DECISION AND FINDINGS
IN THE
CONSISTENCY APPEAL OF
EXXON COMPANY, U.S.A.
FROM AN
OBJECTION BY THE NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION
JUNE 14, 1989

SYNOPSIS OF DECISION

Exxon Company, U.S.A. (Appellant) is the contract purchaser of a 1.068 acre (approximately 46,500 square feet) parcel of land located near Barnegat Bay in Dover Township, Ocean County, New Jersey. That parcel contains 7,600 square feet of wetlands. The Appellant proposes to construct on the lot an automobile service station that would sell gasoline and perform automotive repairs. According to the Appellant, "[t]o provide proper traffic circulation within and around the site, it was necessary to provide [two] one-way access drives from Fischer Boulevard, the primary thoroughfare." Construction of the service station according to that design would necessitate the filling of approximately 5,660 square feet of wetlands on the lot.

Accordingly, in 1986, the Appellant applied to the U.S. Army Corps of Engineers (Corps) for a permit to fill the wetlands with sand. In conjunction with that Federal permit application, the Appellant submitted to the Corps a consistency certification for the proposed activity for the State of New Jersey's (State) review under Section 307(c)(3)(A) of the Coastal Zone Management Act of 1972, as amended (CZMA), 16 U.S.C. § 1456(c)(3)(A).

On December 16, 1986, the State objected to the Appellant's consistency certification for the proposed project on the ground that it violates the State Coastal Management Program's (CMP) prohibition of the filling of wetlands. Under CZMA Section 307(c)(3)(A) and 15 C.F.R. Section 930.131 (1988), the State's consistency objection precludes the Corps from issuing any permit or license necessary for the Appellant's proposed activity to proceed unless the Secretary of Commerce (Secretary) determines that the activity may be federally approved, notwithstanding the State's objection, because the activity is either consistent with the objectives or purposes of the CZMA (Ground I), or necessary in the interest or national security (Ground II). If the requirements of either Ground I or Ground II are met, the Secretary must override the State's objection.

On January 13, 1987, in accordance with CZMA Section 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart H (1988), counsel for the Appellant filed with the Department of Commerce (Department) a notice of appeal from the State's objection to the Appellant's consistency certification for the proposed project. The Appellant based its appeal on Ground I. Upon consideration of the information submitted by the Appellant, the State and several Federal agencies, the Under Secretary for Oceans and Atmosphere made the following findings pursuant to 15 C.F.R. Section 930.121 (1988):

Ground I

The proposed filling of wetlands to construct the service station does not further the objectives or purposes of the CZMA. (Pp. 7-13)

Conclusion

The Under Secretary will not override the State of New Jersey's objection to the Appellant's consistency certification. (Pp. 13-14)

DECISION

I. Background

Exxon Company, U.S.A. (Appellant) is the contract purchaser of a 1.068 acre (approximately 46,500 square feet) parcel of land located near Barnegat Bay at the northwest corner of the intersection of Bay Avenue and Fischer Boulevard in Dover Township, Ocean County, New Jersey. Appellant's Brief at 1. That parcel contains 7,600 square feet of wetlands. Id. at 5. The Appellant proposes to construct on the lot an automobile service station that would sell gasoline and perform automotive repairs. Id. at 1. According to the Appellant, "[t]o provide proper traffic circulation within and around the site, it was necessary to provide [two] one-way access drives from Fischer Boulevard, the primary thoroughfare." Id. at 5. Construction of the service station according to that design would necessitate the filling of approximately 5,660 square feet of wetlands on the lot. In the Appellant's words, "[t]he ingress access from Fischer Boulevard is the main cause for this fill request. Due to traffic safety considerations, the access was moved as far from the wetlands as possible; however, the filling of some of the wetlands cannot be avoided." Id. at 5-6.

Accordingly, in 1986, the Appellant applied to the U.S. Army Corps of Engineers (Corps) for a permit[1] to fill the wetlands with sand. In conjunction with that Federal permit application, the Appellant submitted to the Corps a consistency certification for the proposed activity for the State of New Jersey's (State) review under Section 307(c)(3)(A) of the Coastal Zone Management Act of 1972, as amended (CZMA), 16 U.S.C. § 1456(c)(3)(A). The certification states that "[t]he proposed activitiy [sic] complies with and will be conducted in a manner that is consistent with the approved State Coastal Zone Management [(]CZM) Program." State's Response to Appeal at Exhibit E.

On December 16, 1986, the State objected to the Appellant's consistency certification for the proposed project on the ground that it violates the State Coastal Management Program's (CMP) prohibition of the filling of wetlands. Letter from John R. Weingart, Director, Division of Coastal Resources, New Jersey Department of Environmental Protection, to Exxon Company, U.S.A., Dec. 16, 1986. In addition to explaining the basis of its objection, the State also notified the Appellant of its right to appeal the State's decision to the Department of Commerce (Department) as provided under CZMA Section 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart H (1988). Id. Under CZMA Section 307(c)(3)(A) and 15 C.F.R. Section 930.131 (1988), the State's

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

consistency objection precludes the Corps from issuing any permit or license necessary for the Appellant's proposed activity to proceed unless the Secretary of Commerce (Secretary) determines that the activity may be federally approved, notwithstanding the State's objection, because the activity is either consistent with the objectives or purposes of the CZMA, or necessary in the interest of national security.

II. Appeal to the Secretary of Commerce

On January 13, 1987, in accordance with CZMA Section 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart H (1988), counsel for the Appellant filed with this Department a notice of appeal from the State's objection to the Appellant's consistency certification for the proposed project. Letter from Arthur Stein, Esquire, to the Hon. Malcolm Baldrige, U.S. Secretary of Commerce, Jan. 7, 1987. Soon thereafter, the Appellant requested, and was granted, a stay of the appeal pending negotiations between the parties. Letter from Arthur Stein, Esquire, to Daniel W. McGovern, Esquire, General Counsel, National Oceanic and Atmospheric Administration (NOAA), Jan. 15, 1987 (request for stay); Letter from Anthony J. Calio, Administrator, NOAA, to Arthur Stein, Esquire, Feb. 24, 1987 (grant of request for stay). The parties to the appeal are Exxon Company, U.S.A. and the New Jersey Department of Environmental Protection. By memorandum dated May 19, 1989, the Secretary delegated to the Under Secretary for Oceans and Atmosphere the authority to decide this appeal.

Public notice of the filing and stay of the appeal was published in the Federal Register, 52 Fed. Reg. 6,371-72 (1987). The appeal was stayed for seven months until November 9, 1987, when the Department denied the Appellant's request for a second extension of the stay because continued negotiations between the parties appeared unlikely to result in a settlement of the dispute. Letter from the Hon. C. William Verity, U.S. Secretary of Commerce, to Arthur Stein, Esquire, Nov. 9, 1987. When the Appellant perfected the appeal by filing supporting data and information pursuant to 15 C.F.R. Section 930.125 (1988), public comments on the issues germane to the decision in the appeal were solicited by way of notices in the Federal Register, 53 Fed. Reg. 24,118-19 (1988)(request for comments), and the Newark Star-Ledger (June 18-20, 1988). No public comments were submitted. On February 26, 1988, the State filed a response to the appeal. On July 5, 1988, the Department solicited the views of five Federal agencies[2] on the four regulatory criteria that the project must meet for me to find it "consistent with the objectives or purposes" of the CZMA. The criteria appear at

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2 The Army Corps of Engineers, the Coast Guard, the Department of the Interior, the Environmental Protection Agency, and the National Marine Fisheries Service.

15 C.F.R. Section 930.121 (1988), and are discussed below.[3] All agencies except the Corps responded.

After the comment periods closed, the Department gave the parties an opportunity to file a final response to any submittal filed in the appeal. The State did so on October 20, 1988; the Appellant did not. All documents and information received by the Department during the course of the appeal have been included in the administrative record.[4]

III. Jurisdictional and Procedural Issues

In its brief, the Appellant has raised three issues that I must resolve before addressing the criteria for override of the State's objection. Those three issues pertain to the Corps' categorization of the project such that a state consistency review was triggered, the jurisdiction of the State to conduct a consistency review, and the sufficiency of the State's consistency objection letter. I will address each of these issues in turn.

First, the Appellant argues that an erroneous classification of the proposed project by the Corps resulted in the triggering of a State consistency review:

> [T]he dye [sic] was cast for this appeal when the [Corps of Engineers] determined that the site involved wetlands adjacent to the Barnegat Bay as opposed to headwaters. The significance of this determination was that since a request for a small portion of fill was involved, and since the Army Corps had given the opinion that the site involved wetlands adjacent to the Barnegat Bay, that a review by the same New Jersey Department of Environmental Protection would be required to determine if the proposed filling of approximately 5,600 square feet of this site would be consistent with the Coastal Zone Management Plan.

Appellant's Brief at 7. In other words, according to the Appellant, had the Corps classified the area as headwaters rather than wetlands adjacent to Barnegat Bay, the project would have been eligible for permitting under a nationwide permit that had already received the State's consistency concurrence, and therefore, would not have triggered a separate State consistency

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3 See infra p. 7.

4 Although all materials received have been included in the record, I have considered them only as they are relevant to the statutory and the regulatory grounds for deciding consistency appeals, and to compliance with the regulations governing the conduct of such appeals.

review. Id. at 13. Accordingly, the Appellant requests that I direct the Corps "to process this matter as the proposed filling of headwaters," or "remand [this matter] to the [Corps] for a re-examination of all the evidence prior to its making a final reinterpretation." Id. at 16.

The State disagrees with the Appellant's position on this issue, arguing that it is beyond the scope of this consistency appeal:

> The CZMA requires that any applicant for a federal license or permit must certify that the activity complies with a State's approved program .... Obviously, if no federal permit or license is required by the Army Corps for the proposed activity, then a consistency certification by the appellant and the review by the State would not be required. However, in the first instance whether an Army Corps permit is required is a jurisdictional question for the Army Corps to decide. If the applicant disagrees with that determination, it may pursue any appropriate administrative appeals of the Army Corps determination. Clearly, that question does not fall within the authority of the Secretary in reviewing this appeal.
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> Accordingly, if the Secretary addresses this contention at all, he should direct the appellant to pursue its administrative remedies with the Army Corps in the proper forum.

State's Response to Appeal at 24-25.

The Appellant's arguments on this point are without merit. The CZMA and its implementing regulations establish specific criteria upon which the Secretary must base the review of consistency appeals. As noted previously,[5] the Secretary may override a state's objection by finding that the proposed activity is either consistent with the objectives or purposes of the Act, or necessary in the interest of national security. Nowhere in the law does there appear any authority to examine another Federal agency's decision to require a permit or license. Finding no such authority, I will not determine whether the Corps' decision to require a permit in this instance was justified. The Appellant must seek a remedy for the Corps' allegedly erroneous decision in another forum.

The Appellant next argues that the State lacked jurisdiction to conduct a consistency review for the proposed service station, Appellant's Brief at 10-13, and requests that I remand this matter "to the [Corps] for review under the appropriate

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[5] See supra pp. 1-2.

Nationwide Permit process," id. at 13. The Appellant explains its position as follows:

> [T]his matter involves a boot-strap effort by the New Jersey Department of Environmental Protection to now exercise jurisdiction over an area in which they have no jurisdiction. As previously noted, the New Jersey Department of Environmental Protection had by virtue of its letter dated May 22, 1986, determined that none of the subject site was within regulated wetlands as defined under the Wetlands Act of 1970. Accordingly, a Wetlands permit will not be required for development of the parcel in question. Notwithstanding this candid admission as to their jurisdiction, the New Jersey Department of Environmental Protection was in effect given a second bite at the apple when the matter was referred to them by the Army Corps as a result of the Army Corps' initial opinion.

Appellant's Brief at 10-11 (citations omitted).

The State, on the other hand, maintains that it did possess the requisite jurisdiction to conduct a Federal consistency review:

> Specifically, the [State CMP] wetlands rule applies to both freshwater and coastal wetlands. Thus, the rule applies to both wetlands regulated under the State Wetlands Act, i.e., coastal wetlands, as well as non-coastal wetlands such as freshwater and forested wetlands found at the subject site. Accordingly even though the [State] found that the proposed project will not involve the filling of State regulated coastal wetlands, the [State CMP] wetlands rule, nonetheless, applies because the appellant proposes the filling of freshwater wetlands.

State's Response to Appeal at 5-6 (citations omitted).

The Appellant bases its argument on an erroneous analysis of the CZMA. As noted above,[6] the CZMA's consistency provisions are designed in part to ensure the performance of Federally permitted activities that are consistent with state CMPs. To ensure consistency, a state coastal management agency is afforded the opportunity to conduct a consistency review before the Federal permitting agency issues a permit. It is by virtue of this authority, established by the Federal CZMA, that the State of New Jersey examined the Appellant's proposed project. The lack of jurisdiction to review the project under state law in no way detracts from the State's authority to conduct a Federal consistency review.

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6 See supra pp. 1-2.

Finally, with respect to the State's objection letter, the Appellant contends that the State violated 15 C.F.R. § 930.64(b)(1988) because it "did not specifically describe how the proposed filling activity was inconsistent with specific elements of the management plan and did not describe any alternative measures which would permit the proposed activity to be conducted in a manner consistent with the management plan." Appellant's Brief at 8 (citation omitted). The regulations implementing the CZMA require a state to notify the applicant and the Federal agency of its objection within six months of commencement of its review of the proposed activity. 15 C.F.R. § 930.64 (1988). Those provisions also require the state, in its objection, to describe how the proposed activity is inconsistent with specific elements of its management program and to describe alternative measures if any exist that would permit the proposed activity to be conducted in a manner consistent with its management program. Id. The regulations further require the state to inform the applicant of its right to appeal the state's objection to the Secretary for a determination that the proposed activity may be permitted because it is consistent with the objectives or purposes of the CZMA or necessary in the national interest. Id.

An examination of the State's objection letter for the Appellant's proposed project reveals that it complies fully with the regulations cited above, the Appellant's arguments notwithstanding. The objection letter, in relevant part, states:

> [U]nder New Jersey's federally approved Rules on Coastal Resources Development, the filling of Wetlands N.J.A.C. (7:7E-3.26) is prohibited.
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> Please be advised that the Department of Environmental Protection, acting under Section 307(c) of the Coastal Zone Management Act of 1972, as amended, has determined that the above referenced activity is inconsistent with the New Jersey Coastal Management Program. Therefore, the Corps of Engineers may not issue a permit for this activity following this negative determination unless the U.S. Secretary of Commerce finds that the activity meets the objectives of the Federal Coastal Zone Management Act or is necessary in the interest of national security.
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> You have thirty days from the date of this determination in which to file a notice of appeal with the Secretary of Commerce.

Letter from John R. Weingart, Director, Division of Coastal Resources, New Jersey Department of Environmental Protection, to Exxon Co., U.S.A., December 16, 1986.

I am not persuaded by the Appellant's assertion that the foregoing letter failed to describe specifically how the proposed filling activity was inconsistent with the State's CMP. The first paragraph of the State's objection letter states that the proposed project would contravene the State's prohibition on the filling of wetlands, and includes a citation to the relevant provision of the State CMP. I fail to see how the State could have expressed more clearly the basis for its contention that the proposed project was inconsistent with its CMP. The determination that a proposal to fill wetlands would be inconsistent with a prohibition on the filling of wetlands is straightforward. As such, it lends itself to a brief explanation. Under the circumstances, the State's description of the inconsistency satisfies 15 C.F.R. § 930.64(b)(1988).

The Appellant also argues that the State's failure to describe in the objection letter any alternative measures that would permit the proposed activity to be conducted in a manner consistent with the management plan violates 15 C.F.R. § 930.64(b)(1988). A review of the regulation, however, reveals that the identification of an alternative measure is required only if the state deems that one exists. In relevant part, the regulation requires that a State agency objection "describe ... alternative measures (if they exist) which, if adopted by the applicant, would permit the proposed activity to be conducted in a manner consistent with the management program." 15 C.F.R. § 930.64(b)(1988)(emphasis added). The only reasonable interpretation of the words "if they exist" leads to the conclusion that identification of an alternative measure is not mandatory. I find, therefore, that the omission of that identification in the State's objection letter does not contravene 15 C.F.R. § 930.64(b) (1988). I also find that this appeal is ripe for consideration and that the parties have complied with the Department's regulations governing the conduct of this appeal, 15 C.F.R. Part 930, Subparts D, H (1988).

IV. Grounds for Sustaining an Appeal

Section 307(c)(3)(A) of the CZMA provides that Federal licenses or permits required for the Appellant's proposed activity may not be granted until either the State concurs in the consistency of such activity with its Federally-approved coastal zone management program, or the Secretary finds that the activities are (1) consistent with the objectives of the CZMA or (2) otherwise necessary in the interest of national security. See also 15 C.F.R. § 930.130(a)(1988). The Appellant has pled only the first ground.

To make a finding on this ground, the Secretary must determine that the activity satisfies all four of the elements specified in 15 C.F.R. Section 930.121 (1988). These requirements are:

> 1. The activity furthers one or more of the competing national objectives or purposes contained in sections 302 and 303 of the Act. 15 C.F.R. § 930.121(a)(1988).
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> 2. When performed separately or when its cumulative effects are considered, it will not cause adverse effects on the natural resources of the coastal zone substantial enough to outweigh its contribution to the national interest. 15 C.F.R. § 930.121(b)(1988).
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> 3. The activity will not violate any of the requirements of the Clean Air Act, as amended, or the Federal Water Pollution Control Act, as amended. 15 C.F.R. § 930.121 (c)(1988).
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> 4. There is no reasonable alternative available (e.g., location[,] design, etc.) that would permit the activity to be conducted in a manner consistent with the [state's coastal zone] management program. 15 C.F.R. § 930.121(d)(1988).

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

V. Element Two

This element requires that I weigh the adverse effects of the objected-to activity on the natural resources of the coastal zone against its contribution to the national interest. To perform this weighing, I must first identify the proposed project's adverse effects and its contribution to the national interest.

A. Adverse Effects

The Appellant contends that the proposed project will not affect adversely the environment:

> This proposal to fill .13 acres in wetlands in order to provide a safe roadway access to the property is insignificant locally as well as cumulatively on the natural resources of the Barnegat Bay and the Coastal Zone .... [T]he wetlands present on this property are disturbed in nature by both past and present activities and are not serving in the normal beneficial capacity as a functioning natural drainage system. There is no positive benefit to water quality, groundwater recharge or stormwater runoff detention.

Appellant's Brief at 20. The Appellant bases the foregoing arguments on two reports submitted as exhibits to its brief. See Exhibits A, S. Exhibit S, an environmental impact report

(EIR) on the proposed project, provides the most detailed discussion supporting the Appellant's contentions. That EIR focuses primarily on the characteristics of the wetlands, concluding that their destruction will cause only minimal adverse environmental effects because they are not functioning normally to improve water quality.

examine the other three elements. Therefore, I will not override the State's objection to Exxon's consistency certification.

Under Secretary for Oceans
and Atmosphere