

DECISION
OF THE SECRETARY OF COMMERCE
IN THE
CONSISTENCY APPEAL OF FORD S. WORTHY, JR.,
TO AN
OBJECTION FROM THE NORTH CAROLINA DEPARTMENT
OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT

May 9, 1984

SYNOPSIS OF DECISION

Ford S. Worthy, Jr., a private developer in North Carolina, submitted an application to the United States Department of the Army Corps of Engineers, Wilmington District, for a permit under Section 10 of the River and Harbor Act of 1899 to construct a commercial marina on Bath Creek, near Washington, North Carolina.

The Coastal Resources Commission (Commission) of the North Carolina Department of Natural Resources and Community Development (DNRCD), North Carolina's Federally approved coastal zone management agency, objected to Mr. Worthy's consistency certification for the proposed facility on the ground that the facility was inconsistent with the North Carolina Coastal Management Program because, as proposed, it would have adverse impacts on the water quality of Bath Creek, primarily resulting from illegal overboard discharges of sewage from boats using the marina and from oil and gas spills at the marina's fueling facilities.

Under Subparagraph A of Section 307(c)(3) of the Coastal Zone Management Act of 1972, as amended (CZMA) (16 U.S.C. §1456(c)(3)(A)), and 15 CFR 930 of the Department of Commerce's implementing regulations, the DNRCD's objection to construction of the marina precludes all Federal agencies from issuing any permit or license necessary for the activity to proceed, unless the Secretary of Commerce finds that the activity may be Federally approved because it "is consistent with the objectives of the [CZMA] or is otherwise necessary in the interest of national security" (Section 307(c)(3)(A) of the CZMA).

On August 5, 1983, pursuant to Subparagraph A of Section 307(c)(3) of the CZMA and Subpart H. of 15 CFR Part 930, the Department of Commerce's regulations governing the Secretary of Commerce's review of an objected-to activity, Ford S. Worthy, Jr. (Appellant), filed an initial Notice of Appeal with the Secretary. Appellant amended his appeal on October 11, 1983, to assert that the proposed activity was consistent with the objectives or purposes of the CZMA inasmuch as it would develop the resources of the coastal zone and its cumulative effects on the natural resources of the coastal zone would be negligible and not substantial enough to outweigh its contribution to the national interest.

The Secretary, upon consideration of the materials submitted by Appellant, the DNRCD, and interested persons as well as all other information in the administrative record of this appeal, made the following findings pursuant to 15 CFR 930.121

(a) Development of the commercial marina would further one or more of the competing national objectives or purposes contained in Sections 302 or 303 of the CZMA. (pp. 6-7.)

(b) The project's contribution to the national interest does not outweigh its adverse effects on the natural resources of the North Carolina coastal zone. (pp. 7-10.)

Because the Secretary found that Appellant's project did not satisfy 15 CFR 930.121(b), he found it unnecessary to consider whether the project satisfied 930.121(c) and (d). Based on Appellant's failure to satisfy all four elements of the regulatory test for finding that Appellant's project is "consistent with the objectives or purposes" of the CZMA, he denied Appellant's appeal. (p. 11.)

DECISION

Factual Background

On March 5, 1982, Ford S. Worthy, Jr. (Appellant), applied to the local permit officer in Beaufort County, North Carolina, for a minor development permit for the construction of a commercial marina in Bath Creek, near Washington, North Carolina, under the North Carolina Coastal Area Management Act (CAMA). On April 6, 1982, the Appellant submitted a revised application for the project which, in relevant part, described the project as follows:

the applicant proposes to construct three piers in Bath Creek, south of the Bath Creek, N.C. 92 Bridge and to the east of and served by Lots B and C as shown on the "site plan" of this application ... the north pier is designated to accommodate 56 boats, the south pier 47 boats and the middle pier 42 boats, for a total of 145 slips. The piers will extend 480 feet, 435 feet and 440 feet, respectively, from the shore to the center line of Bath Creek Channel. The piers are to be constructed along Bath Creek with adequate clearance between the piers and between the North pier and the bridge. Shore facilities will include a shower and restroom building, the required parking spaces as per the Bath Zoning Ordinance, a well, holding septic tanks at the land end of the south pier, appropriate septic tanks and drain field. Initial construction will include appropriate electric outlets including light fixtures to illuminate parking areas as well as the piers. The south pier will have two diesel fuel pumps and two gasoline pumps. Administrative Record [all references hereinafter are to the Administrative Record]; Transcript, Appeal Hearing on Issuance of Minor Development Permit, pp. 334-35 (March 1, 1983) [hereinafter Tr.]

Bath Creek is a small, narrow body of water fed by small tributaries which has no tide except for wind-generated tide. Tr., p. 78. There is no flushing action provided by ocean tides. Tr., p. 79. Bath Creek is also located in an area designated under CAMA as an Area of Environmental Concern (AEC) and makes up a significant geographical segment of the Bath Historic Land Use Plan. Tr., p. 361 et seq. Pursuant to the CAMA, an area may be designated as an AEC by the Coastal Resources Commission (Commission), which is part of the North Carolina Department of Natural Resources and Community Development (DNRCD) -- North Carolina's lead coastal agency --, because it is a fragile or historic area, or contains environmental or natural resources of more than local significance where uncontrolled or incompatible development could result in major or irreversible damage to important historic, cultural, scientific or scenic values or natural systems. North Carolina

Coastal Management Program, pp. 76-77 [hereinafter NCCMP]. Bath Creek supports a variety of recreational boating, swimming, water skiing and fishing activities. Tr., p. 105. A small commercial marina is located on Bath Creek opposite the site of the Appellant's proposed marina. Tr., p. 67. Bath Creek is located within North Carolina's coastal zone as defined by Section 304(1) of the Coastal Zone Management Act of 1972, as amended (CZMA). Section 113-A-103(2) of the CAMA, cited in NCCMP, p. 168.

On April 12, 1982, Appellant applied to the Army Corps of Engineers (COE) for a permit to construct his marina under Section 10 of the River and Harbor Act of 1899. The Appellant certified in his application that the proposed activity was consistent with the NCCMP. COE Public Notice 0210. The COE issued a public notice on April 29, 1982, that the Appellant had applied for the permit. COE Public Notice 0210.

On June 3, 1982, the local permit officer for Beaufort County found that the proposed development was "inconsistent" with:

(1) "The state guidelines, particularly 15 NCAC 7H.0207(d) which requires that in part, no activity shall (sic) allowed which is detrimental to public trust rights and the biological and physical functions of the estuary [in that] this project calls for 145 slip marina which does not consider water quality impacts of this development, and

(2) "the local land use plan, see page 9 of Bath Land Use plan which provides that no significant increase in the pollution of Bath Creek will be allowed [in that] this project calls for a 145 slip marina which would tend to increase pollution in Bath Creek." Tr., p. 294.

Nonetheless, the local permit officer issued the CAMA minor development permit subject to conditions which, according to the local permit officer, if met, would render the project consistent with the NCCMP. One condition provided that prior to construction of any fuel facilities the applicant must meet the requirements established by the North Carolina Wildlife Resources Commission. Tr., p. 292.

On June 18, 1982, the Town of Bath, North Carolina, alleging that the proposed activity would cause water quality degradation, impair navigation and destroy the integrity of the coastal wetlands and the fragile estuarine system of Bath Creek, appealed the issuance of the conditional CAMA minor development permit to the Commission. Tr., pp. 299-300. By letter dated July 21, 1982, the COE notified the Appellant that it would not act on his application until the appeal of the issuance of the minor development permit was resolved. Letter from

Charles Hollis, COE Regulatory Branch, to Appellant, July 21, 1982.

On March 1, 1983, the Commission held a hearing on the issuance of the conditional permit. Subsequently, the Commission revoked the Appellant's conditional permit because it found that the local permit officer had improperly delegated his authority to condition the permit so as to mitigate the adverse impacts of the proposed development. Commission Findings of Fact, Conclusions of Law and Order In the Matter of the Appeal from the Issuance of a CAMA Minor Development Permit No. 82-0010 to Ford S. Worthy by Town of Bath and Bath Preservation Association, May 19, 1983 [hereinafter Commission's Findings].

On July 7, 1983,^{1/} the DNRCD notified the Appellant and the COE that it had determined the proposed activity to be inconsistent with the NCCMP because: (1) the Commission had revoked the CAMA minor development permit; (2) the Division of Environmental Management had noted that the continued proliferation of marina facilities in Bath Creek could result in water quality degradation due to the increases of bacterial pollution from illicit overboard discharges and from gas and oil spills from fueling facilities; and (3) the Wildlife Resources Commission had objected that water quality degradation would damage fish

^{1/} Despite the fact that more than six months passed between the date of the public notice of the Appellant's application for the COE permit (April 29, 1982) and the date of the DNRCD consistency objection (July 7, 1983), a timely consistency objection was made. Section 930.63(a) of Title 15 of the Code of Federal Regulations (the CZMA regulations) provides that concurrence by a State coastal management agency in the consistency certification by an applicant for a Federal permit or license shall be conclusively presumed in the absence of an objection by the State agency within six months following commencement of review. State agency review of a consistency certification commences when the agency receives a copy of the certification and the necessary data and information to support it. 15 CFR 930.60(a). The "necessary data and information" required to be submitted with the consistency certification is described in 15 CFR 930.58, and may include State or local government permits which are required in addition to the Federal license or permit. 15 CFR 930.56(b). North Carolina's Federally-approved coastal management program requires that a State CAMA permit be obtained prior to a State consistency determination being made and that the applicant submit this determination to the Federal agency in order to complete the application for the Federal license or permit. NCCMP, p. 235. Because the

and wildlife resources. According to the DNRCD, the conditions contained in the minor development permit did not adequately address these concerns. DNRCD's Consistency Objection, July 7, 1983.

Under Subparagraph A of Section 307(c)(3) of the CZMA and 15 CFR 930.131 of the Department of Commerce's implementing regulations, the DNRCD's objection to Appellant's marina project on the ground that the proposed activity is inconsistent with the NCCMP precludes the COE from issuing any permit necessary for the project to proceed unless the Secretary of Commerce determines that the project is "consistent with the objectives or purposes of the [CZMA], or is necessary in the interest of national security" (15 CFR 930.120).

Appeal to the Secretary of Commerce

On August 5, 1983, the Appellant, pursuant to Subparagraph A of Section 307(c)(3) of the CZMA and 15 CFR 930, Subpart H, Commerce's regulations governing the review by the Secretary of Commerce of an objected-to activity, filed a notice of appeal from the DNRCD's objection with the Secretary of Commerce. The parties to this appeal are the Appellant and the DNRCD. The Secretary of Commerce has reserved the authority to decide this appeal. Department Organization Order 25-5A, Section 3.01(w).

The Appellant, in his initial notice of appeal, alleged as the ground for his appeal that the State of North Carolina had not made a consistency objection but had simply revoked the local permit issued to the Appellant on procedural grounds. Appellant's Notice of Appeal, August 5, 1983.^{2/} By letter dated September 2, 1983, the Administrator of the National Oceanic and Atmospheric Administration (NOAA), on behalf of the Secretary of Commerce, notified the Appellant that, although his appeal was accepted as timely filed, he had not stated a ground on which the Secretary may sustain an appeal. The

^{1/}(Cont.) issuance of the CAMA minor permit was appealed, on June 18, 1982, and, after a hearing, revoked on May 19, 1983, State agency review could not have begun until that date. Therefore, the July 7, 1983 consistency objection by the DNRCD, occurring less than two months after revocation of the CAMA minor permit, was timely made.

^{2/} While this is not a ground on which the Secretary can sustain an appeal, a review of the administrative record shows this argument to be without merit. The State had in fact made a consistency objection to the proposed activity on July 7, 1983. DNRCD's Consistency Objection of July 7, 1983.

Appellant was granted 30 days to amend his appeal to plead either or both of the two statutory grounds for an appeal, infra, and submit supporting information. By letter of October 5, 1983, the Appellant amended his appeal and submitted additional supporting information sufficient to avoid dismissal of the appeal. The Appellant's amended appeal alleged that the construction of the marina is "consistent with the objectives or purposes of the CZMA", one of the two statutory grounds for sustaining an appeal. Appellant's Amended Appeal and Supporting Statement, October 5, 1983.

Commerce published a notice of this appeal in the Federal Register on November 10, 1983 (48 Fed. Reg. 51677 (1983)) and in the local newspaper for the Bath Creek area, The Washington Daily-News, on December 7, 1983. Each of the notices stated that interested parties could submit comments to the Secretary of Commerce on the issues raised by the appeal within 30 days from the date of publication of the notice. On December 30, 1983, Commerce requested that the DNRCD supplement the administrative record by providing information which the DNRCD had considered in making its consistency decision and to submit any additional comments relevant to the four elements identified in 15 CFR 930.121 for finding that the proposed activity is "consistent with the objectives or purposes of the [CZMA]." The Appellant also was invited to submit additional information and comments. Commerce received additional information and comments from the Appellant and the DNRCD on January 9, 1984, and January 13, 1984, respectively. All supporting information submitted by the parties and the numerous comments submitted by individuals and private organizations during the course of this appeal are included in the administrative record of this decision.

I find that this appeal is properly under consideration and that the parties have complied with the procedural requirements set forth in Subparts D and H of 15 CFR Part 930.

Grounds for Sustaining an Appeal

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

The regulation interpreting the statutory ground "consistent with the objectives of [the CZMA]" is found at 15 CFR 930.121 and states:

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

(a) The activity furthers one or more of the competing national objectives or purposes contained in sections 302 or 303 of the Act,

(b) When performed separately or when its cumulative effects are considered, it will not cause adverse effects on the natural resources of the coastal zone substantial enough to outweigh its contribution to the national interest,

(c) The activity will not violate any requirements of the Clean Air Act, as amended, or the Federal Water Pollution Control Act, as amended, and

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

In order to determine that the ground for sustaining an appeal has been met, I must find that the project satisfies all four elements of 15 CFR 930.121.

First Element

To satisfy the first element of this regulation, I must find that:

The activity furthers one or more of the competing national objectives or purposes contained in sections 302 or 303 of the [CZMA].

15 CFR 930.121(a).

Sections 302 and 303 of the CZMA identify a number of objectives and purposes which may be generally stated as follows:

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

3. To encourage and assist 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 to 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 (Section 302(h) and (i); and Section 303(2)).

As I have stated in a previous consistency appeal decision, because Congress has broadly defined 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. Decision of the Secretary of Commerce in the Matter of the Appeal by Exxon Company, U.S.A., to a Consistency Objection by the California Coastal Commission, February 18, 1984; 49 Fed. Reg. 8274 (March 6, 1984).

Appellant's proposed construction of a commercial marina would develop the resources of the coastal zone by providing increased recreational boating facilities. The development of boating facilities and a consideration of the effects of such development on the other resources of the coastal zone are among the national objectives of the CZMA. Therefore, I find that the Appellant's proposed development of a commercial marina satisfies the initial element of the regulation.

Second Element

To satisfy the second element of the regulation, I must find that:

When 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 its contribution to the national interest.

15 CFR 930.121(b).

This element requires that I balance the adverse effects of the objected-to activity on the natural resources of the coastal zone against its contribution to the national interest.

Adverse Effects

The DNRCD asserts that Appellant's project will have an adverse impact on the water quality of Bath Creek. DNRCD's Consistency Objection; Commission's Findings. This assertion is based primarily on the comments before the DNRCD of two State agencies, the North Carolina Wildlife Resources Commission and the Water Quality Section of the Division of Environmental Management:

(a) The North Carolina Wildlife Commission objected to the water quality degradation which would result from installation of two diesel fuel pumps and two gasoline pumps, all on the south pier, due to potential damage to water fowl and other bird populations, inland fishery resources, and benthic organisms.

(b) The Water Quality Section of the Division of Environmental Management commented that since the proposed development did not call for discharge of wastewater, no certification from the Section was required. The comment continued and advised:

Even though a certification is not required, the continued proliferation of marina facilities in Bath and similar areas along the Pamlico River tend to increase the potential for bacterial pollution resulting from illicit overboard discharges and for gas and oil spills from fueling facilities. In addition, rainfall runoff from paved or unpaved parking or storage areas may result in oils, metals, or bacterial contamination in the immediate vicinity.

Commission's Findings, Findings of Fact, Par. 14.

In addition, the DNRCD found that these problems could not be mitigated by the conditions imposed by the local permit officer. DNRCD's Consistency Objection.

In response, Appellant asserts that the record does not support the DNRCD's contention that construction of the marina would result in any deterioration of water quality. He argues that the cumulative effects on the natural resources of the coastal zone will be negligible and that any impact on water quality would be minimized by his agreement to meet conditions imposed by the Wildlife Resources Commission and to require the use of pump-out facilities provided by the marina. Appellant's Supporting Statements of October 5, 1983 and January 9, 1984. Appellant relies on testimony produced at the hearing before the Commission on the issuance of the conditional CAMA minor permit.

I am persuaded by the evidence in the record that, notwithstanding Appellant's offer to meet all State standards and to mitigate this project, Appellant's proposed marina could have adverse effects on the water quality of Bath Creek and, therefore, on the natural resources of the coastal zone. Appellant has not established that these effects would not take place if his proposed project were to proceed.

The DNRC's assertion of adverse effects on the water quality of Bath Creek, based principally on the comments before it of the two State agencies, cited above, is corroborated by testimony at the permit appeal hearing and by the findings made by the local permit officer in issuing the conditional permit. Mr. Bob Benton, supervisor of the Shellfish Sanitation Program of the North Carolina Division of Health Services, testified at the permit appeal hearing that in his opinion Appellant's project would "add to the bacterial loading of Bath Creek." Mr. Benton stated that compliance with a condition requiring all boat heads to be locked would not "relieve the problem" of significant increase of pollution in Bath Creek since the "policy sounds good but in fact they have not proven it to work." Tr., pp. 60-62. Further, Mr. Benton testified that use of pump-out facilities was low and not enforced in North Carolina. Tr., p. 63. While the Appellant did establish, through cross-examination of Mr. Benton, that Appellant's project would not have a significant adverse effect on the shellfish areas of Bath Creek and that Mr. Benton has no specific evidence of any marina-caused pollution in Bath Creek, this does not refute Mr. Benton's direct testimony on the potential of adverse water quality effects.

Appellant also relies on the testimony of Colonel Paul Dennison, retired COE District Engineer for Wilmington, North Carolina. Col. Dennison stated his opinion that "the marina itself as far as a major contributor to the pollution potential is not a significant consideration and would not have adverse effects." Tr., p. 192. However, Col. Dennison was only qualified as an expert in navigation and permitting and also acknowledges that "a marina or any use...adjacent to our coastal estuarine waters represents a potential for increased pollution." Tr., pp. 185, 197.

While the local permit officer of Beaufort County issued a conditional permit to Appellant, he confirmed in a letter to Appellant that he had found Appellant's project inconsistent with 15 NCAC 7H.0207(d) because he was "particularly concerned about runoff from the parking area, fuel spillage and illicit sewage discharges." Tr., pp. 296-7. Evidence in the record supports the opinion of the local permit officer that runoff could be a problem because Appellant's project does not provide for grease and sediment traps for storm water runoff. Tr., p. 41. Appellant has offered no evidence to the contrary.

Finally, Appellant offers to mitigate the effects of his project by agreeing not to construct any fuel facilities until he has met any conditions imposed by the Wildlife Resources Commission. Appellant's Supporting Statement of January 9, 1984. The Wildlife Resources Commission found that Appellant's project does not "address any special facilities or safety precautions to preclude this degradation [by the fuel pumps] of water quality or to prevent a major accidental spill." Tr., p. 290. Appellant has not established

what conditions he will meet, what effect the additional mitigation measures will have on water quality, and how he will be bound by these conditions. Moreover, there is some question whether the Wildlife Resources Commission can be delegated the authority to impose conditions on Appellant's project. Commission's Findings. Even giving the Appellant the benefit of the doubt that he can mitigate completely the adverse effects of fuel pumps at his marina, I still find that his project would have adverse effects on the water quality of Bath Creek, due to increased bacterial pollution and increased runoff, discussed above.

Contribution to the National Interest

Commerce regulations indicate that there are several ways to determine the national interest in a particular project, including seeking the views of Federal agencies, examining Federal laws and policy statements from the President and Federal agencies, and reviewing plans, reports and studies issued by Federal agencies. 15 CFR Part 923, 44 Fed. Reg. 18590, 18591 (1979); and comment to 15 CFR 923.52(c)(2), 44 Fed. Reg. 18608 (1979).

Public notices of this appeal in the Federal Register (48 Fed. Reg. 51677 (November 10, 1983)) and in The Washington Daily-News (December 7, 1983) provided interested Federal agencies an opportunity to comment on the national interest in the proposed activity but none responded. The Wilmington, North Carolina District Office of the COE, which was sent a notice of this appeal, did not submit any information. Letter from Joan Bondareff, Assistant General Counsel for Ocean Services, NOAA, to Steve Brown, Wilmington District Corps of Engineers, November 7, 1983. Commerce also contacted the United States Coast Guard and the Department of the Interior and inquired whether they could identify in what manner or to what degree the proposed project would contribute to the national interest. Neither agency identified any contribution which Appellant's proposed project would make to the national interest. Affidavit from Bernard C. Cody, Attorney Advisor, Office of the General Counsel, NOAA, regarding telephone inquiries to the U.S. Coast Guard and the U.S. Department of the Interior.

Inasmuch as no Federal agency identified any national interest that would be served by Appellant's proposed marina, I find that the only national interest to which Appellant's project would contribute would be that I identified under element one above, increasing recreational boating opportunities in the coastal zone. The addition of a single marina would contribute minimally to this national interest.

Having found above that Appellant's proposed project would cause adverse effects on the natural resources of North Carolina's coastal zone, I now find that these adverse effects

are substantial enough to outweigh the project's contribution to the national interest. Therefore, I find that the Appellant has failed to satisfy the second element of the regulation.

Conclusion

Because the Appellant must satisfy all four elements of the regulation 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 or purposes of the [CZMA]." Having found that the Appellant has failed to satisfy the second element of the regulation, it is unnecessary to examine elements three and four of the regulation. Therefore the appeal is denied.

Michael P. Balducci

Secretary of Commerce