

DECISION AND FINDINGS
IN THE
CONSISTENCY APPEAL OF
HENRY CROSBY FROM AN
OBJECTION BY THE
STATE OF SOUTH CAROLINA
SOUTH CAROLINA COASTAL COUNCIL

DECEMBER 29, 1992

SYNOPSIS OF DECISION

In February, 1989, Henry Crosby (Appellant) applied to the U.S. Army Corps of Engineers (Corps) for a permit under section 404 of the Clean Water Act to place fill material in a wetland for the purpose of constructing an impoundment and installing a water control structure. In conjunction with that Federal permit application, the Appellant submitted to the Corps for review by the South Carolina Coastal Council (State), the State of South Carolina's coastal management agency, 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 South Carolina's Federally-approved Coastal Management Program.

On September 8, 1989, the State objected to the Appellant's consistency certification for the proposed project on the ground that the proposed project is not in accordance with South Carolina's coastal management public policies and objectives of providing for the protection of wildlife and fisheries resources from significant negative impacts and productive freshwater wetlands from significant permanent alteration.

Under CZMA § 307(c)(3)(A) and 15 C.F.R. § 930.131 (1988), the State's consistency objection precludes Federal agencies 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 State's objection.

On October 17, 1989, in accordance with CZMA § 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart H, Appellant's agent 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. To find that the proposed activity satisfies Ground I, the Appellant's project must satisfy the four elements specified at 15 C.F.R. § 930.121. 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(b):

Ground I

In order to find that the second element of Ground I has been satisfied, the Secretary must find that 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. The Secretary found that the Appellant's proposed project would adversely affect the natural resources of the coastal zone by permanently altering wetlands, thus causing loss of normal functions and values. In addition, the Secretary found that the proposed activity's contribution to the national interest would be minimal. Therefore, the proposed project failed to satisfy the second element of Ground I. Because the second element of Ground I was 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. 7-19.)

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.

I. Background

In February, 1989, Henry Crosby (Appellant) applied to the U.S. Army Corps of Engineers for a permit under section 404 of the Clean Water Act to place fill material in a wetland for the purpose of constructing an impoundment and installing a water control structure. The objective of this project is to construct a "green tree reservoir" for private recreational use.¹ The excavation, filling, and impoundment will affect approximately 4.5 acres of freshwater wetlands. The proposed impoundment will be flooded to depths of 0.7 to 1.0 feet from October through February and will provide a static water level and aerial cover for migratory waterfowl. The site of the proposed project is approximately two miles from Willtown Bluff Landing, Colleton County, South Carolina. Brief and Supporting Documents for Appeal of South Carolina Coastal Council Decision to Deny Certification, May 16, 1991 (Appellant's Opening Brief); Brief in Support of South Carolina Coastal Council Determination, July 31, 1991 (State's Brief).

On September 8, 1989, the South Carolina Coastal Council (the State) objected to Appellant's consistency certification for the proposed project on the grounds that it violates certain policies of the State's coastal zone management program. Specifically, the State cited its policies against approval of projects deemed to have a significant negative impact on wildlife and fisheries resources, and against approval of projects which would require fill or other significant permanent alteration of a productive freshwater marsh. 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.

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), 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 or purposes of the CZMA, or necessary in the interest of national security.

¹ Appellant explains that the term "green tree reservoir" refers to the manipulation of water in an area so that trees are able to stay alive, or "green." Appellant's Opening Brief, Attachment 4 at 15.

II. Appeal to the Secretary of Commerce

On October 17, 1989, Lafayette S. Lyle, III, of Agracadabra Land Counselors, filed an appeal with the Secretary on behalf of Henry Crosby. The appeal was filed under section 307(c)(3)(A) of the CZMA and 15 C.F.R. Part 930, Subpart H.

On December 26, 1989, Appellant informed the Department that Appellant and the State were conducting discussions to informally resolve the dispute, in accordance with 15 C.F.R. 930.124, and asked that the appeal be held in abeyance while the discussions were being conducted.

In October, 1990, the parties agreed that the discussions had not been fruitful and that the appeals process should be reinitiated. Appellant asked that the Department grant him two additional months to file his brief and supporting information. The Department granted this request. Several more extensions of time to submit this brief were subsequently requested and granted. Letters from Thomas A. Campbell, General Counsel, NOAA, to both parties, April 30, 1991.

After Appellant perfected the appeal by filing supporting data and information pursuant to 15 C.F.R. 930.125, the Department solicited comments on issues germane to the decision in the appeal by way of notices in the Federal Register, 56 Fed. Reg. 49173 (September 27, 1991) and the Charleston, South Carolina News and Courier (October 2, 3, and 4, 1991). The Department received no public comments.

On September 20, 1991, the Department solicited the views of other federal agencies on the four regulatory criteria 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. The Department requested comments from the National Marine Fisheries Service, the Environmental Protection Agency, the U.S. Army Corps of Engineers, and the Fish and Wildlife Service of the Department of Interior. All agencies responded.

After the comment period closed, the Department gave the parties an opportunity to file final responses to any submissions filed in the appeal. Appellant did so on January 1, 1992; the State did not. All materials received by the Department during the course of this appeal are included in the administrative record. The Department considers only those comments that are relevant to the statutory and regulatory grounds for deciding an appeal, however. See Decision and Findings in the Consistency Appeal of Amoco Production Company, July 20, 1990, at 4.

III. Grounds for Reviewing an Appeal

Before I can determine whether the grounds for secretarial override have been satisfied, I must determine that the State's objection complies with the requirements of section 307(c)(3)(A) of the CZMA and 15 C.F.R. 930.64(a) and (b). Those sections provide that the state's objection must describe how the proposed project is inconsistent with specific, enforceable elements of the State's coastal management program. The State cited its policies of opposing activities deemed to have a significant negative impact on wildlife and fisheries resources, and activities requiring fill or other permanent alteration of wetlands. Both of these policies are part of the State's coastal management program. See State's Brief at 2. The State also explained how Appellant's project is inconsistent with those policies. Because the State's objection describes how Appellant's proposed activity is inconsistent with specific, enforceable elements of the management plan, I find that the State's objection was properly lodged.²

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 or (2) otherwise necessary in the interest of national security. See also 15 C.F.R. 930.130(a). Appellant has pleaded only the first ground.

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

² Appellant charges that the State failed in its objection to consider certain elements of its management program, such as the State's policy to protect and where possible, to restore or enhance the resources of the coastal zone. Appellant's Opening Brief at 1. Appellant also suggests that the State's policies somehow violate to National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 et seq. Both of these issues are beyond the scope of my review in this appeal. As in previous appeals, I do not consider whether the State properly applied its policies in determining that the proposed project is inconsistent with its coastal management program. I do not make my own determination as to whether the proposed project is actually inconsistent with the State's program. My review of the State's objection is limited to determining whether that objection was properly lodged, i.e., whether it complies with the requirements of the CZMA and its implementing regulations. For that, I need only determine that the State has cited policies that are part of its management program, and has explained how the proposed project will be inconsistent with those policies.

1. The proposed activity furthers one or more of the competing national objectives or purposes contained in sections 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 Water 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. 15 C.F.R. 930.121(d).

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

IV. 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 balancing, the Secretary must first identify the proposed project's adverse effects and its contribution to the national interest.

A. Adverse Effects

Appellant's proposed project consists of constructing embankments, and improving existing embankments, for a total of 6,625 linear feet of embankments. The existing 1,000-foot embankment located along the south/west property line will not require any additional work. Fill will be required to improve the 4,425 feet of existing embankments on the north and south sides of the proposed impoundment. The remainder of the embankments will be new. Fill material for the proposed work will be obtained adjacent to the proposed embankments. Joint Public Notice, Charleston District Corps of Engineers, the South Carolina Coastal Council and the South Carolina Department of Health and Environmental Control, March 17, 1989.

Appellant argues that "no net loss of wetlands" will result from

the proposed project. Appellant claims that 3.45 acres of wetlands on the site are already "disturbed," having been altered by the installation of existing embankments, and that the project will only add 1.1 more acres to those characterized as "disturbed." Appellant argues that therefore, the net result of the construction, which will cover 4.6 acres, is a net "disturbance, not loss, of 1.1 acres." Id. at 10.

The State responds by challenging Appellant's argument that the wetlands on the site of the proposed construction are "disturbed." The State argues:

The [South Carolina Coastal] Council looks at the current condition of the wetlands and they represent existing and undisturbed wetlands. Much of the coast of South Carolina prior to the passage of the 1977 Coastal Management Act has been altered by man... This issue is the red herring because it would seek to characterize these wetlands as being disturbed when the more accurate description is that these are viable wetlands serving all of the purposes of wetlands having not been altered by man.

State's Brief at 9.

It appears that Appellant is arguing that I should consider only the adverse effects of the proposed project on the 1.1 acres of wetlands he characterizes as "undisturbed," while the State is arguing that I should consider the adverse effects on the entire construction area. Appellant does not dispute that 4.5 acres of wetlands will be filled as part of the proposed project. I am not persuaded that I should disregard the proposed project's potential adverse effects on those portions of the site that Appellant calls "disturbed" wetlands. An analysis of a project's adverse effects on a particular resource will necessarily take into account the condition of the resource itself. I find nothing in the record to indicate that the proposed activity will affect some portions of these wetlands differently than other portions. I will therefore consider the proposed project's adverse effects on the 4.5 acres that will be filled.

Appellant claims that the proposed project will have no detrimental impact on the integrity of the impounded area. Appellant's Opening Brief, Attachment 4, Cover Page. Appellant argues that the purpose of the proposed green tree reservoir is "waterfowl and wading bird management," a use that would enhance the resource, while there is limited benefit in leaving the area in its current, "severely disturbed" state. Appellant's Opening Brief at 1.

In response, the State argues that permanent alteration of wetlands would result from Appellant's proposed excavation and filling activities. Additional permanent alteration would

result from the proposed impoundment, which would change the area hydrologically. The State argues that these changes would affect "the basic functions of production and export as well as limiting passage of organisms in and out of the impounded area." 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, September 8, 1989.

The South Carolina Wildlife and Marine Resources Department noted that the area in which the project is proposed consists of productive, freshwater wetlands:

In their natural state, the wetlands in question perform a number of well documented ecological and water resource functions. Forested floodplain areas provide an important link between upland watersheds and downstream aquatic environments. Detritus produced in these areas serves as an important energy source for aquatic food chains in adjoining creeks and receiving water bodies. Woody plant communities provide excellent food, cover, and nesting for a variety of wildlife species. Many wildlife species are attracted to the extensive edge and structurally heterogenous habitats found in forested areas.

Letter from James A. Timmerman, Jr., Executive Director, South Carolina Wildlife and Marine Resources Department, to Dr. Wayne H. Beam, Executive Director, South Carolina Coastal Council, May 11, 1989.

The Wildlife and Marine Resources Department concluded that "[i]n light of the direct, significant loss of productive wetlands and the loss of normal functions and values," the permit for Appellant's project should be denied. Id. at 3.

The State also submitted, in support of its position on this appeal, comments that were provided by the Fish and Wildlife Service of the U.S. Department of Interior (FWS) to the U.S. Army Corps of Engineers while the Corps was considering whether to approve Appellant's permit application. The FWS urged the Corps to deny the permit, stating:

Long-term effects of greentree operation on the existing vegetation is uncertain. The potential exists for eventual conversion of forested wetland habitat to emergent wetlands, and the ultimate loss of this locally unique wetland habitat component to the wildlife dependent on it.

Letter from Edwin M. EuDaly, Acting Field Supervisor, Fish and Wildlife Service, to Lt. Colonel Stewart H. Bornhoft, District Engineer, U.S. Army Corps of Engineers, April 25, 1989.

In addition to the parties' submissions, the record contains the comments submitted by other federal agencies to the Department for purposes of this appeal. The FWS, in response to the Department's request for comments, submitted copies of its comments to the Corps, which are discussed above.

The Environmental Protection Agency (EPA) stated:

The available evidence indicates that the proposed activity would cause adverse effects on the natural resources of this wetland area. In addition, 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. As noted in the Clean Water Act Section 404(b)(1) Guidelines, "From a national perspective... filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines" (40 C.F.R. 230.1(d)).

Letter from Richard E. Sanderson, Director, Office of Federal Activities, EPA, to Ray Kammer, Deputy Under Secretary for Oceans and Atmosphere, Department of Commerce, November 8, 1991.

The National Marine Fisheries Service recommended that Appellant's proposed project not be authorized, commenting:

The wetlands at the project site support emergent, scrub/shrub, and forested plant assemblages that directly and indirectly support living marine resources that are of ecological, commercial, and recreational importance. The attached Field Investigation Report (FIR), that we used for our analysis of the project, provides details. Specifically, the FIR indicates that the area provides habitat for shad, herring, striped bass, and shrimp. The endangered shortnose sturgeon also migrates through the area. In addition, the wetlands provide food in the form of detritus and perform water quality maintenance functions that benefit downstream fisheries.

Memorandum from William W. Fox, Jr., Office of the Director, National Marine Fisheries Service, to Susan K. Auer, Attorney-Adviser, Office of Assistant General Counsel for Ocean Services, NOAA, October 16, 1991.

A review of the record on this appeal indicates that permanent alteration of the wetlands will result from Appellant's proposed project. The submissions by the parties suggest that the change could result in the ultimate loss of this wetland habitat, which

would adversely affect the natural resources of this area. The Appellant has not provided any evidence to contradict this. I therefore find that the proposed project will adversely affect the environment by permanently altering the wetlands, thus causing the loss of normal functions and values.

B. Contribution to the National Interest

With respect to the proposed project's contribution to the national interest, Appellant argues that the proposed project will further the desirable goal of waterfowl management and thus will create an enhanced resource. Appellant points out that the public benefits of waterfowl management, and the enhancement of the coastal zone, have been recognized in South Carolina's laws. Appellant's Opening Brief at 1.

Before I can weigh the proposed project's contribution to the national interest against the project's adverse effects, I must first define the national interests involved. 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 [Coastal Zone Management] 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.

Decision and Findings in the Consistency Appeal of Korea Drilling Company, Ltd., January 19, 1989, at 16.

The CZMA includes, in section 303(1), enhancement of coastal zone resources as one of its objectives. Section 303(2)(A) mentions "protection of natural resources, including... fish and wildlife and their habitat" as another objective of the CZMA. Therefore, I find that waterfowl management, to the extent it involves "protection of... wildlife and their habitat," and enhancement of coastal zone resources are national interests that are properly considered for purposes of Element Two analysis. I now turn to an analysis of the extent to which Appellant's proposed project contributes to these interests.

The State argues that it "has consistently objected to the impounding of wetland areas except under rare circumstances," and that Appellant's claim that the proposed project would enhance the resource "meets with no agreement" on the part of the agencies that commented during the consistency determination process. State's Brief at 8-9.

The record does indicate that questions were raised regarding Appellant's argument that the proposed green tree reservoir would enhance the area. The South Carolina Wildlife and Marine Resources Department stated:

We would question the suitability of this area for management as a greentree reservoir. The area contains very few mast producing plant species, a key part of a successful reservoir. With the proposed flooding regime, plant species requiring seasonal drawdown may be adversely impacted and eventually killed.

Letter from James A. Timmerman, Jr., Executive Director, South Carolina Wildlife and Marine Resources Department, to Dr. H. Wayne Beam, Executive Director, South Carolina Coastal Council, May 11, 1989.

The FWS also expressed reservations about the benefits of Appellant's proposed project:

The area does not meet the criteria of a classic green-tree reservoir. Although the existing tree species would provide some protective cover, the lack of mast-producing hardwoods severely limits its attraction to those waterfowl species most associated with this type of habitat, i.e., mallards, black ducks, wood ducks, and other dabblers.

Letter from Edwin M. EuDaly, Acting Field Supervisor, FWS, to Lt. Colonel Stewart H. Bornhoft, District Engineer, U.S. Army Corps of Engineers, April 25, 1989.

The EPA commented:

The applicant has proposed the creation of a "greentree" reservoir. EPA finds this proposal has little merit since the project area does not contain any mast producing trees and has the potential to be converted to an emergent marsh due to long duration hydroperiods... The applicant has stated that approximately 80% of the adjacent area is existing impoundments. EPA does not see the addition of another impoundment as an enhancement.

Letter from Wesley B. Crum, Chief, Wetlands and Coastal Program Section, Region IV, EPA, to LTC James T. Scott, District Engineer, U.S. Army Corps of Engineers, August 15, 1989.

Appellant presents no evidence to demonstrate how the "waterfowl management" aspects of his proposed project will contribute to the protection of any forms of wildlife and their habitat.

Appellant does not present any other evidence demonstrating how his proposed project would contribute to the national interest in enhancing the resources of the coastal zone. In light of the agencies' above statements that the proposed green tree reservoir will not enhance the area, I find that Appellant's proposed project will contribute minimally, if at all, to the national interest.

C. Balancing

Above, I found that Appellant's proposed project would adversely affect the natural resources of the coastal zone by permanently altering wetlands, thus causing loss of normal functions and values. In addition, I found that the proposed activity's contribution to the national interest would be minimal. I now find that the evidence does not convince me that "[w]hen performed separately or when its cumulative effects are considered, [the activity] will not cause adverse effects on 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.

V. Conclusion

Because Appellant must satisfy all four elements of the regulations in order for me to sustain his appeal, failure to satisfy any one element precludes my finding that Appellant's project is "consistent with the objectives of the [CZMA]." Because I found that 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. Crosby's consistency certification.


Secretary of Commerce