

**DECISION AND FINDINGS BY THE U.S. UNDER SECRETARY OF COMMERCE  
FOR OCEANS AND ATMOSPHERE IN THE CONSISTENCY APPEAL OF  
ELECTRIC BOAT CORPORATION FROM AN OBJECTION BY THE NEW YORK  
STATE DEPARTMENT OF STATE**

**NOVEMBER 16, 2020**

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## I. INTRODUCTION

Electric Boat Corporation (“EBC”) has appealed the objection of the New York State Department of State (“the State”) (collectively, “the Parties”) to a consistency certification for a proposed U.S. Army Corps of Engineers (“USACE”) permit that would allow EBC to dispose of 890,000 cubic yards (“cy”) of dredged material in the Eastern Long Island Sound Dredged Material Disposal Site (“ELDS”). The State found that the disposal of dredged material at ELDS would not be consistent with its coastal program established under the Coastal Zone Management Act (“CZMA”), 16 U.S.C. §§ 1451 *et seq.* EBC appeals this objection, requesting that the National Oceanic and Atmospheric Administration (“NOAA”) Administrator, as delegated,<sup>1</sup> override the State’s objection.

The CZMA provides a state with a federally-approved coastal management program the opportunity to review a proposed project requiring federal licenses or permits if the project would affect any land or water use or natural resource of the state’s coastal zone. 16 U.S.C. § 1456(c)(3)(A). A timely objection raised by a state precludes federal agencies from issuing licenses or permits for such projects, unless on appeal by the applicant NOAA finds that the activity is either consistent with the objectives of the CZMA or necessary in the interest of national security. *Id.* These grounds are independent, and an affirmative finding on either ground is sufficient to override a state’s objection. *Id.*; 15 C.F.R. § 930.120.<sup>2</sup> If NOAA overrides a state’s objection by finding that the activity is consistent with the objectives of the CZMA or is necessary in the interest of national security, the federal agency may approve the proposed activity. 15 C.F.R. § 930.130(e)(1).

In the current appeal, after considering the Parties’ briefs, past precedent, and the decision record, NOAA overrides the State’s objection. NOAA finds that EBC’s proposed disposal of 890,000 cy of dredged material at ELDS is necessary in the interest of national security, as articulated in 16 U.S.C. § 1456(c)(3)(A) and the CZMA implementing regulations at 15 C.F.R. § 930.122.

## II. BACKGROUND

### A. Statutory Summary

Section 307 of the CZMA requires that federal actions, within and outside the coastal zone, which have reasonably foreseeable effects on any land or water use or natural resource of the coastal zone, be consistent with the enforceable policies of the affected state’s federally-approved coastal management program. 16 U.S.C. § 1456. Federal license or permit activities

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<sup>1</sup> Under Department Organization Order 10-15 Section 3.01.u, the NOAA Administrator is delegated the authority to perform functions prescribed in the CZMA, including administering and deciding consistency appeals.

<sup>2</sup> See also *Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of the Foothill/Eastern Transportation Corridor Agency and the Board of Directors of the Foothill/Eastern Transportation Corridor Agency from an Objection by the California Coastal Commission*, Dec. 18, 2008, at 12 (“*Foothill/Eastern Transportation Corridor*”). NOAA’s CZMA appeal decisions cited here are available at <https://coast.noaa.gov/czm/consistency/appeals/fcappeldecisions/> (last visited Nov. 11, 2020).

that are listed in a state’s federally-approved coastal management program and that would occur within that state’s coastal zone, or that would occur outside the coastal zone but within a NOAA-approved geographic location description,<sup>3</sup> are subject to federal consistency review. 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.53.

The current appeal involves a case of interstate consistency. The CZMA authorizes interstate consistency reviews where “[a] federal activity may affect coastal uses or resources of a State other than the State in which the activity will occur.” 15 C.F.R. § 930.150(a). The purpose of interstate consistency review is to “encourage cooperation among States in dealing with activities having interstate coastal effects, and to provide States, local governments, Federal agencies, and the public with a predictable framework for evaluating the consistency of these federal activities” under the CZMA. *Id.* § 930.150(b). A state seeking to conduct a consistency review of federal activities in another state must “[l]ist those Federal agency activities, federal license or permit activities, and federal assistance activities that the [s]tate intends to routinely review for consistency” and “[g]enerally describe the geographic location for each type of listed activity.” *Id.* § 930.154(a)(1)–(2). When describing the geographic location, the state must also “provide information to [NOAA’s Office for Coastal Management (“OCM”)] that coastal effects from listed activities occurring within the geographic area are reasonably foreseeable.” *Id.* § 930.154(c). Furthermore, the state must “notify and consult with the [s]tate in which the listed activity will occur, as well as with relevant Federal agencies” and “submit [its] lists and geographic location descriptions . . . to [OCM] for approval.” *Id.* § 930.154(b), (d).

Once OCM has approved a state’s list of federal activities occurring within an interstate geographic location description, an applicant for a federal license or permit activity subject to interstate consistency review “shall notify each affected coastal State of the proposed activity.” *Id.* § 930.155(b). Within 30 days of receiving the consistency certification and necessary data and information from the applicant, each state intending to review an activity occurring in another state must notify the applicant, the federal agency, the state in which the activity will occur, and OCM of its intent to review the activity for consistency. *Id.* § 930.155(c). Each reviewing state has six months from receipt of the consistency certification and necessary data and information to review the applicant’s proposed project. *Id.* § 930.60. If a reviewing state issues an objection, the federal agency may not issue the license or permit sought by the applicant unless NOAA finds that the activity is consistent with the objectives of the CZMA or is otherwise necessary in the interest of national security. 16 U.S.C. § 1456(c)(3)(A).

An applicant may obtain review of a state’s objection by filing a notice of appeal with NOAA within 30 days of receipt of the state’s objection. 15 C.F.R. § 930.125. “NOAA’s Office of the General Counsel assists the NOAA Administrator in carrying out this responsibility and has been

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<sup>3</sup> Under the CZMA implementing regulations, states may, by describing their geographic location, identify “areas outside of the coastal zone where coastal effects from federal license or permit activities are reasonably foreseeable.” 15 C.F.R. § 930.53(a)(1).

delegated certain functions associated with processing consistency appeals, including issuing procedural orders and establishing schedules.”<sup>4</sup>

## **B. Factual Summary**

### **1. EBC’s Proposed Project**

EBC designs, builds, repairs, and maintains submarines for the United States Navy (“Navy”). As part of the EBC South Yard Facilities Master Plan (“FMP”) for its shipyard facility located on the eastern bank of the Thames River in Groton, Connecticut, EBC is upgrading its existing in-water and terrestrial infrastructure to accommodate the construction, launch, and delivery of a new class of ballistic missile submarines (“SSBNs”) – the COLUMBIA Class – to replace the OHIO Class SSBNs. The Navy intends to procure the first COLUMBIA Class submarine in Fiscal Year 2021, and EBC plans to initiate dredging at its South Yard Facility in 2024. Notice of Appeal from EBC to Wilbur L. Ross, Sec’y of Commerce, at 2 (Jan. 23, 2020) (“EBC Notice of Appeal”).<sup>5</sup> The Navy has stated that the first of the OHIO Class SSBNs will reach the end of its service life in 2027, by which time a COLUMBIA Class SSBN must be available to replace it. Comment from U.S. Dep’t of Navy, at 3 (May 14, 2020) (“Navy May Comment”).<sup>6</sup> To accommodate the larger size of the COLUMBIA Class boats, EBC needs to dredge in the Thames River adjacent to the EBC facility to provide new docking, berthing, and launching infrastructure.<sup>7</sup> *Id.*

### **2. USACE Permit and Environmental Reviews**

In order to complete the FMP work described above, in May 2018, EBC submitted an application to USACE for permits under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, and Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, to dredge the Thames River. Comment from USACE, at 1 (March 24, 2020) (“USACE Comment”).<sup>8</sup> EBC also sought a USACE permit under Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (“MPRSA”), 33 U.S.C. § 1413, to authorize disposal of dredged material in ocean waters. *Id.*

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<sup>4</sup> *Decision and Findings by the U.S. Under Secretary of Commerce for Oceans and Atmosphere in the Consistency Appeal of WesternGeco from an Objection by the State of North Carolina*, June 15, 2020, at 3 (“*WesternGeco*”); see also *Redelegation of Authority from the Under Secretary of Oceans and Atmosphere Delegations of Authority*, TM # 81 (2013).

<sup>5</sup> Available at <https://www.regulations.gov/document?D=NOAA-HQ-2020-0021-0283> (last visited Nov. 11, 2020).

<sup>6</sup> Available at <https://www.regulations.gov/document?D=NOAA-HQ-2020-0021-0074> (last visited Nov. 11, 2020).

<sup>7</sup> Specifically, the proposed dredging and associated disposal activities would support the construction of a floating dry dock submersion basin, the berthing of support of transport vessels, and the staging of a floating dry dock. EBC Notice of Appeal at 3.

<sup>8</sup> Available at <https://www.regulations.gov/document?D=NOAA-HQ-2020-0021-0060> (last visited Nov. 11, 2020).

Project planning for the dredging component of the FMP included EBC's implementation of a USACE- and U.S. Environmental Protection Agency ("EPA")-approved sampling and analysis plan<sup>9</sup> of the sediments to be dredged. EBC Notice of Appeal at 3. EBC conducted the testing required by that sampling and analysis plan in order to comply with the evaluation and testing requirements of the MPRSA regulations governing its proposed disposal of dredged material in Long Island Sound waters. *Id.*; see 40 C.F.R. Part 227. EBC then submitted the results of the testing to USACE, to allow the agency to determine the suitability of the sediments in the dredging area for unconfined open-water disposal, pursuant to the MPRSA regulations.<sup>10</sup> EBC Principal Brief at 4.

On December 26, 2018, USACE issued a public notice announcing EBC's permit application.<sup>11</sup> In order to accommodate EBC's construction and timing needs, USACE applied a two-phase approach to this permitting action: Phase I would authorize all of EBC's work aside from the dredging involving disposal in Long Island Sound and would not require the State's CZMA consistency concurrence; and Phase II would authorize the remaining dredging and require the State's CZMA consistency concurrence. USACE Comment at 2.

On June 6, 2019, USACE issued a Suitability Determination for EBC's proposal to dredge approximately 984,000 cy of materials for its FMP project. *Id.* USACE, with EPA's concurrence, found that 890,000 cy of the proposed material were suitable for open-water disposal at ELDS.<sup>12</sup> Soon thereafter, on July 11, 2019, USACE issued the Phase I permit to EBC. *Id.*

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<sup>9</sup> See Memorandum from Charles N. Farris, Project Manager, USACE Marine Analysis Section, to Diane Ray, Project Manager, CENAE-RDB, re: Sampling and Analysis Plan for Electric Boat – South Berth, Thames River, Groton, CT, File Number NAE-2017-02739 (Mar. 16, 2018), available at <https://www.regulations.gov/document?D=NOAA-HQ-2020-0021-0004> (last visited Nov. 11, 2020).

<sup>10</sup> See 40 C.F.R. §§ 227.6, 227.27. The MPRSA regulations set specific environmental impact prohibitions, limits, and conditions for the disposal of materials into ocean waters. *Id.* § 227.4; see also *id.* §§ 227.5–227.13. If these conditions are satisfied,

it is the determination of EPA that the proposed disposal will not unduly degrade or endanger the marine environment and that the disposal will present:

(a) [n]o unacceptable adverse effects on human health and no significant damage to the resources of the marine environment;

(b) [n]o unacceptable adverse effect on the marine ecosystem;

(c) [n]o unacceptable adverse persistent or permanent effects due to the dumping of the particular volumes or concentrations of these materials; and

(d) [n]o unacceptable adverse effect on the ocean for other uses as a result of direct environmental impact.

*Id.* § 227.4.

<sup>11</sup> See USACE, Public Notice, File No. NAE-2017-02739 (Dec. 26, 2018), available at <https://www.nae.usace.army.mil/Portals/74/docs/regulatory/PublicNotices/NAE-2017-02739.pdf>. (last visited Nov. 11, 2020).

<sup>12</sup> USACE determined that the remaining 94,000 cubic yards of dredged materials were unsuitable for open water disposal because of elevated levels of contaminants that would result in unacceptable bioaccumulation risk. See also

Following the issuance of the Suitability Determination, EBC prepared a Dredged Materials Management Plan that evaluated alternatives for disposal sites for the 890,000 cy of suitable dredged material. EBC Principal Brief at 4.<sup>13</sup> On October 7, 2019, EBC presented its alternatives analysis to the Long Island Sound Regional Dredging Team (“LIS RDT”), an interagency body that reviews proposed dredging projects to determine whether practicable alternatives to open-water disposal exist. *See* 40 C.F.R. § 228.15(b)(4)(vi)(C), (b)(4)(vi)(F).<sup>14</sup> The LIS RDT found that EBC properly considered disposal alternatives and that there were no practicable alternatives to open-water disposal. EBC Principal Brief at 5. Instead, the LIS RDT determined that open-water disposal at ELDS was the preferred option for disposal of the 890,000 cy of dredged material in question. *Id.*

The outstanding USACE Phase II permit at issue in this appeal is the final approval EBC requires prior to initiating its dredging and disposal activities at ELDS.<sup>15</sup> USACE stated in its March 24, 2020, comment that it is ready to issue the Phase II permit, pending NOAA’s decision on this consistency appeal. USACE Comment at 2.

### C. Procedural Background

Pursuant to NOAA’s interstate consistency review regulations at 15 C.F.R. Part 930, Subpart I, on February 6, 2006, the State requested OCM approval of a list of interstate activities, which included three activities that would require permits, licenses, or other forms of approval by USACE.<sup>16</sup> On March 28, 2006, NOAA approved the State’s request, finding that the designation and use of open-water disposal sites in Connecticut waters in Long Island Sound would have reasonably foreseeable effects on New York’s coastal resources and uses.<sup>17</sup> Because EBC’s

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Comment from EPA, at 9 (Aug. 4, 2020) (“EPA Comment”), available at <https://www.regulations.gov/document?D=NOAA-HQ-2020-0021-0061> (last visited Nov. 11, 2020).

<sup>13</sup> Available at <https://www.regulations.gov/document?D=NOAA-HQ-2020-0021-0080> (last visited Nov. 11, 2020).

<sup>14</sup> *See also Dredged Material Management in Long Island Sound*, EPA, <https://www.epa.gov/ocean-dumping/dredged-material-management-long-island-sound#RDT> (last visited Nov. 11, 2020).

<sup>15</sup> In addition to applying to USACE for permits to dredge the Thames River in order to complete its FMP, EBC also applied for, and received, permits from the State of Connecticut Department of Energy and Environmental Protection (“CT DEEP”) for in-water activities, and the City of Groton for upland improvements. EBC Principal Brief at 2. CT DEEP has direct permitting authority and integrates its CZMA federal consistency review and concurrence into its permitting process. CT DEEP issued its permit for the EBC project on April 3, 2019. *See* Conn. Dep’t of Energy and Env’tl. Prot. License No. 201807501-SDFWQC, available at <https://beta.regulations.gov/document/NOAA-HQ-2020-0021-0019> (last visited Nov. 11, 2020). For this particular project, CT DEEP informed USACE that it waived its CZMA federal consistency review because of its permitting authority.

<sup>16</sup> *See* Letter from Steven C. Resler, Deputy Chief, Res. Mgmt. Bureau, Div. of Coastal Res., N.Y. Dep’t of State, to John King, Chief, Coastal Programs Div., NOAA (Feb. 6, 2006), available at <https://www.dos.ny.gov/opd/programs/pdfs/Consistency/2006InterstateConsistencyRPC.pdf> (last visited Nov. 11, 2020).

<sup>17</sup> *See* Letter from John King, Chief, Coastal Programs Div., NOAA to George R. Stafford, Dir., Div. of Coastal Res., N.Y. Dep’t of State (March 28, 2006), available at <https://www.dos.ny.gov/opd/programs/pdfs/Consistency/2006InterstateConsistencyRPC.pdf> (last visited Nov. 11,

proposed disposal of dredged material at ELDS falls within the scope of federal activities subject to interstate consistency review within the specified geographic location descriptions, the State has authority to conduct a federal consistency review of the proposed activity.

Accordingly, on June 24, 2019, EBC submitted its CZMA consistency certification<sup>18</sup> to the State for the USACE permit to dispose of 890,000 cy of dredged material in ELDS, which the State acknowledged by letter dated July 24, 2019.<sup>19</sup> In this letter, the State notified EBC that it intended to review EBC's proposed activity pursuant to 15 C.F.R. § 930.155(c). On December 27, 2019, the State timely objected to EBC's CZMA consistency certification.<sup>20</sup> On January 24, 2020, EBC submitted to NOAA a timely Notice of Appeal. EBC Notice of Appeal; *see* 15 C.F.R. § 930.125(a).

On February 21, 2020, EBC submitted its Principal Brief. EBC Principal Brief; *see* 15 C.F.R. § 930.127(a). NOAA published a notice of the appeal in the Federal Register<sup>21</sup> and in New York's *Newsday* and Connecticut's *The Day* newspapers on February 24, 2020, inviting the public and interested federal agencies to comment on the appeal. *See* 15 C.F.R. § 930.128(a). On April 21, 2020, the State submitted its Principal Brief,<sup>22</sup> and on May 11, 2020, EBC submitted its Reply Brief.<sup>23</sup> *See* 15 C.F.R. § 930.127(a).

In response to a request from the State, on May 19, 2020, NOAA issued an Order granting the Parties the opportunity to file two additional briefs to respond to any arguments appearing in previously-filed briefs and/or comments or documentation that federal agencies, states, or the

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2020); *see also* New York's Listed Federal Actions, OCM, NOAA, available at <https://coast.noaa.gov/data/czm/consistency/media/ny.pdf> (last visited Nov. 11, 2020).

<sup>18</sup> Electric Boat Corp., Application for N.Y. State Dep't of State Fed. Consistency Determination (2019), available at <https://www.regulations.gov/document?D=NOAA-HQ-2020-0021-0007> (last visited Nov. 11, 2020); *see* 15 C.F.R. § 930.57.

<sup>19</sup> Letter from Jennifer L. Street, N.Y. Dep't of State, to Paul A. Harren, Electric Boat Corp., Re: F-2019-0672, Intent to Review for Interstate Consistency, available at <https://www.regulations.gov/document?D=NOAA-HQ-2020-0021-0101> (last visited Nov. 11, 2020); *see* 15 C.F.R. § 930.60(a)(3).

<sup>20</sup> Letter from Kisha Santiago-Martinez, N.Y. State Dep't of State, to Paul A. Harren, Electric Boat Corp., Re: F-2019-0672, Objection to Consistency Certification (Dec. 27, 2019) ("State's Objection"), available at <https://www.regulations.gov/document?D=NOAA-HQ-2020-0021-0018> (last visited Nov. 11, 2020); *see* 15 C.F.R. §§ 930.60, 930.62.

<sup>21</sup> 85 Fed. Reg. 10,421 (Feb. 24, 2020), available at <https://www.regulations.gov/document?D=NOAA-HQ-2020-0021-0001> (last visited Nov. 11, 2020).

<sup>22</sup> Available at <https://www.regulations.gov/document?D=NOAA-HQ-2020-0021-0075> (last visited Nov. 11, 2020). Pursuant to 15 C.F.R. § 930.127(a) and the February 6, 2020, Order Regarding Briefing Schedule, the State's Principal Brief was due on March 25, 2020; however, due to unforeseen circumstances caused by the COVID-19 pandemic, NOAA determined there was good cause to grant the State's two requests for an extension to file its Principal Brief.

<sup>23</sup> Available at <https://www.regulations.gov/document?D=NOAA-HQ-2020-0021-0079> (last visited Nov. 11, 2020).

public submitted to NOAA.<sup>24</sup> On July 24, 2020, NOAA issued an Order again providing the Parties with the opportunity to file two additional briefs to respond to new record materials, a U.S. District Court for the Eastern District of New York Memorandum and Order<sup>25</sup> regarding the designation of ELDS as an open-water dredged disposal site, and any other relevant materials.<sup>26</sup> See 15 C.F.R. § 930.127. To accommodate the filing of these additional briefs, NOAA stayed the closure of the decision record until August 24, 2020, pursuant to 15 C.F.R. § 930.130(a)(2), (3). 85 Fed. Reg. 46,598 (Aug. 3, 2020). After receiving these additional briefs from the Parties, NOAA closed the appeal decision record on August 31, 2020, and published a Notice in the Federal Register announcing that closure. 85 Fed. Reg. 54,355 (Sept. 1, 2020).<sup>27</sup> On October 30, 2020, NOAA published a Notice in the Federal Register extending the deadline for issuing a decision by 15 days. 85 Fed. Reg. 68,856 (Oct. 30, 2020).

#### **D. Navy Comments**

In response to NOAA’s February 24, 2020, Notice in the Federal Register inviting interested federal agencies to comment on this appeal and a February 27, 2020, letter NOAA sent to the Department of Defense requesting its views,<sup>28</sup> the Navy submitted a comment. See Navy May Comment. In its comment, the Navy requested that NOAA override the State’s objection “in the interest of national security,” and enable USACE to issue the Phase I permit to EBC. Navy May Comment at 1. The Navy stated that,

[t]he proposed action directly supports the COLUMBIA Class submarine program, a high priority acquisition program due to its critical role in supporting national security through our nation’s strategic nuclear deterrence mission. If EBC is unable to proceed with the proposed action, the COLUMBIA program will be negatively impacted by a delayed construction schedule and an increase in costs.

*Id.* An attachment to the Navy’s May comment noted that the Navy currently operates 14 OHIO Class SSBNs, which “perform a specialized mission of strategic nuclear deterrence—remaining hidden at sea to deter a nuclear attack on the United States.” *Id.* at 2. Furthermore, the attachment explained that approximately one OHIO Class SSBN will reach the end of its service life per year, beginning in 2027 and ending with the 14th ship in 2040. *Id.*

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<sup>24</sup> Available at <https://beta.regulations.gov/document/NOAA-HQ-2020-0021-0285> (last visited Nov. 11, 2020).

<sup>25</sup> *Rosado v. Wheeler*, Case No. 1:17-cv-04843 (E.D.N.Y.) (ECF No. 85). In this Memorandum and Order, the U.S. District Judge dismissed a challenge to EPA’s designation of ELDS and concluded that, “in designating [ELDS], EPA based its findings on substantial evidence, and followed the agency’s obligations under the law.” *Id.* at 42.

<sup>26</sup> Available at <https://beta.regulations.gov/document/NOAA-HQ-2020-0021-0286> (last visited Nov. 11, 2020).

<sup>27</sup> All record material for this consistency appeal may be found at <https://www.regulations.gov/docket?D=NOAA-HQ-2020-0021> (last visited Nov. 11, 2020).

<sup>28</sup> NOAA also sent letters soliciting comments to USACE, the EPA, the Department of Homeland Security, the National Security Council, the Department of Justice, the Department of the Interior, the Department of State, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service.

The Navy's comment stated that through the COLUMBIA Class program, the Navy will design and build at least 12 new SSBNs to replace the OHIO Class SSBNs. *Id.* The Secretary of Defense has designated the COLUMBIA program as a DX-rated program, meaning it has the "highest national defense urgency based on military objectives." *Id.* The Navy quoted the Department of Defense 2018 Nuclear Posture Review,<sup>29</sup> which, in reference to the replacement of the OHIO Class SSBNs with the COLUMBIA Class SSBNs, stated that "there will be little-to-no margin for adjusting to an unforeseen event that would force an SSBN into unscheduled maintenance or early retirement . . . . [T]here is no schedule margin for delay without degrading the critical attributes that the sea-based leg of the [nuclear] triad provides."<sup>30</sup>

Additionally, the Navy provided the following outline of the schedule for EBC's proposed dredging and disposal activities, and an explanation of this schedule's importance to the COLUMBIA Class program: 1) preliminary construction of the COLUMBIA Class SSBNs began at EBC's facility in Quonset Point in 2017; 2) the final assembly and trials of the COLUMBIA Class SSBNs will be performed in a planned assembly facility at EBC's shipyard in Groton, CT beginning in 2024; 3) construction of EBC's Groton shipyard facility, including the dredging and disposal activities that are at issue in this appeal, "must be completed on time in order to assemble and launch the COLUMBIA Class submarines on schedule"; 4) any delays to the completion of the facility improvements and construction timeline "would create serious adverse consequences for national security and the nuclear deterrent mission by likely delaying the delivery of the lead COLUMBIA Class submarine"; and 5) the Navy intends to procure the lead ship of the COLUMBIA Class in Fiscal Year 2021. Navy May Comment at 2-3.

The Navy also described in its comment the process EBC followed prior to selecting ELDS as the "preferred location" for the disposal of dredged material for the EBC project. The Navy stated that EBC considered two open-water disposal sites: ELDS and the Central Long Island Dredge Disposal Site ("CLDS").<sup>31</sup> *Id.* at 3. EBC selected ELDS due to its proximity to EBC's facility, which "supports the current EBC facility project schedule and the COLUMBIA Class construction schedule." *Id.* Furthermore, the Navy stated that use of CLDS or the Rhode Island Sound Disposal Site ("RISDS") instead of ELDS, "will add time and uncertainty to the physical

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<sup>29</sup> See 2018 Nuclear Posture Review, U.S. Dep't of Def., <https://dod.defense.gov/News/SpecialReports/2018NuclearPostureReview.aspx> (last visited Nov. 11, 2020).

<sup>30</sup> Navy May Comment at 2 (quoting 2018 Nuclear Posture Review, U.S. Dep't of Def.) (second alteration in original). The nuclear triad includes SSBNs, land-based Intercontinental Ballistic Missiles, and long-range bomber aircraft. EBC Principal Brief at 6-7.

<sup>31</sup> In all, EBC considered 22 other disposal sites. EBC Principal Brief at 5. These alternative sites included beneficial uses, such as beach nourishment, habitat enhancement/restoration, and shoreline placement for fast land expansion; upland beneficial reuses at brownfield sites and for daily cover at landfills; and island and/or shoreline confined disposal facilities. *Id.* at 4-5. EBC used a tiered analysis to evaluate these disposal sites, which evaluated sediment compatibility, site capacity, and site availability. *Id.* at 5. The seven alternatives that passed the initial screening criteria were then evaluated based on implementation cost. *Id.*

process of dredging and dredged material disposal” due to their greater distances from EBC’s Groton shipyard.<sup>32</sup> *Id.* at 2.

The Navy submitted a second comment to NOAA on July 17, 2020, in which it reinforced many of the points it made in its May comment and provided a detailed explanation of why an override of the State’s objection is necessary to avoid delays in the production schedule for the COLUMBIA Class SSBNs. *See* Navy July Comment at 1. The Navy stated that the timing of the lead ship’s launch, scheduled for April 2026, is “imperative to support delivery of the lead ship on schedule.” *Id.* at 2. Accordingly, the Navy wrote that EBC’s Floating Dry Dock (“FDD”), from which the ship will be launched, must complete testing and acceptance by April 2026. *Id.* To meet this deadline, EBC must begin testing the FDD in April 2025. *Id.* The dredging of the FDD, which is at issue in this consistency appeal and a necessary prerequisite to the testing and acceptance process, must therefore be completed by January 31, 2025, because the annual authorized window for dredging in Groton runs from October 1 through January 31.<sup>33</sup> *Id.*

According to the Navy, even if EBC were not constrained by the October 1 through January 31 annual authorized window for dredging, the earliest EBC could begin dredging the FDD would be August 2024 due to two ongoing projects.<sup>34</sup> *Id.* The Navy has calculated that between October 1, 2024, and February 1, 2025, there are a total of 117 days available for dredging the FDD, not including federal holidays, and that it will take EBC 55 days to dredge the 890,000 cy if it uses ELDS. *Id.* The Navy concluded that if EBC used CLDS or RISDS, it would take 137 days to dredge and dispose of the 890,000 cy, and that EBC would have to apply for new permits from USACE and the State of Connecticut, adding further time to the schedule. *Id.* As a result, the Navy concluded that, “the use of any other site other than ELDS will not allow the dredging effort to be completed in the available dredging window, directly resulting in a delay to the required delivery of the first COLUMBIA Class submarine.” *Id.*

The Navy made it clear that timeliness of the project will “ensure national security interests are not significantly impaired” pursuant to 15 C.F.R. § 930.122. *Id.* The Navy explained that “any delay” in the proposed project timeline would cause a significant impairment of a national

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<sup>32</sup> As “a secondary concern,” the Navy stated that the use of alternative disposal sites “will increase transport costs in support of the COLUMBIA class submarine program.” *Id.* at 3, 4.

<sup>33</sup> EBC explained that this October 1 through January 31 authorized dredging season protects flounder spawning: “[b]ased on conversations with [the National Marine Fisheries Service] and consultation with [CT DEEP], the [time-of-year] restriction for unconfined dredging extends from February 1 through September 30. Therefore, the in-water work window for unconfined dredging and dredge disposal on the [EBC FMP] project will be October 1 through January 31.” EBC Third Supplemental Reply Brief at 2 (*quoting* Fuss & O’Neill and Electric Boat Corp., Joint Permit Application, South Yard Facilities Master Plan (May 24, 2018) (“Joint Permit Application”), Attachment M6 at 54, available at <https://www.regulations.gov/document?D=NOAA-HQ-2020-0021-0005> (last visited Nov. 11, 2020)).

<sup>34</sup> These two projects are EBC’s construction of a new, over-water Final Assembly and Test facility for the COLUMBIA Class adjacent to the dredging location, and the removal/relocation of an underwater range facility next to the EBC dredging location. Navy July Comment at 2.

security interest by degrading the sea-based leg of the nuclear triad. *Id.* at 2, 3 (quoting 2018 Nuclear Posture Review, U.S. Dep’t of Def.).

### **E. Other Agency, State, and Public Comments**

In addition to the Navy comments, NOAA received comments from USACE, the EPA, and the Department of Homeland Security regarding the instant consistency appeal.

In its March 24, 2020, comment, USACE’s Chief Counsel wrote, “[a]s an impartial regulatory agency, [USACE] takes no official position regarding the substantive issues involved in this appeal.” USACE Comment at 1. Nevertheless, USACE provided factual information relating to EBC’s permit application. As stated above, USACE concluded its comment by stating that it is ready to issue a permit that would authorize EBC to dispose of 890,000 cy of dredged material at ELDS. *Id.* at 2.

Kenneth Moraff, the Director of EPA’s Region 1 Water Division, submitted a comment on behalf of EPA on April 8, 2020. *See* EPA Comment. After reviewing the State’s objection, EPA “found it to include certain statements and representations that are incorrect or misleading with respect to EPA’s” designation of ELDS. EPA Comment at 1. Therefore, in his comment, Mr. Moraff addressed issues “pertinent to the appeal about which [EPA] has factual knowledge or related to which [EPA] has scientific or legal expertise.” EPA Comment at 1.

For example, in his comment, Mr. Moraff sought to respond to the State’s representations by clarifying EPA’s designation of ELDS. EPA explained that the MPRSA authorizes it to designate dredged material disposal sites. EPA Comment at 1–2 (citing 33 U.S.C. § 1412(c)). EPA designated ELDS in 2016<sup>35</sup> after completing a Final Supplemental Environmental Impact Statement and Record of Decision for the site.<sup>36</sup> *Id.* EPA also developed the technical criteria used by USACE to review permit applications for dredged material disposal,<sup>37</sup> worked with USACE to develop the sampling plan for the sediment from the EBC dredging project,<sup>38</sup> and

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<sup>35</sup> 81 Fed. Reg. 87,820 (Dec. 6, 2016).

<sup>36</sup> Env’tl. Prot. Agency, Final Supplemental Environmental Impact Statement for the Designation of Dredged Material Disposal Sites(s) in Eastern Long Island Sound, Connecticut and New York (November 2016), available at <https://www.regulations.gov/document?D=NOAA-HQ-2020-0021-0024> (last visited Nov. 11, 2020). The Navy participated in the development of the Final Supplemental Environmental Impact Statement as a cooperating agency. EPA had previously designated CLDS and RISDS, *see Id.* at 1-17, which are 47 and 42 miles from the EBC site, respectively. EBC Principal Brief at 28.

<sup>37</sup> *See* 40 C.F.R. Part 227.

<sup>38</sup> *See* Memorandum from Charles N. Farris, Project Manager, USACE Marine Analysis Section, to Diane Ray, Project Manager, CENAE-RDB, re: Sampling and Analysis Plan for Electric Boat – South Berth, Thames River, Groton, CT., File Number NAE-2017-02739 (Mar. 16, 2018), available at <https://www.regulations.gov/document?D=NOAA-HQ-2020-0021-0004> (last visited Nov. 11, 2020).

partnered with USACE to determine the suitability of the sediment for disposal under the MPRSA.<sup>39</sup> *Id.* at 2, 8. Additionally, EPA is a member of the LIS RDT. *Id.* at 9.

David Palmer, Chief of Staff of the Department of Homeland Security, submitted a comment to NOAA on April 27, 2020. *See* Comment from U.S. Dep’t of Homeland Sec. (Apr. 27, 2020) (“DHS Comment”).<sup>40</sup> In his comment, he wrote that, “the Department of Homeland Security defers to the views of the Secretary of Defense.” *Id.* at 1.

CT DEEP submitted a comment on March 24, 2020, “urg[ing] the Secretary of Commerce to override” the State’s objection to EBC’s consistency certification. Comment from Conn. Dep’t of Energy & Envtl. Protection, at 1 (March 24, 2020) (“CT DEEP Comment”).<sup>41</sup> CT DEEP maintained that the State’s objection

threatens clear national security interests, will cause adverse environmental impacts to Long Island Sound, will have a negative impact on marine safety, lacks any evidence of actual harm, and fails to recognize that all actions associated with this project will occur only in Connecticut waters and will be monitored by Connecticut authorities.

CT DEEP Comment at 1.

In addition to these federal and state agencies, NOAA received comments from over a dozen individuals, members of state governments and towns, and organizations. These comments voiced strong support for either EBC or the State’s positions.<sup>42</sup>

### III. STANDARD OF REVIEW

To override the State’s consistency objection, it is necessary for NOAA to find that the activity is either consistent with the objectives of the CZMA (“Ground I”), or necessary in the interest of national security (“Ground II”). 16 U.S.C. § 1456(c)(3)(A). These grounds are independent, and an affirmative finding on either ground is sufficient for NOAA to override a state’s objection. *See* 15 C.F.R. § 930.120.<sup>43</sup> A proposed activity is “necessary in the interest of national security”

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<sup>39</sup> *See* Memorandum from Frank J. Delgiudice, Chief, CENAE-RDP, USACE, to Diane Ray, Project Manager, CENAE-RDB, re: Suitability Determination for Electric Boat – South Berth, Thames River, Groton, CT, File Number NAE-2017-02739, at 4 (June 6, 2019), available at <https://www.regulations.gov/document?D=NOAA-HQ-2020-0021-0006> (last visited Nov. 11, 2020).

<sup>40</sup> Available at <https://beta.regulations.gov/document/NOAA-HQ-2020-0021-0284> (last visited Nov. 11, 2020).

<sup>41</sup> Available at <https://www.regulations.gov/document?D=NOAA-HQ-2020-0021-0049> (last visited Nov. 11, 2020).

<sup>42</sup> These comments may be found at <https://www.regulations.gov/docket?D=NOAA-HQ-2020-0021> (last visited Nov. 11, 2020).

<sup>43</sup> *See also* *Foothill/Eastern Transportation Corridor* at 12. The Parties disputed this point; it is discussed in more detail below.

if “a national defense or other national security interest would be significantly impaired were the activity not permitted to go forward as proposed.” *Id.* § 930.122.

NOAA’s “review of national security issues shall be aided by information submitted by the Department of Defense or other interested Federal agencies. The views of such agencies, while not binding, shall be given considerable weight.” *Id.* Additionally, the CZMA regulations state that NOAA will give “deference to the views of interested Federal agencies when commenting in their areas of expertise.” 15 C.F.R. § 930.127(e)(1). Nevertheless, the burden of persuasion remains with the appellant.<sup>44</sup>

NOAA considers a federal consistency appeal de novo.<sup>45</sup> NOAA does not second-guess the local factors underlying a state's objection; rather, NOAA applies a broader, national scope based on the factors described in the CZMA.<sup>46</sup> These factors include the consideration of the national security interest at issue in this appeal.

#### **IV. THRESHOLD ISSUES**

NOAA reviews procedural challenges to a state’s federal consistency certification as a threshold matter (i.e., prior to reaching the merits of the appellant’s arguments). NOAA must override a state’s objection if the appellant demonstrates that the state’s consistency objection is in violation of the federal consistency provisions of the CZMA or its implementing regulations. 15 C.F.R. § 930.129(b). This threshold review does not provide an avenue for an appellant to challenge the merits of a state’s objection, the substance of which is presumed to be valid on appeal.<sup>47</sup>

As a threshold matter, EBC argued that the State’s consistency objection failed to comply with 15 C.F.R. § 930.63(b), which requires an objecting state to “describe how the proposed activity is inconsistent with specific enforceable policies of the management program. The objection may describe alternative measures (if they exist) which, if adopted by the applicant, may permit the proposed activity to be conducted in a manner consistent with the enforceable policies of the management program.” Specifically, EBC contended that three of the five alternatives the State proposed, “do not currently exist,” and that the State “based its Objection, in part, on arbitrary standards not reflected in enforceable policies.” EBC Reply Brief at 2–3; EBC Principal Brief at 13–17, 19–22, 27.

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<sup>44</sup> See *WesternGeco* at 9; *Decision and Findings by the U.S. Secretary of Commerce in the Consolidated Consistency Appeals of Weaver’s Cove Energy, L.L.C. and Mill River Pipeline, L.L.C. from Objections by the Commonwealth of Massachusetts*, June 26, 2008, at 37 (“*Weaver’s Cove*”); *Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of the Virginia Electric and Power Company From an Objection by the North Carolina Department of Environment, Health and Natural Resources*, May 19, 1994, at 53 (“*VEPCO*”).

<sup>45</sup> *De novo* means “anew.” Black’s Law Dictionary (11th ed. 2019). Therefore, NOAA assesses the proposed project for the first time, rather than reviewing a state’s CZMA federal consistency review with any deference.

<sup>46</sup> *Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of Chevron U.S.A. Inc. from an Objection by the California Coastal Commission*, October 29, 1990, at 5–7 (“*Chevron 1990*”).

<sup>47</sup> *Chevron 1990* at 6–7.

The CZMA regulations permit an objecting state to describe alternative measures “if they exist.” 15 C.F.R. § 930.63(b). The State was therefore under no obligation to describe alternative measures.<sup>48</sup> The State’s exercise of its discretion to describe alternatives, even assuming that several of those alternatives are not currently available, does not constitute a violation of the procedural requirements of the CZMA regulations.

Additionally, the CZMA regulations require a state to describe how the proposed project is inconsistent with specific, enforceable policies of the coastal management program. 15 C.F.R. § 930.63(b). This provision requires nothing more than is found in its plain meaning – a state’s objection must simply identify specific, NOAA-approved enforceable policies and must describe how the proposed project is inconsistent with those policies.<sup>49</sup> The State has done so in this case, identifying specific, NOAA-approved enforceable policies of its coastal management program that it determined to be inconsistent with EBC’s proposed activity.<sup>50</sup>

Accordingly, the State satisfied the minimum requirements of 15 C.F.R. § 930.63(b), and a threshold override of the State’s objections is not warranted.

## **V. THE PROJECT IS NECESSARY IN THE INTEREST OF NATIONAL SECURITY**

### **A. NOAA May Base Its Decision Solely on Ground II**

The Parties dispute whether Ground I and Ground II provide independent bases for NOAA to override a state objection. In its briefing, the State cited the CZMA’s legislative history and a 1984 consistency appeal decision to argue that “the applicant cannot escape a Ground I reasonable alternatives analysis,”<sup>51</sup> and that EBC had attempted “to leapfrog its way into its national security argument without the distraction afforded by a Ground I analysis.” State Principal Brief at 28 (first citing *Findings and Decision in the Matter of the Appeal by Exxon Company, U.S.A. to the Consistency Objection by the California Coastal Commission to Exxon’s Proposed Development of the Santa Ynez Unit by Means of Development Option A*, Feb. 18, 1984, at 17, 26 (“*Exxon SYU*”); then citing S. Rep. No. 92-753 (1972), as reprinted in 1972 U.S.C.C.A.N. 4776, 4793).

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<sup>48</sup> See, e.g., *Decision and Findings in the Consistency Appeal of the Asociación De Propietarios De Los Indios, Inc. from an Objection By the Puerto Rico Planning Board*, Feb. 19, 1992, at 7 (“*Asociación De Propietarios De Los Indios, Inc.*”) (“[O]n its face, [15 C.F.R.] § 930.96(c)(2) does not require that the objection contain a presentation of alternative measures.”).

<sup>49</sup> See *Decision and Findings in the Consistency Appeal of Carlos A. Cruz Colon From an Objection By the Puerto Rico Planning Board*, Sept. 27, 1993, at 3–4; *Asociación De Propietarios De Los Indios, Inc.*, at 6–7.

<sup>50</sup> See State’s Objection at 12–31 (cataloguing specific enforceable policies determined to be inconsistent with the proposed activity and explaining the basis of the inconsistency).

<sup>51</sup> The Ground I standard has three elements, the third of which asks whether “there is no reasonable alternative that would permit the activity to be conducted in a manner consistent with the enforceable policies of [a state’s coastal] management program.” 15 C.F.R. § 930.121(c); see also *WesternGeco* at 8.

The CZMA and its implementing regulations, though, unambiguously state that NOAA may override a state’s objection to a proposed activity if he or she finds that “the activity is consistent with the objectives of this chapter *or* is otherwise necessary in the interest of national security.” 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.120 (emphasis added). The plain meaning of this statutory text is that satisfaction of *either* ground is sufficient to override a state objection. It is therefore unnecessary to consider the CZMA’s legislative history to determine whether Ground I and Ground II are independent standards.<sup>52</sup> Accordingly, NOAA finds that Ground I and Ground II “are independent and an affirmative finding on either is sufficient to override” a state objection.<sup>53</sup> Although EBC based its appeal on both grounds for appeal, *see* EBC Notice of Appeal at 2, NOAA has determined that Ground II is dispositive and that it is therefore not necessary to reach the Parties’ Ground I arguments.

## **B. Using Specific Information, EBC Has Met Its Burden of Persuasion on Ground II**

Ground II requires an appellant to demonstrate that a “national defense or other national security interest would be significantly impaired were the activity not to go forward as proposed.” 15 C.F.R. § 930.122.<sup>54</sup> Numerous federal consistency appeal decisions have established that general, conclusive statements that “the project furthers or is important to the national interest” do not satisfy an appellant’s burden; the Ground II criteria require a finding specific to the particular project at issue in the appeal.<sup>55</sup> As one past Secretary stated, the appellant must “establish a ‘specific link’ between the [proposed project] and a significant impairment of

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<sup>52</sup> *See e.g., Milner v. Dep’t of the Navy*, 562 U.S. 562, 572 (2011) (“Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text. We will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language.”). Likewise, it is unnecessary to reach the Parties’ arguments regarding the 1984 *Exxon SYU* decision. To the extent that decision may have suggested a linkage between the analysis of Ground II and Ground I, that appeal is distinguishable from the present appeal. First, *Exxon SYU* was the first federal consistency appeal decided, and since that time, the agency has unambiguously found that Ground I and Ground II are separate and independent bases upon which to override a state objection. *See Foothill/Eastern Transportation Corridor* at 12. Second, in *Exxon SYU*, the Department of Defense stated that the identified alternatives in that appeal were of “identical merit[.]” from a national defense perspective. *Exxon SYU* at 22. By contrast, and as noted throughout this decision, the Navy has taken the opposite view with respect to the alternatives raised by the State in this appeal; indeed, the Navy and EBC have described why use of alternative disposal sites would raise a significant national security concern. As such, the *Exxon SYU* decision has little or no relevance to the instant appeal.

<sup>53</sup> *Foothill/Eastern Transportation Corridor* at 12.

<sup>54</sup> *See also Millennium Pipeline Co., L.P. v. Gutierrez*, 424 F. Supp. 2d 168, 179 (D.D.C. 2006) (upholding standard provided by 15 C.F.R. § 930.122 as a “permissible reading” of the CZMA, 16 U.S.C. § 1456(c)(3)(A)).

<sup>55</sup> *Millennium Pipeline* at 39; *see also Decision and Findings in the Consistency Appeal of Union Exploration Partners, Ltd with Texaco Inc. from an Objection by the State of Florida*, Jan. 7, 1993, at 37–38 (“*Texaco*”); *Chevron 1990* at 71–72; *Decision and Findings in the Consistency Appeal of Amoco Production Company from an Objection by the Division of Governmental Coordination of the State of Alaska*, July 20, 1990, at 58 (“*Amoco*”).

national security if the [proposed project] is not allowed to proceed as proposed.”<sup>56</sup> Accordingly, “the regulatory criteria for an override based on Ground II establishes a difficult test.”<sup>57</sup>

In the instant appeal, EBC has explained in sufficient detail why its use of a particular dredged material disposal site is critical to the on-time delivery of the COLUMBIA Class SSBNs, and why the timely launch of these SSBNs is critical to national security. EBC has also explained why the use of the alternative disposal sites the State identified would significantly compromise the project’s timeline. EBC has supported these assertions with specific record evidence, including the Navy’s comments, which, although not binding, carry considerable weight. *See* 15 C.F.R. § 930.122. Therefore, despite the State’s arguments to the contrary, NOAA finds that EBC has met its burden to show that override of the State’s objection is necessary in the interest of national security.

### 1. EBC’s Arguments

EBC argued in its briefs that a national security interest would be significantly impaired if it were not able to obtain the permit at issue in this appeal. EBC stated that the Navy’s comments “provide clear evidence” that its proposed disposal of 890,000 cy of dredged material in ELDS is necessary in the interest of national security. EBC Supplemental Reply Brief at 2<sup>58</sup> (citing Navy May Comment at 1). In particular, EBC wrote that,

[t]he Navy and DoD, with the full support of successive Presidents and Congress, have determined that the national security interest requires the expedited production and delivery of a new, more capable SSBN. SSBNs, land-based Intercontinental Ballistic Missiles, and long-range bomber aircraft comprise the three legs of the nuclear deterrent triad that has kept our country and the free world safe from attack by foreign nuclear powers for decades.

EBC Principal Brief at 6–7 (citing Ronald O’Rourke, Cong. Research Serv., R41129, Navy Columbia (SSBN-826) Class Ballistic Missile Submarine Program 2 (2019), available at <https://beta.regulations.gov/document/NOAA-HQ-2020-0021-0040> (last visited Nov. 11, 2020)).

Furthermore, EBC stated that due to the fact the OHIO Class SSBNs will begin rotating out of service in 2027, “this project is not only vital to U.S. national security, it is also extremely time-sensitive.” *Id.* at 7. In fact, EBC argued, the project’s time sensitivity has compelled the Department of Defense to “designate[ ] the COLUMBIA class submarine a DX-rated program with the ‘highest national defense urgency based on military objectives.’” *Id.* (quoting Department of Defense Priorities and Allocations Manual, DoD 4400.1-M, § C8.2.1. (2002),

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<sup>56</sup> *Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of Broadwater Energy LLC and Broadwater Pipeline LLC from an Objection by the State of New York*, April 13, 2009, at 36–37 (“*Broadwater*”) (quoting *Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S., Inc.*, June 20, 1995, at 46 n.70 (“*Mobil Pensacola*”).

<sup>57</sup> *VEPCO* at 53 (quoting *Amoco* at 58).

<sup>58</sup> Available at <https://beta.regulations.gov/document/NOAA-HQ-2020-0021-0077> (last visited Nov. 11, 2020).

available at <https://beta.regulations.gov/document/NOAA-HQ-2020-0021-0038> (last visited Nov. 11, 2020)).<sup>59</sup>

Finally, EBC argued that “[g]iven the constrained dredging window and amount of material that must be moved, ‘the only site that supports completing this project on time is ELDS.’” EBC Third Supplemental Reply Brief at 3 (quoting Navy July Comment at 2). As support for this claim, EBC reiterated the timeline outlined in the Navy’s July comment, which demonstrated that ELDS would be the only disposal facility that would enable EBC to complete its dredging activities within the available 117-day dredging window between October 1, 2024, and February 1, 2025. The use of a disposal facility other than ELDS, EBC wrote, “‘will add time and uncertainty to the physical process of dredging and disposal of dredged materials’ to a project with ‘*no schedule margin for delay* without degrading the critical attributes that the sea-based leg of the nuclear triad provides.’” *Id.* at 2 (quoting Navy July Comment at 2 (emphasis added by Navy)). Therefore, EBC argued, “failure to allow the project to proceed as proposed will significantly impair a national security interest.” EBC Second Supplemental Reply Brief at 2.<sup>60</sup>

## 2. The State’s Arguments

In its briefs, the State argued that the Navy’s May comment “generally” claimed that if EBC were unable to proceed with its proposed activity, the delayed construction schedule and increased costs would negatively affect the COLUMBIA program. State Reply Brief at 2.<sup>61</sup> The State, citing prior CZMA consistency appeal decisions, contended that “a general statement of a scheduling conflict or increased costs without more specific information is not the requisite Ground II standard, which is that national security would be *significantly impaired* if the activity did not go forward *as proposed*.” *Id.* at 2–3 (emphasis in original) (citing *Chevron 1990* at 71; *Texaco* at 37–38; *Amoco* at 57–58; *Millennium Pipeline* at 39). The State argued that the Navy’s May comment “does not meet this high standard” because the Navy “provided only general comments on how alternatives would ‘negatively impact’ the national defense because use of the alternatives would ‘likely’ delay its schedule and be more expensive.” *Id.* at 3 (citing Navy May Comment at 3).

The State further maintained that the Navy’s July comment and EBC’s briefing present a much shorter timeline for EBC’s dredging and disposal schedule than was originally proposed in its permit application. State Third Reply Brief at 1–2.<sup>62</sup> Moreover, the State argued that the Navy’s

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<sup>59</sup> DX-rated programs are managed under the Defense Priorities and Allocations System, which the Department of Commerce administers to implement the priorities and allocations authority of the Defense Production Act, 50 U.S.C. §§ 4501, *et seq.* See 15 C.F.R. Part 700. DX-rated programs have the highest priority rating under the system. 15 C.F.R. § 700.11. *But see id.* § 700.62(c) (“Directives [issued by Commerce] take precedence over all DX rated orders, DO rated orders, and unrated orders previously or subsequently received.”).

<sup>60</sup> Available at <https://beta.regulations.gov/document/NOAA-HQ-2020-0021-0078> (last visited Nov. 11, 2020).

<sup>61</sup> Available at <https://beta.regulations.gov/document/NOAA-HQ-2020-0021-0082> (last visited Nov. 11, 2020).

<sup>62</sup> Available at <https://beta.regulations.gov/document/NOAA-HQ-2020-0021-0085> (last visited Nov. 11, 2020). In its original permit application, EBC had stated that dredging and disposal would take place over a four-year period. Joint Permit Application at Part III, 2(c), Attachment A.

comments and EBC's briefing misrepresent the annual dredging season, which it stated extends annually from October through April. *Id.* at 3. Even so, the State claimed that the Navy "has not provided any information that it or [EBC] has been denied the ability to extend the dredge and disposal season past January 31." *Id.*

Additionally, the State contended that even if NOAA were inclined to accept EBC and the Navy's "overly narrow dredging window as a framework for the alternatives analysis in this appeal, the new information presented by [the Navy] sufficiently supports a conclusion that disposal at CLDS would be feasible." *Id.* at 4. The State determined that by using the same dredged material disposal rate for CLDS that EBC described as applicable to ELDS in its consistency certification, and by conforming to the industry standard for efficient dredging and disposal, it would take only 75 days to dispose of 89,000 cy of dredged material at CLDS, which would be well within the 117 days EBC claimed as available for dredging the FDD. *Id.* at 5–6. As a result, the State argued that EBC's "revised disposal schedule still supports a finding that the alternatives [of disposal at CLDS and/or RISDS] are available and reasonable."<sup>63</sup> *Id.* at 3. These alternatives, the State maintained, would "allow for the [proposed activity] to proceed in a manner that would not disrupt [the Navy's] newly identified schedule or impair our national security in any manner." *Id.* at 1.

### 3. Findings

NOAA finds that EBC has met its burden of persuasion on Ground II. EBC, quoting the Navy's May and July comments in addition to other supporting Department of Defense sources, described in specific detail that its use of ELDS is critical to the on-time delivery of the COLUMBIA Class SSBNs, and that the timely launch of these SSBNs is critical to national security.

Although the evaluation of alternatives is not a necessary element of the Ground II standard,<sup>64</sup> EBC, citing the specific timeline outlined in the Navy's July comment, explained why ELDS is the only disposal facility that will not compromise the schedule for timely construction and delivery of the COLUMBIA Class SSBNs. Specifically, to satisfy the Navy's requirement that the lead COLUMBIA Class ship launch in April 2026, EBC must begin testing the FDD no later than April 2025. Therefore, the dredging and disposal at issue in this appeal must be completed

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<sup>63</sup> In addition to CLDS, the State wrote that the Navy did not "create a timeframe for disposal at RISDS," and therefore "did not eliminate this alternative or provide an explanation as to whether a second scow could be sent [to] RISDS while a scow is also sent to CLDS," which the State argued would cut the disposal time in half. State Third Reply Brief at 6. The State further stated that the Navy did not identify a timeframe for the construction of confined disposal facilities, which the State had identified as another alternative to disposal at ELDS in its objection and briefs. *Id.* Finally, the State contended that EBC and the Navy fail to explain their claim that "obtaining approvals/permits is a bar to the availability of an alternative (CLDS)," arguing that "[t]here is no reason why the new permit, which should be designed to cover the activity during the new 2024–25 time period, could not be submitted as soon as this year, or 4 years in advance." *Id.* at 6–7.

<sup>64</sup> As discussed above, Ground I and Ground II provide independent bases for deciding CZMA consistency appeals. While the unavailability of reasonable alternatives to the proposed activity is a necessary element of the Ground I standard, the regulation implementing Ground II makes no mention of alternatives. Compare 15 C.F.R. § 930.121(c), with 15 C.F.R. § 930.122.

by that date. The earliest EBC could begin dredging the FDD would be October 1, 2024; completion of two ongoing projects, slated for August 2024, must precede the dredging, and compliance with the authorized annual dredging season limits EBC to conducting its dredging activities between October 1 and January 31. Citing the Navy’s July comment, EBC has articulated in its briefing that the only way to complete its dredging activities during the one available authorized dredging season is to dispose of the 890,000 cy of dredged material in ELDS. Therefore, despite the State’s arguments that disposal at alternative sites is possible and must be considered, NOAA’s determination that EBC has satisfied Ground II obviates the need to reach the alternatives analysis required to satisfy Ground I. To the extent that any of the State’s arguments regarding alternative disposal options for the dredged material call into question the justification that EBC and the Navy put forward to establish the national security interest in disposal at ELDS, NOAA finds, on the record before it, with appropriate weight afforded to the views of the Navy, that disposal of the dredged material at ELDS is necessary to ensure the on-time completion of the COLUMBIA Class SSBNs.

Additionally, although statements by the Navy are not binding, NOAA gives considerable weight to the Navy’s views when it comments in its areas of expertise, *see* 15 C.F.R. § 930.122, such as the national security significance of the COLUMBIA Class SSBNs, the importance of the on-time delivery of these SSBNs, and the timeline that EBC must follow in order to achieve the on-time delivery of these SSBNs. Therefore, although EBC’s dredging schedule has changed since it submitted its May 2018 permit application, NOAA appreciates that construction schedules often come into clearer focus as more information becomes available,<sup>65</sup> and defers to the timeline presented by the Navy in its July comment and cited by EBC in its briefing.

Accordingly, EBC has overcome the “difficult [Ground II] test”<sup>66</sup> and established a “specific link” between its proposed project and a significant impairment of national security “were the activity not to go forward as proposed.”<sup>67</sup>

## VI. CONCLUSION

NOAA overrides the State’s objection to the proposed permit. For the reasons set forth above, the record establishes that the proposed disposal of 890,000 cy of dredged material at ELDS is necessary in the interest of national security. Given this decision, the State’s objection to the proposed USACE permit no longer operates as a bar under the CZMA to issue the permit. The

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<sup>65</sup> EBC acknowledged that the construction schedule “will change over time,” but that all of its submissions “contained the most current information and dredging projection schedules available at the time those submissions were made. It is no surprise that construction plans – including dredging schedules – have become more specific over time.” EBC Fourth Supplemental Reply Brief at 3, available at <https://beta.regulations.gov/document/NOAA-HQ-2020-0021-0099> (last visited Nov. 11, 2020).

<sup>66</sup> *VEPCO* at 53 (quoting *Amoco* at 58).

<sup>67</sup> *Broadwater* at 36–37 (quoting *Mobil Pensacola*, at 46 n.70).

decision to override the State's objection does not supplant other state and federal license and permit requirements and review processes.



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Assistant Secretary of Commerce for  
Environmental Observation and Prediction,  
performing the duties of Under Secretary of  
Commerce for Oceans and Atmosphere