DECISION AND FINDINGS

IN THE

CONSISTENCY APPEAL OF

JOSE R. PEREZ-VILLAMIL FROM

AN OBJECTION BY THE

PUERTO RICO PLANNING BOARD

NOVEMBER 20, 1991

SYNOPSIS OF DECISION

Mr. José R. Pérez-Villamil (Appellant) is the owner of a 62 acre resort, known as Tamarindo Estates, on Culebra Island, Puerto Rico. This property comprises 1,800 feet of shoreline adjacent to Tamarindo Bay. To facilitate water access for the Appellant and his invitees at Tamarindo Estates, the Appellant proposes to construct a wooden pier that would be 125 feet in length with a 25 foot cross-pier at the end.

On January 3, 1989, the Appellant applied to the U.S. Army Corps of Engineers (Corps) for a permit to construct a pier. In conjunction with that Federal permit application the Appellant submitted to the Corps for review of the Puerto Rico Planning Board (PRPB), the Commonwealth of Puerto Rico's coastal management agency, under section 307(c)(3)(A) of the Coastal Zone Management Act of 1972, as amended (CZMA), 16 U.S.C. § 1456(c)(3)(A), a certification that the proposed activity was consistent with Puerto Rico's Federally-approved Coastal Management Program (CMP).

On July 24, 1989, the PRPB objected to the Appellant's consistency certification for the proposed project on the ground that it violates the CMP's policies that protect sea turtle habitat. The PRPB did not recommend any alternatives to the proposed pier.

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

On August 16, 1989, in accordance with CZMA § 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart H, the Appellant filed with the Department of Commerce (Department) a notice of appeal from the PRPB's objection to the Appellant's consistency certification for the proposed project. The Appellant based his appeal on Ground I. Upon consideration of the information submitted by the Appellant, the PRPB and several Federal agencies, the Secretary of Commerce made the following findings pursuant to 15 C.F.R. § 930.121(b):

Ground I

The proposed pier will cause adverse effects on the resources of the coastal zone, when performed separately or in conjunction

with other activities, substantial enough to outweigh its contribution to the national interest. Because the second element of Ground I was therefore not met, it was unnecessary to examine the other three elements. Accordingly, the proposed project is not consistent with the objectives or purposes of the CZMA.
(Pp. 5 - 8)

Conclusion

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

DECISION

I. Background

Mr. José R. Pérez-Villamil (Appellant) is the owner of a 62 acre resort, known as Tamarindo Estates, on Culebra Island, Puerto Rico. Letter from José R. Pérez-Villamil to John A. Knauss, Administrator, NOAA, (Appellant's Brief), October 13, 1989, at 3. This property comprises 1,800 feet of shoreline. Id. The Appellant proposes to construct a wooden pier that would be 125 feet in length with a 25 foot cross-pier at the end. The Appellant has stated that the pier would provide: 1) boating access to the Appellant's property; 2) protection of the coral formations in the vicinity of the proposed pier from swimmers, snorkelers and boaters; 3) indirect protection of seagrass in the vicinity from anchoring; 4) coastal-dependent economic growth; and 5) shelter for boats in distress. Letter from José R. Pérez-Villamil to John A. Knauss, Under Secretary for Oceans and Atmosphere, Department of Commerce, (Appellant's Reply Brief), May 9, 1990, at 1-2.

On January 3, 1989, the Appellant applied to the U.S. Army Corps of Engineers (Corps) for a permit[1] to construct a pier. In conjunction with that Federal permit application the Appellant submitted to the Corps for review of the Puerto Rico Planning Board (PRPB), the Commonwealth of Puerto Rico's coastal management agency, under section 307(c)(3)(A) of the Coastal Zone Management Act of 1972, as amended (CZMA), 16 U.S.C. § 1456(c)(3)(A), a certification that the proposed activity was consistent with Puerto Rico's Federally-approved Coastal Management Program (CMP).

On July 24, 1989, the PRPB objected to the Appellant's consistency certification for the proposed project on the ground that it violates the CMP's policies that protect sea turtle habitat.[2] Letter from Lina M. Dueño, Acting Chairperson, PRPB, to José R. Pérez-Villamil, (PRPB Objection), July 24, 1989. Specifically, the pier would be located near Tamarindo Bay, an ecologically sensitive area which supports endangered and

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

[2] The Corps denied the Appellant's permit application without prejudice based on the PRPB's objection to the proposed project. Letter from LTC Charles S. Cox, Deputy District Engineer, U.S. Army Corps of Engineers, to José R. Pérez-Villamil, August 2, 1989.

threatened sea turtles. Id. at 2. In addition to explaining the basis of its objection, the PRPB also notified the Appellant of his right to appeal the PRPB's decision to the Department of Commerce (Department) as provided under CZMA § 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart H. Id.

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

II. Appeal to the Secretary of Commerce

On August 16, 1989, in accordance with § 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart H, the Appellant filed with this Department a notice of appeal from the PRPB's objection to the Appellant's consistency certification for the proposed project. In that notice, the Appellant requested an extension of time to submit his supporting statements, data and other information. Letter from José R. Pérez-Villamil to the Hon. William C. Verity, Secretary of Commerce, August 10, 1989. The parties to the appeal are José R. Pérez-Villamil and the Puerto Rico Planning Board.

When the Appellant perfected the appeal by filing supporting data and information pursuant to 15 C.F.R. § 930.125, comments on the issues germane to the decision in the appeal were solicited by way of public notices in the Federal Register, 54 Fed. Reg. 43,843 (October 27, 1989), and the San Juan Star, (November 17, 18, 19, 1989). The Department received one public comment opposing the proposed pier.

On January 8, 1990, the Department solicited the views of four Federal agencies[3] 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.[4] Three agencies responded. The Corps did not respond because it denied the Appellant's permit without prejudice, based on the PRPB's

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[3] Comments were requested from the Army Corps of Engineers, the Department of the Interior, the Environmental Protection Agency and the National Marine Fisheries Service. All but the Corps of Engineers responded.

[4] See infra at 4.

objection to the project.[5] Letter from Col. Terrence C. Salt, Assistant Director of Civil Works, U.S. Army Corps of Engineers, to John A. Knauss, Administrator, NOAA, March 9, 1990.

On November 27, 1989, the PRPB filed a response to the appeal. After the comment period closed, the Department gave the parties an opportunity to file a final response to any submittal filed in the appeal. The Appellant did so on May 14, 1990; the PRPB 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. Grounds for Reviewing an Appeal

Once I determine that an objection has been properly lodged[6] and

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[5] See note 2, supra. The PRPB requested that the appeal be dismissed for good cause pursuant to 15 C.F.R. § 930.128(c), based on the Corps' denial without prejudice of the Appellant's permit application. Letter from Patria G. Custodio, Chairperson, PRPB, to John A. Knauss, Under Secretary for Oceans and Atmosphere, Department of Commerce, (PRPB's Response to Appeal), November 21, 1989. The Corps' denial, however, does not provide good cause sufficient to justify dismissal of this appeal because it was based on the PRPB's consistency objection. The PRPB's consistency objection gave rise to the appeal in the first place.

[6] The Appellant indirectly raised an issue as to the scope and standard of review by arguing that the PRPB's objection was "based on research that has not been available for decision-making, and which research has not been available for evaluation by the scientific community, by the affected parties nor by the general public." Appellant's Brief at 4. The Appellant also finds fault with the PRPB's actions in granting a consistency certification to other Culebra Island pier projects. Appellant's Brief at 4-5. Consistent with prior consistency appeals, however, I will not consider whether the PRPB was correct in its determination that the proposed activity was inconsistent with the CMP. See Decision and Findings in the Consistency Appeal of Chevron U.S.A., Inc., (Chevron Decision), October 29, 1990, at 5; Decision and Findings in the Consistency Appeal of Korea Drilling Company, (Korea Drilling Decision), January 19, 1989, at 3. Rather, the scope of my review of the PRPB's objection is limited to determining whether the objection was properly lodged, i.e., whether it complied with the requirements of the CZMA and its implementing regulations. Korea Drilling Decision at 3-4.

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

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

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

> 1. The proposed activity furthers one or more of the competing national objectives or purposes contained in §§ 302 or 303 of the CZMA. 15 C.F.R. § 930.121(a).
>
> 2. When performed separately or when its cumulative effects are considered, [the proposed activity] will not cause adverse effects on the natural resources of the coastal zone substantial enough to outweigh its contribution to the national interest. 15 C.F.R. § 930.121(b).
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> 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).
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> 4. There is no reasonable alternative available (e.g., location[,] design, etc.) that would permit the [proposed] activity to be conducted in a manner consistent with the [PRPB's coastal] management program. 15 C.F.R. § 930.121(d).

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

V. Element Two

This element requires that the Secretary weigh the adverse effects of the objected-to activity on the natural resources of the coastal zone against its contribution to the national

interest. To perform this weighing, the Secretary must first identify the proposed project's adverse effects and its contribution to the national interest.

A. Adverse Effects

The Appellant argues that the proposed pier "would protect the coral and seagrass formation in the vicinity of the dock area." Appellant's Brief at 6. It is apparent, however, from the Appellant's diagram of the proposed pier that this protection would occur only after a minimum of thirty-two pipes filled with reinforced concrete are placed into the coral and seagrass areas.

In response, the PRPB offers the following remarks on the environmental effects of the proposed pier:

> The major concern is not the project's impact on nesting sea turtles, it is the project [sic] impact to an area that is important to the adult and sub adult turtle population on Culebra. Turtles use and depend on areas such as Tamarindo because of the extensive seagrass beds and low human impact.

PRPB's Response to Appeal at 7.

In addition to the parties' submittals, the record contains relevant views of the three Federal agencies that commented on this appeal. The Fish and Wildlife Service (FWS) has commented that the seagrass of Tamarindo Bay is regularly grazed by green sea turtles, an endangered species, and that the proposed dock would eventually lead to more boating activity which would frighten the turtles from the area. Letter from Richard N. Smith, Deputy Director, Fish and Wildlife Service, to Susan K. Auer, Attorney-Adviser, Office of the Assistant General Counsel for Ocean Services, NOAA, February 8, 1990. In noting the cumulative effects of this type of activity, the FWS stated:

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

Id.

The National Marine Fisheries Service (NMFS) states: "[Tamarindo Bay] is heavily used by green turtles, because of the presence of dense seagrass beds. The introduction of mooring facilities in the bay reduces or eliminates this use." Memorandum from William W. Fox, Jr., Assistant Administrator for Fisheries, NMFS,

to Susan K. Auer, Attorney-Adviser, Office of the Assistant General Counsel for Ocean Services, NOAA, February 1, 1990.

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

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

Letter from James M. Strock, Assistant Administrator, Office of Enforcement and Compliance Monitoring, EPA, to Hon. Jennifer Joy Wilson, Assistant Secretary for Oceans and Atmosphere, Department of Commerce, February 22, 1990.

While the Appellant questions the impact of the proposed pier on turtle habitat,[7] I find that the PRPB's comments are supported by the comments of Federal agencies. Moreover, absent scientific evidence to the contrary, I will accept the conclusions of the Federal agencies.[8] Therefore, after reviewing the submissions to the record by the parties and the Federal agencies commenting on this appeal, I find that the proposed dock would lead to more boating activity in the Tamarindo Bay area and frighten endangered and threatened sea turtles from feeding on seagrass in the vicinity.

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[7] The Appellant states:

> The presence and impact of sea turtles has been supposedly documented in unpublished [FWS] research which has not been available to the [PRPB], nor to the scientific community nor to the appellant. However, turtles do not nest in the area of the proposed dock. Turtles were reportedly seen by a field inspection but not reportedly seen feeding from the seagrass near the proposed dock. Turtles are reportedly seen all around Culebra in certain times of the year.

Appellant's Brief at 5.

[8] As stated in the Korea Drilling Decision, "except as otherwise provided by statute, the moving party before an administrative tribunal generally bears both [the burden of producing evidence and the burden of persuasion]." Korea Drilling Decision at 22. Since the CZMA does not provide otherwise, once the PRPB has objected to a consistency certification and described alternatives (if they exist), the Appellant bears both the burden of producing evidence and the burden of persuasion in consistency appeals. See Chevron Decision at 4-5.

B. Contribution to the National Interest

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

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

In addition to contending that the proposed project is in the national interest because it protects the environment,[9] the Appellant contends that the proposed dock serves the national interest by encouraging coastal-dependent economic growth. As to the national interest in economic development, as the Appellant indicates, § 303(2) provides for priority consideration to coastal-dependent uses. Appellant's Brief at 2. The proposed pier is a coastal-dependent use that would encourage economic development by providing access to the Appellant's property and increasing boating opportunities. See Appellant's Reply Brief at 1-2. However, given the small size of the Appellant's proposed project, I can only find its contribution to this interest to be minimal.

In conclusion, based on a review of the submissions to the record by the parties and the Federal agencies commenting on this appeal, I find that the Appellant's proposed project contributes minimally to the national interest in coastal-dependant uses. See CZMA § 303(2)(D). This conclusion is consistent with this Department's finding in an earlier appeal decision. See Decision in the Consistency Appeal of Ford S. Worthy, May 9, 1984, at 10, (the addition of a single boating marina would contribute minimally to the national interest in increasing recreational boating opportunities in the coastal zone).

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[9] See Appellant's Brief at 2-3. The Appellant argues that the proposed pier will protect coral and seagrass from further degradation, which would serve the national interest in preserving and protecting resources. The environmental effects of the project have already been discussed and will not be repeated on the national interest side of the balancing for Element Two.

C. Balancing

At the heart of Element Two is a balancing of the various effects a proposed project will have on the resources and uses of the coastal zone subject to the CZMA. In this case, I found that the Appellant's proposed project would adversely affect the natural resources of the coastal zone by leading to more boating activity in the Tamarindo Bay area that would frighten endangered and threatened sea turtles from feeding on seagrass in the vicinity. I also found that the proposed activity's contribution to the national interest would be minimal. In balancing these competing effects, I now find 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.

VI. 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 PRPB's objection to the Appellant's consistency certification.

Secretary of Commerce