DECISION AND FINDINGS

IN THE CONSISTENCY APPEAL

OF

THE ASOCIACION DE PROPIETARIOS DE LOS INDIOS, INC.

FROM AN OBJECTION BY THE

PUERTO RICO PLANNING BOARD

FEBRUARY 19, 1992

Synopsis of the Decision

A committee of owners of land located in the Los Indios Sector, Las Mareas Ward, Salinas, Puerto Rico, formed the Asociación de Propietarios de Los Indios, Inc. (Appellant or Asociación) to carry on discussions and negotiations with the Army Corps of Engineers (Corps) after almost twenty years of disputes and a court action brought by the Corps over their and their predecessors activities on the subject property. Through a desire to comply with the terms of a judgment entered by the District Court of Puerto Rico on June 22, 1981, the Asociación applied to the Corps for after-the-fact permits to authorize the already-completed or nearly-completed residential structures, landfills, piers and bulkheads, and to maintain a private road on their properties. The Asociación also submitted to the Corps for Puerto Rico's review 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 Puerto Rico's Coastal Management Program.

On August 31, 1988, the Puerto Rico Planning Board (PRPB) objected to the Asociación's consistency certification for its activities on the grounds that authorization of already-completed or nearly-completed residential structures, landfills, piers and bulkheads, and maintenance of a private road is not in accordance with Puerto Rico Coastal Management public policies and objectives of discouraging lateral expansion along the coast, discouraging utilization of lands with important natural resources for urban uses, and prohibiting land development and construction in areas affected by floods and wave surge. Puerto Rico did not discuss whether there were alternatives to the proposed after-the-fact permits.

Under CZMA § 307(c)(3)(A) and 15 C.F.R. § 930.131 (1988), PRPB's consistency objection precludes Federal agencies from issuing any permit or license necessary for authorizing the Asociación's activities unless the Secretary of Commerce determines that the activities may be Federally approved because they are consistent with the objectives or purposes of the CZMA, or are necessary in the interest of national security.

On September 26, 1988, in accordance with CZMA § 307 (c)(3)(A) and 15 C.F.R. Part 930, Subpart H (1987), counsel for Appellant filed with the Department of Commerce a notice of appeal from the PRPB's objection to the Asociación's consistency certifications for the activities. Appellant based its appeal on Grounds I and II. 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:

Ground I

The proposed authorization of already-completed or nearly-completed residential structures, landfills, piers and bulkheads, and maintenance of a private road does not further one or more of the competing national objectives or purposes contained in §§ 302 or 303 of the CZMA. Therefore, the proposed activities are not consistent with the objectives or purposes of the CZMA. (Pp. 8 - 11)

Ground II

Appellant failed to meet its burden of presenting sufficient evidence to support an appeal pursuant to Ground II. (Pp. 12 - 13)

Conclusion

Because the Appellant's proposed activities failed to satisfy the requirements of Ground I, and because the appellant failed to meet its burden of presenting sufficient evidence to support an appeal pursuant to Ground II, the Secretary did not override Puerto Rico's objection to the Asociación's consistency certification and, consequently, the already-completed or nearly-completed residential structure, landfill, piers and bulkheads, and maintenance of a private road may not be permitted by Federal agencies.

DECISION

I. Factual Background

Individual members of the Asociación de Propietarios de Los Indios, Inc. (Appellant or Asociación) purportedly acquired properties pursuant to deed(s) approved by order of the U.S. District Court for the District of Puerto Rico in Case No. B-29-63, Chapter XII Bankruptcy Proceedings in the Matter of Guillermo Gonzalez Hernandez. In the order dated November 30, 1971, the Referee in Bankruptcy approved the "sale contracts and the incidental segregation of the occupied lots" to the purchasers of the debtor's property which was located in the Los Indios Sector, Las Mareas Ward, Salinas, Puerto Rico. In the Matter of Guillermo Gonzalez Hernandez, No. B 29-63 (D. Puerto Rico, Nov. 30, 1971). In that same order, the Referee confirmed that the Puerto Rico Planning Board (PRPB) was notified of the incidental segregation and that no objections were made at that time.

In 1972, the Army Corps of Engineers (Corps) took notice of a group of land owners placing fill and building piers on the subject property. The Corps issued "numerous" cease and desist orders. (Comments from Department of Army, Corps of Engineers ("COE Comments") at 1). In 1977, the Corps brought an action under the Rivers and Harbors Act, 33 U.S.C. 401 et seq., and the Federal Water Pollution Control Act, 33 U.S.C. 1251 et seq., to prevent the defendants or their assigns from continuing dredge & fill activities in the wetlands and mangrove forests. Through that court action, the Corps obtained a temporary restraining order, and preliminary and permanent injunctions against the land owners in 1979. In 1981, the defendant land owners and the United States of America entered into a partial consent judgment where defendants were enjoined from continuing in the dredge, fill and construction activities "without first obtaining the corresponding Corps permit". United States of America v. Guillermo Godreau, et al., C.N. 77-173 (D.C.P.R. 1977)(Partial (Consent) Judgement entered June 22, 1981). The processing of those "after-the-fact" permits was "conditioned on the performance of restorative measures on the affected waters of the United States." (COE Comments at 1.)

In January 1988, the successors and assigns of the original property owners expressed an intention to carry out those restorative measures designed to restore water flow into the area known as "Mar Negro", and they formed the Asociación de Propietarios de Los Indios, Inc. for the purposes of carrying on discussions with the Corps. The Asociación applied to the Corps for after-the-fact permits to authorize the already-completed or nearly-completed residential structures, landfills, piers and bulkheads, and for maintenance of a private road. The Asociación

also submitted to the Corps for Puerto Rico's review 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 Coastal Management Program. On August 31, 1988, the PRPB objected to the Asociación's consistency certification for its activities on the grounds that authorization of already-completed or nearly-completed residential structures, landfills, piers and bulkheads, and maintenance of a private road is not in accordance with Puerto Rico Coastal Management public policies and objectives of discouraging lateral expansion along the coast, discouraging utilization of lands with important natural resources for urban uses, and prohibiting land development and construction in areas affected by floods and wave surge. The PRPB did not discuss whether there were alternatives to the proposed after-the-fact permits.

Under CZMA § 307(c)(3)(A) and 15 C.F.R. § 930.131 (1987), PRPB's consistency objection precludes Federal agencies from issuing any permit or license necessary for authorizing the Asociación's activities unless the Secretary determines that the activities may be Federally approved because they are consistent with the objectives or purposes of the CZMA, or are necessary in the interest of national security.

II. Appeal to the Secretary of Commerce

On September 26, 1988, in accordance with CZMA § 307 (c)(3)(A) and 15 C.F.R. Part 930, subpart H (1987), counsel for Appellant filed with this Department a notice of appeal from the PRPB's objection to the Asociación's consistency certifications for the activities. The parties to the appeal are the owners of land located in the Los Indios Sector, Las Mareas Ward, Salinas, Puerto Rico, who identify themselves as the Asociación de Propietarios de Los Indios, Inc., and the PRPB.

The Asociación provided background documents on December 14, 1988, and, after requesting an extension of time[1] which I granted on April 12, 1989, over the objections of the PRPB[2], the Asociación perfected the appeal pursuant to 15 C.F.R. § 930.125 (1987) by filing its Brief in Support of Appellant's Position (Asociación's Brief) on April 10, 1989. Notices of the appeal and request for comments from the public on the issues

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Letter received by the Department on March 17, 1989.

[2] Letter received by the Department on March 30, 1989.

germane to my decision in the appeal were published in the Federal Register, 54 Fed. Reg. 19212 (May 4, 1989), and in The San Juan Star (May 17, 19, 20, 1989). On May 15, 1989, the PRPB filed its response to the appeal. On May 25, 1989, the Department solicited the views of five Federal agencies[3] regarding the four regulatory criteria which the project must meet for me to find it "consistent with the objectives or purposes" of the CZMA. The criteria appear at 15 C.F.R. § 930.121 (1987), and are discussed below. The Army Corps of Engineers provided comments and recommendations by letter dated July 5, 1989, and the National Marine Fisheries Service provided comments and suggestions by memorandum dated July 14, 1989. 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 the appeal.[4]

III. Threshold Issues

In this appeal, consistent with prior consistency appeals, I have not considered whether the PRPB was correct in its determination that the proposed activity was inconsistent with the State coastal management program.[5] Further, Appellant raises several threshold issues which will be addressed before reaching the substantive issues of this appeal.

1. Validity of PRPB's objection.

The Asociación asserts that PRPB's objection to issuance of after-the-fact permits is invalid for a number of reasons. The Asociación's arguments on this point are not clearly delineated. I perceive that the Asociación is making the following arguments and will treat them accordingly:

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[3] The Environmental Protection Agency, the National Marine Fisheries Service, the Department of the Interior, the Fish and Wildlife Service (DOI), and the Army Corps of Engineers.

[4] It should be noted that, whereas all materials have been incorporated into the record, I have considered them only as they are relevant to the statutory grounds for deciding consistency appeals.

[5] Although past consistency appeal decisions have been limited to consideration of the statutory and regulatory grounds for an override, there is some authority for a review of the correctness of the State's objection. See Exxon v. Fischer, 807 F.2d 842 (9th Cir. 1987).

a. That the PRPB's objection is invalid because the permit applications were made pursuant to court order for facilities constructed prior to enactment of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1251 et seq., and the Clean Air Act (CAA), 42 U.S.C. § 7401 et seq. (Brief in Support of Appellant's Position (Asociación's Brief) at pages 2 and 3).[6]

b. That the PRPB's objection pursuant to the Puerto Rico Coastal Management Program is invalid because the Asociación's activities relating to the subject property are governed by the Referee's in Bankruptcy Order dated November 30, 1971, which the Asociación argues served to dedicate the area to residential use and to allow construction of buildings and fills of the wetlands. (Asociación's Brief at 2.)

c. That the PRPB's objection pursuant to the CZMA and the Puerto Rico Coastal Management Program is invalid because "the project is located in lands originally donated to private citizens by the Spanish Government before the United States took possession of Puerto Rico and are covered by the Treaty of Paris" of 1898, which preempts any other law, except the Constitution. (Asociación's Brief at 5.)

d. That the PRPB's objection is invalid under the doctrine of estoppel. This assertion of the Asociación is grounded in PRPB's failure to appear "to raise any objection or make any clarification" after receiving notice in 1971 of court proceedings that would allegedly affect the use and ownership of the property. (Asociación's Brief at 2.)

All of these issues are beyond the scope of this appeal. Past consistency appeal decisions have been limited to consideration of the statutory and regulatory grounds for an override. The CZMA provides that a Federal permit may not be granted until

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[6] The Asociación's argument is stated as:

> Therefore, to object to facilities constructed pursuant to a court order issued at a time when the FWPCA, as we know it today, and the Clean Air Act were not still in effect is not a valid objection.
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> It is our position that as to those facilities constructed before July 13, 1979, date on which a petition for injunctive relief was granted by the U.S. District Court for the District of Puerto Rico, Case No. 77-173, the Planning Board and the Commerce Department do not have any recourse in law and equity.

(i) the state concurs with the applicant's certification that the project is consistent with the state's coastal zone management program, (ii) concurrence by the state is conclusively presumed, or (iii) I find "that each activity which is described in detail in such plan is consistent with the objectives or purposes of this title or is otherwise necessary in the interest of national security." CZMA, § 307(c)(3)(A). Because the Asociación's arguments that PRPB's objection is invalid are not relevant to my determination whether the activities are consistent with the objectives or purposes of the CZMA or are otherwise necessary in the interest of national security, I have not considered them in this appeal.

2. Authority of the Army Corps of Engineers

The Asociación argues that the Department of the Army, Corps of Engineers "has primary jurisdiction over the coastal zone" and that "[t]he Corps ... should be permitted to make an objective determination and their decision should be final and binding on all parties involved." (Asociación's Brief at 6.) The Asociación has failed to comprehend the import of the CZMA and the National Oceanic and Atmospheric Administration's (NOAA) and the Corps' implementing regulations. Section 307 of the CZMA provides that the Corps may not grant a permit without a state's concurrence (either affirmative or presumed) or a finding by the Secretary that the activity is consistent with the objectives or purposes of this title or is otherwise necessary in the interest of national security. In accordance with NOAA's regulations at 15 C.F.R. §§ 930.65 and 930.131, regulations promulgated by the Corps provide:

> Applications for a [Department of Army] permit for activities affecting the coastal zones of those states having a coastal zone management program approved by the Secretary of Commerce will be evaluated with respect to compliance with that program. No permit will be issued to a non-federal applicant until certification has been provided ... and the appropriate state agency has concurred with the certification.... 33 C.F.R. § 320.4(h).

As pointed out by the PRPB, the Appellant's argument is particularly puzzling since the Asociación "freely and voluntarily" submitted a request for consistency determination to the PRPB. (May 5, 1989 letter from Patria G. Custudio, PRPB Chairperson, to William E. Evans, Under Secretary for Oceans and Atmosphere, ("PRPB Brief") at 2.) Finally, the Corps' comments in this appeal state a clear position in this matter: "It appears that Los Indios has a sincere willingness to comply with the Courts requirements, however I am aware of no legal basis for

challenging PRPB's consistency denial." (COE Comments at 2.) Accordingly, I find the Asociación's argument that the Corps should be allowed to proceed without hindrance by Puerto Rico and the Department of Commerce through this appeal to be without merit.

3. Adequacy of the Objection

The Asociación argues that, on due process grounds, the objection should have no effect because it is "too vague and does not comply with the legal requirements contained in 15 C.F.R. § 930 and does not provide applicant with the specific information which is necessary to put applicant in a position to intelligently and objectively present its position." (Asociación's Brief at 4-5.)

Section 930.96 requires that the State agency objections must describe:

> (a) How the proposed project is inconsistent with specific elements of the management program, and
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> (b) alternative measures (if they exist) which, if adopted by the applicant agency, would permit the proposed project to be conducted in a manner consistent with the management program.

The Certificate of Project Consistency With The Puerto Rico Coastal Management Program (PRPB's Certificate) containing the PRPB's objection to the activities identifies three public policies and objectives that conflict with the proposed activity.[7] PRPB's Certificate asserts that the activities are

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[7]

Policy 1.01

- In coastal zone, promote growth perpendicular to the coast and discourage lateral expansion along the primary roads having direct access to the coast.
- Not utilize for urban uses, lands where important natural resources are located.

Policy 10.00

- To prohibit land development and construction of structures in areas affected by floods and wave surge, except when flood control works or protection against wave surge already exist, are under construction, or can be provided at a

not in accordance with those public policies and objectives because the lands subject to the proposed activity are located within the Jobos Bay Natural Estuarine Reserve (hereinafter "Jobanes"), which reserve supports mangrove forests, 60 species of birds, and an endangered species, the manatee (trichechus manatus), and also that those lands are located in a coastal high hazard area. (PRPB's Certificate at 2.) Alternatives were not discussed but, on its face, § 930.96(c)(2) does not require that the objection contain a presentation of alternative measures. See, e.g., Decision and Findings of the Secretary of Commerce in the Consistency Appeal of the Korea Drilling Company, Ltd. from an Objection by the California Coastal Commission, January 19, 1989. (Korea Drilling Decision). Accordingly, I find that the PRPB's objection contains sufficient detail to satisfy the requirements of 15 C.F.R. § 930.96.

I also find that this appeal is ripe for consideration and that the parties have complied with Department of Commerce regulations governing the conduct of this appeal, 15 C.F.R. Part 930, Subparts D, H (1990).

IV. Grounds for Sustaining an Appeal

Section 307(c)(3)(A) of the CZMA provides that Federal licenses or permits required for the Appellants' proposed activity may not be granted until either the State concurs in the consistency of such activity with its Federally-approved coastal zone management program, or I find that the activities are (1) consistent with the objectives of the CZMA or (2) otherwise necessary in the interest of national security. See also 15 C.F.R. § 930.121 (1990). The Appellant has pled both grounds.

Ground I

To make a finding on the first ground, I must determine that the activity satisfies all four of the elements specified in 15 C.F.R. § 930.121 (1990). These requirements are:

> (a) The activity furthers one or more of the competing national objectives or purposes contained in section 302 or 303 of the Act. 15 C.F.R. § 930.121(a) (1990).

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reasonable cost, to protect the property and guarantee the safety of all the people affected in those lands which are not agriculturally productive, do not have important natural resources, and are not environmentally critical.

(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. 15 C.F.R. § 930.121(b) (1990).

(c) The activity will not violate any requirements of the Clean Air Act, as amended, or the Federal Water Pollution Control Act, as amended. 15 C.F.R. § 930.121(c) (1990).

(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. 15 C.F.R. § 930.121(d) (1990).

Element One

The activity furthers one or more of the competing national objectives or purposes contained in §§ 302 or 303 of the Act.

Sections 302 and 303 of the Act identify a number of objectives or purposes, which can be stated as follows:

1. To preserve, protect and, where possible, restore or enhance the resources of the coastal zone (§§ 302(a), (b), (c), (d), (e), (f), (g) and (i) and 303(1));

2. To develop the resources of the coastal zone (§§ 302(a), (b) and (i) and 303(1)); and

3. To encourage and help the States to exercise their full authority over the lands and waters in the coastal zone, giving consideration to the need to protect as well as develop coastal resources, in recognition by the Congress that State action is the key to more effective protection and use of the resources of the coastal zone (§§ 302(h) and (i) and 303(2)).

More specifically, Congress intended that the States (including Puerto Rico), 16 U.S.C. § 304(4), be encouraged in protecting "special natural and scenic characteristics" from damage by "ill-planned development that threatens these values." 16 U.S.C. § 302(g). Further, Congress specifically identified aspects of particular importance to coastal management:

> (A) the protection of wetlands, floodplains, estuaries, beaches, ... and fish and wildlife and their habitat; 16 U.S.C. § 303(2)(A)
>
> (B) the management of coastal development to minimize the loss of life and property caused by improper development in flood-prone ... [and] ... storm surge ... areas; 16 U.S.C. § 303(2)(B)
>
> (C) priority consideration be given to coastal dependent uses and orderly processes for siting major facilities related to national defense, energy, fisheries development, recreation, ports and transportation ...; 16 U.S.C. § 303(2)(C) and
>
> (D) public access to the coasts for recreation purposes, ...
>
> encourage the preparation of special area management plans which provide for increased specificity in protecting significant natural resources, reasonable coastal-dependent economic growth, improved protection of life and property in hazardous areas, and improved predictability in governmental decision-making; and
>
> encourage the participation and cooperation of the public, state and local governments ... in carrying out the purposes of the [CZMA].

The Appellant has the burden of submitting evidence to persuade the Secretary that the proposed activity is consistent with the objectives or purposes of the CZMA.[8] The Asociación apparently relies upon negative assertions to demonstrate that its proposed activities "minimize the loss of life and property" caused by improper development in flood-prone and storm surge areas and protect "wetlands, floodplains, estuaries, beaches, ... and fish and wildlife and their habitat". Specifically, the Asociación argues that the area "is not located in lands belonging to the Jobos Bay Natural Estuarine Reserve". The Asociación also argues that although previous proceedings have found that

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[8] See Decision and Findings in the Consistency Appeal of Chevron U.S.A. Inc. from an Objection by the California Coastal Commission, October 29, 1990, at page 5. (Chevron Decision). See, also, Korea Drilling Decision at 22.

> "the construction and land fill caved out by appellant have adversely affected the mangroves through the greater part of Mar Negro (Black Sea), having interrupted both surface and ground water flow to and from the Caribbean Sea",

(Asociación's Brief at 4.), the mangroves are healthy and the Mar Negro area is recuperating. The Asociación asserts that any damage to mangroves in the past was caused by discharges from the Puerto Rico Electric Authority power plant. (Id.) Finally, the Asociación argues that "the allegation that the area in question is a 'coastal high hazard area, floodable by cyclonic ocean surges' is not only inaccurate, but also moot...". (Id. at 4-5.) The Asociación recommends a visual inspection of the area to determine the health of the mangroves and refers me to the official maps of the Estuarine Reserve "which are in the possession of the government authorities" to determine whether the lands in question are located within the Jobanes.

The maps submitted by the PRPB indicate that the area is located within the Jobanes and that the area is located in a Coastal High Hazard Area exposed to 100 year flooding. (PRPB's Brief at 3, and Enclosures 2 and 3.) As explained by the PRPB in reference to those enclosures, "it is evident that said site is a) located within the Jobos Bay Natural (sic) Estuarine Reserve and b) within a coastal high hazard area which is exposed to 100 years flooding due to cyclonic ocean surges." The National Marine Fisheries Service (NMFS) identifies that the Jobos Bay National Estuarine Research Reserve "is of high value as a fishery habitat." (NMFS comments at 1.)

In the absence of evidence presented by the Asociación to support its argument, I am compelled to find that the lands are located within the Jobanes and that the area is located in a Coastal High Hazard Area. Accordingly, I find that the activity does not further the objectives or purposes of the CZMA relating to the protection of wetlands, floodplains, estuaries, beaches, and fish and wildlife and their habitat, 16 U.S.C. § 303(2)(A), and to the management of coastal development to minimize the loss of life and property caused by improper development in flood-prone, storm surge areas. 16 U.S.C. § 303(2)(B).

The Asociación also argues that the PRPB blocked the Corps' studies in the area, rejected Appellant's offer to "discuss the matters in controversy, if any, and to explore an amicable solution", and that the PRPB's "attitude is not consistent with the public policy reflected in the federal statutes under which this controversy has arisen, of promoting amicable solutions." Asociación's Brief at 3. However, even that argument does not satisfy the requirement that "the <u>activity</u> furthers one or more

of the competing objectives or purposes" of the CZMA (emphasis added). Section 303(4) contains the objective of encouraging the "participation and cooperation of the public, state and local governments ... in carrying out the purposes of [the CZMA]." The Asociación's argument, although complaining about bureaucratic footdragging, does not and cannot assert that the dredge, fill, construction and maintenance activities themselves satisfy the CZMA's objective of encouraging participation and cooperation.

As the Secretary stated in earlier appeals, "[b]ecause Congress has defined broadly the national interest in coastal zone management to include both protection and development of coastal resources, this element will 'normally' be found to be satisfied on appeal."[9] However, it has also been determined that the residential component of a project does not advance any of the CZMA's goals.[10] In the DeLyser Decision, the appellant DeLyser obtained a permit to construct a dock and boathouse on piles on LeRoy Island in Sodus Bay, Lake Ontario, Huron, N.Y. The permit prohibited construction of living quarters within the boathouse, but DeLyser was ordered to stop all construction when the Corps found that he was constructing the boathouse with living quarters. DeLyser was allowed to submit an application for an after-the-fact permit, which would authorize inclusion of the residential unit in the dock and boathouse project. New York State objected to DeLyser's consistency certification for his project and its objection was upheld by the Secretary of Commerce. The DeLyser Decision contains an explanation of the purposes and goals of the CZMA that is directly applicable to this appeal:

> Nowhere in the CZMA or its history does there appear an express or implied goal of encouraging residential construction in the coastal zone. This silence certainly does not mean that such construction is prohibited; rather, it means that such activity is not isolated as a pursuit to be fostered by the legislation.

(DeLyser Decision at 8.)

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[9] See, e.g. Findings and Decision in the Matter of the Appeal by Exxon Company, U.S.A., to a Consistency Objection by the California Coastal Commission (Feb. 18, 1984) (citing 42 Fed. Reg. 43,594 (1977) (preamble to proposed rule for Federal consistency with approved coastal management programs)).

[10] Decision and Findings of the Secretary of Commerce in the Consistency Appeal of John K. DeLyser from an Objection by the New York State Department of State, Feb. 26, 1988. (DeLyser Decision).

Similarly, the Asociación has presented no evidence, either direct or circumstantial, to show how its proposed activities would do any more than provide residences for the Asociación's members. For example, appellant has not argued and presented evidence that, in addition to the residential component, its proposed activities further such CZMA objectives as public access to the coasts for recreation purposes or provision for coastal dependent uses. Accordingly, I find that the Asociación's proposed authorization for its completed residential structures, to finish construction of its nearly-completed residential structures, landfills, piers and bulkheads, and to maintain a private road do not further one or more of the competing national objectives or purposes contained in §§ 302 or 303 of the Act and therefore fail to satisfy Element One of Ground I.

Because the Appellant must satisfy all four elements of the regulation in order for me to sustain his appeal under Ground I, failure to satisfy any one element precludes my finding that the Asociación's project is "consistent with the objectives or purposes of the [CZMA]". Having found that the Asociación has failed to satisfy the first element of Ground I of the regulation, it is unnecessary to examine the other three elements of Ground I.

Ground II

The second statutory ground (Ground II) for sustaining an appeal requires that I find that the activity is "necessary in the interest of national security." To make this finding, I must determine that "a national defense or other national security interest would be significantly impaired if the activity were not permitted to go forward as proposed". 15 C.F.R. 930.122.

To raise its appeal under Ground II, the Asociación argues that the project subject to this action is located on lands originally donated to private citizens by the Spanish government before the United States took possession of Puerto Rico and are covered by the Treaty of Paris of 1898 ("Treaty"). The Asociación goes on to assert that "[i]t is in the interest of National Security to give treaties full force and effectiveness. And to do otherwise in this case would affect national security...". (Asociación Brief at 5). The Asociación submits the full text of the Treaty and specifically refers to Articles VIII and IX to support its assertion that it is in the interest of national security to give this treaty full force and effect.[11]

See Appendix 1.

The Appellant has the burden of submitting evidence in support of its appeal.[12] The Asociación's conclusory argument that to uphold PRPB's objection would constitute a failure to give the Treaty full force and effect does not assist an inquiry of how its proposed activities are necessary in the interest of national security.

Because the Asociación did not present any evidence to show that the dredge, fill, construction and maintenance activities are necessary in the interest of national security, the Appellant has failed to carry its burden of submitting evidence in support of its appeal pursuant to Ground II. Accordingly, I find the requirements for raising Ground II have not been met.

V. Conclusion

The Asociación must satisfy all four elements of Ground I in order for me to sustain its appeal. Failure to satisfy any one element of Ground I precludes my finding that the Appellant's project is "consistent with the objectives or purposes of the [CZMA]." Having found that the Asociación has failed to satisfy the first element of the regulation, it is unnecessary to examine the other three elements.

Further, the Asociación has failed to raise an appeal to PRPB's objection pursuant to Ground II. Therefore, I will not override the PRPB's objection to the Asociación's consistency certifications.

Acting Secretary of Commerce

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[12] See Chevron Decision at 5 (where it is explained that an appellant has the burden of submitting evidence in support of its appeal and the burden of persuasion). See also Korea Drilling Decision at 22.