State in its letter of objection did not explicitly recommend a particular width for the dock, it referred Appellant to a letter containing a sketch specifying that the dock should be no more than six feet wide. Letter from State to Secretary Baldrige, dated October 21, 1986.

Appellant chose the project design he proposed (and executed) at least in part because that configuration provided an "alternate" waiting area for his restaurant. Appellant does not allege or offer any evidence that the alternative designs identified by the State as consistent with the NYCMP would cost any more than the one he executed. I therefore conclude that the alternative designs are reasonable as far as cost is concerned. Appellant asserts that the alternative designs would fail to "allow for the safe and secure waiting area that the Bianchis require of their dock." Letter from Appellant to Secretary Baldrige, dated December 23, 1986, at 7. The State, however, makes no claim that its recommended alternative would allow for a waiting area. This does not make the alternative unreasonable, because Appellant has stated that there is adequate waiting room in the restaurant. In response to a request from the State for additional information in order to complete its consistency review of Appellant's project, Appellant replied, in pertinent part, "We do not wish to use the dock specifically for a waiting area, but instead to improve and modernize the boatmen's access. We have sufficient room for customers to wait for dinner in our bar area." Undated Letter from Appellant to Larry S. Enoch, Environmental Analyst, Coastal Management Program, New York State Department of State, reproduced at Enclosure 20 of Appellant's Supporting Documentation (Consultant's Survey), dated October 18, 1986, at 3. Accordingly,

the issue becomes whether the suggested alternative is structurally adequate for boat docking.

In support of its position, the State submitted an engineering report prepared by its staff on February 11, 1987. Letter from State to Secretary Baldrige, dated February 18, 1987, Exhibit A. The report concluded that a properly designed six-foot-wide open-pile timber dock in an "L"- or "T"-shape would provide sufficient strength and stability to serve as a safe mooring in Reynolds Channel and thus constitute a reasonable alternative to the docking facility Appellant had constructed. Id. at 2.

Appellant states that a six-foot-wide dock would not be as strong as the docking facility he has constructed; Appellant fails to address sufficiently the structural adequacy of the six-foot-wide alternative. Appellant's Supporting Documentation (Consultant's Survey), dated October 18, 1986, at 10.

Appellant does assert, without providing any proof, that "the last storm, Hurricane Gloria, left many of the smaller narrow docks in our area with severe damage" and that several dock builders have told him that they believe a square structure would withstand greater storm forces than the narrow "T"- or "L"-shaped dock. Undated Letter from Appellant to Larry S. Enoch, at 4. The State's engineers counter that they "believe catastrophic events such as hurricanes can cause severe damage or destruction to all types of structures, no matter how many precautions are taken." Letter from State to Secretary Baldrige, dated February 18, 1987, Exhibit A, at 2. I am persuaded by the State's counterargument.

Appellant also states that it is sometimes "almost impossible to keep one's balance on the floating docks before getting to the dock-ramp when prevailing south easterly [sic] winds, which are at times very strong all summer long, are blowing." Undated Letter from Appellant to Larry S. Enoch, at 4. The response of the State's engineers, which I find convincing, is the following:

[T]his condition will exist whether the floating docks are attached to the existing fixed rectangular dock or one of "T" or "L" shaped configuration. This type of instability is primarily due to the unequal vertical movement caused by wave action. Once a person is on a fixed dock, this movement under normal circumstances will have little effect on the structure's stability. Letter from State to Secretary Baldrige, dated February 18, 1987, Exhibit A, at 2.

Appellant also cites as support for his position the letter submitted by the U.S. Coast Guard. The Coast Guard, although stating that it had no comment on the reasonableness of the alternative proposed by the State, did provide the following additional statement:

However, during the summer boating season, Reynolds Channel which is only 500 feet wide experiences heavy yacht traffic causing heavy wave/wake action in this area. In the absence of protection measures to attenuate the effect of the wave/wake action, the Appellant and his clients may find mooring difficult and experience personal property damage to their vessels. Letter from J.W. Kime, Rear Admiral, U.S. Coast Guard, Chief, Office of Marine Safety, Security and Environmental Protection to Daniel McGovern, General Counsel, NOAA.

The State responds that "[t]he lateral loads imposed by strong waves must be considered in the design of any docking facility. However, there is no reason to believe that a properly designed six foot wide dock cannot accommodate these conditions and be safe, rigid, and serviceable." Letter from State to Secretary Baldrige, dated February 18, 1987, Exhibit A, at 2.

The State's response seems reasonable. If the Coast Guard had believed that the recommended protection measures could not be achieved with the proposed six-foot-wide alternative, it presumably would have said so. In addition, I note that Appellant's engineering consultant never states that the proposed alternative would not be sufficiently stable to provide safe mooring during heavy wave/wake action.

One other agency letter regarding this appeal merits mention at this juncture. COE states that it concurs with the reasonableness of the State's proposed alternative; it "does not feel that the proposed alternative would be unstable." COE adds that, in order to increase the stability of the proposed alternative, it would "consider authorizing the alternative structure to be widened to a width of eight feet." Letter from Ingros Desvousges, Project Manager, Eastern Permits Section, COE, to Anthony J. Calio, Administrator, NOAA, dated January 9, 1987, at 1. The important point here is that COE agrees that the six-foot-wide alternative would be structurally adequate for safe mooring.

The State also asserts, providing aerial photographic evidence from 1984 and 1985 (the latter photograph taken three days after Hurricane Gloria struck the area), that most of the other docks on Reynolds Channel are similar in size and configuration to the recommended alternative designs and have demonstrated their stability through time. Letters from State to Secretary Baldrige, dated October 21, 1986, at 6, and February 18, 1987. Appellant provides nonaerial photographs taken in 1986 of neighboring structures allegedly similar to Appellant's project. Appellant's Supporting Documentation (Consultant's Survey), dated October 18, 1986.

I note two points with regard to Appellant's photographic evidence. First, and most important, it is not probative on the issue of the structural adequacy of the State's proposed alternative. Second, FWS has made the following comment:

[R]eview of the examples provided showed most to be either of a much smaller magnitude than the proposed project or structures completed prior to the existence of current legislation. Regardless of this, the Corps has repeatedly indicated in the past that applications are reviewed on their own merit and not in relation to unassociated applications. Letter from Paul P. Hamilton, Field Supervisor, FWS, to Ingro Desvousges, Project Manager, Eastern Permits Section, COE, dated December 15, 1986 -- copy attached to Letter from Ingro Desvousges to Anthony J. Calio, Administrator, NOAA, dated January 9, 1987.

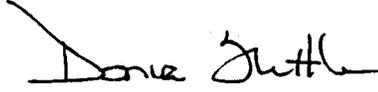
In summary, I find that the proposed alternative is structurally adequate for boat docking.

Appellant additionally asserts that the alternative designs would interfere with the riparian rights of his neighbors, to, e.g., build their own docks, because boats would be forced to "swing along" the neighbors' properties in order to enter the "T"- or "L"-shaped dock. Letter from Appellant to Secretary Baldrige, dated December 23, 1986, at 8; undated Letter from Appellant to Larry S. Enoch, at 3. The State responds that incompatibility with neighboring dock designs could occur with Appellant's proposal as well and that "[i]f docks were constructed by property owners, the design of these facilities would have to take into account any existing dock constructed by Appellant. An incompatible design could destroy the usefulness of not only the alternatives suggested by the Department of State, but of Appellant's proposal as well." Letter from State to Secretary Baldrige, dated December 24, 1986, at 10. I am persuaded by the State's rebuttal.

In accordance with the foregoing analysis, I find that there is a reasonable alternative available that would permit the activity to be conducted in a manner consistent with the NYCMP. 15 C.F.R. § 930.121(d). To reiterate, a six-foot-wide open-pile timber dock in a "T"- or "L"-shape would provide safe mooring for patrons of Appellant's restaurant, who may wait in the bar area for tables.

Conclusion

As stated previously, because Appellant's project must satisfy all four elements of 15 C.F.R. § 930.121 in order for me to find that it is consistent with the objectives of the Act, failure to satisfy any one element precludes me from sustaining the appeal. Because I found that the fourth element of the regulation is not satisfied, it is unnecessary to examine the other three elements. Therefore, I will not override the State's objection to Appellant's consistency certification. The appeal is denied.


ACTING Secretary of Commerce