DECISION AND FINDINGS
IN THE
CONSISTENCY APPEAL OF
YEAMANS HALL CLUB FROM AN
OBJECTION BY THE
SOUTH CAROLINA COASTAL COUNCIL
AUGUST 1, 1992

SYNOPSIS OF DECISION

In May, 1990, Yeamans Hall Club (Appellant) applied to the U.S. Army Corps of Engineers (Corps) for a § 404 permit to place 5,200 cubic yards of fill in 0.23 acres of freshwater wetlands to create a dam across a small stream for the purpose of creating a six-acre pond on the Appellant's property in Hanihan, South Carolina. The construction of the dam would result in the flooding of an additional 2.5 acres of freshwater wetlands. In conjunction with that the Federal permit application, Appellant submitted to the Corps for review by the South Carolina Coastal Council (SCCC), 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 the South Carolina's Federally-approved Coastal Management Program.

On August 20, 1990, the SCCC objected to the Appellant's consistency certification for the proposed project on the ground that the proposed project is not in accordance with the South Carolina's coastal management public policies and objectives of discouraging project proposals which require the filling or significant permanent alteration of productive freshwater marsh. Letter from H. Stephen Snyder, Director of Planning and Certification, SCCC, to LTC James T. Scott, District Engineer, Corps. In the objection letter, however, the SCCC did propose an alternative to the Appellant's proposed project, specifically, the construction of a lake out of uplands. Id.

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

On September 25, 1990, 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 SCCC'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 SCCC and several Federal agencies, the Secretary of Commerce made the following findings pursuant to 15 C.F.R. § 930.

Ground I

The alternative proposed by the SCCC was a reasonable, available alternative that would be consistent with South Carolina's Coastal Management Program. In order to find the fourth element of Ground I satisfied, there must be no reasonable alternative to the Appellant's proposed project available that would permit the activity to be conducted in a manner consistent with South Carolina's Coastal Management Program. Because the fourth element of Ground I was therefore not met, it is unnecessary to examine the other three elements. Accordingly, the proposed project is not consistent with the objectives or purposes of the CZMA. (Pp. 4-9)

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

DECISION

I. Background

In May, 1990, Yeamans Hall Club (Appellant) applied to the U.S. Army Corps of Engineers (Corps) for a permit[1] to place 5,200 cubic yards of fill in 0.23 acres of freshwater wetlands to create a dam across a small stream for the purpose of creating a six-acre pond on the Appellant's property in Hanihan, South Carolina. The Appellant's U.S. Army Corps of Engineers 404 Permit Application; Appellant's Statement in Support of Request for an Override (Appellant's Initial Brief) at 1. The construction of the dam would result in the flooding of an additional 2.5 acres of freshwater wetlands. Report on Proposed Yeamans Hall Impoundment by Newkirk Environmental Consultants, Inc., (Consultant Report), (Appellant's Initial Brief), March 1991, at 6. The stream which the Appellant has proposed to dam is a headwater tributary to Goose Creek and originates from several small springs and hillside seepages within the Appellant's property. Id. at 3. The area of wetlands to be filled is a section of a stream approximately 50 feet wide and located 1500 feet below the springs which feed the wetlands area. Appellant's Initial Brief at 1. The wetland drains through an excavated channel and proceeds several hundred feet past the point of the proposed dam where it flows through a culvert under a railway causeway. Id. The stream then continues through another culvert under a highway and eventually flows into Goose Creek. Id.

In September, 1989, the uplands within the proposed project site were severely damaged by Hurricane Hugo and most of the trees along the streams shorelines and the surrounding hillsides were either destroyed or severely damaged. Consultant Report at 4. The uplands were replanted with loblolly pine seedlings in late 1989 and early 1990 and are in early vegetation regeneration and successional stages. Id. at 4. The proposed lake will be used for irrigation of a nearby golf course, recreation, landscaping and wildlife management. Appellant's Initial Brief at 2. In addition, it will result in an aesthetic improvement to the project site. Id.

In conjunction with that Federal permit application the Appellant submitted to the Corps for review by the South Carolina Coastal Council (SCCC), South Carolina'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 South Carolina's Federally-approved Coastal Management Program (CMP).

---

[1] 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.

On August 20, 1990, the SCCC 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 discouraging project proposals which require the filling or significant permanent alteration of productive freshwater marsh. Letter from H. Stephen Snyder, Director of Planning and Certification, SCCC, to LTC James T. Scott, District Engineer, Corps. In the objection letter, however, the SCCC did propose an alternative to the Appellant's proposed project, specifically, the construction of a lake out of uplands. Id. In addition to explaining the basis of its objection, the SCCC also notified the Appellant of its right to appeal the SCCC'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.

Under CZMA § 307(c)(3)(A) and 15 C.F.R. § 930.131 (1988), the SCCC'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 SCCC'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 September 25, 1990, in accordance with CZMA § 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart H, the Appellant filed with the Department a notice of appeal from the SCCC's objection to the Appellant's consistency certification for the proposed project. Letter from John M. Simms to Robert A. Mosbacher, then Secretary of Commerce. The parties to the appeal are the Yeamans Hall Club and the SCCC.

The Department set a briefing schedule and solicited comments from the public and from interested agencies. On April 29, 1991, after the Appellant perfected the appeal by filing supporting data and information pursuant to 15 C.F.R. § 930.125, the SCCC filed a response to the appeal. On May 23, 1991, the Department solicited the views of five Federal agencies[2] 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.[3] All agencies responded. Public notice of the

---

[2] Comments were requested from the Army Corps of Engineers, the U.S. Fish and Wildlife Service (FWS), the Environmental Protection Agency (EPA), the U.S. Coast Guard, and the National Marine Fisheries Service.

[3] See infra at 3-4.

filing of the appeal and comments on the issues germane to the decision in the appeal were solicited by way of notices in the Federal Register, 56 Fed. Reg. 24,788-89 (May 31, 1991) (request for comments), and The News and Courier (June 18-20, 1991). The Department received 42 comments supporting and three comments opposing the proposed pond.

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 October 18, 1991, (Appellant's Final Brief); the SCCC did not file a response. 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.

III. Grounds for Reviewing an Appeal

Once I determine that an objection has been properly lodged[4] and 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 Secretarial override have been satisfied. Since the SCCC's objection was timely made and described how the proposed activity was inconsistent with specific, enforceable elements of the CMP, I conclude that the SCCC'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 the Appellant's proposed activity may not be granted until either the SCCC 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 II). See also 15 C.F.R. § 930.130(a). The Appellant has pleaded only the first ground.

---

[4] The Appellant contends that the SCCC improperly applied policies set forth in South Carolina's CMP to the Appellant's proposed project. Appellant's Final Brief at 19. The Appellant also finds fault with the SCCC's actions in granting consistency certifications for other similar impoundment projects. Appellant's Final Brief at 20-23. Consistent with prior consistency appeals, I have not considered whether the SCCC was correct in its determination that the proposed activity was inconsistent with South Carolina's CMP. Rather, the scope of my review of the SCCC's objection itself is limited to determining whether it is in compliance with the requirements of the CZMA and its implementing regulations. See Decision and Findings in the Consistency Appeal of Jose Perez-Villamil (Villamil Decision), Nov. 20, 1991, at 3.

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 [South Carolina'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.

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 (LILCO Decision), 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 serves 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.

Decision and Findings in the Consistency Appeal of Korea Drilling Company (Korea Drilling Decision), January 19, 1989, at 23.

In this case, the SCCC proposed an alternative in its objection letter that would permit the activity to be conducted in a manner consistent with the South Carolina's CMP.[5] See Letter from H. Stephen Snyder, Director of Planning and Certification, SCCC, to LTC James T. Scott, District Engineer, Corps, August 20, 1990. Specifically, the SCCC proposed that the Appellant construct a lake out of uplands. Id. In its Brief, the SCCC reasserts the alternative proposed in its August 20, 1990, objection letter and states that "the Appellant offers no reason why a lake cannot be created out of the many acres of uplands Appellant owns rather than in freshwater wetlands." Appellee's Brief in Opposition to Appellant's Request for an Override (SCCC's Brief) at 10.

As discussed above, once an alternative is proposed by a state, an appellant, in order to prevail on element four, will have the burden of demonstrating that the alternative is unreasonable or unavailable. See Korea Drilling Decision, at 24. I will first consider whether the identified alternative is available. In the context of this case, unavailability means that the alternative proposed by the SCCC will not allow the project to achieve its primary purpose(s).[6]

The Appellant opposes the alternative of constructing a lake out of uplands because, it argues, the "Coastal Council has not proposed an alternative which addresses the issues and problems sought to be corrected by the Appellant." Appellant's Initial Brief at 17. Specifically, the Appellant argues that digging a pond on an upland site: (1) will not provide an upland run-off filtration and detention area to prevent sediment-laden water from eventually running into Goose Creek through the wetland at issue; (2) will do nothing to stabilize or reduce the possibility of water quality problems related to temperature fluctuation and dissolved oxygen levels at the wetlands site; and (3) will do nothing to enhance the aesthetic qualities associated with the particular wetlands site. Id. In essence, the Appellant argues that these site specific benefits will be lost if it implements the alternative proposed by the SCCC. Appellant's argument confuses the purposes of a proposed project with tangential

---

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

[6] A project that is technically infeasible (a project for which technology and/or resources do not exist) would also be an unavailable project. See Decision and Findings in the Consistency Appeal of Exxon Company, U.S.A. (Exxon SYU Decision), Nov. 14, 1984, at 14.

benefits a project might obtain. In this case, the proposed site specific characteristics of the pond provide certain tangential benefits. However, the loss of a wetlands area has adverse effects or "costs." While under element two of 15 C.F.R. § 930.121 it is appropriate to weigh national interest benefits against adverse effects (costs) on coastal zone natural resources, an examination of availability under element four must look to a project's primary purpose(s). An examination of site specific secondary purposes and/or all of the benefits, including site specific ones, that a project may obtain would likely make site alternatives for all projects unavailable. Accordingly, I will limit my inquiry regarding availability to whether the essential or primary purpose(s) can be obtained if the alternative is implemented.

Here, construction of a pond in an upland area, as proposed by the SCCC, will allow the project to fulfill its essential or primary purposes of providing irrigation for a nearby golf course, increased recreational opportunities, and improved wildlife management.[7] See Appellant's Initial Brief at 2. Improved landscaping of the wetlands area is a site specific secondary purpose or benefit.[8] Accordingly, I find that the alternative proposed by the SCCC is available. See Exxon SYU Decision at 14. However, to satisfy the fourth element of Ground I, I must also determine that the alternative is "reasonable" or economically feasible. Id. Again, the Appellant must demonstrate that the alternative proposed by the SCCC is unreasonable. See Korea Drilling Decision at 24.

In order to reach a determination as to whether the alternative identified by the SCCC is reasonable (economically feasible), I must weigh the increased costs of the alternative against its environmental advantages. See Exxon SYU Decision at 14. In this case, balancing the environmental advantages against the estimated increased costs requires consideration of two factors: first, the increased costs to the Appellant of carrying out the proposed project in a manner consistent with South Carolina's CMP, including as costs the lost site specific aesthetic enhancements, and second, the environmental benefits of saving the wetlands proposed to be filled and flooded less the

---

[7] As in the instant case, where an alternative would prevent a project from achieving a non-essential or secondary purpose(s) or would result in the non-obtainment of certain benefits, I will consider that fact when analyzing whether the alternative is reasonable.

[8] A wetlands protectionist might argue that transformation of a wetlands into a pond would be an aesthetic degradation. In addition, construction of a pond in an upland area does not necessarily mean that the water quality and aesthetics of the project site cannot be improved. There may be other actions that the Appellant can take other than filling the wetlands at issue which will have the same beneficial effects upon the project site.

environmental advantages of Appellant's proposal of providing an upland run-off filtration and detention area to prevent sediment-laden water from running into Goose Creek and stabilizing or reducing possible water quality problems at the wetlands site. Appellant's Initial Brief at 17. I will address each of these factors in turn.

First, I must consider and evaluate the increased costs to the Appellant of implementing the alternative proposed by the SCCC. The Appellant in its submissions does not claim that it will incur additional acquisition or construction costs if it elects to implement the alternative suggested by the SCCC. In addition, the administrative record contains no evidence regarding the cost of constructing the pond as originally proposed or as to the increased costs to the Appellant, if any, of constructing the pond in an upland area. Given the total lack of evidence in the record, I find that the Appellant has failed to establish that the alternative proposed by the SCCC would result in any increased acquisition or construction cost to the Appellant. However, I will consider the lost site specific aesthetic enhancements alleged by the Appellant as a cost to the Appellant of implementing the alternative proposed by the SCCC.

Second, I must consider the environmental gain of not filling and flooding the wetlands less the environmental advantages of Appellant's proposal. Exhibit B to the State's Brief, a letter from the FWS, Charleston, South Carolina, is particularly informative regarding this factor. The letter concludes that:

> the wetland system in question is a spring-fed slough which appears to retain water throughout the year. Such systems are rare in South Carolina and because of their stability offer unique habitats to fish and wildlife resources.
>
> Energy from this wetlands resource is transferred by means of grazing by consumers, including insects, fish, wading birds, amphibians, reptiles, and mammals. Emergent wetlands, such as those at the proposed site, provide cover, spawning, and nursery habitat for numerous fish species as well as a source of materials used in the food chains at downstream sites. Four species of breeding fish have been identified at this site. . . . Predators, including other fish, reptiles and wading birds, are dependent on this vital link in the food chain.
>
> The project as proposed would eliminate the headwaters of this tributary leading to Goose Creek. The permanent conversion of vegetated wetlands to open water ponds results in the loss of a number of important ecological functions generally attributable

> to wetlands. Open water ponds, though they do provide some wildlife habitat, do not replace the ecological functions of wetlands.

Letter from Roger Banks, FWS, to Steve Snyder, South Carolina Coastal Council, July 17, 1991.

In addition, the EPA reviewed the Appellant's proposed project and concluded:

> It is general EPA policy to recommend that where any activity will adversely affect the natural functions of a wetland, that activity should be avoided to the maximum extent practicable. Wetlands serve a variety of functions including shoreline erosion control, habitat for commercial and recreational fin and shellfish species and wildlife habitat. The available evidence indicates that the proposed activity would cause adverse effects on the natural resources of this wetland area. Filling operations in wetlands are considered to be among the most severe environmental impacts according to the Clean Water Act Section 404(b)(1) Guidelines (40 C.F.R. § 230.1(d)).

Letter from Richard E. Sanderson, EPA, to the Honorable Gray Castle, then Deputy Under Secretary for Oceans and Atmosphere, NOAA, July 11, 1991.[9]

From the benefits of preserving this wetlands I must subtract the environmental advantages of Appellant's proposal. As described above, these advantages include providing an upland run-off filtration and detention area to prevent sediment-laden water from running into Goose Creek and stabilizing or reducing possible water quality problems at the wetlands site. I am persuaded by the evidence in the record that, the construction of a pond as proposed by the Appellant would have the effect of permanently altering, and thereby adversely affecting the wetlands at issue. Indeed, as pointed out by the SCCC, if allowed to go forward as proposed, the Appellant's project will result in the destruction of the wetland area at issue. SCCC's Brief at 10. The alternative suggested by the SCCC of constructing a pond out of uplands will not alter the wetlands, thus ensuring that the wetland area will continue to carry out the important ecological functions described by EPA and FWS.

---

[9] As previously stated, the Department received forty-two comments supporting and three comments opposing the proposed pond. I have reviewed all comments received. Most of the commenters state, in general terms, their support for the Appellant's proposed project. However, almost all of the commenters fail to address the statutory and regulatory grounds upon which my decision must be based. Consistent with prior consistency appeals, I have only considered those comments relevant to the statutory and regulatory grounds for deciding this appeal.

Therefore, I find that, that notwithstanding the environmental advantages of Appellant's proposal, constructing a pond in an upland area as proposed by the SCCC, would have "measurably less adverse effects on land and water resources of the coastal zone." See Bachman Decision at 6 (citing Decision and Findings in the Consistency Appeal of Southern Pacific Transportation Company, Sept. 24, 1985, at 19.).

Based on the record, I cannot determine that there are any increased acquisition or construction costs associated with the SCCC's alternative. However, there is the cost of not improving the aesthetics of the project area. This lost aesthetic benefit however is not sufficient to make the SCCC's alternative unreasonable given the environmental benefits of not filling and flooding wetlands generally even given the lost environmental advantages of Appellant's proposal of providing an up-land run-off filtration and detention area and stabilizing or reducing possible water quality problems at the wetlands site.

In accordance with the foregoing analysis, I find that there is an available, reasonable alternative that would permit the Appellant's proposed project to be conducted in a manner consistent with South Carolina's CMP. 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 SCCC's objection to the Appellant's consistency certification.

Barton H. Thompson

Secretary of Commerce